

**U.S. Fish & Wildlife Service, Benton Lake & Black Coulee – Montana  
Water Rights Compact  
Summary**

**Introduction**

The Montana Reserved Water Rights Compact Commission was created by the Montana Legislature in 1979 to act on behalf of the State and its water users to settle the water rights associated with reserved federal land such as the Benton Lake National Wildlife Refuge. The goal of the Commission in the process is to protect existing water use and future water needs adjacent to the federal land, while assuring that federal reserves such as the Benton Lake and Black Coulee Refuges have sufficient water to operate as Congress intended. This summary contains a description of the Commission as well as information regarding federal reserved water rights.

**Background Information**

**1) A brief explanation of the State of Montana's water adjudication process:**

The process of settling water rights at the Benton Lake Refuge is part of the statewide water adjudication. The Refuge water right will ultimately be part of a water right decree covering pre-1973 water rights in the Lake Creek watershed. In 1979, the Montana legislature passed Senate Bill 76 which required a comprehensive determination and recording of the priority, quantity, source and use, or adjudication, of those water rights in Montana which legally originated before July 1, 1973, the date of the Montana Water Use Act. Water rights for development after July 1, 1973 are obtained by going to DNRC to obtain a permit. Users of pre-1973 water rights were required to file a claim or rights were assumed to be forfeited. Stock and individual domestic rights from instream water or groundwater were exempt from the filing requirement. The 1979 legislature also provided for the settlement of all federal water rights in the State and created the Commission to achieve this. The end result of this adjudication process is that the Water Court, after all objections have been resolved, will issue a permanent decree in each basin that integrates the state and federal rights.

**2) State water rights/federal reserved water rights:**

Often there is confusion about the difference between state water rights and federal reserved water rights. A person who wanted to obtain a state water right prior to July 1, 1973 simply diverted the water and applied it to a beneficial use. Since July 1, 1973 a person who wants a water right must obtain a permit from DNRC. A federal reserved water right is not created in the same way as a state water right. A federal reserved water right is created when an Act of the United States Congress or a Presidential Executive Order or Proclamation sets aside federal land from the public domain for a certain purpose. The water right then carries the priority date of the Act that reserved the land, even though the water for the federal land may not be put to use at that time. The amount of water to which a reservation is entitled depends on the purpose for which the land was reserved. A federal reserved water right does not have the same restrictions placed on it as a state appropriative right. A federal reserved right does not require a notice of appropriation or beneficial use to maintain the water right, and there is no possibility of losing the water due to non-use as there is with a state water right.

For example, Benton Lake National Wildlife Refuge was set aside by a Presidential Executive Order on November 21, 1929. The Executive Order stated that the public lands were reserved and "set apart for the use of the Department of Agriculture, as a refuge and breeding ground for birds." Therefore, Benton Lake National Wildlife Refuge carries a reserved water right for the maintenance of bird habitat with a priority date of November 21, 1929. That means that the U.S. Fish and Wildlife Service has the right to use an unquantified amount of water it needs for this purpose before owners of state water rights with priority after 1929 can use water. Through negotiation the Commission attempts to quantify this right and protects uses with a priority up to the date of the compact.

**3) The role of the Montana Reserved Water Rights Compact Commission in negotiating settlements between the federal government and the State of Montana regarding federal reserved water rights for federal agencies:**

The Montana Reserved Water Rights Compact Commission was created by the legislature in 1979 to negotiate water rights settlements on behalf of the Governor with federal agencies such as the U.S. Fish and Wildlife Service and Indian tribes in Montana. The Commission is composed of nine members. Four members are appointed by the Governor. Those members are Gene Etchart, Jack

Salmond, Bob Thoft, and Tara DePuy. Two members are appointed by the President of the Senate. They are Senator Chuck Swysgood and Senator Jeff Weldon. Two members are appointed by the Speaker of the House of Representatives. They are Representative Emily Swanson and Representative Robert Story. One member is appointed by the Attorney General; he is Chris Tweeten who currently chairs the Commission. Legal and historical research, technical analyses and contacts with water users are prepared for the Commission by an 11-member staff in Helena, composed of two attorneys, an agricultural engineer, soil scientist, two hydrologists, an historian, a geographer specializing in the Geographic Information System and two administrative support staff.

The 1979 Montana legislature set up a negotiated settlement process for a number of reasons. Litigation of federal reserved water rights can be expensive to both taxpayers and individual water users. In addition, the early priority date of many federal reserved water rights can place existing water use in jeopardy if a practical solution to water allocation is not negotiated. The process of negotiating settlements allows the involved parties more flexibility to explore practical solutions.

During the settlement process, numerous opportunities for public comment exist. While Commission negotiations are ongoing, you may directly influence the solution chosen, which was the case for the Benton Lake agreement. Commission settlement agreements, or Compacts, must be ratified by the legislature. At that stage in the process, you may comment at legislative hearings on your support or opposition to the solution chosen, or recommend changes, which would have to be supported by all the parties. Finally, the Compact must go to the Montana Water Court for entry in a final decree. There, any participant in the adjudication affected by the settlement may raise an objection. If the court finds the objection valid, it may void the Compact. The earlier in the negotiations public concerns and comments are voiced, the easier it is for the Commission to consider those concerns and to revise proposed settlements.

The Commission's job is to negotiate federal reserved water rights on the behalf of the State and the residents of Montana who use water. The Commission feels that public participation is an essential part of each settlement negotiation, and that such participation insures that the Commission's negotiations on behalf of the State address the concerns of the public and incorporate local solutions to water user problems. The Commission appreciates your past input on these proposals and welcomes any further comments you may have.

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### **Benton Lake National Wildlife Refuge**

For natural flow in the Lake Creek watershed:

-The U.S. Fish and Wildlife Service has the right to the remaining natural flow in the Lake Creek watershed after the following rights are satisfied:

- 1) all valid water rights (as finally decreed by the Water Court or permitted by DNRC with a priority date before the date of the Compact) are satisfied; and
- 2) new post-Compact wells of less than 35 gallons per minute that use 10 acre-feet per year, and
- 3) new post-Compact stock impoundments with a surface acreage of 15 acre-feet capacity or less that appropriate a maximum of 30 acre-feet per year

Following the satisfaction of the criteria above, there would be:

-Basin closure in the Lake Creek watershed to new water permits other than the 35 gpm or less wells, and stock water up to 15 acre-feet capacity or less that appropriates a maximum of 30 acre-feet per year.

For consumptive use:

-2 acre-feet of groundwater for headquarters site well

### **Black Coulee National Wildlife Refuge**

For natural flow in the Black Coulee watershed:

-The U.S. Fish and Wildlife Service has the right to the remaining natural flow in the Black Coulee watershed above the Refuge **after the following rights are satisfied:**

- 1) all valid water rights (as finally decreed by the Water Court or permitted by DNRC with a priority date before the date of the Compact) are satisfied; and
- 2) new post-Compact wells of less than 35 gallons per minute that use 10 acre-feet per year, and
- 3) new post-Compact stock impoundments with a surface acreage of 15 acre-feet capacity or less that appropriate a maximum of 30 acre-feet per year

Following the satisfaction of the criteria above, there would be:

-Basin closure in the Black Coulee watershed upstream from the Refuge to new water permits other than the 35 gpm or less wells, and stock water ponds of up to 15 acre-feet capacity or less that appropriates a maximum of 30 acre-feet per year.

It is important to understand, that despite their 1938 priority date, the **U.S. Fish and Wildlife Service is willing to subordinate to all existing uses in the watershed up to the date the Compact is finalized. This means the U.S. Fish and Wildlife Service is basically willing to take a 1997 priority date (or whenever the Compact goes through the legislature and is approved by the federal government), and has agreed to the exemption of stock ponds and small groundwater wells.** It means that if all such existing uses are satisfied, the remaining water referred to in the proposal would belong to the Refuge.