

85-20-1301. United States of America, fish and wildlife service, Bowdoin national wildlife refuge -- Montana compact ratified. The compact entered into by the State of Montana and the United States of America to settle for all time any and all claims to federal reserved water rights for the Bowdoin National Wildlife Refuge administered by the U.S. Fish and Wildlife Service within the State of Montana and filed with the secretary of state of the State of Montana under the provisions of 85-2-703 on April 6, 2007, is ratified. The compact is as follows:

ARTICLE I - RECITALS

WHEREAS, in 1979, the United States brought several actions in the United States District Court for the District of Montana to adjudicate, inter alia, its rights to water with respect to the Bowdoin National Wildlife Refuge; see *United States v. Aageson*, No. CV-79-GF (filed April 5, 1979);

WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America; see "the McCarran Amendment", 43 U.S.C. 666(a)(1) (1952);

WHEREAS, the State of Montana in 1979 pursuant to Title 85, chapter 2, of the Montana Code Annotated (MCA), commenced a general adjudication of the rights to use water within the State of Montana, including all federal reserved and appropriative water rights;

WHEREAS, the Montana Reserved Water Rights Compact Commission, pursuant to 85-2-703, MCA, is authorized to negotiate settlement of water rights claims filed by the United States for areas in which the United States claims reserved waters within the State of Montana;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of Bowdoin National Wildlife Refuge in the State of Montana;

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute this Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. 516-517 and 519 (1968);

WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department of the Interior pursuant to 43 U.S.C. 1457 (1986, Supp. 1992), inter alia;

WHEREAS, it is in the best interest of all Parties that the water rights claims for the Bowdoin National Wildlife Refuge be settled through agreement between the State of Montana and the United States;

NOW, THEREFORE, the Parties agree to enter into this Compact for the purpose of settling the water rights claims of the United States for the Bowdoin National Wildlife Refuge.

ARTICLE II - DEFINITIONS

For purposes of this compact only, the following definitions shall apply:

(1) "Abstract" means the copy of the document entitled "Abstract of U.S. Fish and Wildlife Service Water Rights" referenced in this Compact as Appendix 1.

(2) "Acre-Foot" or "Acre-Feet" or "AF" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet of water.

(3) "Acre-Foot per Year" or "Acre-Feet per Year" or "AFY" means an annual quantity of water measured in Acre-Feet over a period of a year.

(4) "Aquifer" means any underground geological structure or formation which is capable of yielding water or is capable of recharge.

(5) "Arising Under State Law" means, as applied to a water right, a water right created under Montana law and does not include water rights created under federal law.

(6) "Beaver Creek Basin" means Montana Water Court Basin 40M, consisting of the mainstem of Beaver Creek and its tributaries, including Big Warm Creek, Little Warm Creek, and Black Coulee, to its confluence with the Milk River.

(7) "Bowdoin National Wildlife Refuge" or "Refuge" means those lands and interests in lands located in Montana that were acquired pursuant to or withdrawn and reserved by Executive Order No. 7295 of February 14, 1936, and Executive Order No. 8592 of November 12, 1940, for purposes of providing a refuge and breeding ground for migratory bird and other wildlife.

(8) "Change in Use" means, as applied to the Refuge water right, a change in the point of diversion, the place of use, the purpose of use, or the place of storage.

(9) "Consumptive Use" means a use of water that removes water from the source of supply such that the quality or quantity is reduced or the timing of return delayed, making it unusable or unavailable for use by others, and includes evaporative loss from impoundments and natural lakes.

(10) "Deep Ground Water" means water extracted from any deep regional Aquifer that is located in any geologic formation dating from the Jurassic Period or older.

(11) "Department" means the Montana Department of Natural Resources and Conservation or any successor agency.

(12) "Effective Date" means the date on which the Compact is given ratification by the Montana Legislature, written approval by the United States Department of the Interior, or written approval by the United States Department of Justice or on which the Memorandum of Understanding concerning the exercise of certain of the water rights quantified in this Compact and attached hereto as Appendix 3 is executed by the State of Montana and the United States Fish and Wildlife Service, whichever date is latest.

(13) "FWS" means the United States Fish and Wildlife Service of the United States Department of the Interior or any successor agency.

(14) "Ground Water" means any water that is beneath the surface of the ground.

(15) "Jurassic Period" means the middle period of the Mesozoic era, spanning the time between approximately 213 million and 145 million years before the Effective Date of this Compact, as identified on the geologic table attached hereto as Appendix 4.

(16) "Milk River Basin" means the mainstem of the Milk River and its tributaries from its headwaters to the confluence with the Missouri River and consists of: Montana Water Court Basins 40F, 40G, 40H, 40I, 40JW, 40JE, 40K, 40L, 40M, 40N, and 40O, as those Basin names may be modified by the Montana Water Court from time to time, and the portion of the Milk River and its tributaries flowing through the Provinces of Alberta and Saskatchewan in Canada.

(17) "Party" or "Parties" means the State of Montana, the United States of America, or both.

(18) "Person" or "Persons" means an individual or individuals or any other entity, public or private, including the State, a tribe, and the United States and all officers, agents, and departments thereof.

(19) "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof, and unless otherwise indicated, for purposes of notification or consent, "State" means the Director of the Department or the Director's designee.

(20) "United States" means the federal government and all officers, agencies, and departments thereof, and unless otherwise indicated, for purposes of notification or consent other than service in litigation, "United States" means the Secretary of the Department of the Interior or the Secretary's designee.

ARTICLE III - REFUGE WATER RIGHT

The Parties agree that the following water rights are in settlement of the reserved water rights of the United States for the Refuge. All water rights described in this Article are subject to Article IV of this Compact as well as any specific additional conditions set forth below.

A. Quantification.

The United States shall have the right to water from the following sources:

1. Natural Flow.

Subject to the provisions of Article III.B.2, the United States has the right to the surface flow in Basin 40M that drains naturally into the Refuge after satisfaction of the following water rights Arising Under State Law:

(a) all water rights Arising Under State Law with a priority date before the Effective Date of this Compact;

(b) any right excepted from the permitting requirements of State law to appropriate stock water for impoundments or pits with a priority date after the Effective Date of this Compact; and

(c) any right excepted from the permitting requirements of State law to appropriate Ground Water for domestic and/or lawn and garden use with a priority date after the Effective Date of this Compact.

2. Diversion from Beaver Creek - Consumptive Use.

Subject to the provisions of Article III.B.2, the United States has the right to divert up to 24,714 Acre-Feet per Year from Beaver Creek.

3. Ground Water - Consumptive Use.

Subject to the provisions of Article III.B.2:

(a) the United States has the right to develop 223 Acre-Feet of Ground Water extracted from well(s) located within the exterior boundaries of the Refuge; and

(b) subject also to the provisions of Article III.H, the United States has the right to develop 5,300 Acre-Feet of Deep Ground Water extracted from well(s) located any place within the Refuge.

B. Relative Priority.

1. Priority Date.

Subject to the provisions of Article III.H., the United States has a priority date of November 12, 1940, for the water rights described in this Compact for the Refuge.

2. Subordination.

The water rights described in Article III.A are subordinated to:

(a) all rights Arising Under State Law with a priority date before the Effective Date of this Compact;

(b) any right excepted from the permitting requirements of State law to appropriate stock water for impoundments or pits with a priority date after the Effective Date of this Compact; and

(c) any right excepted from the permitting requirements of State law to appropriate Ground Water for domestic and/or lawn and garden use with a priority date after the Effective Date of this Compact.

C. Period of Use.

The period of use of the water right set forth in Article III.A is January 1 through December 31 of each year.

D. Points and Means of Diversion.

1. Diversion of the water right set forth in Article III.A.2 may be located on Beaver Creek off the Refuge, subject to applicable State and federal law and/or any place within the Refuge.

2. Diversion of the water right set forth in Article III.A.1 and 3 may be located any place within the Refuge.

E. Place of Use.

The water rights set forth in Article III.A may be used anywhere within the Refuge.

F. Purposes.

The water rights set forth in Article III.A may be used for the purposes of the Refuge, including wildlife habitat maintenance and enhancement (including grazing needs for habitat management purposes), stock watering, and administrative uses, including but not limited to domestic, lawn and garden, institutional, and dust abatement uses.

G. Temporary Emergency Appropriations.

The use of water for emergency fire suppression benefits the public and is necessary for the purposes of the Refuge. The United States may divert water for emergency fire suppression at the Refuge without definition of the specific elements of a recordable water right. Temporary emergency use of water for emergency fire suppression from a source for which a water right is quantified in Article III shall not be considered an exercise of that right.

H. Deep Ground Water Use.

The development and use of the water right set forth in Article III.A.3(b) is subject to:

1. The provisions of Article III.I.1.b. and Article IV.B of the Fort Belknap-Montana Compact, 85-20-1001 through 85-20-1008, MCA; and

2. All applicable State laws pertaining to Ground Water wells, including but not limited to authorization under 85-2-311, MCA, and all state and federal water quality standards, with the exception that the priority date for this use shall be the Effective Date of this Compact and the water developed pursuant to this right may be used only for the purposes set forth in Article III.F of this Compact.

I. Exercise of Right Subject to Agreement.

In addition to the foregoing, the exercise of the water rights quantified in this Compact are subject to the provisions set forth in that Memorandum of Understanding (MOU) executed between the FWS and the State and attached hereto as Appendix 3. The MOU may at any time be modified by the mutual consent of the Parties, and such modification shall not be considered a modification of this Compact. Prior to execution of the MOU or of any changes to it, the Parties shall: (1) provide notice to water users in the affected basins of the proposed terms of the MOU and any proposed changes to it; (2) hold at least one meeting in Malta, Montana, and one meeting in Glasgow, Montana, preceded by such notice as may be required under State law for public meetings, at which representatives of the State and the United States will explain the proposed MOU or any change(s) to it and allow for public comment; and (3) provide a reasonable period for receipt of any written public comment concerning the MOU or the proposed change(s).

ARTICLE IV - IMPLEMENTATION OF COMPACT

A. Enforcement of Water Right.

1. The United States, the State, or a holder of a water right Arising Under State Law may petition a state or federal court of competent jurisdiction for relief when a controversy arises between the United States' water right described by this Compact and a holder of a water right Arising Under State Law. Resolution of the controversy shall be governed by the terms of this Compact where applicable, or to the extent not applicable, by applicable state or federal law.

2. The United States agrees that a water commissioner appointed by a state or federal court of competent jurisdiction, or other official authorized by law, may enter the Refuge for the purpose of data collection, including the collection of information necessary for water distribution on or off the Refuge, and to inspect structures for the diversion and measurement of water described in this Compact for Consumptive Use. The terms of entry shall be as specified in an order of a state or federal court of competent jurisdiction.

3. The Department may enter the Refuge at a reasonable hour of the day for the purposes of data collection on water diversion and stream flow or inspection of devices maintained by the United States pursuant to this Compact. The Department shall notify the United States by certified mail, telephone, e-mail, or in person, at least 24 hours prior to entry.

4. The United States may request an investigation by the Department of a diversion located on a stream for which a water right is described in this Compact. The Department may investigate. If an investigation occurs, the United States may accompany the Department.

5. The United States shall maintain structures, including wellhead equipment and casing, for the diversion and measurement of water authorized for consumptive use by this Compact and shall measure all exercises of its consumptive use water right. The United States shall maintain any devices it deems necessary for enforcement of its water right for natural flow described in this Compact.

B. Use of Water Right.

The rights of the United States described in this Compact are federal reserved water rights. Non-use of all or a part of the federal reserved water rights described in this Compact shall not constitute abandonment of the right. The federal reserved water rights described in this Compact need not be applied to a use deemed beneficial under State law, but shall be restricted to uses necessary to fulfill the purposes of the Refuge.

C. Change in Use.

1. Natural flow.

Water rights specified in this Compact for natural flow shall not be subject to Change in Use, provided that: the emergency use of water for fire suppression as provided for in Article III.G. shall not be deemed a Change in Use or violation of a water right for natural flow.

2. Consumptive uses.

The United States may make a Change in Use of its Consumptive Use water rights described in Article III.A. of this Compact provided that:

- (a) the Change in Use shall be in fulfillment of the purposes of the Refuge;
- (b) the total Consumptive Use shall not exceed the amount described in this Compact;
- (c) the Change in Use shall not adversely affect any water right Arising Under State Law; and

(d) with the exception of the provisions governing a change in the purpose for which the water right is used, the United States, in making the change, shall comply with the provisions of the Montana Water Use Act, Title 85, chapter 2, MCA, applicable to change in appropriation right at the time of the change.

3. Reporting by the United States.

For any action affecting the use of a consumptive right, whether or not such action is deemed a Change in Use, the United States agrees to provide the following information to the Department upon request:

(a) Well Log:

A well log for any use that includes the drilling of a well or enlargement of an existing wellbore, such well log(s) also to be supplied to the Montana Bureau of Mines and Geology.

(b) Emergency Use:

(i) The use to which water was put, the dates of use, and the estimated amount of water used, for any temporary emergency use for fire suppression authorized by Article III.G of this Compact;

(ii) Such information needs to be provided to the Department, in response to its request, only after the commencement and subsequent cessation of any such emergency use.

(c) Periodic Report:

Within 60 days after receiving a request from the Department, the United States agrees to provide the Department with a report on:

(i) actions since the Effective Date of the Compact or any prior periodic report, whichever is later, affecting the use of a Consumptive Use right described in this Compact;

(ii) the initiation of new uses of any water right recognized in this Compact that were completed since the Effective Date of the Compact or any prior periodic report, whichever is later; and

(iii) any data and documents generated or received by the FWS since the Effective Date of the Compact or any prior periodic report, whichever is later, on measurement of stream flow on a stream with a natural flow water right set forth in this Compact.

4. Reporting by the State.

Upon request and no more often than once in each calendar year, the Department shall provide the United States with a report of:

(a) changes in appropriation granted, as defined by State law, since the Effective Date of the Compact or any prior report, whichever is later, of water rights upstream of the Refuge on Beaver Creek;

(b) any data and documents generated by the Department since the Effective Date of the Compact or any prior report, whichever is later, on the measurement of stream flows, diversions, and well use on or tributary to a stream for which a water right for natural flow is described in this Compact;

(c) any certificate of water right issued since the Effective Date of the Compact or any prior report, whichever is later, for the right to appropriate Ground Water in Basin 40M; and

(d) any permit issued since the Effective Date of the Compact or any prior report, whichever is later, for the right to appropriate stock water for impoundment or pit in Basin 40M.

ARTICLE V - GENERAL PROVISIONS

A. No Effect on Tribal Rights or Other Federal Reserved Water Rights.

1. The relationship between the water rights of the United States described in this Compact and any rights to water of any Indian tribe, or any federally derived water right of an individual, or of the United States on behalf of such tribe or individual, shall be determined by the rule of priority. The Parties agree that the water rights described in this Compact are junior to any rights to water of any Indian tribe, or any federally derived water right of an individual, or of the United States on behalf of such tribe or individual, currently quantified or as may be quantified after the Effective Date of this Compact and with a priority date before the Effective Date of this Compact, including aboriginal rights, if any, in the basins affected.

2. Nothing in the Compact may be construed or interpreted as a precedent to establish the nature, extent, or manner of administration of the rights to water of any other federal agency or federal lands in Montana other than those of the FWS at the Refuge.

3. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the water rights of any Indian tribe or tribal member.

4. Nothing in this Compact is otherwise intended to conflict with or abrogate a right or claim of any Indian tribe regarding its boundaries or property interests in the State of Montana.

B. State Water Rights.

Nothing in this Compact may limit the exclusive authority of the State, including the authority of a water commissioner authorized by State law, to administer all current and future water rights Arising Under State Law within and upstream of the Refuge, provided that in administration of those water rights in which the United States has an interest, such authority is limited to that granted under federal law.

C. Abstract.

Concurrent with this Compact, the Parties have prepared an Abstract, a copy of which is referenced as Appendix 1, which is a specific listing of all of the United States' water rights for the Refuge that are described in this Compact and quantified in accordance with this Compact. The Parties prepared the Abstract to comply with the requirements for a final decree as set forth in 85-2-234, MCA, and in an effort to assist the state courts in the process of entering decrees accurately and comprehensively reflecting the rights described in this Compact. The rights specified in the Abstract are subject to the terms of this Compact. In the event of a discrepancy between a right listed in the Abstract and that same right as quantified in accordance with Articles III and IV of this Compact, the Parties intend that the quantification in accordance with Articles III and IV of this Compact shall be reflected in a final decree.

D. General Disclaimers.

Nothing in this Compact may be construed or interpreted:

1. as a precedent for the litigation of reserved water rights or the interpretation or administration of future compacts between the United States and the State or the United States and any other state;

2. as a waiver by the United States of its right under State law to raise objections in state court to individual water rights claimed pursuant to the state Water Use Act, Title 85, MCA, in the basins affected by this Compact or any right to raise objections in an appropriate forum to individual water rights subject to a provisional permit under the state Water Use Act, Title 85, MCA, in the basins affected by this Compact;

3. as a waiver by the United States of its right to seek relief from a conflicting water use not entitled to protection under the terms of this Compact;

4. to determine the relative rights inter sese of Persons using water under the authority of state or tribal law or to limit the rights of the Parties or any other Person to litigate any issues or questions not resolved by this Compact;

5. to authorize the taking of a water right that is vested under state or federal law;

6. to create or deny substantive rights through headings or captions used in this Compact;

7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the Effective Date of this Compact;

8. to affect or determine the applicability of any state or federal law, including, without limitation, environmental and public safety laws, on activities of the FWS;

9. to affect the right of the State to seek fees or reimbursement for costs or the right of the United States to contest the imposition of such fees or costs, pursuant to a ruling by a state or federal court of competent jurisdiction or Act of Congress;

10. to affect in any manner the entitlement to or quantification of other federal water rights. This Compact is only binding on the United States with regard to the water rights of the United States for the Refuge and does not affect the water rights of any other federal agency that is not a successor in interest to the water rights subject to this Compact.

11. to prevent the United States from constructing or modifying an outlet to an impoundment at the Refuge in compliance with all applicable laws;

12. to prevent the United States from seeking a permit to appropriate water under State law;

13. to modify or prevent modification of the March 9, 1937, Memorandum of Agreement between the Secretary of the Interior and the Secretary of Agriculture in the Matter of a Water Supply for the Lake Bowdoin Migratory Water Fowl Refuge;

14. to prevent the United States from entering into an agreement pursuant to applicable law(s) to obtain additional water from the Milk River or Beaver Creek Basins by contract, lease, or purchase or from participating in efforts to improve water supply in the Milk River Basin.

E. Reservation of Rights.

The Parties expressly reserve all rights not granted, described, or relinquished in this Compact.

F. Severability.

The provisions of this Compact are not severable.

G. Multiple Originals.

This compact is executed in quintuplicate. Each of the five (5) Compacts bearing original signatures shall be deemed an original.

H. Notice.

Unless otherwise specifically provided for in this Compact, service of notice required hereunder, except service in litigation, shall be:

1. State: Upon the Director of the Department and such other officials as the Director may designate in writing; and

2. United States: Upon the Secretary of the Interior and such other officials as the Secretary may designate in writing.

ARTICLE VI - FINALITY

A. Binding Effect.

1. After the Effective Date of this Compact, all of the provisions of this Compact shall be binding on:

(a) the State, and any Person, using, claiming, or in any manner asserting a right under the authority of the State to the use of water; and

(b) except as otherwise provided in Article V.A., the United States, and any Person, using, claiming, or in any manner asserting a right under the authority of the United States to the use of water.

2. Following the Effective Date, this Compact shall not be modified without the mutual consent of the Parties. Either Party may seek enforcement of this Compact in a court of competent jurisdiction. Attempt to unilaterally modify this Compact by either Party shall render this Compact voidable at the election of the other Party.

3. On approval of this Compact by a state or federal court of competent jurisdiction and entry of a decree by such court confirming the rights described herein, this Compact and such rights are binding on all Persons bound by the final order of the court.

4. If an objection to this Compact is sustained pursuant to 85-2-702, MCA, this Compact shall be voidable by action of and without prejudice to either Party.

5. Notwithstanding any other provision in this Compact, the State reserves the right to withdraw as a Party if, within five (5) years of ratification of this Compact by the Montana legislature:

(a) this Compact is not given written approval by the United States Department of the Interior;

(b) this Compact is not given written approval by the United States Department of Justice; or

(c) the Memorandum of Understanding concerning the exercise of certain of the water rights quantified in this Compact and attached hereto as Appendix 3 is not executed by the State and the FWS.

6. Notwithstanding any other provision in this Compact, the United States reserves the right to withdraw as a Party if, within five (5) years of ratification of this Compact by the Montana legislature, the Memorandum of Understanding concerning the exercise of certain of the water rights quantified in this Compact and attached hereto as Appendix 3 is not executed by the State and the FWS.

7. Notwithstanding any other provision in this Compact, the State reserves the right to withdraw as a Party if, at any point subsequent to the Effective Date of this Compact, the United States unilaterally withdraws from the Memorandum of Understanding attached hereto as Appendix 3.

B. Disposition of Actions.

Subject to the following stipulations and within one hundred eighty (180) days of the Effective Date, the Parties shall submit this Compact to an appropriate state court or courts having jurisdiction over this matter in an action commenced pursuant to 43 U.S.C. 666, for approval in accordance with State law and for the incorporation of the reserved water rights described in this Compact into a decree or decrees entered therein. The Parties understand and agree that the submission of this Compact to a state court or courts, as provided for in this Compact, is solely to comply with the provisions of 85-2-702, MCA, and does not expand the jurisdiction of the state court or expand in any manner the waiver of sovereign immunity of the United States in the McCarran Amendment, 43 U.S.C. 666, or other provision of federal law.

1. Dismissal of Filed Claims.

At the time the state courts approve the reserved water rights described in this Compact and enter a decree or decrees confirming the rights described herein, such courts shall dismiss, with prejudice, all of the water right claims specified in Appendix 2 to this Compact. If this Compact fails approval or a reserved water right described herein is not confirmed, the specified claims shall not be dismissed.

2. Disposition of Federal Suits.

Within ninety (90) days of the issuance of a final decree or decrees by the state courts approving this Compact and confirming the reserved water rights described herein and the completion of any direct appeals therefrom or the expiration of the time for filing such appeal, the Parties shall execute and file joint motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss with prejudice any claims made by the United States for the FWS for the Refuge described in this Compact in federal court. This Compact may be filed as a consent decree in those federal suits only if, prior to the dismissal of the federal suits as provided in this Article, it is finally determined in a judgment binding on the State that the state courts lack jurisdiction over some or all of the reserved water rights described in this Compact. Within one (1) year of such judgment, the United States agrees to commence such additional proceedings in the federal district court for the District of Montana as may be necessary to judicially confirm the reserved water rights described herein which are not included within an existing action.

3. Continuation of Negotiations.

The Parties were unable to finalize agreement on quantification of the water rights for the National Bison Range and the Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend Wilderness Area, prior to the Effective Date of this Compact. The Parties agree to continue to pursue, in good faith, quantification of water rights for these areas. In the event the Parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water right for these areas adjudicated in a state or federal court of competent jurisdiction.

C. Settlement of Claims.

The Parties intend that the water rights described in this Compact are in full and final settlement of the water right claims for the reserved land described in this Compact and administered by the FWS in Montana on the Effective Date of this Compact. Pursuant to this settlement, the United States hereby and in full settlement of any and all claims filed by the United States or which could have been filed by the United States for the Refuge relinquishes forever on the Effective Date of this Compact all said claims to water within the State for the Refuge. The State agrees to recognize the reserved water rights described and quantified herein and shall, except as expressly provided for herein, treat them in the same manner as a water right recognized by the State.

D. Defense of Compact.

The Parties agree to defend the provisions and purposes of this Compact from all challenges and attacks.