

**IN THE WATER COURT OF THE STATE OF MONTANA**  
**USDA FOREST SERVICE – MONTANA COMPACT**

IN THE MATTER OF THE ADJUDICATION )  
OF EXISTING AND RESERVED RIGHTS )  
TO THE USE OF WATER, BOTH SURFACE )  
AND UNDERGROUND, OF THE UNITED )  
STATES DEPARTMENT OF AGRICULTURE )  
FOREST SERVICE WITHIN THE STATE OF )  
MONTANA )

**CASE NO. WC-2007-03**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW,  
ORDER FOR COMMENCEMENT OF SPECIAL PROCEEDINGS  
FOR CONSIDERATION OF THE  
USDA FOREST SERVICE – MONTANA COMPACT**

THIS MATTER came before the Court on motion of the State of Montana and the United States of America (collectively “Settling Parties”), to commence the proceedings required under applicable law to review and approve the compact settling the reserved water right claims of the United States for the National Forest System Lands and for the South Fork of the Flathead Wild and Scenic River. Based on the submissions of the Settling Parties, and being otherwise advised in these matters, the Court FINDS, CONCLUDES, and ORDERS as follows:

**FINDINGS OF FACT**

1. The Settling Parties have concluded a compact settling the reserved water right claims of the United States of America for the National Forest System Lands and for the South Fork of the Flathead Wild and Scenic River in accordance with Mont. Code Ann. § 85-2-703 (2007). The USDA Forest Service-Montana Compact (“Compact”) was ratified by the 2007 Montana Legislature (see, 2007 Mont. L., ch. 213, § 1), Mont. Code Ann. § 85-20-1401 (2007), and was approved by the Secretary of Agriculture and the Department of Justice effective April 17, 2007.

2. In Article II, the Compact identifies specific federal reserved water rights of the United States for the National Forest System Lands and for the South Fork Flathead Wild and Scenic River. The identified water rights are located in 50 of the 85 minor drainage basins identified by basin code in the Atlas of Water Resources of Montana prepared by the Montana Water Resources Board. Rule 2(8), W.R.C.E.R. The 50 basins are as follows: 39E, 39F, 39FJ, 40A, 40B, 40C, 41A, 41B, 41C, 41D, 41E, 41F, 41G, 41H, 41I, 41J, 41K, 41M, 41O, 41Q, 41QJ, 41R, 41S, 41U, 42B, 42C, 42J, 43A, 43B, 43BJ, 43BV, 43C, 43D, 43N, 43P, 76B, 76C, 76D, 76E, 76F, 76G, 76GJ, 76H, 76I, 76J, 76K, 76L, 76LJ, 76M, and 76N. Hereafter, these 50 basins will be collectively referred to as the “Forest Service Basins.”

3 On October 11, 2007, the Settling Parties filed with the Water Court a Joint Motion for Incorporation of the Compact into Preliminary and Final Decrees. On March 20, 2008, the Settling Parties filed their Joint Motion for Commencement of Special Proceedings for Consideration of the USDA Forest Service Compact. The Settling Parties requested the Court, in accordance with Mont. Code Ann. § 85-2-215, to consolidate the Forest Service Basins into a single judicial unit and to issue a Preliminary Decree of a single class of claims encompassing the water rights recognized in the Compact. Furthermore, the Settling Parties requested the Court to direct the Montana Department of Natural Resources and Conservation (“DNRC”) to provide Notice of the Preliminary Decree to a defined set of water users as more fully described in the Affidavit of John Hoeglund filed on April 14, 2008 (the “Hoeglund Affidavit”).

4. John Hoeglund is a DNRC Water Resource Specialist. Through the Hoeglund Affidavit, the DNRC explained its methodology of isolating sub-basins to identify potentially affected water users and its resulting recommendations of providing notice to those water users. According to his Affidavit, John Hoeglund reviewed the 263 water rights involved in the

Compact, and found that 233 claims identified volumes between .01 and 1.5 acre feet of water, that 21 claims were between 1.60 and 9.2 acre feet, 7 claims were between 12.5 and 64.68 acre feet, 2 claims were between 240 and 325 acre feet, 1 claim was for 665 acre feet, and 1 non-consumptive hydropower claim in a remote area was for 4,245.9 acre feet. The Hoeglund Affidavit referenced many of the Compact rights as “bucket rights,” consisting of the right to dip a bucket into a source for seasonal domestic or stock uses. Based on its analysis of the claims in the Compact, their location, and their potential adverse affect on other water users, the DNRC determined the identity and location of water users, and then recommended that notice be mailed only to those identified users. The Settling Parties agree with DNRC’s recommendations.

5. In its analysis, the DNRC designated sub-basins and identified the water users in the following manner:

A. For each USDA Forest Service water right that listed a perennial or intermittent surface water source (whether named or unnamed) in the abstract for that Compact water right, the DNRC designated the sub-basin by first identifying the hydrologic watershed from the point at which the listed water source enters a named stream. The DNRC identified all water users contained within the computerized water right database of its centralized record system who owned water rights within that entire watershed. In addition, the DRNC included in its designation of the sub-basin a downstream reach from that watershed. It defined the downstream reach as the area from the point where the listed water source enters a named stream (at the bottom of the identified watershed) to the next downstream confluence of the named stream and a perennial stream or major drainage. Within the downstream reach, the DNRC identified all persons owning water rights located on or within ½ mile of the named stream. In some situations where the listed source was a named stream and if the DNRC determined that the entire watershed was unreasonably broad when compared to the size of the USDA Forest Service water right, it applied an exception to the procedure set forth above. In these situations, the DNRC designated the sub-basin as the area upstream from the USDA Forest Service water right together with a downstream reach to the next confluence with a perennial stream. The DNRC then used the same procedure for identifying persons owning water rights within the sub-basin as set forth above; namely, it identified all persons owning water rights in the area upstream of the USDA Forest Service water right or located on or within ½ mile of the downstream reach.

B. For USDA Forest Service water rights where the source was a spring or well within a clearly defined watershed, the DNRC designated the sub-basin as that watershed

together with the downstream reach under the same procedure as for a surface water source described in paragraph 5.A. above. The DNRC used the same procedure for identifying all persons owning water rights within the sub-basin as described in Section 5.A. above.

C. For USDA Forest Service groundwater wells serving administrative sites located on or near major rivers where the standard process would have resulted in an unreasonably broad sub-basin designation given the size of the USDA Forest Service water right, or where the watershed was otherwise difficult to delineate, the DNRC designated the sub-basin as a circular area around the well. The DNRC varied the size of the circular area depending on the flow rate of the well. For wells with a flow rate of 1 c.f.s. or less, the DNRC designated the sub-basin as a circle with a half mile radius around the well, using the well as the centerpoint. Within the designated circular areas, the DNRC identified all persons owning water rights. In one instance, for water right number 76M-30026857, the well's flow rate exceeded 1 c.f.s. and the DNRC designated the sub-basin as a circle around the well with a one mile radius together with a downstream reach to the next confluence of the nearest surface water source. In that instance, the DNRC identified all water right owners within the circular area and in the downstream reach.

6. The Court finds that the Settling Parties have established special circumstances as to why the Court should issue the Compact as a single Preliminary Decree in the Forest Service Basins, rather than to include the compacted water rights in 50 separate decrees in the 50 individual basins. While the Court is unable to accord priority status to all claims filed in the adjudication, there exist sufficient reasons for prioritization of this matter.

*First*, the requested procedure is consistent with procedures adopted for other compacts, including the National Park Service Compact proceedings involving 12 basins (Case No. WC-94-1), and the Fort Peck Compact proceedings involving 6 basins (Case No. WC-92-1).

*Second*, in this Compact, the Settling Parties have reached an agreement to resolve reserved water rights located in administrative or political boundaries which overlap the water divisions utilized in Montana's statewide adjudication effort. Specifically, this Compact quantifies water rights located in nine National Forest areas. Four of these National Forests encompass National Forest lands in more than one water division. Both the Beaverhead-

Deerlodge National Forest and the Helena National Forest include National Forest lands in the Clark Fork River Division and the Upper Missouri River Division. The Gallatin National Forest includes National Forest lands in both the Upper Missouri River Division and the Yellowstone River Division. The Lewis and Clark National Forest includes National Forest lands in both the Upper and Lower Missouri River Divisions.

*Third*, this Compact identifies current or future water usage in 50 of Montana's 85 water basins. Of these 50 basins, 38 basins have had their state based water right claims included in temporary preliminary decrees and will not likely be issued as preliminary decrees until sometime after 2020. Eleven of the 50 basins have yet to be decreed and are not scheduled for a decree for several years. One basin is in final decree status and will have to be reopened, most likely after 2020. If review of the Compact's individual basin water rights is delayed for so many years, background information necessary to evaluate the Compact terms, now fresh, could become stale.

*Fourth*, Article VII, section D, of the Compact provides that except as provided in Article VIII, section C, addressing the "Exclusive Remedy for Changes in State Law," the provisions of the Compact are not severable. Fifty separate considerations of the Compact in 50 separate decrees would delay final resolution of the Compact provisions for many, many years. Since the Water Court may only confirm or declare a compact void, an adverse decision on the 50<sup>th</sup> decree would void the entire Compact, thereby vitiating all prior proceedings, and require the United States to file statements of claim to start the process all over again. Mont. Code Ann. §§ 85-2-702(3), 85-2-703, and 85-2-233(8). Reviewing the Compact in this single proceeding will avoid waste of public and private resources that would result from multiple actions.

*Fifth*, the Montana Legislature's policy of promoting the settlement of reserved water right claims (see, Mont. Code Ann. § 85-2-702 (2007)) supports the commencement of proceedings to confirm settlements of this magnitude, reached after years of negotiation, on their own merits, rather than incorporating their individual components into 50 separate decrees to be issued piecemeal over several years.

*Sixth*, the USDA Forest Service is willing to pay the mailing costs for service of the notice of the Preliminary Decree containing the Compact, and otherwise has represented to the Court that it is in the best interest of the National Forest System and the South Fork of the Flathead Wild and Scenic River to have these water rights confirmed on a timely basis.

7. These Findings, Conclusions, and Order are issued by the Chief Water Judge under the authority of Mont. Code Ann. §§ 3-7-224(2) and 85-2-231 (2007).

#### **CONCLUSIONS OF LAW**

1. Issuance of the Preliminary Decree containing the Compact as authorized by Mont. Code Ann. § 85-2-231(2) and adoption of the DNRC recommendations are reasonable and appropriate measures to commence a process that will lead to the approval and incorporation of the Compact into Montana's general water right adjudication effort or to the Compact's disapproval.

2. The Settling Parties have demonstrated good cause for entry of decree for this matter under Mont. Code Ann. § 85-2-218(1) (b) (2007).

3. Commencement of these special proceedings is consistent with prior Water Court practice in approving and incorporating reserved water rights compacts into the Montana adjudication.

4. Prioritization of this decree for issuance furthers the intent of the 2007 Montana Legislature which approved this Compact and incorporated it into the Montana Codes. It is fitting and timely to issue the decree now to incorporate the Compact into the Water Court adjudication.

5. The DNRC identification of sub-basins and the recommendation for mailing personal notice to all water users within those sub-basins is a reasonable method to provide meaningful notice as required by Mont. Code Ann. § 85-2-232 (2007) to water right owners who might potentially be adversely affected by the Compact.

WHEREFORE, for good cause shown, the Court hereby enters the following:

### **ORDER**

1. The Court grants the Settling Parties' Motion to commence special proceedings to consider the USDA Forest Service-Montana Compact. The Court sets forth in this Order the initial set of procedures necessary to commence these special proceedings and to provide notice of the Compact in accordance with Mont. Code Ann. § 85-2-232 (2007).

2. The Compact shall be incorporated into a Preliminary Decree in the Forest Service Basins.

3. The Court hereby designates all of the reserved water rights recognized in the Compact as a single class of claims and issues a Preliminary Decree under Mont. Code Ann. § 85-2-231 (2007). This Preliminary Decree contains the following information only: (a) the proposed decree of the Compact; (b) the contents of the Compact; and (c) these Findings of Fact and Conclusions of Law and Order.

4. The Court, by separate order of this date, will instruct the DNRC to serve Notice of Entry of USDA Forest Service-Montana Compact Preliminary Decree and Notice of

Availability to all persons with water rights in the designated Forest Service Basins in the manner recommended by the DNRC. Additionally, the Court will publish the Notice (or a modified Notice better suited for publication purposes) in newspapers with partial or general circulation within the Forest Service Basins in the manner set forth in that separate order.

5. In addition to the requirements set forth in Mont. Code Ann. § 85-2-233(2) (2007), any objection filed to the Compact shall be on forms provided by the Court and shall include:

- A. the name and address of the objector;
- B. the name and address of the objector's attorney, if any; and
- C. a statement of the specific grounds and evidence on which the objection is based.

6. Any proceedings following the issuance of the Preliminary Decree and service of the Notice in accordance with this Order shall be pursuant to further order of this Court.

DATED this 19th day of May, 2008.



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C. Bruce Loble  
Chief Water Judge