

# U.S.D.A. FOREST SERVICE - MONTANA WATER RIGHTS COMPACT

## INTRODUCTION

Since 1992, the Montana Reserved Water Rights Compact Commission (RWRCC) and the United States Department of Agriculture, Forest Service (Forest Service) have been in active negotiations concerning federal reserved water rights on National Forest System lands in Montana. In the fall of 2005, the RWRCC and the Forest Service hired a mediator to assist with the negotiations and have reached a settlement (Compact) to present to the Legislature.

## BACKGROUND

The RWRCC was created by the Montana Legislature in 1979 to act on behalf of the State to negotiate settlement of federal reserved water right claims as part of the state-wide water adjudication. A federal reserved water right is created when an Act of Congress or a Presidential Executive Order or Proclamation sets aside federal land from the public domain for a specified purpose. This includes National Forests, National Parks, Fish and Wildlife Refuges, some BLM lands, Indian reservations, and others. The water right has the priority date of the reservation of the land, even though the water right might not be used at that time. The water right includes the amount of water necessary to accomplish the specified purpose for which the land was reserved.

By state law a negotiated settlement must be enacted by the Montana Legislature, be approved by federal officials, and go through an objection process in the Montana Water Court. After objections to all claims (including objections to the Compact) are resolved, the Water Court issues a final decree for all water rights in each basin, including the reserved rights in the negotiated settlement.

The RWRCC was composed of nine members: four appointed by the Governor; two appointed by the President of the Montana Senate; two appointed by the Speaker of the Montana House of Representatives; and, one appointed by the Attorney General.

RWRCC members that were on the Negotiating Team for Forest Service issues are:

- Former state senator Lorents Grosfield, Negotiating Team Chairman
- Senator Bill Tash
- Former Park County Attorney Tara DePuy
- Chris D. Tweeten, Chief Civil Counsel, Office of the Attorney General, RWRCC Chairman.

Members of the Forest Service Negotiating Team were:

- Kathleen McAllister, Deputy Regional Forester, Missoula
- Eric Johnston and Tim Sullivan, Forest Service, Missoula
- Jody Miller and Lois Witte, Office of General Counsel, Missoula and Denver
- Jim DuBois, United States Department of Justice, Denver.

Because of the vast geographic scope of the National Forest System lands in Montana (20% of the land, with water in 50 of the 85 Water Court Basins), settlement of Forest Service water rights is an important part of completing Montana's water adjudication in a timely and cost effective way.

## PROPOSED COMPACT

In general, the Compact recognizes reserved water rights for the Forest Service for administrative and emergency fire fighting uses and instream flows for the South Fork Flathead Wild and Scenic River. To resolve major differences between the negotiating parties concerning the existence, nature and extent of any possible reserved water rights for instream flows under federal law, the proposed Compact uses state law to create numerous state-based water rights for instream flow on National Forest System lands and to set up a process for applying for additional instream flows under state law. Below is a summary of what the Compact does.

### Federal Reserved Water Rights:

- Recognizes a reserved water right to divert water for the Forest Service for administrative uses (such as for ranger stations, pack stock, road watering) and for emergency fire suppression. Priority date is date of the creation of the National Forest or as specified.
- Recognizes an instream flow right for the South Fork Flathead Wild and Scenic River. Priority date is October 12, 1976, the date this river was designated by Congress.

### Instream Flows under State Law:

- Creates, in the Compact, instream flow water rights under state law for 77 streams and one in-place water right for a fen (wetland) all located on National Forest System lands. All of these water rights will have a priority date of 2007.
- Establishes a process that the Forest Service may use in the future to apply for additional instream flows under state law on other streams throughout the National Forest System lands in Montana. Priority date will be the date of application.
- In exchange for water rights created and the means of acquiring instream flows under state law, the Forest Service will withdraw forever all of its existing or possible claims for reserved water rights for instream flows in the ongoing water adjudication.

As part of the overall agreement, the parties have agreed to seek changes to state law that:

- Continues the ability of the Forest Service to object in the Water Court to any water right claim on or crossing National Forest System lands that adversely affects Forest Service interests.
- Coordinates state and federal permitting processes.
- Allows a change of use from an appropriation to divert or withdraw water on land owned by the Forest Service above or immediately adjacent to the National Forest boundary to an instream flow. This is primarily intended to allow the Forest Service to change irrigation and other rights to instream flow on land that it might acquire in the future.

This Compact settles all federal reserved water rights of the Forest Service. The Forest Service has other water use claims based on state law that are in the adjudication process and are not part of this agreement (for example, campgrounds are not “specific purposes” for which forest service land was originally reserved).

### Public Input

All negotiating sessions were noticed and open to the public. In the fall of 2006, public meetings were held in 17 communities. Meetings with interested individuals and groups were held. A web site was created. Written comments via mail or e-mail were encouraged. *All comments* on this Compact were considered by the negotiating teams.

The following are some of the changes made to the agreement based on public comment:

- Additional streams were included in the Compact. Approximately 57 streams where appropriate data was available were added to Article V based on public input that more instream flow rights should be quantified in the Compact. 77 instream flows are now included in the Compact. These streams were added prior to the general public meetings.
- Concerns were expressed about the priority for administrative uses on lands not originally part a Forest unit, but reserved by later Congressional action. Language was added in Article II, section A.1., to clarify that if a current administrative use has a later priority date, the abstract for that water right will specify the later date.
- Concerns were raised about Forest Service water use for road watering and road construction. Article III, section C.3 now specifies that senior water rights cannot be adversely affected by Forest Service use and withdrawals will cease if affecting seniors.
- Many people and groups commented on a proposed change to § 85-2-233, MCA concerning the Forest Service’s ability to object in the adjudication based on land ownership. Based on these comments the proposed changes to this provision were dropped and language put in the Compact that recognized the Forest Service’s ownership interest in water and its use within National Forest System lands.
- Concerns were raised that instream flow rights would prevent changes from a direct stock use to an off-stream stock use (even if the Forest Service required riparian protection). Now the Forest Service cannot object to changes in this limited circumstance.
- Concerns were raised about the use of the wetted perimeter methodology with no flexibility to provide for the evolution of the science regarding instream flow methodologies. Language was added that allows for a new methodology to be used under the Compact if the parties agree to it and it is adopted by rule. Criteria for the reliability of the new methodology include that it be a peer reviewed methodology with a track record and that it be generally accepted in the scientific community. The use must be instream flow for certain fish species.

- Comments were received that proposed changes to § 85-2-316, MCA were too broad and would apply to all existing state water reservations as well as new applications under that section. This provision was amended to limit the statutory changes to the Forest Service.
- Concern was expressed that the Forest Service would not go forward to apply for additional instream flow rights and there was no method to monitor the applications once the Compact was passed. The Compact now includes a requirement that DNRC report to the Environmental Quality Council biennially on the status of the Forest Service applications for state water reservations.