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DRAFT

UNITARY ADMINISTRATION AND MANAGEMENT ORDINANCE
9/22/08 Version¹

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

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*],

(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:

[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

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 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*]

(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.

(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

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]

(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.

(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.

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

(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]

(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

(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.

(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?*]

(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.

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

(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?*]

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.]*

(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.]*

(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.

(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.

(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. *[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.

(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, 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.

(31) “Spring” means a natural or unmodified surface discharge of ground water. *[the deleted term “shared shortage” is not used elsewhere in the Ordinance”]*

(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.

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

(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]*

(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.

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

(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]*

(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.

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

(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.*]

(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 excepted from the permitting process pursuant to Mont. Code Ann. § 85-2-306. [*multiple water right/water use definitions. Clarify/consolidate?*]

(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.

(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

- 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.

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

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

(1) Flow rates shall be measured in cubic feet per second (cfs). Where documentary evidence of an existing use is expressed in gallons per minute, 448.8 gallons per minute shall be considered equivalent to a flow of one cubic foot per second. Where documentary evidence of an existing use is expressed in statutory or miner’s inches, 40 statutory or miner’s inches shall be considered equivalent to a flow of one cubic foot per second.

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

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

1-1-107. Inventory of Existing Uses.

(1) Within 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.

(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.

(2) The Water Management Board shall cause its recommended Plan to be published in one or more newspapers of general circulation on the Reservation, together with a notice of the availability of copies of the Plan at such locations as the Water Management Board shall designate, and a notice of public hearing by the Water Management Board on the recommended Plan. The hearing shall be held within thirty (30) days of the last date of the publication of the recommended Plan under such rules as the Water Management Board may adopt for the conduct of the hearing. All interested persons may participate in the hearing by the submission of oral or written comments on the recommended Plan.

(3) Within 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.

(4) Upon adoption of a Plan, the Board shall, no later than three years from the date of first adoption, and every third year thereafter, review the Plan and recommend any additions,

modifications, or deletions it may find necessary or proper after consideration of the criteria set forth in subparagraph (1) of this Section. If the Water Management Board's recommended additions, modifications, or deletions involve a substantive change in the adopted Plan, the procedures set forth in subparagraphs (2) and (3) above shall be followed. If the recommended additions, modifications or deletions are editorial, or clerical in character, the Board may implement the recommendations. [*The line between substance and procedure can be very fine.*]

(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.

(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;

(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.]*

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.

[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]*

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.

(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]*

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.

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

[also where the WMB is to be housed]

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;

(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, 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]*

(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]*

(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;

(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"*

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 allocation of WMB resources]

(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 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 be 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]*

(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.]*

(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;

(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;

(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;

(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?*]

(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.*]

(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:

(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];*

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

(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]

(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]*

(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]*

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:

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

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

(c) Recommend, after coordination with 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;

(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

(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]*

(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]*

CHAPTER II

WATER USE²

PART 1. GENERAL PROVISIONS

² 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.

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 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.

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

(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.

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.

(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.

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

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.

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.

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

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.

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.

(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.

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.

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.

(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*].

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]

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

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.

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.

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.

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.

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.

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.

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.

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

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

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

(c) both.

2-1-123. 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.

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.

(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]*

(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]*

(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;

(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.

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.

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;

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

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

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

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

criteria set forth in subsection (h), only the NRD, the Montana Department of Environmental Quality, or a local water quality district may file a valid objection.

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

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

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

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

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

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

(b) the applicant has exclusive property rights in the 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.

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

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

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

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

(5) The Board shall conduct a review of the record, including the application, technical analysis and any 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 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.

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.

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 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.

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

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

(1) an application for a new appropriation of surface water, a change, or a 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.

(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.

(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;
- (3) falsely verify by written declaration any application, permit, form, objection or other document, or to withhold data required to be submitted by law;
- (4) repeatedly violate the conditions or stipulations of his or her permit or license including by taking more water than is allowed by the permit;
- (5) intentionally take, waste, alter or damage Reservation water resources or the permitted rights of others;
- (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.

4-1-102. Penalties.

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

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

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

limitation of the amount of water permitted for diversion

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

subject to limitations set forth by applicable federal law; and

- (i) costs.

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

(4) All penalties assessed by the Board shall be reasonable and proportionate to the prohibited act committed, and appealable to the court as set forth in Section 3-1-112.