

DRAFT

UNITARY ADMINISTRATION AND MANAGEMENT ORDINANCE

11/03/08 Clean Joint State/Tribal Version

CHAPTER I

WATER RESOURCES CONSERVATION, DEVELOPMENT AND ADMINISTRATION

PART 1 - GENERAL PROVISIONS

1-1-101. Authority.

(1) This Ordinance is adopted in exercise of the sovereign powers of the Confederated Salish and Kootenai Tribes (Tribes), as reserved and recognized in the Treaty of Hellgate, 12 Stat. 975, by which the Confederated Salish and Kootenai Tribes reserved the present Flathead Reservation for their exclusive use and benefit, and by the authority of the Tribal Council of the Tribes as provided in Article VI, Section 1(a), (n), (t), and (u) of the Tribal Constitution, approved October 26, 1935 by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. § 476).

(2) This Ordinance parallels legislation adopted by the State of Montana pursuant to _____ to effectuate Unitary Administration and Management on the Flathead Indian Reservation. Such parallel legislation will be codified in the Montana Code Annotated in Title 85.

(3) This Ordinance and the parallel Montana legislation are contingently effective; neither operates with the force and effect of law without the other. No modification by the Tribes or the State of Montana of these respective laws shall be effective within the exterior boundaries of the Reservation unless and until the other makes an analogous modification.

1-1-102. Findings and Policy. The Tribal Council finds and declares as follows:

- (1) The waters of the Flathead Reservation are a hydrological unitary resource in that
 - (a) all Reservation waters drain into the Flathead River, a part of the Columbia River system, or into Flathead Lake, a naturally occurring lake which is fed by the Flathead River north of the Reservation and which empties into the Flathead River within the Reservation, and
 - (b) most of the water appropriated and utilized by the people of the Reservation is taken from streams arising on lands owned by the Tribes and tributary to the Lake or the River; the balance of the surface water consumed on the Reservation was appropriated and diverted from off-Reservation sources by the United States, and
 - (c) there is a direct and pervasive hydrological interrelationship between the surface and ground water of the Reservation, and
 - (d) every use of Reservation waters affects and impacts water use by all Reservation residents;
- (2) Prudent and knowledgeable conservation, management, and protection of the uses of Reservation water resources is essential to the health and welfare of all Reservation residents;
- (3) The Reservation waters are the foremost asset of the Reservation, and Reservation resident well-being and development depends, in large measure, on wise and stable regulation of the appropriation, use, and conservation of this resource; and
- (4) The public policy of the Confederated Salish and Kootenai Tribes is
 - (a) to provide for the conservation, development, beneficial use, and quality of the water resources of the Reservation to promote the health, welfare, and economic and social prosperity of Reservation residents,

(b) to recognize and confirm existing uses of Reservation waters for any beneficial purpose consistent with the policies and provisions of this Ordinance,

(c) to manage and protect supplies of Reservation waters adequate to preserve the ecosystem of the Reservation, to conserve and enhance Reservation wildlife and fisheries, to maintain and improve opportunities for water-based recreation, and to secure to Reservation residents the quiet enjoyment of the use of Reservation waters for beneficial uses,

(d) to provide methods and procedures for the appropriation and reservation of the waters, for maintenance and enhancement of water quality, and for the establishment and maintenance of a system of central records of permitted Reservation water uses, and

(e) to secure the greatest benefits from the use of Reservation waters by sound coordination of conservation and development with the development and use of other natural resources of the Reservation.

1-1-103. Notice of Enactment. To insure that all persons affected by this Ordinance are given notice of its enactment, its effective date, and its purpose, the Water Management Board, no later than sixty (60) days prior to the date set in Section 1-1-112, establishing the effective date of this Ordinance shall cause the following notice to be posted on its website, and also published weekly for four weeks in (1) a daily newspaper of general circulation on the Flathead Reservation, (2) one or more weekly newspapers of general circulation on the Flathead Reservation, and (3) the Tribal newspaper:

[INSERT NOTICE HERE]

1-1-104. Definitions. Unless the context otherwise requires, the following definitions will apply:

(1) “Abandonment” means what occurs when an appropriator ceases to use all or a part of an appropriation right or ceases using the appropriation right according to its terms and conditions for a period of ten (10) successive years when there was water available for use. Such discontinuation of use constitutes a prima facie presumption that the appropriator has abandoned the right for the part not used.

The State wants the definition of abandonment to include rebuttable presumption, with the criteria to rebut stated. The State will offer language. The Tribes changed the abandonment period from five to ten years at the State’s request.

(2) “Aboriginal Water Right” means a Tribal reserved water right for cultural and religious uses and for instream flows and ecological functions beneficial to aquatic and terrestrial plants and animals that support traditional lifestyle activities, such as fishing, hunting and gathering, as reserved by the Tribes in the Treaty of Hellgate, with a priority date of time immemorial.

The definition of “aboriginal water right” will be more completely defined in the Compact and the definition here may be clarified.

(3) “Allottee” means an owner of an interest in a tract of land held by the United States of America in trust for an individual and/or the Tribes which was allotted pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended.

(4) “Amnesty Filing” is a process by which a person who: a) was not required to and in fact did not, previously file a claim with the State for a pre-1973 use of water for a water use arising under State law, MCA § 85-2-306, and who has an existing, but unrecorded water use as

of the date of this Ordinance; or b) who developed, after August 22, 1996, a use of water that would qualify as an exception from the permitting requirements, but who failed to lodge a notice of completion of such development with DNRC, may file notice of that water use with the Water Management Board. Those who fall under subpart a) of this definition shall receive a Reservation Water Permit with a priority date as of the first use of their water, and those who fall under subpart b) of this definition shall receive a Reservation Water Permit with a priority date as of the date of the Compact between the Tribes and the State of Montana.

(5) “Appropriate” means to divert, impound, maintain an instream or impoundment use, or withdraw a quantity of water for a beneficial use.

(6) “Authorization to Drill” means a written document authorizing the Applicant to proceed to drill a well with such conditions as may be required by the Board.

(7) “Beneficial Use” means a consumptive or non-consumptive use of water for the benefit of the appropriator, other persons, the Tribes, one or more Tribal members, or the general public, including but not limited to agricultural, stock water, domestic, fish and wildlife, cultural and religious practices, industrial, irrigation, mining, municipal, power, and recreational uses.

(8) “Change in Existing Use” means an authorized change in the point of diversion, the place of use, the period of use, purpose of use, or the place of storage.

(9) “Compact” means that agreement entered into by the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States of America, pursuant to the governmental authority of each sovereign, intended to quantify and resolve all aboriginal, reserved, and acquired water rights of the Confederated Salish and Kootenai Tribes and the United States.

The definition of “compact” will be more completely defined in the Compact and maybe clarified in the Ordinance in the future

(10) “Consumptive Use” means the annual volume of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products, that does not return to ground or surface water.

(11) “Conjunctive Management” means the coordinated management of surface water and ground water, which derives from the recognized interconnection between both resources.

(12) “Deferred Water Use” means a reserved or aboriginal water right to which the Tribes are entitled but implementation of which is deferred in order to protect existing verified and registered uses until some point in the future when water becomes available.

The definition of “deferred water use” will be more completely defined in the Compact.

(13) “Domestic Well” means a well, the sole purpose of which is domestic use, and that has a flow rate and volume of not more than _____ gallons per minute and _____ acre-feet per year.

The Technical Team will recommend the physical parameters for this definition.

(14) “Emergency” means a situation that demands unusual or immediate action to prevent imminent injury to life, property or the environment.

(13) “Existing Use” means a beneficial use of water which was in place as of the date of the Compact between the Tribes and the State of Montana, and which is recognized by

- (a) Montana State law as a water right arising under State law,
- (b) the laws of the United States, including federal common law, or
- (c) this Ordinance.

The definition of “existing use” will be more completely defined in the Compact and may be redefined here.

(15) “Flathead Indian Irrigation Project” (also known as the “Flathead Agency Irrigation Division”) means the federal irrigation project located on the Flathead Indian Reservation and which utilizes Reservation waters.

(16) “Flathead Indian Reservation” means all land within the exterior boundaries of the Flathead Indian Reservation notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation.

(17) “Ground water” means any water that is below the surface of the earth.

(18) “Harm” means an impact on a water right resulting in a quantifiable injury.

The definition of “harm” will be reexamined after the Tribes’ water right quantities are negotiated.

(19) “Instream Flow” means the quantity of water in a surface water body, including but not limited to streams, rivers, standing water bodies, and undeveloped springs, at any time of the year. The quantity may or may not be adequate to sustain ecological processes and may or may not be protected or administered under a permit, water right arising under state law, or other legally recognized means

(20) “Instream Flow Requirement” means 1) that quantity of water flowing through a surface water body, including ground water recharge, that is needed to sustain, rehabilitate, or restore the ecological functions of a stream in terms of hydrology, geomorphology, biology, water quality, and connectivity at a particular level; or 2) that quantity of water flowing through a stream course needed to sustain instream values at an acceptable level based on appropriate study. Instream values and uses include protection of fish and wildlife habitat, migration and propagation; cultural and religious practices; outdoor recreation activities; navigation; hydropower generation; water quality; and ecosystem maintenance, which includes recruitment

of fresh water to the riparian vegetation, floodplains, wetlands, and maintenance of channel geomorphology.

The quantities referred to in the definition of “instream flow requirement” will be set out in the Compact.

(21) “Instream use” means any use of surface water body that does not require diversion or withdrawal from the watercourse or water body, including in-place uses such as habitat maintenance and enhancement, navigation and recreation.

(22) “Mitigation” or “mitigation water” means the reallocation of surface water or ground water through a change in Reservation water right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion in surface water.

(23) “Montana Department of Natural Resources and Conservation” or “DNRC” means the department of natural resources and conservation provided for in Montana Law, Montana Code Annotated, Title 2, chapter 15, part 33.

(24) “Natural Flow” means the water that would exist in a watercourse absent human intervention.

(25) “Non-consumptive Use” means any beneficial use of water that does not meet the definition of consumptive use, including water used for Indian cultural and religious practices and beliefs.

(26) “Permit” or “Permitted use” means a beneficial use of Reservation waters for which a Reservation water permit, Montana Water Court final decree or Montana Department of Natural Resources and Conservation permit or certificate has been issued defining the terms and conditions of the water use.

The definition of “permit” or “permitted use ” will be more completely defined in the Compact and may be

redefined here.

(27) “Publish” or “Publication” means, unless otherwise designated, the printing of an announcement of document availability, or the text of the document itself, in a newspaper of general circulation on the Reservation and in the Tribal newspaper and posting on the Water Management Board’s website.

(28) “Person” means an individual, corporation, partnership, firm, entity, association, government, governmental agency, or a political subdivision of a government.

(29) “Registration” means a process of accounting for uses of the Tribes’ aboriginal and reserved water uses and rights by filing notices with the Water Management Board of such water uses.

(30) “Reservation Land” means all land within the limits of the Flathead Indian Reservation notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation.

(31) “Reservation Waters” or “Waters” means all the waters, surface and ground water, arising upon, occurring within or under, or flowing through the Flathead Indian Reservation, including, without limitation, geothermal waters, irrigation return flows, diffuse surface water, and sewage or industrial effluent, and waters diverted from off-Reservation sources by the United States and serving Reservation lands through the Flathead Indian Irrigation Project.

(32) “Reservation Water Permit” means a permit for water use issued by the Water Management Board pursuant to the terms and authority contained in the Compact and this Ordinance.

(33) “Reserved Right” or “Reserved Use” means a beneficial use of water, either consumptive or non-consumptive, reserved by or on behalf of the Tribes for one or more of the purposes for which the Reservation was created and with a priority date of July 16, 1855.

The definition of “reserved right” will be more completely defined in the Compact and may be redefined here.

(34) “Secretary” means the Secretary of the United States Department of the Interior or his designee.

(35) “Spring” means a natural or unmodified surface discharge of ground water.

(36) “Standing water” means the volume of water in lakes, high mountain lakes, ponds and potholes.

(37) “Tribal Council” means the governing body of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

(38) “Tribal Water Right” means the right to divert, use, store or market an amount of water included under the umbrella of the Tribes’ water right, including aboriginal water rights, water for individual Indians, water used to serve the Flathead Indian Irrigation Project, and water used by or reserved to the Tribes.

The definition of “Tribal water right” will be more completely defined in the Compact and may be clarified here.

(39) “Tribal Natural Resources Department” or “NRD” means the governmental subdivision of the Confederated Salish and Kootenai Tribes authorized by Tribal Ordinance No. 78-B, as amended.

(40) “Tribes” means the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

(41) “Waste” means the unreasonable loss of water resulting from the design, construction, operation or maintenance of a water diversion, distribution facility, well, or the application of water to anything but a beneficial use.

(42) “Water Engineer” means the licensed Professional Engineer employed by the Water Management Board and the person vested with the powers and duties described in Section 1-2-111.

(43) “Water Management Area” means any geographic area that for hydrologic reasons requires special management by the Water Management Board.

(44) “Water Management Board” or “Board” means the management board created by this Ordinance and vested by the Tribes and the State of Montana with the responsibilities set forth in Tribal and State law.

(45) “Water Rights Arising Under State Law” means those valid water rights recognized under state law existing as of the date of ratification of the Compact by the Montana legislature, and not subsequently relinquished or abandoned, as: decreed or to be decreed by the Montana Water Court pursuant to Mont. Code Ann. § 85-2-234; permitted by DNRC; exempted from filing in the State adjudication pursuant to Mont. Code Ann. § 85-2-222; excepted from the permitting process pursuant to Mont. Code Ann. § 85-2-306.

The definition of “Water Rights Arising Under State Law” will be more completely defined in the Compact and may be redefined here.

(46) “Watershed” means the area contained within a drainage divide above a specified point on a stream.

(47) “Water Year” means the annual period of time commencing on October 1 and ending on September 30 and includes variable water yields that can be classified as

- a) Average water year – where the water yield is equal or exceeded 50% of the time when compared to a sequence of water years;
- b) High water year – where the flow volume is equaled or exceeded 20% of the time when compared to a sequence of water years; and
- c) Low water year – where the flow volume is equaled or exceeded 80% of the time when compared to a sequence of water years.

The previous definitions will be more completely defined in the Compact and will be clarified in the Ordinance in the future.

(48) “Well” means any artificial opening or excavation in the ground, however made, by which water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(49) “Works” means all property, real or personal, necessary or convenient to the appropriation, conservation, storage, diversion, distribution, development, screening and utilization of water.

The foregoing noted definitions will be more completely defined in the Compact and may cause further clarification to occur in the remainder of this Ordinance as negotiations progress.

1-1-105. Measurement of Water. Upon the effective date of this Ordinance, legal standards of measurement of water for the Flathead Reservation shall be as follows:

(1) Flow rates shall be measured in cubic feet per second (cfs). Where documentary evidence of an existing use is expressed in gallons per minute, 448.8 gallons per minute shall be considered equivalent to a flow of one cubic foot per second. Where documentary evidence of

an existing use is expressed in statutory or miner's inches, 40 statutory or miner's inches shall be considered equivalent to a flow of one cubic foot per second.

(2) Volumes of water shall be measured in acre-feet. One acre-foot shall be considered equivalent to a volume of 43,560 cubic feet. One cubic foot shall be considered equivalent to a volume of 7.48 gallons.

1-1-106. Measurement of Time. Whenever in this Ordinance an action is required to be performed within a certain number of days, the time shall be measured in calendar days unless the last day falls on a Saturday, Sunday, or Tribal, State or Federal legal holiday, in which case the time for performance is extended to the next subsequent business weekday.

1-1-107. Inventory of Existing Uses.

(1) Within _____ days (____) days after the effective date of this Ordinance, the Water Management Board will approve and publish an initial inventory of existing uses of Reservation waters based on information contained in federal, state and tribal records.

(2) The Water Management Board shall update the inventory upon completion of the registration required in Section 2-1-105, and upon incorporation of water rights arising under Montana law into the Compact between the Tribes and the State of Montana.

(3) The inventory, organized by watershed and water delivery area, will be made available at no cost to any requesting Reservation resident at the time of the final update as described in subsection (2) and will be posted on the internet, the DNRC, the NRD, and the Water Management Board.

(4) The Water Management Board shall provide a copy of the initial and updated inventories of existing uses to the DNRC and the NRD concurrently with publication.

(5) The Water Management Board shall make copies of the initial and updated inventories available to members of the public at a reasonable charge for paper copies and no charge for copies printed from the internet.

1-1-108. Water Resources Conservation and Development Plan.

(1) Within _____ years of the effective date of this Ordinance, the Water Management Board shall formulate a recommended Flathead Reservation Water Conservation and Development Plan (the “Plan”). The Plan shall cover both surface and ground water, and measures for conservation, development and utilization of Reservation waters. The Plan shall consider conservation alternatives to permitted and to proposed uses, the efficiency of combinations of uses and reuses of water, the economic and social well-being of Reservation residents, and the effects of proposed conservation and development on existing uses within the Reservation and on off-Reservation downstream uses.

The Federal Team would like a discussion at 1-1-108, “Water Resources Conservation and Development Plan” of the relationship of this plan to existing water uses/rights. The Tribes intend that water uses and rights existing as of the date of the Compact be protected.

(2) The Water Management Board shall cause its recommended Plan to be published in one or more newspapers of general circulation on the Reservation, together with a notice of the availability of copies of the Plan at such locations as the Water Management Board shall designate, and a notice of public hearing by the Water Management Board on the recommended Plan. The hearing shall be held within thirty (30) days of the last date of the publication of the

recommended Plan under such rules as the Water Management Board may adopt for the conduct of the hearing. All interested persons may participate in the hearing by the submission of oral or written comments on the recommended Plan.

(3) Within _____ (___) days after the hearing, the Water Management Board shall consider the recommended Plan and the comments received at the hearing and adopt, modify, or reject the recommended Plan.

(4) Upon adoption of a Plan, the Board shall, no later than three years from the date of first adoption, and every third year thereafter, review the Plan and recommend any additions, modifications, or deletions it may find necessary or proper after consideration of the criteria set forth in subparagraph (1) of this Section. If the Water Management Board's recommended additions, modifications, or deletions involve a substantive change in the adopted Plan, the procedures set forth in subparagraphs (2) and (3) above shall be followed. If the recommended additions, modifications or deletions are editorial or clerical in character, the Board may implement the recommendations.

(5) The Water Management Board shall cause any adopted Plan and any subsequent modification(s) of the Plan to be published and made available to any requesting person for free from the internet or at a reasonable charge for paper copies. The Water Management Board shall provide a copy of the Plan to the DNRC and the NRD at no charge concurrently with publication.

1-1-109. Establishment of a Water Management Plan.

(1) The Water Management Board may establish and administer any Water Management Area if the Water Management Board finds that:

(a) the application for Reservation Water Permits for water use and the existing uses of water plus the aboriginal uses, reserved uses and registered uses in the area exceed the available supply of surface water and the sustainable yield of ground water in an average water year;

(b) in low water years, all available water in the area is required to satisfy instream flows, leaving no water available for existing uses with priority dated later than such instream flows;

(c) the Tribes' deferred reserved uses cannot be converted to active reserved uses; or

(d) overuse or misuse of water in the area is so widespread among consumptive water users that coordinated control of all works in the area is necessary to reduce or eliminate the overuse or misuse.

(2) Members of the public may propose to the Water Management Board establishment of a Water Management Area if 25% or 10, whichever is less, of the users of water in the geographic area proposed for establishment as a Water Management Area petition the Board for the establishment of such an area alleging that any of the conditions in subsection (1) above exist within the proposed boundaries of such an Area.

The whole Section 1-1-109, "Establishment of a Water Management Plan" is subject to further review.

1-1-110. Effect of Federal Laws and Trusteeship.

(1) Nothing in this Ordinance is intended to or may be construed to vary or diminish the effect of federal law or Treaty, nor to vary or diminish the powers and responsibilities of the federal government in its role as trustee of Indian natural resources

(2) Nothing in Ordinance is intended to or may be construed to constitute Tribal ratification of:

(a) agreements made or actions taken by federal officials or agents with respect to Reservation water resources which were illegal, unauthorized, not required by law, or not consented to by the Tribes; or

(b) the failure of federal officials or agents to act as trustees of Indian property.

The foregoing Section 1-1-110 is subject to change and will be informed by the Waiver discussions between the United States and the Tribes.

1-1-111. Codification, Severability and Defense.

(1) The provisions of this Ordinance are severable, and a finding of invalidity of one or more provisions hereof shall not affect the validity of the remaining provisions.

(2) This Ordinance is intended to function in conjunction with those portions of Title 85 of the Montana Code Annotated codified at _____. Should those portions of the Mont. Code Ann. be amended by subsequent legislation without contemporaneous and identical Tribal amendment to this Ordinance, this Ordinance shall govern the use of Reservation waters, as to the amended provisions, until such time as the laws are rendered compatible. Similarly, should this Ordinance be amended without contemporaneous and identical Montana amendment of the provisions of Mont. Code Ann. §_____, Montana law shall govern the use of Reservation waters, as to the amended provisions, until such time as the laws are rendered compatible.

(3) This Ordinance and subsequent amendments thereto are subject to the approval of the Secretary.

(4) The Tribes adopt this code and the State adopts its parallel legislation only after concluding its provisions are lawful. Should the legality of the Ordinance, or parallel State legislation, or any provision thereof be challenged in any court the parties shall use their best effort jointly to defend the enforceability of the Ordinance, the parallel State legislation and each of the respective provisions.

1-1-112. Effective Date. This Ordinance and each provision hereof according to its terms shall take effect _____ from the date of its adoption.

PART 2 - UNITARY ADMINISTRATION AND MANAGEMENT

1-2-101. Purpose. The purpose of this Part is to establish a unitary process applicable to all surface and ground water use within the exterior boundaries of the Flathead Indian Reservation.

1-2-102. Establishment and Composition of the Water Management Board. There is established a Flathead Indian Reservation Water Management Board consisting of five voting members and one *ex officio* member.

1-2-103. Qualifications of Board Members.

(1) A Water Management Board member shall be a Reservation resident over 18 years of age.

(2) “Reservation Resident” means, for the purposes of encumbering a position on the Water Management Board, a person who

(a) does business within Flathead Indian Reservation boundaries, and who uses water in the ordinary course of such business,

(b) is domiciled within Flathead Indian Reservation boundaries, or

(c) owns and maintains a seasonal residence within Flathead Indian Reservation boundaries.

The State retains the concern that this requirement too tightly limits the State’s pool of potential appointees. The Tribes remain concerned that opening up Water Management Board appointments to surrounding counties introduces upstream and downstream interests to a matter better left to local control.

(3) No elected official of the State of Montana, or any political subdivision thereof, or of the United States, or of the Tribes is eligible for nomination to the Board while holding such elective office. However, a nominee for Water Management Board membership shall not be disqualified by reason of the fact that he or she is an employee or contractor of the State of Montana or any political subdivision thereof, or of the Tribes, except that no employee or contractor of the DNRC or the NRD may be a voting member of the Water Management Board.

(4) A Water Management Board member shall have education and experience in one or more of the following fields: natural resources management, public administration, agriculture, engineering, commerce or finance, hydrology, biological sciences, water law or water policy.

1-2-104. Terms of Board Members. Three members of the first Board shall serve for two years, and three members shall serve for four years. One member selected by the Tribes, one

member selected by the Governor, and one member appointed by the Secretary shall be appointed to the first four-year term. At the expiration of the term of the initial two-year appointments, all Water Management Board members thereafter shall serve for a term of four years.

1-2-105. Appointment of Water Management Board Members. The Governor and the Tribal Council will each appoint two (2) voting members to the Water Management Board and the Secretary will appoint the *ex officio* member to the Water Management Board within sixty (60) days of the effective date of this Ordinance. The four voting members of the Board will nominate a fifth voting member for confirmation by the Governor and the Tribal Council. If the fifth voting member is not confirmed within thirty (30) days of nomination, the four appointed voting members will nominate another individual for confirmation by the Governor and the Tribal Council. Both the Governor and the Tribal Council shall provide reasons for refusing to confirm the nominee in writing to the other confirming party. Until the fifth voting member of the Water Management Board is confirmed, the Board shall conduct business with the four appointed Board members.

The State prefers five- member Water Management Board but further prefers the fifth Board member be chosen by the other four and that neither the Governor nor the Tribal Council confirm the fifth board member. The State also prefers that no business be conducted until all five members of the Board are appointed.

The Tribes fear that preventing the Board from doing business while awaiting appointment of the fifth member will leave a vacuum in management and enforcement.

1-2-106. Public Meetings. All regular and special meetings of the Board shall be open to the observation of the general public pursuant to State and Tribal open meeting laws. Where there is

a conflict of laws the law that provides the greater openness to the public applies. All Board meeting records are public records.

1-2-107. Compensation and Expenses of the Board. Each Board member shall receive such compensation for services and reimbursement for expenses for attendance at Board meetings as shall be fixed by the State of Montana, the Tribal Council and the Secretary.

The State wants to discuss the funding mechanism and housing of the Board in this section or in the Compact.

1-2-108. Quorum and Voting of the Board. A quorum of the Water Management Board consists of four of the five voting Board members. If a proposal put to a vote of a quorum of Board members ends in a tie vote, the proposal, or matter under consideration is deemed disapproved or denied.

1-2-109. Powers and Duties of the Board. The Water Management Board shall have the following powers and duties.

- (1) Promulgate rules, prescribe forms, develop additional materials and implement amendments thereto as may be required or necessary to implement this Ordinance;
- (2) Issue, deny, condition or revoke new use permits and change of use authorizations for the beneficial use of Reservation waters;
- (3) Give notices and conduct hearings as may be required or authorized by this Ordinance or Water Management Board rule;
- (4) Approve and publish an initial inventory and updated inventory of Reservation water use in accordance with Section 1-1-107;

(5) Approve and publish for a public hearing and further Water Management Board deliberation a Flathead Reservation Water Resources Conservation and Development Plan and such revisions thereto as may be required, necessary, or advisable, as recommended by the Water Engineer pursuant to 1-2-111(2);

(6) Annually determine and announce the water supply forecast for the water year and make such mid-year adjustments and notices as may be necessary;

(7) Account for all water allocated to satisfy the Tribes deferred water rights and after the Tribes' deferred water rights are satisfied, allocate available surface and ground water to new appropriations;

(8) Determine and declare whether all or part of a water use has been abandoned;

(9) Exercise all necessary powers to prevent waste, unlawful use, and interference with lawful use of water, and to require conservation of water by requiring any Reservation water user, as a condition of a Reservation water permit or by order, to construct or install and maintain a weir, head gate, valve, meter, gauge, fish screen, or other reasonable and appropriate device or works for the control of flows, measurement of flows and water use;

(10) Confirm ground water certificates issued by the DNRC for wells drilled after August 22, 1996 and affirm, modify, condition or revoke those not satisfying the limits of exempt domestic wells specified under Montana law at the time of issuance of the certificate.

(11) Establish and administer one or more water management areas, to adopt rules for the conservation and management of water use in the area;

(12) Condition new Reservation water as recommended by the Water Engineer;

(13) Assess reasonable fees for applications for permits and change of use authorizations, and for providing copies of the public record, and to deposit the money so

collected to a Water Management Board account for implementation of this ordinance and for no other use;

(14) Conduct research and investigations in furtherance of its powers and duties and to obtain such consultation and advice from the NRD, the DNRC and independent professionals as the Water Management Board or “Board” may deem necessary or desirable;

(15) Consult and cooperate with governmental agencies and with individuals in matters affecting the use and conservation of Reservation waters;

(16) Be a party in its own behalf in any contested case, rulemaking proceeding, or judicial proceeding in any matter in which the use, or regulation of the use, of Reservation waters is at issue or in any matter relating to a final decision of the Water Management Board;

(17) Upon reasonable notice to the occupant thereof, to enter upon any Reservation land for the purpose of inspecting water sources, water use, diversions, impoundments, or distribution facilities, and to conduct such tests or collect such physical or scientific samples and information as may be useful or necessary in the assessment of water supply or water use;

(18) Seek and accept donations, grant and contract funding from public or private sources in order to contract for services, and initiate, construct, or maintain special projects which are consistent with the powers and duties of the Board;

(19) Hire the Water Engineer and such other staff as may be necessary; and

(20) Recommend an annual budget to the Tribes and State for appropriation.

The State wants this Section 1-2-109, “Powers and Duties of the Board” to include the specifics on the establishment of the Water Management Board account and auditing of expenditures from the account.

The employment status and benefits of the Board’s employees must be determined and if placed in the Ordinance can be placed in Section 1-2-109, “Powers and Duties of the Board.”

1-2-110. Technical Assistance to the Water Management Board. The NRD and the DNRC shall jointly exercise the following responsibilities in providing technical assistance to the Water Management Board.

(1) Within the limits of their respective expertise and resources, and when so requested by the Water Management Board, collect, compile, and analyze information related to Reservation waters, their use, and the works associated with their use, and produce reports and provide technical assistance and advice to the Water Management Board;

(2) Assist the Water Engineer in the preparation, revision, and supplementation of an inventory of Reservation water uses as provided in Section 1-1-107. A current copy of the inventory, together with any modifications, will be deposited with the NRD and the DNRC.

(3) Assist the Water Engineer in the preparation of Reservation Water Permits, for issuance by the Water Management Board, incorporating the terms of water rights arising under State or Tribal law.

The parties must define the enforcement powers of the Water Management Board which may make duplicate Reservation Water Permits unnecessary. Issues include the fact that the time gap between the compact decree and basin decrees and the need to enforce claims during that period; the need for the Water Management Board to have enforcement authority to enforce, change or abandon decreed rights in lieu of enforcing duplicate Reservation Water Permits; the McCarren Amendment overlay, that is the need for a general stream adjudication; and provision of the greatest possible protection to existing water uses and water resources.

(4) Conduct annual water forecasting activities and recommend the appropriate hydrographs for water year water management.

(5) Assist in technical review and make recommendations to the Water Management Board on applications for Reservation Water Permits for new water use.

(6) Conduct a confirmation of all certificates issued by DNRC for wells drilled after August 22, 1996 and recommend modification, conditioning or revocation of those not satisfying the limits of exempt domestic wells specified under Montana law at the time of issuance of the certificate.

(7) Conduct ground water related technical tasks for the Board such as monitoring and evaluating surface and ground water, the interconnection between surface and ground water, and the impact of use on and in light of this interrelationship.

1-2-111. Duties of the Water Engineer. The Water Engineer shall be an employee of the Water Management Board and shall exercise the following duties.

(1) Enforcement Functions:

(a) Administer Reservation water rights, and ensure maximum compliance with the Ordinance and with the conditions of all permits, determinations, orders, regulations, plans, policies, guidelines, and other actions taken by the Water Management Board and coordinate such activities with the Flathead Indian Irrigation Project manager;

(b) Enter upon Reservation lands with reasonable notice to the owner or occupant to investigate and inspect methods of diversion, withdrawal, and other activities affecting water quantity, to install measuring devices on surface and ground water diversions for the purpose of enforcing and administering this Ordinance, and to monitor water use, water quality, and the diversions;

(c) In emergencies, remove, render inoperative, shut down, close, seal, cap, modify, or otherwise control methods of diversions and withdrawals, and obstructions to the

flow of water subject to expedited appeal to the Water Management Board by the affected person, as provided in Section 4-1-104.

(d) Initiate, by citation and petition, enforcement proceedings before the Water Management Board for violations of this Ordinance, including injunctive relief.

(2) Advisory Functions:

(a) Advise the Water Management Board on all water resource related development planning issues consistent with the Water Resources Conservation and Development Plan, provide periodic reports to the Water Management Board on Water quantity and the status of water use on the Reservation, and provide suggestions, alternatives, and recommendations for water management.

(b) Recommend to the Water Management Board a declaration of water supply conditions and prepare alternative water supply scenarios for different climatic trends and conditions for the Board's use in setting priorities and preferred uses during drought;

(c) Recommend, after coordination with NRD and DNRC, designation of certain land areas, waters, and surface and ground water regions on the Reservation for dedication to certain beneficial uses or as water management areas requiring specialized provisions for management.

(d) Closely coordinate Reservation water resource activities with the Flathead Indian Irrigation Project Manager; and

(e) Recommend to the Water Management Board proposed changes to this ordinance and to its regulations.

(f) One month before each irrigation season, prepare a water supply forecast for the coming irrigation season and provide periodic updates on hydrologic conditions to the Water Management Board and managing entity of the Flathead Indian Irrigation Project.

(3) Information and Research Functions

(a) Compile and update the inventory and registration of Reservation water uses;

(b) Conduct hydrologic investigations to determine annual water supply, analyze existing uses, identify water needs and development possibilities, and study means of developing, managing and conserving, and otherwise protecting Reservation water resources;

(c) Collect, maintain, and analyze, on a continuing basis, information regarding Reservation- and basin-wide water resources, including data on factors actually or potentially affecting Reservation water resources;

(d) Conduct public educational programs and develop educational material regarding Reservation water resources, irrigation management, water quality, environmental issues, water conservation, and any other pertinent issues as may be determined by the Water Management Board;

(e) Determine the extent of potential effects on existing water users, given hydrologic conditions, from proposed uses of Reservation water resources;

(f) Identify sources of financial support for water management and development;

(g) Identify promising research areas regarding Reservation water resources and solicit research proposals by government, university, or private sources;

(4) Administrative Functions

(a) Supervise and recommend termination of staff and contractors that are employed to enforce and administer this Ordinance, including delegating duties to staff members, provided that ultimate responsibility for such duties lies with the Water Engineer; and

The State and Tribes recognize that the employment of and direction of technical staff supporting the Water Management Board is a global issue that merits more discussion . Section 1-2-111(4), “Administrative Functions” [of the Board].

(b) Develop and submit to the Water Management Board budget requests for approval and forwarding to the Tribes and State.

CHAPTER II

WATER USE

PART 1. GENERAL PROVISIONS

2-1-101. Purpose. The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation and the State of Montana intend to recognize uses of Reservation waters existing as of the date of this ordinance, including undeveloped reserved and aboriginal water uses, and to scientifically manage future appropriation of surface and ground water in order to protect existing water uses.

Section 2-1-101, should be synchronized with the quantification and administrative provisions regarding undeveloped reserved and aboriginal in the Compact.

2-1-102. Recognition of Existing Uses. The Tribes and the State of Montana recognize and confirm existing Reservation water use as of the date of this Ordinance by

- (1) incorporating State of Montana Water Court final decrees for Reservation waters;
- (2) incorporating verified water permits issued by DNRC;
- (3) incorporating ground water certificates issued by DNRC;
- (4) requiring a registration of aboriginal and reserved water uses and designation of deferred reserved and aboriginal water uses; and
- (5) requiring an amnesty filing of water use arising under State law not heretofore claimed, permitted, certified or acknowledged.

Section 2-1-102, provides for the recognition and protection of existing uses. The State feels the section is redundant because it will be made clear in the Compact; the Tribes wish to assure the public at every opportunity that existing uses will be protected.

2-1-103. Requirement to Register Aboriginal and Reserved Water Use.

(1) Within _____ year(s) from the effective date of this Ordinance, the NRD shall complete a comprehensive registration of aboriginal water uses falling under the umbrella of the Tribal Water Right.

(2) Within _____ year(s) from the effective date of this Ordinance, the NRD shall complete a comprehensive registration of all reserved used falling under the umbrella of the Tribal Water Right.

(3) Upon the registration by the user of an existing use of the Tribal water right as provided in Section 2-1-105, an existing use of the Tribal water right is rebuttably presumed

valid as to the point of diversion, if any, rate and volume of appropriation or reserved use, place of use, and purpose of use.

2-1-104. Allottee Water Rights. To the extent any allottee possesses a valid claim to a portion of the Tribes' irrigation water pursuant to 25 U.S.C. Section 381, those claims will be honored.

2-1-105. Registration of Aboriginal or Reserved Uses of Reservation Waters.

(1) Each person, including individual Indians, who claims to have used or have a right to use Reservation waters which are a part of the Tribes' aboriginal or reserved water right for a beneficial purpose as of the effective date of this Ordinance, shall file a registration of an existing aboriginal or reserved water use with the NRD. A registration of a reserved use shall be a pro forma filing for a Reservation water permit. Only the Tribes, or the United States on behalf of the Tribes may claim an aboriginal right.

(2) The NRD shall prepare registrations of water use for flows and quantities of water included in the compact between the Tribes and the State of Montana for existing aboriginal and reserved Tribal uses, for agreed upon but undeveloped aboriginal and reserved Tribal uses, and for deferred aboriginal and reserved Tribal uses on behalf of the Tribes. A registration of an aboriginal or reserved Tribal use is an application for a Reservation water permit.

(3) The NRD shall work with the Secretary to assist individual Indians in preparing registrations, or make registrations on behalf of absentee individual Indians.

(4) The NRD shall confirm that the registered use falls under the umbrella of the Tribal aboriginal or reserved right and forward all registrations received from individual Indians

and those prepared on behalf of the Tribes to the Water Management Board for issuance of a Reservation Water Permit and inclusion in the Inventory of Existing Uses.

(5) The NRD, upon request, shall make available for the inspection of any registrant any relevant information and, upon request, shall supply the registrant with a copy of the initial inventory of existing uses for the appropriate watershed or water delivery area and a copy of this Ordinance with implementing rules.

In Section 2-1-205, the State wants to incorporate a process to ground-truth registrations of Tribal rights and uses, but did not offer a process. The present draft proposes only a Tribal check. This is a new proposal to which the Tribes have not agreed.

2-1-106. Contents of Registration. A registration of aboriginal or reserved water use shall be a form prescribed by the Water Management Board and shall include the following:

- (1) name and address of the applicant;
- (2) source of the water;
- (3) purpose of the use;
- (4) priority date of the use;
- (5) legal description of the point of diversion, if any, and a description of the works at the diversion site;
- (6) legal description of the place of use, and, if the purpose of the use is irrigation, of the actual acreage to which the water is applied;
- (7) method of conveyance or delivery, if any, of the water to the place of use, and a description of the works by which the water is conveyed or delivered;
- (8) period of use;

- (9) volume and rate of use;
- (10) a map showing the source, point of diversion, and area of the place of use;
- (11) any documentation supporting the existing use including, without limitation, copies of such documents as deeds, abstracts of claims filed with the State of Montana, original trust patents or deeds, or findings of the “Secretarial” committees; and
- (12) the signature of the applicant with a notarized verification of the accuracy and truthfulness of contents of the declaration.

2-1-107. Incomplete, Defective, and Amended Registrations.

(1) Within _____ (___) days of filing of the registration with the Water Management Board, the Board shall return to the applicant or the NRD a registration that is, on its face, defective or incomplete, together with the reasons for the return. The registration shall be corrected, completed, and refiled with the Water Management Board within thirty (30) days of the date of return.

(2) Any applicant may submit an amended registration within thirty (30) days of the filing of the original application.

2-1-108. Copies of Registrations Provided to DNRC. The NRD shall timely file with the Water Management Board, and provide copies to the DNRC, copies of registrations of all uses emanating from the Tribal right, reserved and otherwise;

2-1-109. Fee for Filing Registration of Aboriginal or Reserved Right. The Water

Management Board shall charge no fee for the accepting and filing of registrations of aboriginal or reserved water uses.

2-1-110. Receipt for Registration.

(1) Within ten (10) days of the filing of the registration by the applicant, the Water Management Board will issue to each applicant, whose registration has not been returned for completion or the curing of a facial defect, a receipt. The receipt, in a form specified by the Board, will also constitute evidence that the applicant complied with the terms of this Ordinance until the Board has acted upon the application and has issued a Reservation water permit to the applicant.

(2) If an incomplete or defective registration was filed, the Water Management Board will issue a receipt to the applicant upon the re-filing of a completed or cured registration.

(3) Upon the filing of an amended registration, the Board will issue a second receipt reflecting the amendments.

2-1-111. Recognition and Confirmation of Reservation Water Rights Arising Under State

Law.

(1) Upon a Montana Water Court final decree for the applicable basin or sub-basin, claims of appropriation made pursuant to Montana Law arising prior to July 1, 1973, the Board shall issue a Reservation water permit as provided in Section 2-1-126.

The parties must define the enforcement powers of the Water Management Board which may make duplicate Reservation Water Permits unnecessary. Issues include the fact that the time gap between the compact decree

and basin decrees and the need to enforce claims during that period; the need for the Water Management Board to have enforcement authority to enforce, change or abandon decreed rights in lieu of enforcing duplicate Reservation Water Permits; the McCarren Amendment overlay, that is the need for a general stream adjudication; and provision of the greatest possible protection to existing water uses and water resources.

(2) Upon verification by DNRC of permits for water use made pursuant to Montana Law, and appropriated after July 1, 1973 and prior to the effective date of the compact between the State of Montana and the Confederated Salish and Kootenai Tribes, the Board shall issue a Reservation water permit as provided in Section 2-1-126.

(3) Upon issuance of a Certificate of Water Right provided for in Mont. Code Ann. §§ 85-2-306 and 85-2-315, for exempt ground water appropriations made pursuant to Montana State Law prior to the date of the compact between the State of Montana and the Confederated Salish and Kootenai Tribes, the Board shall issue a Reservation water permit as provided in Section 2-1-126.

(4) Upon the filing of an amnesty filing by the user of Reservation water for a beneficial use arising under State law and not heretofore permitted under Montana law prior to the effective date of this Ordinance, an existing use of Reservation waters is rebuttably presumed valid as to the point of diversion, if any, rate and volume of appropriation or reserved use, place of use, and purpose of use and shall receive a priority date as of the date of the compact between the State of Montana and the Confederated Salish and Kootenai Tribes.

(5) Issuance of a Reservation water permit for an existing water use arising under State Law confirms and recognizes the existing use and right of appropriation subject to the conditions of the receipt and of this Ordinance. When so confirmed by the Reservation water permit, the permitted use is transferable unless federal law provides otherwise, is enforceable

administratively and judicially by the receipted user or by the Water Management Board, or both, and is defeasible only as provided in this Ordinance.

2-1-112. Voluntary Conversion of Claims, Permits or Certificates for Existing Water Use, or State Based Right, to Tribal Right.

(1) Any person possessing an existing use of a water right arising under State law may voluntarily convert such existing use to a Tribal use right falling under the umbrella of the Tribes' water right within one year of the issuance of the final decree, water permit, of water certificate by the State of Montana.

(2) The Water Management Board shall not charge any fees for such voluntary conversion.

(3) The Water Management Board shall notify the appropriate State Court or DNRC of the voluntary relinquishment of the water right arising under State law and incorporation of the right under the Tribal right and shall issue a new Reservation water permit reflecting such conversion.

(4) Priority dates for such converted rights shall be in accordance with Section 2-1-114 of this ordinance.

The State would like clarification that a voluntary conversion of a state-based right to a Tribal right will not harm senior users. The Tribes proposed language proposed at Section 2-1-114(2)(e).

2-1-113. Right to Appropriate and to Reserve. Reservation waters may be appropriated by any person for a beneficial use within the Reservation pursuant to the process described in this Ordinance.

2-1-114. Application of Doctrine of Prior Appropriation as Modified by Federal Law, Conversion to a Tribal Use Right and Unitary Irrigation Project Priority Date.

(1) As between appropriations and among aboriginal and reserved uses of Reservation waters, the first in time is the first in right, subject to the conditions set forth in this Section and Section 2-1-116.

(2) Priority water use will be determined as follows:

(a) All waters reserved by or on behalf of the Tribes for fishing, hunting, trapping, wildlife, grazing, cultural, or religious purposes will have a priority date of time immemorial, or pre-1855;

(b) All Reservation waters reserved or appropriated by or on behalf of the Tribes or individual Indians for domestic, agricultural, municipal, community, recreational, industrial, mining, or water power purposes will have a priority date of July 16, 1855, regardless of whether the place of use is in trust status or is held in fee, and regardless of the Indian or non-Indian status of the user.

(c) All surface waters appropriated by the United States for delivery by the Flathead Indian Irrigation Project, shall be considered a part of the Tribal water right, and shall have the priority date of July 16, 1855 as agreed in the Compact between the State of Montana and the Confederated Salish and Kootenai Tribes.

(d) All existing uses of Reservation water that are not part of the Tribes' water right, shall have the priority date set forth in the State decree, permit or certificate recognizing the right.

(e) Rights voluntarily converted pursuant to 2-1-111 shall retain the priority date they had prior to the voluntary conversion.

(f) Amnesty filings “Amnesty Filing” made by persons who did not previously file a claim, application for a permit, or notice of appropriation of an exempt ground water use with the State or Tribes for a water use right arising under State law and who have an existing, but unacknowledged water use as of the date of this Ordinance, shall have a priority date as of the date of the compact between the Tribes and the State of Montana.

(g) All new appropriations that are not for aboriginal or reserved uses will have as their priority date as of the date of application.

The parties recognize there may need to be process to deal with applications deemed deficient and how this process may modify the priority date.

2-1-115. Deferred Aboriginal and Reserved Water Rights. The Confederated Salish and Kootenai Tribes shall have the right to defer implementation or appropriation of aboriginal and reserved water rights until _____, at which time, those aboriginal and reserved waters, if not available for appropriation from any source, shall convert to a loss of the Tribes’ water right and be subject to compensation as a damage pursuant to _____, or may, at the option of the Tribes, exercised in writing, be deferred for an indefinite period, until water for implementation or appropriation becomes available for appropriation through other water rights abandonment, supplementation, irrigation project infrastructure or management improvements, retirement of water rights, reduction of water rights, abandonment of water rights and conservation.

The Federal Team has problems with Section 2-1-115, “Deferred Aboriginal and Reserved Water Rights” and while they consider it a place-holder they will want changes in the future. This section will be informed by the Federal/Tribal/State discussion on Waiver.

2-1-116. Limitation to Beneficial Use. Beneficial use shall be the basis, measure and limit to the use of Reservation waters.

2-1-117. Severance of Use Right from Land. Any reserved use or appropriation and Reservation use right, once permitted, may be transferred independently of any transfer or conveyance by the owner of the place of use or the point of diversion, upon compliance by the transferee and transferor with the provisions of Section 2-1-127 and re-issuance of a Reservation water permit to the transferee.

2-1-118. No Adverse Possession. No right to use water on the Flathead Indian Reservation may be acquired by prescription or by adverse possession of use.

2-1-119. Abandonment of Water Use.

- (1) No part of the Tribal water right is subject to abandonment by nonuse.
- (2) When the water not part of the Tribal water right is not used for ten consecutive years while there was water available for use, it shall, upon a finding of abandonment,
 - (a) revert to the Tribes until the Tribes’ deferred aboriginal and reserved water right is fully implemented or waived by a damages settlement; or
 - (b) be available for allocation by the Water Management Board.

The State will propose rebuttable criteria and burden shifting for abandonment that will fit in Sections 2-1-119 and 2-1-120, “Abandonment of Water Use” and “Procedure for Declaring Abandonment.”

2-1-120. Procedure for Declaring Abandonment.

(1) When the Water Engineer has reason to believe that an appropriator may have abandoned some or all of his use, the Water Engineer shall initiate an administrative adjudication as provided in this Section by filing a petition requesting the Water Management Board to declare the appropriation and use abandoned in whole or in part and to revoke any Reservation water permit or other governmental authority for water use.

(2) At the hearing on the Water Engineer’s petition, the burden of proof shall be on the Water Engineer, who must establish abandonment by a preponderance of the evidence.

The State will propose rebuttable criteria and burden shifting for abandonment that will fit in Sections 2-1-119 and 2-1-120, “Abandonment of Water Use” and “Procedure for Declaring Abandonment.”

2-1-121. Prior Tribal Commitments. Each written, unexpired or unabandoned permit, lease, certificate, contract or other document containing the permission of the Tribal Council of the Tribes, granted prior to the effective date of this Ordinance, to appropriate and use Reservation waters for a beneficial purpose is presumed to be clear and convincing evidence of an existing use as to the permitted rate and volume of water, the water source, the place of use, and the purpose of the use. Upon registration of such an existing use by the user, the Water Management Board may issue to the user a Reservation water permit containing terms and conditions substantially similar to those incorporated in the prior document and, where appropriate, recommend to the Tribal Council the revocation or modification of the prior document.

2-1-122. Permit Required. After _____, no person may appropriate or use Reservation waters without a Reservation water permit issued as provided in this Ordinance, except that no permit is required for an individual user of water supplied through a system owned and operated by a municipality, corporation, improvement district, association, or other entity or agency, including the Flathead Indian Irrigation Project, when the system owner and operator is a permittee on behalf of the persons served by the systems.

2-1-123. Wrongful Water Use.

(1) The use of Reservation waters without a Reservation water permit or in violation of the terms of the permit, is after _____, wrongful and unlawful.

(2) Upon petition of the Water Engineer, and after notice to the person or persons named in the petition as wrongful and unlawful users of Reservation waters, and after providing an opportunity for the persons named to be heard, the Water Management Board may find wrongful and unlawful use of Reservation waters and

(a) order the person or persons wrongfully using Reservation waters to cease and desist from such wrongful uses, and, if the wrongful use is found to be reckless or malicious, fine said person or persons in an amount not to exceed \$1000.00 for each day of wrongful use,

(b) order the Water Engineer to remove the works diverting or transporting the water for wrongful use and to recover the costs of such removal and for damages, if any, or

(c) both.

2-1-124. Prevention of Waste and Interference with Lawful Use.

(1) Reservation waters may not be wasted, nor may water be used unlawfully, nor may a lawful use of water be interfered with.

(2) All facilities, works and equipment associated with the withdrawal, impoundment, pumping, diversion, drainage, or transmission of Reservation waters shall be so constructed, installed, and maintained as to prevent the waste, contamination, or pollution of surface and ground water and to avoid injury to the lands and property of others. All wells, producing and non-producing, which may contaminate other surface and ground waters must be properly abandoned or upgraded with a sanitary seal, in accordance with the water well criteria incorporated by reference in Section 2-3-107(6). All flowing wells shall be capped or equipped with valves so that the flow of water can be stopped when the water is not being put to beneficial use.

(3) Pursuant to rules adopted by the Water Management Board, the Water Engineer may require any permittee to construct or install a weir, headgate, valve, meter, gauge, or other reasonable and appropriate device for the control and measurement of water permitted for use by a Reservation water permit and for the prevention of waste or harm.

(4) In addition to any remedy in law or equity that may be available to a person harmed by another's waste of water or interference with a lawful water use, the Water Engineer may, upon ascertaining, that a person is wasting water or preventing water from moving to another person having a lawful right to use the same,

(a) order the person wasting the water or interfering with the lawful water use of another to cease and desist from doing so and take such steps as may be necessary to remedy the waste or interference, and

(b) regulate the controlling works of an appropriation as may be necessary to prevent the wasting of water or to secure water to a person having a lawful right to its use, and

(c) seek an order from the Water Management Board to enjoin such waste or interference.

2-1-125. Issuance of Reservation Water Permit Does Not Constitute Permission to

Trespass. A grant of a Reservation water permit by the Water Management Board does not constitute a license or permission to trespass on land which the permittee does not otherwise have a legal right to access. Land owners suffering trespass by Reservation water permit holders may seek any remedy available in law.

2-1-126. Issuance of Reservation Water Permits for Water Use.

(1) Following the completion of the registration of aboriginal and reserved water uses, including deferred aboriginal and reserved uses, falling under the umbrella of the Tribes' water right, the Water Management Board shall issue to the water user, without charge, a Reservation water permit incorporating all the terms of the registered use.

The State wants to assure that the registration process and issuance of Reservation Water Permits for Tribal water use contained in Section 2-1-126(1) is consistent with the protection of Water Rights Arising Under State Law.

(2) Following the completion of procedures for recognition and confirmation of existing use of Reservation waters prescribed in Section 2-1-111, the Water Management Board shall issue, without charge, a Reservation water permit incorporating all the terms of the confirmed water use.

The parties must define the enforcement powers of the Water Management Board which may make duplicate Reservation Water Permits unnecessary. Issues include the fact that the time gap between the compact decree and basin decrees and the need to enforce claims during that period; the need for the Water Management Board to have enforcement authority to enforce, change or abandon decreed rights in lieu of enforcing duplicate Reservation Water Permits; the McCarren Amendment overlay, that is the need for a general stream adjudication; and provision of the greatest possible protection to existing water uses and water resources.

(3) The Water Management Board shall provide copies of all Reservation water permits to the DNRC.

(4) The Water Management Board shall publish the Reservation water permits to the Water Management Board's website.

2-1-127. Transfers of Permits.

(1) A Reservation water permit may be conveyed, sold, leased or transferred, subject to the following conditions, and in the case of aboriginal or reserved uses, subject to the approval of the Bureau of Indian Affairs.

(2) Within thirty (30) days of the transfer of permit ownership, the transferor shall give written notice, together with a copy of the instrument of transfer and its recordation, to the Water Engineer in a form prescribed by the Water Management Board.

(3) Within thirty (30) days after receipt of the notice and instrument of transfer required by subsection (1) of this section, the Water Engineer shall re-issue to the transferee the permit subject to the same terms and conditions as the permit or license prior to transfer.

(4) By virtue of, or in conjunction with the transfer, the parties may not effect a change in the appropriation, the appropriation works, or use of water, except that if the Tribes reacquire a former allotment the water use right priority date shall be July 16, 1855.

The State has a concern with Section 2-1-127, "Transfers of Permits" which will be articulated in the future.

PART 2. APPLICATIONS FOR PERMITS FOR NEW SURFACE WATER USE

2-2-101. Amnesty Filings for Water Use Arising Under Montana State Law and Not Heretofore Claimed, Permitted Certified or Otherwise Acknowledged.

(1) Persons who appropriated water for beneficial use prior to the effective date of the compact between the Confederated Salish and Kootenai Tribes and the State of Montana and prior to the effective date of this Ordinance, without filing for a claim for beneficial water use under the Montana Water Use Act, as amended, or who do not claim a water use under the Confederated Salish and Kootenai reserved water right, may file an amnesty filing by providing the information specified in Sections 2-1-106 and 2-1-107 above to protect such existing but unpermitted beneficial water use.

(2) The Water Management Board shall issue a receipt for such amnesty filings as prescribed in Section 2-1-110.

(3) The Board may set a reasonable fee for the filing of such amnesty filings.

(4) Following confirmation by the Board, amnesty filings shall receive a priority date as of the effective date of the compact for water rights between the State of Montana and the Tribes.

2-2-102. Copies of Amnesty Filings to DNRC. The NRD shall timely file with the Water Management Board, and provide copies to the DNRC, amnesty filings of all water uses arising

under Montana State Law, existing at the time of approval of this ordinance, but not heretofore claimed, permitted, certified, or acknowledged.

2-2-103. Application for Permit for New Appropriation or Use and Change in Use.

(1) After the effective date of this Ordinance, each person who intends to initiate a new appropriation of Reservation waters or to change any aspect of an existing use shall apply to the Water Management Board for a permit for the new appropriation, use, or change of use.

(2) A change in the owner of a Reservation water permit shall not constitute a change of use and shall be duly recorded in accordance with the provisions of Section 2-1-127.

2-2-104. Contents of Application for New Use. An application for a new use shall be on a form prescribed by the Water Management Board and shall include:

(1) All of the information required for a registration of existing use in Section 2-1-106, except that described in subparagraph (12) of that section;

(2) Any permit for the construction or installation of works that may be required for the appropriation by the Tribes' Shoreline Protection Ordinance or by the Tribes' Aquatic Lands Conservation Ordinance;

(3) If the use is an aboriginal or a reserved use, proof of its incorporation, prior to the application, in the Water Conservation and Development Plan; and

(4) Documentary evidence that
(a) the proposed use will not adversely affect existing uses or planned aboriginal or reserved uses,

- (b) the proposed means of diversion and operation of the appropriation works, if any, are adequate to carry the water to the place of use with minimal losses,
- (c) the proposed use will not create or contribute to saline seep, soil or mineral leaching, drainage problems or waste,
- (d) the water quality of another user will not be harmed; and
- (e) the applicant has an ownership interest or an approved right-of-way for the point of diversion and conveyance ditch or pipe.

2-2-105. Contents of Application for Change of Use. An application for a change in a permitted surface water use shall be on a form prescribed by the Board and shall include:

- (1) a statement that the change of use will not change the previously permitted rate of flow or volume of water;
- (2) all of the information required for an application for a new use by Section 2-2-103, except that required by subparagraph (1) of that section; and
- (3) a description of the change or changes proposed including any change in the point of diversion, means of diversion, appropriation works, period of use, purpose of use, or place of use, together with a statement of the benefits to be derived from the change or changes of use by the applicant and by Reservation residents generally.

2-2-106. Incomplete or Defective Application for New Use or Change in Use. The Water Engineer shall return an incomplete or defective application for a new surface water use or a change in surface water use to the applicant for correction or completion, together with the reasons for return. If an application for a new use or for a change in use is not corrected,

completed, and refiled with the Water Engineer within thirty (30) days of the return, the priority date of any nonreserved new use will be the date of refiling of a correct and complete application.

2-2-107. Review Process. The following process shall be implemented for the review and consideration of applications for new or changed surface water uses:

(1) The Water Engineer shall within ten (10) days of receipt, determine whether an application is complete and, if deemed complete, will date-stamp the application. If the application is not complete the Water Engineer shall return it to the applicant and shall notify the applicant of the identified deficiencies.

(2) The Water Engineer shall transmit each complete application to the NRD and the DNRC for technical review. Such technical review shall be completed within sixty (60) days.

(3) Upon completion of technical review of the application by the NRD and the DNRC the Board, through the Water Engineer, shall provide public notice and an opportunity for potentially affected persons to object prior to the Board making a decision to authorize, authorize with conditions or deny authorization to appropriate water. The deadline for filing objections shall be thirty (30) days after provision of notice, but, at its discretion and accompanied by a written statement of reasons, the Board may modify the objection period, though such period may be no shorter than fifteen (15) days NS no longer than sixty (60) days after the provisions of notice.

(4) Between completion of technical review and the provision of notice pursuant to subsection (3) above, the Board, for good cause, may act to:

(a) require the applicant to conduct and submit to the Board specific technical, environmental and cultural information and analyses, or such other information that the Board deems essential to full and fair consideration of the application, to the extent that such information is reasonably obtainable prior to appropriation, for which the applicant shall bear the cost; and/or

(b) require the applicant to conduct environmental review pursuant to all applicable environmental laws when construction of the proposed appropriation could adversely affect the quality of the human environment.

(5) The Board shall conduct a review of the record, including the application, technical analysis and any additionally required information. Prior to the conclusion of this review process, the applicant and any objector(s) shall be given the opportunity to respond in writing to any information before the Board that adversely affects the application or objection(s). At its discretion, the Board may convene a hearing to take oral testimony as well. The Board shall render a written decision to authorize, authorize with conditions, or deny authorization to appropriate within forty-five (45) days of the closing of the public notice and comment period, the receipt of written responses from the applicant and any objector(s), or any hearing, whichever comes later.

(6) The Board may deny an application for a Reservation water permit for surface water appropriation or change if

(a) the use declared is not a beneficial use;

(b) there is insufficient water in the source, after uses with earlier prior dates are satisfied, to provide for the use in a dry water year;

(c) the works employed to appropriate the water or to implement its use are so inadequate, inefficient, or poorly constructed that

(i) they result in a waste of water, or

(ii) the losses of water associated with storage and delivery of the use or with irrigation return flows, or the works themselves, constitute a threat of harm to persons or to the property of others;

(d) the basin or sub-basin is closed to new appropriations; or

(e) the proposed use will harm or adversely affect prior existing rights.

(7) The Board shall provide the applicant and any objector in writing with the reasons(s) for any such denial.

2-2-108. Conditions and Restrictions on a Permit. The Board may impose such conditions and restrictions on a new surface water permit as it finds necessary to protect the persons, property, or water use of other permittees and to preserve and protect the health, safety, or welfare of Reservation residents.

2-2-109. Mitigation Guidelines for Permits Proposed in Water Management Areas. The Water Management Board may develop mitigation guidelines by which new surface water permits in established Water Management Areas or closed basins or sub-basins may be considered and issued.

2-2-110. Issuance of Permit for a New Use or Change in Use.

(1) Except as provided in Section 2-2-107

(6), the Board shall issue a permit to an applicant for a new use or a change in use in such form as the Board may specify by rule.

(2) A permitted change in use shall carry the same priority date as the original permit, and a denial of an application for a change in use, in whole or in part, will not affect the validity of the underlying permit.

2-2-111. Reduction and Revocation of Permits.

(1) Any aggrieved permittee or the Water Engineer, upon a finding that a permittee has failed to comply with the terms and conditions of a permit, may petition the Water Management Board to show cause why the permit should not be reduced or revoked.

(2) Upon the order of the Water Management Board that a permit be reduced, the Water Engineer shall require the installation of, or install and bill the permittee for installation of the appropriate water measurement device to assure the permittee abides with the Board's order for reduction.

(3) Upon the order of the Water Management Board that a permit be revoked, the Water Engineer, or law enforcement personnel will remove or render inoperative any works implementing the appropriation, and the water will become available for new appropriation and use.

(4) A revocation of a permit to change a use does not affect the status of the underlying permit as it existed prior to the change in use.

2-2-112. Appeals.

(1) Any person aggrieved by the issuance of a permit to another person or the revocation of a permit may appeal the decision in accordance with Section 3-1-112 of this Ordinance.

(2) Any applicant aggrieved by the denial of an application in whole or in part, or by the issuance of a permit containing different conditions from those applied for, may, within thirty (30) days of the decision of the Board denying, conditioning, or restricting the permit, appeal the decision in accordance with Section 3-1-110 of this Ordinance.

(3) Any person aggrieved by the revocation of a permit may appeal the decision in accordance with Section 3-1-110 of this Ordinance.

The State suggests there may be a better word(s) than “any person aggrieved” to limit the universe of people with standing to object which should be inserted in Section 2-2-110, “Appeals.”

2-2-113. Fees. The Water Management Board may set administrative fees for the filing and processing of applications for new surface water appropriation and changes.

PART 3. APPLICATIONS AND ISSUANCE OF PERMITS FOR GROUND WATER WELLS

2-3-101. Application. A person or entity seeking to drill a well after the effective date of this Ordinance must pay an application fee to and file a correct and complete application with the Board on the form approved by the Board. The Water Engineer shall determine if an application

is correct and complete and shall transmit all applications to the NRD and the DNRC for technical review.

2-3-102. Criteria.

(1) An applicant seeking to drill and place a well into production must demonstrate the following by a preponderance of the evidence:

(a) scientific information demonstrates the likelihood that there is water physically available at the proposed point of diversion in the amount that the applicant seeks to use throughout the proposed period of use;

(b) no existing water use will be harmed;

(c) the proposed means of diversion, construction, and operation of the diversion works are adequate;

(d) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(e) the applicant has exclusive property rights in the ground water development, or the written consent of the person with such exclusive property rights;

(f) the applicant has written consent of the owner of the land from which the water is to be withdrawn and upon which the water is to be used, if that person is different than the applicant;

(g) the water quality of another user will not be harmed;

(h) the proposed use will be substantially in accordance with the classification of water quality assigned to the source of the supply pursuant to applicable law;

(i) the ability of a discharge permit holder to satisfy effluent limitation of a permit issued in accordance with the applicable law will not be harmed;

(j) the well is of a type authorized by this Ordinance;

(k) the proposed use will not result in harm to fish, wildlife or the habitat upon which they depend; and

(l) the proposed use will not result in harm to Tribal archaeological resources, burial material, burial sites, cultural items, cultural resources, traditional cultural property, human skeletal remains, or religious sites.

(2) In the event the Water Management Board determines that any of these criteria cannot be satisfactorily demonstrated prior to the actual drilling of the proposed well, the Board may act to deny the application or to grant authorization to drill on the condition that all applicable criteria must be proven before a Reservation water permit for the proposed water use may be granted, and with such other conditions as the Board may deem necessary under the circumstances.

(3) The applicant is required to prove that the criteria in subsections (1)(g) through (1)(i) of this Section have been met only if a valid objection is filed. For these purposes, a valid objection must contain substantial credible information establishing to the satisfaction of the Board that the criteria in subsection (1)(g), (h), or (i), as applicable, may not be met. For the criteria set forth in subsection (h), only the NRD, the Montana Department of Environmental Quality, or a local water quality district may file a valid objection.

(4) The criteria contained in subsections (1)(a) - (k) of this section shall not apply if the following conditions occur:

(a) the application is for a “domestic well” as defined by this ordinance; and

(b) (i) after performing technical and cultural review of the application neither the NRD nor the DNRC has any objection to the application or believes that Board consideration of the application is warranted; or

(ii) except upon notice to the applicant and the Board, and upon a showing of significant impracticability by either the NRD or the DNRC, technical review for an application for well satisfying the description of a “domestic well” as defined by this Ordinance is not completed by both the NRD and the DNRC within sixty (60) days of transmission of the complete application by the Water Engineer to the NRD and the DNRC.

(5) If the conditions of Section (4) are met, the Board shall issue the applicant an authorization to drill so long as the application demonstrates the following:

(a) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(b) the applicant has exclusive property rights in the ground water development, or the written consent of the person with such exclusive property rights; and

(c) the applicant has written consent of the owner of the land from which the water is to be withdrawn, and upon which the water is to be used, if that person is different than the applicant.

2-3-103. Review of Applications. The following process shall be implemented for the review and consideration of new groundwater well applications:

(1) The Water Engineer shall, within ten (10) days of receipt, determine whether an application is correct and complete and, if deemed correct and complete, will date stamp the application and promptly transmit each complete application to the NRD and the DNRC for

technical review. If the application is not correct and complete the Water Engineer shall return it to the applicant and shall notify the applicant of the identified deficiencies. If the applicant resubmits the application in a complete form with five (5) working days of receiving notice of incompleteness, no new application fee shall be required.

(2) After technical review, applications satisfying the conditions of Section 2-3-102(4) and (5) shall be exempt from the following four process steps and shall be processed pursuant to the terms of Section 2-3-102(5). All other applications shall be processed according to the following four steps.

(3) Upon completion of technical review of the application by the NRD and the DNRC, the Board shall provide public notice and an opportunity for potentially affected persons to object prior to the Board making a decision to authorize, authorize with conditions or deny authorization to drill a well. The deadline for filing objections shall be thirty (30) days after provision of notice, but, at its discretion and accompanied by a written statement of reasons, the Board may modify the objection period, though such period may be no shorter than fifteen (15) days and no longer than sixty (60) days after the provision of notice.

(4) Between completion of technical review and the provision of notice pursuant to subsection (3) above, the Board, for good cause, may act to:

(a) require the applicant to conduct and submit to the Board specific technical, environmental and cultural information and analyses, or such other information that the Board deems essential to full and fair consideration of the application, to the extent that such information is reasonably obtainable prior to well drilling, for which the applicant shall bear the cost; and/or

(b) require the applicant to conduct environmental review pursuant to all applicable environmental laws when construction of the proposed well could adversely affect the quality of the human environment.

(5) The Board shall conduct a review of the record, including the application, technical analysis and any additionally required information. Prior to the conclusion of this review process, the applicant and any objector(s) shall be given the opportunity to respond in writing to any information before the Board that adversely affects the application or objection(s). At its discretion, the Board may convene a hearing to take oral testimony as well. The Board shall render a written decision to authorize, authorize with conditions, or deny authorization to drill a well within forty-five (45) days of the closing of the public notice and comment period, the receipt of written responses from the applicant and any objector(s), or any hearing, whichever comes later.

State is concerned about use of the term “adversely affects” in Section 2-3-103(5), “Review of Applications,” because of the use of the term in State law.

(6) The Board may deny an application for authorization to drill if, after reviewing information provided to it by the NRD, the DNRC, the any objector, and the applicant, the Board determines that the application criteria have not been satisfied. The Board shall provide the applicant and any objector with the reasons(s) for any such denial in writing. The Board may, at its discretion, issue an authorization to drill even if all of the application criteria are not satisfied if the process of drilling is anticipated to generate additional information relevant to the criteria. In no event, however, shall a permit be issued if all of the applicable criteria are not satisfied.

2-3-104. Mitigation Guidelines for Permits Proposed in Water Management Areas. The Water Management Board may develop and publish mitigation guidelines by which new ground water well permits in established Water Management Areas may be considered and issued.

2-3-105. Appeals of Decisions Concerning Authorization to Drill. The decision of the Board to authorize, authorize with conditions or deny authorization to drill a well may be contested pursuant to Section 3-1-110 of this Ordinance.

2-3-106. Post-Drilling Obligations. If the Board authorizes the drilling of a well, the applicant shall provide the Board with accurate copies of all well logs, aquifer tests, water quality analyses, and other relevant and requested information arising from well completion within forty-five (45) days of well completion.

2-3-107. Reservation Water Permits for Ground Water Wells.

(1) Upon receipt of all required post-drilling information, the Board shall provide public notice pursuant to Section 2-3-103(3) and provide an opportunity for potentially affected persons to object prior to the Board making a decision to issue a Reservation water permit for ground water. The deadline for filing objections shall be thirty (30) days after provision of notice, but, at its discretion and accompanied by a written statement of reasons, the Board may modify the objection period, though such period may be no shorter than fifteen (15) days no longer than sixty (60) days after provision of notice. No objection shall be considered at this stage unless:

(a) it is based upon information reasonably unavailable to the purported objector during the authorization to drill stage; or

(b) if the objector, or his or her predecessor interest, lacked a meaningful opportunity to object at that stage.

(2) Prior to making its decision, the Board shall afford the applicant and any objector the opportunity to respond in writing to any information before the Board concerning the application or objection. At its discretion, the Board may convene a hearing to take oral testimony as well.

(3) The Board shall render a written decision to permit, permit with conditions, or deny the permit for a well within forty-five (45) days of the closing of the public notice and comment period, the receipt of written responses from the applicant and any objector, or any hearing, whichever comes later.

(4) The Board shall grant a permit if, after examination of the record, the Board determines that the applicable criteria have been met. If after examination of the record, the Board determines that the applicable criteria may be satisfied by placing conditions on the use of a well, the Board may grant a permit for that well subject to terms and conditions deemed proper by the Board. These terms and conditions may include a requirement that the licensee install and maintain a functional monitoring system and timely report all monitoring results to the Water Engineer. The Board shall provide the applicant and any objector in writing with the reasons for its decision, including a specific statement of its reasons for imposing any term or condition.

(5) The Board shall deny a permit if, after examination of the record, it determines that the applicable criteria are not satisfied. The Board shall provide the applicant and any objector in writing with the reasons for any such denial. If a permit is denied, the applicant must

completely seal and protect the well at issue from utilization, contamination and waste within sixty (60) days of the denial of the permit. If the applicant appeals the denial, the obligation to seal and protect shall be suspended pending the outcome of the appeal unless the Board requires otherwise for good cause shown, such cause to be shown in writing. If the appeal is unsuccessful, the applicant must completely seal and protect the well at issue from utilization, contamination and waste within sixty (60) days of the denial of the appeal.

(6) The water well criteria contained in the Administrative Rules of Montana, Board of Water Well Contractors are incorporated herein by reference and shall govern the construction, sealing and protection of all wells authorized and permitted under this Ordinance to the extent that those criteria do not purport to expand or limit the regulatory or adjudicatory jurisdiction of the Tribes, the State of Montana or the United States.

(7) The decision of the Board to permit, permit with conditions or deny a permit for the use of a well may be contested pursuant to Section 3-1-110 of this Ordinance.

2-3-108. Fees.

(1) The following filing fees apply to the process outlined in Part 3. Payment is to be made to the Water Management Board through the Water Engineer:

- | | | |
|-----|---|-------|
| (a) | Application for a Permit for Ground water Use - Domestic Well | \$100 |
| (b) | Application for Permit for Ground water Use - Community | \$800 |
| (c) | Application for Permit for Ground water Use - Municipal | \$800 |
| (d) | Objection to a Permit Application | \$100 |
| (e) | Transfer of a Permit | \$100 |
| (f) | Change of Existing Use | \$100 |

CHAPTER III
OBJECTIONS AND HEARINGS

3-1-101. Standing for Filing Objections. Any person alleging that they will suffer harm from the grant of an application for a new permit or change of use may file an objection with the Water Management Board.

3-1-102. Time for Filing Objections. Any person authorized by this Ordinance to file an objection must file such objection within thirty (30) days after the close of the published notice period, unless otherwise specified by the Board consistent with this Ordinance.

3-1-103. Grounds for Objection. An objector may rely on one or more of the following grounds, supported by specific allegations of fact:

(1) an application for a new appropriation of surface water, a change, or a ground water well application contains a misstatement of fact regarding the period of use, purpose of use, place of use, or means of delivery, or ownership of a point of diversion or diversion works;

(2) the objector will be harmed if the application for surface water appropriation, authorization to drill, ground water appropriation, change of use, or revocation of permit is granted; and or

(3) The health, safety, or welfare of Reservation residents will be harmed if the appropriation, change or revocation is permitted.

3-1-104. Contents of Objections. Objections will be filed with the Water Management Board on a form prescribed by the Board and will contain the following information:

- (1) the name and address of the objector;
- (2) a copy of the objector's registration or permit in the watershed or water delivery area of the matter objected to;
- (3) a statement of the particular grounds for the objection, supported by allegations of fact;
- (4) a list of all witnesses and exhibits supporting the objection; and
- (5) the signature of the objector and a notarized verification of the objection

3-1-105. Notice of Hearing on Objection.

(1) Within thirty (30) days after the expiration of the time for filing objections, the Board shall mail to any applicant whose application is objected to a copy of all objections and shall set a time and place for hearing on the objections to the application.

(2) Notice of a hearing shall be published once a week for two weeks immediately prior to the date set for hearing in a newspaper of general circulation in the watershed or water delivery area, and the notice shall be mailed by the Water Engineer to each applicant and objector whose declaration and objection thereto will be heard.

(3) The notice shall contain, without limitation, the names and addresses of the applicants and objectors, a description of the watershed or water delivery area involved, a summary of the contested matter and of the grounds for objection thereto.

3-1-106. Notice of Hearing on Petition of Water Engineer. Within thirty (30) days of filing of a petition for an order by the Water Engineer, the Board shall provide the affected water user a copy of the petition and shall set a time and place for hearing on the Water Engineer's petition.

3-1-107. Burden and Standard of Proof.

(1) At the hearing, the burden of proof will be on the objector, aggrieved person or, in the case of a petition by the Water Engineer, upon the Water Engineer.

(2) The standard of proof will be a preponderance of the evidence presented.

The State needs more internal discussion on who should bear the burden of proof in a hearing. That discussion may and the resulting conclusion may affect Section 3-1-107, "Burden and Standard of Proof."

3-1-108. Conduct of the Hearing.

(1) The Board shall adopt rules of procedure for hearings within sixty (60) days of the enactment of this Ordinance.

(2) At the hearing, the rules of evidence will not apply, except that all evidence must be relevant.

(3) Any party may be represented by counsel, but applicants and objectors must also be present in person to respond to examination by adverse parties and by the Board. Failure to appear shall result in a default by the party failing to appear.

(4) Proceedings will be recorded.

3-1-109. Decision of the Board.

(1) Within sixty (60) days after the date of a hearing, the Board shall render its decision in the matter, which shall consist of written findings of fact and conclusions of law and the issuance, conditioning, or denial of a permit to the applicant or a revocation, modification or imposition of conditions on an existing Reservation water permit.

(2) In reaching its decision, the Board may not rely upon nor give weight to uncorroborated hearsay evidence presented at the hearing.

3-1-110. Appeal of the Decision of the Board.

(1) Within thirty (30) days of receiving the decision of the Board, a party aggrieved by its decision may petition a Federal Court U.S. Magistrate Judge for relief.

(2) A proceeding before a Federal Court U. S. Magistrate Judge will be a review of the administrative record.

Section 3-1-110, and any other section calling for appeals of decisions of the Water Management Board to a U. S. Magistrate Judge is problematic for the State.

CHAPTER IV
ENFORCEMENT

4-1-101. Prohibited Acts. The following constitute acts prohibited by this ordinance for which the Water Engineer shall issue a citation to the person committing the prohibited act and may

petition the Water Management Board for appropriate action and penalties following notice and opportunity to be heard:

- (1) obstruct or impede the due administration of this Ordinance;
- (2) commit fraud, or assist another in the commission of fraud, with the intent to evade or defeat the administration of this Ordinance or costs imposed or assessed;
- (3) falsely verify by written declaration any application, permit, form, objection or other document, or to withhold data required to be submitted by law;
- (4) repeatedly violate the conditions or stipulations of his or her permit or license including by taking more water than is allowed by the permit;
- (5) repeatedly take, waste, alter or damage Reservation water resources or the permitted rights of others;

The State and Tribes will consider better wording for (4) and (5) of Section 4-1-101, "Prohibited Acts," because the State prefers the word "intentionally" and the Tribes prefer the word "repeatedly." "Intent" is difficult to prove, however the State does not want to give anyone a free shot by making enforcement rely on repeated acts.

- (6) make use or take action affecting the use of Reservation waters without authorization required under this Ordinance; or
- (7) obstruct or interfere with persons performing their lawful duties under this civil Ordinance.

4-1-102. Penalties.

(1) A person committing a prohibited act listed in Section 4-1-101 shall be subject to civil proceedings before the Water Management Board on citation and petition by the Water Engineer.

(2) Penalties determined by the Water Management Board and ordered after notice and the opportunity to be heard can include:

- (a) monetary damages
- (b) restitution
- (c) injunctive relief
- (d) affirmative remedial action
- (e) additional conditions or limitations upon the holder's permit, including

limitation of the amount of water permitted for diversion

- (f) suspension of the permit for a certain term
- (g) revocation of permit
- (h) temporary or permanent disqualification from eligibility for any permit

subject to limitations set forth by applicable federal law; and

- (i) costs.

(3) Penalties assessed to the Confederated Salish and Kootenai Tribes shall be limited to prospective, non-monetary declaratory and injunctive relief and the Tribes' waive sovereign immunity only to that extent.

(4) All penalties assessed by the Board shall be reasonable and proportionate to the prohibited act committed, and appealable to the court as set forth in Section 3-1-110.

4-1-103. Petitions for Orders Filed by the Water Engineer. The Water Engineer may, as authorized in Sections 1-2-111(1)(d) and 4-1-101 petition the Water Management Board for orders to cease and desist wrongful water use, for removal of works, and for remediation, mitigation and other remedies.

4-1-104. Proceedings on Exercise of Water Engineer’s Emergency Enforcement Powers.

When in the exercise of the Tribal Water Engineer’s authority under Section 1-2-111(c), the Tribal Water Engineer removes, renders inoperative, shuts down, closes, seals, caps or otherwise controls any method of diversion or withdrawal, any obstruction to the flow of water, or any activities adversely affecting the quality or quantity of Reservation water use, the affected person may appeal the Water Engineer’s action and in appealing shall have the following appeal deadlines.

(1) A written petition must be filed with the Water Management Board not later than ten (10) days from the date of the Water Engineer’s action.

(2) The Water Management Board will conduct a hearing to receive evidence from the person adversely affected by the Water Engineer’s action within ten (10) days of filing such petition after having, in good faith, attempted to notify any affected permit holders.

(3) The Water Management Board shall within five (5) days issue a written decision stating the grounds therefore.

(4) The Water Management Board’s decision may be appealed in accordance with Section 3-1-110.