

**OFFICE OF THE WATER ENGINEER  
COMPLAINT PROCEDURE**

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The below section is intended to be added to the Board's Water Policy and Procedures (WP&P) Document and is formatted to integrate to Chapter III WP&P Enforcement Section. Due to priority need for complaint policies and procedures, this section has been selected to receive Board consideration ahead of other pending WP&P items.

**WP&P 31-102: Complaint[s] to the Engineer Regarding Actions or Interactions Between Appropriators**

- 1) **Who May Bring a Formal Complaint.** Any Appropriator aggrieved by the action or inaction of any other Appropriator, or by any person the Complainant believes is wasting water or illegally using water to the detriment of a right to use water the Complainant possesses, may file a Complaint with the Water Engineer. Ordinance, § 3-1-102.
- 2) **Who May Bring an Informal Complaint.** A Person residing within the exterior boundaries of the Reservation may file an informal complaint with the Office, using Form 609F, pertaining to matters not covered under the formal complaint process in Ordinance, § 3-1-102.
- 3) **Who May Bring a Temporary Use Complaint.** An Appropriator, whether the water right is prior or subsequent in priority to the short-term lease [temporary use] acquired by a Person, who cannot satisfy in full the Appropriator's right during the time that the short-term lease is diverting water, may make a [temporary use] complaint to the Engineer and cause the short-term lessee's diversion to be discontinued. In this form of complaint, the diversion is discontinued until the Complainant's water right is satisfied or until the lessee establishes to the Engineer that the discontinuance has had no effect on the Complainant's water right. Ordinance, § 2-2-122(5).
- 4) **Complaint Requirements.** A complaint must be submitted in writing to the Office of the Engineer and describe specifically the action or inaction being complained of and the justification for the complaint. The Office maintains complaint forms on the Board's website for a Complainant's use (Form 609F - Informal Complaint and Form 610F – Formal Complaint; Temporary Use Complaints also use Form 610F).

**5) Receiving an Informal Complaint.** Upon receipt, the Office may investigate the informal complaint and resolve the matter utilizing its emergency enforcement powers or upon motion to the Board for further penalties and/or restrictions. The OE shall not charge a filing fee for the filing of an informal complaint and informal complaints are not subject to the timelines and requirements set forth in Ordinance, § 3-1-102, unless the OE, at its discretion, so chooses to impose those timelines and requirements.

**6) Receiving and Notice of Formal Complaint.** When the Office of the Engineer receives a formal complaint, with the accompanying fee set forth in WP&P 10-102 OE Forms & Fee Table, the Office shall date stamp the complaint.

Within three (3) days of receiving a formal complaint, the Office of the Engineer shall serve, via regular mail, a copy of the complaint on the Complainant and the Respondent and shall post a notice of the complaint on the Board's website. Ordinance, § 3-1-102(2) and (3).

The notice shall include a written statement indicating that informal resolution of the dispute between the Complainant and the Respondent may provide a more timely and cost-effective remedy than having the petition adjudicated by the Engineer. Ordinance, § 3-1-102(3). If a hearing is required, the notice shall specify the date, time, location, and manner in which the hearing shall take place. The notice may also specify if the Engineer or Designee requires additional time for investigation of the complaint prior to a hearing.

The notice format is set forth in WP&P Attachment 31-A.

This section also applies to informal complaints that are determined by the Engineer or Designee to require a notice.

**7) Extension of Time by Parties.** The parties, upon mutual agreement, may extend the timeframes set forth in Ordinance sections 3-1-102 through -107. Ordinance, § 3-1-101(3).

## **WP&P 31-103: Resolution of Complaint[s]**

- 1) Informal Resolution of Complaints.** The parties may resolve the complaint informally, unless the complaint pertains to illegal use of water. If the parties resolve the complaint informally, they must notice the OE, in writing, that the complaint has been resolved informally and the OE will add the written notice to the file and consider the matter resolved.

The Engineer need not issue a Findings of Fact, Conclusions of Law for complaints brought under this section, but rather an Order providing: (1) a background on the Complainants alleged harm, (2) any procedural steps taken, (3) a finding that discontinuance has not had an effect, and (4) anything else the Engineer deems appropriate for the resolution of this type of complaint.

- 2) Resolution of Temporary Use Complaints.** Upon establishment that discontinuance of the short-term lessee's diversion has not had an effect, the Engineer shall enter an order allowing the diversion to continue. Ordinance, § 2-2-122(5).

The Engineer need not issue a Findings of Fact, Conclusions of Law for complaints brought under this section, but rather an Order providing: (1) a background on the Complainants alleged harm, (2) any procedural steps taken, (3) a finding that discontinuance has not had an effect, and (4) anything else the Engineer deems appropriate for the resolution of this type of complaint.

- 3) Timing of Formal Complaint Hearing.** In the event informal resolution is unsuccessful, the Engineer or Designee shall hold a hearing on the formal complaint no later than fifteen (15) days after providing notice of the complaint to the Respondent.

The Engineer or Designee may take an additional (10) days before holding the hearing to perform such independent investigation into the formal complaint as the Engineer or Designee deems appropriate. Ordinance, § 3-1-103.

The Engineer or Designee may extend timelines to accommodate weather and access conditions that limit field inspections necessary for resolution of complaints: extensions may be up to one month or until weather/travel restriction conditions permit, whichever is longer.

This section also applies to informal complaints that are determined by the Engineer or Designee to require a hearing.

- 4) Representation.** A party may appear on their own behalf or may be represented by an attorney, licensed to practice law in the state of Montana or the CSKT Tribal Court, in a hearing, 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.
- 5) Investigation of Complaints.** The Engineer or Designee may choose to perform an independent investigation of complaints prior to any scheduled hearing. The findings of the investigation shall be documented in an OE field report and become part of the official complaint record that is available to the public. The findings of the investigation may be used by the Engineer or Designee in writing its decision.
- 6) Formal Complaint Hearing.**
  - a. At the hearing before the Engineer or Designee, both the Complainant and the Respondent shall explain their positions concerning the complaint.
  - b. The Engineer or Designee may set time limitations on the parties in the presentation of evidence to efficiently hear the evidence before him/her. Any hearing logistics should be detailed in the notice of complaint served upon the parties.
  - c. The parties may call a lay or expert witness to present testimony at the hearing before the Engineer or Designee. 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. At the request of one of the parties, the Engineer may permit a lay or expert witness to appear and provide oral testimony by means of

electronic participation and may only be granted if the participation will not substantially prejudice the rights of any party. Any testimony provided shall be under oath or affirmation.

- d. 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. Ordinance, § 3-1-103(1).
- e. Rules of privilege recognized by law shall be given effect. Evidence, which is irrelevant, immaterial, or unduly repetitious shall be excluded. Ordinance, § 3-1-103.
- f. The hearing shall be electronically recorded and included as part of the administrative record.

This section also applies to informal complaints that are determined by the Engineer or Designee to require a hearing.

- 7) Timing of Decision.** A decision of the Engineer or Designee on a formal complaint shall be made in writing within seven (7) days after the completion of the hearing. Ordinance, § 3-1-103(2).

A decision of the Engineer or Designee on an informal complaint or a temporary use complaint shall be made in writing within twenty (20) days after the completion of a hearing, when determined by the Engineer or Designee.

**8) Final Decision of the Engineer or Designee to a Formal Complaint.**

- a. The final decision of the Engineer or Designee shall be in the format of a Findings of Fact, Conclusions of Law, and an Order.
- b. The final decision of the Engineer or Designee may include an award of declaratory relief, and/or the imposition of conditions on the use or exercise of a water right.
- c. Such conditions may include, but are not limited to:
  - i. Instructions regarding the proper delivery of water;
  - ii. the installation of measuring devices;
  - iii. the construction of suitable ditches to carry the return waters from any ditch or lands to the main stream or proper waste way;or

- iv. the mandate of structural changes to diversion structures. Ordinance, § 3-1-103(3).

This section also applies to informal complaints that are determined by the Engineer or Designee to require a hearing.

**9) Emergency Enforcement Powers of the Engineer.** In an Emergency, the Engineer, or any Staff who is so directed by the Engineer, shall have the authority to lock, remove, render inoperative, shut down, close, seal, cap, modify, or otherwise control methods of diversions and withdrawals, and obstructions to the flow of the water, subject to expedited appeal to the Board by the affected person. Ordinance, § 3-1-109.

**10) Additional Enforcement Powers of the Engineer.**

- a. The Engineer, or any Staff who is so directed by the Engineer, may enter upon lands on the Reservation with reasonable notice of the owner or occupant, to investigate and inspect methods of diversion, withdrawal, and other activities affecting water quantity, to install measuring devices at the expense of the water user on surface and groundwater diversions for the purpose of enforcing and administering this Ordinance, to monitor water use, water quality, and diversion structures. Ordinance, § 3-1-110.
- b. The OE reserves the authority to collaborate with and utilize local law enforcement, jurisdiction dependent, in the event a landowner resists noticed and lawful entry.
- c. The Engineer, or any Staff who is so directed by the Engineer, may take action to prevent the illegal use of water, including, but not limited to the temporary decommissioning of head gates or other diversion works. Ordinance, § 3-1-110.
- d. The Engineer may issue written notices of violation to Appropriators and to illegal users of water for violations of the Ordinance or of the terms and conditions of any Appropriation Right or Existing Use or of any lawful order of the Engineer or the Board. A notice shall specify the particular violation or violations, the step(s) to be taken to come into compliance, and identify a reasonable time frame within which such steps are to be taken. Ordinance, § 3-1-110.

- 11) **Recording and Notice of Final Decision.** A final decision of the Engineer or Designee shall be entered into the administrative record and retained by the Office of the Engineer. The Office of the Engineer shall promptly issue to all parties a copy of the final decision and notice of the date of entry.
- 12) **Effect of Final Decision.** The final decision issued by the Engineer or Designee shall be deemed the final decision of the Office of the Engineer and is binding upon all the parties as to all issues and claims that were raised or might have been raised in the complaint proceeding.
- 13) **Appeal to the Board.** Any Complainant or Respondent dissatisfied with the final decision of the Engineer or Designee may appeal to the Board and obtain review of the Engineer's or Designee's decision by filing a notice of appeal to the Board, which must be received within thirty (30) days of the issuance of the Engineer's or Designee's written decision. Ordinance, § 3-1-104.
- 14) **Stay of Decision.** The decision of the Engineer or Designee shall not be stayed during the pendency of the appeal unless the Board expressly orders such a stay upon motion of the Complainant or Respondent. Ordinance, § 3-1-103(4).