

# **U.S. Fish & Wildlife Service, Bowdoin National Wildlife Refuge – Montana Water Rights Compact Summary**

## **INTRODUCTION**

The Montana Reserved Water Rights Compact Commission (RWRCC) and the United States Fish and Wildlife Service (FWS) took part in active negotiations concerning federal reserved water rights for the Bowdoin National Wildlife Refuge (the Refuge), located just east of Malta, Montana, between 1995 and 2007.

## **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 (now inactive after finishing negotiations surrounding 18 water right compacts) 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 FWS issues are:

- Chris D. Tweeten, Chief Civil Counsel, Office of the Attorney General, RWRCC Chairman
- Representative Art Noonan
- Gene J. Etchart, Rancher and Irrigator

Members of the FWS Negotiating Team were:

- Megan Estep, Chief of Region 6 Water Resources Division
- John Chaffin, Interior Solicitor's Office, U.S. Department of the Interior, federal team Chairman
- David Gehlert, U.S. Department of Justice
- Jana Mohrman, Refuge Hydrologist
- Carmen Luna, Bowdoin National Wildlife Refuge Manager

Bowdoin National Wildlife Refuge, located in Phillips County near Malta, was established in 1936 and expanded in 1940 to be a refuge and breeding ground for migratory birds. The now-15,551 acre Refuge is utilized by nearby communities as an environmental education resource and it draws in tourist dollars for sightseeing and hunting. Most of the Refuge lands were originally part of the Bureau of Reclamation's Milk River Project.

The lands comprising the Refuge sit in a low-lying area alongside the floodplain of Beaver Creek in what is thought to be an old oxbow of the pre-ice age Missouri River. Historically, these lands were fed by large floods that spilled out of the banks of Beaver Creek, creating wetlands. With the development of the Milk River Project, these lands began to receive irrigation return flows from the Project along with some direct deliveries via the Dodson Canal. Diking installed after the creation of the Refuge reduced the ability of the Refuge lands to receive flood flows from Beaver Creek. At the same time, water development upstream has contributed to a reduction of those flows on Beaver Creek, further diminishing the supply of fresh water available to the Refuge. In the early years of the Refuge, FWS managers tried to conserve their water supply by limiting the volume of water released from the Refuge. This in turn caused a buildup of salts, which, for a time, was desirable because it created a saline ecosystem that was very good for waterfowl. But as salts continued to increase and water quality laws became more stringent, the Refuge was prohibited by law from releasing any water at all. Irrigation return flows have also become a source of additional salt which continue to accumulate in the Refuge. Currently, the only way salts can escape the Refuge is when winds blow salt crusts away, or when large Beaver Creek floods enter the refuge wetlands and push some of the saline water downstream into Beaver Creek. Neither of these are sustainable management strategies, especially as large salt/dust storms and occasional releases of saline water have caused problems on neighboring properties. The Refuge is presently embarking on a comprehensive planning process to determine how best to address its long-term management options. Quantifying the Refuge's federal reserved water rights in the proposed Compact is a first step toward ensuring the sustainability of the Refuge as positive rather than negative part of its community.

## COMPACT

The Compact recognizes federal reserved water rights for the Bowdoin National Wildlife Refuge from three sources – surface flows from Beaver Creek, surface flows that drain naturally into the Refuge (predominantly from Black Coulee), and ground water. These water rights may be used for the purposes of the Refuge, including wildlife maintenance and enhancement, stock watering, and administrative, institutional, dust suppression and emergency fire suppression uses. These federal reserved rights are subordinated to all water rights existing under State law as of the Effective Date of the Compact, as well as to all future development excepted from State permitting law (such as small domestic and stock uses). The Refuge's federal reserved rights are also conditioned on the execution of a Memorandum of Understanding (still being developed) that will establish additional restrictions on the use of these rights to ensure that they do not exacerbate the Refuge's salt problems. It is also worth bearing in mind that the Water Court basin in which the Refuge is located (Basin 40M) was closed to new surface appropriations by the Legislature in 2001 as part of its ratification of the Ft. Belknap Water Rights Compact. Below is a summary of the key provisions of the Compact.

### Federal Reserved Water Rights.

Subject to the subordination requirement, the Compact assigns the FWS federal reserved water rights for:

- 24,714 acre-feet per year from Beaver Creek;
- Surface flows in Basin 400 that drain naturally into the Refuge;
- 223 acre-feet per year of ground water extracted from any source from wells located on the Refuge;

- 5300 acre-feet per year of deep ground water extracted from wells located on the Refuge that must be drilled into geologic formations dating to the Jurassic Period or older

### Deep Ground Water.

A relatively unique aspect of this Compact is the manner in which it addresses the Refuge's ground water rights. In the negotiations, FWS made a request for recognition of a significant ground water right. The RWRCC was concerned about the potential impacts of such a right for two reasons. First, the RWRCC wanted to ensure that any such right would not harm existing users. Second, RWRCC worried about the risk to those who might develop a ground water right in the future who could potentially still be displaced by the FWS by virtue of the senior priority of an undeveloped federal reserved right. At the same time, the RWRCC recognized that the introduction of new water into a water short area would be of benefit to both the FWS and the off-Refuge community. The Compact's subordination provisions addressed the RWRCC's first concern. The second concern is addressed by requiring that the bulk of FWS' ground water right may only be satisfied with water extracted from such a deep aquifer that the FWS would not be able to deplete it unilaterally. For legal purposes, this depth requirement is defined in the Compact as a requirement that the FWS may only exercise the right by drilling wells into geologic formations of the Jurassic Period or older. Such formations are likely located at least 2600 feet beneath the Refuge's surface, and are relatively straightforward for a well driller to identify. The Compact also requires the FWS to comply with State permitting requirements (including water quality standards) prior to developing its deep ground water right.

The Compact settles all federal reserved water rights of the FWS on behalf of the Refuge. FWS and the RWRCC remain in negotiation over FWS federal reserved water rights claims for the C.M. Russell National Wildlife Refuge and the National Bison Range. FWS also retains one claim on behalf of the Refuge based in state law that is in the adjudication process and is not part of this agreement. Nothing in this Compact recognizes a federal reserved water right for the Refuge from the Milk River or from water claimed by the U.S. Bureau of Reclamation or other water users on behalf of the Milk River Project.

### PUBLIC INPUT.

All negotiating sessions were noticed and open to the public. In addition, in 2004 RWRCC staff convened an *ad hoc* local advisory committee comprised of irrigators and other community members concerned about and/or affected by the salt problems at the Refuge for the purpose of soliciting feedback about proposed settlement concepts. Additional meetings with interested individuals and groups have also been held. On February 6 and 7, 2007, RWRCC Commissioner Gene Etchart and RWRCC staff held two open houses in Malta, Montana, to visit with and receive input from interested members of the public about the proposed Compact.