

**FLATHEAD RESERVATION WATER MANAGEMENT BOARD  
AND THE OFFICE OF THE WATER ENGINEER  
DRAFT WATER POLICIES & PROCEDURES**



**NOTICE**

**THE BOARD APPROVED THE SECTIONS OF THE WP&P BELOW FOR A 15-DAY PUBLIC COMMENT PERIOD ON 7/24/2024. THESE SECTIONS INCLUDE:**

- **WP&P CHAPTER 4**
  - **WP&P 41-101. General Provisions.**
  - **WP&P 41-201. Office of the Engineer Hearings.**
  - **WP&P 41-301. Office of the Engineer Decisions.**

## CHAPTER IV: OE HEARINGS AND APPEALS

### WP&P 41-101. General Provisions.

- 1) Purpose and Intent. The purpose of these WP&Ps is to provide context and detail to the applicable and relevant sections of the Ordinance pertaining to hearings before the OE. These WP&Ps are intended to assist individuals and persons involved in hearings proceedings before either the Engineer or Designee.
- 2) Representation. A party may appear on their own behalf, appearing pro se, or may be represented by an attorney licensed to practice law in the state of Montana or the CSKT Tribal Court in a proceeding before the Engineer or Designee. All legal entities, including but not limited to corporations, limited liability companies, trusts, partnerships, and not for profit associations must be represented by an attorney licensed to practice law in the state of Montana or the CSKT Tribal Court throughout the entire proceeding. The State of Montana and the Confederated Salish & Kootenai Tribes may intervene in a proceeding before the Engineer or Designee for the limited purpose of representing the interests of the public.
- 3) Extension of Time. Upon a showing of good cause by either party to the action, the Engineer or Designee may extend the time limits specified within these WP&Ps. The Engineer or Designee shall grant or reject the extension through an order and detail the reasons for the grant or rejection and issue the order to the parties.
- 4) Administrative Record. For purposes of hearings before the OE, the OE shall maintain the official record in each proceeding until the issuance of the final decision. See also **OE Personnel Policies and Procedures, 12.04.**

The record in a proceeding shall contain: a complete copy of the application file, all pleadings, motions, intermediate rulings, and orders; all evidence received or considered, including a verbatim record of oral proceedings and pre-filed testimony; a statement of matters official noticed; questions and offer of proof, objections, and rulings; the OE file and all staff memoranda or data submitted to the Engineer or Designee as evidence in connection with the case; and the decision or final order by the Engineer or Designee.

- 5) Verbatim Record. If a hearing is held, the verbatim record consisting of audio recordings of the hearing shall be transcribed if requested by the Engineer or Designee.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing to the Board, the requesting party must make arrangements with the OE for ordering and payment of preparation cost of a written transcript.

If any party appeals a final decision of the Engineer or Designee to the Board, the OE will transmit a copy of the recording(s) of the proceedings to the Board. Any party may request copies of the recordings and shall pay the charge set by the OE in **WP&P [ ]**.

All monies received for copies of the recordings shall be payable to the OE.

- 6) Final Agency Action. For purposes of hearings before the OE, the recommended decision shall not constitute a final agency action appealable to the Board.

#### **WP&P 41-201. Office of the Engineer Hearings.**

- 1) Appeal to Engineer/Designee from Recommended Decision. If a recommended decision is to deny an application or grant it with a requirement of Mitigation or other conditions, the applicant may appeal to the Engineer by filing a notice of appeal within 30 days of issuance of the recommended decision.

An applicant may elect to have the appeal decided on the record, after submission of additional evidence and argument, or after hearing. If the applicant elects to have a hearing, that request must be 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 must specify the parts of the recommended decision claimed to be in error.

- 2) Additional Evidence or Argument. Within 60 days from the filing of the notice of appeal, or any extended period of time, not to exceed 60 days, granted by the Engineer or Designee, the applicant may submit additional factual evidence and legal argument in support of the application.

OE Staff who issued the recommended decision shall have 45 days from the applicant's submission to revise, amend, or affirm the recommended decision in a second recommended decision that explains in writing the rationale for the second recommended decision.

- 3) Application Deemed Denied. If the recommended decision or second recommended decision is to deny an application and no notice of appeal is filed, the application shall be deemed denied at close of business the day after expiration of the time for filing a notice of appeal. The OE shall issue a denial letter noticing the applicant of its decision. The denial letter constitutes the final administrative decision of the OE.
- 4) Burdens of Proof. Any party involved in a hearing before the Engineer or Designee shall adhere to the burdens of proof as described in the pertinent sections of the Ordinance.
- 5) Hearings Involving Objections. An objector or an applicant may elect to have any valid objection decided on the record or after hearing. If the objector elects to have a hearing, that request must be made at the same time as the filing of the objection or the objector's right to a hearing is waived. The applicant must invoke the right to a hearing within ten days of receiving notice of the objection of the applicant's right to a hearing is waived.

The applicant retains a burden to prove the applications' applicable criteria by a preponderance of evidence. The scope of a hearing involving an objection before the Engineer or Designee shall involve the criteria to which the objector specifically objected to and which is determined valid by the Engineer or Designee.

- 6) Hearing Notice. A hearing notice for a hearing before the Engineer or Designee shall include: (a) a short and plain statement regarding the time; (b) place and nature of the hearing; (c) the legal authority and jurisdiction under which the hearing is to be held; (d) the particular sections of the statutes and rules involved; (e) the matters asserted, unless the OE is unable to state the matters in detail at the time the notice is served; (f) whether the formal proceeding may be waived; (g) name, address, and telephone number of the Engineer or Designee; (h) notification of the right of the parties to be represented by legal counsel; (i) notification that the failure of a party to appear at the hearing may result in default against a party; and (j) a citation to these procedural rules and to the relevant sections of the Ordinance.

Service of a hearing notice constitutes the commencement of the hearing timeline before the Engineer or Designee; if a party is represented by an attorney, service upon the attorney shall constitute service upon the party.

- 7) Timing of Hearing. Timing of a hearing before the Engineer or Designee shall be determined by the applicable sections of the Ordinance. Upon request of a party to a hearing, if a hearing is continued, the Engineer or Designee shall make an oral statement providing that the hearing will be continued to a certain time and day or the hearing will be continued to a date to be determined later by written order.
- 8) Rules of Evidence. All evidence that, in the opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their normal business affairs. Rules of privilege recognized by law shall be given effect and evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded. The Engineer or Designee may take judicial notice of cognizable facts and generally recognized technical or scientific facts within the OE's specialized knowledge. Parties shall be notified, either before or during the hearing or by reference in the proposal for decision of the material noticed. Each party shall be afforded an opportunity to contest the materials so noticed.
- 9) Witnesses and Pre-filed Testimony. Any party may be a witness and may present witnesses at the hearing. The Engineer or Designee may order anticipated direct examination testimony by experts or other witnesses be prepared in advance and submitted as pre-filed testimony in either question-and-answer or narrative format.

Pre-filed testimony shall be served upon the Engineer or Designee and all parties as established by a schedule set by the Engineer or Designee. Any witness who submits pre-filed testimony must be available for cross-examination at the hearing. Evidentiary objections to such pre-filed testimony may be made by any party at any time during the hearings conducted pursuant to these procedures. At the hearing, the party presenting the testimony may, if they deem it appropriate, briefly summarize the pre-filed testimony prior to the start of cross-examination. Nothing contained within pre-filed testimony shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas without the necessity of pre-filing.

At the request of the party or a witness, the Engineer or Designee may permit a witness to appear and provide oral testimony by means of telephonic or video participation. Such requests may be granted if the Engineer or Designee determines, based on information provided by the requesting party to the OE at the time the request is made, that telephonic or video participation will not substantially prejudice the rights of any party. Another party may voice an objection to electronic participation, however, the determination shall remain with the Engineer or Designee.

A party may call an adverse witness who may be a party's managing agent or employees, or an officer, director, managing agent, or employee of the state or any political subdivision thereof, or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate the adverse witness by leading questions and contradict and impeach the adverse witness on material matters in all respects as if the adverse witness had been called by the adverse party. The adverse witness may be examined by counsel for the adverse witness upon the subject matter of the examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the adverse witness' testimony.

- 10) Subpoenas. Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the Engineer or Designee and shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be subpoenaed.

A subpoena shall be served in the manner provided by the Montana Rules of Civil Procedure. The cost of service, fees, and expenses of any witnesses' subpoenas shall be paid at the rates determined by the OE by the party at whose request the witness appears. The person serving the subpoena shall make proof of service by filing the subpoena together with a certificate of service with the Engineer or Designee. Upon submitting a prompt motion, and in any event at or before the time specified in the subpoena for compliance therewith, the subpoena may be quashed or modified if the Engineer or Designee finds it is unreasonable or oppressive. The party seeking the subpoena may seek enforcement of the same by applying to a judge of a Court of Competent Jurisdiction for an order to show cause why the subpoena should not be enforced against any witness who fails to obey the subpoena.

11)Discovery. Written discovery may commence upon service of the hearing notice by the OE. Unless otherwise specified in these procedures or order of the Engineer or Designee, the methods, scope, and procedures of discovery available pursuant to the Montana Rules of Civil Procedure apply to written discovery in a proceeding before the Engineer or Designee.

A party may make a written demand upon another party requesting the disclosure of witnesses and written documents following the commencement of discovery. Within ten days of a service of a written demand, the responding party must: disclose the names and addresses of all witnesses known to the responding party to have knowledge of relevant facts along with a brief summary of the facts known by each witness, whether the responding party intends to call the witness as a witness at hearing, and the anticipated testimony of any witness the responding party intends to call as a witness at hearing.

All witnesses unknown at the time of the disclosure shall be disclosed, together with a brief summary of the expected testimony, as soon as they become known; identify all relevant documents, maps, photographs, correspondence, recorded statements, or other written materials; provide the name and address of the custodian of such information; and disclose whether the responding party intends to use the evidence at hearing. Within ten days of being served with written requests for production of documents, written interrogatories, and/or written requests for admission, the responding party shall serve written responses and/or objections upon the requesting party.

Any party unreasonably failing upon demand to make a disclosure, may be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed. Depositions of parties and witnesses by oral examination may be taken in accordance with the Montana Rules of Civil Procedure. Depositions of parties and witnesses by oral examination may be used at hearing for any purpose permitted by the Montana Rules of Civil Procedure.

12)Ex Parte Communications. No party or representative of a party shall communicate, in connection with any issue of law or fact in a pending proceeding, with the Engineer or Designee without notice and opportunity for all parties to participate in the communication. The prohibitions of this WP&P shall apply beginning at the time at which a hearing is noticed and shall continue until a final order has been issued unless the person responsible for the

communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of that person's acquisition of such knowledge.

The Engineer or Designee may respond to questions of any party or representative of a party if it relates solely to procedures to be followed during the pendency of the hearing. A communication made for this purpose is not an ex parte communication. If the Engineer or Designee receives a prohibited communication, the Engineer or Designee shall decline to listen to such communication and shall explain that the matter is pending for determination, and that the Engineer or Designee may not listen to information or allegation when other parties are not present to respond.

If unsuccessful in preventing such communication, the Engineer or Designee shall notify the communicator that the Engineer or Designee will not consider the communication and that the other parties will be notified of it. The Engineer or Designee shall then place on the record of the pending matter any written communications received or a memorandum stating the substance of all oral communications received and all responses made and the identity of each person from whom the Engineer or Designee received an ex parte communication. The Engineer or Designee shall then notify all parties of the communication and its substance either orally on the record at the hearing or, if no hearing is held, in a written memorandum. The Engineer or Designee shall inform the parties that the substance of the communication is not part of the record in the pending matter, and will not be used as a basis for any part of the decision made therein. Upon receipt of a communication knowingly made in violation of this procedure the Engineer or Designee may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why the communicator's claim, objection or interest in the hearing should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

- 13) Site Visits. Upon the request of the Engineer or Designee or upon the motion of any party, a site visit to the lands involved in the proceeding may be made at any time during the proceeding. The Engineer or Designee may enter upon lands to view proposed works, sources of water, location of proposed uses, construction of works, and such other views that are deemed relevant by the Engineer or Designee to gain a proper understanding of the issues involved in the proceeding.

Before making any site visit, the Engineer or Designee shall give the parties at least five days written notice to participate, unless the motion is made during a hearing and then oral notice on the record shall be sufficient.

- 14) Staff Experts. An OE Staff expert may be appointed to issue a written report/opinion regarding: the subject matter and issues presented by technical aspects of the application; valid objections; and/or evidence in the proceeding. A copy of any OE Staff report/opinion shall be served on each party at least 14 days before commencement of the hearing.

A party may take the deposition of any OE Staff expert witness who prepares a report/opinion. An OE Staff expert witness who prepares a report/opinion may be called as a witness at the hearing and examined or cross-examined by any party and/or the Engineer or Designee. Nothing in these procedures shall prevent any of the parties from producing other expert evidence on the same fact or matter to which the OE Staff expert witness appointed by the Engineer or Designee relates.

- 15) Settlement and Stipulations. The terms of a settlement, stipulation, or consent entered between private parties as a private contractual agreement are not binding on the OE. If the parties propose inclusion of the terms of a settlement, stipulation, or consent as a condition to a permit or change authorization, the parties shall submit a copy of the written settlement, stipulation, or consent along with any proposed condition to the OE for consideration.

At the OE's discretion, the terms may be included as a condition to a permit or change authorization upon determination that the terms are consistent with and necessary to satisfy the applicable statutory criteria. A complete copy of the settlement, stipulation, or consent considered by the OE must be included in the record. In an proceeding involving a hearing before the Engineer or Designee, if the parties sign and file with the OE a stipulation that the proceeding be dismissed, specifying the terms as to payment of costs, and whatever fees are due, the OE shall enter the proceeding dismissed, and shall give to each party a copy of the stipulation filed.

- 16) Engineer/Designee Hearing Duties. The Engineer or Designee shall perform the following duties associated with conducting a hearing: (a) regulate the course of the proceeding, including the scheduling, establishing deadlines, recessing, reconvening, and adjournment; (b) hear and rule on motions; (c) preside over the hearing; administer oaths and affirmations; (d) maintain a

complete record of the proceeding; and (e) issue a decision or final order containing findings of fact and conclusions of law.

The Engineer or Designee may perform the following duties: (a) enter preliminary, interlocutory and other orders deemed necessary; (b) limit the scope of discovery; (c) appoint a staff expert to issue a written report; (d) question witnesses; (e) issue subpoenas; (f) enter rulings regarding the admissibility of evidence; (g) request the submission of proposed findings of fact and conclusions of law; and (h) perform such other duties consistent with the Ordinance.

- 17) Prehearing Conference and Orders. Upon written request of a party or by order of the Engineer or Designee, a prehearing conference may be conducted to: (a) clarify the issues to be determined prior to or at the hearing; (b) establish deadlines for matters including but not limited to: (i) the submission of prehearing evidence; (ii) submission of post-hearing pleadings; and (iii) submission of proposed findings of fact and conclusions of law; (c) obtain stipulations regarding foundation for evidence including but not limited to expert witness testimony; (d) hear argument and rule on prehearing motions and evidentiary objections; (e) identify witnesses and exhibits; and (f) establish and review issues related to the hearing.

Following a conference, the Engineer or Designee shall issue an order reciting the matters addressed and documenting any action taken at the prehearing conference. A party who fails to appear at a prehearing conference without good cause waives the right to object to any matters set forth in the prehearing order.

- 18) Consolidation. Two or more proceedings may be proposed for consolidation as a single proceeding upon motion of a party or upon notice by the Engineer or Designee. If consolidation is proposed by a party, the procedures regarding filing of motions to the Engineer or Designee shall be followed. If consolidation is proposed by the Engineer or Designee, the Engineer or Designee shall serve each party with written notification of the proposal to consolidate. Any party opposing consolidation shall file and serve a written objection stating the reasons consolidation should not be ordered within 14 days of service of notice.

The Engineer or Designee may order consolidation upon determining: (a) the proceedings present substantially the same issues of fact or law; (b) the final order in one proceeding would affect the rights of the parties in the other; and

(c) the consolidation would not substantially prejudice any party. An order granting or denying a motion for consolidation shall be served upon all parties and shall contain a description of the cases being consolidated and shall explain the basis for the Engineer or Designee's determination.

- 19) Hearing Procedure. A hearing shall be conducted in the following manner: the Engineer or Designee shall open the hearing and provide a statement that explains or identifies: (a) the subject matter of the hearing and issues presented; (b) the procedures to be followed at hearing including the sequence for presenting evidence and argument; (c) any exhibits or evidence entered into the record by stipulation of the parties; (d) the burden of proof for each party; (e) the time and place for each party to present argument and evidence and cross-examine witnesses; (f) any relevant procedures or Ordinance provisions applicable to the hearing; (g) the Engineer or Designee's discretion to make determinations regarding admissibility of evidence; and (h) such other matters as the Engineer or Designee considers appropriate.

Each party shall be provided the opportunity to make an opening statement. Each party shall be provided the opportunity to present evidence and examine witnesses in a sequence determined by the Engineer or Designee. Each party shall be provided the opportunity to cross-examine witnesses in a sequence determined by the Engineer or Designee. Each party shall be given the opportunity to present final argument in a sequence and form determined by the Engineer or Designee. Such final argument may be in the form of written memoranda or oral argument, or both.

After final argument, the hearing shall be closed or continued. The hearing shall be electronically recorded and an official record maintained as part of the administrative record. The Engineer or Designee may require submission of proposed findings of facts and or post-hearing briefs at the close of testimony in the hearing. The proposed findings and briefs may be submitted simultaneously or sequentially and within such time periods as the Engineer or Designee may prescribe. The record of the proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits that the parties and the Engineer or Designee have agreed should be received in the record, whichever occurs latest.

- 20) Disruption of Hearings. It is the duty of the Engineer or Designee to conduct a fair and impartial hearing and to maintain order. All parties to the hearing, their counsel and any other persons present shall conduct themselves in a respectful

manner. Any disregard by parties or their attorneys of the rulings of the Engineer or Designee on matters of order and procedure may be noted on the record. If the applicant is responsible for disrespectful, disruptive, or disorderly conduct which interferes with the proper and orderly holding of the hearing, the Engineer or Designee may recess or continue the hearing.

If a party or person other than the applicant is disrespectful, disorderly or disruptive, the Engineer or Designee may bar that party or person from the proceeding and may strike all evidence presented by that party or person if the applicant's case is not prejudiced by the absence of the offending party or person. The Engineer or Designee shall first read this procedure to those parties or attorneys causing such interference or disruption prior to taking action under this rule.

21)Unavailability of Engineer/Designee. If the Engineer or Designee becomes unavailable to the OE, a decision may be prepared by an individual who has read the record only if the demeanor of witnesses is considered immaterial by all parties. If any party considers the demeanor of any witness to be material to the resolution of the appeal, a new hearing must be held.

22)Requests for New Hearings. A party must request a new hearing, in writing, within 30 days after the date of the notice of hearing before the Engineer or Designee. When a party requests a hearing, it shall be that party's burden to describe, with particularity, its reasons for requesting a new hearing.

23)Default. A default occurs when a party fails to appear at a hearing or fails to comply with an interlocutory orders of the Engineer or Designee. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice), denied, disregarded or disposed of adverse to the defaulting party. An applicant is not relieved of the duty to present evidence to satisfy the applicant's substantive burden of proof when all objectors to a proceeding default.

#### **WP&P 41-301. Office of the Engineer Decisions.**

1) Decisions of the Engineer/Designee. A decision to reverse, modify, or affirm a recommended decision, or, if applicable, a second recommended decision, shall be made in writing, as prescribed by the applicable sections of the Ordinance, after the later of: (a) the filing of a notice of appeal; (b) the

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submission of additional evidence or legal argument; (c) issuance of OE Staff's second recommended decision; or (d) the completion of the hearing.

If the Engineer or Designee reverses a recommended decision, or, if applicable, a second recommended decision, and determines that the application should be granted, the application shall be publicly noticed to the public.

If the Engineer or Designee affirms a recommended decision, or, if applicable, a second recommended decision, resulting in a denial of an application, the applicant may either accept that decision by withdrawing the application or taking no further action, or may appeal that decision to the Board. The application filing fee shall not be refunded upon withdrawal and if no timely notice of appeal is filed, the application shall be deemed denied on the day after the expiration of the time to file the notice of appeal.

If the Engineer or Designee affirms a recommended decision, or, if applicable, a second recommended decision, resulting in the granting of an application with a requirement of conditions other than Mitigation, the applicant may: (a) withdraw the application; (b) file with the OE written acceptance of the conditions within 30 days of the Engineer or Designee's decision, in which case the application will be noticed to the public; or (c) appeal the decision to the Board. The application filing fee shall not be refunded upon withdrawal and failure to withdraw the application, file written acceptance of the condition, or file an appeal within the applicable timeframes shall result in the application being deemed denied on the day after the expiration of the time to appeal.

If an applicant has appealed to the Engineer a determination that Mitigation is necessary and the Engineer or Designee affirms the recommended decision resulting in a determination that Mitigation is required before the application may be granted, the applicant may: (a) withdraw the application; (b) appeal the decision to the Board; or (c) prepare a Mitigation Plan. The application filing fee shall not be refunded upon withdrawal and failure to withdraw the application, file a Mitigation Plan, or file an appeal within the applicable timeframes shall result in the application being deemed denied on the day after the expiration of the time to file a Mitigation Plan.

If the Engineer or Designee affirms a recommended decision, or, if applicable, a second recommended decision, that found a Mitigation Plan inadequate to justify the issuance of the proposed right or change, the applicant may either accept that decision by withdrawing the application or taking no further action,

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or may appeal that decision to the Board. The application filing fee shall not be refunded upon withdrawal and if no timely notice of appeal is filed, the application shall be deemed denied on the day after the expiration of the time to file the notice of appeal.

- 2) Form of Decision. The final decision of the Engineer or Designee shall be in the form of a final order.
  
- 3) Finality of Decision. The decision issued by the Engineer or Designee in a hearing proceeding shall be deemed the final decision of the Engineer or Designee and is binding upon all the parties as to all issues and claims that were raised or might have been raised at the hearing. Under the applicable sections of the Ordinance, an aggrieved party may obtain review of the final decision of the Engineer or Designee by filing an appeal with the Board within thirty (30) days of the issuance of the final decision.