

DRAFT

UNITARY ADMINISTRATION AND MANAGEMENT ORDINANCE

9/22/08 Version¹

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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.

¹ The comments and redlines below reflect significant interagency consultation and input, particularly as between the Compact Commission and the DNRC's Water Resources Division (WRD). At this time, WRD wants to make clear that its comments are limited to Chapter 1 of the draft ordinance (General Provisions). WRD intends to provide feedback on the remainder of the Ordinance after additional internal policy discussions, and after some of the overarching issues implicated by Chapter 1 are worked out among the Parties. Reflecting the fact that this Ordinance is a work in progress, WRD and the RWRCC both want to be clear that these comments are preliminary and dependent on Compact negotiations that quantify the Tribal Water Right and otherwise establish the parameters for water use on the Reservation.

(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. [*reworded this because “consent” is likely to be a legislative flashpoint word and also to preclude unilateral modifications by either side.*]

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1-1-102. Findings and Policy. The Tribal Council finds *[since this is the Tribes’ ordinance]* and declares as follows:

(1) The waters of the Flathead Reservation are a 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 *[this point emphasizes that we are going to need – probably in the Compact itself – to clarify how the WMB will interface with the existing off-reservation regulatory and enforcement scheme (i.e. the DNRC and state district courts) – there’s also ambiguity about the term “unitary” – is it referring to connected surface water/groundwater, all waters of a geographic area, or managed under unitary ordinance? This needs to be clarified and made consistent throughout the document]*

(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 groundwater 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) *[Irrespective of the factual accuracy of the language I'm proposing to delete, I don't think it advances the negotiations to keep it in, and I don't think it adds anything of substance.]* 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 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 *[this seems to create a priority of uses which is something that that state has not done and has been careful not to do – we'll need to discuss this notion further]*.

Deleted: There has been no coherent or consistent governmental regulation of the appropriation, use, and conservation of Reservation water resources in the past by any governmental entity; and¶
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[“State” should come out as this is a Tribal Ordinance]

(c) to recognize and confirm existing uses of Reservation waters for any beneficial purpose consistent with the policies and provisions of [the Compact and this Ordinance](#),

(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 ensure 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;

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[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 five (5) 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. *[DNRC has specifically expressed a preference for the abandonment scheme here to mirror state law, particularly as it pertains to the time period (10 years rather than 5) and also to the intent requirement]*

(2) “Aboriginal Water Right” means a Tribal reserved water right for cultural and religious uses and for instream flows and ecological functions *[is this intended to encompass things like channel maintenance flows?]* 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. *[there are a lot of different references to types of water rights in here; I expect most of them – at least – are absolutely necessary, but we should do a comprehensive inventory of the types to be sure there are no redundancies or unnecessary points of confusion]*

(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 right arising under state law and who has an existing, but unrecorded water use as of the date of this Ordinance; or b) who developed a use of water that would qualify as an exception from the permitting requirements of State law after August 22, 1996 but who failed to lodge a notice of completion of such development with the DNRC, may file notice of that water use with the Water Management Board. After confirmation of the terms of that use by the Board, those who fall under subpart a) of this definition shall receive a Reservation Water Permit with a priority

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date as of the date of 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

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between the Tribes and the State of Montana. [my understanding of the intent here – which I appreciate – is to open up a process for post-Ciotti non-filers to get their actual uses recognized; we have also talked about the need to bring in and get recorded pre-1973 state-based uses that were exempt from filing in the adjudication (mainly de minimis domestic and stock uses); I think this definition as currently drafted conflates those two goals and also runs the risk of making it appear that we’re opening up a whole new filing period for folks who should have filed – my proposed changes are intended to draw this distinction plainly and eliminate the risk of opening the door to a new filing period for larger users who failed to comply with State law][on further reflection, it occurs to me that we might want to wholly differentiate the two subcategories and leave “Amnesty filings” for only the post-Ciotti non-filers and have a different process – something perhaps akin to the Registration process set out in 2-1-105 or the Confirmation process of 2-1-110 for the people with uses exempted from filing in the Montana adjudication.]

(5) “Appropriate” means to divert, impound, maintain an instream or impoundment use, or withdraw a quantity of water for a beneficial use. [what about non-diversion rights such as mitigation water – uses we are seeing with HB 831 and augmentation challenges. One calls the water to the old POD and leaves it instream as make up water for other appropriators?]

(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 nonconsumptive 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.

[add mitigation to the list?]

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

(9) “Consumptive Use” means a beneficial use of appropriated water in which the water, after use, is not returned to the source from which it was appropriated or, if returned, is, as a result of the use, different in quantity or quality from the water in the source prior to its appropriation. [DNRC notes that State law does not contain this carve-out; consumptive use is only that portion of the use not returned to the source – DNRC has a general preference for us to track as much of State law in the Ordinance as practicable. In addition, by defining consumptive use to a particular source, you can have issues with instream flow as to the “consumptive amount” that can be protected – if the return flows are going to another source – in instream flow you do not get that amount as part of the “consumptive use” you can protect. There is also a timing issue if you go down this path – does it return in time for the next appropriator?]

Consumptive uses include, without limitation: [why list all of these specific uses as opposed to just the definition?]

(a) domestic use, including community [What is a community use]?, municipal, commercial [some commercial isn't consumptive – cooling with pumping and reinjection (Zoot)], institutional, lawn and garden, and firefighting uses,

(b) agricultural uses,

(c) industrial or manufacturing uses, including mining or oil or gas recovery

or processing,

(d) the leasing or contracting of the right to transport and use Reservation water for a beneficial purpose within or without the Reservation, and

(e) hydropower consumptive use associated with evaporation from storage.

(10) “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 through, *inter alia*, supplemental water [not defined], purchase of existing water rights [“existing water rights” not defined], retirement of existing water rights, measurement or water management and conservation improvements. [Multiple terms describing water rights. Consolidate?] [I took out the definition of “Conjunctive Management” because the term is not used in the body of the Ordinance]

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

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(11) “Domestic Well” means a well that serves three or fewer individual households [household might need to be defined] and the sole purpose of which is domestic use, including no more than one acre of irrigated lawn and garden per household, and that has a flow rate and volume of not more than _____ gallons per minute and _____ acre-feet per year.

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(12) “Existing Use” means a beneficial use of water which was in use 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, or

(c) this Ordinance. [this definition implicates a concern about the various ways we are referring to water uses in this document – at some points, it appears that future/deferred tribal uses can count as “existing uses,” which I don’t think – at the very least as a matter of terminology – is

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consistent with trying to make clear that water rights arising under state law are being protected; also while the definition here talks of “existing uses” the Ordinance in other places speaks of “existing verified uses” which is confusing

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

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(14) “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.

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(15) “Groundwater” means any water that is below the surface of the earth.

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

DNRC has some concern about how this definition will be applied in practice as it does not have the same judicial development as the State “adverse effect” standard

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(17) “Instream Flow” means the quantity of water in a surface water body, including but not limited to streams, rivers, [lakes, high mountain lakes, ponds, potholes *for these four bracketed repositories of water, DNRC wonders whether we ought to have a separate definition and way of handling them as they pertain to standing water which implicates issues of volume rather than flow*] 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

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(18) “Instream Flow Requirement” means 1) that quantity of water flowing through a surface water body, including groundwater 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.

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(19) “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 [*mitigation?*]

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(20) “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.

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

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(22) “Nonconsumptive Use” means a beneficial use of water reserved or identified by this Ordinance to remain in a stream, aquifer, or body of water, which does not significantly *reduce or impair* the quantity or quality of the remaining water. [*what about timing?*]

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Nonconsumptive uses include, without limitation, the generation of hydroelectric power, recreation, and uses associated with the protection, preservation, and enhancement of fisheries,

wildlife, Indian cultural and religious practices and beliefs, water quality, and the vitality of an ecosystem. *[The whole consumptive use v. non-consumptive issue is confusing. Hydropower is both. It might be better simply to delete the examples from the definition.]*

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(23) “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. *[I don’t think these defined terms are used consistently throughout this draft, and would recommend that the definition be deleted; using the term “Permit” in this way is likely to sow confusion, as permits (using that word as a noun) are something specific under State law yet at various places in the Ordinance, it talks about uses that are permitted (using that word as a verb rather than a noun); in addition, we have definitions like “Reservation Water Permit” which seem more specific to what we’re trying to accomplish yet whose meaning will be muddied if the term “Permit” is defined independently. Throw this in with “existing uses” and it gets extremely confusing.]*

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(24) “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 for two (2) consecutive weeks and posting on the Water Management Board’s website.

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

(26) “Registered Use” or “Registration” means a process of accounting for aboriginal and reserved water uses and rights by filing notices with the Water Management Board of such reserved water uses.

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(27) “Reservation Waters” or “Waters” means all the waters, surface and groundwater, 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 lands through the Flathead Indian Irrigation Project.

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Deleted: “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. ¶
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[the definition I deleted (“Reservation Land”) is identical to definition 15 and thus unnecessary, and I have made modifications in the text above and below to account for the deletion of this defined term without – I hope and intend – any change to the substance of those provisions where this defined term had been used; separately, this definition also illustrates again that we are going to need to hammer out a mechanism – likely in the Compact – for how the WMB will interface with the existing off-reservation regulatory framework.]

(28) “WMB 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.

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(29) “Reserved Right” or “Reserved Use” means a beneficial use of water, either consumptive or nonconsumptive, 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,

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1855. *[Multiple definitions of water rights/use. Consolidate/clarify?]*

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

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Deleted: “Shared Shortages” means a science based approach to adjust water allocation between beneficial uses under different climatic conditions (wet, dry, average years) through the use of hydrographs appended to the Water Rights Compact between the Tribes and the State of Montana.¶
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(31) “Spring” means a natural or unmodified surface discharge of ground water. *[the deleted term “shared shortage” is not used elsewhere in the Ordinance”]*

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(32) “Surface Water Body” means water lying on the surface or flowing over the earth, including but not limited to streams, rivers, lakes, ponds, potholes, wetlands and undeveloped springs.

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

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(34) “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 or reserved by or on behalf of the Tribes, as set forth in the Compact. *[I’m not sure we’ll ultimately need this definition as I expect it will be defined in the Compact and we should just import that definition when we have it. For now, I think this is best read as a placeholder]*

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(35) “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.

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

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(37) “Waste” means the unreasonable loss of water resulting from the design, construction, operation or maintenance of a water storage diversion or distribution facility or the application of water to anything but a beneficial use. *[How about an uncapped artesian well? Also, I deleted the definition “Use right” because we use the term in several different ways and constructions throughout the Ordinance, and I think having it defined in the way that it was causes confusion and adds nothing of substance]*

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- Deleted: “Use Right” means a verified and permitted right to use Reservation waters.¶ . (4139) .

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

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

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(40) “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 responsibility of protecting existing uses, permitting new uses of Reservation waters, and enforcing terms and conditions of Reservation water permits. [again – there are a lot of terms describing water which are not included here –ex. registered uses.]

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(41) “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 the DNRC; exempted from filing in the State adjudication pursuant to Mont. Code Ann. § 85-2-222; or exempted from the permitting process pursuant to Mont. Code Ann. § 85-2-306. [multiple water right/water use definitions. Clarify/consolidate?]

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(42) “Watershed” means the area that gathers water originating as precipitation or transbasin diversion and contributes it to a particular stream channel or system of channels, or to a lake, reservoir, or other body of water.

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(43) “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

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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.

[THIS DEFINITION NEEDS FURTHER REFINEMENT BY THE JOINT TECHNICAL TEAM]

(44) “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.

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

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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.

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1-1-107. Inventory of Existing Uses.

(1) Within sixty days (60) days after the effective date of this Ordinance [DNRC is very concerned that this timeframe is too tight], 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 [Not doing it in this draft, but we'll need to ensure consistency of capitalization – or lack thereof – of the words “federal” “tribal” and “state” – e.g. cf. 1-1-106 and 1-1-107] records.

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(2) The Water Management Board shall update the inventory upon completion of the registration required in Section 2-1-104, and upon incorporation of water rights arising under Montana law into the compact between the Tribes and the State of Montana [what is intended by this last clause?].

(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 by the DNRC and the NRD.

(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.

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

(1) Within two years [DNRC would like further discussion about whether this is an adequate timeframe] 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 [terms defined and used consistently?], 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.

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(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.

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 . . (2) . The Water Management Board may establish and administer any Water Management Area if the Water Management Board finds that ¶
 . . . (a) . the applications for Reservation Water Permits for water use and the existing uses of water plus the designated aboriginal uses, reserved uses and registered uses in the area exceed the available supply of surface water and the sustainable yield of groundwater 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 later priority dates; ¶
 . . . (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.

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(3) Within sixty (60) 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.

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(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,

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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. [The line between substance and procedure can be very fine.]

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(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 a charge reasonably related to costs incurred in Plan publication [related to total costs or some pro-rata share?]. 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 Area.

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

(a) the applications for Reservation Water Permits for water use and the existing uses of water plus the designated [is this a special term?] aboriginal uses, reserved uses and registered uses in the area exceed the available supply of surface water and the sustainable yield of groundwater in an average water year; [is this a paper total or in actual use with return flows]

(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 dates later than such instream flows;

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(c) the Tribes deferred reserved uses cannot be converted to active reserved uses [for what reasons?]; 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. *[DNRC experience with similar requirements in the Controlled Groundwater Area statute indicates that the standard and burden of proof should be more rigorous. An agency can spend a lot of resources on allegations with no real factual threshold – also there is not limit as to how large the area is that can be tied up. Other concerns include that there is no formal process laid out for this designation or to ensure public participation. Nor are the specific powers for the WMB within this area addressed.]*

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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) federal agreements made or federal actions taken 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.

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[THE FEDERAL TEAM MAY HAVE OBJECTIONS TO THE WORDING OF THE CONCEPTS IN THIS SECTION AND WILL CAREFULLY REVIEW.]

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 is subject to the approval of the Secretary. Contemporaneous and identical amendments made pursuant to subsection (2) above, however, shall not be subject to Secretarial approval.

(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 efforts jointly to jointly defend the enforceability of the Ordinance, the parallel State legislation and each of the respective provisions. *[This language probably belongs in the Compact rather than the Ordinance and is best viewed as a placeholder here.]*

1-1-112. Effective Date. This Ordinance and each provision hereof according to its terms shall take effect _____ from the date of its adoption. *[establishing the Effective Date carefully may be another way at getting at some of DNRC's timetable concerns]*

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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 groundwater use within the exterior boundaries of the Flathead Indian Reservation. *[DNRC is much more comfortable with this language than with the more sweeping policy statements at the beginning of the Ordinance.]*

1-2-102. Establishment and Composition of the Water Management Board. There is established a Flathead Indian Reservation Water Management Board consisting of four voting members and one *ex officio* member. *[The State definitely prefers the alternate version below]*

[THE STATE OBJECTED TO THIS CONFIGURATION SO THE TRIBES OFFER THIS ALTERNATIVE]

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. [\[The State retains concern that this requirement too tightly limits the State's pool of potential appointees, though we appreciate the effort to broaden that universe somewhat that is reflected below in sub \(2\)\]](#)

(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.

(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.

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(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. Two members of the first Water Management Board shall serve for two years, and two members shall serve for four years. One member selected by the Tribes, one member selected by the Secretary, and one member selected by the Governor will 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. [*\[The State definitely prefers the alternate version below\]*](#)

[IF THE TRIBES ALTERNATIVE WATER MANAGEMENT BOARD CONFIGURATION IS SELECTED, THE FOLLOWING TERM SECTION SHOULD BE INCLUDED]

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, the Tribal Council and the Secretary will appoint the first Water Management Board within sixty (60) days of the effective date of this Ordinance. The Governor and the Tribal Council may decide which appointees to the first Board will serve two year terms. [*\[The State definitely prefers the alternate version below\]*](#)

[IF THE TRIBES ALTERNATIVE BOARD CONFIGURATION IS SELECTED, THE FOLLOWING APPOINTMENT SECTION SHOULD BE INCLUDED]

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. [*\[The State's preference would be for no business to be conducted until all five members are appointed\]*](#)

1-2-106. Public Meeting. 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. *[I believe the deleted language is subsumed by the Board membership qualifications set forth in 1-2-103; to the extent there's a desire to preserve either of these deleted provisions – and we would still have some concern about (1) unduly narrowing our pool of potential appointees – they probably ought to go in 1-2-103 rather than here]*

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· (1) geographic distribution of the location of residences or businesses of appointees within the boundaries of the Reservation to insure that the Board as a whole is familiar with localized conditions of and constraints upon water availability and use; and¶
· (2) possession by the Board as a whole of a breadth of relevant education and experience.¶
· (3) .

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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.

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[STATE WANTS TO DISCUSS FUNDING MECHANISM – HERE OR IN COMPACT]

[also where the WMB is to be housed]

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1-2-108. Quorum and Voting of the Board. A quorum of the Water Management Board consists of three of the four voting Board members. If a proposal put to a vote of a quorum of the Board members ends in a tie vote, the proposal is deemed disapproved or denied. *[The State definitely prefers the alternate version below]*

[IF THE TRIBES ALTERNATIVE BOARD CONFIGURATION IS SELECTED, THE FOLLOWING QUORUM AND VOTING SECTION SHOULD BE INCLUDED]

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 and regulations *[aren't rules and regs generally the same?]*, *[there will be more than permit forms – applications? Changes? etc.]* prescribe forms, develop additional materials and implement amendments thereto as may be required or necessary to implement this Ordinance;

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(2) Issue, deny, condition or revoke permits *[what is this intended to include – new permits only? existing uses? DNRC permits? Also what about change 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

[(low, average, or high)], and make such mid-year adjustments and notices as may be necessary;

(7) Account for all water allocated to the Tribes' deferred water use through supplemental water [not defined], irrigation project infrastructure improvements, irrigation project management improvements, retirement of water rights [water rights not defined and neither is "existing water rights"], reduction of water rights, abandonment of water rights,

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conservation, or other sources or means, and after the Tribes' deferred water rights are fulfilled, allocate available surface and groundwater to new appropriations; [this is a topic I expect we will need to treat more fully in the Compact itself, such provisions to be referenced and or incorporated into the Ordinance; for the time being, I think sub (7) is best viewed as a placeholder]

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(8) Determine and declare whether all or part of a water use [what is a water use? existing water use? water rights? registered use? This needs to be clearer] has been abandoned; [again, we'll need to work out any issues surrounding the definition of and the process for finding abandonment]

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(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 [not defined] 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;

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(10) Confirm 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; [deleted the word "all"]

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because this is a potential black hole of a project, and while there's logic in ensuring that the WMB has the power to do this in the event there is a practical need, to impose the requirement of confirming "all" certificates seems likely to be a poor allocations of WMB resources]

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

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water permits for water use as recommended by the Water Engineer, the DNRC and the NRD; [the water management area is very vague with no public process on an issue that appears to able to significantly affect the exercise of existing rights" through conservation and management of water use in the area" – we need to work to refine this more]

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(12) Assess reasonable fees for applications for permits and change of use, and for providing copies of the public record, and to turn over the money so collected to the Tribal Treasurer for deposit in an earmarked account for implementation of this ordinance and for no

other use; [This approach seems like an artifact from the IA process. The State believes the WMB should have its own organization and account – from a State perspective, we need to know how the money is spent. In addition, there should also be some sort of an annual report on funding and expenses (at least) and a summary of the activities. There may be some examples from the Flathead Basin Commission statutes.]

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(13) 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 Board may deem necessary or desirable;

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

(15) 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;

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(16) Upon reasonable notice to the occupant thereof, to enter upon any land *within its jurisdiction* 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;

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(17) Seek and accept donations, grant and contract funding from public or private sources in order to initiate, construct, or maintain special projects which are consistent with the powers and duties of the Board; [*ability for the WMB to contract for services not just receive contract funding?*]

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(18) Hire its own staff, establish the terms of employment and manage of all such personnel, including the Water Engineer, as may be necessary, to fulfill the functions and duties of the Water Management Board; and [*because the State participates, we need to look at whether WMB staff might be considered State employees for purposes of benefits, just cause etc.*]

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(19) Recommend an annual Board [*sometimes it is Board and other times it is WMB and sometimes water management board – need to ensure consistency*], budget to the Tribes and State for appropriation.

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;

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(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) Designate watersheds and water delivery areas^[?] no later than thirty (30) days [DNRC has some concerns about the feasibility of this timeline] after the effective date of this Ordinance. The designation shall be based on sound hydrological and engineering principles and shall contain an estimate of the volume of water contributed by each stream or water body to a water delivery area. Upon designation, a water delivery area may be deemed a watershed or water source for purposes of inventories of water resources, describing existing or permitted uses^[definition?] and for regulation of appropriation and use^[is the watershed like a water management area, i.e. area for special management];

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(3) Timely file, and provide to the DNRC copies of registrations of all uses emanating from the Tribal right, reserved and otherwise;

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(4) Timely file, and provide to the DNRC copies of amnesty filings of all water uses arising under Montana State Law, existing at the time of approval of this ordinance [Compact?], but not heretofore claimed, permitted, certified, or acknowledged. [– items 3 and 4 seem like purely NRD/DNRC issues that should be addressed elsewhere, rather than under the “joint assistance to the Board” section; sub (3) would seem to fit better under the Registration provisions of 2-1-103-108, and sub (4) would seem to fit better under 2-2-101]

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(5) Assist the Water Engineer in the preparation, revision, and supplementation of an inventory of Reservation water uses [another non-defined term] 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. *[this second sentence seems out of place in this section; it might work better in 1-1-108]*

(6) Prepare Reservation Water Permits *[not defined]* for existing water uses arising under Montana law for Water Management Board's issuance after decree *[what kind of decree – final?]* by the Montana Water Court, verification of State law-based permits by the DNRC, and registration of existing reserved and non-reserved uses.

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

(8) Assist in technical review and make recommendations to the Water Management Board on applications for Reservation Water Permits for new water use *[what about changes?]*.

(9) Conduct a confirmation of certificates issued by the DNRC for wells drilled after August 22, 1996 and recommend modification, conditioning or revocation of any not satisfying the limits of exempt domestic wells specified under Montana law at the time of issuance of the certificate. *[see comment on section 1-2-109(10) regarding confirmation of certificates]*

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(10) Conduct related technical tasks for the Board such as monitoring groundwater levels to ensure there is a sustainable *[ground ? surface?]* water source, determining impact to other water users *[impact from what?]*, and assuring groundwater levels are maintained to support connectivity of groundwater with surface water *[I'm not sure what the clause after the last comma means; separately, DNRC has some questions about whether the first and third of the tasks identified above re. sustainable water source or supporting connectivity are tasks it is equipped to undertake]*

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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 practicable 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 lands within the Board's jurisdiction with reasonable notice to the owner or occupant to investigate and inspect diversion, withdrawal, and other activities affecting water quantity, to install measuring devices on surface and groundwater [ground water is two words in state statute and one word in this doc] diversions [need to flag political sensitivity of this point] for the purpose of enforcing and administering this Ordinance, and to monitor water use, water quality, and the diversions;

(c) In emergencies [what is an emergency?], remove, render inoperative, shut down, close, seal, cap, modify, or otherwise control diversions and withdrawals, obstructions to the flow of water, and activities adversely affecting [what does this mean? This term has independent existence in State law] Reservation waters, subject to expedited appeal to the Water Management Board by the affected person, as provided in Section 3-1-106.

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

(e) Except as otherwise provided, the Water Engineer shall ensure [no one can ensure this] that water delivery systems on the Reservation shall divert only that quantity of water to which they are legally permitted [permitted – need consistency in terms for water use].

(2) Advisory Functions:

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(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.

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(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 the NRD and the 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;

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

(e) Recommend to the Water Management Board proposed changes to this Ordinance and to its regulations; and

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(f) Assist all applicants for Reservation Water Permits [how about change applicants?] in assembling and analyzing hydrologic and environmental data required to be submitted with the application and otherwise to assist in the preparation of the application, and, if appropriate, to seek assistance from the NRD and the DNRC. [question about the propriety of the regulator (through the person of the Engineer) providing technical assistance to the regulated (applicants) – how do you turn down a report or permit app prepared by your water

engineer? this could be a huge time and resource commitment for the engineer – who do you help and who do you turn down?]

(3) Information and Research Functions: *[I think this would be the place to include the Engineer’s duty to assemble the inventory and registration of Reservation water uses, which seems to have dropped out from the 7/24 draft]*

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(a) Conduct hydrologic investigations to estimate 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;

(b) Collect, maintain, and analyze, on a continuing basis, information regarding Reservation- and basin-wide water resources, including data on water, land, air quality *[questionable task for a water engineer]*, rangeland, timber harvest, and other factors actually or potentially affecting Reservation water resources after conferring with the NRD and the DNRC;

(c) Perform regular research regarding the overall carrying capacity of the Reservation’s water system, with a view in particular to discovering and reporting the levels above or below which specific water use impairs or injures overall water availability and use *[this seems to overlap with a;]*

(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 *[isn’t this an overlap with 2f?;]*

(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;

(h) 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. *[isn't this an overlap with 2a?]*

(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 *[there's a potential personnel management problem with the way this relationship is constructed here]*; and

(b) Develop and submit to the Water Management Board an annual budget for approval and forwarding to the Tribes and State. *[will need to synchronize this with the (biennial) State budget process to ensure appropriate state funding]*