

CHAPTER II

WATER USE¹

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 *-I understand the intent here, but this locution suggests that undeveloped reserved and aboriginal uses are “existing” which is potentially in tension with the idea of protecting existing water rights arising under State law – we’re just going to need to be careful in how we use words like “existing” and “use” for that matter, throughout the draft to avoid confusion*], and to scientifically manage future appropriation of surface and groundwater in order to protect existing water uses.

2-1-102. Requirement to Register Aboriginal and Reserved Water Use.

(1) Within one year [*DNRC wonders whether this is enough time*] from effective date of this Ordinance, the NRD shall complete a comprehensive registration of aboriginal and reserved water uses, [*including deferred aboriginal and reserved water uses,*] for Reservation waters falling under the umbrella of the Tribes’ [Reservation Water Right *- this term is not*

¹ *As noted above, WRD is continuing to develop formal comments on Chapters 2-4. The comments that follow have been generated primarily by RWRCC staff, though they have been informed by informal discussions with WRD personnel.*

Deleted: 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 the DNRC;¶
. (3) incorporating ground water certificates issued by the 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.¶*
2-1-103. I propose deleting the old 2-1-102 because I think its individual parts are covered below

defined in the Ordinance; it might be better to use something like "...under the umbrella of the Tribal Water Right" which I expect is a term we will both define and quantify in the Compact].

(2) 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.

2-1-103. 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.

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2-1-104. Registration of Aboriginal or Reserved Uses of Reservation Waters.

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(1) Each person, including individual Indians, who claims to have used 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.

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2-1-105. Contents of Registration. A registration of aboriginal or reserved water use shall be on 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 [\[what’s a “Secretarial committee”?\]?](#)

(12) the signature of the applicant with a notarized verification of the accuracy and truthfulness of contents of the declaration.

2-1-106. Incomplete, Defective, and Amended Registrations.

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(1) Within ten (10) days [\[DNRC again wonders about this time frame\]](#) 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. [If the registration is incomplete, it](#) shall be corrected, completed, and refiled with the Water Management Board within thirty (30) days of the date of return. [If the registration is not returned within that timeframe, the NRD shall correct and complete the registration on the filer’s behalf.](#)

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

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2-1-107. 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.

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2-1-108. 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 corrected registration.

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

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2-1-109. Recognition and Confirmation of Reservation Water Rights Arising Under State

Law. *[the State is still chewing over the policy – and potential constitutional – ramifications of this sort of parallel paperwork system; we're not saying "no" to it but we are still reviewing it]*

(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.

(2) Upon [verification] by [the](#) 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 [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.

(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.

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2-1-110. Voluntary Conversion of Claims, Permits or Certificates for Existing Water Use, or State Based Right, to Tribal Right. *[The State has some concerns about how the exercise of voluntarily converted rights will interface with remaining Water Rights Arising Under State Law; I believe this issue is more appropriately addressed in the first instance in Article IV(administration) of the Compact, and that the Ordinance and parallel State legislation can be modified to reflect what we ultimately come up with; therefore, I suggest we view the language below as a placeholder more than anything else]*

(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, or water certificate by the State of Montana.

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(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 2-1-112 of this ordinance.

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2-1-111. 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.

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2-1-112. Application of Doctrine of Prior Appropriation as Modified by Federal Law,

Conversion to a Tribal Use Right and Unitary Irrigation Project Priority Date. [\[see my](#)

[note re. 2-1-110 above\]](#)

(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 2-1-114.

(2) Priority of 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.

Deleted: "Amnesty Filing"

(e) Amnesty filings made by persons who did not previously file a claim, application for a permit, or notice of appropriation of an exempt groundwater 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.

(f) All new appropriations that are not aboriginal or reserved uses will have as their priority date the date of issuance of a Reservation water permit [under State law, the priority date would be the date of receipt of the application].

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2-1-113. 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 THIS SECTION AND WHILE THEY CONSIDER IT A PLACE HOLDER AND WILL WANT CHANGES IN THE FUTURE]

[The State agrees that this is a subject better addressed in the Compact and attendant federal legislation]

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2-1-114. Limitation to Beneficial Use. Beneficial use shall be the basis, measure and limit to the use of Reservation waters.

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2-1-115. Preferred Beneficial Uses. If there are simultaneous *[probably need to spell out what “simultaneous” means – if it’s two applications being lodged at exactly the same time, that’s likely to be a rare occurrence at best, and we probably don’t need this section; if it’s more like having multiple applications under the WMB’s consideration simultaneously, we ought to clarify that]* competing applications for permits for new appropriations and if the water supply is inadequate to provide for all the existing uses applied for, the highest and best beneficial use will have the preferred right. Highest and best uses for purposes of such ranking, in order of preference, are:

1. instream flow;
2. domestic, commercial (including hydropower production), municipal or community uses, including fire protection and domestic lawn and garden irrigation;
3. agricultural uses;
4. industrial or manufacturing uses;
5. mining, mineral processing or oil and gas recovery and processing; and
6. leasing or contracting for conveyance of Reservation waters for use outside the Reservation.

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2-1-116. 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.

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2-1-117. No Adverse Possession. No right to use water on the Reservation may be acquired by prescription or by adverse possession of use.

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2-1-118. Abandonment of Water Use.

(1) No part of the Tribal water right is subject to abandonment by nonuse.

(2) When water not part of the Tribal water right is not used for five consecutive years while there was water available for use, it shall, upon a finding of abandonment, revert to the Tribes and shall again be subject to application for a permit for deferred use or new appropriation. *[the State certainly prefers the alternate formulation below; the State also thinks that the mechanism for what happens to available water should probably be spelled out in the Compact proper; in addition, this section implicates some of our concerns about the definition of and process for finding abandonment that I noted above]*

[THE STATE TEAM OBJECTS TO THE LANGUAGE OF SUBSECTION (2) SO THE TRIBES PROPOSE ALERNATIVE LANGUAGE FOR THAT SUBSECTION AS FOLLOWS.]

(2) When the water not part of the Tribal water right is not used for five 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.

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2-1-119. Procedure for Declaring Abandonment. *[the State is still chewing on the policy implications of this]*

(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.

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2-1-120. 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.

2-1-121. 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.

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2-1-122. 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.

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(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.

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2-1-123. 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 groundwater 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, fish screen *[fish screens are potentially a big ticket expense that are not necessarily going to be needed to prevent waste or harm (as that term is defined herein) or for, measurement and control; if this is a power we want the engineer or the WMB to have, we probably ought to make a more specific provision for it]* 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.

2-1-124. 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.

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2-1-125. 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.

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(2) Following the completion of procedures for recognition and confirmation of existing use of Reservation waters prescribed in Section 2-1-109, the Water Management Board shall issue, without charge, a Reservation water permit incorporating all the terms of the confirmed water use. *[again, we'll need to make sure that this process is consistent with the protection of Water Rights Arising Under State Law, which will be a Compact issue in the first instance]*

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(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.

2-1-126. Transfers of Permits. *[it might be a lot simpler to make the ownership update process – which is what this really is – consistent with existing State law; we should also make clear that a change to anything but the name of the holder of the water right requires an application for change of use]*

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(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, 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) 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.]

(4) 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.

PART 2. APPLICATIONS FOR PERMITS FOR NEW SURFACE WATER USE

[I think there needs to be some clean-up to clarify the distinctions between new surface water applications – Part 2 – and new groundwater applications – Part 3; the inclusion of amnesty filings directly below, for instance, should either be wholly free-standing or needs to be reincorporated in Part 3, as the vast majority of unpermitted post-Ciotti uses are for groundwater; similarly, in Part 2, change applications are lumped in with new surface water permit applications, while Part 3 wholly lacks provisions for changing the use of a groundwater right or for drilling replacement wells]

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 surface 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 2-1-109.

(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. 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 [surface](#) waters or to [change any aspect *– this is a very broad formulation; 2-2-104(3) seems to delimit the change aspects that require a change application, but it'd be helpful if we specifically identify what sorts of things require a change app. – State law could provide a template*] of an existing [surface water](#) 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.

2-2-103. Contents of Application for New Use. An application for a new [surface water](#) 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, and

(d) the applicant has an ownership interest or an approved right-of-way for the point of diversion and conveyance ditch or pipe.

2-2-104. 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.

2-2-105. 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. *[there's a conflict here with 2-1-112(f), which talks about the priority date being the issuance of the permit rather than the date of filing a correct and complete application; we like this approach better; separately, we will need to deal with how newly developed reserved uses will interface with the protection of Water Rights Arising Under State Law, which I see as an issue to be handled in the Compact itself]*

2-2-106. Review Process. The following process shall be implemented for the review and consideration of applications for new or changed surface water uses: [DNRC has some concerns that the process described here is insufficiently clear, including that it's not explicit that a "correct and complete" application requires something less than the information generated as a product of NRD/DNRC technical review, that the public notice and comment provisions of (3)

and (5) do not seem to be seamlessly integrated, and that (6) lumps in both new applications and change applications in ways that might be problematic]

(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 and 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;

Deleted: storage or delivery

- (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.

2-2-107. 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.

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2-2-108. 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.

2-2-109. Issuance of Permit for a New [Surface Water](#) Use or Change in [Surface Water](#) Use.

(1) Except as provided in Section 2-2-106(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.

2-2-110. 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.

2-2-111. Appeals.

(1) Any person [aggrieved *– might need a better word to limit the universe of people with standing to object*] 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 3-1-112 of this Ordinance.

(3) Any person [aggrieved — again, might need a better word to limit the universe of people with standing to object] by the revocation of a permit may appeal the decision in accordance with Section 3-1-112 of this Ordinance.

2-2-112. 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 NEW GROUNDWATER WELLS

[note: Part 3 is drawn heavily from the final draft of the Interim Agreement]

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.

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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 groundwater 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; *[this criterion is not being applied to new surface application; should it be?]*

(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;

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(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

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(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 groundwater 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 within 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.~~

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.. (3) .

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(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.

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

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(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.

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(5) The Board shall conduct a review of the record, including the application, technical analysis and any additional 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 – might need a different term given the way this one is used in State law] 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

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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.

(6) The Board may deny an application for authorization to drill if, after reviewing information provided to it by the NRD, the DNRC, 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.

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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 groundwater well permits, in established Water Management Areas, may be considered and issued.

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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 3-1-112 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 Groundwater Wells. *[2-3-103 also talks about the provision of notice to the public, the applicant and objectors; we should probably make sure it's clear that the notice obligations in 2-3-103 and this section are the same and not that two distinct notice periods are being created]*

(1) Upon receipt of all required post-drilling information, the Board shall provide public notice and an opportunity for potentially affected persons to object prior to the Board making a decision to issue a Reservation water permit for groundwater. 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 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

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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 3-1-112 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 Groundwater Use - Domestic Well | \$100 |
| (b) | Application for Permit for Groundwater Use - Community | \$800 |
| (c) | Application for Permit for Groundwater 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 to File Objection. 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.

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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.

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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 groundwater 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 rate or flow actually put to use at the place of use exceeds the rate of flow or the volume of water specified in the application, permit, or change authorization; - this seems like a reasonable ground for seeking an enforcement action but does not make sense as a ground to object to an application before it's issued as the water "actually put to use" can't be known until after the permit is issued and exercised; this provision seems better located in the enforcement section]

(3) the objector will be harmed if the application for surface water appropriation, authorization to drill, groundwater appropriation, change of use, [or revocation of permit - how can an objector be harmed by the revocation of a permit] is granted; and or

(4) 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. Petitions for Orders Filed by the Water Engineer. The Water Engineer may, as authorized in Sections 1-2-111(6) 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.

3-1-106. Proceedings on Exercise of Water Engineer's Emergency Enforcement Powers.

When in the exercise of the Water Engineer's authority under Section 1-2-111(1)(c), the 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.

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(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 3-1-112.]

[3-1-105 and 3-1-106 both seem to deal with post-issuance enforcement rather than pre-issuance concerns; as such it seems more logical to situate them in Part IV of the Ordinance]

3-1-107. Notice of Hearing on Objection.

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

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(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.

3-1-108. 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.

[\[this should probably also go into Part 4 along with 3-1-105 and 106 as I noted above\]](#)

3-1-109. 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. [- again, this part to Part IV\]](#)

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

3-1-110. 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.

3-1-111. 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.

3-1-112. 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.

[THIS SECTION 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; Deleted: ¶
- (3) falsely verify by written declaration any application, permit, form, objection or other document, or to withhold data required to be submitted by law; Deleted: ¶
- (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; Deleted:
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- (5) intentionally take, waste, alter or damage Reservation water resources or the permitted rights of others; Deleted: ¶
- (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 Ordinance. Deleted: civil
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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
- (f) suspension of the permit for a certain term
- (g) revocation of permit
- (h) temporary or permanent disqualification from eligibility for any permit

limitation of the amount of water permitted for diversion

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.

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(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 3-1-112.

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