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7 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

8
9 FLATHEAD JOINT BOARD OF
CONTROL and JERRY LASKODY,
10 BOONE COLE, TIM ORR, TED HEINS,
BRUCE WHITE, SHANE ORIEN, WAYNE
11 BLEVINS AND GENE POSIVIO, all
members of the Flathead Joint Board of
Control,

12 Plaintiffs,

13 vs.

14 MEMBERS OF THE MONTANA 64TH
15 LEGISLATURE, a legislative body
comprised of Members of the Senate and
16 House of Representatives; AUSTIN
KNUDSEN, Speaker of the House; DEBBY
17 BARRETT, President of the Senate; STATE
OF MONTANA; STEPHEN C. BULLOCK,
18 Governor, State of Montana; TIMOTHY
FOX, Montana Attorney General;
19 REPRESENTATIVE DANIEL SALOMON,
representing Montana House District 93;
20 REPRESENTATIVE GREG HERTZ,
representing Montana House District 12;
21 REPRESENTATIVE GEORGE KIPP, III,
representing Montana House District 15;
22 SENATOR CLIFF LARSEN, representing
Montana Senate District 47; SENATOR LEA
23 WHITFORD, representing Montana Senate
District 8

Cause No. DI-15-73

Judge: JAMES A. MANLEY

**VERIFIED COMPLAINT, PETITION
FOR PRELIMINARY INJUNCTION
AND EX PARTE APPLICATION FOR
EMERGENCY TEMPORARY
RESTRAINING ORDER**

1 and JOHN DOES 1 - 10.

2 Defendants.

3 COME NOW Plaintiffs FLATHEAD JOINT BOARD OF CONTROL, JERRY
4 LASKODY, BOOONE COLE, TIM ORR, TED HEINS, BRUCE WHITE, SHANE ORIEN,
5 WAYNE BLEVINS, and GENE POSIVIO, all as Members of the FLATHEAD JOINT
6 BOARD OF CONTROL with their **VERIFIED COMPLAINT, PETITION FOR**
7 **PRELIMINARY INJUNCTION AND EX PARTE APPLICATION FOR**
8 **EMERGENCY TEMPORARY RESTRAINING ORDER** and complain, allege and aver
9 as follows:

10 **PARTIES**

11 1. Plaintiff, the Flathead Joint Board of Control (“FJBC”), is the joint board of
12 operations for the Flathead Irrigation District (FID), Mission Irrigation District (MID) and
13 Jocko Valley Irrigation District (JVID) (collectively “the Districts”), which are elected local
14 government bodies under Montana law generally empowering irrigation districts with the
15 authority and responsibility to represent landowners within district boundaries as to irrigation
16 matters, including relations with the United States, the State and irrigation project operations.
17 *See generally* Title 85, Chapter 7, Parts 1 through 22, Montana Code Annotated (2013). The
18 FJBC headquarters is located in St. Ignatius, Lake County, Montana. The FJBC is the
19 operating agent of the Districts and possesses the powers and duties of the Districts,
20 including but not limited to, the authority to institute any action or proceeding proper to carry
21 out the provisions of Chapter 7, Title 85, MCA, and to enforce and maintain, protect, or
22 preserve any and all rights, privileges, and immunities created by that Chapter. §85-7-1612,
23 MCA.

1 2. Plaintiffs Jerry Laskody, Boone Cole, Tim Orr, Ted Heins, Bruce White,
2 Shane Orien, Wayne Blevins and Gene Posivio are all standing members of the FJBC and
3 reside in either Lake or Sanders County, Montana.

4 3. The Montana 64th Legislature is the legislative branch of the State of Montana
5 authorized under the Art. V of the Montana Constitution and is comprised of elected officials
6 in the Senate and the House of Representatives, including but not limited to, Representative
7 Dan Salomon, Representative Greg Hertz, Representative George Kipp, Senator Cliff Larson
8 and Senator Lea Whitford who reside in, or represent constituents located in, either Lake or
9 Sanders County, Montana, and who are elected to represent the public interests of their
10 constituents. Mont. Const. Art. V.

11 4. Defendant, the State of Montana is a sovereign.

12 5. Defendant, Stephen C. Bullock, is the Governor for the State of Montana
13 residing in Lewis and Clark County, Montana.

14 6. Defendant, Timothy Fox, is the Attorney General for the State of Montana
15 residing in Lewis and Clark County, Montana, who along with the aforementioned are
16 collectively the “Defendants”.

17 **JURISDICTION AND VENUE**

18 7. Each and every Defendant, as either a member of the Montana 64th
19 Legislature, Governor for the State of Montana, and/or as Attorney General for the State of
20 Montana, took an oath of office swearing to uphold the Montana Constitution, and as such,
21 each is bound by the Montana Constitution. Mont. Const. Art. III, §3.
22
23
24

1 state sovereign immunity and defenses under the Eleventh Amendment to the United States
2 Constitution, then in the same sentence effectively guts that purported waiver by reclaiming
3 immunity. More particularly the waiver clause states:

4 Waiver of Immunity. The Tribes and the State hereby waive
5 their respective immunities from suit, including any defense
6 the State shall have under the Eleventh Amendment of the
7 Constitution of the United States, in order to permit the
8 resolution of disputes under the Compact by the Board, and the
9 appeal or judicial enforcement of Board decisions as provided
10 herein, except that such waivers of sovereign immunity by
11 the Tribes or the State shall not extend to any action for
12 money damages, costs, or attorneys' fees. The parties
13 recognize that only Congress can waive the immunity of the
14 United States and that the participation of the United States in
15 the proceedings of the Board shall be governed by Federal law,
16 including 43 U.S.C. § 666. (Emphasis added.)

17 *See Exhibit 1, pg. 46, ll. 20-24.*

18 15. SB 262 further narrows the waiver of immunity doctrine by limiting any
19 alleged waiver to only those waivers expressly stated in SB 262:

20 B. General Disclaimers. Nothing in this Compact shall be construed or
21 interpreted:

22 11. To constitute a waiver of sovereign immunity by the Tribes or the
23 State except as expressly set forth in this Compact.

24 *Exhibit 1, pg. 48, ll. 9-10.*

16. At the same time, SB 262 creates a new governing law of the land coined the
"Unitary Management Ordinance" ("UMO"). The UMO is a new law of administration
which will be enforced by a newly created Unitary Management Board ("UMB") comprised
of political appointees. It further abolishes the dual sovereign water administration system
by eliminating applicability of Montana's Water Use Act and by stripping the Montana
Water Court's application and jurisdiction. **Exhibit 1.**

1 17. The newly created UMB is granted unprecedented powers over all water
2 located on the Flathead Indian Reservation (“FIR”) whether derived from state, federal or
3 tribal law, including but not limited to:

- 4 • governing authority for allocation and distribution of all water rights,
5 whether derived from tribal, state or federal law within the exterior
6 boundaries of the FIR. (Pg. 56)
- 7 • control over a single system governing the appropriation, allocation and
8 administration of the waters of the FIR. (Pg. 3)
- 9 • Authorization of all change in use. (Pg. 43.)
- 10 • Enforcement of the terms of the Compact along with judicial review
11 powers. (Pg. 43).

12 18. On page 76, SB 262 grants immunity to those authorizing, administering,
13 allocating and enforcing water rights (whether derived from state, federal or tribal law) on
14 the FIR, which includes governmental entities and politically appointed boards:

15 1-2-111. Immunity from Suit. Members of the Board, the
16 Engineer, any Designee, any Water Commissioner appointed
17 pursuant to Section 3-1-114 of this Ordinance, and any Staff
18 shall be immune from suit for damages arising from the lawful
19 discharge of an official duty associated with the carrying out of
20 powers and duties set forth in the Compact or this Ordinance
21 relating to the authorization, administration, or enforcement of
22 water rights on the Reservation.

23 **Exhibit 1** pg. 76, ll. 25-29.

24 19. Mont. Const. Art. II, § 18 requires a 2/3 vote of each house of the legislature
in order to give the state or other defined governmental entities immunity from suit:

Section 18. State subject to suit. The state, counties, cities,
towns, and all other local governmental entities shall have no
immunity from suit for injury to a person or property, except as

1 may be specifically provided by law by a two-thirds vote of
2 each house of the legislature.

3 20. No other water compact adopted by the State of Montana vests a politically
4 appointed board with complete control over all water rights whether derived under federal,
5 state or tribal law. Neither does any water compact adopted by the State of Montana abolish
6 dual sovereign water administration. Rather, those water compacts *implement* a dual
7 sovereign water administration system where the Montana Water Use Act regulates state
8 based rights and non-tribal water use while a Tribal Water Code regulates the use of the
9 Tribe and Tribal members. Chapter 20, Title 85, Parts 1-18, MCA. In other words, the State
10 of Montana operates under its own rules and the tribes operate under their rules consistent
11 with federal law.

12 21. All other water compacts adopted by Montana have passed by a 2/3 or greater
13 vote of each house of the legislature.

14 22. On February 26, 2015, the Montana Senate improperly passed SB 262 with a
15 31-19 vote (62%), which is less than the required 2/3 vote mandated by the Montana
16 Constitution. It subsequently, and improperly, transmitted SB 262 to the House of
17 Representatives.

18 23. The House Judiciary Committee took testimony on SB 262 on April 11, 2015,
19 and transmitted the bill to the House floor attaching a number of amendments. On April 14,
20 2015, consistent with the House Rules and the Montana Constitution, the Speaker of the
21 House of Representatives, Austin Knudsen, ruled that SB 262 provided the State of Montana
22 with immunity from suit, thereby requiring a 2/3 vote of each house of the legislature in
23 order to pass the bill into law. Mont. Const. Art. II, §18.

1 24. On April 14, 2015 at 5:41 p.m. the Solicitor General's Office issued its
2 opinion that the provision was essentially boilerplate language, indicating that the Montana
3 Constitutional provision had been "*drained of any significant meaning*"; that despite the
4 state's waiver of its defenses under the Eleventh Amendment (as contained in SB 262) the
5 State of Montana is still immune from all suits for money damages (regardless of the court in
6 which an action may be brought) under the Eleventh Amendment of the United States
7 Constitution, as a matter of law; and that the subject waiver of immunity clause is really a
8 "*limited waiver of sovereign immunity*" as opposed to a "*grant to the state or state entity*" of
9 immunity. See attached **Exhibit 2**.

10 25. On April 15, 2015, the House Rules Committee met and upheld the Speaker's
11 ruling that passage of SB 262 required a 2/3 vote of each house of the legislature because it
12 provided the State of Montana immunity from suit. Mont. Const. Art. II, §18. During the
13 hearing, House Speaker Austin Knudsen provided evidence that every other Tribal water
14 compact in Montana has been approved by at least a 2/3 vote of each house of the legislature.

15 26. The afternoon of April 15, 2015, without mandatory jurisdiction, the House of
16 Representatives then voted, by a simple majority (53-48), to overrule both the Speaker and
17 the Rules Committee's findings that a 2/3 vote was required for SB 262.

18 27. Upon information and belief, both the Governor and Attorney General's
19 Office have been leading proponents of SB 262 and have actively campaigned in favor of its
20 passage. The Solicitor General's Office possessed a conflict of interest when it issued its
21 legal opinion regarding Mont. Const. Art. II, §18. The legal opinion issued was relied upon
22 by the Montana 64th Legislature in its determination to override the House Speaker's and
23 House Rules Committee's findings.

1 34. Montana's Uniform Declaratory Judgment Act vests this Court with the
2 jurisdiction and the power to declare the rights of the parties hereto together with the status of
3 SB 262. A justiciable controversy exists regarding the status of SB 262.

4 35. SB 262 required a 2/3 vote of each house of the legislature in order to pass
5 Constitutional muster and to be made law. SB 262 did not receive a 2/3 vote of each house
6 of the legislature. Accordingly, the Montana 64th Legislature's purported passage of SB 262
7 violates the Montana Constitution. The Court should properly interpret and apply Mont.
8 Const. Art. II, §18 and declare that a 2/3 vote of each legislative house was required to
9 legally pass SB 262 into law and further declare that SB 262 did not pass by the required 2/3
10 vote thereby rendering it dead.

11 **COUNT TWO**
12 **PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING**
13 **ORDER**

14 36. Plaintiffs incorporate by reference as if fully set forth herein each of the
15 allegations stated in Paragraphs 1 through 35, above.

16 37. The Court has the power to issue a preliminary and permanent injunction
17 compelling the Defendants to act, or refrain from acting, in violation of Mont. Const. Art. II,
18 §18; finding that the Montana 64th Legislature's act in allegedly passing SB 262 by less than
19 a 2/3 vote violated Mont. Const. Art. II, § 18; and declaring that SB 262 did not pass because
20 neither house of the legislature passed SB 262 by a 2/3 or greater vote. § 27-19-101, MCA *et*
seq.

21 38. A preliminary injunction may be granted in the following cases applicable to
22 this action:

- 23 (1) when it appears that the applicant is entitled to the relief demanded and
24 the relief or any part of the relief consists in restraining the

1 commission or continuance of the act complained of, either for a
2 limited period or perpetually;

3 (2) when it appears that the commission or continuance of some act during
4 the litigation would produce a great or irreparable injury to the
5 applicant; or

6 (3) when it appears during the litigation that the adverse party is doing or
7 threatens or is about to do or is procuring or suffering to be done some
8 act in violation of the applicant's rights, respecting the subject of the
9 action, and tending to render the judgment ineffectual.

10 § 27-19-201 (1) - (3), MCA. The above cited statutory subsections are disjunctive and
11 findings to satisfy all subsections are not required for the issuance of an injunctive order.

12 39. It is apparent that Plaintiffs are entitled to the relief sought. Execution,
13 implementation and/or transmittal of SB 262 will cause material and significant damage to
14 the Plaintiffs and those they represent that cannot be compensated for by monetary damages.

15 40. The Court further has the power to issue a preliminary injunction ordering that
16 the status quo be maintained and that no further action be taken by the Defendants to sign,
17 execute or implement SB 262 into law in the State of Montana.

18 41. Until such time as this matter may be determined, the Court has the power to
19 issue a temporary restraining order maintaining the status quo.

20 42. Failure to issue the requested temporary restraining order and preliminary
21 injunction will result in immediate and irreparable damage and harm to the Plaintiffs and
22 those landowners served by the FJBC.

23 43. Plaintiffs are entitled to a preliminary injunction during the pendency of this
24 action and are ultimately entitled to a permanent injunction precluding the passage of SB 262
into law until such time as this Court has rendered a determination in this case based upon its
merits.

1 44. In the interest of justice, Plaintiffs are entitled to a preliminary injunction
2 without posting an undertaking. MCA, § 27-19-306(1)(b)(ii).

3 **COUNT THREE—PRIVATE ATTORNEY GENERAL DOCTRINE**
4 **§ 25-10-711, MCA**

5 45. Plaintiffs incorporate by reference as if fully set forth herein each of the
6 allegations stated in Paragraphs 1 through 44, above.

7 46. SB 262 directly affects the public’s rights and impacts matters of significant
8 public interest. The 64th Montana Legislature has expressly violated Mont. Const. Art. II,
9 §18. As such, any defenses are frivolous and/or are pursued in bad faith. Accordingly,
10 Plaintiffs are entitled to an award of their reasonable attorneys’ fees and costs.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, the Plaintiffs pray for relief as follows:

13 1. That the Court declare that passage of SB 262 violated Mont. Const. Art. II,
14 §18; that SB 262 did not receive the necessary 2/3 vote of each house of the legislature
15 necessary to become law and therefore, SB 262 is dead;

16 2. An emergency ex-parte order temporarily enjoining the Defendants from
17 violating Mont. Const. Art. II, §18 thereby maintaining the status quo until such time as this
18 Court shall hold a show cause hearing;

19 3. A preliminary injunction enjoining the Defendants from violating Mont.
20 Const. Art. II, §18 thereby maintaining the status quo until such time as this Court has
21 rendered a determination on the merits;

22 4. That at the conclusion of this action, the Court issue an Order permanently
23 enjoining the Defendants from implementing SB 262;

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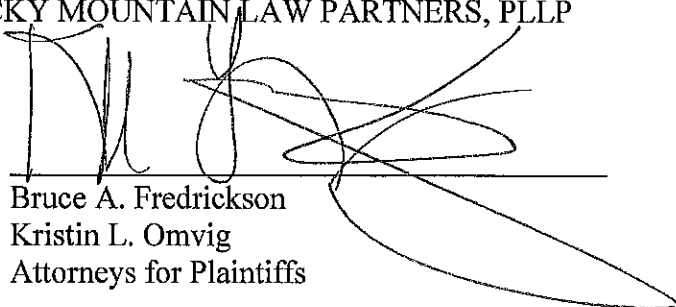
5. That the Plaintiffs be awarded their reasonable costs, expenses and attorney fees incurred in prosecuting this action as allowed by law or in equity; and

6. That the Plaintiffs be awarded such additional and further relief as might be just and equitable under the circumstances of this action.

DATED this 20th day of April, 2015.

ROCKY MOUNTAIN LAW PARTNERS, PLLP

By:



Bruce A. Fredrickson
Kristin L. Omgig
Attorneys for Plaintiffs

VERIFICATION

STATE OF Montana)
) ss:
County of Lake)

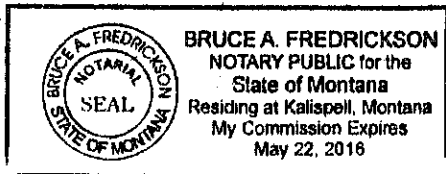
JERRY LASKODY, being first duly sworn upon oath, deposes and says:

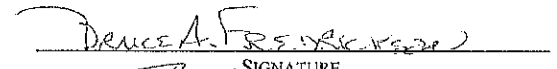
That he is the Chairman of the Flathead Joint Board on Control and is a Plaintiff
named above; that he has read the foregoing Verified Complaint and Petition for Preliminary
Injunction and Ex Parte Application for *Emergency* Temporary Restraining Order, and the
matters contained therein are true and correct to the to the best of his personal knowledge and
belief with respect to matters contained herein.

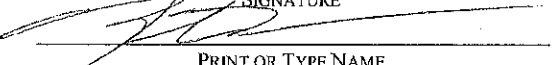


JERRY LASKODY

Signed and sworn to before me on 20 day of April, 2015, by JERRY
LASKODY.





SIGNATURE


PRINT OR TYPE NAME
Notary Public for the State of Montana.
Residing at Kalispell, MT
My commission expires:
MAY 22, 2016

MONTH, DAY, YEAR (201*)

1 SENATE BILL NO. 262

2 INTRODUCED BY C. VINCENT, P. CONNELL, S. FITZPATRICK, B. HAMLETT, S. STEWART-PEREGOY,
3 K. WILLIAMS

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A WATER RIGHTS COMPACT ENTERED INTO BY THE
6 CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, THE STATE OF
7 MONTANA, AND THE UNITED STATES OF AMERICA; CREATING A UNITARY ADMINISTRATION AND
8 MANAGEMENT ORDINANCE TO GOVERN WATER RIGHTS ON THE FLATHEAD RESERVATION;
9 PROVIDING EXCEPTIONS FROM CERTAIN STATE WATER LAWS RELATED TO DEPARTMENT POWERS,
10 JUDICIAL ENFORCEMENT, AND WATER RIGHTS PERMITTING; AMENDING SECTIONS 3-7-211, 85-2-111,
11 85-2-114, 85-2-301, 85-2-302, 85-2-306, 85-2-427, 85-2-506, AND 85-5-110, MCA; AND PROVIDING AN
12 IMMEDIATE EFFECTIVE DATE."

13
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15
16 NEW SECTION. **Section 1. Water rights compact entered into by the Confederated Salish and**
17 **Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States**
18 **ratified.** This Compact is entered into by and among the Confederated Salish and Kootenai Tribes of the
19 Flathead Reservation, Montana, the State of Montana, and the United State of America to settle all existing claims
20 to water of or on behalf of the Confederated Salish and Kootenai Tribes within the State of Montana.

21 ARTICLE I - RECITALS

22 WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai
23 Tribes reserved the Flathead Indian Reservation; and

24 WHEREAS, the Confederated Salish and Kootenai Tribes claim aboriginal water rights and, pursuant to
25 said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation; and

26 WHEREAS, in 1979, the United States, on its own behalf and on behalf of the Confederated Salish and
27 Kootenai Tribes, their members and Allottees brought suit in the United States District Court for the District of
28 Montana to obtain a final determination of the Tribes' water rights claims, see United States v. Abell, No.
29 CIV-79-33-M (filed April 5, 1979); and

30 WHEREAS, as a result of Congressional action and subsequent judicial interpretation, state courts have

1 been found to possess, under certain circumstances, adjudicatory jurisdiction over federal reserved water rights
2 held in trust by the United States for the benefit of Indians; see, McCarran Amendment 43 U.S.C. 666; Colorado
3 River Conservation District v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S.
4 545 (1983); and

5 WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of
6 Chapter 697, Laws of Montana 1979, which includes claims regarding the Confederated Salish and Kootenai
7 Tribes' water rights; and

8 WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is
9 authorized to negotiate settlement of water rights claims filed by Indian tribes or filed on their behalf by the United
10 States claiming reserved waters within the State of Montana; and

11 WHEREAS, the Federal district court litigation was stayed in 1983 pending the outcome of Montana State
12 court water adjudication proceedings, see Northern Cheyenne v. Adsit, 721 F.2d 1187 (9th Cir.1983); and

13 WHEREAS, the adjudication of Confederated Salish and Kootenai Tribes' water rights in the State court
14 proceeding has been stayed while negotiations are proceeding to conclude a compact resolving all water rights
15 claims of the Confederated Salish and Kootenai Tribes; and

16 WHEREAS, the Confederated Salish and Kootenai Tribes, or their duly designated representatives, have
17 authority to negotiate the Compact and the Tribal Council has the authority to execute this Compact pursuant to
18 Article 6, Section 1, subsections (a), (c), and (u) of the Constitution and Bylaws of the Confederated Salish and
19 Kootenai Tribes said Constitution adopted and approved under Section 16 of the Act of June 18, 1934 (48 Stat.
20 984), as amended; and

21 WHEREAS, the United States Attorney General, or a duly designated official of the United States
22 Department of Justice, has authority to execute this Compact on behalf of the United States pursuant to the
23 authority to settle litigation contained in 28 U.S.C. 516-17 and the Federal legislation ratifying this Compact
24 identified in Article VIII.B; and

25 WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department
26 of the Interior, has authority to execute this Compact on behalf of the United States Department of the Interior
27 pursuant to 43 U.S.C. 1457, inter alia, and appropriate Federal legislation ratifying this Compact as identified in
28 Article VIII.B; and

29 WHEREAS, the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States
30 agree that the Tribal Water Right and other water rights described in this Compact, subject to the provisions of

1 the Act of Congress identified in Article VIII.B, is in satisfaction of the water rights claims of the Tribes, their
2 members and Allottees, and of the United States on behalf of the Tribes and their members and Allottees; and

3 WHEREAS, the Parties agree that it is in the best interest of all Parties that the water rights claims of the
4 Confederated Salish and Kootenai Tribes be settled through agreement between and among the Tribes, the State
5 of Montana, and the United States; and

6 WHEREAS, the Parties agree that there is a clear hydrological interrelationship between the surface
7 water and Groundwater of the Reservation, and each use of water on the Reservation may affect water use by
8 all water users on the Reservation; and

9 WHEREAS, the Parties agree that prudent and knowledgeable conservation, management, and
10 protection of the water resources of the Reservation are essential to the health and welfare of all residents of the
11 Reservation; and

12 WHEREAS, the Parties seek to secure to all residents of the Reservation the quiet enjoyment of the use
13 of waters of the Reservation for beneficial uses; and

14 WHEREAS, the Parties agree to protect Tribal Instream Flows, Existing Uses, and Historic Farm
15 Deliveries to Flathead Indian Irrigation Project irrigators; and

16 WHEREAS, the Parties desire to create a unitary administration system that would provide a single
17 system for the appropriation and administration of the waters of the Reservation and for the establishment and
18 maintenance of a single system of centralized records for all water uses of the Reservation regardless of whether
19 the use is based on State or Federal law.

20 NOW THEREFORE, the Parties agree to enter into the Compact for the purpose of settling the water
21 rights claims of the Confederated Salish and Kootenai Tribes, their members, and Allottees of the Flathead Indian
22 Reservation, and of the United States on behalf of the Tribes, their members and Allottees, and to provide the
23 necessary foundation for the establishment of a board composed of Tribal and State appointed representatives
24 to provide for the unified administration of all water resources on the Reservation.

25 ARTICLE II - DEFINITIONS

26 The following definitions shall apply for purposes of the Compact:

27 1. "Acre-foot" or "Acre-feet" means the amount of water necessary to cover one acre to a depth of one
28 foot and is equivalent to 43,560 cubic feet of water.

29 2. "Adaptive Management" means an ongoing process of decision-making, based on water measurement
30 and accounting designed to continuously manage and improve the allocation of water between Instream Flows,

1 Minimum Reservoir Pool Elevations, and FIIP Water Use Rights pursuant to the Adaptive Management Appendix
2 3.5.

3 3. "Allottee" or "Allottees" means an owner of an interest in a tract of land held in trust by the United
4 States which was allotted pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended, or the Act of February
5 25, 1920, 41 Stat. 452, as amended.

6 4. "Alternate Value" means, as applied to the consensual agreements provided for by Article III.G.3, the
7 quantity of water allowed under a claim decreed by the Montana Water Court or water right granted by the DNRC.

8 5. "Appropriation Right" means a right to appropriate water issued by the Water Management Board
9 pursuant to the terms of this Compact and the Law of Administration.

10 6. "Arising Under State Law" means, as applied to a water right, a water right created under Montana law
11 or a water right held by a nonmember of the Tribes on land not held in trust by the United States for the Tribes
12 or a Tribal member and for which a claim was required to be filed in the Montana general stream adjudication.

13 7. "Basin 76D" means the hydrologic Basin 76D, including the Kootenai River and its tributaries, as shown
14 in Appendix 1.

15 8. "Basin 76E" means the hydrologic Basin 76E, including Rock Creek and its tributaries, as shown in
16 Appendix 1.

17 9. "Basin 76F" means the hydrologic Basin 76F, including the Blackfoot River and its tributaries, as shown
18 in Appendix 1.

19 10. "Basin 76G" means the hydrologic Basin 76G, including the Clark Fork River above the Blackfoot
20 River, and its tributaries, as shown in Appendix 1.

21 11. "Basin 76GJ" means the hydrologic Basin 76GJ, including Flint Creek and its tributaries, as shown
22 in Appendix 1.

23 12. "Basin 76H" means the hydrologic Basin 76H, including the Bitterroot River and its tributaries, as
24 shown in Appendix 1.

25 13. "Basin 76I" means the hydrologic Basin 76I, including the Middle Fork of the Flathead River and its
26 tributaries, as shown in Appendix 1.

27 14. "Basin 76J" means the hydrologic Basin 76J, including the South Fork of the Flathead River and its
28 tributaries, as shown in Appendix 1.

29 15. "Basin 76K" means the hydrologic Basin 76K, including the Swan River and its tributaries, as shown
30 in Appendix 1.

1 16. "Basin 76L" means the hydrologic Basin 76L, including the Flathead River below Flathead Lake, and
2 its tributaries, as shown in Appendix 1.

3 17. "Basin 76LJ" means the hydrologic Basin 76LJ, including the Flathead River to and including Flathead
4 Lake, and its tributaries, as shown in Appendix 1.

5 18. "Basin 76M" means the hydrologic Basin 76M, including the Clark Fork River between the Blackfoot
6 River and the Flathead River, and its tributaries, as shown in Appendix 1.

7 19. "Basin 76N" means the hydrologic Basin 76N, including the Clark Fork River below the Flathead
8 River, and its tributaries, as shown in Appendix 1.

9 20. "Call" means the right of the holder of a water right with a senior priority date and an immediate need
10 for a use of water to require a holder of a water right with a junior priority date to refrain from appropriating water
11 otherwise physically available until the senior water right is satisfied.

12 21. "Cfs" means cubic feet per second.

13 22. "Change in Use" means an authorized change in the point of diversion, the place of use, the period
14 of use, the purpose of use, or the place of storage of an Appropriation Right issued by the Water Management
15 Board under this Compact and the Law of Administration, or of an Existing Use. A changed water right retains
16 the original priority date of that right.

17 23. "Compact" means this water rights settlement entered into by the Confederated Salish and Kootenai
18 Tribes, the State and the United States.

19 24. "Compact Implementation Technical Team" or "CITT" means the entity established by this Compact
20 to plan and advise the Project Operator on the implementation of FIIP Operational Improvements, Rehabilitation
21 and Betterment, and Adaptive Management. The CITT duties and responsibilities are defined in more detail in
22 Appendix 3.5.

23 25. "Compact Management Committee" or "CMC" means the entity described in Article IV.G.5 formed
24 to provide policy and administrative oversight of the CITT.

25 26. "Court of Competent Jurisdiction" means a State or Tribal court that otherwise has jurisdiction over
26 the matter so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction,
27 but if no such court exists, a Federal court.

28 27. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor
29 agency.

30 28. "Effective Date" means the date on which the Compact is finally approved by the Tribes, by the State,

1 and by the United States, and on which the Law of Administration has been enacted and taken effect as the law
2 of the State and the Tribes, whichever date is latest.

3 29. "Existing Use" means a use of water under color of Tribal, State or Federal law in existence as of the
4 Effective Date, including uses in existence on that date that are eligible for either of the registration processes
5 set forth in the Law of Administration; provided that any portion of a Water Right Arising Under State Law within
6 the Reservation that is, at any point after the date the ratification of the Compact by the Montana Legislature takes
7 effect under State law, voluntarily relinquished or is legally determined to be abandoned, relinquished, or have
8 otherwise ceased to exist, shall be stricken from the relevant basin decree as a Water Right Arising Under State
9 Law and be entitled to no further protection as such a right or as an Existing Use.

10 30. "Flathead Indian Irrigation Project" or "FIIP" means the irrigation project developed by the United
11 States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat.
12 302 (1904), and the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), and includes, but is not limited
13 to, all lands, reservoirs, easements, rights-of-way, canals, ditches, laterals, or any other FIIP facilities (whether
14 situated on or off the Reservation), headgates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies,
15 records or copies of records and all other physical, tangible objects, whether of real or personal property, used
16 in the management and operation of the FIIP.

17 31. "FIIP Influence Area" means the lands influenced by the operations of the FIIP as identified on the
18 map attached hereto as Appendix 2.

19 32. "FIIP Water Use Right" means the water right set forth in Article III.C.1.a that is dedicated to use by
20 the FIIP and FIIP irrigators and includes uses of water for irrigation and Incidental Purposes allowed by the FIIP
21 through water service contracts. This water right is the source for the entitlement to delivery of available irrigation
22 water for assessed parcels as provided by Article IV.D.2.

23 33. "Flathead Indian Reservation" or "Reservation" means all land within the exterior boundaries of the
24 Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the
25 issuance of any patent, and including rights-of-way running through the Reservation.

26 34. "Flathead Reservation Water Management Board," "Water Management Board," or "Board" means
27 the entity established by this Compact and the Law of Administration to administer the use of all water rights on
28 the Reservation upon the Effective Date.

29 35. "Flathead System Compact Water" means that portion of the Tribal Water Right consisting of 229,383
30 Acre-feet per year that the Tribes may withdraw from the Flathead River or Flathead Lake, which includes up to

1 90,000 Acre-feet per year stored in Hungry Horse Reservoir, with a maximum total volume consumed of 128,158
2 Acre-feet per year.

3 36. "Historic Farm Deliveries" means the aggregate annual volume of water for irrigation and Incidental
4 Purposes on the FIIP that was delivered to all farm turnouts within an individual River Diversion Allowance Area
5 prior to the date the ratification of the Compact by the Montana Legislature takes effect under State law. Historic
6 Farm Deliveries include historic crop consumption and estimated standard rates of on-farm conveyance and
7 irrigation application inefficiencies and are used to evaluate RDA values pursuant to Article IV.D.1.e. Historic
8 Farm Delivery volumes are specified in Appendix 3.3.

9 37. "Groundwater" means any water that is beneath the surface of the earth.

10 38. "High Mountain Lakes" means those lakes shown in Appendix 17.

11 39. "Hungry Horse Dam" means the dam that is a part of the Hungry Horse Project.

12 40. "Hungry Horse Project" means that project authorized by the Act of June 5, 1944 (58 Stat. 270, Public
13 Law 78-329) to be constructed and operated by the US Bureau of Reclamation. The Act of May 29, 1958 (Public
14 Law 85-428) amended the authorizing act to make Hungry Horse a Reclamation project subject to Reclamation
15 laws.

16 41. "Hungry Horse Reservoir" means the reservoir that is a part of the Hungry Horse Project.

17 42. "Incidental Purpose(s)" means water delivered through or diverted from FIIP facilities for purposes
18 incidental to irrigation, including but not limited to Rehabilitation and Betterment, and lawn and garden purposes
19 allowed by the FIIP through water service contracts.

20 43. "Individual Indian Owner" means a Tribal member and his or her heirs or an Allottee and his or her
21 heirs who is an owner of an interest in trust or restricted lands and who has a documented use of the Tribal Water
22 Right registered pursuant to the terms of this Compact and the Law of Administration.

23 44. "Instream Flow" means a stream flow retained in a watercourse to benefit the aquatic environment.
24 Instream Flow may include Natural Flow or streamflow affected by regulation, diversion, or other modification.
25 A water right for Instream Flow purposes is quantified for a stream reach and measured for enforcement purposes
26 at a specified point.

27 45. "Law of Administration" or "Unitary Administration and Management Ordinance" means the body of
28 laws enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater
29 within the Reservation, that are both materially consistent with the substantive provisions of Appendix 4.

30 46. "Lease" means, as applied to the Tribal Water Right, an authorization for a Person or Persons to use

1 any part of the Tribal Water Right through a service contract, temporary assignment, or other similar agreement
2 of limited duration.

3 47. "MFWP" means the Montana Department of Fish, Wildlife, and Parks, or any successor agency.

4 48. "Minimum Enforceable Instream Flows" or "MEFs" means the schedule of monthly minimum
5 enforceable streamflow levels that are set forth in Appendix 3.1.

6 49. "Minimum Reservoir Pool Elevations" means the minimum pool water elevations for FIIP reservoirs
7 specified in the table attached hereto as Appendix 3.1 and abstracts of water right attached hereto as Appendix
8 15.

9 50. "Natural Flow" means the rate and volume of water movement past a specified point on a natural
10 stream, produced from a drainage area for which there have been no effects caused by diversion, storage, import,
11 export, return flow, or changes in consumptive use.

12 51. "New Development" means the development of a use of the Tribal Water Right set forth in the
13 Compact, from any source, commencing after the Effective Date, and encompasses all uses of the Tribal Water
14 Right not included within the definition of Existing Use.

15 52. "Operational Improvements" means practices that improve the ability of the Project Operator to plan
16 for and manage water storage and allocation between Instream Flows and FIIP Water Use Rights. Operational
17 Improvements address water supply planning, reservoir management, Instream Flow management, water
18 accounting and reporting, Stock Water delivery, irrigation wastewater, measurement at diversion works, water
19 measurement at farm delivery locations, and water measurement at irrigation wasteways. Operational
20 Improvements are set forth in the schedule attached hereto as Appendix 3.4.

21 53. "Parties" means the Tribes, the State, and the United States.

22 54. "Person" means an individual or any other entity, public or private, including the Tribes, the State, and
23 the United States, and all officers, agents and departments of each sovereign.

24 55. "Project Operator" means the entity with the legal authority and responsibility to operate the Flathead
25 Indian Irrigation Project.

26 56. "Reallocated Water" means the water from that portion of any given FIIP diversion or RDA that is
27 made available through increased efficiency resulting from Rehabilitation and Betterment projects.

28 57. "Rehabilitation and Betterment" means both irrigation facility upgrades that improve water
29 management and operational control at irrigation diversion works, and irrigation facility upgrades to reduce losses
30 in conveyance of water from irrigation sources of supply to irrigation points of use. Rehabilitation and Betterment

1 actions include, but are not limited to, reconstruction, replacement, and automation at irrigation diversion works;
2 lining of open canals; and placement of open canals in pipe.

3 58. "River Diversion Allowance" or "RDA" means initially the volume of water identified in Appendix 3.2
4 and defined for wet, normal and dry Natural Flow years that is necessary to be diverted or pumped to supply the
5 FIIP Water Use Right. As Reallocated Water is made available through Rehabilitation and Betterment, the RDA
6 is the amount defined in Appendix 3.2, reduced by the volume of Reallocated Water made available by a
7 particular Rehabilitation and Betterment project.

8 59. "River Diversion Allowance Area" or "RDA Area" means geographic divisions of the FIIP to which
9 water is diverted. RDA Areas are depicted in Appendix 3.2.

10 60. "Secretary" means the Secretary of the United States Department of the Interior, or the Secretary's
11 duly authorized representative.

12 61. "Shared Shortages" means a water management procedure to be applied when water supply is
13 insufficient to satisfy both MEFs and RDAs simultaneously.

14 62. "State" means the State of Montana and all officers, agencies, departments and political subdivisions
15 thereof.

16 63. "Stock Water" means water used for livestock.

17 64. "Target Instream Flows" or "TIFs" means the schedule of monthly Instream Flow levels, defined for
18 normal and wet Natural Flow years that are identified in Appendix 3.1.

19 65. "Tribal Council" means the duly elected governing body of the Confederated Salish and Kootenai
20 Tribes of the Flathead Reservation, Montana.

21 66. "Tribal Natural Resources Department" means the governmental subdivision of the Tribes authorized
22 by Tribal Ordinance No. 78-B, as amended, or any successor agency.

23 67. "Tribal Water Right" means the water rights of the Confederated Salish and Kootenai Tribes, including
24 any Tribal member or Allottee, the basis of which are federal law, as set forth in Article III.A, Article III.C.1.a
25 through j, Article III.C.1.k.i, Article III.C.1.l.i, Article III.D.1 through 3 and Article III.D.7 and 8. The term "Tribal
26 Water Right" also includes those rights identified in Article III.H that are appurtenant to lands taken into trust by
27 the United States on behalf of the Tribes.

28 68. "Tribes" means the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana,
29 and all officers, agencies, and departments thereof.

30 69. "United States" means the Federal government and all officers, agencies and departments thereof.

1 70. "Water Rights Arising Under State Law" means those valid water rights Arising Under State Law
 2 existing as of the Effective Date and not subsequently relinquished or abandoned, as those rights are: decreed
 3 or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by the DNRC; exempted
 4 from filing in the Montana general stream adjudication pursuant to 85-2-222, MCA; or excepted from the
 5 permitting process pursuant to 85-2-306, MCA.

6 71. "Wetland" means an area that is inundated or saturated by surface water or Groundwater at a
 7 frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence
 8 of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes,
 9 bogs and similar areas.

10 ARTICLE III -WATER RIGHTS OF THE TRIBES

11 The water rights of the Tribes quantified in Article III are composed of two parts: water rights whose basis
 12 is Federal law that are defined and referred to as the Tribal Water Right and those Water Rights Arising Under
 13 State Law identified in Article III.C.1.k.ii, III.C.1.l.ii, III.D.4, 5, and 6, and III.H.

14 A. Religious or Cultural Uses. The Tribal Water Right described in this Article III includes all traditional,
 15 religious, or cultural uses of water by members of the Confederated Salish and Kootenai Tribes within Montana.
 16 Individual exercises of traditional, religious, or cultural uses are exempt from the Registration process contained
 17 in the Law of Administration.

18 B. Abstracts of Water Right. Abstracts of water right appended to this Compact are a substantive element
 19 of this Compact. The language of the abstracts, including all informational remarks, shall control in the event of
 20 any inconsistency between the Compact and the abstracts of water right; provided however, that the Parties upon
 21 written mutual agreement may make technical corrections to the abstracts prior to the Parties submission to the
 22 Montana Water Court of the motion for entry of the Proposed Decree identified in Article VII.B. Such modifications
 23 are pursuant to, and shall not be deemed an amendment of, this Compact.

24 C. Basins 76L and 76 LJ and Flathead Indian Irrigation Project Irrigation Water Diversions from Basins
 25 76F and 76N.

26 1. Quantification.

27 a. Flathead Indian Irrigation Project. The Tribes have the right to water that is supplied to the Flathead
 28 Indian Irrigation Project to be used for such purposes in such volumes and flow rates and from such sources of
 29 supply as identified in the abstracts of water right attached hereto as Appendix 5. The FIIP will serve up to, but
 30 not more than 135,000 acres. The exercise of this portion of the Tribal Water Right shall be satisfied by meeting

1 the RDA values for each RDA Area described in Appendix 3.2 as evaluated pursuant to Article IV.D.1.e, and is
2 subject to Article IV.D through F.

3 The priority date for the portion of the Tribal Water Right used by the FIIP is July 16, 1855.

4 b. Existing Uses by the Tribes, their Members and Allottees.

5 i. The Tribal Water Right includes all Existing Uses by the Tribes, their members and Allottees that are
6 not Water Rights Arising Under State Law and are not otherwise specifically quantified in other sections of this
7 Article III.

8 ii. Water Rights Arising Under State Law held by the Tribes, their members and Allottees will be satisfied
9 pursuant to their own terms as finally decreed by the Montana Water Court or permitted by the DNRC.

10 iii. For each Existing Use identified in Article III.C.1.b.i to be valid and enforceable, the Tribes, or each
11 Tribal member or Allottee claiming such an Existing Use, shall complete the process for the registration of uses
12 of the Tribal Water Right set forth in the Law of Administration. Such uses include but are not limited to irrigation,
13 Stock Water, domestic, commercial, municipal and industrial purposes, as well as those historically irrigated
14 allotments that are held for individuals in trust by the United States that are not served by the FIIP and that are
15 identified on the map and table attached hereto as Appendix 6.

16 iv. Uses of the Tribal Water Right for which abstracts are appended to this Compact, including uses on
17 the FIIP, are exempt from the registration requirement set forth in Article III.C.1.b.iii.

18 v. The priority date for water uses registered pursuant to Article III.C.1.b.iii and the Law of Administration
19 is July 16, 1855.

20 c. Flathead System Compact Water. The Tribes have a direct flow water right from the Flathead River
21 with the following elements:

22 Source of Water: Flathead River, Flathead Lake, and the South Fork of the Flathead River up to Hungry
23 Horse Reservoir

24 Point of Diversion: From Flathead Lake or the Flathead River, either on or off of the Reservation

25 Purpose: Any beneficial use

26 Diversion Volume: 229,383 Acre-feet per year

27 Depletion Volume: 128,158 Acre-feet per year

28 Period of Diversion and Depletion: January 1 through December 31

29 i. As part of the Tribal Water Right quantified in this Article III.C.1.c, the Tribes shall be entitled to an
30 allocation of 90,000 Acre-feet per year, as measured at the Hungry Horse Dam, of storage water in Hungry Horse

1 Reservoir.

2 ii. This water right shall be used in a manner that ensures impacts associated with the exercise of this
3 water right are no greater than those identified in model run: Natural Q + 90K of the United States Bureau of
4 Reclamation's Final Flathead Basin Depletions Study (USBR, October 2012), attached hereto as Appendix 7.
5 In the event that the impacts exceed those identified in model run: Natural Q + 90K of the United States Bureau
6 of Reclamation's Final Flathead Basin Depletions Study, the use of the water right set forth in this Article III.C.1.c
7 shall be reduced in such amounts as are necessary to immediately achieve impacts that are no greater than
8 those identified in model run: Natural Q + 90K of the United States Bureau of Reclamation's Final Flathead Basin
9 Depletions Study.

10 iii. The releases of the stored water identified in Article III.C.1.c.i shall be limited in accordance with the
11 "Biological Impact Evaluation and Operational Constraints for a proposed 90,000 Acre-foot withdrawal" (State
12 of Montana, September 14, 2011) attached hereto as Appendix 8. The Parties upon mutual written agreement,
13 and in conformance with other applicable provisions of law including but not limited to the Endangered Species
14 Act of 1973, 16 U.S.C. 1531, et seq. (ESA), may amend the Biological Impact Evaluation Constraints identified
15 in the September 14, 2011 report. Such modifications are pursuant to, and shall not be deemed an amendment
16 of, this Compact.

17 iv. The exercise of this water right shall conform with the minimum instream flow schedules, as measured
18 at the USGS gaging station on the Flathead River at Columbia Falls (12363000) and the USGS gaging station
19 on the Flathead River at Polson (12372000) as identified in Tables 3 through 6 of Appendix 7, as well as the
20 minimum flow requirements set forth in Table 5 that must also be met downstream at the USGS gaging station
21 on the Flathead River at Perma (123887000). The exercise of this water right shall also conform to the ramping
22 rates, as measured below Kerr and Hungry Horse Dams, and identified in Tables 3 through 6 of Appendix 7. In
23 the event that the minimum instream flow schedules or ramping rates are not met, the use of the water right set
24 forth in this Article III.C.1.c shall be suspended until such time as those minimum instream flow schedules and
25 ramping rates are achieved. The Parties upon mutual written agreement, and in conformance with applicable
26 ESA and Federal Energy Regulatory Commission licensing requirements for the three previously identified sites,
27 may amend the limitations for releases from Hungry Horse Reservoir that are required to conform with minimum
28 instream flow and ramping rate schedules at these sites. Such modifications are pursuant to, and shall not be
29 deemed an amendment of, this Compact.

30 v. The exercise of this water right shall also conform with the Flathead Lake filling criteria identified on

1 page 12 of Appendix 7.

2 vi. The Tribes may use any amount of the stored water identified in Article III.C.1.c.i that is not necessary
3 to be released each year pursuant to the provisions of Article III.C.1.c.ii through v, for any beneficial purpose,
4 subject to the terms and conditions of this Compact.

5 vii. Use of the 90,000 Acre-feet of water from Hungry Horse Reservoir is subject to the approval of, and
6 any terms and conditions specified by, Congress.

7 viii. The priority date for Flathead System Compact Water is July 16, 1855.

8 ix. Any development by the Tribes of this Flathead System Compact Water Right outside the boundaries
9 of the Reservation shall be pursuant to Article IV.B.5.c.

10 x. The Parties agree that nothing in this Compact precludes the Tribes from leasing Flathead System
11 Compact Water to FIIP irrigators.

12 xi. The abstract of water right for this Flathead System Compact Water Right is attached hereto as
13 Appendix 9.

14 d. Instream Flow Rights on Reservation.

15 i. Natural Instream Flows. The Tribes have Instream Flow rights in the quantities and locations identified
16 in the abstracts of water right attached hereto as Appendix 10.

17 ii. FIIP Instream Flows. The Tribes have Instream Flow rights in the quantities and locations identified
18 in the abstracts of water right attached hereto as Appendix 11. The exercise of this portion of the Tribal Water
19 Right is subject to Article IV.C through F.

20 iii. Other Instream Flows. The Tribes have Instream Flow rights in the quantities and locations identified
21 in the abstracts of water right attached hereto as Appendix 12. The Parties agree that a right identified in
22 Appendix 12 shall only become enforceable on the date that an enforceable flow schedule for that right has been
23 established pursuant to the process set forth in the Law of Administration, Section 2-1-115 of this Ordinance, for
24 the development of such enforceable schedules.

25 iv. Interim Instream Flows. Until such time as the Instream Flow water rights set forth in Article III.C.1.d.ii
26 become enforceable pursuant to Article IV.C, the Tribes shall be entitled to enforce the interim Instream Flows
27 contained in Appendix 13 consistent with the provisions in Article IV.C and IV.E. The Tribes and the United
28 States shall enforce these interim Instream Flows pursuant to Appendix 13 or existing practice as of December
29 31, 2014, and as described in the protocols in Appendix 14.

30 v. The priority date for the Instream Flow water rights set forth in this Article III.C.1.d is time immemorial.

- 1 e. Minimum Reservoir Pool Elevations in Flathead Indian Irrigation Project Reservoirs.
- 2 i. The Tribes have the right to water necessary to maintain Minimum Reservoir Pool Elevations for FIIP
3 reservoirs in the quantities and locations set forth in the table and abstracts of water right attached hereto as
4 Appendix 15. The exercise of this portion of the Tribal Water Right is subject to Article IV.C and E and
5 superseding Federal law allowing for regulation of reservoir elevations.
- 6 ii. The Minimum Reservoir Pool Elevations will become enforceable according to the schedule attached
7 hereto as Appendix 3.4.
- 8 iii. The priority date for the water rights set forth in this Article III.C.1.e is July 16, 1855.
- 9 iv. Until such time as the Minimum Reservoir Pool Elevations set forth in Article III.C.1.e become
10 enforceable pursuant to Article IV.C, the Tribes shall be entitled to enforce those interim reservoir pool elevations
11 identified in Appendix 13. The Tribes and the United States shall enforce these interim reservoir pool elevations
12 only pursuant to Appendix 13 or existing practice as of December 31, 2014, and subject to superseding Federal
13 law allowing for regulation of reservoir elevations.
- 14 f. Wetland Water Right. The Tribes have the right to all naturally occurring water necessary to maintain
15 the Wetlands identified in the abstracts of water right attached hereto as Appendix 16. The priority date for the
16 Wetland water rights set forth in this Article III.C.1.f is time immemorial.
- 17 g. High Mountain Lakes Water Right. The Tribes have the right to all naturally occurring water necessary
18 to maintain the High Mountain Lakes identified in the abstracts of water right attached hereto as Appendix 17.
19 The priority date for the High Mountain Lakes water rights set forth in this Article III.C.1.g is time immemorial.
- 20 h. Flathead Lake. The Tribes have the right to all naturally occurring water necessary to maintain the
21 level of the entirety of Flathead Lake at an elevation of 2,883 feet as described in the abstract of water right
22 attached hereto as Appendix 18. The priority date for the Flathead Lake water right set forth in this Article III.C.1.h
23 is time immemorial.
- 24 i. Boulder Creek Hydroelectric Project. The Tribes have the right to water necessary to operate the
25 Boulder Creek Hydroelectric Project as identified in the abstracts of water right attached hereto as Appendix 19.
26 The priority date for the Boulder Creek Hydroelectric Project water right set forth in this Article III.C.1.i is July 16,
27 1855.
- 28 j. Hellroaring Hydroelectric Project. The Tribes have the right to water necessary to operate the
29 Hellroaring Hydroelectric Project as identified in the abstracts of water right attached hereto as Appendix 20. The
30 priority date for the Hellroaring Hydroelectric Project water right set forth in this Article III.C.1.j is July 16, 1855.

1 k. Wetlands Appurtenant to Lands Owned by Montana Fish Wildlife and Parks.

2 i. The Tribes and Montana Fish Wildlife and Parks (MFWP) have the right to all naturally occurring water
3 necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as Appendix 21. The
4 priority date for Wetland water rights appurtenant to lands owned by MFWP is time immemorial.

5 ii. Upon the Effective Date, the Tribes shall be added as a co-owner with MFWP of water right number
6 76L 153988-00, the abstract of which is attached hereto as Appendix 22. MFWP shall make reasonable efforts
7 to defend this right in the Montana general stream adjudication. The Tribes have the right but not the duty to
8 participate in the defense of this right in the Montana general stream adjudication.

9 iii. The Tribes shall be added in an expeditious manner as a co-owner to any water right with a fish or fish
10 and wildlife purpose that is appurtenant to land acquired by MFWP on the Reservation after the Effective Date.

11 iv. The Tribes shall be added in an expeditious manner as a co-owner to any Wetlands water right
12 acquired by MFWP pursuant to the Law of Administration after the Effective Date.

13 v. MFWP shall be the sole entity entitled to manage the water rights identified in Article III.C.1.k. The
14 recognition of these co-owned water rights does not confer on the Tribes any authority over the management of
15 the MFWP-owned lands to which these water rights are appurtenant.

16 vi. MFWP shall meet and confer with the Tribes on a biennial basis, or on such other timeframe as the
17 Tribes and MFWP may mutually agree, to discuss the exercise of these water rights. Such modifications to the
18 meeting schedule are pursuant to, and shall not be deemed an amendment of, this Compact.

19 I. Wetlands Appurtenant to Lands Owned by Department of Interior Fish and Wildlife Service.

20 i. The Tribes and the Department of the Interior's Fish and Wildlife Service (FWS) have the right to all
21 naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached
22 hereto as Appendix 23. The priority date for Wetland water rights appurtenant to lands owned by FWS is time
23 immemorial.

24 ii. Upon the Effective Date, the Tribes shall be added as a co-owner with FWS of water right numbers
25 76L 99338 00, 76L 99339 00, and 76L 99340 00, the abstracts of which are attached hereto as Appendix 24.
26 FWS shall make reasonable efforts to defend these rights in the Montana general stream adjudication. The
27 Tribes have the right but not the duty to participate in the defense of these rights in the Montana general stream
28 adjudication.

29 iii. The Tribes shall be added in an expeditious manner as a co-owner to any water right with a fish or fish
30 and wildlife purpose that is appurtenant to land acquired by FWS on the Reservation after the Effective Date.

1 iv. The Tribes shall be added in an expeditious manner as a co-owner to any Wetlands water right
2 acquired by FWS pursuant to the Law of Administration, after the Effective Date.

3 v. FWS shall be the sole entity entitled to manage the water rights identified in this Article III.C.1.I. The
4 recognition of these co-owned water rights does not confer on the Tribes any authority over the management of
5 the FWS-owned lands to which these water rights are appurtenant.

6 vi. FWS shall meet and confer with the Tribes on a biennial basis, or on such other timeframe as the
7 Tribes and FWS may mutually agree, to discuss the exercise of these water rights. Such modifications to the
8 meeting schedule are pursuant to, and shall not be deemed an amendment of, this Compact.

9 D. Instream Flow Water Rights Off of the Reservation.

10 1. Mainstem Instream Flow Right in the Kootenai River (Basin 76D). The Tribes have an Instream Flow
11 water right for the mainstem of the Kootenai River for the reach and with the associated flow rates set forth in the
12 abstract of water right attached hereto as Appendix 25. The measurement point for this water right is USGS
13 streamflow gage #12305000 located at Leonia, Idaho.

14 a. The priority date for this water right is time immemorial.

15 b. The period of use of this water right is January 1 to December 31 of each year.

16 c. The purpose of this water right is for the maintenance and enhancement of fish habitat to benefit the
17 instream fishery. This right shall not be changed to any other or additional purpose, changed to consumptive use,
18 or transferred to different ownership.

19 d. The point of diversion and place of use for this water right is instream. This water right shall not be
20 exercised in conjunction with any artificial diversion.

21 e. The ability to enforce this right shall be suspended so long as Libby Dam remains in existence and the
22 Army Corps of Engineers' operations of that dam are conducted consistently with the 2008 Federal Columbia
23 River Power System Biological Opinion, the 2010 updated Biological Opinion, and the 2014 Supplemental
24 Federal Columbia River Power System Biological Opinion, specifically as described in Reasonable and Prudent
25 Alternative Action (RPA) No. 4 (Storage Project Operations), Table No. 1 (Libby Dam), including the Northwest
26 Power and Conservation Council's 2003 mainstem amendments to the Columbia River Basin Fish and Wildlife
27 Program, or any subsequent Biological Opinion(s) governing the same RPAs and Operations.

28 f. In the event of changes to the U.S. Army Corps of Engineers' (Corps) responsibilities under the ESA,
29 such as the delisting of resident and anadromous fish species, that no longer require the Corps to operate Libby
30 Dam pursuant to ESA section 7 biological opinions or other substantive ESA requirements, the United States,

1 acting through the Corps, the Tribes, and the State shall establish written protocols and understandings on
2 meeting and enforcing the Tribes' mainstem Instream Flow right in the Kootenai River while also ensuring that
3 the Corps' operations of Libby Dam meet all Federal statutory and regulatory requirements and obligations.
4 Provided however, that any such enforcement protocol shall not alter the limitations on Call set forth in Article
5 III.D.1.g. The establishment of such protocols and understandings are pursuant to, and shall not be deemed an
6 amendment of, this Compact.

7 g. Should the suspension on enforcement set forth in Article III.D.1.e be lifted due to the removal of Libby
8 Dam, this water right may be exercised to make a Call only against junior users whose point of diversion is from
9 the mainstem of the Kootenai River and not its tributaries, the purpose of whose rights is irrigation and whose
10 source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source
11 of supply is Groundwater that is connected to the mainstem of the Kootenai River, and whose flow rate is greater
12 than 100 gallons per minute.

13 h. Call may be made only when the average daily flow drops below the enforceable level for the previous
14 24-hour period.

15 2. Mainstem Instream Flow Right in the Swan River (Basin 76K). The Tribes have an Instream Flow
16 water right for the reach of the mainstem of the Swan River with the associated flow rates set forth in the abstract
17 of water right attached hereto as Appendix 26. The measurement point for this water right is USGS streamflow
18 gage #12370000 located immediately below Swan Lake near Big Fork, Montana.

19 a. The priority date for this water right is time immemorial.

20 b. The period of use of this water right is January 1 to December 31 of each year.

21 c. The purpose of this water right is for the maintenance and enhancement of fish habitat to benefit the
22 instream fishery. This right shall not be changed to any other or additional purpose, changed to consumptive use,
23 or transferred to different ownership.

24 d. The point of diversion and place of use for this water right is instream. This water right shall not be
25 exercised in conjunction with any artificial diversion.

26 e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce
27 this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is
28 surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is
29 Groundwater connected to surface sources in Basin 76K and whose flow rate is greater than 100 gallons per
30 minute.

1 f. Call may be made only when the average daily flow drops below the enforceable level for the previous
2 24-hour period.

3 3. Mainstem Instream Flow Right in the Lower Clark Fork River (Basins 76M and 76N). The Tribes have
4 a 5000 cfs Instream Flow water right for the reach of the mainstem of the Clark Fork River as set forth in the
5 abstract of water right attached hereto as Appendix 27. The measurement point for this water right is USGS
6 streamflow gage #12391950 located immediately below Cabinet Gorge Dam in Idaho.

7 a. The priority date for this water right is time immemorial.

8 b. The period of use of this water right is January 1 to December 31 of each year.

9 c. The purpose of this water right is for the maintenance and enhancement of fish habitat to benefit the
10 instream fishery. This right shall not be changed to any other or additional purpose, changed to consumptive use,
11 or transferred to different ownership.

12 d. The point of diversion and place of use for this water right is instream. This water right shall not be
13 exercised in conjunction with any artificial diversion.

14 e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce
15 this water right only against junior users whose point of diversion is from the mainstem of the Clark Fork River
16 and not its tributaries, the purpose of whose rights is irrigation and whose source of supply is surface water, or
17 against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater connected
18 to the mainstem of the Clark Fork River and whose flow rate is greater than 100 gallons per minute.

19 f. Call may be made only when the average daily flow drops below the enforceable level for the previous
20 24-hour period.

21 g. For so long as the Cabinet Gorge and Noxon Dams remain in existence, the enforceable level of this
22 right is a flow rate equal to the lesser of 5000 cfs or the minimum flow level established by the FERC as a
23 condition on the license for the Cabinet Gorge and Noxon Dams as that license condition may be modified over
24 time.

25 4. Co-ownership of Instream and Public Recreation Water Rights Held by MFWP.

26 a. Upon the Effective Date, the Tribes shall be added as a co-owner with MFWP of the Water Rights
27 Arising Under State Law held by MFWP for Instream Flow and recreation purposes that are identified on the
28 tables attached hereto as Appendix 28 and Appendix 29. Nothing in this co-ownership changes any of the other
29 elements of these Water Rights Arising Under State Law, including their priority dates or flow rates.

30 i. The Water Rights Arising Under State Law identified in Appendix 28 shall be included as part of the

1 proposed decree to be filed with the Montana Water Court pursuant to Article VII.B.1.

2 ii. The Water Rights Arising Under State Law identified in Appendix 29 shall proceed through the Montana
3 general stream adjudication as though they were not included in this Compact. MFWP shall make reasonable
4 efforts to defend each of these rights identified in Appendix 29 in the Montana general stream adjudication. The
5 Tribes have the right but not the duty to participate in the defense of these rights in the Montana general stream
6 adjudication.

7 b. As co-owners, the Tribes and MFWP shall meet and confer on a biennial basis, or on such other
8 timeframe as the Tribes and MFWP may mutually agree, to discuss the exercise of the rights identified in Article
9 III.D.4.a, with a goal of establishing a joint plan for the exercise of these rights. Notwithstanding this planning
10 process, the Tribes and MFWP each retain(s) the unilateral right to exercise each water right identified in Article
11 III.D.4.a as each deem(s) appropriate, but neither the Tribes nor MFWP has any affirmative duty to take any
12 particular action in regard to the exercise of any of these rights.

13 5. Co-ownership of Water Right Number 76M 94404-00 (Milltown Dam) in Basin 76G (Upper Clark Fork).

14 a. Upon the date the ratification of this Compact by the Montana Legislature becomes effective under
15 State law, Water Right Arising Under State Law number 76M 94404-00 is changed as follows: the right is split
16 into two separate active and enforceable Water Rights Arising Under State Law, 76M 94404-01 and 76M
17 94404-02, and the original water right elements are changed to support the maintenance and enhancement of
18 fish habitat and take the form of two enforceable hydrographs. The elements of the changed and split water right
19 are set forth in the two water rights abstracts attached hereto as Appendix 30. The measurement point for 76M
20 94404-01 is the USGS gage #12334550 at Turah, Montana, and the measurement point for 76M 94404-02 is the
21 USGS gage #1234000 at Bonner, Montana.

22 i. The period of use of these water rights is January 1 to December 31 of each year.

23 ii. The point of diversion and place of use for these water rights is instream.

24 iii. These water rights shall not be exercised in conjunction with any artificial diversion.

25 iv. MFWP, and the Tribes after they become co-owners, and subject to the limitation on enforcement set
26 forth in Article III.D.5.c, shall be entitled to make a Call to enforce these water rights only against junior users the
27 purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the
28 purpose of whose rights is irrigation, whose source of supply is Groundwater and whose flow rate is greater than
29 100 gallons per minute.

30 v. The enforceable levels of these water rights are identified in the table attached hereto as Appendix 31.

1 The minimum enforceable level of this right is 700 cfs at the location of USGS gage #1234000 at Bonner, and
2 500 cfs at the location of USGS gage #12334550 at Turah.

3 vi. Call may be initiated on the day following a five-consecutive-day-period in which four out of five
4 average daily river flows fall below their respective daily enforceable hydrograph values. Call may persist until
5 such time as two average daily flows of the previous five-consecutive-day-period are in excess of their respective
6 enforceable hydrograph values.

7 b. Upon the Effective Date, the Tribes shall be a co-owner with MFWP of these water rights. As
8 co-owners, the Tribes and MFWP shall meet and confer on a biennial basis, or on such other timeframe as the
9 Tribes and MFWP may mutually agree to, regarding the exercise of these rights, with a goal of establishing a joint
10 plan for the exercise of these rights. The establishment of such a plan is pursuant to, and shall not be deemed
11 an amendment of, this Compact. Notwithstanding this planning process, the Tribes and MFWP each retains the
12 unilateral right to exercise these water rights as each deems appropriate, but neither the Tribes nor MFWP has
13 any affirmative duty to take any particular action in regard to the exercise of these rights.

14 c. The ability to enforce these rights shall be suspended for a period of 10 years from the date the
15 ratification of this Compact by the Montana Legislature becomes effective under State law. During and after this
16 period, the Tribes and MFWP shall engage with other stakeholders in the Upper Clark Fork Basin on water
17 management subjects including, but not limited to, drought planning and the exercise of these water rights in
18 conjunction with the other water rights in the Upper Clark Fork Basin.

19 d. For any analysis of the legal availability of water in the Upper Clark Fork Basin, these rights shall be
20 considered to have a combined year-round flow rate of 2,000 cfs as measured at the location of USGS gauge
21 #12340500 below the confluence of the Blackfoot and Clark Fork Rivers.

22 e. No owner of these water rights, acting independently or jointly, shall be entitled to lease, sell or change
23 the purpose of these water rights.

24 f. The Water Rights Arising Under State Law identified in this Article III.D.5 shall be finally decreed as part
25 of the decree of this Compact that will be proposed to the Montana Water Court pursuant to Article VII.B.1.

26 6. Contract Rights to Stored Water Held by MFWP in Basin 76H (Bitterroot).

27 a. MFWP is a party to two contracts for the delivery of stored water from Painted Rocks Reservoir: MFWP
28 Water Purchase Contract Painted Rocks, between MFWP and DNRC, July 12, 2004 (attached hereto as
29 Appendix 32); and Water Purchase Contract, March 5, 1958, as amended on March 5, 1958 (attached hereto
30 as Appendix 33). In the event that MFWP obtains an ownership interest in any water rights pursuant to these

1 contracts or obtains an ownership interest in any water rights pursuant to any future contract for the delivery of
2 water from Painted Rocks Reservoir, MFWP shall expeditiously take all steps necessary to add the Tribes as a
3 co-owner of said water rights.

4 b. MFWP is a party to a contract for the delivery of stored water from Lake Como: Agreement Between
5 the Bitterroot Irrigation District and the United States Department of the Interior, Bureau of Reclamation for the
6 Operation of the Enlarged Storage Pool at Lake Como, July, 1994 (attached hereto as Appendix 34). In the event
7 that MFWP obtains an ownership interest in any water rights pursuant to this contract, or obtains an ownership
8 interest in any water rights pursuant to any future contract for delivery of water from Lake Como, MFWP shall
9 expeditiously take all steps necessary to add the Tribes as a co-owner of said water rights.

10 c. MFWP shall manage the Painted Rocks and Como contract rights, in a prudent, biologically based and
11 environmentally sound manner, and within the terms and conditions of these contracts. MFWP will manage in
12 the same manner any future contracts for the delivery of water from Painted Rocks or Lake Como to which MFWP
13 becomes a party. The Tribes are an intended beneficiary of MFWP's management of these contracts, and have
14 the right to challenge MFWP's management decisions in a Court of Competent Jurisdiction.

15 d. MFWP shall meet and confer with the Tribes on a biennial basis, or on such other timeframe as the
16 Tribes and MFWP may mutually agree to, regarding the management of these contract rights. Such modifications
17 to the meeting schedule are pursuant to, and shall not be deemed an amendment of, this Compact. If the Tribes
18 become co-owners of any water right pursuant to this Article III.D.6 of the Compact, the Tribes and MFWP shall
19 each retain the independent right to exercise each water right as each deems appropriate. Neither the Tribes
20 nor MFWP has any affirmative duty to take any particular action in regard to the exercise of any of such rights.
21 The Tribes do not assume any liability arising out of or resulting from any of the contracts identified in this Article
22 III.D.6 pertaining to co-ownership of rights to stored water in Basin 76H.

23 7. Instream Flow Right on the North Fork of Placid Creek (Basin 76F). The Tribes have an Instream Flow
24 water right for the upper reach of the North Fork of Placid Creek with the associated flow rates set forth in the
25 abstract of water right attached hereto as Appendix 35. The measurement point for this water right shall be within
26 the main channel of the North Fork of Placid Creek, below the North Fork Placid Creek FIIP Diversion located
27 within the SE 1/4 of the NW 1/4 of the SE 1/4 of Section 29 in Township 17 North Range 16 West.

28 a. The priority date for this water right is time immemorial.

29 b. The period of use of this water right is January 1 to December 31 of each year.

30 c. The purpose of this water right is for the maintenance and enhancement of fish habitat to benefit the

1 instream fishery. This right shall not be changed to any other or additional purpose, changed to consumptive use,
2 or transferred to different ownership.

3 d. The point of diversion and place of use for this water right is instream. This water right shall not be
4 exercised in conjunction with any artificial diversion.

5 e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce
6 this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is
7 surface water of Placid Creek, or against junior users the purpose of whose rights is irrigation, whose source of
8 supply is Groundwater connected to Placid Creek and whose flow rate is greater than 100 gallons per minute.

9 f. Call may be made only when the average daily flow drops below the enforceable level for the previous
10 24-hour period.

11 8. Instream Flow Rights on Kootenai River Tributaries (Basin 76D). The Tribes have Instream Flow water
12 rights for the reaches of the Kootenai River tributaries Big Creek, Boulder Creek, Steep Creek and Sutton Creek,
13 with the associated flow rates set forth in the abstracts of water right attached hereto as Appendix 36.

14 a. The priority date for this water right is time immemorial.

15 b. The period of use of this water right is January 1 to December 31 of each year.

16 c. The purpose of this water right is for the maintenance and enhancement of fish habitat to benefit the
17 instream fishery. This right shall not be changed to any other or additional purpose, changed to consumptive use,
18 or transferred to different ownership.

19 d. The point of diversion and place of use for this water right is instream. This water right shall not be
20 exercised in conjunction with any artificial diversion.

21 e. Water rights held by the United States Forest Service pursuant to the United States Forest
22 Service-Montana Water Rights Compact, 85-20-1401, MCA, shall not be subject to Call by the Tribes and/or the
23 United States on behalf of the Tribes.

24 f. The recognition of the Instream Flow water rights in this Article III.D.8 does not confer on the Tribes
25 any authority over the management of National Forest System lands within Basin 76D, or any claim to ownership
26 or other rights in that land. With the exception of future diversionary uses by the United States on National Forest
27 System lands in excess of the Forest Service's reserved rights identified in Article III.D.8.e, the Tribes hold the
28 United States harmless for delivery of water or maintenance of flows to meet this Instream Flow water right in
29 Basin 76D.

30 E. Period of Use. The period of use of the Tribal Water Right set forth in this Article III shall be January

1 1 to December 31 of each year, provided however, that any portion of that water right that is dedicated to
2 seasonal use, including irrigation use, shall have a period of use as set forth in the abstracts attached hereto as
3 Appendix 5 or as set forth in the registration of such right pursuant to the Law of Administration, as applicable.

4 F. Points and Means of Diversion. The points and means of diversion for use of the Tribal Water Right
5 set forth in this Article III are as set forth in the abstracts of water rights attached to this Compact or as may be
6 provided for under the Law of Administration.

7 G. Call Protection.

8 1. Non-Irrigators. The Tribes, on behalf of themselves and the users of any portion of the Tribal Water
9 Right set forth in this Compact, and the United States agree to relinquish their right to exercise the Tribal Water
10 Right to make a Call against any Water Right Arising Under State Law whose purpose(s) do(es) not include
11 irrigation.

12 2. Groundwater Irrigators with Flow Rates Less Than or Equal to 100 Gallons Per Minute. The Tribes,
13 on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact and the
14 United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water
15 Right Arising Under State Law whose purpose is irrigation and whose source of supply is Groundwater and
16 whose flow rate is less than or equal to 100 gallons per minute.

17 3. Irrigators Within the FIIP Influence Area.

18 a. The Tribes, the United States, and the Project Operator, agree to relinquish their right to exercise the
19 Tribal Water Right to make a Call against that portion of any Water Right Arising Under State Law identified in
20 Article III.G.3.b that is equal to the quantity of water established as the annual FIIP quota for the current irrigation
21 season, or an equivalent farm delivery amount within the FIIP as implemented by the Project Operator within the
22 applicable RDA Area, or the quantity allowed under a claim decreed by the Montana Water Court or water right
23 granted by the DNRC (an Alternate Value), whichever is less, whose owner enters into a consensual agreement
24 as described in this Article III.G.3.

25 b. Water Rights Arising Under State Law whose owners are eligible to enter into consensual agreements
26 as described in this Article III.G.3 are those rights:

27 i. whose purpose is irrigation;

28 ii. whose point(s) of diversion or place(s) of use are within the FIIP Influence Area; and

29 iii. whose source of supply is surface water; or

30 iv. whose source of supply is Groundwater and whose flow rate is greater than 100 gallons per minute.

1 c. The Tribes, the United States, and the Project Operator, agree to enter into the consensual agreement
2 described in this Article III.G.3 with every owner of a Water Right Arising Under State Law described in Article
3 III.G.3.b who wishes to enter into such an agreement. The following conditions shall apply to any such
4 consensual agreement:

5 i. the owner of a Water Right Arising Under State Law that meets the criteria described in Article III.G.3.b
6 shall measure all diversions, report the measured amount of those diversions to the Project Operator, agree to
7 divert no more water each year than the lesser of the quantity established as the annual FIIP quota or an
8 Alternate Value, and shall not expand water use beyond the terms of the agreement;

9 ii. the owner of a Water Right Arising Under State Law does not acquire any entitlement to any delivery
10 or diversion of water from the FIIP, whether the water is stored or run of the river, by entering into a consensual
11 agreement as described in this Article III.G.3;

12 iii. irrigation use pursuant to any Water Right Arising Under State Law whose owner enters into a
13 consensual agreement as set forth in this Article III.G.3 shall be limited to the irrigation season identified annually
14 by the FIIP and to such period of use limitation as may apply to FIIP irrigators;

15 iv. the method and frequency of measurement of the diversion must be described and occur at a
16 reasonable level of accuracy and frequency to demonstrate that the diversion does not exceed the lesser of the
17 annual FIIP quota for a given irrigation season or an Alternate Value, and;

18 v. the agreement is permanent and is binding on the heirs and assigns of the owner of each Water Right
19 Arising Under State Law who enters into such agreement.

20 d. The entering into a consensual agreement as set forth in this subsection (3) does not relieve the owner
21 of any claim to a Water Right Arising Under State Law that is at issue in the Montana general stream adjudication
22 from the obligation of prosecuting that water right claim through the Montana general stream adjudication.

23 e. If a consensual agreement is entered into among the Tribes, United States, the Project Operator and
24 the owner of a Water Right Arising Under State Law described in Article III.G.3.b prior to the issuance of the final
25 decree for Montana Water Court Basin 76L and 76 LJ, as applicable, that agreement shall terminate as a matter
26 of law if the claimed Water Right is terminated as a result of proceedings conducted in the Montana general
27 stream adjudication.

28 f. If a consensual agreement is entered into among the Tribes, the United States, the Project Operator,
29 and the owner of a Water Right Arising Under State Law described in Article III.G.3.b prior to the issuance of the
30 final decree for Montana Water Court Basin 76L and 76 LJ, as applicable, and such owner has a claim in the

1 Montana general stream adjudication that is ultimately decreed a quantity of water for that claim less than the
2 quantity established in the agreement, the consensual agreement shall protect only the lesser amount of water.

3 g. If the owner of a Water Right Arising Under State Law described in Article III.G.3.b ceases to use that
4 portion of that water right in excess of the lesser of the annual FIIP quota for a given irrigation season, or an
5 Alternate Value, pursuant to a consensual agreement as set forth in Article III.G.3:

6 i. that nonuse does not represent an intent by the owner of that water right to wholly or partially abandon
7 that water right or to not comply with the terms and conditions of that right; and

8 ii. the period of nonuse may not create or may not be added to any previous period of nonuse to create
9 a presumption of abandonment.

10 h. Any use of a Water Right Arising Under State Law subject to a consensual agreement described in
11 this Article III.G.3 exceeding the volume of water specified in the consensual agreement shall be subject to Call
12 by the Tribes, the United States, or the Project Operator for that amount of water in excess of the terms of the
13 consensual agreement.

14 i. A Person who has both an entitlement to the delivery of water from the FIIP and a Water Right Arising
15 Under State Law to serve the same acreage may only protect from Call, by entering into a consensual agreement
16 pursuant to this Article III.G.3, a total quantity of water equal to the lesser of the annual FIIP quota for a given
17 irrigation season, or an Alternate Value, for each acre served, irrespective of whether the water applied to each
18 acre is pursuant to that Person's FIIP delivery right or that Person's Water Right Arising Under State Law.

19 4. Water Rights Upstream of the Reservation (Basins 76I, 76J, and 76LJ). The Tribes, on behalf of
20 themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United States
21 agree to relinquish their right to exercise the Tribal Water Right to make a Call against any water right located
22 upstream of the Flathead Reservation in Basins 76I, 76J, and 76LJ, except for those Water Rights Arising Under
23 State Law:

24 a. Whose purpose is irrigation and whose source of supply is surface water, and whose point of diversion
25 is:

26 i. the mainstem of the Flathead River, including Flathead Lake;

27 ii. the North Fork of the Flathead River;

28 iii. the Middle Fork of the Flathead River; or

29 iv. the South Fork of the Flathead River.

30 b. Whose purpose is irrigation, whose source of supply is Groundwater connected to one of the sources

1 identified in Article III.G.4.a, and whose flow rate is greater than 100 gallons per minute.

2 c. The Tribes and the United States agree that the Tribal Water Right recognized in the Compact may
3 not be exercised to make Call against any Water Right Arising Under State Law upstream of the Flathead
4 Reservation and located on a tributary to the Flathead River not identified in Article III.G.4.a.

5 5. Water Rights on the Little Bitterroot River Outside the Reservation (Basin 76L). The Tribes, on behalf
6 of themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United
7 States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right
8 Arising Under State Law whose point of diversion is outside the Flathead Reservation and whose source of
9 supply is the Little Bitterroot River or its tributaries.

10 6. Any Water Right Arising Under State Law the purpose of which is irrigation and that is susceptible to
11 Call by the Tribes pursuant to Article III.D.1.g, III.D.2.e, III.D.3.e, III.D.5.a.iv, III.D.7.e, III.G.4.a, or III.G.4.b whose
12 purpose is changed after the Effective Date to something other than irrigation shall remain susceptible to Call
13 pursuant to the terms and conditions of this Compact as though the purpose of the Water Right Arising Under
14 State Law was still irrigation.

15 H. Water Rights Arising Under State Law Appurtenant to Lands Acquired by the Tribes. For lands
16 acquired by the Tribes within the Reservation, the Tribes have the right to any Water Right Arising Under State
17 Law acquired as an appurtenance to the land. Starting upon the Effective Date of the Compact, the Tribes may
18 file a Trust Transfer form with the Board for any lands acquired by the Tribes with appurtenant Water Rights
19 Arising Under State Law that have been taken into trust by the United States on behalf of the Tribes, as provided
20 in the Law of Administration and the water right appurtenant to the land shall be transferred to the Tribal Water
21 Right quantified in this Compact with a priority date of July 16, 1855, provided that the Tribes shall continue to
22 use the acquired water right as it was historically used or may change the use of the acquired water right pursuant
23 to the provisions for change of use set forth in Article IV.B.4 and the Law of Administration. Such transfer does
24 not shield the underlying right from abandonment based on acts or omissions of the holder of that water right prior
25 to its acquisition by the Tribes.

26 ARTICLE IV - IMPLEMENTATION OF COMPACT

27 A. Trust Status of Tribal Water Right. The Tribal Water Right shall be held in trust by the United States
28 for the benefit of the Tribes, their members and Allottees.

29 B. Use of Tribal Water Right.

30 1. Persons Entitled to Use the Tribal Water Right. The Tribal Water Right may be used by the Tribes,

1 their members, Allottees, or their lessees or assigns. FIIP customers who have assessed land within the FIIP
2 who are in compliance with the applicable BIA rules and guidelines are entitled to have delivered an equitable
3 share of the FIIP Water Use Right as provided by Article IV.D.2.

4 2. Effect of Non-Use of the Tribal Water Right. Non-use of all or any portion of the Tribal Water Right
5 described in Article III shall not constitute a relinquishment, forfeiture, or abandonment of such right.

6 3. Review of Registration of Existing Uses of the Tribal Water Right.

7 a. Within five (5) years after the Effective Date, the Board shall provide the DNRC with a report, in a form
8 materially consistent with that of abstracts of water rights decreed by the Montana Water Court, of the Tribal
9 Water Right registered pursuant to the Law of Administration as being in existence as of the Effective Date.

10 b. Within six (6) months after receipt of the report, the DNRC must agree, agree in part, or disagree with
11 the report. If the DNRC takes no action by the end of the six-month period after the report is received, the report
12 shall be deemed accepted. If the DNRC agrees in part or disagrees with the report, the State, the Tribes, and
13 the United States shall meet within ninety (90) days of issuance of the DNRC's notice of disagreement in an effort
14 to resolve the issue(s) giving rise to the disagreement. If, after meeting and conferring, the State, the Tribes, and
15 the United States are still unable to come to agreement on the list of Existing Uses, all disagreements over the
16 contents of the list must be brought to the Water Management Board for resolution of the dispute under Article
17 IV.I.4.c within 180 days of the issuance of the DNRC's notice of disagreement.

18 4. Changes in Use of the Tribal Water Right. Any user of a portion of the Tribal Water Right who proposes
19 a change of such use must seek authorization to change the use of that portion of the right. Such applications
20 for authorization to change a use shall be heard and decided by the Board pursuant to Article IV.I.4.b of the
21 Compact and the Law of Administration, provided that the Board may not consider any change application of
22 Flathead System Compact Water unless the applicant has secured the written consent of the Tribal Council to
23 apply for a Change in Use authorization.

24 5. New Development of the Tribal Water Right.

25 a. The Tribes, or any Person with authorization from the Tribes, may develop a new use of the Tribal
26 Water Right on the Reservation after the Effective Date. Such development may only proceed upon the issuance
27 of an Appropriation Right for the New Development by the Board pursuant to Article IV.I.4.a and the Law of
28 Administration.

29 b. The Tribes, or any Person with authorization from the Tribes, may develop a new use of the Flathead
30 System Compact Water Right set forth in Article III.C.1.c off the Reservation after the Effective Date, but only after

1 complying with the provisions of Article IV.B.5.c.

2 c. Any New Development by the Tribes of a portion of the Tribes' Flathead System Compact Water Right
3 off the Reservation shall be treated as a change in use. The DNRC shall process each change application
4 pursuant to the provisions of 85-2-302, 85-2-307 through 85-2-310, and 85-2-314, MCA. Prior to developing
5 Flathead System Compact Water for beneficial use off the Reservation, the Tribes must comply with the
6 provisions of subsections (1) through (3) and (8) through (17) of 85-2-402, MCA, as those provisions read on
7 December 31, 2014.

8 d. In the event that, after the date the ratification of the Compact by the Montana Legislature takes effect
9 under State law, the Montana Legislature substantively amends or repeals any of the sections identified in Article
10 IV.B.5.c, the Tribes and the DNRC shall meet no later than 60 days after the effective date of the State legislative
11 action amending or repealing to determine if they can agree whether the provisions of State law set forth in Article
12 IV.B.5.c or the new provisions of State law shall govern the process for off-Reservation development of new uses
13 of the Flathead System Compact Water Right set forth in Article III.C.1.c. In the event that the Tribes and the
14 DNRC are unable to agree, the provisions of State law identified in Article IV.B.5.c shall remain in effect. Such
15 modifications are pursuant to, and shall not be deemed an amendment of, this Compact

16 e. If the Tribes' use of Flathead System Compact Water off the Reservation involves diversion works or
17 facilities for the transport of water located off the Reservation, the Tribes shall apply for and obtain all permits,
18 certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the
19 siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed
20 to use or transport water, prior to exercising a use of the Flathead System Compact Water Right off the
21 Reservation.

22 6. Lease of the Tribal Water Right.

23 a. Lease of the Tribal Water Right generally.

24 i. Pursuant to the terms and conditions of this Compact, the Tribes may Lease, for use on or off the
25 Reservation, any portion of the Tribal Water Right set forth in Article III.C.1.a, b, i, and j; provided, that either the
26 Tribes or its assignee, on behalf of the Tribes, first comply with the procedures for changing the use of water
27 rights set forth in subsections iii and iv of this Article IV.B.6.a, as applicable.

28 ii. The Tribes may make or authorize a Lease of the Tribal Water Right for use within or outside the
29 Reservation; provided that, any Lease shall be for a term not to exceed 99 years, and may include provisions
30 authorizing renewal for an additional term not to exceed 99 years. The off-Reservation use of any portion of the

1 Tribal Water Right is limited to a place of use within the Flathead or Clark Fork River Basins in Montana.

2 iii. A Lease of the Tribal Water Right shall not adversely affect a Water Right Arising Under State Law
3 with a priority date before the date of the Lease or an Appropriation Right issued pursuant to this Compact with
4 a priority date before the date of the Lease. Uses of the Tribal Water Right being exercised prior to the date of
5 the Lease shall not be adversely affected by a Lease of the Tribal Water Right, except that the Tribes may allow
6 uses of the Tribal Water Right on Tribally owned land to be adversely affected by declining to object to the
7 Change in Use application associated with the Lease.

8 1. If the Lease is for use on the Reservation, the determination of adverse effect shall be made by the
9 Water Management Board pursuant to the process set forth regarding applications for Change in Use
10 authorizations under the Law of Administration.

11 2. If the Lease is for use off the Reservation, the Lease shall be treated as a change in use. The DNRC
12 shall process each change application pursuant to the provisions of 85-2-302, 85-2-307 through 85-2-310, and
13 85-2-314, MCA. Prior to the lessee putting leased water to beneficial use, the Tribes or their assignee, on behalf
14 of the Tribes, must comply with the following provisions of State law as those provisions read on December 31,
15 2014:

16 a. Subsections (1) through (3) and (8) through (17) of 85-2-402, MCA;

17 b. Subsections (1) through (8) of 85-2-407, MCA, provided, that the term of any such Lease may be for
18 up to 99 years, and the DNRC may approve the renewal of such a Lease for a period of up to 99 years; and

19 c. 85-2-408, MCA, as limited by the provisions of Article IV.B.6.a.iii.2.a.

20 iv. In the event that, after the date the ratification of the Compact by the Montana Legislature takes effect
21 under State law, the Montana Legislature substantively amends or repeals any of the sections identified in Article
22 IV.B.6.a.iii.2, the Tribes and the DNRC shall meet, no later than 60 days after the effective date of the State
23 legislative action amending or repealing, to determine if they can agree whether the provisions set forth in Article
24 IV.B.6.a.iii.2 or the new provisions of State law shall govern the process for off-Reservation Leases under this
25 Compact. In the event that the Tribes and the DNRC are unable to agree, the provisions of Article IV.B.6.a.iii.2
26 shall remain in effect. Such modifications are pursuant to, and shall not be deemed an amendment of, this
27 Compact.

28 v. The Tribes or any Person using diversion works or facilities for the transportation of water located off
29 the Reservation in connection with a use of the Tribal Water Right shall apply for and obtain all permits,
30 certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the

1 siting, construction, operation, alteration or use of any equipment, device, or facility proposed to use or transport
2 water, prior to exercising a use of the Tribal Water Right off the Reservation.

3 b. Lease of the Tribal Water Right by an Individual Indian Owner.

4 i. An Individual Indian Owner may enter into a Lease to authorize a Person or Persons to use the
5 Individual Indian Owner's allocated portion of the Tribal Water Right on the Reservation.

6 ii. If the lessee intends to put the water to beneficial use in a manner different than how the Individual
7 Indian Owner had been using the water prior to the date of the Lease, the Individual Indian Owner or the lessee
8 must comply with the provisions of the Law of Administration pertaining to securing Change in Use authorizations
9 from the Water Management Board before the use of water may be changed.

10 iii. Any Lease entered into pursuant to subsection b of this section may be for a term not to exceed 25
11 years, and may include provisions authorizing renewal for an additional term not to exceed 25 years.

12 iv. A Lease of the Tribal Water Right by an Individual Indian Owner shall not adversely affect a Water
13 Right Arising Under State Law with a priority date before the date of the Lease or an Appropriation Right issued
14 pursuant to this Compact with a priority date before the date of the Lease. Uses of the Tribal Water Right being
15 exercised prior to the date of the Lease shall not be adversely affected by a Lease of the Tribal Water Right by
16 an Individual Indian Owner, except that the Tribes may allow uses of the Tribal Water Right on Tribally owned
17 land to be adversely affected by declining to object to the Change in Use application associated with the Lease.

18 c. Lease of the Flathead System Compact Water Right.

19 i. Pursuant to the terms and conditions of this Compact, the Tribes may Lease Flathead System Compact
20 Water for use on or off the Reservation, provided that either the Tribes or their lessee comply with the Law of
21 Administration and the relevant provisions of this section, as applicable.

22 ii. The Tribes shall make available Flathead System Compact Water for short-term Lease within the FIIP
23 or the FIIP Influence Area pursuant to the Shared Shortages provisions set forth at Article IV.E. The Lease term
24 may not exceed the period during which Shared Shortage provisions are in effect. The baseline annual price for
25 this water shall be \$8 per Acre-foot plus a \$25 administrative fee per Lease as of July 1, 2015. From that date,
26 the baseline annual price and the administrative fee shall be indexed for inflation and consequently adjusted
27 annually on July 1st of each successive year thereafter (the Adjustment Date) by the percentage change over
28 the previous twelve months in the most recent monthly Consumer Price Index for All Urban Consumers (CPI-U)
29 published by the United States Department of Labor, Bureau of Labor Statistics, or such other index as the
30 Parties may agree to use. The initial price for each Lease of any portion of the Flathead System Compact Water

1 entered into during that year pursuant to the Shared Shortage provisions contained in Article IV.E shall be the
2 adjusted baseline price. During the term of any given Lease, the price per Acre-foot shall continue to adjust
3 annually on the Adjustment Date by the percentage change in the CPI-U, or such other index as the Parties may
4 agree to use, of the previous twelve-month period. The foregoing provisions regarding the adjusted baseline price
5 and per-Lease administrative fee shall constitute the sole and exclusive price terms of each Lease entered under
6 this Article IV.B.6.c.ii. Any modifications of the index are pursuant to, and shall not be deemed an amendment
7 of, this Compact.

8 iii. The Tribes may make or authorize a Lease of the Tribal Water Right for use within or outside the
9 Reservation; provided that, any Lease shall be for a term not to exceed 99 years, and may include provisions
10 authorizing renewal for an additional term not to exceed 99 years. The off-Reservation use of any portion of the
11 Tribal Water Right is limited to a place of use within the Flathead or Clark Fork River Basins in Montana.

12 iv. If the Lease is for a portion of the Tribes' Flathead System Compact Water right to be delivered wholly
13 from water stored in Hungry Horse Reservoir, the Tribes shall provide notice to the DNRC and the Water
14 Management Board, in advance of the effective date of the Lease, of the terms of the Lease and any
15 modifications thereto or termination thereof. For Leases lasting one irrigation season or less, notice to the DNRC
16 and the Water Management Board shall be provided as far in advance as practicable. For Leases lasting longer
17 than one year, notice shall be provided to the DNRC and the Water Management Board by the later of 120 days
18 prior to the date on which the Lease is to take effect or March 31 of the year in which the Lease is to take effect.
19 The point of delivery for a Lease shall be the outlet works at the Hungry Horse Dam. If disputes arise between
20 or among holders of Water Rights Arising Under State Law as to the reasonable transmission and carriage losses
21 from the point of delivery to the place of use of the Lease, the district court pursuant to its powers and duties
22 under Title 85, Chapter 5, MCA, shall calculate such losses.

23 v. Any Lease or portion of a Lease to be delivered from water stored in Hungry Horse Reservoir is subject
24 to reduction due to conditions defined in Appendix 8 on a pro rata basis as set forth in Article III.C.1.c.iii.

25 vi. If the Lease is for the off-Reservation use of a portion of the Tribes' Flathead System Compact Water
26 right to be delivered from a combination of stored water and direct flow water from the Flathead River, or
27 exclusively from direct flow water from the Flathead River, the Lease shall be treated as a change in use as it
28 pertains to the use of the direct flow water. The DNRC shall process each change application pursuant to the
29 provisions of 85-2-302, 85-2-307 through 85-2-310, and 85-2-314, MCA. Prior to the lessee putting leased water
30 to beneficial use, the Tribes or the lessee must comply with the following provisions of State law as those

1 provisions read on December 31, 2014:

2 1. Subsections (1) through (3) and (8) through (17) of 85-2-402, MCA;

3 2. Subsections (1) through (8) of 85-2-407, MCA, provided, however, that the term of any such Lease
4 may be for up to 99 years, and the DNRC may approve the renewal of such a Lease for a period of up to 99
5 years; and

6 3. 85-2-408, MCA, as limited by the provisions of Article IV.B.6.c.vi.1.

7 vii. In the event that, after the date the ratification of the Compact by the Montana Legislature takes effect
8 under State law, the Montana Legislature substantively amends or repeals any of the sections identified in Article
9 IV.B.6.c.vi.1 through 3, the Tribes and the DNRC shall meet no later than 60 days after the effective date of the
10 State legislative action amending or repealing to determine if they can agree whether the provisions set forth in
11 Article IV.B.6.c.vi.1 through 3 or the new provisions of State law shall govern the process for off-Reservation
12 Leases under this Compact. In the event that the Tribes and the DNRC are unable to agree, the provisions of
13 Article IV.B.6.c.vi.1 through 3 shall remain in effect. Any agreed upon modifications are pursuant to, and shall
14 not be deemed an amendment of, this Compact.

15 viii. The Tribes or any Person using diversion works or facilities for the transportation of water located
16 off the Reservation in connection with a use of the Flathead System Compact Water Right shall apply for and
17 obtain all permits, certificates, variances and other authorizations required by State laws regulating, conditioning
18 or permitting the siting, construction, operation, alteration or use of any equipment, device, or facility proposed
19 to use or transport water, prior to exercising a use of the Flathead System Compact Water Right off the
20 Reservation.

21 7. Lease of 11,000 Acre-Feet per Year of Water From Hungry Horse Reservoir for Off-Reservation
22 Mitigation.

23 a. The Tribes shall make available for Lease off the Reservation 11,000 Acre-feet of the water identified
24 in Article III.C.1.c.i stored in Hungry Horse Reservoir pursuant to the process, and subject to the terms and
25 conditions, set forth in this Article IV.B.7.

26 b. The water identified in Article IV.B.7.a shall be available for the mitigation of net depletions arising from
27 new or existing domestic, commercial, municipal and/or industrial uses of water at any point in the Flathead or
28 Clark Fork Basins in Montana for which the 11,000 Acre-feet per year of water is capable of providing mitigation.

29 c. The DNRC, under Title 85, MCA, shall retain the responsibility for determining if, when, where, and
30 how much mitigation water is needed for any proposed new development and if the water identified in Article

1 IV.B.7.a meets the appropriate mitigation criteria for any proposed mitigation plan.

2 d. The water identified in Article IV.B.7.a is subject to reduction due to conditions defined in Appendix 8
3 on a pro rata basis as set forth in Article III.C.1.c.iii.

4 e. The mechanism for entering into a Lease for any portion of the water set forth in this Article IV.B.7.a
5 shall be as follows:

6 i. Any interested Person may approach the Tribes, through the Tribal Lands Department or successor
7 Tribal department, to negotiate a Lease of a portion of this water;

8 ii. The baseline annual per Acre-foot price for this water shall be set at \$40 as of July 1, 2015. From that
9 date, the baseline price shall be indexed for inflation and consequently adjusted annually on July 1st of each year
10 thereafter (the Adjustment Date) by the percentage change over the previous year in the most recent monthly
11 Consumer Price Index for All Urban Consumers (CPI-U) published by the United States Department of Labor,
12 Bureau of Labor Statistics, or such other index as the Parties may agree. The initial price for each Lease of any
13 portion of the 11,000 Acre-feet identified in this Article IV.B.7 entered into during that year shall be the adjusted
14 baseline price. During the term of any given Lease, the price per Acre-foot shall continue to adjust annually on
15 the Adjustment Date by the percentage change in the CPI-U, or such other index as the Parties may agree to use,
16 of the previous twelve-month period. The foregoing provisions regarding the adjusted baseline price shall
17 constitute the sole and exclusive price term of each Lease;

18 iii. Each Lease between the Tribes and a lessee shall be for a term of 99 years, with the lessee holding
19 an option to renew for an additional 99 years, unless the Tribes and the lessee affirmatively agree on an alternate
20 duration not to exceed 99 years. Any Lease including a term of alternate duration may also include an option to
21 renew for a term not to exceed 99 years; and

22 iv. The Tribes and each prospective lessee shall negotiate any and all other non-price terms of the Lease
23 arrangement.

24 f. In the event of an impasse between the Tribes and a prospective lessee over any non-price term, the
25 prospective lessee may file a notice of impasse with the Water Management Board, invoking the Board's authority
26 to resolve any such impasse pursuant to the process set forth in Article IV.B.7.g.

27 g. Process for resolving disputes over Lease terms.

28 i. Upon receipt of a notice of impasse, the Board shall date stamp it. Within three days of the filing of a
29 notice of impasse, the Board shall provide notice of the filing to the Tribes, with a copy to the prospective lessee,
30 identifying a date certain between 30 and 60 days from the date of receipt of the notice for the Tribes and the

1 prospective lessee each to submit a last, best offer concerning all of the non-price terms.

2 ii. No later than the date set by the Board, the Tribes and the prospective lessee shall file a last, best offer
3 with the Board in the form of a proposed Lease agreement and shall serve the same on each other. To be filed,
4 the offer must be placed in the custody of the Board within the time fixed for filing. Filing may be accomplished
5 by mail addressed to the Board, but filing shall not be timely unless the papers are actually received within the
6 time fixed for filing. Immediately upon receipt by the Board, the offers shall be date stamped. If the Tribes fail
7 to timely file an offer, the offer filed by the prospective lessee shall become the terms of the Lease. If the
8 prospective lessee fails to timely file an offer, no Lease shall be concluded.

9 iii. The Board shall issue a decision selecting one side's offer or the other's between 15 and 45 days after
10 the filing of the offer. At any time prior to the Board's decision, the prospective lessee may choose to withdraw
11 the prospective lessee's offer and decline to enter into the Lease.

12 iv. The Board shall provide notice of its decision to both the Tribes and the prospective lessee. The
13 Lease shall be concluded on the terms selected by the Board, but must include the price term identified in Article
14 IV.B.7.e.ii of this Compact. The effective date of the Lease shall be ten days after the Board's issuance of its
15 decision.

16 v. The Tribes or a prospective lessee dissatisfied with a decision of the Board made pursuant to this
17 Article IV.B.7.g may appeal that decision by filing a petition for judicial review with a Court of Competent
18 Jurisdiction within 30 days of the issuance of the Board's decision. The court shall review the Board's decision
19 for abuse of discretion.

20 C. Exercise of Certain Portions of the Tribal Water Right Related to the FIIP.

21 1. Priority for the Exercise of the FIIP Instream Flow and FIIP Water Use Rights. Once the water rights
22 described in Article III.C become enforceable, the following relative priorities among those rights shall apply:

23 a. Minimum Enforceable Instream Flows.

24 b. Minimum Reservoir Pool Elevations.

25 c. River Diversion Allowances.

26 d. Target Instream Flows.

27 2. Reallocated Water in excess of Target Instream Flows will be split as equally as hydrologically
28 practicable between the Instream Flow water rights set forth in Article III.C.1.d.ii and the FIIP Water Use Right
29 set forth in Article III.C.1.a.

30 3. MEF and TIF implementation and schedule. Exercise of FIIP Instream Flow Rights set forth in Article

1 III.C.1.d.ii shall be accomplished through the implementation and enforcement of MEFs and TIFs and is subject
2 to the Shared Shortage and Adaptive Management provisions set forth in Article IV.E and F and Appendix 3.5.

3 a. MEFs and TIFs shall be enforceable at the values set forth in Appendix 3.1.

4 b. Implementation and enforceability of MEFs and TIFs.

5 i. Incremental implementation of Operational Improvements will result in additional FIIP Instream Flow.

6 ii. MEFs and TIFs shall be enforceable following the completion of Operational Improvements according
7 to the schedule attached hereto as Appendix 3.4.

8 iii. Reallocated Water from Rehabilitation and Betterment Projects shall be used to incrementally achieve
9 FIIP Instream Flows set forth in Article III.C.1.d.ii.

10 iv. If the schedule attached hereto as Appendix 3.4 cannot be met due to lack of available funding or other
11 circumstances outside of the control of the Parties or Project Operator, the Parties may agree to adjust the
12 schedule as necessary to allow for timely implementation of MEFs and TIFs. Such modifications are pursuant
13 to, and shall not be deemed an amendment of, this Compact.

14 v. If the Project Operator fails to implement the schedule attached hereto as Appendix 3.4 due to acts,
15 errors, or omissions of the Project Operator, MEFs and TIFs will be enforceable as though the schedule had been
16 implemented.

17 c. Until an MEF has become enforceable, the interim Instream Flow, where applicable, for that location
18 shall be the enforceable Instream Flow. Where the Instream Flow has been incrementally increased above the
19 interim Instream Flow level as a result of the partial completion of actions listed in the Implementation Schedule
20 attached hereto as Appendix 3.4, the incrementally achieved level may be maintained until the MEF is achieved.

21 d. Until a Minimum Reservoir Pool Elevation has become enforceable, the interim reservoir pool
22 elevation, where applicable, for that location shall be enforced.

23 e. TIFs shall be determined seasonally according to Appendix 3.5, and will vary between the wet and
24 normal year levels attached hereto as Appendix 3.1.

25 4. Minimum Reservoir Pool Elevations. Minimum Reservoir Pool Elevations attached hereto as Appendix
26 3.1 shall be enforceable according to the schedule specified in Appendix 3.4. Enforceability of Minimum
27 Reservoir Pool Elevations is subject to Article IV.E, Appendix 3.5, and superseding Federal law allowing for
28 regulation of reservoir elevations.

29 D. Exercise of the FIIP Water Use Right.

30 1. FIIP Water Use Right.

1 a. The FIIP Water Use Right shall be satisfied by meeting the RDA values for each RDA Area attached
2 hereto as Appendix 3.2 and as evaluated pursuant to Article IV.D.1.e.

3 b. RDAs shall be enforceable according to the schedule attached hereto as Appendix 3.4, subject to
4 evaluation pursuant to Article IV.D.1.e.

5 c. Headworks diversion amounts shall be progressively adjusted to achieve the RDAs as Operational
6 Improvements are completed pursuant to Appendix 3.4.

7 d. Once RDAs are achieved through completion of Operational Improvements, headworks diversion
8 amounts shall be progressively adjusted as Rehabilitation and Betterment is completed pursuant to Appendix 3.6.
9 The enforceable RDA for the location in which a particular Rehabilitation and Betterment project has been
10 completed is the amount defined in Appendix 3.2, reduced by the volume of Reallocated Water made available
11 by that Rehabilitation and Betterment project. The amount actually diverted may be adjusted pursuant to the
12 evaluation process described in Article IV.D.1.e.

13 e. RDA values shall be evaluated to ensure their adequacy to meet Historic Farm Deliveries. Initial
14 evaluation of RDAs shall occur once the Parties and Project Operator have completed all Operational
15 Improvements in a given RDA Area according to the schedule attached hereto as Appendix 3.4. Evaluation of
16 RDAs will continue as part of the responsibilities of the CITT described in Appendix 3.5 as follows:

17 i. The Project Operator must measure and record farm turnout deliveries within a given RDA Area.

18 ii. If the aggregate measured deliveries to farm turnouts do not meet Historic Farm Deliveries for a given
19 RDA Area, actual diversions shall be adjusted to assure that Historic Farm Deliveries are met for wet, normal and
20 dry water years. If water in excess of the RDA is needed to meet Historic Farm Deliveries, it will be provided
21 through an increase of the Flathead River pumping plant diversion allowed by the Flathead Pumping Station RDA
22 attached hereto as Appendix 3.2. If the aggregate measured deliveries to farm turnouts exceed Historic Farm
23 Deliveries within an RDA Area, the actual diversions shall be reduced accordingly.

24 iii. Any adjustment of actual diversions pursuant to this section shall not result in decrease of the MEFs,
25 TIFs, or Minimum Reservoir Pool Elevations.

26 f. RDAs are quantified for wet, normal, and dry Natural Flow years, attached hereto as Appendix 3.2, and
27 shall be set each year according to the process specified in Appendix 3.5.

28 2. FIIP Delivery Entitlement Statement. Assessed land within the FIIP is entitled to have water delivered
29 by the Project Operator if the FIIP customer is in compliance with the applicable BIA rules and guidelines for FIIP.
30 Beginning on the Effective Date, an owner of assessed land within the FIIP may request of the Project Operator

1 a delivery entitlement statement, which must be tendered within 90 days of the request or denied for cause.
2 Beginning on the date one year after the Effective Date, the delivery entitlement statement must be tendered or
3 denied within 30 days. The delivery entitlement runs with the land and is valid so long as the land remains
4 assessed and the FIIP customer is in compliance with the applicable BIA rules and guidelines for FIIP.

5 E. Shared Shortages Provision.

6 1. In the event that water supplies are inadequate to simultaneously satisfy an enforceable Instream Flow
7 water right and a corresponding RDA, the provisions of Article IV.E govern the exercise of the water rights set
8 forth in Articles III.C.1.a and III.C.1.d.ii and iv at that location. The CITT shall determine when Shared Shortages
9 conditions begin and end as specified in Appendix 3.5.

10 2. For purposes of Article IV.E, once MEFs and RDAs have become enforceable, they shall be
11 maintained at the levels set forth in Appendices 3.1 and 3.2, as adjusted pursuant to Article IV.D.1.e. Prior to
12 enforceability of the MEF and RDA levels attached hereto as Appendices 3.1 and 3.2, Instream Flows will be
13 maintained as provided by Article IV.C.3.c and RDAs will be maintained as provided by Article IV.D.1.b and c.

14 3. Subject to the priority system set forth in Article IV.C.1, RDAs shall be maintained by implementing the
15 following measures in the order of priority set forth below:

16 a. Available Natural Flow or regulated streamflow shall be diverted by the Project Operator to satisfy
17 RDAs.

18 b. If the application of Article IV.E.3.a does not satisfy RDAs, Flathead River pumping plant diversions
19 shall be increased as allowed by the Flathead Pumping Station RDA attached hereto as Appendix 3.2.

20 c. If the application of Article IV.E.3.a and b does not satisfy RDAs, FIIP reservoirs may be reduced below
21 the Minimum Reservoir Pool Elevations specified in Appendix 3.1 to supply RDAs, subject to Article IV.E.5.

22 d. If the application of Article IV.E.3.a through c does not satisfy RDAs, the Tribes shall make available
23 for short-term lease Flathead System Compact Water for use within the FIIP as provided by Article IV.B.6.c.ii.

24 4. Within the Basin 76LJ portion of the Little Bitterroot Valley, RDAs shall be maintained by sequentially
25 applying the procedures in Article IV.E.3.a through c, where applicable.

26 5. As set forth in Article IV.E.3.c, FIIP reservoirs may be reduced below the Minimum Reservoir Pool
27 Elevations set forth in Article III.C.1.e to support RDAs as follows:

28 a. FIIP reservoirs may be reduced pursuant to this section for no more than four consecutive years.

29 b. Article IV.E.3.c does not apply to Mission Reservoir.

30 c. FIIP reservoirs may not be reduced below the interim reservoir pool elevations set forth in Article

1 III.C.1.e.iv and attached hereto as Appendix 13.

2 d. RDAs may be met from carryover reservoir storage, at the discretion of the Project Operator.

3 F. Requirement to Implement Adaptive Management and Water Measurement.

4 1. The Parties agree that Adaptive Management and a comprehensive water measurement program, as
5 described in Appendix 3.5, are essential to the successful implementation of this Compact.

6 2. The Parties, upon mutual written agreement, and in conformance with the Compact and other
7 applicable provisions of law, may amend Appendix 3.5. Such modifications are pursuant to, and shall not be
8 deemed an amendment of, this Compact.

9 G. Compact Implementation Technical Team. Within six months of the date the ratification of the Compact
10 by the Montana Legislature takes effect under State law, the Parties shall establish a Compact Implementation
11 Technical Team (CITT) to allow planning for and implementation of Operational Improvements, Rehabilitation
12 and Betterment, and Adaptive Management prior to and following the Effective Date.

13 1. The CITT membership shall be as provided for in Appendix 3.5.

14 2. The CITT shall carry out the duties specified by Appendix 3.5.

15 3. The CITT shall develop criteria for prioritizing and selecting projects.

16 4. Public Meetings and Records:

17 a. All regularly scheduled meetings of the CITT shall be open to the observation of the general public
18 pursuant to State and Tribal open meeting laws. Where there is a conflict of laws, the law that provides for
19 greater openness to the public applies.

20 b. CITT records are public records and shall be made available to the public for inspection under such
21 reasonable terms and conditions as the CITT shall establish.

22 5. Disputes Related to the Compact Implementation Technical Team. The Parties agree to perform each
23 obligation set forth in this Compact in good faith and with diligence and loyalty to this agreement. The Parties shall
24 form a Compact Management Committee (CMC) comprised of the Director of the Montana Department of Natural
25 Resources, the Chairman of the Tribal Council, and the Regional Director of the Northwest Region of the Bureau
26 of Indian Affairs or their designees. The CMC will provide policy and administrative oversight of the CITT.

27 a. The CITT shall attempt to reach consensus on all of its actions.

28 b. Where consensus is not achieved, the CITT will resolve disputed issues by majority vote.

29 c. If the CITT vote results in a tie, or is appealed, the disputed issue will be referred to the CMC. The
30 CMC will review and attempt to reach consensus on the disputed issue and if consensus is not possible, will

1 resolve the issue by majority vote.

2 d. A majority vote of the CMC may be appealed using the following procedures:

3 i. Disputes arising out of any act, failure to act, error or omission of the BIA or Project Operator involving
4 Operational Improvements or Rehabilitation and Betterment or otherwise affecting real property owned by the
5 United States may be appealed under Title 25, Part 2, Code of Federal Regulations.

6 ii. For disputes raising questions of Compact interpretation, the CMC shall immediately seek a
7 determination of those questions from the Water Management Board, which determination will be provided in
8 writing within 30 days.

9 iii. All other disputes may be appealed to a Court of Competent Jurisdiction. In considering a petition for
10 relief, a Court of Competent Jurisdiction will review the CMC's legal conclusions for correctness and its factual
11 findings for abuse of discretion.

12 H. Power Provisions

13 1. Low-Cost Block of Power

14 The Parties recognize that Article 40 of the Kerr Project License, as amended, jointly issued to the
15 Montana Power Company and the Tribes for the Kerr Project, Project No. 5, requires Montana Power Company,
16 through its successor-in-interest, NorthWestern Energy, to make available the capacity and energy up to 3.734
17 megawatts at up to 100 percent load factor during the months of April through October to the United States, for
18 and on behalf of the FIIP, at the rates set forth in and adjusted in accordance with such Article.

19 The Parties agree that the Kerr Project License Article 40 Low Cost Block of Power is equivalent to the
20 delivery of 19,178,000 kilowatt hours of electricity per year, and generally supplies electricity necessary to pump
21 approximately 46,000 Acre-feet of water per year to the FIIP. If the operation and maintenance, and all other
22 rights and responsibilities for the Kerr Project are assumed by the Tribes or their wholly-owned corporation, the
23 Tribes agree, to the extent permitted under applicable license(s) and Federal law, to make the Low Cost Block
24 of Power available in the same manner and at the same rates, as adjusted, as NorthWestern Energy. If the
25 Tribes seek a new license for the Kerr Project, the Tribes or their wholly-owned corporation, agree that their
26 license application will request authority from FERC to make the Low Cost Block of Power available in the same
27 manner and at the same rates, as adjusted, as NorthWestern Energy.

28 2. Net Power in Excess of Low Cost Block

29 For purposes of Article IV.E, power required to run the Flathead Pumping Station in excess of the Low
30 Cost Block of Power identified in Article IV.H.1 shall be purchased at the price at which Mission Valley Power sells

1 power for irrigation purposes.

2 3. Net Power Revenues

3 The State and Tribes agree to seek provisions in the Federal legislation ratifying this Compact for Mission
4 Valley Power to budget annually for an anticipated amount of \$200,000 of Net Power Revenues to be made
5 available in the subsequent year to meet the needs of both the power system and the FIIP with an initial allocation
6 of the Net Power Revenue that provides fifty percent to the Project Operator and fifty percent to the Tribes. These
7 funds shall only be used for work on the FIIP that has significant fisheries, water conservation, or water
8 management benefits. If on an annual basis such work by the Project Operator or the Tribes does not require
9 the full amount of such net revenues the remainder shall be set aside and accumulated for future expenditure
10 for these purposes. This initial allocation may be changed by mutual agreement of the Parties within nine (9)
11 years of the Effective Date, with any subsequent agreement to become effective on the tenth (10th) anniversary
12 of the Effective Date. Any such modification is pursuant to, and shall not be deemed an amendment of, this
13 Compact.

14 I. Administration: Establishment of Flathead Reservation Water Management Board.

15 1. Establishment of Board. There is hereby established the Flathead Reservation Water Management
16 Board. Upon the Effective Date, the Board shall be the exclusive regulatory body on the Reservation for the
17 issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing
18 Uses, and for the administration and enforcement of all Appropriation Rights and Existing Uses. The Board shall
19 also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact
20 on the Reservation, and any controversy over the right to the use of water as between the Parties or between
21 or among holders of Appropriation Rights and Existing Uses on the Reservation except as explicitly provided
22 otherwise in Article IV.G.5. The jurisdiction of this Board does not extend to any water rights whose place of use
23 is located outside the exterior boundaries of the Reservation.

24 2. Membership.

25 a. Voting Members. The Board shall consist of five voting members: two members selected by the
26 Governor of the State pursuant to Article IV.1.2.b, after consultation with holders of Water Rights Arising Under
27 State Law located on the Reservation; two members appointed by the Tribal Council; and one member selected
28 by the other four members. All members shall be appointed within six months of the Effective Date.

29 b. Appointment by Governor. Within 90 days of the Effective Date, or 15 days of any vacancy in one or
30 more of the Board positions selected by the Governor, the commissioners of each county whose boundaries

1 include any portion of the Reservation shall nominate individuals for the Governor's consideration for appointment
2 to the Board as follows:

- 3 i. The Commissioners of Lake County shall choose five (5) nominees;
- 4 ii. The Commissioners of Sanders County shall choose three (3) nominees;
- 5 iii. The Commissioners of Missoula County shall choose two (2) nominees;
- 6 iv. The Commissioners of Flathead County shall choose one (1) nominee; and
- 7 v. Each nominee must meet the eligibility requirements of Article IV.1.2.f.

8 The Governor shall choose two Board members from the group of nominees. If the county
9 commissioners fail to nominate a minimum of seven (7) individuals for selection by the Governor within the time
10 set forth in Article IV.1.2.b, the Governor may select any two individual(s) who meet the eligibility requirements
11 set forth in Article IV.1.2.f after consultation with Holders of Water Rights Arising Under State Law located on the
12 Reservation.

13 c. Should the four appointed members fail to agree on the selection of a fifth voting member within sixty
14 days of the date of appointment of the fourth member, or within thirty days after any vacancy in that fifth position
15 occurs, the following procedure shall be utilized:

16 i. Within five days thereafter the two members appointed by the Tribal Council shall nominate three
17 individuals to serve as a member of the Board and the two members appointed by the Governor shall nominate
18 three individuals to serve as a member of the Board;

19 ii. Within fifteen days thereafter the two members appointed by the Tribal Council shall reject two of the
20 individuals nominated by the two members appointed by the Governor, and the two members appointed by the
21 Governor shall reject two of the individuals nominated by the two members appointed by the Tribal Council; and

22 iii. Within five days thereafter, the remaining two nominees shall be submitted to the Chief Judge of the
23 United States District Court for the District of Montana for selection of the fifth member of the Board.

24 d. Ex Officio Member. The Board shall also have a sixth, non-voting member appointed by the Secretary.

25 e. Term. Initially, three voting members of the Board shall serve for four years, and two shall serve for
26 two years. One member appointed by the Governor, one member appointed by the Tribal Council and the fifth
27 voting member shall serve for four years. One member appointed by the Governor and one member appointed
28 by the Tribal Council shall serve for two years. The member appointed by the Secretary shall be appointed for
29 four years. At the expiration of the initial two-year appointments, all subsequently appointed Board members shall
30 serve four year terms.

1 f. Eligibility. To be eligible to serve on the Board, an individual must be over 18 years of age and be a
2 Reservation resident. For the purposes of filling a position on the Water Management Board, a Reservation
3 resident is an individual who:
4 i. does business within Flathead Indian Reservation boundaries;
5 ii. is domiciled within Flathead Indian Reservation boundaries; or
6 iii. owns and maintains a seasonal residence within Flathead Indian Reservation boundaries.

7 An eligible individual must also have education and experience in one or more of the following fields:
8 natural resources management, public administration, agriculture, engineering, commerce or finance, hydrology,
9 biological sciences, water law or water policy.

10 No elected official of the State of Montana, or any political subdivision thereof, or of the United States,
11 or of the Tribes is eligible for nomination to the Board while holding such elective office. However, a nominee for
12 Board membership shall not be disqualified by reason of the fact that he or she is an employee or contractor of
13 the State of Montana or any political subdivision thereof, or of the Tribes, or of the United States.

14 No Board member may vote on any application or appeal that the member participated in personally and
15 substantially in any non-Board capacity.

16 g. Vacancies. Subject to the provisions of Article IV.1.2.a and c regarding the filling of a vacancy of the
17 fifth member of the Board, upon the occurrence of any other vacancy in a Board position, the Tribal Council, if
18 the vacancy is in a position appointed by the Tribal Council, or the Governor, if the vacancy is in a position
19 appointed by the Governor, shall name a new Board member within 30 days of the occurrence of the vacancy.
20 Should Board action be required during the period of any such vacancy, the Department Head of the Tribal
21 Natural Resources Department, if the vacancy is in a position appointed by the Tribal Council, or the Director of
22 the DNRC, if the vacancy is in a position appointed by the Governor, shall fill the vacant position on an acting
23 basis until a new appointment is made.

24 h. Compensation and Expenses of the Board. Each Board member shall receive such compensation for
25 services and reimbursement for expenses for attendance at Board meetings as shall be fixed by the State and
26 the Tribal Council for the Board members appointed by the same. The compensation for the fifth Board member
27 shall be set jointly by the State and the Tribal Council. The expenses of the Federal ex officio member shall be
28 covered by the United States.

29 3. Quorum and Vote Required. Four Board members appointed pursuant to Article IV.1.2.a shall constitute
30 a quorum. No Board action may be voted upon in the absence of a quorum. All Board decisions shall be by

1 affirmative vote of a majority of the Board, except as set forth in Article IV.I.5.d for the appointment of water
2 commissioners. If a proposal put to a vote of a quorum of Board members ends in a tie vote, the proposal is
3 deemed disapproved or denied.

4 4. Jurisdiction of the Board.

5 a. Issuance of Appropriation Rights. Upon the Effective Date, the Board shall have exclusive jurisdiction
6 over the issuance of all new Appropriation Rights on the Reservation. The process for the consideration,
7 issuance or denial of all Appropriation Rights is set forth in the Law of Administration.

8 b. Authorizations for Changes in Use. Upon the Effective Date, the Board shall have exclusive jurisdiction
9 over the issuance of authorizations for Changes in Use of all water rights on the Reservation. The process for
10 the consideration, issuance or denial of such Change in Use authorizations is set forth in the Law of
11 Administration.

12 c. Enforcement. Upon the Effective Date, the Board shall have the jurisdiction to enforce the terms of this
13 Compact as provided by Article IV.I.1. All controversies cognizable under this subsection shall be heard and
14 resolved pursuant to the Compact and the Law of Administration.

15 d. Water Right Ownership Updates. The Board shall not have jurisdiction over water right ownership
16 updates on water rights appurtenant to fee lands, which shall remain with the DNRC as set forth in 85-2-421
17 through 85-2-424, 85-2-426, and 85-2-431, MCA.

18 5. Powers and Duties.

19 a. In General. The Board shall have the power to promulgate procedures, prescribe forms, develop
20 additional materials and implement amendments thereto as may be necessary and proper to exercise its
21 jurisdiction and carry out its assigned functions under this Compact and the Law of Administration. A set of forms
22 for initial use by the Board in the implementation of the Law of Administration is attached hereto as Appendix 37.
23 The Board may amend these forms at its discretion. Such modifications are pursuant to, and shall not be deemed
24 an amendment of, this Compact.

25 b. Hearings. Pursuant to the procedures set forth in the Law of Administration, the Board shall hold
26 hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and
27 issue subpoenas to compel attendance of witnesses or production of documents or other evidence, and to
28 appoint technical experts. The Tribes and the State shall enforce the Board's subpoenas in the same manner
29 as prescribed by the laws of the Tribes and the State for enforcing a subpoena issued by the courts of each
30 respective sovereign in a civil action. The Persons involved in the controversy may present evidence and

1 cross-examine any witnesses. The Board shall cause all hearings to be recorded, and shall determine the
2 controversy and grant any declaratory or injunctive relief allowed by the Law of Administration, including a
3 temporary order. The Board shall not have power to award money damages, attorneys' fees or costs; however
4 it shall have the power to impose fines pursuant to the terms of the Law of Administration and award any kind of
5 equitable relief. All decisions of the Board shall be in writing, and, together with a written justification for the
6 decision and any dissenting opinions, shall be served personally or by certified mail on all Persons involved in
7 the proceeding before the Board. All records of the Board shall be open to public inspection.

8 c. Employment of Water Engineer. The Board shall have the authority to employ a Water Engineer to
9 carry out such functions as assigned by the Board pursuant to the Law of Administration, including the
10 supervision of any water commissioners appointed by the Board. As set forth in the Law of Administration, the
11 Engineer shall hold hearings upon notice in proceedings before the Engineer and shall have the power to
12 administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of
13 documents or other evidence, and to appoint technical experts. The Tribes and the State shall enforce the
14 Engineer's subpoenas in the same manner as prescribed by the laws of the Tribes and the State for enforcing
15 a subpoena issued by the courts of each respective sovereign in a civil action. The Persons involved in the
16 controversy may present evidence and cross examine any witnesses. The Engineer shall cause all hearings to
17 be recorded, and shall determine the controversy and grant any relief allowed by the Law of Administration,
18 including a temporary order. All decisions of the Engineer shall be in writing, and, together with a written
19 justification for the decision, shall be served personally or by certified mail on all Persons involved in the
20 proceeding before the Engineer. All records of the Engineer shall be open to public inspection.

21 d. Appointment of Water Commissioner(s)

22 i. The Board shall have the authority, upon a unanimous vote of all five members of the Board, to appoint
23 one or more commissioners to provide day-to-day administration of water on the Reservation. The compensation
24 for any such commissioner and the identification of the Person(s) responsible for paying costs associated with
25 the appointment of any such commissioner must also be established by a unanimous vote of all five members
26 of the Board as part of the Board action appointing any such commissioner. Any commissioner appointed shall
27 act under the supervision of the Water Engineer.

28 ii. Under the jurisdiction of the Board, and as set forth in the Law of Administration, the commissioner(s)
29 shall have the authority to administer and distribute water only on the Reservation. The authority of any
30 commissioner(s) appointed pursuant to this subsection, as it pertains to portions of the Tribal Water Right used

1 within the FIIP, extends only to the delivery of water to FIIP diversion facilities and shall not extend to the
2 administration of that water in FIIP facilities or on lands served by the FIIP, which shall remain subject to the
3 authority of the Project Operator.

4 6. Review and Enforcement of Board Decisions.

5 a. Decisions by the Board shall be effective immediately, unless stayed by the Board. Persons involved
6 in the proceedings before the Board may appeal any final decision by the Board to a Court of Competent
7 Jurisdiction within thirty days of such decision. An appeal of a final decision of the Board shall be styled as a
8 petition for judicial review of an agency decision pursuant to the rules of procedure of the court from which review
9 is sought. The petition for judicial review shall be filed with the Board and the court and served upon all Persons
10 involved in the proceeding before the Board, as well as the Tribes, the State and the United States. Service shall
11 be accomplished according to the requirements of the court's rules of procedure.

12 b. Unless a petition is filed within thirty days of a final decision of the Board, as provided in Article IV.I.6.a,
13 any decision of the Board shall be recognized and enforced by any court with personal and subject matter
14 jurisdiction over the matter on petition by any Person, or a successor in interest, before the Board in the
15 proceeding in which the decision was made.

16 c. A Court of Competent Jurisdiction in which a timely petition is filed pursuant to Article IV.I.6.a, or any
17 court with personal and subject matter jurisdiction over the matter in which a petition to confirm or enforce is filed
18 pursuant to Article IV.I.6.b, may order such temporary or permanent relief as it considers just and proper subject
19 to the limited waivers of immunity set forth in Article IV.I.8.

20 d. An appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to
21 Article IV.I.6.a, or in which a petition to confirm or enforce is filed pursuant to Article IV.I.6.b, in the manner and
22 to the same extent as from orders or judgments of the court in a civil action.

23 e. In any petition to confirm or enforce the Board's decision, the Board shall file with the court to which
24 appeal is taken the record of the proceedings before the Board within the time and in the manner provided by the
25 court's rules of procedure.

26 f. The appellate court shall conduct the review on the record made before the Board. In considering the
27 petition, the Board's legal conclusions shall be reviewed for correctness and its factual findings for abuse of
28 discretion.

29 g. In the event that a court determines that it lacks subject matter or personal jurisdiction to rule on a
30 petition for judicial review of a Board decision, the party filing the petition shall be entitled to petition for judicial

1 review from any other Court of Competent Jurisdiction within thirty days from the date of a final court order finding
2 a lack of jurisdiction.

3 7. Public Meetings and Records

4 a. Notwithstanding any other provisions of law, the Board is a public agency for purposes of the
5 applicability of State and Tribal right to know laws.

6 b. All regular and special meetings of the Board, including all hearings conducted by the Office of the
7 Engineer or the Board, shall be open to the observation of the general public pursuant to State and Tribal open
8 meeting laws. Where there is a conflict of laws, the law that provides for greater openness to the public applies.

9 c. Where no more specific notice provisions are set forth in the Law of Administration, notice of any
10 meeting, including an agenda, shall be provided to the public in a manner and timeframe consistent with the
11 criteria set forth in State and Tribal law. Where there is a conflict of laws, the law that provides for earlier notice
12 shall apply.

13 d. The Board shall keep the following records:

14 i. minutes of all meetings;

15 ii. recordings of all hearings conducted by the Board or the Office of the Engineer;

16 iii. all documents filed with or generated by the Board or the Office of the Engineer;

17 iv. any other records required by applicable provisions of Federal, State or Tribal law, provided that if
18 there is a conflict of laws, the law that provides for more expansive record retention shall apply.

19 e. All Board records are public records and shall be made available to the public for inspection under
20 such reasonable terms and conditions as the Board shall establish.

21 8. Waiver of Immunity. The Tribes and the State hereby waive their respective immunities from suit,
22 including any defense the State shall have under the Eleventh Amendment of the Constitution of the United
23 States, in order to permit the resolution of disputes under the Compact by the Board, and the appeal or judicial
24 enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribes
25 or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties recognize
26 that only Congress can waive the immunity of the United States and that the participation of the United States
27 in the proceedings of the Board shall be governed by Federal law, including 43 U.S.C. 666.

28 J. Amendments to the Law of Administration. The Board may not amend the Law of Administration. No
29 amendment by the Tribes or the State of the Law of Administration shall be effective unless and until the other
30 makes an analogous amendment. Such modifications are pursuant to, and shall not be deemed an amendment

1 of, this Compact.

2 K. Water Rights Database. The Board shall cause all Appropriation Rights and Changes in Use
3 authorized by the Board and all uses of water registered pursuant to the Law of Administration to be entered into
4 the DNRC water rights database in a format agreed to by the Board and the DNRC.

5 ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS

6 A. No Effect on Water Rights of Other Tribes or on other Federal Reserved Water Rights.

7 1. Except as otherwise provided herein, the relationship between the Tribal Water Right described herein
8 and any water rights of any other Indian tribe or its members, or of any federally-derived water right of an
9 individual outside the boundaries of the Flathead Indian Reservation, or of the United States in its own right or
10 on behalf of such other tribes or individuals, shall be determined by the rule of priority.

11 2. Nothing in this Compact shall be construed or interpreted as a precedent to establish the nature,
12 extent, or manner of administration of the rights to water of any other Indian tribe, its members or Indian owners
13 of trust land outside of the Flathead Indian Reservation.

14 3. Nothing in this Compact is intended, nor shall it be used, to affect or abrogate a right or claim of an
15 Indian tribe other than the Confederated Salish and Kootenai Tribes.

16 4. Except as provided herein and authorized by Congress, nothing in this Compact shall be construed
17 or interpreted to establish the nature, extent, or manner of administration of rights to water of the United States
18 on Federal lands outside of the Flathead Indian Reservation.

19 B. General Disclaimers. Nothing in this Compact shall be construed or interpreted:

20 1. To preclude the Tribes, Tribal members, and Allottees, or the United States, from applying to the Water
21 Management Board for an Appropriation Right under the Law of Administration on the same basis as any other
22 Person;

23 2. As a precedent for litigation of aboriginal or reserved water rights;

24 3. As precedent for interpretation or administration of future compacts between the United States and
25 the State, or between the United States and any other state, or between the State and any other state;

26 4. As precedent for negotiation, interpretation or administration of any existing or future Compact,
27 negotiated settlement, judicial settlement or other form of accommodation of water rights involving Indian tribes
28 or individual Indians;

29 5. To preclude the possession, acquisition or exercise of Water Rights Arising Under State Law by the
30 Tribes or Allottees or members of the Tribes;

- 1 6. To limit in any way the right of the Parties or any other Person to litigate any issue or question not
2 resolved by this Compact;
- 3 7. To authorize the taking of any water right that is vested under State, Tribal or Federal law;
- 4 8. To affect the ability of tribes or qualified individuals under Title 25, Sections 151.4 and 151.8, Code
5 of Federal Regulations, to purchase land from willing sellers or the Secretary's ability to convert fee land to trust
6 land status;
- 7 9. To create or deny substantive rights through headings or captions used in this Compact;
- 8 10. To address or prejudge how the Tribal Water Right may be treated or interpreted in any interstate or
9 international water apportionment proceeding;
- 10 11. To constitute a waiver of sovereign immunity by the Tribes or the State except as expressly set forth
11 in this Compact;
- 12 12. To constitute a waiver of sovereign immunity by the United States except as expressly set forth in
13 43 U.S.C. 666 or as otherwise provided by Congress;
- 14 13. Except as expressly provided herein and as may be required by Congress, to modify the obligations
15 of any agency of the United States;
- 16 14. To limit or prohibit the Tribes, their members or Allottees, or to limit the United States in any capacity,
17 from objecting in any general stream adjudication in the Montana Water Court to any claims to water rights on
18 or off the Flathead Indian Reservation;
- 19 15. To prevent the Montana Water Court from adjudicating any properly filed claims or objections to the
20 use of water within the Flathead Indian Reservation;
- 21 16. To limit or prohibit the Tribes, their members or Allottees, or the United States in any capacity, from
22 filing any necessary action to prevent any Person or Party from interfering with the Tribal Water Right;
- 23 17. To affect or determine the applicability of any State, Tribal or Federal law not subject to this Compact,
24 including, but not limited to environmental and public safety laws, on activities of the Tribes, their members or
25 Allottees or the United States;
- 26 18. To prejudice or predetermine any right that Tribal members or Allottees have to obtain the use of a
27 portion of the Tribal Water Right under the provisions of this Compact and the Law of Administration;
- 28 19. To affect the capacity of any Tribal member or Allottee to lease his or her land;
- 29 20. To empower the Water Management Board to assess a fee for the use of water;
- 30 21. To confer any jurisdiction on the Water Management Board over any water right whose place of use

1 is located outside the exterior boundaries of the Reservation;

2 22. To limit, diminish, modify, or enlarge any Party's adjudicatory or legislative jurisdiction except as
3 expressly provided herein;

4 23. To constitute a waiver of an individual's right to object to the Compact during the Water Court decree
5 process; or

6 24. To transfer, convert, or otherwise change the ownership or trust/fee status of land on the Reservation.
7 Specifically, nothing in this Compact changes fee owned land to trust land or trust land to fee land, or in any way
8 alters the ownership status of land within the exterior boundaries of the Flathead Indian Reservation.

9 C. Other Rights Reserved.

10 1. Nothing in this Compact is intended, nor shall be interpreted or applied, in any manner to alter, limit,
11 or diminish the right of the Tribes to take all steps they deem necessary or prudent before any court or
12 adjudicative forum, any legislature or legislative entity, or any State or Federal administrative agency, including
13 but not limited to the Federal Energy Regulatory Commission, to protect any interests in Water Rights Arising
14 Under State Law that the Tribes may acquire or seek to acquire and which are associated with the Federal
15 Energy Regulatory Commission license for the Kerr Hydroelectric Project, FERC Project No. 5 (32 FERC #
16 61,070, July 17, 1985, as amended) or any other hydroelectric facility located on the Reservation subject to FERC
17 jurisdiction.

18 2. The Parties expressly reserve all rights not granted, recognized or relinquished in this Compact,
19 including but not limited to the right to the continued exercise by members of the Tribes of Tribal off-Reservation
20 rights to hunt, fish, trap and gather food and other materials, as reserved in Article III of the Hellgate Treaty of July
21 16, 1855 (12 Stat. 975).

22 D. Obligations of the United States Contingent.

23 1. Notwithstanding any language contained herein and except as authorized under Federal law, the
24 obligations of the United States under this Compact shall be contingent upon ratification and necessary
25 authorization by Congress.

26 2. The expenditure or advance of any money or the performance of any work by the United States or the
27 Tribes pursuant to this Compact which requires appropriation of money by Congress or by the Tribes is
28 contingent on such appropriation being timely made.

29 3. The Tribes and the State recognize that this Compact has not been finally approved by the United
30 States as of the date of execution by the Tribes or the State, and that ratification by the Tribes or by the State in

1 no manner limits or restricts the discretion of the United States in the negotiation of all matters related to this
2 Compact.

3 E. Obligations of the State Contingent. The expenditure or advance of any money or the performance
4 of any work by the State pursuant to this Compact that requires appropriation of money by the Montana
5 Legislature or allotment of funds shall be contingent upon such appropriation or allotment.

6 ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT

7 A. State Contribution to Settlement. The Parties agree that the State contribution to settlement shall be
8 \$55 million. The agreement to, expenditure, or advance of any State contribution which may require authorization
9 and appropriation of money by the Montana Legislature or allotment of funds is contingent on such appropriation
10 or allotment being made pursuant to Article V, Section 11(4) of the Montana Constitution. The Parties recognize
11 that the amount and structure of the State funding is contingent on action of the Montana Legislature. If the
12 Legislature appropriates funds in a manner inconsistent with the structure contemplated by the Parties in this
13 section, the Parties agree to meet and confer to consider adjustments to the funding structure and priorities
14 described in Articles IV.H.1.a and b above. Such modifications are pursuant to, and shall not be deemed an
15 amendment of, this Compact.

16 1. The State Contribution to Settlement shall be allocated as follows:

- 17 a. \$4 million for water measurement activities;
18 b. \$4 million for improving on-farm efficiency;
19 c. \$4 million for mitigating the loss of Stock Water deliveries from the FIIP;
20 d. \$30 million to offset pumping costs associated with Compact implementation and related projects; and
21 e. \$13 million to provide for aquatic and terrestrial habitat enhancement.

22 B. Federal Contribution to Settlement. The Parties agree that the Federal contribution to settlement shall
23 be negotiated by the Tribes, the State, and the United States as part of the negotiations on the Federal legislation
24 to ratify and effectuate the Compact.

25 ARTICLE VII - FINALITY

26 A. Ratification and Effectiveness of Compact.

27 1. The terms of the Compact may not be amended without the consent of all the Parties following the first
28 ratification by any Party. After the Effective Date, no provision of the Compact shall be modified except as
29 expressly provided in the Compact. Any amendment that is not expressly provided for in the Compact must be
30 ratified in the same manner as the Compact; however, if the proposed amendment concerns non-monetary

1 matters and does not affect the water rights of the Tribes determined in this Compact or other property held in
2 trust by the United States on behalf of the Tribes or Indians, the Secretary may ratify such amendment on behalf
3 of the United States, as determined by Congress. The State and the Tribes will support provisions in the Federal
4 legislation ratifying the Compact that delegates to the Secretary the authority to ratify such future amendments
5 on behalf of the United States.

6 2. Notwithstanding any other provision in the Compact, the Tribes reserve the unilateral right to withdraw
7 as a Party if:

8 a. Congress has not ratified this Compact and authorized appropriations for the Federal contribution to
9 the settlement within four years from the date on which the ratification of the Compact by the Montana Legislature
10 takes effect under State law. This is a continuing right until Congress ratifies the Compact;

11 b. Appropriations are not made in the manner contemplated by the Federal legislation ratifying this
12 Compact;

13 c. The Parties do not reach agreement on the State contribution to settlement;

14 d. The State has not authorized appropriations for the State contribution to settlement within five years
15 from the date the Compact is ratified by the United States; or

16 e. Appropriations are not made by the State in the manner contemplated by any agreement for
17 contributions to settlement made pursuant to Article VI.A.

18 3. The Tribes may exercise their right to withdraw from the Compact under Article VII.A.2 by sending to
19 the Governor of the State and to the Secretary by certified mail a resolution of the Tribal Council expressing the
20 Tribes' intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one
21 hundred and twenty days from the date of the resolution. On the date designated in the resolution for Tribal
22 withdrawal, the Compact shall become null and void without further action by any Party.

23 4. Notwithstanding any other provision in the Compact, the State reserves the unilateral right to withdraw
24 as a Party to the Compact if:

25 a. Congress has not ratified this Compact within four years from the date on which the ratification of the
26 Compact by the Montana Legislature takes effect under State law. This is a continuing right until Congress
27 ratifies the Compact;

28 b. The Tribes have not ratified this Compact within five years from the date on which the ratification of
29 the Compact by the Montana Legislature takes effect under State law;

30 c. Congress requires a State contribution to settlement that exceeds the contributions described in Article

1 VI.A; or

2 d. Congress does not authorize and appropriate the Federal share of funding agreed to pursuant to
3 Article VI.B.

4 5. The State may exercise its right to withdraw under Article VII.A.4 by sending to the Chair of the Tribal
5 Council and to the Secretary a letter delivered by certified mail from the Governor of the State expressing the
6 State's intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one
7 hundred and twenty days from the date of the letter. On the date designated in the letter for State withdrawal,
8 the Compact shall become null and void without further action by any Party.

9 B. Incorporation into Decrees.

10 1. Within one hundred eighty (180) days of the date this Compact is ratified by the Tribes, the State, and
11 the United States, whichever is latest, the Tribes, the State, and/or the United States shall file, in the general
12 stream adjudication initiated by the State, pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of
13 the proposed decree attached hereto as Appendix 38 as the decree of the water rights held by the United States
14 in trust for the Tribes, Tribal members, and the Allottees of the Tribes as well as those Water Rights Arising Under
15 State Law set forth in Article III.D.4.a.i and Article III.D.5, of which the Tribes become co-owners pursuant to this
16 Compact, and such other provisions of the Compact as are related to the determination of these water rights and
17 their administration. If the Montana Water Court does not approve the proposed decree submitted with the
18 motion within three years following the filing of the motion, the Compact shall be voidable by written agreement
19 of the State and the Tribes. If the Montana Water Court approves the proposed decree within three years, but
20 the decree is subsequently set aside by the Montana Water Court or on appeal, the Compact shall be voidable
21 by written agreement of the State and the Tribes. Any effect of the failure of approval or setting aside of the
22 decree on the approval, ratification, and confirmation by the United States shall be as provided by Congress. The
23 Parties understand and agree that the submission of the Compact to a State court or courts, as provided for in
24 the Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and does not expand the jurisdiction
25 of the State court or expand in any manner the waiver of sovereign immunity of either the United States or the
26 Tribes in the McCarran Amendment, 43 U.S.C. 666, or other provision of Federal law.

27 2. Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes
28 of 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to the contents of Appendix 38, and
29 may extend to other sections of the Compact only to the extent that they relate to the determination of water rights
30 and their administration. The final decree shall consist of the contents of Appendix 38, and such other information

1 as may be required by 85-2-234, MCA. Nevertheless, pursuant to 85-2-702(3), MCA, the terms of the entire
2 Compact must be included in the preliminary decree without alteration for the purpose of notice.

3 C. Disposition of State and Federal Suits.

4 1. On issuance of a final decree by the Montana Water Court or its successor, and the completion of any
5 direct appeals therefrom, or on expiration of the time for filing any such appeal:

6 a. the United States, the Tribes, and the State shall execute and file joint motions pursuant to Rule 41(a),
7 Fed.R.Civ.P., to dismiss without prejudice any and all claims of the Tribes, Tribal members, and Allottees and
8 any and all claims made by the United States for the benefit of the Tribes, Tribal members, and Allottees in United
9 States v. Abell, No. CIV-79-33-M (filed April 5, 1979). The case may only be resumed if either the State or the
10 Tribes exercise the rights each holds under Article VII.A;

11 b. the Tribes and the State shall execute and file joint motions to dismiss without prejudice the case
12 entitled Confederated Salish and Kootenai Tribes v. Bud Clinch, Director, Montana Department of Natural
13 Resources and Conservation, and the Montana Department of Natural Resources and Conservation, Montana
14 First Judicial Court, County of Lewis and Clark, Cause No. BDV-2001-253, Montana First Judicial District Court,
15 Lewis and Clark County, Montana;

16 c. The United States, the Tribes, and the State shall execute and file joint motions pursuant to Rule 41(a),
17 Mont.R.Civ.P., to dismiss without prejudice any and all claims of the Tribes, Tribal members, and Allottees and
18 any and all claims made by the United States for the benefit of the Tribes, Tribal members, and Allottees that
19 have been filed in the Montana Water Court as contemplated by Article VII.D.2. The case adjudicating those
20 claims may only be resumed if either the State or the Tribes exercise the rights each holds under Article VII.A.2
21 and 4; and

22 d. The Decree shall be filed by the Parties as a consent decree in Abell, or in Federal court as a new
23 proceeding after the dismissal of Abell conditional on agreement by the Parties to seek the necessary State,
24 Tribal, and Federal ratification of the Compact, if it is finally determined in a judgment binding on the State that
25 the State courts lack jurisdiction over, or that the State court proceedings are inadequate to adjudicate some or
26 all of the water rights asserted in Abell.

27 D. Settlement of Water Rights Claims.

28 1. The water rights and other benefits confirmed to the Tribes in this Compact are in full and final
29 satisfaction of and are intended to be in replacement of and substitution for all claims to water or to the use of
30 water by the Tribes, Tribal members, and Allottees and the United States on behalf of the Tribes, Tribal members,

1 and Allottees existing on the Effective Date, except for any Appropriation Rights or Water Rights Arising Under
2 State Law held by the Tribes, their members, or Allottees as of the Effective Date or acquired thereafter, which
3 shall be satisfied pursuant to their own terms.

4 2. The Tribes and United States will file all of their claims to water on and off of the Flathead Indian
5 Reservation on or before July 1, 2015, pursuant to 85-2-702(3), MCA. Upon filing, the Tribes and United States
6 will request that the Montana Department of Natural Resources and Conservation stay any action on such claims
7 pending the occurrence of the following events:

8 a. The passage of an Act of Congress ratifying the Compact and authorizing appropriations for monetary
9 settlement to the Tribes;

10 b. Approval by the Tribes of the Compact and the Act described in Article VII.D.2.a.

11 c. Issuance by the Montana Water Court of a final water right decree or decrees incorporating the water
12 rights quantified pursuant to this Compact; and

13 d. All portions of the final Water Court decree or decrees survive exhaustion of all avenues of appeal.

14 3. Upon occurrence of these events, the waiver and dismissal described in Article VII.C.1.c and VII.D.3
15 shall be accomplished.

16 4. In consideration of the water rights and other benefits confirmed to the Tribes, Tribal members, and
17 Allottees in this Compact, and of performance by the State and the United States of all actions required by this
18 Compact, and on entry of a final order issuing the decree of the Tribal Water Right held in trust by the United
19 States as quantified in this Compact and displayed in Appendix 38 and occurrence of the events set forth in
20 Article VII.D.2, the Tribes and the United States as trustee for the Tribes, Tribal members, and Allottees shall
21 waive, release, and relinquish any and all claims to water rights or to the use of water, and shall dismiss any such
22 claims filed pursuant to Article VII.D.2, existing on the Effective Date.

23 E. Settlement of Tribal Claims Against the United States. Waiver of claims against the United States by
24 the Tribes, their members and Allottees shall be as provided by Congress.

25 F. Binding Effect. After the Effective Date and the entry of a final decree by the Montana Water Court of
26 the water rights quantified by this Compact, or if necessary the Federal court in Abell, the Compact's terms shall
27 be binding on:

28 1. The State and any Person using, claiming or in any manner asserting any right under the authority of
29 the State to the use of water in the State; provided that, the validity of consent, ratification, or authorization by the
30 State is to be determined by State law;

1 WATER RESOURCES CONSERVATION, DEVELOPMENT AND ADMINISTRATION

2 PART 1 - GENERAL PROVISIONS

3 1-1-101. Authority.

4 1. This Ordinance parallels legislation adopted by the Confederated Salish and Kootenai Tribes pursuant
5 to Tribal approval of the Confederated Salish and Kootenai Tribes-Montana Compact and the Montana Water
6 Use Act of 1973 to effectuate Unitary Administration and Management on the Flathead Indian Reservation.

7 2. This Ordinance and the parallel Tribal legislation are contingently effective; neither operates with the
8 force and effect of law without the other. No modification by the Tribes or the State of Montana of these respective
9 laws shall be effective within the exterior boundaries of the Reservation unless and until the other makes an
10 analogous modification. No amendment of this Ordinance that may affect a use of the Tribal Water Right may
11 be made without Secretarial approval.

12 3. Upon the Effective Date of the Compact, this Ordinance shall govern all water rights, whether derived
13 from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses,
14 changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior
15 boundaries of the Flathead Indian Reservation. Any provision of Title 85, MCA, that is inconsistent with this Law
16 of Administration is not applicable within the Reservation.

17 1-1-102. Reserved.

18 1-1-103. Reserved.

19 1-1-104. Definitions. Unless otherwise defined herein, capitalized terms used in this Ordinance shall have
20 the meaning set forth in the Compact.

21 1. "Allottee" or "Allottees" means an owner of an interest in a tract of land held in trust by the United
22 States which was allotted pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended, or the Act of February
23 25, 1920, 41 Stat. 452, as amended.

24 2. "Appropriate" means to divert, impound, maintain an instream, inlake, inwetland or impoundment use,
25 or withdraw a quantity of water for a beneficial use on the Flathead Indian Reservation under color of law.

26 3. "Appropriation" means the diversion, impoundment, maintenance of an instream, lake, Wetland, or
27 impoundment use, or the withdrawal of a quantity of water for a Beneficial Use on the Flathead Indian Reservation
28 under color of law.

29 4. "Appropriation Right" means a right to Appropriate water issued by the Water Management Board
30 pursuant to the terms of the Compact and this Ordinance.

1 5. "Aquifer Injection" means the subsurface discharge of fluids into the ground by means of an Injection
2 Well.

3 6. "Appropriator" means a Person who Appropriates water.

4 7. "Beneficial Use" means a consumptive or non-consumptive use of water for the benefit of the
5 Appropriator, other Persons, the Tribes, one or more Tribal members, or the general public, including but not
6 limited to agricultural, stock water, domestic, fish and wildlife, cultural and religious practices, industrial, Instream
7 Flow, irrigation, mining, Mitigation Water, municipal, power, recreational uses, and Wetlands purposes.

8 8. "Business" means a building or site where commercial work is carried on, including but not limited to
9 a factory, store, or office.

10 9. "Change in Use" means an authorized change in the point of diversion, the place of use, the period
11 of use, the purpose of use, or the place of storage of an Appropriation Right issued by the Water Management
12 Board under the Compact and this Ordinance, or of an Existing Use. A changed water right retains the original
13 priority date of that right.

14 10. "Compact" means that water rights settlement entered into by the Confederated Salish and Kootenai
15 Tribes, the State of Montana, and the United States.

16 11. "Complainant" means one who files a Complaint.

17 12. "Complaint" means a written assertion of injury submitted to the Engineer pursuant to Section 3-1-102
18 of this Ordinance.

19 13. "Consumptive Use" means the amount of water used for a beneficial purpose, such as water
20 transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products, that
21 does not return to the Groundwater or surface water source.

22 14. "Designee" means an individual selected by the Engineer to exercise, in regard to a particular
23 application or objection, those powers assigned to the Engineer under Chapter II of this Ordinance. Any Staff is
24 eligible to be selected as a Designee provided that he or she has not previously worked on the particular
25 application or objection at issue.

26 15. "Developed Spring" means any artificial opening or excavation in the ground, however made,
27 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
28 yield of Groundwater, from which Groundwater is sought or can be obtained or through which it flows under
29 natural pressures or is artificially withdrawn.

30 16. "Development" means contiguous or closely grouped parcels of land under the same or affiliated

1 ownership, including, but not limited to, housing subdivisions or any combination of business and residential units.

2 17. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor
3 agency.

4 18. "Domestic Allowance" means an entitlement to use water issued to households and small businesses
5 pursuant to the provisions of Section 2-2-117 of this Ordinance; Domestic Allowances include Individual Domestic
6 Allowances, Shared Domestic Allowances, and Development Domestic Allowances.

7 19. "Domestic Use" means those water uses common to a household, including washing, drinking,
8 bathing, waste disposal, cooling and heating, domestic animals, and garden and landscape irrigation. Domestic
9 Use does not include the filling of ponds, pits, pit-dams or reservoirs.

10 20. "Effective Date" means the date on which the Compact is finally approved by the Tribes, by the State,
11 and by the United States, and on which the Law of Administration has been enacted and taken effect as the law
12 of the State and the Tribes, whichever date is latest.

13 21. "Emergency" means a situation that demands unusual or immediate action to prevent imminent injury
14 to life, property, or the environment.

15 22. "Enclosed Storage" means a storage container fully enclosed to include a cistern or tank.

16 23. "Existing Use" means a use of water under color of Tribal, State or Federal law in existence as of the
17 Effective Date, including uses in existence on that date that are eligible for either of the registration processes
18 set forth in Sections 2-1-101 through 2-1-108 of this Ordinance; provided that any portion of a Water Right Arising
19 Under State Law within the Reservation that is, at any point after the date the ratification of the Compact by the
20 Montana Legislature takes effect under State law, voluntarily relinquished or is legally determined to be
21 abandoned, relinquished, or have otherwise ceased to exist, shall be stricken from the relevant basin decree as
22 a Water Right Arising Under State Law and be entitled to no further protection as such a right or as an Existing
23 Use.

24 24. "Flathead Indian Irrigation Project" or "FIIP" means the irrigation project developed by the United
25 States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat.
26 302 (1904), and the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), and includes, but is not limited
27 to, all lands, reservoirs, easements, rights-of-way, canals, ditches, laterals, or any other FIIP facilities (whether
28 situated on or off the Reservation), head gates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies,
29 records or copies of records and all other physical, tangible objects, whether of real or personal property, used
30 in the management and operation of the FIIP.

1 25. "FIIP Influence Area" means the lands influenced by the operations of the FIIP as identified on the
2 map attached to the Compact as Appendix 2.

3 26. "Flathead Indian Reservation" or "Reservation" means all land within the exterior boundaries of the
4 Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the
5 issuance of any patent, and including rights-of-way running through the Reservation.

6 27. "Flathead System Compact Water" means that portion of the Tribal Water Right consisting of 229,383
7 acre feet per year that the Tribes may withdraw from the Flathead River or Flathead Lake, which includes up to
8 90,000 acre feet per year stored in Hungry Horse Reservoir, with a maximum total volume consumed of 128,158
9 acre feet per year.

10 28. "Groundwater" means any water that is beneath the surface of the earth.

11 29. "Groundwater Management Area" means an area designated and managed under Section 1-1-109
12 of this Ordinance.

13 30. "Heating/Cooling Exchange Well" means a Well for the purpose and with the attributes set forth in
14 Section 2-2-119(1) of this Ordinance.

15 31. "Home" means a house, apartment, or other shelter that is a permanent or temporary residence of
16 a Person, family, or household.

17 32. "Illegal" or "Illegally" means, as it pertains to the use of water, to Appropriation water not pursuant to
18 an Appropriation Right or Existing Use.

19 33. "Injection Well" means a Well utilized for injecting fluids or gases into geologic materials. Open pits,
20 ponds, or excavations are not considered Injection Wells.

21 34. "Instream Flow" means a stream flow retained in a watercourse to benefit the aquatic environment.
22 Instream Flow may include Natural Flow or streamflow affected by regulation, diversion, or other modification.
23 A water right for Instream Flow purposes is quantified for a stream reach and measured for enforcement purposes
24 at a specified point.

25 35. "Livestock" means cattle, bison, sheep, swine, horses, mules, goats, or other animals specifically
26 raised and used for food or fiber or as a beast of burden.

27 36. "Mitigation" means the reallocation of surface water or Groundwater through a Change in Use or other
28 means to offset adverse effect resulting from Net Depletion by any proposed new Appropriation.

29 37. "Mitigation Plan" means a plan as developed by an applicant to provide Mitigation.

30 38. "NRD" means the Confederated Salish and Kootenai Tribes' Natural Resources Department.

1 39. "Natural Wetland" means a Wetland area that is maintained with a natural surface water source,
2 natural Groundwater source or a combination of natural surface water and natural Groundwater without any
3 artificial means of diversion, impoundment, withdrawal, excavation, or other artificial means of control.

4 40. "Net Depletion" means the calculated volume, rate, timing, and location of reductions to a water
5 source resulting from a proposed new Appropriation that are not offset by the corresponding accretions to that
6 source caused by the proposed new Appropriation.

7 41. "Non-consumptive Use" means any beneficial use of water that does not meet the definition of
8 consumptive use.

9 42. "Other Instream Flows" means the Tribal instream flow water rights for stream reaches described in
10 Article III.C.1.d.iii of the Compact.

11 43. "Office of the Engineer" means the Engineer and Staff, acting in their official capacities.

12 44. "Person" means an individual or any other entity, public or private, including the Tribes, the State, and
13 the United States, and all officers, agents and departments of each sovereign.

14 45. "Pits, Pit-dams, Constructed Ponds, or Reservoirs" refer to bodies of water that are created by
15 man-made means and which store water for beneficial use.

16 46. "Project Manager" means the person or team of persons hired by the Project Operator to operate and
17 manage the FIIP in accordance with its direction, this and other applicable agreements, and applicable law,
18 including the Compact.

19 47. "Project Operator" means that entity with the legal authority and responsibility to operate the Flathead
20 Indian Irrigation Project.

21 48. "Public Water Supply System" means a system for the provision of water for human consumption that
22 has at least 15 service connections or that regularly serves at least 25 Persons daily for any 60 or more days in
23 a calendar year.

24 49. "Publish" or "Publication" means, unless otherwise designated, the printing of an announcement of
25 document availability, or the text of the document itself, in a newspaper of general circulation on the Reservation
26 and in the Tribal newspaper and posting on the Water Management Board's website.

27 50. "Redundant Well" means a Well to provide a backup source of water for a Public Water Supply
28 System.

29 51. "Restored Natural Wetland" means a Wetland area that, upon restoration, shall be maintained with
30 a natural surface water source, natural Groundwater source, or a combination of natural surface water and natural

1 Groundwater without any artificial means of diversion, impoundment, withdrawal, excavation, or other artificial
2 means of control.

3 52. "Secretary" means the Secretary of the United States Department of the Interior or the Secretary's
4 duly assigned representative.

5 53. "Shall" means a mandatory and not a discretionary act.

6 54. "Shared Well" means a single Well that is physically manifold to multiple homes and/or businesses
7 and is cooperatively used pursuant to a Shared Well Agreement.

8 55. "Shared Well Agreement" means a legally binding document that stipulates the manner in which a
9 Shared Well is jointly used between or among all Homes or Businesses connected to the well; to be valid, it must
10 be signed by representatives for each Person having a possessory interest in each individual Home or Business
11 connected to a Shared Well.

12 56. "Spring" means a perennial hydrologic occurrence of water involving the natural flow of water
13 originating from beneath the land surface and arising to the surface of the ground.

14 57. "Staff" means the employees, contractors and others assigned to or engaged by the Board or the
15 Engineer to assist or facilitate the Engineer in carrying out the duties assigned to the Engineer by the Compact
16 and this Ordinance, and by the Board pursuant to the same.

17 58. "Stock Tank" means a 30 to 1500 gallon tank used to provide drinking water for Livestock that is
18 equipped with a water level regulator that shuts off supply to keep the Stock Tank from overflowing.

19 59. "Substitute Well" means a Well that replaces an existing Well which is to be abandoned.

20 60. "Temporary Emergency Appropriation" means the temporary beneficial use of water necessary to
21 protect lives, property, or the environment, by reason of fire, storm, earthquake or other disaster, or unforeseen
22 combination of circumstances which call for immediate action. An appropriation made necessary due to drought
23 conditions is not a temporary emergency appropriation.

24 61. "Temporary Groundwater Management Area" means an area established pursuant to Section
25 1-1-109(10) of this Ordinance.

26 62. "Tribal Member" means a Person who is lawfully enrolled by and whose name appears on the official
27 enrollment list of the Confederated Salish and Kootenai Tribes.

28 63. "Tribal Water Right" means the water rights of the Confederated Salish and Kootenai Tribes, including
29 any Tribal member or Allottee, that arise under Federal law, as set forth in Article III.A, Article III.C.1.a through
30 j, Article III.C.1.k.i, Article III.C.1.l.i, Article III.D.1 through 3, and Article III.D.7 and 8 of the Compact. The term

1 "Tribal Water Right" also includes those rights identified in Article III.H of the Compact that are appurtenant to
2 lands taken into trust by the United States on behalf of the Tribes.

3 64. "Tribes" means the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and all
4 officers, agencies, and departments thereof.

5 65. "Waste" or "Wasting" means the unreasonable loss of water resulting from the design, construction,
6 operation or maintenance of a water diversion, storage or distribution facility, Well, Developed Spring, or the
7 application of water to anything but a beneficial use.

8 66. "Water Engineer" or "Engineer" means the Person satisfying the criteria in Section 1-2-109 of this
9 Ordinance employed by the Water Management Board pursuant to Article IV.I.5.c of the Compact to exercise the
10 powers and duties of the Water Engineer as set forth in the Compact and this Ordinance.

11 67. "Water Management Board" or "Board" means the board created by Article IV.I of the Compact and
12 vested with the responsibilities set forth in the Compact and in Tribal and State law for the administration of water
13 within the Reservation.

14 68. "Water Rights Arising Under State Law" means those valid water rights Arising Under State Law
15 existing as of the Effective Date and not subsequently relinquished or abandoned, as those rights are: decreed
16 or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by the DNRC; exempted
17 from filing in the Montana general stream adjudication pursuant to 85-2-222, MCA; or excepted from the
18 permitting process pursuant to 85-2-306, MCA.

19 69. "Well" means any artificial opening or excavation in the ground, however made, by which
20 Groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially
21 withdrawn.

22 70. "Well Log Report" means DNRC Form No. 603 (see ARM 36.12.102), or any successor reporting form
23 and requirement promulgated in State law.

24 71. "Well Shaft Casing" means an impervious durable pipe placed in a well or Developed Spring to
25 prevent the walls from caving, to seal off surface drainage, or undesirable water, gas, or other fluids to prevent
26 their entering the well, and to prevent the Waste of Groundwater.

27 72. "Wetland" means an area that is inundated or saturated by surface water or Groundwater at a
28 frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence
29 of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes,
30 bogs and similar areas.

1 73. "Wetland Quantified Appropriation Right" means an Appropriation Right issued for a Wetlands
2 purpose that utilizes any man-made diversions, impoundment, withdrawals, excavations, or other artificial means
3 for the purposes of appropriation for either all or a portion of a Wetland.

4 74. "Wetland Protective Appropriation Right" means an Appropriation Right issued for either a Natural
5 Wetland or Restored Natural Wetland.

6 75. "Works" means all property, real or personal, necessary or convenient to the appropriation,
7 conservation, storage, diversion, distribution, development, screening and utilization of water.

8 1-1-105. Measurement of Water. Upon the effective date of this Ordinance, legal standards of
9 measurement of water within the Flathead Reservation shall be as follows:

10 1. Flow rates shall be measured in cubic feet per second, unless otherwise provided herein. Where
11 documentary evidence of an existing use is expressed in gallons per minute, 448.8 gallons per minute shall be
12 considered equivalent to a flow of one cubic foot per second. Where documentary evidence of an existing use
13 is expressed in statutory or miner's inches, 40 statutory or miner's inches shall be considered equivalent to a flow
14 of one cubic foot per second.

15 2. Volumes of water shall be measured in acre-feet, unless otherwise provided herein. One acre-foot shall
16 be considered equivalent to a volume of 43,560 cubic feet. One cubic foot shall be considered equivalent to a
17 volume of 7.48 gallons.

18 1-1-106. Measurement of Time. Whenever in this Ordinance an action is required to be performed within
19 a certain number of days, the time for completion of the act shall be measured in calendar days unless the last
20 day falls on a Friday, Saturday, Sunday, or Tribal, State or Federal legal holiday, in which case the time for
21 performance is extended to the next subsequent business weekday.

22 1-1-107. Appropriation Rights Allowed.

23 1. The following Appropriation Rights or Changes in Use may be authorized by the Board pursuant to the
24 Compact and this Ordinance:

25 a. Appropriation Rights for Groundwater appropriations for Redundant or Substitute Wells as set forth
26 in Section 2-2-115 of this Ordinance.

27 b. Appropriation Rights for Stock Water Allowances as set forth in Section 2-2-116 of this Ordinance.

28 c. Appropriation Rights for Domestic Allowances as set forth in Section 2-2-117 of this Ordinance.

29 d. Appropriation Rights for uses of Flathead System Compact Water as set forth in Section 2-2-118 of
30 this Ordinance.

1 e. Appropriation Rights for non-consumptive geothermal heating or cooling exchange Wells as set forth
2 in Section 2-2-119 of this Ordinance.

3 f. Appropriation Rights for Temporary Emergency Appropriations as set forth in Section 2-2-120 of this
4 Ordinance.

5 g. Appropriation Rights or Change in Use authorizations for Wetlands as set forth in Sections 2-2-123
6 and 2-2-124 of this Ordinance.

7 h. Appropriation Rights for Non-consumptive Uses, including, but not limited to, hydropower generation
8 and not including flow-through ponds.

9 i. Appropriation Rights for which adverse effects to existing Appropriators are offset by Mitigation.

10 j. Changes in Use of all Appropriation Rights or Existing Uses except for those Appropriation Rights
11 authorized under subsections (1)(a), (1)(b), (1)(c), (1)(e), (1)(f), (1)(k), or (1)(l) of this Section or those for Existing
12 Uses exempt from the permitting requirements of 85-2-306, MCA, or from the claim filing requirements of
13 85-2-221, MCA, as set forth in 85-2-222, MCA; provided that a use authorized under subsection (1)(h) may not
14 be changed from a Non-consumptive Use to a consumptive use.

15 k. Appropriation Rights to appropriate surface water to conduct response actions related to natural
16 resource restoration required for:

17 i. remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and
18 Liability Act of 1980, 42 U.S.C. 9601, et seq.;

19 ii. aquatic resource activities carried out in compliance with and as required by the federal Clean Water
20 Act of 1977, 33 U.S.C. 1251 through 1387; or

21 iii. remedial actions taken pursuant to the Remedial Action Upon Release of Hazardous Substance Act,
22 Title 75, chapter 10, part 7, MCA.

23 No Appropriation Rights issued pursuant to this subsection may be used for dilution.

24 l. Appropriation Rights for uses of surface water for or by a municipality or regional distribution system.

25 m. Appropriation Rights for new uses of the Tribal Water Right by the Tribes, Tribal Members, or
26 Allottees, provided that any such new uses be sourced from:

27 i. Flathead System Compact Water; or

28 ii. another source, provided that any adverse effects to existing Appropriators caused by the Net
29 Depletion of the new Appropriation Right must be offset by Mitigation pursuant to Section 1-1-112 of this
30 Ordinance.

1 2. Other than those Appropriation Rights set forth in subsection (1) of this Section, the Board may not
2 grant an Appropriation Right or other authorization to appropriate surface water or Groundwater within the
3 exterior boundaries of the Flathead Indian Reservation.

4 1-1-108. Reservation Water Rights Database. The Board shall cause all Appropriation Rights and
5 Changes in Use authorized by the Board, including those uses registered pursuant to the provisions of Sections
6 2-1-101 through 2-1-107 of this Ordinance, to be entered into the DNRC water rights database in a format agreed
7 to by the Board and the DNRC.

8 1-1-109. Groundwater Management Areas. The Board may designate, modify, or repeal either permanent
9 or Temporary Groundwater Management Areas as provided in this part.

10 1. Each designation of a Groundwater Management Area shall identify the need for the special
11 management, the boundaries of the area, the water resources targeted for special management, and the specific
12 restrictions that will apply in the Groundwater Management Area.

13 2. The designation, modification, or repeal of a Groundwater Management Area may be initiated by
14 submission of a correct and complete petition by:

- 15 a. the Tribes, the State, or the United States;
16 b. a local public health agency;
17 c. a municipality, county, or conservation district; or
18 d. at least one-third of the water rights holders in a proposed Groundwater Management Area.

19 3. A correct and complete petition shall:

- 20 a. be in a form prescribed by the Board;
21 b. contain facts and analysis prepared by a hydrologist, hydrogeologist, qualified scientist, or a qualified
22 licensed professional engineer demonstrating the existence of one or more of the criteria set forth in subsection
23 (8) are met; and

24 c. describe proposed measures, if any, needed to mitigate effects of the criteria identified in subsection
25 (8) of this Section; and that are alleged in the petition or describe the rationale as to why a Groundwater
26 Management Area should be repealed or modified.

27 4. Upon receipt of a completed petition complying with subsection (3) of this Section, the Office of the
28 Engineer shall date stamp the petition.

29 5. Office of the Engineer review:

- 30 a. within 180 days of the date of receipt of the petition pursuant to subsection (4) of this Section, the

1 Office of the Engineer shall:

2 i. determine in writing that the petition is correct and complete; or

3 ii. notify the petitioner of any defects in a petition, with an explanation in writing of the defect(s).

4 b. any petition that is returned pursuant to subsection (5)(a)(ii) of this Section and not corrected within
5 90 days from the date of return shall be deemed terminated.

6 c. if the Office of the Engineer does not notify the petitioner pursuant to subsection (5)(a) of this Section,
7 the petition shall be treated as correct and complete.

8 6. Board review:

9 a. within 60 days after a petition is determined to be correct and complete, the Board shall:

10 i. deny the petition in writing in whole or part, stating the reasons for denial;

11 ii. inform the petitioner in writing that the Board will study the information presented in the petition for a
12 period not to exceed 90 days before denying or proceeding with the petition; or

13 iii. publish notice of the Board's consideration of action concerning a permanent or Temporary
14 Groundwater Management Area pursuant to subsection (8) of this Section.

15 b. failure of the Board to act under subsection (6)(a) of this Section shall be deemed a denial of the
16 petition.

17 7. If the Board determines that a correct and complete petition contains sufficient information to warrant
18 the Board granting the petition, the Board shall proceed to hear the petition. The Board shall provide public notice
19 of the hearing by:

20 a. publishing a notice at least once each week for 3 successive weeks, with the first notice not less than
21 30 days before the date of the hearing in a newspaper of general circulation on the Reservation;

22 b. serving by mail a copy of the notice, not less than 30 days before the hearing, upon each Person or
23 public agency known from an examination of the records of the Board to be a water right holder within the
24 proposed or existing Groundwater Management Area;

25 c. serving by mail a copy of the notice upon any other Person, including Tribal, State or federal agencies,
26 that the Board knows to be interested in or affected by the proposed designation, modification, or repeal of a
27 Groundwater Management Area.

28 d. the notice under subsections (7)(a) through (7)(c) must include a summary of the basis for the
29 proposed action. Publication and mailing of the notice as prescribed in this Section, when completed, is
30 considered to be sufficient notice of the hearing to all interested parties.

1 e. the Board shall make available to the public on its website a complete copy of the petition or request
2 to designate, modify, or repeal either permanent or Temporary Groundwater Management Areas.

3 8. The Board may designate a permanent Groundwater Management Area if it finds by a preponderance
4 of the evidence that any of the following criteria have been met:

5 a. current or projected reductions of recharge to the aquifer or aquifers within the boundaries of the
6 proposed permanent Groundwater Management Area will cause Groundwater levels to decline to the extent that
7 water rights holders cannot reasonably exercise their water rights;

8 b. current or projected Groundwater withdrawals from the aquifer or aquifers in the boundaries of the
9 proposed Groundwater Management Area have reduced or will reduce Groundwater levels or surface water
10 availability necessary for water rights holders to reasonably exercise their water rights;

11 c. current or projected Groundwater withdrawals from the aquifer or aquifers in the proposed permanent
12 Groundwater Management Area have impaired or will impair Groundwater quality necessary for water right
13 holders to reasonably exercise their water rights based on relevant water quality standards;

14 d. Groundwater within the proposed permanent Groundwater Management Area is not suitable for any
15 beneficial use; or

16 e. public health, safety, or welfare is or will become at risk.

17 9. Monitoring and studies:

18 a. if the Board finds that sufficient facts, including monitoring information, are not available to designate
19 a permanent Groundwater Management Area, the Board may designate a Temporary Groundwater Management
20 Area to allow studies to obtain the facts needed to:

21 i. correct deficiencies that the Board identifies in a petition for a permanent Groundwater Management
22 Area;

23 ii. determine the extent to which the criteria identified in subsection (8) are met or not met;

24 iii. determine appropriate control measures to implement to designate a permanent Groundwater
25 Management Area.

26 b. the Board shall set the length of time that the Temporary Groundwater Management Area shall be in
27 effect. The term of a Temporary Groundwater Management Area may be extended by the Board, but may not
28 exceed a total of 6 years.

29 c. the Board shall determine the responsibility for funding the costs associated with subsection (9)(a).
30 Any person on whom a funding responsibility is placed by the Board pursuant to this subsection may appeal that

1 determination to a Court of Competent Jurisdiction, which shall review the determination for an abuse of
2 discretion.

3 d. prior to designating a Temporary Groundwater Management Area, the Board shall provide notice and
4 the opportunity for public hearing pursuant to the notice provisions of subsection (7) of this Section.

5 e. a Temporary Groundwater Management Area designation is for the purpose of monitoring and study
6 and shall not include the control provisions set forth in subsection (10) of this Section, other than measurement,
7 water quality testing, and reporting.

8 f. prior to expiration of a Temporary Groundwater Management Area, and subject to the limitations of
9 subsection (9)(b) of this Section, the Board may amend or repeal the establishment of the Temporary
10 Groundwater Management Area, or may designate a permanent Groundwater Management Area under this
11 Section.

12 10. A permanent Groundwater Management Area may include, but is not limited to, one or more of the
13 following provisions:

14 a. closing the permanent Groundwater Management Area to further appropriation of surface water and/or
15 Groundwater;

16 b. restricting the development of future surface water and/or Groundwater appropriations within the
17 permanent Groundwater Management Area;

18 c. prohibiting or restricting the issuance of Stock Water Allowances pursuant to Section 2-2-116 of this
19 Ordinance;

20 d. prohibiting or restricting the issuance of Domestic Allowances pursuant to Section 2-2-117 of this
21 Ordinance;

22 e. requiring measurement and reporting of future surface water or Groundwater appropriations within the
23 permanent Groundwater Management Area;

24 f. requiring water conservation measures within the permanent Groundwater Management Area;

25 g. requiring mitigation of Groundwater withdrawals within the permanent Groundwater Management Area;

26 h. reporting data to the Board within the permanent Groundwater Management Area; and

27 i. other provisions that the Board determines are appropriate and adopts.

28 11. The Board, upon petition, may modify or repeal a Groundwater Management Area. Any petition
29 seeking the modification or repeal of a permanent Groundwater Management Area must demonstrate by a
30 preponderance of the evidence that current or projected recharge to the aquifer or aquifers or changes to current

1 or projected Groundwater withdrawals from the aquifer or aquifers in the boundaries of an existing Groundwater
2 Management Area justify modification or repeal of that Groundwater Management Area.

3 12. Appeal from any final decision of the Board concerning the designation, modification or repeal of any
4 permanent Groundwater Management Area pursuant to this Section shall be as set forth in Section 2-2-112 of
5 this Ordinance.

6 13. If the Board determines that it is appropriate for a Groundwater Management Area identified pursuant
7 to this section to extend to an area adjacent to but outside the boundaries of the Reservation, the Board, through
8 the Office of the Engineer, may petition the DNRC, pursuant to 85-2-506(2)(c)(i), MCA, to designate a Controlled
9 Groundwater Area in that adjacent area. Designation or modification by the DNRC of a Controlled Groundwater
10 Area in any such adjacent area shall be governed by the procedures set forth in 85-2-506, MCA.

11 1-1-110. Standards for Applications for Appropriation Rights and Changes in Use. For any application
12 for an Appropriation Right or Change in Use that is not one of the categories of Appropriation Right identified in
13 Sections 1-1-112(1) or 2-2-118 of this Ordinance, in addition to whatever information is required by specific
14 provisions of the Ordinance, all applications for Appropriation Rights and Changes in Use must include:

15 1. An identification of the proposed beneficial use.

16 2. An identification of the source of water supply.

17 3. A project description, including an identification of any water right(s) to be changed to a new use, if
18 applicable.

19 4. A legal description of the point of diversion and the place of use.

20 5. The monthly volume(s) and flow rate(s) of the water supply to be diverted, withdrawn, or impounded,
21 and the monthly volume(s) to be consumed; however the Office of the Engineer may require a more frequent
22 quantification time step.

23 6. The monthly historic diverted, withdrawn, or impounded volume(s) and flow rate(s) and the historically
24 consumed volume(s) of the water right(s) to be changed to a new use, if applicable; however, the Office of the
25 Engineer may require a more frequent quantification time step.

26 7. The calculations, references and methodologies used to determine the volume(s) and flow rate(s) in
27 subsections (5) and (6) above.

28 8. Identification of physical water availability and existing legal demands on the source of supply of water.

29 9. Evidence that the proposed means of diversion, construction, and operation of the appropriation Works
30 are adequate.

1 10. Evidence of possessory interest or the written consent of the person with the possessory interest in
2 the property where the water is to be put to beneficial use, diverted, conveyed, impounded, stored, transported,
3 withdrawn, used, and distributed.

4 11. Information showing that the water quantity or quality of an Appropriator will not be adversely affected,
5 if applicable.

6 12. A United States Geological Survey (USGS) quadrangle map or United States Department of
7 Agriculture (USDA) aerial photo must be included with the application.

8 a. The following items shall be clearly identified on the map:

- 9 (1) North arrow;
10 (2) Scale bar;
11 (3) Section corners and numbers;
12 (4) Township and range numbers;
13 (5) Property lines and ownership;
14 (6) Source(s);
15 (7) Point(s) of diversion;
16 (8) Means of conveyance;
17 (9) Place(s) of use;
18 (10) Place(s) of storage, if applicable:
19 (11) Surface water features;
20 (12) Measurement and instrument locations associated with the application; and
21 (13) The place(s) of use of all associated and supplemental water rights.

22 b. If the application is for a Change in Use, the site map shall also show the historic point(s) of diversion,
23 place(s) of use, and place(s) of storage, as applicable.

24 c. Additional maps shall be submitted if the information on one map cannot convey the required
25 information clearly and shall be of the same scale so the maps can be overlain.

26 1-1-111. Groundwater Diversion Standards

27 1. Wells:

28 a. Persons that drill, make, or construct Wells, including monitoring Wells, on the Reservation shall
29 comply with Title 37 Chapter 43, MCA, and ARM 36 Chapter 21 licensing, conduct, and regulatory requirements,
30 or any successor provisions promulgated in State law.

1 b. All Well construction on the Reservation shall meet the standards set forth in ARM 36 Chapter 21, or
2 any successor provisions promulgated in State law.

3 c. Construction and operations of all Wells must comply with all applicable federal, State, Tribal, and local
4 environmental regulations.

5 2. Developed Springs:

6 a. All Developed Spring collection components, including but not limited to infiltration galleries, infiltration
7 basins, and French drains, shall be installed and buried under the surface of the ground.

8 b. All means of storage and conveyance, including but not limited to supply pipes, cisterns, and pump
9 housings, shall be sealed and made impervious to water and designed in a manner that protects the source from
10 backflow and surface contamination.

11 c. Open pits, ponds, or excavations shall not be used as a means of diversion for Developed Springs.

12 d. Construction and operation of all Developed Springs must comply with all applicable federal, State,
13 Tribal, and local environmental regulations.

14 3. Aquifer Injection and Injection Wells are not allowed except when used exclusively for Heating/Cooling
15 Exchange Wells.

16 1-1-112. Mitigation

17 1. Unless any provision of a Groundwater Management Area established pursuant to Section 1-1-109
18 of this Ordinance specifically requires Mitigation for any of the following categories of Appropriation Rights,
19 Mitigation is not required for Appropriation of:

20 a. Redundant or Substitute Wells pursuant to Section 2-2-115 of this Ordinance;

21 b. Stock Water Allowances pursuant to Section 2-2-116 of this Ordinance;

22 c. Domestic Allowances pursuant to Section 2-2-117 of this Ordinance;

23 d. Heating/Cooling Exchange Wells pursuant Section to 2-2-119 of this Ordinance;

24 e. Temporary Emergency Appropriations pursuant to Section 2-2-120 of this Ordinance; or

25 f. Short-term uses of an Appropriation Right pursuant to Sections 2-2-121 and 2-2-122 of this Ordinance.

26 2. Mitigation is not required for Appropriation of Flathead System Compact Water Pursuant to 2-2-118
27 of this Ordinance.

28 3. Any Appropriation Right that results in a Net Depletion of either surface water or Groundwater shall
29 offset the entire Net Depletion that results in adverse effect to any Appropriator through the use of Mitigation
30 pursuant to a Mitigation Plan.

1 4. An adverse effect to a Wetland Protective Appropriation Right recognized in Article III.C.1.f of the
2 Compact or a Wetland Protective Appropriation Right issued pursuant to Section 2-2-123 of this Ordinance that
3 requires Mitigation shall include, but is not limited to, a water supply alteration that would cause:

- 4 a. reductions of the Wetland boundary in excess of the normal range of variability in water; or
- 5 b. unnatural Wetland plant community change.

6 5. A Mitigation Plan must include:

- 7 a. a plan of use for the proposed Appropriation Right for which the Mitigation Plan is required;
- 8 b. an identification of the location, volume, and timing (by monthly or more frequent time step as
9 determined by the Engineer) of the adverse effect to be mitigated;
- 10 c. if necessary, evidence that an application for a Change in Use has been submitted;
- 11 d. the amount of water reallocated through exchange or substitution that is required to mitigate the
12 adverse effect;
- 13 e. evidence that the water for Mitigation is legally and physically available;
- 14 f. evidence of how the Mitigation Plan will offset the Net Depletion in a manner that will offset any adverse
15 effect to any Appropriator; and
- 16 g. evidence that the necessary water quality permits, if any, have been applied for pursuant to the Tribal
17 Water Quality Management Ordinance.

18 6. No applicant for an Appropriation Right shall be required to provide more Mitigation than the quantity
19 needed to offset the adverse effects of that proposed new Appropriation Right on any Appropriator.

20 7. Compliance with a Mitigation Plan and proof of any water quality permit(s) issued pursuant to the Tribal
21 Water Quality Management Ordinance, if applicable, must be included as a written condition on any Appropriation
22 Right or Change in Use authorization that is conditioned on Mitigation.

23 8. If compliance with a Mitigation Plan or any applicable water quality permit(s) issued pursuant to the
24 Tribal Water Quality Management Ordinance ceases or terminates, the holder of the Appropriation Right
25 conditioned on compliance with the Mitigation Plan shall immediately notify the Office of the Engineer, and use
26 of the Appropriation Right shall be suspended immediately until a new Mitigation Plan is approved and
27 implemented pursuant to this Ordinance.

28 1-1-113. Codification, Severability and Defense.

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

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

2 3. No elected official of the State of Montana, or any political subdivision thereof, or of the United States,
3 or of the Tribes is eligible for nomination to the Board while holding such elective office. However, a nominee for
4 Board membership shall not be disqualified by reason of the fact that he or she is an employee or contractor of
5 the State of Montana or any political subdivision thereof, or of the Tribes, or of the United States.

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

9 5. No Board member may vote on any application or appeal that the member participated in personally
10 and substantially in any non-Board capacity.

11 1-2-104. Public Meetings and Records. As set forth in Article IV.1.7 of the Compact:

12 1. Notwithstanding any other provisions of law, the Board is a public agency for purposes of the
13 applicability of State and Tribal right to know laws.

14 2. All regular and special meetings of the Board, including all hearings conducted by the Office of the
15 Engineer or the Board pursuant to the provisions of Chapter 2 Part 2, and Chapter 3 of this Ordinance, shall be
16 open to the observation of the general public pursuant to State and Tribal open meeting laws. Where there is a
17 conflict of laws, the law that provides for greater openness to the public applies.

18 3. Where no more specific notice provisions are set forth in this Ordinance, notice of any meeting,
19 including a draft agenda, shall be provided to the public in a manner and on a timeframe consistent with the
20 criteria set forth in State and Tribal law. Where there is a conflict of laws, the law that provides for earlier notice
21 shall apply.

22 4. The Board shall keep the following records:

23 a. minutes of all meetings;

24 b. recordings of all hearings conducted by the Board or the Office of the Engineer pursuant to the
25 provisions of Chapter 2 Part 2, and Chapter 3 of this Ordinance;

26 c. all documents filed with or generated by the Board or the Office of the Engineer pursuant to this
27 Ordinance;

28 d. any other records required by applicable provisions of State or Tribal law, provided that if there is a
29 conflict of laws, the law that provides for more expansive record retention shall apply.

30 5. All Board records are public records and shall be made available to the public for inspection under

1 such reasonable terms and conditions as the Board shall establish.

2 1-2-105. Compensation and Expenses of the Board. As set forth in Article IV.I.2.h of the Compact, each
3 Board member shall receive such compensation for services and reimbursement for expenses for attendance
4 at Board meetings as shall be fixed by the State and the Tribal Council for the Board members appointed by the
5 same. The compensation for the fifth Board member shall set jointly by the State and the Tribal Council. The
6 compensation and expenses of the Federal ex officio member shall be paid by the United States.

7 1-2-106, Quorum and Voting of the Board. As set forth in Article IV.I.3 of the Compact, four voting
8 members of the Board shall constitute a quorum. No Board action may be voted upon in the absence of a
9 quorum. All Board decisions shall be by affirmative vote of a majority of the Board. If a proposal put to a vote of
10 a quorum of Board members ends in a tie vote, the proposal, or matter under consideration is deemed
11 disapproved or denied.

12 1-2-107. Powers and Duties of the Board.

13 1. The Board shall have those powers and duties set forth in Article IV.I.4 and 5 of the Compact and in
14 this Ordinance, including those powers necessary and proper to carry out all Board responsibilities as set forth
15 in the Compact and this Ordinance.

16 2. As set forth in the Compact, the Board shall have exclusive jurisdiction to resolve any controversy as
17 between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation
18 over the meaning and interpretation of the Compact and this Ordinance.

19 1-2-108. Technical Assistance to the Board and the Engineer. The NRD and the DNRC shall, within the
20 limits of their respective expertise and resources, and when so requested by the Board or the Office of the
21 Engineer, collect, compile, and analyze information related to waters of the Reservation, their use, and the Works
22 associated with their use, and produce reports and provide technical assistance and advice to the Board or the
23 Office of the Engineer.

24 1-2-109. Qualifications of the Water Engineer.

25 1. The Water Engineer shall be a professional in one or more of the following water resources or
26 management related fields:

27 a. water resources management;

28 b. hydrology;

29 c. hydrogeology;

30 d. environmental science;

- 1 e. business or public administration;
- 2 f. biological science;
- 3 g. civil engineering;
- 4 h. environmental engineering; or
- 5 i. law.

6 2. The Water Engineer shall have a minimum of a bachelor's degree with 10 years of increasingly
7 responsible experience, including three years of management experience, or a master's degree with seven years
8 of increasingly responsible experience, including three years of management experience, or an appropriate
9 combination of education and experience.

10 3. The Water Engineer shall have the skill to deal with a diverse and sometimes contentious public.

11 4. The Water Engineer shall have the ability to:

- 12 a. successfully manage the water resources staff;
- 13 b. provide technical assistance to the Board; and
- 14 c. act as a hearings officer and document decisions and orders in writing.

15 1-2-110. Duties of the Engineer. The Engineer shall be an employee of the Board and shall exercise the
16 duties set forth in the Compact and this Ordinance, and as assigned by the Board pursuant to the Compact and
17 this Ordinance. These duties include, but are not limited to:

18 1. The administration of water rights on the Reservation, and the enforcement of the terms of this
19 Ordinance and the conditions of all Appropriation Rights, determinations, orders, regulations, plans, policies,
20 guidelines, and other actions taken by the Engineer or the Board, pursuant to the Compact and this Ordinance;

21 2. Coordination with the Project Manager, as far as practicable, of the operations of the FIIP with the
22 administration and enforcement of water rights outside of the FIIP;

23 3. The supervision and management of Staff; and

24 4. The development and submission to the Board of budget requests for approval by the Board and
25 forwarding to the Tribes and State for the purpose of securing necessary appropriations.

26 1-2-111. Immunity from Suit. Members of the Board, the Engineer, any Designee, any Water
27 Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, and any Staff shall be immune from suit
28 for damages arising from the lawful discharge of an official duty associated with the carrying out of powers and
29 duties set forth in the Compact or this Ordinance relating to the authorization, administration or enforcement of
30 water rights on the Reservation.

1 1-2-112. Filing Fees. A filing fee shall be paid at the time an application is filed with the Office of the
2 Engineer under Section 2-1-107, 2-2-104, 2-2-115, 2-2-116, 2-2-117, 2-2-118, 2-2-119, 2-2-123, or 2-2-124 of
3 this Ordinance. The amount of the fee shall be the same as the fee charged by DNRC for the same type of
4 application under State law, as those fees may be modified from time to time by the DNRC. The Board shall post
5 notice of the applicable amount of these fees at the Office of the Engineer and on the Board's website.

6 CHAPTER II WATER USE

7 PART 1. GENERAL PROVISIONS

8 2-1-101. Registration of Uses of the Tribal Water Right in Existence as of the Effective Date of the
9 Compact.

10 1. Pursuant to Article III.C.1.b of the Compact, the Tribes, each Tribal Member, and each Allottee who
11 claims to have an Existing Use of waters of the Reservation which is part of the Tribal Water Right shall file a
12 registration of Existing Use of the Tribal Water Right with the Engineer. Uses of the Tribal Water Right for which
13 abstracts are appended to this Compact, including uses on the FIIP, are exempt from this registration
14 requirement.

15 2. Historically irrigated allotments with serviceable delivery systems that are held by individuals and in
16 trust by the United States, and are not served by the FIIP, shall be eligible to be registered pursuant to the
17 provisions of Sections 2-1-101 et seq. of this Ordinance even if such allotments are not being irrigated on the
18 Effective Date of the Compact.

19 3. The NRD shall provide assistance to the Tribes, Tribal Members, and Allottees in preparing
20 registrations of Existing Uses of the Tribal Water Right for filing.

21 4. No Tribal Member or Allottee may exercise, for the same water use, both a registration of Existing Use
22 of the Tribal Water Right and a Water Right Recognized Under State Law.

23 2-1-102. Process for Registration of Existing Use of the Tribal Water Right.

24 1. The Tribes, Tribal Members, and Allottees claiming a use of water that falls under the terms of Section
25 2-1-101 of this Ordinance shall, within five years of the Effective Date of this Ordinance, file a Registration Form
26 with the Board documenting the registration of Existing Use of the Tribal Water Right and identifying:

- 27 a. the rate and volume of water used;
28 b. the source of supply for the use;
29 c. the point of diversion by legal land description;
30 d. the place of use by legal land description;

- 1 e. the period of use
- 2 f. the period of diversion;
- 3 g. the place of storage (if applicable);
- 4 h. the capacity of storage (if applicable);
- 5 i. the purpose; and
- 6 j. the means of diversion.

7 2. Upon receipt, the Board shall transmit the Registration Form to the Office of the Engineer.

8 3. Upon receipt of the Registration Form, the Office of the Engineer shall review the Registration Form
9 within 180 days and may either issue a Registration Certificate or return a defective Registration Form to the filer,
10 together with the reasons for returning it. Upon receiving a corrected Registration Form, the Office of the Engineer
11 has 90 days from the certified receipt of the corrected Registration Form to issue a Registration Certificate or
12 reject the registration. If the Office of the Engineer neither issues a Registration Certificate nor rejects the
13 registration within the initial 180 day review period, the Registration Form shall be deemed approved and the
14 Board shall issue a Registration Certificate. If the Office of the Engineer neither issues a Registration Certificate
15 nor rejects the registration within 30 days of certified receipt of a corrected Registration Form, the Registration
16 Form shall be deemed approved and the Board shall issue a Registration Certificate.

17 4. Any Person filing a Registration Form or a corrected Registration Form with the Office of the Engineer
18 pursuant to subsections (1) and (3) of this Section who is dissatisfied with the rejection of that corrected
19 Registration Form by the Office of the Engineer pursuant to subsection (3) of this Section may appeal that
20 rejection to the Board by filing a notice of appeal to the Board within 30 days of the rejection of the corrected
21 Registration Form. To be filed, a notice must be placed in the custody of the Board within the time fixed for filing.
22 Filing may be accomplished by mail addressed to the Board, but filing shall not be timely unless the papers are
23 actually received within the time fixed for filing. Immediately upon receipt by the Board, the notice of appeal shall
24 be date stamped.

25 5. Any appeal to the Board filed pursuant to subsection (4) of this Section shall be conducted pursuant
26 to the provisions of Section 3-1-104 of this Ordinance.

27 2-1-103. Fee for Filing Registration of Existing Use of the Tribal Water Right. The Board shall not charge
28 a fee for the processing of registrations or corrected registrations of Existing Uses of the Tribal Water Right.

29 2-1-104. Tribal Member and Allottee Entitlements Pursuant to 25 U.S.C. Section 381. All Tribal Members'
30 and Allottees' entitlements pursuant to 25 U.S.C. Section 381 are hereby recognized and confirmed. The

1 attributes of these entitlements shall be defined through either:

2 1. the process set forth in Section 2-1-101 et seq. of this Ordinance, if the Tribal Member or Allottee with
3 an entitlement pursuant to 25 U.S.C. Section 381 also has a use of water eligible for the registration process set
4 forth in those sections of this Ordinance; or

5 2. by applying for a New Appropriation as provided in Section 2-2-101 et. seq. of this Ordinance or by
6 applying to develop a use of Flathead System Compact Water as provided in Section 2-2-118 of this Ordinance,
7 if the Tribal Member or Allottee with an entitlement pursuant to 25 U.S.C. Section 381 does not have a use of
8 water eligible for the registration process set forth in Section 2-1-101 et seq. of this Ordinance.

9 2-1-105. Tribal, Tribal Member and Allottee Challenge of a Registration Certificate Issued by the Office
10 of the Engineer. The Tribes, Tribal Members, and Allottees may seek judicial review of any final decision by the
11 Board pursuant to Section 2-1-102(4) of this Ordinance by filing a petition for judicial review with the Tribal Court
12 of the Tribes within 30 days of the issuance of the final Board decision. In considering the petition, the Board's
13 legal conclusions shall be reviewed for correctness and its factual findings for abuse of discretion.

14 2-1-106. Registration of Certain Other Previously Unrecorded Existing Uses. Persons who have Existing
15 Uses on the Reservation as of the effective date of this Ordinance shall register such Existing Uses with the
16 Board if those uses:

17 1. Were not required to be filed, pursuant to 85-2-222, MCA, and in fact were not filed as claims in the
18 Montana General Stream Adjudication for a pre-1973 use of water arising under State law; or

19 2. Were developed on or after July 1, 1973, at a volume and flow rate that would qualify as an exception
20 to the permit requirements of 85-2-306, MCA, and for which a notice of completion of Groundwater development
21 (DNRC Form 602) or an application for provisional permit for completed Stock Water pit or reservoir (DNRC Form
22 605) was filed with the DNRC but not processed by the DNRC.

23 3. Were developed after July 1, 1973, at a volume and flow rate that would qualify as an exception to the
24 permit requirements of 85-2-306, MCA, and for which a notice of completion of Groundwater development (DNRC
25 Form 602) or an application for provisional permit for completed Stock Water pit or reservoir (DNRC Form 605)
26 was not filed with the DNRC.

27 2-1-107. Process for Registration of Certain Other Previously Unrecorded Existing Uses.

28 1. Each Person claiming an Existing Use of water that falls under the terms of Section 2-1-106 of this
29 Ordinance shall, within 180 days of the effective date of this Ordinance, file a Registration Form with the Board
30 documenting that the Existing Use is for a purpose and with a flow rate and volume that falls within the terms of

1 Section 2-1-106, and identifying:

- 2 a. the date of first use of the water;
- 3 b. the source of supply for the use;
- 4 c. the point of diversion by legal land description;
- 5 d. the place of use by legal land description; and
- 6 e. the period of use.

7 2. Within 30 days of the Effective Date, the DNRC shall transmit to the Board all filed but not processed
8 completion notices (DNRC Form 602 or 605) it has received for water uses excepted from the permitting
9 requirements of State law developed within the boundaries of the Reservation after August 22, 1996. The
10 transmission of these notices shall constitute compliance with Section 2-1-107(1) of this Ordinance for those uses
11 eligible for registration pursuant to Section 2-1-106(2) of this Ordinance. No additional fee shall be required for
12 the processing of the forms transmitted by the DNRC.

13 3. Upon receipt, the Board shall transmit the Registration Form to the Office of the Engineer.

14 4. Upon receipt of the Registration Form, the Office of the Engineer shall review the Registration Form
15 within 180 days and may either issue a Registration Certificate or return a defective Registration Form to the filer,
16 together with the reasons for returning it. If a corrected Registration Form is submitted within 30 days of its return
17 by the Engineer, no new filing fee shall be required. Upon receiving a corrected Registration Form, the Office of
18 the Engineer has 90 days from the certified receipt of the corrected Registration Form to issue a Registration
19 Certificate or reject the registration. If the Office of the Engineer neither issue a Registration Certificate nor rejects
20 the registration within the initial 180 day review period, the Registration Form shall be deemed approved and the
21 Board shall issue a Registration Certificate. If the Office of the Engineer neither issues a Registration Certificate
22 nor rejects the registration within 90 days of certified receipt of a corrected Registration Form, the Registration
23 Form shall be deemed approved and the Board shall issue a Registration Certificate.

24 5. For any use registered under Section 2-1-106(1) of this Ordinance, the priority date of the use shall
25 be the date of first beneficial use, and such a date shall be reflected on the Registration Certificate.

26 6. For any use under Section 2-1-106(2) of this Ordinance, the priority date for the use shall be the date
27 of filing of the appropriate form, and such a date shall be reflected on the Registration Certificate.

28 7. For any use under Section 2-1-106(3) of this Ordinance, the priority date for the use shall be the
29 Effective Date of the Compact, and that date shall be reflected on the Registration Certificate.

30 8. Any Person filing a corrected Registration Form with the Office of the Engineer pursuant to subsection

1 (2) of this Section who is dissatisfied with the rejection of that corrected Registration Form by the Office of the
2 Engineer pursuant to subsection (2) of this Section may appeal that rejection to the Board by filing a notice of
3 appeal to the Board within 30 days of the rejection of the corrected Registration Form. To be filed, a notice must
4 be placed in the custody of the Board within the time fixed for filing. Filing may be accomplished by mail
5 addressed to the Board, but filing shall not be timely unless the papers are actually received within the time fixed
6 for filing. Immediately upon receipt by the Board, the notice of appeal shall be date stamped.

7 9. Any appeal to the Board filed pursuant to subsection (6) of this Section shall be conducted pursuant
8 to the provisions of Section 3-1-104 of this Ordinance.

9 2-1-108. Failure to Register an Existing Use of Water. Failure to register an Existing Use that is subject
10 to registration as provided for under Sections 2-1-101, 2-1-102, and 2-1-106(2) and (3) of this Ordinance, shall
11 divest the holder of the Existing Use of any legal protections otherwise afforded under the Compact and this
12 Ordinance, to the extent not inconsistent with federal law.

13 2-1-109. Limitation to Beneficial Use. Beneficial use shall be the basis, measure and limit to Appropriation
14 Rights issued pursuant to this Ordinance.

15 2-1-110. No Adverse Possession. No right to use water within the Reservation may be acquired by
16 prescription or by adverse possession of use.

17 2-1-111. Abandonment of Appropriation Right.

18 1. No part of the Tribal Water Right is subject to abandonment by nonuse.

19 2. If an Appropriator, other than a user of any portion of the Tribal Water Right, ceases to use all or a part
20 of an Appropriation Right, or any Existing Use, with the intention of wholly or partially abandoning the right, or if
21 the appropriator ceases using the right according to its terms and conditions with the intention of not complying
22 with those terms and conditions, the Appropriation Right or Existing Use is, to the extent of the nonuse,
23 considered abandoned and must immediately expire.

24 3. If an Appropriator, other than a user of any portion of the Tribal Water Right, ceases to use all or part
25 of an Appropriation Right or Existing Use, or ceases using the Appropriation Right or Existing Use according to
26 its terms and conditions for a period of 10 successive years and there was water available for use, there is a
27 prima facie presumption that the Appropriator has abandoned the right for the part not used.

28 4. If an Appropriator ceases to use all or part of an Appropriation Right or Existing Use in compliance with
29 a candidate conservation agreement initiated pursuant to 50 CFR 17.32 or because the land to which the water
30 is applied to a beneficial use is contracted under a state, tribal, or federal conservation, mitigation, or set-aside

1 program:

2 a. the land set-aside and resulting reduction in use of the Appropriation Right or Existing Use from the
3 conservation, mitigation, or set-aside program shall not be construed as an intent by the appropriator to wholly
4 or partially abandon the Appropriation Right or Existing Use or to not comply with the terms and conditions
5 attached to the right; and

6 b. the period of nonuse that occurs for part or all of the Appropriation Right or Existing Use as a result
7 of the conservation, mitigation, or set-aside program shall not create and shall not be added to any previous
8 period of nonuse to create a prima facie presumption of abandonment.

9 2-1-112. Procedure for Declaring Abandonment.

10 1. An Appropriator who claims to have been or alleges will be injured by the resumption of use of an
11 Appropriation Right or Existing Use alleged to have been abandoned may file a petition with the Office of the
12 Engineer to declare the Appropriation Right or Existing Use abandoned in whole or in part. Upon receipt of the
13 petition, the Office of the Engineer shall date stamp it.

14 2. If the Engineer or Designee finds that the petition provides enough information to give rise to a question
15 of abandonment, the petition shall be posted on the Board's website within 10 working days of the determination
16 of validity. If the Engineer or Designee finds that the petition fails to provide enough information to give rise to a
17 question of abandonment, the petition shall be rejected.

18 3. Upon a finding of validity pursuant to subsection (2) of this Section, a hearing shall be set within 180
19 days of the determination of validity, or any extended period of time, not to exceed 90 days, granted by the
20 Engineer, for the Engineer or Designee to determine whether the Appropriation Right or Existing Use has been
21 abandoned. Discovery prior to hearing will be as provided by the Engineer or Designee, and may commence
22 following the notice of the hearing.

23 4. The owner of the right alleged to have been abandoned shall be personally served notice of the
24 hearing by the Office of the Engineer and the hearing shall be publicly noticed by the Office of the Engineer once
25 via a legal notice in a local newspaper of general circulation and posted by the Office of the Engineer on the
26 Board's website for a period of 10 days commencing not less than 30 days from the date of the hearing.

27 5. At the hearing on the petition, the burden of proof shall be on the petitioner who must prove by a
28 preponderance of the evidence that the Appropriation Right or Existing Use has been abandoned pursuant to
29 Section 2-1-111 of this Ordinance, unless a prima facie presumption of abandonment has arisen pursuant to
30 Section 2-1-111(3). In such circumstances, the burden of proof is shifted to the owner of the right alleged to have

1 been abandoned, who must prove by a preponderance of the evidence a lack of intent to abandon the right in
2 question.

3 6. The hearing shall be recorded electronically and an official record maintained. All evidence that, in the
4 opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is the
5 type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their normal business
6 affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or
7 unduly repetitious shall be excluded.

8 7. A written decision by the Engineer or Designee shall be rendered within 60 days of the hearing,
9 disseminated to the parties, and posted by the Office of the Engineer on the Board's website within 10 days of
10 its issuance. If the individual who conducted the hearing becomes unavailable to the Office of the Engineer, a
11 decision may be prepared by an individual who has read the record only if the demeanor of witnesses is
12 considered immaterial by all parties; if any party considers the demeanor of any witness to be material to the
13 resolution of the appeal, a new hearing must be held.

14 8. Any party to the abandonment hearing dissatisfied with the decision of the Engineer or Designee may
15 appeal to the Board (and become an appellant) and obtain review of the Engineer's or Designee's decision. A
16 notice of appeal to the Board must be filed with the Board within 30 days of the Engineer's or Designee's decision.
17 To be filed, a notice must be placed in the custody of the Board within the time fixed for filing. Filing may be
18 accomplished by mail addressed to the Board, but filing shall not be timely unless the papers are actually
19 received within the time fixed for filing. Immediately upon receipt by the Board, the notice of appeal shall be date
20 stamped.

21 9. Appeal to the Board pursuant to subsection (8) of this Section, shall be made and resolved pursuant
22 to the provisions of Section 2-2-111 of this Ordinance.

23 10. Any petitioner whose petition is rejected by the Engineer or Designee as failing to provide enough
24 information to give rise to a question of abandonment may appeal the Engineer's decision to the Board pursuant
25 to the provisions of Section 3-1-104 of this Ordinance.

26 2-1-113. Prevention of Waste and Interference with Lawful Use.

27 1. Waters within the Reservation may not be wasted, nor may water be used unlawfully, nor may a lawful
28 use of water be interfered with.

29 2. All facilities, Works and equipment associated with the withdrawal, impoundment, pumping, diversion,
30 drainage, or transmission of waters on the Reservation shall be so constructed, installed, and maintained as to

1 prevent the Waste, contamination, or pollution of surface and Groundwater and to avoid injury to the lands and
2 property of others. All wells, producing and non-producing, which may contaminate other surface or Groundwater
3 must be properly abandoned or upgraded with a sanitary seal, in accordance with the water well criteria
4 incorporated by reference in Section 1-1-111 of this Ordinance. All flowing wells shall be capped or equipped with
5 valves so that the flow of water can be stopped when the water is not being put to beneficial use.

6 3. The Board, on its own initiative or through the Office of the Engineer, may require the recipient of any
7 Appropriation Right issued pursuant to this Ordinance to construct or install a weir, head gate, valve, meter,
8 gauge, or other reasonable and appropriate device for the control and measurement of water and for the
9 prevention of Waste.

10 2-1-114. Issuance of Appropriation Right Does Not Constitute Permission to Trespass. The issuance of
11 an Appropriation Right pursuant to this Ordinance does not constitute a license or permission to trespass on land
12 which the holder of the Appropriation Right does not otherwise have a legal right to access, not does it constitute
13 a ditch right.

14 2-1-115. Development of Enforceable Schedule for the Tribes' Other Instream Flow Rights.

15 1. As set forth in the Compact, each of the Tribes' instream flow rights identified in Article III.C.1.d.iii of
16 the Compact shall not be enforceable until after an enforceable schedule for that stream reach is promulgated
17 pursuant to the process set forth in this Section. This process shall not commence for any stream reach until the
18 Compact has been finally approved by the Montana Water Court, and until the Montana Water Court has issued
19 a final decree for the water court basin (76L or 76LJ) in which that stream reach lies, including the expiration of
20 all time for appeals, or the resolution of any such appeal, whichever date is latest (the "Eligibility Date").

21 2. At any time after the Eligibility Date, the Tribes may initiate the enforceable schedule process for any
22 given stream reach included in the rights identified in Article III.C.1.d.iii of the Compact by:

23 a. providing notice to water rights holders in the reach of the Tribes' initiation of the process to finalize
24 and implement the enforceable schedule;

25 b. developing a full summary of all Water Rights Arising Under State Law in the reach, including a
26 monthly time-step pattern of water use;

27 c. developing a summary of streamflow conditions, at or near each enforceable schedule compliance
28 point within the reach area, utilizing:

29 i. streamflow gaging information; or

30 ii. an accepted hydrologic analysis procedure to estimate streamflow conditions. The method to develop

1 streamflow information will be based on the professional judgment of the Tribes' hydrologist responsible for
2 coordinating the enforceable schedule process; and

3 d. preparing a report on the availability of water to fulfill the Tribes' instream flow water right for that reach
4 area.

5 3. The Tribes shall prepare each proposed enforceable schedule based on a water budget that allows
6 valid water rights to be exercised.

7 4. The Tribes shall hold one or more public meetings, and provide timely advanced notice to affected
8 water users of each such meeting, to report on the completion of the water availability study and the proposed
9 enforceable schedule for that reach area.

10 5. The Tribes shall consider the public comment received either at the public meeting(s) or within 30 days
11 thereafter, and shall finalize the proposed enforceable schedule for a given reach area no fewer than 45 days
12 after the day of the last public meeting.

13 6. The Tribes shall provide written notice to the Engineer of the finalized proposed enforceable schedule,
14 including an explanation of the technical basis therefore. Upon receipt, the Engineer shall forward the proposed
15 enforceable schedule to Staff for review.

16 7. Staff, using information from the written notice, as well as their own compilation of independent
17 resources and analysis, if available, shall issue a recommended decision as to whether to adopt the enforceable
18 schedule within 90 days of the date of the written notice provided by the Tribes pursuant to subsection (6) of this
19 Section.

20 8. If the recommended decision is to adopt the enforceable schedule, a summary of the proposed
21 enforceable schedule and the recommended decision shall be publicly noticed by the Office of the Engineer once
22 via a legal notice in a local newspaper of general circulation and posted by the Office of the Engineer on the
23 Board's website for a period not less than 45 days from the date the recommendation is issued. A summary of
24 the proposed enforceable schedule and the recommended decision shall also be distributed electronically to
25 individuals or entities who have registered with the Board to receive electronic notice. If no objections are filed
26 within 45 days of the initial Publication of the recommended decision by the Office of the Engineer, or if all filed
27 objections are unconditionally withdrawn prior to being ruled upon, the application shall be granted by the
28 Engineer or Designee within 10 days after expiration of the time for filing objections or after the unconditional
29 withdrawal of the last objection, whichever date is later.

30 9. Objections to a proposed enforceable schedule may be filed only by holders of water rights in the

1 particular stream reach for which the enforceable schedule is proposed. The only cognizable ground for objection
2 is that the proposed enforceable schedule will have an adverse effect on the objector's water right. An objection
3 must describe the alleged adverse effect on the objector's water right. The burden of proof shall be on the
4 objector.

5 10. An objector or the Tribes may elect to have any valid objection decided on the record or after hearing.
6 If the objector elects to have a hearing, that request must be made at the same time as the filing of the objection
7 or the objector's right to a hearing is waived. The Tribes must invoke the right to a hearing within 10 days of
8 receiving notice of the objection or the Tribes' right to a hearing is waived.

9 11. Discovery prior to hearing will be as provided by the Engineer or Designee, and may commence
10 following the receipt of a valid objection.

11 12. The Engineer or Designee, after issuance of notice of hearing, may not communicate with any party
12 to that case or any party's representative(s) in connection with any issue of fact or law in the case except upon
13 notice and opportunity for all parties to participate.

14 13. The hearing shall be recorded electronically and an official record maintained.

15 14. All evidence that, in the opinion of the Engineer or Designee, possesses probative value shall be
16 admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons
17 in the conduct of their normal business affairs. Rules of privilege recognized by law shall be given effect.
18 Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.

19 15. A written decision by the Engineer or Designee shall be rendered within 60 days of the hearing,
20 disseminated to the parties, and posted by the Office of the Engineer on the Board's website within 10 days of
21 its issuance. If the individual who conducted the hearing becomes unavailable to the Office of the Engineer, a
22 decision may be prepared by an individual who has read the record only if the demeanor of witnesses is
23 considered immaterial by all parties to the case. If any party considers the demeanor of any witness to be material
24 to the resolution of the appeal, a new hearing must be held.

25 16. The Tribes or any objector dissatisfied with the final decision of the Engineer or Designee may appeal
26 to the Board (and become an appellant) and obtain review of the Engineer's or Designee's decision. A notice of
27 appeal to the Board must be filed with the Board within 30 days of the Engineer's or Designee's decision. To be
28 filed, a notice must be placed in the custody of the Board within the time fixed for filing. Filing may be
29 accomplished by mail addressed to the Board, but filing shall not be timely unless the papers are actually
30 received within the time fixed for filing. Immediately upon receipt by the Board, the notice of appeal shall be date

1 stamped. Appeal to the Board shall be resolved pursuant to the provisions of Section 2-2-111 of this Ordinance.

2 17. If the recommended decision is to reject the proposed enforceable schedule, the Tribes may withdraw
3 the proposed enforceable schedule within 10 days of the issuance of the recommended decision, or may appeal
4 the recommended decision to the Engineer by filing a notice of appeal within 30 days of issuance of the
5 recommended decision. The Tribes may elect to have the appeal decided on the record, after submission of
6 additional evidence and argument, or after hearing. If the Tribes elect to have a hearing, that request must be
7 made at the same time as the filing of the notice of appeal or the right to a hearing is waived. The notice of appeal
8 must specify those parts of the recommended decision claimed to be in error.

9 18. Within 60 days from the filing of the notice of appeal, or any extended period of time, not to exceed
10 60 days, granted by the Engineer or Designee, the Tribes may submit additional factual evidence and legal
11 argument in support of the proposed enforceable schedule. Staff who issued the recommended decision shall
12 have 45 days from the Tribes' submission to revise, amend, or affirm the recommended decision in a second
13 recommended decision that explains in writing the rationale for the second recommended decision.

14 19. If the recommended decision or second recommended decision is to reject the proposed enforceable
15 schedule and no notice of appeal is filed pursuant to this Section, the proposed enforceable schedule shall be
16 deemed rejected the day after expiration of the time for filing a notice of appeal. The rejection of a proposed
17 enforceable schedule does not preclude the Tribes from filing another proposed enforceable schedule for the
18 same or any other stream reach identified in the rights set forth in Article III.C.1.d.iii of the Compact.

19 20. The Tribes bear the burden of demonstrating to the Engineer or Designee by a preponderance of the
20 evidence, whether a hearing is held or not, that the recommended decision or second recommended decision
21 is in error.

22 21. If the Tribes request a hearing before the Engineer or Designee, a hearing shall be held no later than
23 the latest of the following:

24 a. 90 days after the filing of the notice of appeal; or

25 b. 30 days after the issuance of a second recommended decision pursuant to subsection (2) of this
26 Section, whichever is later.

27 22. The hearing shall be recorded electronically and an official record maintained. All evidence that, in
28 the opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is
29 the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their normal
30 business affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant,

1 immaterial, or unduly repetitious shall be excluded.

2 23. A decision by the Engineer or Designee to reverse, modify, or affirm the recommended decision or
3 the second recommended decision shall be made in writing within 60 days after the later of:

- 4 a. the filing of a notice of appeal pursuant to subsection (1) of this Section;
5 b. the submission of additional evidence or legal argument pursuant to subsection (2) of this Section;
6 c. issuance of Staff's second recommended decision; or
7 d. the completion of the hearing.

8 24. If the Engineer or Designee reverses the recommended decision or the second recommended
9 decision, and determines that the enforceable schedule should not have been rejected, the proposed enforceable
10 schedule shall be publicly noticed to the public and processed pursuant to the provisions of subsections (8)-(16)
11 of this Section.

12 25. If the Engineer or Designee affirms the recommended decision or the second recommended decision,
13 resulting in the rejection of the proposed enforceable schedule, the Tribes may either accept that decision by
14 withdrawing the proposed enforceable schedule or taking no further action, or may appeal that decision to the
15 Board pursuant to Section 2-2-111 of this Ordinance. If no timely notice of appeal is filed, the proposed
16 enforceable schedule shall be deemed rejected on the day after the expiration of the time to file the notice of
17 appeal.

18 26. Any final Board decision on implementation of the enforceable schedule made pursuant to the
19 process outlined in this Section may be appealed pursuant to Section 2-2-112 of this Ordinance.

20 PART 2. PERMIT AND CHANGE APPLICATION PROCESS

21 2-2-101. Appropriation Rights and Change in Use authorizations on the Reservation. After the Effective
22 Date, a Person within the exterior boundaries of the Reservation may not appropriate surface water or
23 Groundwater for a new beneficial use, or change an Existing Use, or commence construction of diversion,
24 impoundment, withdrawal, or related distribution Works except by applying for and receiving an Appropriation
25 Right, or Change in Use authorization, from the Board.

26 2-2-102. Burden of Proof for Ground or Surface Water Permits and Change Authorizations.

27 1. For any application for an Appropriation Right or Change in Use that is not one of the categories of
28 Appropriation Right identified in Sections 1-1-112(1) or 2-2-118 of this Ordinance, applicants for an Appropriation
29 Right, or for a Change in Use authorization must prove by a preponderance of the evidence that the proposed
30 new Appropriation Right or Change in Use authorization will not adversely affect any Appropriator.

1 2. For any application for an Appropriation Right or Change in Use that is not one of the categories of
2 Appropriation Right identified in Sections 1-1-112(1) or 2-2-118 of this Ordinance, the Board, Engineer, or
3 Designee may modify or condition the issuance of Appropriation Right or Change in Use authorization applied
4 for, to assure that:

5 a. the new Appropriation Right or Change in Use authorization will not adversely affect any Appropriator;
6 b. the proposed means of diversion, construction, and operation of the appropriation Works are adequate;
7 c. except in the case of instream flows or other non-consumptive uses, the applicant has the possessory
8 interest or the written consent of the Person(s) with possessory interest in the property where the water is to be
9 put to beneficial use;

10 d. the water quality of an Appropriator will not be adversely affected;

11 e. the proposed use will be consistent with the classification of water set for the source of supply pursuant
12 to water quality standards established under the federal Clean Water Act, 33 USC Section 1251 et seq., and
13 contained in regulations promulgated under the Confederated Salish and Kootenai Tribes' Water Quality
14 Management Ordinance, Tribal Ordinance 89B; and

15 f. the proposed Appropriation Right or Change in Use authorization will not impair the ability of a
16 discharge permit holder to satisfy effluent limitations set forth in a permit issued in accordance with water quality
17 standards established under the federal Clean Water Act, 33 USC Section 1251 et seq., and contained in
18 regulations promulgated under the Confederated Salish and Kootenai Tribes' Water Quality Management
19 Ordinance, Tribal Ordinance 89B.

20 2-2-103. Pre-Application Meeting with Office of the Engineer. Prior to applying to the Board for a new
21 Appropriation Right or Change in Use authorization, within the exterior boundaries of the Flathead Reservation,
22 applicants may meet informally with Staff regarding the application process and information requirements.

23 2-2-104. Application to Board.

24 1. An applicant for a new Appropriation Right or Change in Use authorization must:

25 a. pay the appropriate application fee in the amount set by the Board;

26 b. fill out completely:

27 i. the Flathead Reservation Appropriation Right Application; or

28 ii. the Flathead Reservation Application for a Change in Use authorization; and

29 iii. all applicable addenda;

30 c. attach to each application all required maps; and

1 d. sign, date, and notarize or otherwise swear under appropriate oath to the accuracy of the contents of
2 each application.

3 2. Upon the day of the receipt of an application, or amendment to an application, for a new Appropriation
4 Right or Change in Use authorization, the Office of the Engineer must stamp it received.

5 3. If an application for a new Appropriation Right is ultimately granted, the priority date of the application
6 is the date the application is stamped received by the Office of the Engineer.

7 4. All application forms may, upon recommendation by the Engineer, be modified by a unanimous vote
8 of the Board. Any such modification is pursuant to and does not constitute a modification of this Ordinance or the
9 Compact.

10 2-2-105. Adequate to Process Review.

11 1. Within 30 days of receipt by the Office of the Engineer of an application for a new Appropriation Right
12 or Change in Use authorization, Staff shall review the application and make a determination whether the
13 application is adequate to process. An application is adequate to process if it:

14 a. clearly identifies the proposed project; and

15 b. contains the information required by the following forms:

16 i. Flathead Reservation Appropriation Right Application, including for Groundwater applications
17 Addendum B - "Flathead Reservation Groundwater Minimum Aquifer Testing Requirements"; or

18 ii. Flathead Reservation Application for a Change in Use authorization.

19 2. Staff may waive aquifer testing requirements if sufficient hydrogeologic information already exists on
20 the source and in the location of the proposed development.

21 3. An application determined to be adequate to process shall be posted on the Board's website within
22 10 working days of the determination of adequacy.

23 2-2-106. Not Adequate to Process Determination.

24 1. If Staff determines an application for a new Appropriation Right or Change in Use authorization is not
25 adequate to process, the Office of the Engineer shall send a letter to the applicant notifying the applicant of the
26 defects in the application.

27 2. An applicant has 90 days from the date of mailing of the notice of inadequacy pursuant to subsection
28 (1) of this Section to make the application adequate to process. An application for a new Appropriation Right
29 whose defects are timely corrected and which is ultimately granted retains its priority of the date of the initial
30 application.

1 3. Upon receipt of the information from the applicant to correct deficiencies, Staff must review the updated
2 application and make a determination within 30 days whether the application is adequate to process.

3 4. An application that is not timely made adequate to process, either through the applicant's failure to
4 respond to the notice of inadequacy issued pursuant to subsection (1) of this Section within the timeframe set
5 forth in subsection (2) of this Section, or by the applicant's failure to provide sufficient information in response to
6 a notice of inadequacy issued pursuant to subsection (1) of this Section within the timeframe set forth in
7 subsection (2) of this Section, shall be deemed denied.

8 5. An applicant who disagrees with the decision to deny may appeal that decision to the Board pursuant
9 to Section 3-1-104 of this Ordinance. If such an appeal is filed, the Engineer shall be the appellee.

10 2-2-107. Application Analysis and Recommended Decision.

11 1. Prior to the expiration of the time periods set forth in Sections 2-2-105(1), 2-2-106(2), 2-2-106(3), or
12 2-2-108(2) of this Ordinance, Staff may meet informally with an applicant to discuss an application, including any
13 proposed Mitigation Plan. The results of such meetings shall be documented by a summary memo prepared by
14 Staff and included in the application file. An applicant may also submit a memo documenting the meeting, which
15 becomes part of the application file. If an application submitted pursuant to Section 2-2-104 or a Mitigation Plan
16 submitted pursuant to Section 2-2-108(2) of this Ordinance is amended during this informal process, the amended
17 application shall be reviewed by an individual on Staff who was not involved in the informal process to determine
18 whether the amendments are so substantial that they constitute a new application. If it is determined that the
19 amended application constitutes a new application, that application must be reviewed in its entirety pursuant to
20 Sections 2-2-105 and 2-2-106 of this Ordinance. A new application fee must be submitted. A determination that
21 an application amendment is so substantial as to constitute a new application may be appealed to the Engineer
22 pursuant to Section 2-2-109 of this Ordinance.

23 2. Staff shall analyze an application determined to be adequate to process pursuant to Section 2-2-105
24 of this Ordinance within 180 days of the determination of adequacy using tools or techniques that may include:

- 25 a. independent resources compiled by Staff (including, but not limited to, Water Resources Surveys and
26 field notes, aerial photographs, water rights decrees, stream gauging records, well logs, and water rights records);
27 b. water use records (water measurement, ranch logs, etc.) submitted by the applicant;
28 c. field inspection by Staff;
29 d. hydrologic or geohydrologic evaluation completed by Staff, provided that all model results, if any, shall
30 be documented.

1 3. All information relied on by Staff in analyzing an application pursuant to this Section shall be
2 documented in the application file.

3 4. Staff, using information from the application as well as their own compilation of independent resources
4 and analysis, shall draft a recommended decision with findings of fact and conclusions of law determining:

5 a. whether the proposed Appropriation Right or Change in Use authorization will cause adverse effect
6 to any Appropriator; and

7 b. whether and, if so, what amount of Mitigation is required before the proposed Appropriation Right or
8 Change in Use authorization may be issued.

9 5. If the recommended decision is to grant the application, a summary of the application and the
10 recommended decision shall be publicly noticed by the Office of the Engineer once via a legal notice in a local
11 newspaper of general circulation and posted by the Office of the Engineer on the Board's website for a period
12 not less than 45 days from the date the recommendation is issued. A summary of the application and the
13 recommended decision shall also be distributed electronically to individuals or entities who have registered with
14 the Board to receive electronic notice. If no objections are filed within 45 days of the initial Publication of the
15 recommended decision by the Office of the Engineer, or if all filed objections are unconditionally withdrawn prior
16 to being ruled upon, the application shall be granted by the Engineer or Designee within 10 days after expiration
17 of the time for filing objections or after the unconditional withdrawal of the last objection, whichever date is later.

18 6. If the recommended decision is to deny the application, the applicant may withdraw the application
19 within 10 days of the issuance of the recommended decision or appeal the recommended decision to the
20 Engineer pursuant to Section 2-2-109 of this Ordinance. The application filing fee shall not be refunded upon
21 withdrawal. Failure to withdraw the application or file an appeal within the applicable timeframes shall result in
22 the application being deemed denied on the day after the expiration of the time to appeal.

23 7. If the recommended decision is to grant the application with conditions other than Mitigation, the
24 application shall be noticed to the public and processed pursuant to the procedures set forth in Sections
25 2-2-107(5) and 2-2-110 of this Ordinance unless the applicant withdraws the application within 30 days of the
26 issuance of the recommended decision or appeals the recommended decision to the Engineer pursuant to
27 Section 2-2-109 of this Ordinance. The application filing fee shall not be refunded upon withdrawal.

28 8. Amendments to applications are not allowed after the issuance of a recommended decision on that
29 application, except as provided in Section 2-2-108(2) of this Ordinance.

30 2-2-108. Process if Mitigation Required.

- 1 1. If Staff analysis of an application concludes that Mitigation is necessary to approve an application, a
2 recommended decision shall be issued to that effect. Upon issuance of a recommended decision finding that
3 Mitigation is required, the applicant may:
- 4 a. withdraw the application (with no refund of the application filing fee);
 - 5 b. appeal the recommended decision to the Engineer pursuant to Section 2-2-109 of this Ordinance; or
 - 6 c. prepare a Mitigation Plan.
- 7 2. If the applicant chooses to prepare a Mitigation Plan, the running of the time set forth in Section
8 2-2-107(2) of this Ordinance for processing that application is suspended until a timely Mitigation Plan is received
9 from the applicant. The Mitigation Plan must be submitted within 180 days of issuance of the recommended
10 decision requiring Mitigation, or of the decision of the Engineer or Designee as set forth in Section 2-2-109(10)
11 of this Ordinance, whichever date is later, and must include either or both of:
- 12 a. an application for a Change in Use authorization for another water right so as to provide for the
13 required Mitigation; and/or
 - 14 b. amendments describing the source, volume, flow rate, point of diversion, place of use, period of use,
15 and place of storage of mitigation water that comes from other than a change authorization.
- 16 3. The running of the time set forth in Section 2-2-107(2) of this Ordinance for analyzing the application
17 and issuing a recommended decision resumes upon the timely receipt by the Office of the Engineer of the
18 material(s) required by subsection (2) of this Section.
- 19 4. If a Mitigation Plan is timely submitted by an applicant following a decision of the Engineer or Designee
20 as set forth in Section 2-2-109(10) of this Ordinance, Staff shall issue a new recommended decision concerning
21 the application within 180 days of the timely submission of the Mitigation Plan.
- 22 5. If the recommended decision is to grant the application conditioned on the Mitigation Plan submitted
23 by the applicant pursuant to subsection (2) of this Section, the application shall be noticed to the public and
24 processed pursuant to the procedures set forth in Sections 2-2-107(5) and 2-2-110 of this Ordinance.
- 25 6. If the recommended decision is to deny the application, the applicant may withdraw the application
26 within 10 days of the issuance of the recommended decision or appeal the recommended decision to the
27 Engineer pursuant to Section 2-2-109 of this Ordinance. The application filing fee shall not be refunded upon
28 withdrawal. Failure to withdraw the application or file an appeal within the applicable timeframes shall result in
29 the application being deemed denied on the day after the expiration of the time to appeal.
- 30 7. If the Mitigation Plan is not submitted within 180 days of issuance of the recommended decision

1 requiring Mitigation the application shall be deemed denied.

2 2-2-109. Appeal to Engineer from Recommended Decision.

3 1. If a recommended decision issued pursuant to Sections 2-2-107 or 2-2-108 of this Ordinance is to deny
4 an application, or grant it with a requirement of Mitigation or other conditions, the applicant may appeal to the
5 Engineer by filing a notice of appeal within 30 days of issuance of the recommended decision. An applicant may
6 elect to have the appeal decided on the record, after submission of additional evidence and argument, or after
7 hearing. If the applicant elects to have a hearing, that request must be made at the same time as the filing of the
8 notice of appeal or the right to a hearing is waived. The notice of appeal must specify those parts of the
9 recommended decision claimed to be in error.

10 2. Within 60 days from the filing of the notice of appeal, or any extended period of time, not to exceed
11 60 days, granted by the Engineer or Designee, the applicant may submit additional factual evidence and legal
12 argument in support of the application. Staff who issued the recommended decision shall have 45 days from the
13 applicant's submission to revise, amend, or affirm the recommended decision in a second recommended decision
14 that explains in writing the rationale for the second recommended decision.

15 3. If the recommended decision or second recommended decision is to deny an application and no notice
16 of appeal is filed pursuant to this Section, the application shall be deemed denied the day after expiration of the
17 time for filing a notice of appeal.

18 4. The applicant bears the burden of demonstrating to the Engineer or Designee by a preponderance of
19 the evidence, whether a hearing is held or not, that the recommended decision or second recommended decision
20 is in error.

21 5. If the applicant requests a hearing before the Engineer or Designee, a hearing shall be held no later
22 than the latest of the following:

23 a. 90 days after the filing of the notice of appeal; or

24 b. 30 days after the issuance of a second recommended decision pursuant to subsection (2) of this
25 Section, whichever is later.

26 6. The hearing shall be recorded electronically and an official record maintained. All evidence that, in the
27 opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is the
28 type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their normal business
29 affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or
30 unduly repetitious shall be excluded.

1 7. A decision by the Engineer or Designee to reverse, modify, or affirm the recommended decision or the
2 second recommended decision shall be made in writing within 60 days after the later of:

3 a. the filing of a notice of appeal pursuant to subsection (1) of this Section;

4 b. the submission of additional evidence or legal argument pursuant to subsection (2) of this Section;

5 c. issuance of Staff's second recommended decision; or

6 d. the completion of the hearing.

7 8. If the Engineer or Designee reverses the recommended decision or the second recommended
8 decision, and determines that the application should be granted, the application shall be publicly noticed to the
9 public and processed pursuant to the provisions of Section 2-2-107(5) and Section 2-2-110 of this Ordinance.

10 9. If the Engineer or Designee affirms the recommended decision or the second recommended decision,
11 resulting in the denial of an application, the applicant may either accept that decision by withdrawing the
12 application or taking no further action, or may appeal that decision to the Board pursuant to Section 2-2-111 of
13 this Ordinance. The application filing fee shall not be refunded upon withdrawal. If no timely notice of appeal is
14 filed, the application shall be deemed denied on the day after the expiration of the time to file the notice of appeal.

15 10. If the Engineer or Designee affirms the recommended decision or the second recommended decision,
16 resulting in the granting of an application with a requirement of conditions other than Mitigation, the applicant may
17 withdraw the application; file with the Office of the Engineer written acceptance of the conditions within 30 days
18 of the Engineer's or Designee's decision, in which case the application will be noticed to the public and processed
19 pursuant to the provisions of Sections 2-2-107(5) and 2-2-110 of this Ordinance; or appeal the decision to the
20 Board pursuant to Section 2-2-111 of this Ordinance. The application filing fee shall not be refunded upon
21 withdrawal. Failure to withdraw the application, file written acceptance of the condition, or file an appeal within
22 the applicable timeframes shall result in the application being deemed denied on the day after the expiration of
23 the time to appeal.

24 11. If an applicant has appealed to the Engineer a Staff determination that Mitigation is necessary
25 pursuant to Section 2-2-108(1)(b) of this Ordinance, and the Engineer or Designee affirms the recommended
26 decision resulting in a determination that Mitigation is required before the application may be granted, the
27 applicant may withdraw the application; appeal the decision to the Board pursuant to Section 2-2-111 of this
28 Ordinance; or prepare a Mitigation Plan pursuant to Section 2-2-108(2) of this Ordinance. The application filing
29 fee shall not be refunded upon withdrawal. Failure to withdraw the application, file a Mitigation Plan, or file an
30 appeal within the applicable timeframes shall result in the application being deemed denied on the day after the

1 expiration of the time to file a Mitigation Plan.

2 12. If the Engineer or Designee affirms a recommended decision or second recommended decision that
3 found a Mitigation Plan inadequate to justify the issuance of the proposed Appropriation Right or Change in Use
4 authorization, the applicant may either accept that decision by withdrawing the application or taking no further
5 action, or may appeal that decision to the Board pursuant to Section 2-2-111 of this Ordinance. The application
6 filing fee shall not be refunded upon withdrawal. If no timely notice of appeal is filed, the application shall be
7 deemed denied on the day after the expiration of the time to file the notice of appeal.

8 13. Any applicant wishing to appeal a decision of the Engineer or Designee pursuant to this Section must
9 file a notice of appeal with the Board. Any such notice of appeal must be filed with the Board within 30 days of
10 the Engineer's or Designee's decision. To be filed, a notice must be placed in the custody of the Board within the
11 time fixed for filing. Filing may be accomplished by mail addressed to the Board, but filing shall not be timely
12 unless the papers are actually received within the time fixed for filing. Immediately upon receipt by the Board, the
13 notice of appeal shall be date stamped.

14 2-2-110. Notice and Hearing on Recommended Decision to Grant.

15 1. Any Person alleging that they will suffer adverse effect from the grant of an application for proposed
16 Appropriation Right or Change in Use authorization may file an objection to a recommended decision to grant
17 an application. To be valid, an objection must describe the alleged adverse effect on the objector's water right.

18 2. An objector or an applicant may elect to have any valid objection decided on the record or after
19 hearing. If the objector elects to have a hearing, that request must be made at the same time as the filing of the
20 objection or the objector's right to a hearing is waived. The applicant must invoke the right to a hearing within 10
21 days of receiving notice of the objection or the applicant's right to a hearing is waived.

22 3. Discovery prior to hearing will be as provided by the Engineer or Designee, and may commence
23 following the receipt of a valid objection.

24 4. If, prior to the hearing, valid objections are withdrawn pursuant to an agreement between or among
25 the applicant and objector(s) setting forth various conditions on the application, the Engineer or Designee shall
26 grant the application subject to those conditions necessary to satisfy the criteria set forth in Section 2-2-102(1)
27 of this Ordinance, but the Engineer or Designee has the discretion to accept or reject other conditions of the
28 agreement between or among the applicant and objector(s).

29 5. The Engineer or Designee, after issuance of notice of hearing, may not communicate with any party
30 to that case or any party's representative(s) in connection with any issue of fact or law in the case except upon

1 notice and opportunity for all parties to participate.

2 6. The hearing shall be recorded electronically and an official record maintained.

3 7. All evidence that, in the opinion of the Engineer or Designee, possesses probative value shall be
4 admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons
5 in the conduct of their normal business affairs. Rules of privilege recognized by law shall be given effect.
6 Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.

7 8. The burden of proof is on the applicant to prove the applicable criteria of Section 2-2-102(1) of this
8 Ordinance by a preponderance of evidence.

9 9. A written decision by the Engineer or Designee shall be rendered within 60 days of the hearing,
10 disseminated to the parties, and posted by the Office of the Engineer on the Board's website within 10 days of
11 its issuance. If the individual who conducted the hearing becomes unavailable to the Office of the Engineer, a
12 decision may be prepared by an individual who has read the record only if the demeanor of witnesses is
13 considered immaterial by all parties to the case. If any party considers the demeanor of any witness to be material
14 to the resolution of the appeal, a new hearing must be held.

15 10. Any applicant or objector dissatisfied with the final decision of the Engineer or Designee may appeal
16 to the Board (and become an appellant) and obtain review of the Engineer's or Designee's decision. A notice of
17 appeal to the Board must be filed with the Board within 30 days of the Engineer's or Designee's decision. To be
18 filed, a notice must be placed in the custody of the Board within the time fixed for filing. Filing may be
19 accomplished by mail addressed to the Board, but filing shall not be timely unless the papers are actually
20 received within the time fixed for filing. Immediately upon receipt by the Board, the notice of appeal shall be date
21 stamped.

22 2-2-111. Appeal to the Board.

23 1. Any question not raised before the Engineer or Designee may not be raised in the appeal to the Board
24 unless it is shown to the satisfaction of the Board that there was good cause for failure to raise the question
25 before the Engineer or Designee.

26 2. Appeal to the Board of decisions of the Engineer or Designee shall be confined to the record. If, before
27 the date set for hearing the appeal, application is made to the Board for leave to present additional evidence and
28 it is shown to the satisfaction of the Board that the additional evidence is material and that there were good
29 reasons for failing to present it in the proceeding before the Engineer or Designee, the Board may order that the
30 additional evidence be taken before the Engineer or Designee upon conditions determined by the Board,

1 including the deadline for submission of additional evidence to the Engineer or Designee and for the conclusion
2 of the Engineer's or Designee's review of any such additional evidence. The Engineer or Designee may modify
3 the findings and decision by reason of the additional evidence or may affirm the prior decision and shall file a
4 modified decision or notice of affirming the decision with the Board pursuant to a reasonable deadline set by the
5 Board.

6 3. If the appellant requests an oral argument, the Board must hold oral argument on the appeal. If the
7 appellant does not request an oral argument, the Board may, in its discretion, order oral argument or may resolve
8 the appeal without one.

9 4. Review by the Board:

10 a. the review by the Board must be confined to the record. In cases of alleged irregularities in procedure
11 before the Engineer or Designee not shown in the record, proof of the irregularities may be taken by the Board.
12 The Board, upon request, shall hear oral argument and receive written briefs.

13 b. the Board may not substitute its judgment for that of the Engineer or Designee as to the weight of the
14 evidence on questions of fact.

15 c. the Board may affirm the decision of the Engineer or Designee or remand the case for further
16 proceedings.

17 d. the Board may reverse or modify the decision if substantial rights of an appellant have been prejudiced
18 because:

19 i. the Engineer's or Designee's findings, inferences, conclusions, or decisions are:

20 (1) in violation of constitutional or statutory provisions;

21 (2) in excess of the authority of the Engineer or Designee;

22 (3) made upon unlawful procedure;

23 (4) affected by other error of law;

24 (5) clearly erroneous in view of the record as a whole;

25 (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of
26 discretion; or

27 ii. findings of fact, upon issues essential to the decision, were not made although requested.

28 2-2-112. Appeal to Court of Competent Jurisdiction. Pursuant to Article IV.1.6 of the Compact, an
29 aggrieved party may obtain review of a final decision of the Board by filing a petition for judicial review with a
30 Court of Competent Jurisdiction within 30 days of the issuance of the final Board decision. In considering the

1 petition, the Board's legal conclusions shall be reviewed for correctness and its factual findings for abuse of
2 discretion. In the event that a court determines that it lacks subject matter or personal jurisdiction to rule on a
3 petition for judicial review of a Board decision, the party filing the petition shall be entitled to petition for judicial
4 review from any other Court of Competent Jurisdiction within thirty days from the date of a final court order finding
5 lack of jurisdiction.

6 2-2-113. Completion.

7 1. Whenever an Appropriation Right or Change in Use authorization is issued under this Chapter, the
8 Engineer or Designee shall specify in writing as part of the Appropriation Right or Change in Use authorization
9 issued, or in any authorized extension of time provided pursuant to subsection (2) of this Section, the time limits
10 for commencement of the appropriation Works, completion of construction, and actual application of water to the
11 proposed beneficial use. In fixing those time limits, the Engineer or Designee shall consider the cost and
12 magnitude of the project, the engineering and physical features to be encountered, and, on projects designed
13 for gradual development and gradually increased use of water, the time reasonably necessary for that gradual
14 development and increased use. The Engineer or Designee shall issue the Appropriation Right or Change in Use
15 authorization, or the authorized extension of time, subject to the terms, conditions, restrictions and limitations the
16 Engineer or Designee considers necessary to ensure that work on the Appropriation is commenced, conducted,
17 and completed and that the water is actually applied in a timely manner to the beneficial use specified in the
18 Appropriation Right or Change in Use authorization.

19 2. The Engineer or Designee, for good cause shown, may extend the time limits specified in the
20 Appropriation Right or Change in Use authorization for commencement of the appropriation Works, completion
21 of construction, and actual application of water to the proposed beneficial use. If commencement of the
22 appropriation Works, completion of construction, or actual application of water to the proposed beneficial use is
23 not completed within the time limit set forth in the Appropriation Right or Change in Use authorization, or by any
24 extension granted pursuant to this subsection, the Appropriation Right or Change in Use authorization is void
25 upon lapse of the time limit.

26 3. Any owner of an Appropriation Right or Change in Use authorization who disagrees with the time limit
27 specified by the Engineer or Designee pursuant to subsections (1) and (2) of this Section may appeal the
28 Engineer's decision to the Board pursuant to Section 2-2-111 of this Ordinance. A notice of appeal must be filed
29 with the Board within 30 days of the Engineer's or Designee's decision. To be filed, a notice must be placed in
30 the custody of the Board within the time fixed for filing. Filing may be accomplished by mail addressed to the

1 Board, but filing shall not be timely unless the papers are actually received within the time fixed for filing.

2 2-2-114. Compliance with Completion Deadline. Upon actual application of water to the proposed
3 beneficial use within the time allowed by the Engineer or Designee pursuant to Section 2-2-113 of this Ordinance,
4 the owner of the Appropriation Right or Change in Use authorization shall notify the Office of the Engineer that
5 the Appropriation has been completed. The notification must contain a certified statement by an individual with
6 experience in the design, construction, or operation of appropriation Works describing how the Appropriation was
7 completed. The Office of the Engineer shall review the certified statement and may then inspect the Appropriation,
8 and if it determines that the Appropriation has been completed in substantial accordance with the Appropriation
9 Right or Change in Use authorization, it shall issue the owner of the Appropriation Right or Change in Use
10 authorization a Flathead Reservation Appropriation Right Document. The original of the document shall be sent
11 to the owner of the Appropriation Right or Change in Use authorization, and a duplicate shall be kept in the Office
12 of the Engineer.

13 2-2-115 Redundant and Substitute Wells.

14 1. An Appropriator may change an Appropriation Right or Existing Use without first applying for a Change
15 in Use authorization pursuant to Sections 2-2-101 et seq. of this Ordinance for the purpose of constructing a
16 Substitute Well if:

17 a. the rate and volume of the appropriation from the Substitute Well are equal to or less than that of the
18 Well being replaced;

19 b. the water from the Substitute Well is appropriated from the same Groundwater source as the water
20 appropriated from the Well being replaced; and

21 c. a timely, correct and complete Notice of Substitute Well is submitted to the Engineer as provided in
22 subsection 2 of this Section.

23 2. Review.

24 a. Within 60 days after a Substitute Well is completed and delivering water, the Appropriator shall file a
25 Notice of Substitute Well with the Office of the Engineer on a form provided by the Board. Upon receipt of the
26 Notice, the Office of the Engineer shall date stamp it.

27 b. The Engineer or Designee shall review the Notice of Substitute Well within 90 days of the date
28 stamped on it pursuant to subsection (2)(a) of this Section, and shall issue a Change in Use authorization if all
29 of the criteria identified in subsection (1) of this Section have been met and the Notice of Substitute Well is correct
30 and complete.

1 c. The Engineer or Designee may not issue a Change in Use authorization until a correct and complete
2 Notice of Substitute Well has been filed with the Office of the Engineer. The Office of the Engineer shall return
3 to the Appropriator a Notice that is determined by Staff to be defective, along with a description of defects in the
4 Notice. The Appropriator shall refile a corrected and completed Notice of Substitute Well within 30 days of
5 notification of defects or within a further time as the Engineer or Designee may allow, not to exceed 180 days.
6 If the Appropriator does not refile within that timeframe, the Appropriation Right will be deemed denied and the
7 Appropriator must then comply with the provisions of subsection (d) of this Section.

8 d. If a Notice of Substitute Well is not completed within the time allowed, the Appropriator shall:

9 i. cease appropriation of water from the Substitute Well pending approval by the Engineer or Designee;

10 and

11 ii. submit an application for a Change in Use authorization pursuant to Section 2-2-104 of this Ordinance;

12 or

13 iii. comply with the well abandonment procedures, standards and rules adopted by the board of water
14 well contractors pursuant to 37-43-202, MCA, or any successor procedures, standards and rules that are
15 promulgated in State law.

16 3. Wells that have been determined to be abandoned pursuant to Sections 2-1-111 and 2-1-112 of this
17 Ordinance are not eligible to be replaced by Substitute Wells under this Section.

18 4. For each well that is replaced under subsection (1) of this Section, the appropriator shall follow the well
19 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
20 37-43-202, MCA, or any successor procedures, standards and rules that are promulgated in State law.

21 5. An Appropriator may change an Appropriation Right or Existing Use without first applying for a Change
22 in Use authorization pursuant to Section 2-2-101, et seq. of this Ordinance for the purpose of constructing a
23 Redundant Well in a Public Water Supply System if the Redundant Well:

24 a. withdraws water from the same Groundwater source as the original well; and

25 b. is required by a State, federal, or Tribal agency.

26 6. The priority date of the Redundant Well is the same as the priority date of the original well. Only one
27 well may be used at one time.

28 7. Within 60 days of completion of a Redundant Well, the Appropriator shall file a Notice of Construction
29 of Redundant Well with the Office of the Engineer on a form provided by the Board. The Engineer or Designee
30 shall review and process the Notice pursuant to the procedures set forth in subsection (2) of this Section.

1 8. If a Notice of Construction of Redundant Well is not completed within the time allowed, the Appropriator
2 shall:

3 a. cease appropriation of water from the Redundant Well pending approval by the Engineer or Designee;

4 and

5 b. submit an application for a Change in Use authorization pursuant to Section 2-2-104 of this Ordinance;

6 or

7 c. comply with the well abandonment procedures, standards and rules adopted by the board of water well
8 contractors pursuant to 37-43-202, MCA, or any successor procedures, standards and rules that are promulgated
9 in State law.

10 9. Any Appropriator aggrieved by a determination that a corrected Notice required by subsection (2) or
11 (7) of this Section, as applicable, is defective may appeal that determination to the Board by filing a notice of
12 appeal to the Board within 30 days of the rejection of the corrected Notice. To be filed, a notice must be placed
13 in the custody of the Board within the time fixed for filing. Filing may be accomplished by mail addressed to the
14 Board, but filing shall not be timely unless the papers are actually received within the time fixed for filing.

15 10. Any appeal to the Board filed pursuant to subsection (9) of this Section shall be conducted pursuant
16 to the provisions of Section 3-1-104 of this Ordinance. If such an appeal is filed, the Engineer shall be the
17 appellee.

18 2-2-116. Appropriation Rights for Stock Water Allowances.

19 1. Appropriation Rights for Stock Water Allowances include Stock Water Well Allowances, Stock Water
20 Pit Allowances, and Stock Water Tank Served by Surface Water Allowances.

21 2. A Stock Water Well Allowance may be sourced from either Wells or Developed Springs.

22 3. A Stock Water Pit Allowance may be sourced from Groundwater seepage or a non-perennial stream.

23 4. A Stock Water Tank Served by Surface Water Allowance may be sourced from a perennial or
24 non-perennial stream.

25 5. Before appropriating water for a Stock Water Well, approval from the Engineer is required. The
26 Engineer may approve a Stock Water Well Allowance if:

27 a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;

28 b. the maximum flow rate is 35 gallons per minute or less;

29 c. the maximum annual diverted volume is 2.4 acre-feet or less;

30 d. the means of diversion is a single Well or Developed Spring;

- 1 e. the well is not physically connected to a Home or Business;
- 2 f. the means of diversion includes Well Shaft Casing; and
- 3 g. Stock Water use associated with the Appropriation is dispensed using Stock Tanks.
- 4 6. Before appropriating water for a Stock Water Pit Allowance, approval from the Engineer is required.
- 5 The Engineer can approve a Stock Water Pit allowance if:
- 6 a. the capacity of the Stock Water Pit is 5 acre feet or less;
- 7 b. the maximum annual appropriated volume is 10 acre feet or less;
- 8 c. the Stock Water Pit Allowance is sourced from Groundwater seepage, a non-perennial stream, or both,
- 9 provided that a ditch or pipeline is not used;
- 10 d. the Stock Water Pit Allowance is constructed on and accessible to a parcel of land 40 acres or larger
- 11 and owned or under control of the applicant; and
- 12 e. the construction of the means of diversion complies with Tribal Ordinance 87(A) (Aquatic Lands
- 13 Conservation Ordinance).
- 14 7. Before appropriating water for a Stock Water Tank Served by Surface Water Allowance, approval from
- 15 the Engineer is required. The Engineer can approve a Stock Water Tank Served by Surface Water Allowance
- 16 if:
- 17 a. the maximum flow rate is 10 gallons per minute or less;
- 18 b. the combined maximum annual diverted volume is 2.4 acre-feet or less;
- 19 c. the means of conveyance is a fully contained pipe or hose. Open ditch conveyance is not allowed;
- 20 d. the construction of the means of diversion complies with Tribal Ordinance 87(A) (Aquatic Lands
- 21 Conservation Ordinance); and
- 22 e. Stock Water associated with the appropriation is dispensed using one or more Stock Tanks.
- 23 8. An applicant must file a completed Application for a Stock Water Allowance with the Office of the
- 24 Engineer and obtain approval from the Engineer before developing and appropriating water for Stock Water use
- 25 pursuant to this Section. A complete application shall also include:
- 26 a. proof that the applicant has the possessory interest or the written consent of the Person(s) with
- 27 possessory interest in the property where the point of diversion is located and where the water is to be put to
- 28 beneficial use, and property rights in the diversion Works; and
- 29 b. a site-map that shows, in addition to the requirements of Section 1-1-110(12) of this Ordinance, the
- 30 location of all proposed Stock Water Allowance development(s) including latitude and longitude in decimal

1 degrees. The map must include the entire property boundaries where the Stock Water Allowance development
2 is proposed, or a minimum radius of 500 feet from any proposed Stock Water Allowance development, whichever
3 is greater, and include any of the following that are in existence or are proposed by the applicant:

- 4 i. well(s), Pits and Stock Tanks including purpose of each;
- 5 ii. buildings on the site, including identification of Well connections;
- 6 iii. property lines and ownerships; and
- 7 iv. means of conveyance, water right points of diversions, and surface water features.

8 9. Upon receipt of a completed application form complying with subsection (8) of this Section, the Office
9 of the Engineer shall date stamp the application form.

10 10. The Engineer or Designee shall review the application within 30 days of the date stamped on the
11 application pursuant to subsection (9) of this Section, and within that timeframe may either approve the
12 application or return a defective application to the applicant with a written explanation of the defects. If a corrected
13 application is submitted within 30 days of its return by the Office of the Engineer, no new filing fee shall be
14 required. Upon receiving a corrected application, which shall be date stamped by the Office of the Engineer upon
15 receipt, the Engineer or Designee has 30 days from the date stamped on the corrected application pursuant to
16 this subsection (10) to approve or deny the application.

17 11. If the Engineer or Designee does not approve or return an application within 30 days of the date
18 stamped on the application pursuant to subsection (9) of this Section, the application shall be deemed approved.
19 If the Engineer or Designee does not approve or deny a corrected application within 30 days of the date stamped
20 on the application pursuant to subsection (10) of this Section, the application shall be deemed approved.

21 12. Once an applicant meets the requirements of subsections (5) through (9) of this Section, as
22 applicable, and an application is approved by the Engineer or Designee under subsection (10) or (11) of this
23 Section, the Office of the Engineer shall issue an authorization to develop a Stock Water Allowance. The
24 authorization to develop a Stock Water Allowance entitles an Appropriator to construct the authorized type of
25 Stock Water Allowance within, but not to exceed, one year of the date of approval.

26 13. An Appropriation Right for a Stock Water Allowance becomes valid and final when, within 120 days
27 of completing the diversion Works and putting the water to beneficial use, an Appropriator files a Stock Water
28 Allowance completion form accurately and completely. The completion form for a Stock Water Well Allowance
29 must include a copy of the companion Well Log Report(s), and must identify the as-built attributes of any Well,
30 Pit or Stock Tank constructed. If the as-built attributes are less than or equal to the size of the Allowance for which

1 the applicant originally applied, a Certificate of Stock Water Allowance shall be issued for the as-built attributes.
2 No Certificate of Stock Water Allowance may be issued if the as-built system exceeds the volumes or flow rates
3 set forth in subsections (5), (6) or (7) of this Section, as applicable.

4 14. If an Appropriation Right for a Stock Water Allowance is revoked by the Board pursuant to the
5 provisions of Section 3-1-112(3) of this Ordinance, or is determined to be abandoned pursuant to the provisions
6 of Sections 2-1-111 and 2-1-112 of this Ordinance, or is voluntarily abandoned, the Appropriator shall, within 180
7 days of the revocation or voluntary abandonment, fill in and rehabilitate any Pits, Pit-dams, Constructed Ponds,
8 or Reservoirs associated with the revoked or abandoned Appropriation Right for a Stock Water Allowance, and
9 shall, within 180 days of the revocation or voluntary abandonment, seal any tanks or supply lines associated with
10 the revoked or abandoned Appropriation Right for a Stock Water Allowance.

11 2-2-117. Appropriation Rights for Domestic Allowances for Homes and Businesses; process for
12 application, review, and issuance.

13 1. Appropriation Rights for Domestic Allowances include Individual Domestic Allowances, Shared
14 Domestic Allowances and Development Domestic Allowances. An Individual Domestic Allowance may be used
15 only to serve an individual Home or Business. A Shared Domestic Allowance may be used only to serve no less
16 than two and no more than three Homes and/or Businesses. A Development Domestic Allowance may be used
17 only to serve a Development.

18 2. A Domestic Allowance may be sourced from either Wells or Developed Springs.

19 3. A Domestic Allowance may not be used to fill or maintain Pits, Pit-Dams, Constructed Ponds, or
20 Reservoirs.

21 4. Before appropriating water for Domestic Use for an Individual Domestic Allowance, approval from the
22 Engineer is required. The Engineer may approve an Individual Domestic Allowance if:

23 a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;

24 b. the maximum flow rate is 35 gallons per minute or less;

25 c. the maximum annual diverted volume is 2.4 acre-feet or less;

26 d. the means of diversion is a single Well or Developed Spring;

27 e. the Well is physically connected to and serves one and only one Home or Business;

28 f. the means of diversion includes Well Shaft Casing;

29 g. Stock Water use associated with the allowance is dispensed using Stock Tanks; and

30 h. the amount of land to be irrigated by the allowance is 0.7 acres or less.

- 1 5. Before appropriating water for a Shared Domestic Allowance, approval from the Engineer is required.
- 2 The Engineer may approve a Shared Domestic Allowance if:
- 3 a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;
- 4 b. the maximum flow rate is 35 gallons per minute or less;
- 5 c. the maximum annual diverted volume is 2.4 acre-feet or less;
- 6 d. the means of diversion is a single Well or Developed Spring;
- 7 e. the Well is physically connected to not less than two and not more than three Homes and/or
- 8 Businesses that are not a Development;
- 9 f. the means of diversion includes Well Shaft Casing;
- 10 g. Stock Water use associated with the allowance is dispensed using Stock Tanks;
- 11 h. if the Well is connected to two homes and/or businesses, the amount of land to be irrigated with the
- 12 allowances is 0.5 acres or less. If the well is connected to three Homes and/or Businesses, the amount of land
- 13 to be irrigated by the allowance is 0.75 acres or less; and
- 14 i. the application includes a copy of the Shared Well Agreement signed by all parties.
- 15 6. Before appropriating water for a Development Domestic Allowance, approval from the Engineer is
- 16 required. The Engineer may approve a Development Domestic Allowance if:
- 17 a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;
- 18 b. the maximum flow rate from each Well or Developed Spring is 35 gallons per minute or less;
- 19 c. the combined maximum annual diverted volume from all wells and Developed Springs is 10 acre-feet
- 20 or less;
- 21 d. Measurement devices approved by the Engineer and capable of recording cumulative volumes are
- 22 installed on each Well or Developed Spring;
- 23 e. the means of diversion is one or more Wells and/or Developed Springs not to exceed one Well or
- 24 Developed Spring per Home or Business within the Development;
- 25 f. the means of diversion includes Well Shaft Casing;
- 26 g. the allowance is physically connected to multiple Homes and/or Businesses that together constitute
- 27 a Development;
- 28 h. Stock Water use associated with the allowance is dispensed using Stock Tanks;
- 29 i. the amount of land to be irrigated with the allowances is limited to 0.25 acres or less for each Home
- 30 or Business within the Development;

1 j. the application includes a copy of any Shared Well Agreement(s) signed by all parties, if applicable;

2 k. the water supply requirements for all Homes and Businesses within the Development are satisfied by

3 the allowance; and

4 l. the applicant includes a copy of the development plan, plat, or equivalent as required by the associated

5 county government.

6 7. The owner(s) or operator(s) of a Development Domestic Allowance must submit a Development

7 Domestic Allowance Water Measurement Report by March 31st of the year following the year covered by the

8 report.

9 8. An applicant must file a completed Application for a Domestic Allowance and obtain approval from the

10 Engineer before drilling any Well(s) or developing any spring(s) and putting water to use pursuant to this Section.

11 A completed application shall also include:

12 a. proof that the applicant has a possessory interest or the written consent of the Person(s) with

13 possessory interest in the property where the point of diversion is located and where the water is to be put to

14 beneficial use, and property rights in the diversion Works; and

15 b. a site-map that shows, in addition to the requirements of Section 1-1-110(12) of this Ordinance, the

16 location of all proposed Wells and Developed Springs including latitude and longitude in decimal degrees. The

17 map must include the entire property boundaries where the Well associated with the Domestic Allowance is

18 proposed, or a minimum of 500 feet in radius around the proposed Well(s) or Developed Spring(s), whichever

19 is greater, and include any existing or proposed by the applicant:

20 i. Well(s) and Stock Tanks, including purpose of each well;

21 ii. sewage facilities including septic tanks and drainfields;

22 iii. buildings on the site, including identification of Well connections;

23 iv. property lines and ownerships;

24 v. irrigated acres per lot or unit Well(s); and

25 vi. means of conveyance, water right points of diversions, and surface water features.

26 9. Upon receipt of a completed application form complying with subsection (8) of this Section, the Office

27 of the Engineer shall date stamp the application form.

28 10. The Engineer or Designee shall review the application within 30 days of the date stamped on the

29 application pursuant to subsection (9) of this Section, and within that timeframe may either approve the

30 application or return a defective application to the applicant, together with a written explanation of the defects.

1 If a corrected application is submitted within 30 days of its return by the Office of the Engineer, no new filing fee
2 shall be required. Upon receiving a corrected application, which shall be date stamped by the Office of the
3 Engineer upon receipt, the Engineer or Designee has 30 days from the date stamped on the corrected application
4 pursuant to this subsection (10) to approve or deny the application.

5 11. If the Engineer or Designee does not approve or return an application within 30 days of the date
6 stamped on the application pursuant to subsection (9) of this Section, the application shall be deemed approved.
7 If the Engineer or Designee does not approve or deny a corrected application within 30 days of the date stamped
8 on it pursuant to subsection (10) of this Section, the application shall be deemed approved.

9 12. Once an applicant meets the requirements of subsections (4), (5), or (6) of this Section, as applicable,
10 as well as the requirements of subsection (8) of this Section, and an application is approved by the Engineer or
11 Designee under subsection (10) or (11) of this Section, the Office of the Engineer shall issue an authorization to
12 develop a Domestic Allowance. The authorization to develop a Domestic Allowance entitles an Appropriator to
13 construct the authorized type of Domestic Allowance within, but not to exceed, one year of the date of approval.

14 13. An Appropriation Right for a Domestic Allowance becomes valid and final when, within 120 days of
15 completing the Well(s) or Developed Spring(s) and putting the water to beneficial use, an Appropriator files a
16 Domestic Allowance completion form accurately and completely. The completion form must also include a copy
17 of the companion Well Log Report(s), and must identify the as-built attributes of any Well or Stock Tank
18 constructed. If the as-built attributes are less than or equal to the size of the allowance for which the applicant
19 originally applied, a Certificate of Domestic Allowance shall be issued for the as-built attributes. No Certificate
20 of Domestic Allowance may be issued if the as-built system exceeds the volumes or flow rates set forth in
21 subsections (4), (5) or (6) of this Section, as applicable.

22 14. If an Appropriation Right for a Domestic Allowance is revoked by the Board pursuant to the provisions
23 of Section 3-1-112(3) of this Ordinance, or is determined to be abandoned pursuant to the provisions of Sections
24 2-1-111 and 2-1-112 of this Ordinance, or is voluntarily abandoned, the Appropriator shall, within 180 days of the
25 revocation or voluntary abandonment, follow the well abandonment procedures, standards, and rules adopted
26 by the board of water well contractors pursuant to 37-43-202, MCA, or any successor procedures, standards and
27 rules that are promulgated in State law, for any Well associated with the revoked or abandoned Appropriation
28 Right for a Domestic Allowance.

29 2-2-118. Process for development of new uses from Flathead System Compact Water.

30 1. Subject to the terms and conditions of the Compact, the Tribal Council or its delegate, or any Person

1 with the written consent of the Tribal Council or its delegate, may apply to utilize Flathead System Compact Water
2 for any beneficial use within the Reservation by submitting a correct and complete application to the Office of the
3 Engineer.

4 2. A correct and complete application for a use of Flathead System Compact Water shall contain the
5 following information:

6 a. the name of the applicant;

7 b. a description of the proposed purpose of use;

8 c. the point of diversion

9 d. the means of diversion

10 e. the place of use;

11 f. the flow rate, volume diverted, and volume consumed;

12 g. the means of conveyance;

13 h. the period of use;

14 i. the duration or term of the proposed use;

15 j. a project plan, including a proposed completion period and, if applicable, a list of water rights to be used
16 in conjunction with or to be replaced by the proposed use of Flathead System Compact Water for which the
17 application is being filed;

18 k. a map depicting all the features described in this subsection (2); and

19 l. if the applicant is not the Tribal Council or its delegate, written authorization from the Tribal Council or
20 its delegate to submit the application.

21 3. Upon receipt of a completed application for the use of Flathead System Compact Water, the Office of
22 the Engineer shall date stamp it.

23 4. Staff shall analyze the application for the use of Flathead System Compact Water within 180 days of
24 the date stamped on the application pursuant to subsection (3) of this Section using the tools and techniques
25 identified in Section 2-2-107(2) of this Ordinance to determine compliance with the criteria identified in Section
26 2-2-102(2)(b) through (f) of this Ordinance.

27 5. All information relied upon by Staff in analyzing an application pursuant to this Section shall be
28 documented in the application file.

29 6. Staff, using information from the application as well as their own compilation of independent resources
30 and analysis, shall draft a recommended decision with findings of fact and conclusions of law determining whether

1 the application satisfies the criteria set forth in Section 2-2-102(2)(b) through (f) of this Ordinance.

2 7. If the recommended decision is to grant the application, a summary of the application and the
3 recommended decision shall be publicly noticed by the Office of the Engineer once via legal notice in a
4 newspaper of general circulation on the Reservation and shall be posted on the Board's website for a period of
5 45 days from the date the recommended decision is issued, during which time objections may be filed with the
6 Engineer. If no objections are filed, or if all filed objections are withdrawn prior to being ruled upon, the application
7 shall be granted by the Engineer within 10 days after expiration of the time for filing objections, or after the
8 unconditional withdrawal of the last objection, whichever date is later.

9 8. If the recommended decision is to deny the application, the applicant may appeal the recommended
10 decision to the Engineer pursuant to the provisions of Section 2-2-109 of this Ordinance.

11 9. If the recommended decision is to grant the application with conditions, the application shall be noticed
12 to the public pursuant to the provisions of subsection (7) of this Section unless the applicant withdraws the
13 application within 30 days of the issuance of the recommended decision or appeals the recommended decision
14 to the Engineer pursuant to the provisions of Section 2-2-109 of this Ordinance. The application filing fee shall
15 not be refunded upon withdrawal.

16 10. To be valid for processing, an objection to an application for the use of Flathead System Compact
17 Water must assert and describe how the proposed development of Flathead System Compact Water fails to
18 comply with one or more of the criteria set forth in Section 2-2-102(2)(b) through (f) of this Ordinance. Any such
19 valid objection shall be resolved pursuant to the procedures set forth in Sections 2-2-110 through 2-2-112 of this
20 Ordinance, provided however, that the burden of proof in the hearing before the Engineer or Designee shall be
21 on the objector to prove by a preponderance of the evidence that the application fails to comply with one or more
22 of the criteria set forth in Section 2-2-102(2)(b) through (f) of this Ordinance.

23 11. Unless an objection to the application is sustained, the application shall be granted within 10 days
24 of expiration of the time to appeal the decision relating to any objection or after the exhaustion of the objector's
25 last appeal, whichever date is later.

26 12. The priority date of any use of Flathead System Compact Water is the date of the Tribes' Flathead
27 System Compact Water right as set forth in Article III.C.1.c of the Compact.

28 2-2-119. Appropriation Rights for Non-consumptive Geothermal Heating or Cooling Exchange Wells.

29 1. Appropriation Rights may be issued for non-consumptive geothermal heating or cooling exchange
30 Wells with a maximum appropriation of 350 gallons a minute or less if all of the water extracted is returned without

1 delay to the same source aquifer, if the distance between the extraction well and both the nearest existing well
2 and any hydraulically connected surface waters is more than twice the distance between the extraction well and
3 the Injection Well, and if all Well construction complies with the requirements of Section 1-1-111 of this
4 Ordinance. Before appropriating water for a use described in this subsection (1), approval of the Engineer is
5 required.

6 2. An applicant must file a completed application form and obtain approval from the Engineer before
7 drilling any Well(s) or developing any spring(s) and putting water to use pursuant to this Section. A completed
8 application shall also include:

9 a. proof that the applicant has the possessory interest or the written consent of the Person(s) with
10 possessory interest in the property where the point of diversion is located and where the water is to be put to
11 beneficial use, and property rights in the diversion Works; and

12 b. a site-map showing the location of all proposed wells including latitude and longitude in decimal
13 degrees. The map must also include the entire property boundaries where the Wells are proposed, or a minimum
14 of 500 feet in radius around the proposed Well(s) or spring(s), whichever is greater, and include any of the
15 following that exist or are proposed by the applicant:

- 16 i. well(s) including purpose of each well;
- 17 ii. sewage facilities including septic tanks and drainfields;
- 18 iii. buildings on the site, including identification of Well connections;
- 19 iv. property lines and ownerships;
- 20 v. irrigated acres per lot or unit well(s); and
- 21 vi. means of conveyance, water right points of diversions, and surface water features.

22 3. Upon receipt of a completed application form complying with subsection (2) of this Section, the Office
23 of the Engineer shall date stamp the application form.

24 4. The Engineer or Designee shall review the application within 45 days of the date stamped on the
25 application pursuant to subsection (3) of this Section, and within that timeframe may either approve the
26 application or return a defective application to the applicant, together with a written explanation of the defects.
27 If a corrected application is submitted within 30 days of its return by the Office of the Engineer, no new filing fee
28 shall be required. Upon receiving a corrected application, which shall be date stamped by the Office of the
29 Engineer upon receipt, the Engineer or Designee has 30 days from the date stamped on the corrected application
30 pursuant to this subsection (4) to approve or deny the application.

1 5. If the Engineer or Designee does not approve or return an application within 45 days of the date
2 stamped on the application pursuant to subsection (3) of this Section, the application shall be deemed approved.
3 If the Engineer or Designee does not approve or deny a corrected application within 30 days of the date stamped
4 on this application pursuant to subsection (4) of this Section, the application shall be deemed approved.

5 6. Once an applicant meets the requirements of subsection (1) of this Section and the application is
6 approved pursuant to subsection (4) or (5) of this Section, as applicable, the Engineer shall issue an authorization
7 to develop the Appropriation Right for a Heating/Cooling Exchange Well.

8 7. An Appropriation Right for a Heating/Cooling Exchange Well becomes valid and final when, within 120
9 days of completing the Well(s) or Developed Spring(s) and putting the water to beneficial use, an Appropriator
10 files a Heating/Cooling Exchange completion form accurately and completely. The completion form must also
11 include a copy of the companion Well Log Report(s) for the extraction Well and the Injection Well.

12 8. If an Appropriation Right for a Heating/Cooling Exchange Well is revoked by the Board pursuant to the
13 provisions of Section 3-1-112(3) of this Ordinance, or is determined to be abandoned pursuant to the provisions
14 of Sections 2-1-111 and 2-1-112 of this Ordinance, or is voluntarily abandoned, the Appropriator shall, within 180
15 days of the revocation or voluntary abandonment, follow the well abandonment procedures, standards, and rules
16 adopted by the board of water well contractors pursuant to 37-43-202, MCA, or any successor procedures,
17 standards and rules that are promulgated in State law, for any Well associated with the revoked or abandoned
18 Appropriation Right for a Heating/Cooling Exchange Well.

19 2-2-120. Temporary Emergency Appropriations.

20 1. A Temporary Emergency Appropriation may be made without prior approval from the Board, but the
21 use must cease immediately when the water is no longer required to meet the emergency.

22 2. A Temporary Emergency Appropriation does not include the use of water for the ordinary operation
23 and maintenance of any trade or business, including but not limited to agricultural production.

24 3. Within 60 days after the cessation of a Temporary Emergency Appropriation, the Appropriator shall
25 notify the Board of the use to which the water was put, the dates of use, and the estimated amount of water used.

26 4. Except as set forth in subsection (5) of this Section, a Temporary Emergency Appropriation may not
27 include the use of Enclosed Storage.

28 5. When the Temporary Emergency Appropriation is made by a local governmental fire agency organized
29 under Title 7, chapter 33, MCA, or applicable Tribal law, and the Temporary Emergency Appropriation is used
30 only for emergency fire protection, the Temporary Emergency Appropriation may include enclosed storage.

- 1 2-2-121. Short-term use of a portion of the Tribal Water Right for road construction or dust abatement.
- 2 The Tribes, or a Person with the written consent of the Tribes, may use a portion of the Tribal Water Right for road
- 3 construction or dust abatement purposes, without the prior approval of the Board, subject to the following
- 4 provisions:
- 5 1. For uses of 20,000 gallons or less per day from a single source of supply, no notice is required;
- 6 2. For uses greater than 20,000 gallons per day and less than 60,000 gallons per day from a single
- 7 source of supply, a notice must be posted at the site of the diversion or withdrawal for the entire period during
- 8 which water is being diverted or withdrawn. The notice posted shall be clearly legible and visible and provide the
- 9 following information:
- 10 a. source of water;
- 11 b. purpose of use;
- 12 c. starting and ending date of diversion;
- 13 d. place of use;
- 14 e. diversion flow rate;
- 15 f. maximum volume of water to be diverted or withdrawn per day; and
- 16 g. name and contact information for the user of the water and for the Board.
- 17 3. For uses greater than 60,000 gallons per day from a single source of supply, the Board must be
- 18 notified at least 10 days but not more than 45 days in advance of the initial use of the water. Notice must be
- 19 posted at the site of the diversion or withdrawal, as provided in subsection (2) of this Section. Notification to the
- 20 Board must provide the following information:
- 21 a. source of water;
- 22 b. legal description of the point of diversion or withdrawal;
- 23 c. place of use;
- 24 d. map showing preceding three items;
- 25 e. purpose of use;
- 26 f. starting and ending date of use;
- 27 g. diversion flow rate;
- 28 h. maximum volume of water to be diverted or withdrawn per day; and
- 29 i. name and contact information for the user.
- 30 4. The diversion or withdrawal of water pursuant to this Section shall not adversely affect any legal use

1 of water in existence as of the date of the diversion or withdrawal; and

2 5. If notified that the diversion or withdrawal of water pursuant to this Section is adversely affecting any
3 legal use of water in existence as of the date of the diversion or withdrawal, the user will immediately cease
4 diversion or withdrawal from that source of supply. To resume the diversion or withdrawal, the user may move
5 the diversion or withdrawal to another source of supply, or may satisfy the Board and the holder(s) of the affected
6 legal use(s) of water in existence as of the date of the diversion or withdrawal that use will not cause adverse
7 effects.

8 2-2-122. Short-term use of an appropriation right that is not part of the Tribal Water Right for road
9 construction or dust abatement.

10 1. An Appropriator may lease, for a term not to exceed 90 days, all or part of an Appropriation Right or
11 Existing Use that is not part of the Tribal Water Right for road construction or dust abatement without the prior
12 approval of the Board, subject to the requirements of this Section. The lease agreement must include the
13 following information:

14 a. the name and address of the lessee;

15 b. the name of the owner of the Appropriation Right or Existing Use;

16 c. the number of the Appropriation Right or Existing Use;

17 d. the purpose of use of water for which the lease is being made;

18 e. the source of water to be appropriated;

19 f. the starting and ending date of the proposed use of water;

20 g. the proposed point of diversion;

21 h. the proposed place of use;

22 i. the diversion flow rate and volume of water to be used during the period of use; and

23 j. a description of how the prior use of water will be reduced to accommodate the temporary change of
24 use of the Appropriation Right or Existing Use, including the number and location of acres to be removed from
25 irrigation, if applicable.

26 2. A short-term lease of an Appropriation Right or Existing Use under this Section may not exceed 60,000
27 gallons a day or the amount of the Appropriation Right or Existing Use, whichever is less. Any combination of
28 short-term leases cannot exceed 120,000 gallons a day for one project.

29 3. Except as provided in subsection (7) of this Section, the following information must be submitted to
30 the Board at least 2 days prior to the use of water by a lessee under this Section:

1 a. a copy of the Publication notice or copies of the individual notice required under subsection (4) of this
2 Section;

3 b. a copy of the lease agreement; and

4 c. for a combination of short-term leases greater than 60,000 gallons a day for one project, an analysis
5 by the lessee of any potential adverse effects and a description of planned actions to mitigate any potential
6 adverse effects to Appropriators in the area of the proposed point of diversion.

7 4. Except as provided in subsection (7) of this Section, the lessee of an Appropriation Right or Existing
8 Use under this section shall, 30 days prior to the use of the water, publish a notice of the proposed use of water
9 once in a newspaper of general circulation in the area of the diversion or mail individual notice to potentially
10 affected Appropriators in the area of the proposed point of diversion. The published notice or the individual notice
11 must contain the information listed in subsections (1)(a) through (1)(j) and (3)(c) of this Section.

12 5. Complaints regarding temporary use

13 a. an Appropriator, whether the water right is prior or subsequent in priority to the short-term lease
14 acquired by a Person under this Section, who cannot satisfy in full the Appropriator's right during the time that
15 the short-term lessee is diverting water, may make a complaint to the Engineer pursuant to Section 3-1-102 of
16 this Ordinance and cause the short-term lessee's diversion to be discontinued.

17 b. the diversion is discontinued until the complaining Appropriator's water right is satisfied or until the
18 lessee establishes to the Engineer that the discontinuance has had no effect on the complaining Appropriator's
19 water right. Upon establishment that discontinuance has not had an effect, the Engineer shall enter an order
20 allowing the diversion to continue.

21 6. This Section does not limit the remedies available to an Appropriator to enjoin or to seek damages from
22 a Person appropriating water under this Section.

23 7. a. a consolidated city-county or a county or an incorporated city or town is not subject to the
24 requirements of subsections (3)(a) and (4) of this Section when conducting dust abatement that was not
25 scheduled or contracted for 30 days or more prior to the use of the water.

26 b. a consolidated city-county or a county or an incorporated city or town that does not publish notice as
27 provided in subsection (4) of this Section shall post a copy of the lease agreement at the point of diversion at least
28 24 hours prior to and during the time that water is diverted.

29 2-2-123. Wetland Protective Appropriation Rights.

30 1. Pursuant to the provisions of Sections 2-2-101 et seq. of this Ordinance, a Wetland Protective

1 Appropriation Right for a Natural Wetland or Restored Natural Wetland may be issued, subject to the following
2 limitations:

3 a. except as authorized by Appropriation Rights issued pursuant to Section 1-1-107(1)(k) of this
4 Ordinance, irrigation return flows may not be used as a source for an Appropriation Right issued pursuant to this
5 Section.

6 b. No Wetland Protective Appropriation Right shall be issued for any Wetland using Pits, Pit-dams, or
7 Constructed Ponds.

8 c. No Wetland Protective Appropriation Right shall be issued for any Wetland occurring solely as a result
9 of seepage from irrigation reservoirs, canals, laterals or ditches.

10 d. No Wetland Protective Appropriation Right shall be used for any other purpose and shall not be
11 changed to another purpose.

12 2. Wetlands eligible for Wetlands Protective Appropriation Rights are:

13 a. Those Wetlands identified on the map of Wetlands eligible for Wetlands Protective Appropriations
14 Rights (available from the Office of the Engineer); or

15 b. Those Wetlands not identified on the Map if:

16 i. the proposed use is a Restored Natural Wetland;

17 ii. the applicant provides a site-specific Wetlands delineation, using any delineation method approved by
18 the Engineer, that includes:

19 (1) the total number of acres and a detailed map showing the proposed boundary of the Wetland for
20 which the Wetland Protective Appropriation Right is being applied; and

21 (2) an identification of the Wetlands delineation method used, along with supporting field data.

22 2-2-124. Wetland Quantified Appropriation Rights.

23 1. Pursuant to the provisions of Sections 2-2-101 et seq. of this Ordinance, an Appropriations Right or
24 Change in Use authorization to divert, impound, or withdraw surface water or Groundwater for a Wetland purpose
25 may be issued.

26 2. All Wetlands that utilize man-made diversions, impoundments, withdrawals, excavations, or other
27 artificial means for the purposes of Appropriation for either all or a portion of a Wetland water supply in excess
28 of a Natural Wetland water supply or Restored Natural Wetland water supply shall obtain, in advance of
29 Appropriation, an Appropriation Right or Change in Use authorization for that Wetland purpose.

30 3. In addition to the information required by Sections 1-1-110 and 2-2-104 of this Ordinance, an

1 application for an Appropriation Right or Change in Use authorization pursuant to this section shall include the
2 following information:

3 a. A delineation of pre-project existing Wetlands and post-project Wetlands using a Wetland delineation
4 method approved by the Engineer. The delineation shall describe the following pre-project and post-project
5 Wetland attributes:

6 i. the outer Wetland boundary and area in acres;

7 ii. the boundaries of permanently inundated areas, depth in feet, and area in acres;

8 iii. the boundaries of seasonally inundated areas, period of inundation, depth in feet, and area in acres;

9 iv. the boundaries of permanently saturated areas and area in acres;

10 v. the boundaries of seasonally saturated areas, period of saturation, and area in acres; and

11 vi. Wetland vegetation boundaries and area in acres.

12 b. The location and description of the manmade diversions, impoundments; withdrawals, excavations,
13 or other artificial means for the purposes of Appropriation;

14 c. The flow rate and volume of water to be appropriated in monthly time steps; however, the Office of the
15 Engineer may require a more frequent quantification time step;

16 d. The consumptive volume for each Wetland attribute delineated pursuant to Section 2-2-124(a) of this
17 Ordinance in monthly time steps; however, the Office of the Engineer may require a more frequent quantification
18 time step;

19 e. non-consumed water, including flow rate and volume estimates, and a description of return flows and
20 their eventual destination and timing; and

21 f. the volume of Natural Wetland water supply, if applicable, in monthly time steps.

22 2-2-125. Notice of Trust Status Conversion for Lands with Appurtenant Water Rights Arising Under State
23 Law Acquired by the Tribes. As provided for by the Compact, Article III.H, the following process shall be used to
24 notify the Water Management Board of the transfer of Tribally-owned fee land to trust status:

25 1. Starting upon the Effective Date of the Compact, the Tribes may file a Trust Transfer form with the
26 Board for any lands acquired by the Tribes with appurtenant Water Rights Arising Under State Law that have
27 been taken into trust by the United States on behalf of the Tribes.

28 2. A copy of the deed transferring the fee land to trust status shall be attached to the form.

29 2-2-126. Water Management Board Adjustment of Priority Date Pursuant to Compact. Upon submission
30 of a Trust Transfer form by the Tribes, the priority date of any Water Rights Arising Under State Law appurtenant

1 to land identified on the Trust Transfer form shall be adjusted by the Water Management Board to July 16, 1855.
2 The Board shall cause the adjusted priority date to be entered into the Reservation water rights database
3 identified in Section 1-1-108 of this Ordinance.

4 2-2-127. Tribal Utilization of Water Right with Adjusted Priority Date. Any water right whose priority date
5 is adjusted pursuant to Section 2-2-126 of this Ordinance shall be subject to the following use conditions:

6 1. The water right must be used as historically used; or

7 2. Changes to the water right must be made pursuant to the provisions set for the in Article IV.B.4 of the
8 Compact and Section 2-2-101 et seq. of this Law of Administration.

9 2-2-128. Public Water Supply Reporting Requirements

10 1. The following shall comply with the reporting requirements set forth in subsection (2) of this Section:

11 a. any new Public Water Supply System approved pursuant to this Ordinance;

12 b. any Public Water Supply System in existence prior to the effective date of this Ordinance whose
13 authorized use is expanded pursuant to this Ordinance.

14 2. On an annual basis, any entity responsible for the operation of a Public Water Supply System identified
15 in subsection (1) of this Section shall report to the Office of the Engineer the total volume by month of pumping
16 or diversion of the Public Water Supply System.

17 Chapter III Enforcement

18 3-1-101. Scope

19 1. The enforcement powers set forth in this Chapter apply to the resolution of disputes between
20 Appropriators who are not served by the Flathead Indian Irrigation Project, or between any Appropriators who
21 are not served by the FIIP and any water user(s) or holders of Existing Rights, if any, whose use of water is
22 served by the FIIP. Disputes exclusively between or among users whose water is delivered by the FIIP shall
23 remain subject to the oversight of the Project Operator and the Enforcement provisions of this Ordinance shall
24 not apply. The powers and duties set forth in this Chapter, as they extend to uses of the Tribal Water Right within
25 the FIIP, extend only to the resolution of disputes concerning the delivery of water to FIIP diversion facilities and
26 shall not extend to the administration of that water in FIIP facilities or on lands served by the FIIP, which shall
27 remain subject to the oversight of the Project Operator.

28 2. Nothing in this Chapter, or in the Ordinance, is intended to preclude a water user from working
29 informally with other water users, any Water Commissioner appointed pursuant to Section 3-1-114 of this
30 Ordinance, or the Engineer, to resolve disputes or real-time water operation issues without recourse to the

1 provisions of this Chapter. A synopsis of all such resolutions between a water user and any Water Commissioner
2 or the Engineer shall be reduced to writing, and dated; a copy of which shall be kept in the Office of the Engineer
3 and available for public inspection. A synopsis of any such resolution between or among water users may be
4 reduced to writing. Provided, however, that any water user not party to any such informal resolution who believes
5 himself or herself to be injured by the informal resolution may seek redress by invoking the provisions of this
6 Chapter, subject to the limitation concerning FIIP water use set forth in subsection (1) of this Section, to challenge
7 the informal resolution.

8 3. Any of the timeframes set forth in Sections 3-1-102 through 3-1-107 of this Ordinance may be extended
9 upon mutual agreement of the parties to any dispute.

10 3-1-102. Complaint to the Engineer Regarding Actions or Inactions Between Appropriators.

11 1. Subject to the limitation concerning FIIP water use set forth in Section 3-1-101(1) of this Ordinance,
12 any Appropriator aggrieved by the action or inaction of any other Appropriator, or by any Person the Complainant
13 believes is Wasting water to the detriment of a right to use water the Complainant possesses, may file a
14 Complaint with the Engineer. Such Complaint must be submitted in writing and describe specifically the action
15 or inaction being complained of and the justification for the Complaint.

16 2. Upon receipt of a Complaint, the Office of the Engineer shall date stamp it and return a copy to the
17 Complainant along with a written statement indicating that informal resolution of the dispute between the
18 Appropriators, or between an Appropriator and a Person accused of Wasting water, may provide a more timely
19 and cost-effective remedy than having the Complaint adjudicated by the Engineer.

20 3. Within 3 days of the receipt of the Complaint, the Office of the Engineer shall serve a copy of it on the
21 Appropriator or other Person whose action or inaction is being complained of (the "Respondent"), and shall post
22 notice of the Complaint on the Board's website. The notice to the Respondent shall include a written statement
23 indicating that informal resolution of the dispute between the Complainant and the Respondent may provide a
24 more timely and cost-effective remedy than having the petition adjudicated by the Engineer.

25 3-1-103. Resolution of Complaint.

26 1. No later than 15 days after the provision of notice of the Complaint to the Respondent, pursuant to
27 Section 3-1-102(3) of this Ordinance, the Engineer or Designee shall hold a hearing on the Complaint, provided,
28 however that the Engineer or Designee may take an additional 10 days before holding the hearing to perform
29 such independent investigation into the Complaint as the Engineer or Designee deems appropriate. At such time,
30 both the Complainant and the Respondent shall explain their positions concerning the matter complained of. All

1 evidence that, in the opinion of the Engineer or Designee, possesses probative value shall be admitted, including
2 hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their
3 normal business affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant,
4 immaterial, or unduly repetitious shall be excluded.

5 2. A decision by the Engineer or Designee on the Complaint shall be made in writing within 7 days after
6 the completion of the hearing.

7 3. The decision of the Engineer or Designee may include an award of declaratory relief, and/or the
8 imposition of conditions on the use or exercise of a water right. Such conditions may include, but are not limited
9 to, instructions regarding the proper delivery of water, the installation of measuring devices, the construction of
10 suitable ditches to carry the return waters from any ditch or lands to the main stream or proper waste way, or the
11 mandate of structural changes to diversion structures.

12 4. Any Complainant or Respondent dissatisfied with the final decision of the Engineer or Designee may
13 appeal to the Board (and become an Appellant) and obtain review of the Engineer's or Designee's decision. A
14 notice of appeal to the Board must be received by the Board within 30 days of the issuance of the Engineer's or
15 Designee's written decision. The decision of the Engineer or Designee shall not be stayed during the pendency
16 of the appeal unless the Board expressly orders such a stay upon motion of the Complainant or Respondent.

17 3-1-104. Appeal to the Board.

18 1. Upon receipt of a notice of appeal pursuant to Section 3-1-103(4) of this Ordinance, or any other
19 Section of this Ordinance that provides for appeal to the Board pursuant to the provisions of this Section, the
20 Board, acting through the Office of the Engineer, shall date stamp the notice and return a copy to the Appellant.
21 Within three days of receipt of the notice of appeal, the Board, acting through the Office of the Engineer, shall
22 serve a copy of the notice of appeal on the other party to the dispute (who becomes the Appellee).

23 2. Either party to the appeal may elect to have oral argument prior to the resolution of the appeal. The
24 Appellant must request oral argument at the time of the filing of the notice of appeal or the Appellant's right to oral
25 argument is waived. The Appellee must request oral argument within 10 days of the Appellee's receipt of the
26 notice of appeal pursuant to subsection (1) of this Section, or the Appellee's right to oral argument is waived. If
27 either party to the appeal requests oral argument, such argument must be held within 60 days of the filing of the
28 notice of appeal, or within 30 days of the receipt of evidence or argument pursuant to subsection (3) or (4) of this
29 Section, whichever date is later.

30 3. Within 60 days from the filing of the notice of appeal, or any extended period of time, not to exceed

1 60 days, granted by the Board, the Appellant and Appellee may each submit additional factual evidence and legal
2 argument concerning the appeal to the Board and shall serve copies of the same on the other party to the
3 dispute.

4 4. Either party to the appeal shall have 60 days from the date of receipt of the evidence or argument
5 served pursuant to subsection (3) of this Section, or any extended period of time granted by the Board, not to
6 exceed 60 days, to respond in writing to the evidence and argument submitted by the other party to the dispute
7 pursuant to subsection (3) of this Section.

8 5. If oral argument is held, the argument shall be recorded electronically and an official record maintained.

9 6. A decision by the Board on the appeal shall be made in writing within 60 days after the completion of
10 oral argument or, if the right to oral argument is waived, within 60 days after the deadline for the submission of
11 evidence and argument pursuant to subsections (3) and (4) of this Section, whichever is later. The written
12 decision shall set forth the ruling of the Board along with a statement of the reasons therefor.

13 7. In ruling on the appeal, the Board may sustain the decision of the Engineer or Designee, may overturn
14 that decision and set aside any relief ordered by the Engineer or Designee, or may remand the matter to the
15 Engineer or Designee for such further proceedings as may be specified in the Board's written decision.

16 3-1-105. Petition to the Engineer by Any Appropriator Aggrieved by Actions or Inactions of a Water
17 Commissioner.

18 1. Any Appropriator aggrieved by the action or inaction or written directive from any Water Commissioner
19 appointed pursuant to Section 3-1-114 of this Ordinance, may petition the Engineer for relief (and become a
20 Petitioner). Such petition must be submitted in writing and describe with particularity the action, inaction or
21 directive giving rise to the petition and the justification for the petition.

22 2. Upon receipt of a petition, the Office of the Engineer shall date stamp it and return a copy to the
23 Petitioner along with a written statement indicating that informal resolution of the dispute between the Petitioner
24 and the Water Commissioner may provide a more timely and cost-effective remedy than having the petition
25 adjudicated by the Engineer.

26 3. Within 3 days of the date stamped on the petition pursuant to subsection (2) of this Section, the Office
27 of the Engineer shall serve a copy of it on the Water Commissioner whose action, inaction or written directive is
28 being petitioned against, and shall post notice of the Petition on the Board's website.

29 3-1-106. Resolution of Petition.

30 1. A Petitioner may elect to have the Petition decided on the record after submission of additional

1 evidence and argument, or after hearing. If a Petitioner elects to have a hearing, that request must be made at
2 the same time as the filing of the Petition or the right to a hearing is waived.

3 2. The Water Commissioner may elect to have the Petition decided after a hearing. The request for a
4 hearing must be made within 5 days of the Water Commissioner's receipt of notice of the Petition pursuant to
5 Section 3-1-105(3) of this Ordinance or the Water Commissioner's right to a hearing is waived.

6 3. If either the Petitioner or the Water Commissioner elects to have the Petition resolved after a hearing,
7 the Engineer or Designee shall hold a hearing on the Petition no later than 14 days after the filing of the Petition,
8 or within 14 days of the expiration of the time for the submission of evidence or argument pursuant to subsection
9 (5) of this Section, whichever date is later; provided, however that the Engineer or Designee may take an
10 additional 10 days before holding the hearing to perform such independent investigation into the petition as the
11 Engineer or Designee deems appropriate.

12 4. Within 5 days from the filing of the Petition, or any extended period of time, not to exceed 5 days,
13 granted by the Engineer, the Petitioner and Commissioner may each submit additional factual evidence and legal
14 argument concerning the Petition to the Engineer or Designee and shall serve copies of the same on the other
15 party to the dispute.

16 5. Either party to the dispute shall have 5 days from the date of receipt of the evidence or argument
17 served pursuant to subsection (4) of this Section, or any extended period of time granted by the Engineer or
18 Designee, not to exceed 5 days, to respond in writing to the evidence and argument submitted by the other party
19 to the dispute pursuant to subsection (4) of this Section.

20 6. The Petitioner shall bear the burden of proof before the Engineer or Designee.

21 7. The hearing shall be recorded electronically and an official record maintained. All evidence that, in the
22 opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is the
23 type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their normal business
24 affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or
25 unduly repetitious shall be excluded.

26 8. A decision by the Engineer or Designee on the Petition shall be made in writing within 7 days after the
27 completion of the hearing or, if the right to a hearing is waived, within 7 days after the deadline for the submission
28 of evidence and argument pursuant to subsections (4) and (5) of this Section, whichever is later. If the individual
29 who conducted the hearing becomes unavailable to the Office of the Engineer, a decision may be prepared by
30 an individual who has read the record only if the demeanor of witnesses is considered immaterial by all parties;

1 if any party considers the demeanor of any witness to be material to the resolution of the petition, a new hearing
2 must be held.

3 9. The decision of the Engineer or Designee may include an award of declaratory relief, and/or the
4 imposition of conditions on the use or exercise of an Appropriation Right or Existing Use. Such conditions may
5 include, but are not limited to, the installation of measuring devices, the construction of suitable ditches to carry
6 the return waters from any ditch or lands to the main stream or proper waste way, or the mandate of structural
7 changes to diversion structures.

8 10. Any Petitioner or Commissioner dissatisfied with the final decision of the Engineer or Designee may
9 appeal to the Board (and become an Appellant) and obtain review of the Engineer's or Designee's decision. A
10 notice of appeal to the Board must be received by the Board within 30 days of the issuance of the Engineer's or
11 Designee's written decision.

12 3-1-107. Appeal to the Board from a Decision on a Petition. The process for appeal to the Board of the
13 Engineer's or Designee's decision on a Petition shall be as set forth in Section 3-1-104 of this Ordinance.

14 3-1-108. Appeal from a Decision of the Board. The process for appeal from a decision of the Board
15 issued pursuant to Section 3-1-104 of this Ordinance shall be as set forth in Section 2-2-112 of this Ordinance.

16 3-1-109. Emergency Enforcement Powers of the Engineer. In an Emergency, the Engineer, or any Staff
17 who is so directed by the Engineer, or any Water Commissioner appointed pursuant to Section 3-1-114 of this
18 Ordinance, shall have the authority to lock, remove, render inoperative, shut down, close, seal, cap, modify, or
19 otherwise control methods of diversions and withdrawals, and obstructions to the flow of water, subject to
20 expedited appeal to the Board by the affected Person, as provided in Section 3-1-110 of this Ordinance.

21 3-1-110. Additional Enforcement Powers of the Engineer.

22 1. The Engineer, or any Staff who is so directed by the Engineer, or any Water Commissioner appointed
23 pursuant to Section 3-1-114 of this Ordinance, may enter upon lands on the Reservation with reasonable notice
24 to the owner or occupant, to investigate and inspect methods of diversion, withdrawal, and other activities
25 affecting water quantity, to install measuring devices at the expense of the water user on surface and
26 Groundwater diversions for the purpose of enforcing and administering this Ordinance, to monitor water use,
27 water quality, and diversion structures.

28 2. The Engineer, or any Staff who is so directed by the Engineer, or any Water Commissioner appointed
29 pursuant to Section 3-1-114 of this Ordinance, may take action to prevent the Illegal use of water, including, but
30 not limited to the temporary decommissioning of head gates or other diversion Works.

1 3. The Engineer may issue written notices of violation to Appropriators and to Illegal users of water for
 2 violations of this Ordinance or of the terms and conditions of any Appropriation Right or Existing Use or of any
 3 lawful order of the Engineer or the Board or any action or directive of any Water Commissioner appointed
 4 pursuant to Section 3-1-114 of this Ordinance.

5 4. Any notice issued pursuant to subsection (3) of this Section shall specify the particular violation or
 6 violations, the step(s) to be taken to come into compliance, and identify a reasonable time frame within which
 7 such steps are to be taken.

8 5. In the event of non-compliance with any written notice issued pursuant to subsection (3) of this Section
 9 within the specified time frame, the Engineer may move the Board to exercise its powers pursuant to Sections
 10 3-1-112 and 3-1-113 of this Ordinance.

11 6. Upon receipt of any written recommendation, pursuant to Section 3-1-115(3) of this Ordinance, from
 12 any Water Commissioner, the Engineer or Designee may reject the recommendation or may issue notice of intent
 13 to hold a hearing to determine whether the imposition of such conditions identified in the recommendation is
 14 warranted. The process for the consideration and resolution of any such matter shall be as set forth in Sections
 15 3-1-105 through 3-1-108 of this Ordinance, with the recommendation being treated as a petition, the Water
 16 Commissioner as the Petitioner and the affected water user(s) as Respondent(s).

17 3-1-111. Expedited Appeal to the Board in the Event of Certain Actions by the Engineer.

18 1. Any Appropriator whose use of water is affected by an action taken pursuant to Section 3-1-109 or
 19 3-1-110(2) of this Ordinance may file a written notice of appeal with the Board (and become an Appellant). The
 20 notice of appeal must describe with particularity the action being appealed and the justification for the appeal.

21 2. The Board must immediately notify the Engineer of the filing of a notice of appeal pursuant to
 22 subsection (1) of this Section, and must hear the appeal within 10 days of the notice of appeal being filed.

23 3. If the Board finds in favor of the Appellant, it may award appropriate relief, including declaratory relief,
 24 but not monetary penalties against the Office of the Engineer or any employee thereof, including any Water
 25 Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, acting in either their professional or
 26 personal capacities.

27 3-1-112. Additional Enforcement Powers of the Board. Upon motion by the Engineer, and after notice to
 28 any affected Appropriator and the opportunity for all parties to be heard, the Board may:

29 1. Impose fines, as set forth in Section 3-1-113 of this Ordinance.

30 2. Impose conditions on the future use of any Appropriation Right to prevent further violation, but only

1 upon a finding that the holder of any such Appropriation Right is violating or has violated any provision of that
2 Appropriation Right, or is violating or has violated any order issued by the Engineer or any directive of any Water
3 Commissioner appointed pursuant to Section 3-1-114 of this Ordinance concerning the use of that permit. The
4 process for appeal from any Board decision imposing conditions pursuant to this Section shall be as set forth in
5 Section 2-2-112 of this Ordinance.

6 3. Revoke or suspend any Appropriation Right, but only upon a finding that the holder of any such
7 Appropriation Right is willfully violating or has willfully violated any provision of that Appropriation Right, or is
8 willfully violating or has willfully violated any order issued by the Engineer concerning the use of that Appropriation
9 Right. The process for appeal from any Board decision revoking or suspending a permit shall be as set forth in
10 Section 2-2-112 of this Ordinance.

11 3-1-113. Fines.

12 1. The Board, pursuant to the provisions of this Section, may impose a fine not to exceed \$1,000 per
13 violation on any Person who fails to comply with the provisions of this Ordinance, including any written order of
14 the Board or Engineer or written directive of any Water Commissioner.

15 2. If a Person is using water under the color of law, fines may only be imposed commencing on the day
16 after the resolution of any appeal from the written order of the Board or Engineer or action or written directive of
17 any Water Commissioner whose violation gives rise to the proposed imposition of fines, or the deadline for filing
18 an appeal if no appeal is filed, after receipt of a written notice of violation pursuant to Section 3-1-111(2) of this
19 Ordinance.

20 3. If a Person is using water illegally, the Board may impose fines on that Person at any time commencing
21 from the date of that Person's receipt of the notice of violation from the Engineer pursuant to section 3-1-111(3)(a)
22 of this Ordinance, if the illegal use is not ceased immediately upon receipt of the notice of violation.

23 4. Each day of violation constitutes a separate violation.

24 5. The process for appeal from any Board decision imposing fines pursuant to this Section shall be as
25 set forth in Section 2-2-112 of this Ordinance.

26 3-1-114. Appointment of Water Commissioners. Pursuant to Article IV.I.5.d of the Compact, the Board
27 may appoint one or more Water Commissioners to provide day-to-day administration of water on the Reservation.
28 The appointment shall specify the geographic area for which the commissioner shall have responsibility.

29 3-1-115. Powers and Duties of Water Commissioners. Subject to the jurisdictional limitation set forth in
30 Article IV.I.5.d.ii of the Compact and Section 3-1-101(1) of this Ordinance, any Water Commissioner appointed

1 pursuant to Section 3-1-114 of this Ordinance:

2 1. Shall, consistent with the terms and conditions of the Compact, the federal legislation ratifying the
3 Compact, this Ordinance, and the terms of all applicable Appropriation Rights and Existing Uses, distribute water
4 in the proper priority;

5 2. Shall, as near as may be practicable, divide, regulate and control the use of the water of all streams,
6 springs, lakes or other sources of water within that Water Commissioner's district to prevent the Waste of water
7 or its use in excess of the volume to which any Appropriator is lawfully entitled, including through the opening and
8 closing of headgates. Whenever a Water Commissioner regulates a headgate to a ditch or the controlling Works
9 of reservoirs, it shall be that Water Commissioner's duty to attach to such headgate or controlling Works a written
10 notice, properly dated and signed, setting forth the fact that such headgate or controlling Works has been properly
11 regulated and is wholly under the Water Commissioner's control and such notice shall be a legal notice to all
12 parties interested in the division and distribution of the water of such ditch or reservoir;

13 3. Shall notify the Engineer in writing of the non-compliance of any water user with a prior order of the
14 Engineer or the Board or any prior written directive of that Water Commissioner issued pursuant to subsection
15 (4) of this Section;

16 4. May issue written directives to any Appropriator, or any Illegal user of water, concerning day-to-day
17 actions that must be taken to facilitate the execution of the duties of that Water Commissioner as set forth in
18 subsections (1) and (2) of this Section; and

19 5. May recommend to the Engineer, in writing, conditions to be placed on the exercise of any
20 Appropriation Right or Existing Use on the Reservation, including the requirement of measuring devices and the
21 necessity of structural changes to diversion or other structures. The Water Commissioner shall serve copies of
22 any such written recommendation on the Appropriator(s) whose Appropriation Right(s) or Existing Use(s) are
23 referenced in the recommendation.

24 3-1-116. Recourse from Water Commissioner Decisions. Any Person who may be injured by the action
25 or inaction of a Water Commissioner has the right to petition the Engineer pursuant to the provisions of Section
26 3-1-105 of this Ordinance.

27 3-1-117. Removal of Water Commissioners. Water Commissioners shall serve at the pleasure of the
28 Board and may be removed by unanimous vote of the Board at any time.

29

30 **Section 3.** Section 3-7-211, MCA, is amended to read:

1 **"3-7-211. Appointment of water commissioners.** The Except as provided in [section 2], the district
 2 court having jurisdiction over the hydrologically interrelated portion of a water division, as described in
 3 85-2-231(3), in which the controversy arises may appoint and supervise a water commissioner as provided for
 4 in Title 85, chapter 5."

5

6 **Section 4.** Section 85-2-111, MCA, is amended to read:

7 **"85-2-111. Department powers.** (1) The department may:

8 ~~(1)~~(a) enter into agreements with federal, state, or local agencies necessary to carry out this chapter;

9 ~~(2)~~(b) apply for, accept, administer, and expend funds, grants, gifts, and loans from the federal
 10 government or any other public or private source for the purposes of this chapter.

11 (2) The department shall, pursuant to [sections 1 and 2], recognize the jurisdiction of the Flathead
 12 reservation water management board over water rights, including permitting of new uses, changes of existing
 13 uses, enforcement of water right calls, and all aspects of enforcement within the exterior boundaries of the
 14 Flathead Indian reservation."

15

16 **Section 5.** Section 85-2-114, MCA, is amended to read:

17 **"85-2-114. Judicial enforcement.** (1) If the department ascertains, by a means reasonably considered
 18 sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another
 19 person having a prior right to use the water, or violating a provision of this chapter, it may petition the district court
 20 supervising the distribution of water among appropriators from the source to:

21 (a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or
 22 unlawful use of water or to secure water to a person having a prior right to its use;

23 (b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to
 24 cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or
 25 interference; or

26 (c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter.
 27 Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if
 28 it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this
 29 chapter is being violated.

30 (2) Upon the issuance of an order or injunction, the department may attach to the controlling works a

1 written notice, properly dated and signed, setting forth the fact that the controlling works have been properly
2 regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of
3 the water.

4 (3) The department may also direct its own attorney or request the attorney general or county attorney
5 to bring suit to enjoin the waste, unlawful use, interference, or violation.

6 (4) The county attorney or the attorney general may bring suit to enjoin the waste, unlawful use,
7 interference, or violation or bring an action under 85-2-122(1) without being requested to do so by the department.

8 (5) A county attorney who takes action pursuant to subsection (3) or (4) may request assistance from
9 the attorney general.

10 (6) When enforcing the provisions of this section, the department, the county attorney, and the attorney
11 general shall give priority to protecting the water rights of a prior appropriator under an existing water right, a
12 certificate, a permit, or a state water reservation.

13 (7) After considering the provisions of subsection (6), the department may attempt to obtain voluntary
14 compliance through warning, conference, or any other appropriate means before petitioning the district court
15 under subsection (1). An attempt to obtain voluntary compliance under this subsection must extend over a period
16 of at least 7 days and may not exceed 30 working days.

17 (8) Pursuant to [section 2], the provisions of this section do not apply within the exterior boundaries of
18 the Flathead Indian reservation."

19

20 **Section 6.** Section 85-2-301, MCA, is amended to read:

21 **"85-2-301. Right to appropriate -- recognition and confirmation of permits issued after July 1,**
22 **1973.** (1) After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may
23 appropriate water only for a beneficial use.

24 (2) (a) Only the department may appropriate water by permit for transport outside the following river
25 basins:

- 26 (i) the Clark Fork River and its tributaries to its confluence with Lake Pend Oreille in Idaho;
27 (ii) the Kootenai River and its tributaries to its confluence with Kootenay Lake in British Columbia;
28 (iii) the St. Mary River and its tributaries to its confluence with the Oldman River in Alberta;
29 (iv) the Little Missouri River and its tributaries to its confluence with Lake Sakakawea in North Dakota;
30 (v) the Missouri River and its tributaries to its confluence with the Yellowstone River in North Dakota; and

1 (vi) the Yellowstone River and its tributaries to its confluence with the Missouri River in North Dakota.

2 (b) The department may lease water subject to this subsection (2) under the provisions of 85-2-141.

3 (3) A right to appropriate water may not be acquired by any other method, including by adverse use,
4 adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

5 (4) All permit actions of the department after July 1, 1973, are recognized and confirmed subject to this
6 part and any terms, conditions, and limitations placed on a permit by the department.

7 (5) Pursuant to [section 2], the provisions of this section do not apply within the exterior boundaries of
8 the Flathead Indian reservation."

9

10 **Section 7.** Section 85-2-302, MCA, is amended to read:

11 **"85-2-302. Application for permit or change in appropriation right.** (1) Except as provided in
12 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of diversion,
13 impoundment, withdrawal, or related distribution works unless the person applies for and receives a permit or an
14 authorization for a change in appropriation right from the department.

15 (2) The department shall adopt rules that are necessary to determine whether or not an application is
16 correct and complete, based on the provisions applicable to issuance of a permit under this part or a change in
17 appropriation right pursuant to Title 85, chapter 2, part 4. The rules must be adopted in compliance with Title 2,
18 chapter 4.

19 (3) The application must be made on a form prescribed by the department. The department shall make
20 the forms available through its offices.

21 (4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application. The
22 determination of whether an application is correct and complete must be based on rules adopted under
23 subsection (2) that are in effect at the time the application is submitted.

24 (b) If an application is for a permit to appropriate water with a point of diversion, conveyance, or place
25 of use on national forest system lands, the application is not correct and complete under this section until the
26 applicant has submitted proof of any written special use authorization required by federal law to occupy, use, or
27 traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation,
28 withdrawal, use, or distribution of water under the permit.

29 (5) The department shall notify the applicant of any defects in an application within 180 days. The defects
30 must be identified by reference to the rules adopted under subsection (2). If the department does not notify the

1 applicant of any defects within 180 days, the application must be treated as a correct and complete application.

2 (6) An application does not lose priority of filing because of defects if the application is corrected or
3 completed within 30 days of the date of notification of the defects or within a further time as the department may
4 allow, but not to exceed 90 days from the date of notification. If an application is made correct and complete after
5 the mandated time period, but within 90 days of the date of notification of the defects, the priority date of the
6 application is the date the application is made correct and complete.

7 (7) An application not corrected or completed within 90 days from the date of notification of the defects
8 is terminated.

9 (8) Pursuant to [section 21], the provisions of this section do not apply within the exterior boundaries of
10 the Flathead Indian reservation."

11

12 **Section 8.** Section 85-2-306, MCA, is amended to read:

13 **"85-2-306. Exceptions to permit requirements.** (1) (a) Except as provided in subsection (1)(b), ground
14 water may be appropriated only by a person who has a possessory interest in the property where the water is
15 to be put to beneficial use and exclusive property rights in the ground water development works.

16 (b) If another person has rights in the ground water development works, water may be appropriated with
17 the written consent of the person with those property rights or, if the ground water development works are on
18 national forest system lands, with any prior written special use authorization required by federal law to occupy,
19 use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation,
20 withdrawal, use, or distribution of water under the certificate.

21 (c) If the person does not have a possessory interest in the real property from which the ground water
22 may be appropriated, the person shall provide to the owner of the real property written notification of the works
23 and the person's intent to appropriate ground water from the works. The written notification must be provided to
24 the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are
25 proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice
26 requirement only and does not create an easement in or over the real property where the ground water
27 development works are located.

28 (2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

29 (a) according to a permit received pursuant to 85-2-508; or

30 (b) according to the requirements of a rule promulgated pursuant to 85-2-506.

1 (3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before
2 appropriating ground water by means of a well or developed spring:

3 (i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter
4 33, and the appropriation is used only for emergency fire protection, which may include enclosed storage;

5 (ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive geothermal
6 heating or cooling exchange applications, all of the water extracted is returned without delay to the same source
7 aquifer, and the distance between the extraction well and both the nearest existing well and the hydraulically
8 connected surface waters is more than twice the distance between the extraction well and the injection well;

9 (iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does
10 not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells
11 or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

12 (iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does
13 not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells
14 or developed springs exceeding this limitation requires a permit.

15 (b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water
16 for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the
17 department through its offices.

18 (ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate
19 of water right, return a defective notice for correction or completion, together with the reasons for returning it. A
20 notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the
21 department within 30 days of notification of defects or within a further time as the department may allow, not to
22 exceed 6 months.

23 (iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation
24 is the date of refiling a correct and complete notice with the department.

25 (c) A certificate of water right may not be issued until a correct and complete notice has been filed with
26 the department, including proof of landowner notification or a written federal special use authorization as
27 necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department
28 shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date
29 of priority of the right.

30 (4) An appropriator of ground water by means of a well or developed spring first put to beneficial use

1 between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force
2 prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in
3 subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is
4 sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing
5 of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

6 (5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the
7 department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that
8 for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue
9 a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the
10 adjudication proceedings provided for in 85-2-236.

11 (6) A permit is not required before constructing an impoundment or pit and appropriating water for use
12 by livestock if:

13 (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

14 (b) the appropriation is less than 30 acre-feet a year;

15 (c) the appropriation is from a source other than a perennial flowing stream; and

16 (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned
17 or under the control of the applicant and that is 40 acres or larger.

18 (7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit
19 as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete application for a
20 stock water provisional permit, the department shall automatically issue a provisional permit. If the department
21 determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may
22 revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit
23 subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other
24 appropriators.

25 (b) If the impoundment or pit is on national forest system lands, an application is not correct and
26 complete under this section until the applicant has submitted proof of any written special use authorization
27 required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion,
28 impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

29 (8) A person may also appropriate water without applying for or prior to receiving a permit under rules
30 adopted by the department under 85-2-113.

1 (9) Pursuant to [section 2], the provisions of this section do not apply within the exterior boundaries of
2 the Flathead Indian reservation."

3

4 **Section 9.** Section 85-2-427, MCA, is amended to read:

5 **"85-2-427. (Temporary) Temporary lease of appropriation right -- requirements -- rulemaking. (1)**

6 Applications to temporarily lease an appropriation right that comply with the requirements of this section are not
7 subject to the provisions of 85-2-402, 85-2-407, 85-2-408, or 85-2-436. After obtaining department approval
8 pursuant to this section, an appropriator may temporarily lease an appropriation right.

9 (2) The amount of water leased may not exceed the total consumptive use of the appropriation right. For
10 an irrigation right, the consumptive volume may not exceed 1 acre-foot per acre irrigated. The department shall
11 determine the consumptive volume limits for other uses by rule.

12 (3) (a) Each appropriation right leased pursuant to this section:

13 (i) must have been used within 5 years prior to the application date;

14 (ii) may be leased only during the period of diversion for the appropriation right; and

15 (iii) may not be leased for more than 2 years one time during any consecutive 10-year period.

16 (b) The volume of water leased may not exceed 180 acre-feet per year.

17 (c) The point of diversion for the appropriation right may not be changed.

18 (4) The use of any appropriation rights on the place of use associated with a leased appropriation right
19 is forbidden during the term of the lease.

20 (5) Storage may not be added to the leased appropriation right at the point of diversion or the original
21 place of use.

22 (6) This section does not apply to changes in an appropriation right that would result in leased water
23 being transported outside Montana. Proposed out-of-state uses are subject to the provisions of 85-2-402.

24 (7) Water leased pursuant to this section must be measured at the point of diversion by a meter
25 approved by the department. The appropriator shall report the amount of water measured at the end of the year
26 in which the lease occurred or upon request of the department.

27 (8) An applicant proposing to lease an appropriation right pursuant to this section shall submit a correct
28 and complete application on a form provided by the department and a fee as established by rule. The application
29 must include:

30 (a) the name and address of each lessee;

- 1 (b) the name of all owners of each appropriation right;
- 2 (c) the number of each appropriation right;
- 3 (d) the proposed use and the place of use for the leased water;
- 4 (e) the source of water to be appropriated;
- 5 (f) the start and end dates of the proposed lease;
- 6 (g) the proposed diversion flow rate and volume of water to be used during the lease;
- 7 (h) evidence that the appropriation right has been used within the last 5 years;
- 8 (i) a description of how the existing use of the appropriation rights would cease at the place of use during
- 9 the lease period, including the number and location of acres to be removed from irrigation, if applicable; and
- 10 (j) an analysis of potential adverse effects and a description of planned actions to mitigate potential
- 11 adverse effects.

12 (9) Within 30 days of receiving the application, the department shall approve or deny the application. An

13 approved application must be correct and complete and meet the requirements of this section. The department

14 may approve an application with conditions.

15 (10) After approval, the department shall provide notice of the proposed lease that includes the

16 information in subsections (8)(a) through (8)(g). The department shall:

17 (a) mail individual notice to potentially affected appropriators identified by the department in the area of

18 the point of diversion; and

19 (b) post the notice on the department's website.

20 (11) (a) For 60 days from the date that notice is mailed pursuant to subsection (10), the department shall

21 accept correct and complete objections to the proposed lease from any person whose property, water rights, or

22 interests would be adversely affected by the proposed appropriation. The objection must be made on a form

23 provided by the department.

24 (b) The department shall determine if an objection is valid. A valid objection contains facts indicating that

25 the rights of other appropriators would be adversely affected by the lease of the appropriation right. If the

26 department determines that an objection is valid, the approval for the use of the appropriation right under the

27 lease is canceled and no water may be used pursuant to the lease.

28 (c) The owner of an appropriation right whose approval is canceled under subsection (11)(b) may

29 request a hearing on the objection pursuant to 2-4-604 within 15 days of notice of the cancellation. The

30 department shall issue an order reinstating approval for the use of the appropriation right under the lease if the

1 applicant proves by a preponderance of the evidence that the water rights of other appropriators will not be
2 adversely affected by the lease.

3 (12) Leased water may not be put to use until a final determination is made pursuant to subsection (11).
4 The lessee shall provide the department with a copy of the executed lease agreement before the leased water
5 is put to use.

6 (13) Violations of this section are subject to the provisions of 85-2-114 and 85-2-122. This subsection
7 does not limit the remedies available to an appropriator to enjoin or seek damages from the owner of an
8 appropriation right who leased the water or from a lessee.

9 (14) The department shall adopt rules to implement this section. The rules must include definitions of
10 consumptive uses and criteria for determining if an appropriation right has been used in the 5 years prior to the
11 temporary lease application.

12 (15) The department shall report annually to the water policy interim committee provided for in 5-5-231.
13 The report must include the number of leases, the amount of water leased, and the number of irrigated acres
14 taken out of production.

15 (16) Pursuant to [section 2], the provisions of this section do not apply within the exterior boundaries of
16 the Flathead Indian reservation. (Terminates July 1, 2019--sec. 4, Ch. 236, L. 2013.)"

17

18 **Section 10.** Section 85-2-506, MCA, is amended to read:

19 **"85-2-506. Controlled ground water areas -- designation or modification.** (1) The department may
20 by rule designate or modify permanent or temporary controlled ground water areas as provided in this part. The
21 rule for each controlled ground water area must designate the boundaries of the controlled ground water area.

22 (2) The rulemaking process for designation or modification of a controlled ground water area may be
23 initiated by:

24 (a) the department;

25 (b) submission of a correct and complete petition from a state or local public health agency for identified
26 public health risks; or

27 (c) submission of a correct and complete petition:

28 (i) by a municipality, county, conservation district, or local water quality district formed under Title 7,
29 chapter 13, part 45; or

30 (ii) signed by at least one-third of the water right holders in a proposed controlled ground water area.

1 (3) (a) A correct and complete petition must:

2 (i) be in a form prescribed by the department and must contain analysis prepared by a hydrogeologist,
3 a qualified scientist, or a qualified licensed professional engineer concluding that one or more of the criteria
4 provided in subsection (5) are met; and

5 (ii) describe proposed measures, if any, to mitigate effects of the criteria identified in subsection (5) that
6 are alleged in the petition.

7 (b) When the department proposes a rule pursuant to this section, the place for the hearing must be
8 within or as close as practical to the proposed or existing controlled ground water area.

9 (c) (i) The department shall notify the petitioner of any defects in a petition within 180 days. If the
10 department does not notify the petitioner of any defects within 180 days, the petition must be treated as correct
11 and complete.

12 (ii) A petition that is not made correct and complete within 90 days from the date of notification by the
13 department of any defect is terminated.

14 (4) (a) Within 60 days after a petition is determined to be correct and complete, the department shall:

15 (i) deny in writing the petition in whole or in part, stating the reasons for denial;

16 (ii) inform the petitioner that the department will study the information presented in the petition for a period
17 not to exceed 90 days before denying or proceeding with the petition; or

18 (iii) initiate rulemaking proceedings in accordance with Title 2, chapter 4, part 3.

19 (b) Failure of the department to act under subsection (4)(a) does not mandate that the department grant
20 the petition for rulemaking.

21 (c) In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the department shall
22 provide public notice of the rulemaking hearing by:

23 (i) publishing a notice at least once each week for 3 successive weeks, with the first notice not less than
24 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which
25 the proposed controlled ground water area is located;

26 (ii) serving by mail a copy of the notice, not less than 30 days before the hearing, upon each person or
27 public agency known from an examination of the records of the department to be a water right holder with a
28 diversion within the proposed controlled ground water area, all landowners of record within the proposed
29 controlled ground water area, and each well driller licensed in Montana whose address is within any county in
30 which any part of the proposed controlled ground water area is located; and

1 (iii) serving by mail a copy of the notice upon any other person or state or federal agency that the
2 department feels may be interested in or affected by the proposed designation or modification of a controlled
3 ground water area.

4 (d) The notice under subsection (4)(c) must include a summary of the basis for the proposed rule.
5 Publication and mailing of the notice as prescribed in this section, when completed, is considered to be sufficient
6 notice of the hearing to all interested persons.

7 (5) The department may designate a permanent controlled ground water area by rule if it finds by a
8 preponderance of the evidence that any of the following criteria have been met and cannot be appropriately
9 mitigated:

10 (a) current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled
11 ground water area will cause ground water levels to decline to the extent that water right holders cannot
12 reasonably exercise their water rights;

13 (b) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled
14 ground water area have reduced or will reduce ground water levels or surface water availability necessary for
15 water right holders to reasonably exercise their water rights;

16 (c) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled
17 ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water
18 quality standards;

19 (d) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled
20 ground water area have impaired or will impair ground water quality necessary for water right holders to
21 reasonably exercise their water rights based on relevant water quality standards;

22 (e) ground water within the proposed controlled ground water area is not suited for beneficial use; or

23 (f) public health, safety, or welfare is or will become at risk.

24 (6) (a) If the department finds that sufficient facts are not available to designate a permanent controlled
25 ground water area, it may designate by rule a temporary controlled ground water area to allow studies to obtain
26 the facts needed to determine whether or not it is appropriate to designate a permanent controlled ground water
27 area. The department shall set the length of time that the temporary controlled ground water area will be in effect.
28 Subject to subsection (6)(c), the term of a temporary controlled ground water area may be extended by rule.

29 (b) A temporary controlled ground water area designation is for the purpose of study and cannot include
30 the control provisions provided in subsection (7), other than measurement, water quality testing, and reporting

1 requirements.

2 (c) A temporary controlled ground water area designation may not exceed a total of 6 years, including
3 any extensions.

4 (d) Prior to expiration of a temporary controlled ground water area, the department may amend or repeal
5 the rule establishing the temporary controlled ground water area or may designate a permanent controlled ground
6 water area through the rulemaking process under this section.

7 (e) Studies for temporary controlled ground water areas may be considered for funding under the
8 renewable resource grant and loan program in Title 85, chapter 1, part 6.

9 (f) If there is a ground water investigation program within the bureau, the ground water assessment
10 steering committee established by 2-15-1523 shall consider temporary controlled ground water areas for study.

11 (7) A controlled ground water area may include but is not limited to the following control provisions:

12 (a) a provision closing the controlled ground water area to further appropriation of ground water;

13 (b) a provision restricting the development of future ground water appropriations in the controlled ground
14 water area by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria
15 that the department determines necessary;

16 (c) a provision requiring measurement of future ground water or surface water appropriations;

17 (d) a provision requiring the filing of notice on land records within the boundary of a permanent controlled
18 ground water area to inform prospective holders of an interest in the property of the existence of a permanent
19 controlled ground water area. Notice of the designation must be removed or modified as necessary to accurately
20 reflect modification or repeal of a permanent designation within 60 days.

21 (e) a provision for well spacing requirements, well construction constraints, and prior department
22 approval before well drilling, unless the well is regulated pursuant to Title 82, chapter 11;

23 (f) a provision for mitigation of ground water withdrawals;

24 (g) a provision for water quality testing;

25 (h) a provision for data reporting to the department; and

26 (i) other control provisions that the department determines are appropriate and adopts through
27 rulemaking.

28 (8) Pursuant to [section 2], the provisions of this section do not apply within the exterior boundaries of
29 the Flathead Indian reservation."

30

1 **Section 11.** Section 85-5-110, MCA, is amended to read:

2 **"85-5-110. Appointment of water mediators -- duties.** (1) ~~The~~ Except as provided in [section 2], the
3 judge of the district court may appoint a water mediator to mediate a water controversy in a decreed or
4 nondecreed basin under the following circumstances:

5 (a) upon request of the governor;

6 (b) upon petition by at least 15% of the owners of water rights in a decreed or nondecreed basin; or

7 (c) in the discretion of the district court having jurisdiction.

8 (2) A water mediator appointed under this section may:

9 (a) discuss proposed solutions to a water controversy with affected water right holders;

10 (b) review options related to scheduling and coordinating water use with affected water right holders;

11 (c) discuss water use and water needs with persons and entities affected by the existing water use;

12 (d) meet with principal parties to mediate differences over the use of water; and

13 (e) hold public meetings and conferences to discuss and negotiate potential solutions to controversies
14 over use of water.

15 (3) If the governor requests or a state agency petitions for a water mediator, the governor or agency shall
16 pay all or a majority of the costs of the water mediator as determined equitable by the district court having
17 jurisdiction.

18 (4) The governor may use funds appropriated under 75-1-1101 to pay the costs of a water mediator.

19 (5) This section does not allow a water mediator to require any valid water right holder to compromise
20 or reduce any of the holder's existing water rights.

21 (6) If an appropriator voluntarily ceases to use all or part of an appropriation right or voluntarily ceases
22 to use an appropriation right according to its terms and conditions as a result of the efforts of a mediator
23 appointed under this section, the appropriator may not be considered to have abandoned all or any portion of the
24 appropriation right."

25

26 NEW SECTION. **Section 12. Notification to tribal governments.** The secretary of state shall send
27 a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
28 Chippewa tribe.

29

30 NEW SECTION. **Section 13. Codification instruction.** [Sections 1 and 2] are intended to be codified

1 as an integral part of Title 85, chapter 20, and the provisions of Title 85, chapter 20, apply to [sections 1 and 2].

2

3 NEW SECTION. **Section 14. Effective date.** [This act] is effective on passage and approval.

4

- END -

Barnes, John

From: Schowengerdt, Dale
Sent: Tuesday, April 14, 2015 5:41 PM
To: Everts, Todd
Subject: Compact Immunity Issue

Todd, Here is my analysis of the immunity issue that was raised earlier today:

Some have asked whether the Compact's provision waiving sovereign immunity (p. 46, ln. 20-26) violates Art. II, Section 18 of the Montana Constitution. The short answer is that Article II section 18 clearly does not apply.

Article II, section 18 prohibits granting immunity to state and local governmental entities without a 2/3 vote of each house:

The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the Legislature. Mont. Const. Art. II, Section 18.

This provision of the constitution says that the state and other governmental agencies are not immune from suit, unless the Legislature makes it immune by a 2/3 vote. The 1972 constitution changed the common law doctrine that states cannot be sued for damages by its citizens. Since then, the Legislature has granted the state and other agencies fairly broad immunity (see, e.g., MCA § 2-9-11), which the Supreme Court has broadened even further (see, e.g., Masee v. Thompson, 2004 MT 121). As prominent scholars of the Montana Constitution have noted, "[c]ase interpretations coupled with an accumulation of statutory exceptions have drained the provision of any significant meaning." Elison, Larry & Snyder, Fritz, The Montana State Constitution, 71 (2001).

But regardless of whether Article II, Section 18 has any substantial meaning left, the Compact's waiver of sovereign immunity is completely opposite of what Article II, Section 18 prohibits. It does not grant immunity; it waives it vis-à-vis the Eleventh Amendment). In fact, every other Compact that the State has passed has substantially similar language.

Here is what the provision states:

Waiver of Immunity. The Tribes and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit resolution of disputes under the Compact by the Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribes or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties recognize that only Congress can waive the immunity of the United States and that the participation

of the United States in the proceedings of the Board shall be governed by Federal law, including 43 U.S.C. 666. (Compact, p. 46, ln. 20-26)

The State, the federal government, and the Tribe are all sovereign. In other words, they generally can't be sued in court unless they waive their immunity. The state can't be sued in federal court or Tribal court under the Eleventh Amendment and related court decisions. See *Alden v. Maine*, 527 U.S. 707 (1999); *Holladay v. State*, 506 F.Supp. 1317 (D. Mont. 1981). The federal government can't be sued in state court. *Price v. U.S.*, 174 U.S. 373 (1899). And the Tribe can't be sued in state or federal court. *C&L Enters., Inc. v. Citizen Band*, 532 U.S. 411 (2001).

So the Compact ensures that each of these entities can be sued in an appropriate court for the limited purposes detailed in the Compact.

The Compact limits the extent of the waiver, however, by stating that "such waivers of sovereign immunity by . . . the State shall not extend to any action for money damages, costs, or attorney fees." Some have argued that this a specific grant of immunity that requires a 2/3 vote under Article II, Section 18 of the Montana Constitution. That is not the case.

Montana is immune from money damages in federal court under the Eleventh Amendment, regardless of Article II, Section 18. See *Brown v. Montana*, 442 F.Supp.2d 982, 988 (D. Mont. (2006) (noting that the Eleventh Amendment "bars [plaintiff] from proceeding in federal court with claims for money damages against the State of Montana"). The Ninth Circuit has held that Montana did not waive its Eleventh Amendment immunity by virtue of Article II, Section 18 of the Montana Constitution, and thus could not be sued in federal court or tribal court. *State of Montana v. Peretti*, 661 F.2d 756, 748 (9th Cir. 1981).

Thus, the Compact clarifies that the State and Tribe are waiving immunity for suit to resolve disputes arising under the Compact, but it is not waiving immunity to money damages under the Eleventh Amendment (and, presumably, the state's immunity in state court to the extent it's relevant under MCA § 2-9-11 and related provisions). Which of course makes sense. Parties can enforce the Compact by this waiver of immunity, but the State is not at the same time opening itself up to money damages on that basis.

In short, the Compact is not removing the state from liability for money damages, because the State is already immune from money damages under the Eleventh Amendment. It is simply clarifying the boundaries of its waiver, just as every other Tribal water Compact has done.

Because the provision at p.46, ln. 20-26 is a limited waiver of sovereign immunity, not a grant of immunity to the state or a state entity, Article II, Section 18 clearly has no application to the provision.

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