

## **Fort Peck – Montana Water Rights Compact Outline**

This outline summarizes the basic provisions of the Fort Peck – Montana Compact, ratified by the Tribal Executive Board and the Montana Legislature in April, 1985.

### **Introduction**

The Fort Peck Reservation is located in northeastern Montana. It is about 110 miles long (east to west) and 40 miles wide (north to south) encompassing slightly over two million acres. Over 6,000 tribal members live on the Reservation, as well as several hundred Indians belonging to other tribes. Reservation lands were allotted to the Indians beginning in 1908, and then opened to settlement by non-Indian homesteaders. Today, about half the lands of the Reservation are owned by non-Indians. About 550,000 acres are held in trust by the United States for Indian allottees, and another 400,000 held in trust for the Tribes. Trust and fee lands are commonly interspersed in a “checkerboard” pattern.

The southern boundary of the Reservation is the Missouri River, the major interstate stream system of the Northern Great Plains. The western boundary is the Milk River and, farther north, its tributary, Big Porcupine Creek. The northern boundary of the Reservation is about thirty miles south of the United States – Canadian border. The Reservation’s eastern boundary, Big Muddy Creek, joins the Missouri River about 20 miles west of the North Dakota state line.

The climate is semi-arid, with average annual precipitation between 12 and 13 inches. The major water resource of the Reservation is the mainstem Missouri which has an average annual flow of over seven million acre feet. Fort Peck Dam, a major Missouri Basin hydroelectric project constructed by the Corps of Engineers, lies about five miles upstream of the Reservation, on the Missouri. The Reservoir, about one-hundred miles long, holds over 20 million acre feet. A number of much smaller tributaries of the Missouri originate on or flow through the Reservation in a generally north to south direction. The major run-off in these streams is in March and April; flows are often intermittent in the late summer, and the water quality is poor.

### **Quantification**

The Compact determines finally and forever the quantity of water reserved for the Assiniboine and Sioux Tribes by federal law as 1,050,472 acre feet of diversions, or a consumptive use of 525,236 acre feet per year. A maximum of 950,000 acre feet may be diverted, and 475,000 acre feet may be used, from surface water each year. The rest would have to come from groundwater, and the Compact recognizes the Tribes’ groundwater rights.

The Tribes can use this water for irrigation, or for any other purpose determined by them on the Reservation. Part of the Tribes' water right may be used to establish instream flows to protect fish and wildlife resources on various tributary streams on the Reservation.

The Compact provides that nonuse of the Tribal Water Right does not abandon or forfeit the Tribes' right, which is a standard component of reserved water rights.

### **Tribal jurisdiction over tribal water rights and Resolution of disputes by impartial board**

The United States will continue to administer and settle disputes concerning water use on the Fort Peck Irrigation Project, which presently serves less than 20,000 acres of Indian and non-Indian lands on the Reservation with water from the Missouri River. The Tribes will administer all other uses of water on the Reservation by itself, by Indians, or by non-Indians who either lease water from the Tribes or claim a water right under federal law because they purchased a former trust allotment. The Tribes will adopt a water code, and will also resolve all water disputes among these persons. The Interior Department has agreed to approve the tribal water code.

The State will administer all water rights established pursuant to state law, including by non-Indians on the Reservation, and resolve all disputes among state water users.

These separate administrative systems make it less likely a dispute will arise between the Tribes and the State, or between tribal and state water users. If a dispute does occur, it will be determined by a new Joint Tribal-State Board established by the Compact. This Board has one representative from the State, one from the Tribes, and a third to be selected by neutral means. It has the power to subpoena witnesses, to hold hearings and take testimony. All decisions must be by majority vote.

Appeals of the Board's decisions may be had in a court of competent jurisdiction, but the scope of review is limited in a fashion very similar to that of an award in binding arbitration. Decisions of the Board must be enforced by any court of competent jurisdiction unless an appeal is timely filed.

### **Tribal Water Marketing**

The Compact recognizes that the Tribes may market water within the Reservation to non-Indians without complying with any state law or administrative regulation. The permanent sale of tribal water is not authorized. The Compact also provides that the Tribes may market their water outside the Reservation by leasing or otherwise transferring it for up to 50 years, so long as the following requirements are met.

First, the water must be diverted from Fort Peck Reservoir or the mainstem of the Missouri River downstream from Fort Peck Dam. (Diversions are also possible for tribal water marketing out of the

mainstem Missouri River above Fort Peck Reservoir and y deferral agreements on reservation tributaries. As to these, however, state law must be observed)

Second, outside the Reservation, water must be used for a beneficial purpose as that term is defined by valid state law at the time the Tribes propose the use. This means that if the State denies a particular use as non-beneficial for all its citizens, it can also impose a nondiscriminatory ban on tribal water marketing for that use.

Third, any export of the Tribal Water Right outside Montana must comply with valid state laws at the time the export is proposed. The federal Constitution imposes limits on state restrictions against exporting water. It is uncertain at present whether any state restrictions on exports of water are valid. And of course it is unknown what, if any, restrictions on water exports Montana will attempt in the future.

Fourth, industrial facilities or pipelines using or transporting water marketed by the Tribes or constructed by the Tribes outside the Reservation must comply with valid state laws such as Montana's Major Facilities Siting Act that regulate th construction or operations of such facilities.

Fifth, the quantity of water marketed by the Tribes outside the Reservation in any year is limited in a complex fashion by reference to the amount of water authorized to be transferred by the State. If the State is authorized to market 50,000 acre feet or more, the amount the Tribes can market is a varying percent of the State total. If total State water marketing is less than 50,000 acre feet per year, the Tribes can market any quantity permitted by federal law or—if federal Law has no limits—any quantity state law allows private water users to market. In all events, the Tribes may market at least 50,000 acre feet per year.

Sixth, the Tribes must give notice to the State showing that:

- a) The means of diversion and construction and operation of diversion works for tribal water marketing are adequate,
- b) The diversion will not adversely affect any federal or state water right actually in use at the time the diversion is processed,
- c) The proposed use does not cause any unreasonable significant environmental impact, and
- d) That certain large diversions will not be made that significantly impair the quality of water for existing uses, use high-quality water where low-quality water is legally and physically available to the Tribes for the use, create or contribute substantially to saline seep, or substantially injure fish or wildlife populations.

Although tribal water marketing is not limited by state law, the above criteria do somewhat resemble present state Law.

Seventh, in a unique provision, the Tribes agree to offer the State the opportunity to participate in any marketing proposal the Tribes develop outside the Reservation. The State in returns must do the

same for the Tribes for opportunities in Fort Peck Reservoir on the mainstem Missouri River below Fort Peck Dam.

### **Protection of existing uses in Missouri River tributaries**

The Tribes agree in the Compact to make no use of the mainstem of Milk River, which is the western boundary of the Reservation for only a few miles above its confluence with the Missouri. This is because their engineers advised the Tribes that the lands in this area could better be served from the Missouri, which is a dependable, high-quality source.

The Compact also protects all existing Indian and non-Indian uses on the other streams that flow through, and the ground water basins that underlie, the Reservation. About 33,000 acres are presently irrigated from these streams or groundwater basins, mostly by non-Indians. About half the irrigation is from groundwater. Most of the acres irrigated from surface flow are by means of “water spreading” — capturing high stream flows during the early spring runoff. These irrigation uses are protected, as are present and future domestic uses and figure stock watering impoundments not in excess of 20 acre feet per year. All new non-Indian uses, however, will be subordinate to future exercise of the Tribes’ reserved rights.

Had the controversy been litigated, the Tribes could of course have “cut off” these junior uses on the tributaries, since the Tribes enjoy a much earlier priority date. The Tribes, however, agreed to protect those uses in return for the State’s agreement to the quantification determined by the Tribes’ experts, tribal jurisdiction, resolution of disputes by a Compact Board and tribal water marketing.