
Part 18

United States of America, Bureau of Land Management, Upper Missouri River Breaks National Monument-Montana Compact

85-20-1801. United States of America, Bureau of Land Management, Upper Missouri River Breaks National Monument-Montana compact ratified. This Compact is 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 Upper Missouri River Breaks National Monument administered by the U.S. Bureau of Land Management within the state of Montana.

ARTICLE I RECITALS

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

WHEREAS, 85-2-228, MCA, provides that a federal reserved water right with a priority date of July 1, 1973, or later be subject to the same process and adjudication as a federal reserved water right with a priority date before July 1, 1973;

WHEREAS, 85-2-703 and 85-2-228(3), MCA, provide that the State may negotiate settlement of claims by the federal government to non-Indian 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 the Upper Missouri River Breaks National Monument as articulated in the Proclamation of January 17, 2001;

WHEREAS, the 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 (1968);

WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department of the Interior, has authority to execute this Compact on behalf of the United States Department of Interior pursuant to 43 U.S.C. 1457 (1986, Supp. 1992);

NOW THEREFORE, the State of Montana and the United States agree as follows:

ARTICLE II DEFINITIONS

For Purposes of this Compact only, the following definitions shall apply:

(1) "Abstract" means copies of the documents entitled "Abstract of U.S. Bureau of Land Management Water Right for the Judith River" and "Abstract of U.S. Bureau of Land Management Water Right for Arrow Creek," referenced in this Compact as Appendices 1 and 2.

(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) "Arrow Creek Basin" means the watershed of Arrow Creek designated as Montana Water Court Basin 41R.

(4) "BLM" means the United States Department of Interior, Bureau of Land Management or its successor.

(5) "Concurrent" means occurring or existing simultaneously or side by side. As applied to this compact, "Concurrent" rights to instream flow are non-additive water rights that constitute a usufructuary interest held by two or more parties in the same volume of water.

(6) "Department" means the Montana Department of Natural Resources and Conservation or its successor.

(7) "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, and written approval by the United States Department of Justice, whichever occurs later.

(8) "Groundwater" means any water that is beneath the ground surface.

(9) "Instream Flow" means the water that the parties agree shall remain in the stream in satisfaction of the United States' reserved water right for the purposes of the federal reservation.

(10) "Judith River Basin" means the watershed of the Judith River designated as Montana Water Court Basin 41S.

(11) "Monument" means the "Upper Missouri River Breaks National Monument" as defined herein.

(12) "Non-Consumptive Use" means a beneficial use of water that does not cause a reduction in the source of supply or result in a reduction in the quantity or quality of water and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(13) "Parties" means the State of Montana and the United States.

(14) "Proclamation" means Presidential Proclamation 7398 of January 17, 2001, designating the Upper Missouri River Breaks National Monument.

(15) "Proportionally Enforceable Stream Flow" means, as applied to the Arrow Creek water right described herein, a rate of flow that when measured at a point upstream of the designated enforcement point described in Article III.B.2, shall be equivalent to an instream flow right of five (5) cfs measured at the designated enforcement point.

(16) "Ramped Diversion" means a condition on new diversions that allows for an increase in diversion of up to twenty (20) cubic feet per second (cfs) per day to prevent sudden drops in the natural recession rate of the river hydrograph.

(17) "Recognized Under State Law" when referring to a water right or use means a water right or use protected by state law, but does not include state recognition of a federal or tribal reserved water right arising under federal law.

(18) "Reserved Water Right" means collectively the federal reserved water rights to quantified instream flows in the Judith River and Arrow Creek as described herein.

(19) "State" means the state of Montana and all officers, agents, departments, and political subdivisions thereof. Unless otherwise indicated, "state" means the Director of the Montana Department of Natural Resources and Conservation or the Director's designee.

(20) "Upper Missouri River Breaks National Monument" means the federal reservation of land that was designated under the Antiquities Act of 1906, 16 U.S.C. 431-433 (1906, Supp. ____) by Presidential Proclamation 7398.

(21) "United States" means the federal Government and all officers, agencies, departments, and political subdivisions thereof. 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 WATER RIGHT

The Parties agree that the following water rights are in settlement of the reserved water rights claims of the United States for the Monument. 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. Priority Date. The United States' water rights for instream flow purposes within the Upper Missouri River Breaks National Monument that are described herein have a priority date of January 17, 2001. The United States' January 17, 2001, water rights are subordinate in priority to water rights Recognized Under State Law existing on June 1, 2012. Accordingly, any water right Recognized Under State Law with a priority date before June 1, 2012, is not subject to call by the United States in the exercise of the Reserved Water Right.

B. Instream Flow. The United States has water rights for minimum instream flows in the Judith River and Arrow Creek as follows:

1. The Judith River. From the point furthest upstream where the Monument boundary crosses the mainstem river channel on the southern boundary of the NW 1/4 SE 1/4 of section 2, T.21N., R.16E., MPM, to the confluence with the Missouri River. The water right is in the amount of an instream flow rate of one hundred and sixty (160) cubic feet per second (cfs), to be measured at the United States Geological Survey (USGS) Gaging Station #06114700 near the confluence of the Judith River with the Missouri River. The period of use for this right is from January 1 to December 31.

2. Arrow Creek. From the point furthest upstream where the Monument Boundary crosses the mainstem creek channel on the western boundary of the SW 1/4 of section 6, T.20N., R.15E., MPM, to the confluence with the Missouri River. The water right is in the amount of an instream flow rate of five (5) cfs enforceable at the point immediately upstream of the confluence of Arrow Creek and Flat Creek in the SE 1/4 NE 1/4 of section 6, T.22N., R.15E., MPM (the designated enforcement point). The period of use for this right is from March 1 to July 31.

i. Provision for Alternate Enforcement Location. The parties recognize that measurement at the confluence of Arrow Creek and Flat Creek may be difficult to administer and that measurement at an upstream point may be more feasible. The enforceable level of the flow rate shall be adjusted to an amount proportional to the 5 cfs if measurement is conducted at an upstream measurement point rather than at the designated enforcement point described above. The Proportionally Enforceable Stream Flow shall be determined jointly by the BLM and the Department, after additional stream flow monitoring is conducted by the BLM to provide the Parties sufficient data to make a determination. Prior to implementing a Proportionally Enforceable Stream Flow, the Parties shall: (1) provide notice to water users in the affected basin of the proposed revision to the enforceable amount; (2) hold at least one meeting in Stanford, Montana, preceded by such notice as may be required under State law for public meetings, at which the Parties shall explain the proposed revision; and (3) provide a reasonable period for receipt of any written public comment concerning the proposed revision. Any future revision of the designated enforcement point and implementation of a Proportionally Enforceable Stream Flow as provided in this section shall be based solely on stream flow monitoring considerations and shall be subject to the same conditions as provided above. Such future revision shall not be considered a modification of this Compact or an enlargement or diminution of the 5 cfs instream flow right in Arrow Creek.

C. Stream Reaches on which new mainstem impoundments will be prohibited after the Effective Date of the Compact.

1. The Judith River. From the confluence of the Middle and South Forks of the Judith River downstream to its confluence with the Missouri River.

2. Arrow Creek. From its confluence with Hay Creek downstream to its confluence with the Missouri River.

D. Conditions to be applied to permits issued after the Effective Date of the Compact.

1. Direct from source diversions from the Judith River or Arrow Creek that have a diversion capacity greater than 20 cfs shall be operated as a Ramped Diversion. The permit conditions shall require such diversions to be implemented incrementally with an increase of no more than 20 cfs in any 24-hour period.

ARTICLE IV COMPACT IMPLEMENTATION

A. Judith River. Judith River flows that are not already appropriated as of the Effective Date of this Compact will be available for future development, subject to the Reserved Water Right and applicable permit conditions as described herein. The Department may approve new uses after the Effective Date of this Compact, but the Department shall condition any permit or approval of new uses to provide that such uses may not cause the flow of the Judith River to fall below one hundred and sixty (160) cfs from January 1 through December 31 at the United States Geological Survey gaging station #06114700 on the lower Judith River near the mouth of the Judith River near Winifred, Montana; and, if required, with the diversion restrictions described under Article III.C. Appropriations occurring after June 1, 2012, shall be subject to a call by the United States in the exercise of the Reserved Water Right at any time streamflow falls below the minimum instream flow requirement for five (5) consecutive days.

B. Arrow Creek. Arrow Creek flows that are not already appropriated as of the Effective Date of this Compact will be available for future development subject to the Reserved Water Right and applicable permit conditions as described herein. The Department may approve new uses after the Effective Date of this Compact but shall condition any permit or approval of new uses to provide that such uses may not cause the flow of Arrow Creek to fall below five (5) cfs if measured at the confluence of Arrow Creek and Flat Creek at the designated enforcement point described in Article III.B.2 above--or if measured at an alternate enforcement location as described in Article III.B.2.i above, a Proportionally Enforceable Stream Flow amount as described therein--from March 1 through July 31; and, if required, with the diversion restrictions described under Article III.C. New appropriations occurring after June 1, 2012, shall be subject to a call by the United States in the exercise of the Reserved Water Right at any time stream flow falls below the minimum instream flow requirement as measured at the designated enforcement point as described in Article III.B.2 above, or at an alternate enforcement point provided for in Article III.B.2.i.

C. Conditions to be applied to permits issued after the Effective Date of the Compact.

1. Direct from source diversions from the Judith River or Arrow Creek that have a diversion capacity greater than twenty (20) cfs shall be operated as a Ramped Diversion. The permit conditions shall require that diversions be implemented incrementally with an increase of no more than 20 cfs in any 24-hour period.

D. Uses exempted from curtailment by the United States' exercise of the Reserved Water Right during times of shortage. During times when there is insufficient water to satisfy the Reserved Water Right, and curtailment of junior water rights is otherwise contemplated under Articles III.A and B, the following water rights shall not be subject to call or curtailment for the benefit of the Reserved Water Right:

1. Non-Consumptive Uses located upstream of the instream flow reaches identified in Article III.

2. Groundwater Uses developed pursuant to 85-2-306, MCA. Water permits/certificates under the provisions of 85-2-306, MCA, shall not be subject to call by the Reserved Water Right. Should the Montana Legislature amend the requirements of this section to a more restrictive standard than that in effect under this subsection on the Effective Date of this Compact (35 gallons per minute or less and not to exceed 10 acre-feet per year), the more restrictive standard shall apply to appropriations permitted after the effective date of the amending legislation when determining whether the right is subject to curtailment by the United States in the exercise of the Reserved Right.

3. Stockwater impoundments of less than 15 acre-feet capacity and total appropriation less than 30 acre-feet per year.

a. Stockwater impoundments of less than 15 acre-feet capacity and a total appropriation of less than 30 acre-feet per year that are not diverted from a perennial flowing stream and that are constructed on and will be accessible to a parcel of land that is owned or under control of the applicant and that is 40 surface acres or larger shall not be subject to call by the Reserved Water Right.

4. Temporary Emergency Appropriations under 85-2-113(3), MCA.

5. An Application submitted pursuant to 85-20-1401, MCA, Article VI.

6. An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required for:

a. Remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;

b. Aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or

c. Remedial actions taken pursuant to Title 75, chapter 10, part 7, of the Montana Code Annotated.

E. Prohibition on Future Mainstem Impoundment. DNRC may permit no new impoundments that do not meet the permit exception requirements of 85-2-306, MCA, on the mainstem of the Judith River or Arrow Creek as described in Article III.C. Reclamation, repair, or rehabilitation of an existing impoundment shall not be considered a new impoundment, provided that reclamation, repair, or rehabilitation shall not cause the impoundment to exceed the storage volume listed on the statement of claim.

F. Action for enforcement of Provisions of Article III. The United States may file an original action in a court of competent jurisdiction to enforce the provisions of Article III at any time. The United States shall not be required to exhaust any available administrative remedies in order to enforce Article III of this Compact.

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 Bureau of Land Management described herein and any rights to water of an Indian Tribe in Montana, or of 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.

2. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the rights to water of any Indian Tribes and Tribal members in Montana.

3. Nothing in this Compact is otherwise intended to conflict with or abrogate a right or claim of an Indian Tribe regarding boundaries or property interests in the State of Montana.

4. Nothing in this Compact may be construed or interpreted in any manner 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 Bureau of Land Management for the Upper Missouri River Breaks National Monument.

B. 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 existing or future compacts between the United States and the State; or of 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, of the Montana Code Annotated, in the basins affected by this Compact, or, except as provided in this Compact, 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, of the Montana Code Annotated, 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 establish a precedent for other agreements between the State and the United States or an Indian tribe;

5. To determine the relative rights, inter sese, of persons using water under the authority of state law or to limit the rights of the parties or a person to litigate an issue not resolved by this Compact;

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 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 an Act of Congress;

9. To affect, in any manner, the entitlement to or quantification of other federal water rights. This Compact is binding on the United States solely in regard to the water rights of the United States for the Upper Missouri River Breaks National Monument, and this Compact 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.

C. Use of Water Right. Non-use of all or a part of the Reserved Right shall not constitute abandonment of the right. The Reserved Right need not be applied to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the purposes outlined in the Proclamation.

D. Concurrent with other Non-Consumptive Instream Water Uses. The federal reserved water right for instream flows for the Upper Missouri River Breaks National Monument described in this Compact shall run concurrently with any other non-consumptive instream water rights, and shall not be additive to such non-consumptive instream rights.

E. Appropriation Pursuant to State Law. Nothing in this Compact may prevent the United States from seeking a water appropriation pursuant to State law for use on the reserved land within the Upper Missouri River Breaks National Monument or for use outside the boundaries of the federal reservation for which a water right is described in this Compact, provided that a water right obtained in this manner shall be Recognized Under State Law and shall be administered pursuant to State law.

F. Reservation of Rights. The parties expressly reserve all rights not granted, described, or relinquished in this Compact.

G. Severability. The provisions of this Compact are not severable.

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

I. Notice. Unless otherwise specifically provided for in this Compact, service of notice, except service in litigation, shall be:

1. State. Upon the Director of the Department or its successor agency, and such other officials as the Director may designate in writing.

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

ARTICLE VI FINALITY OF COMPACT

A. Binding Effect.

1. The Effective Date of this Compact is the date of the ratification of this Compact by the Montana Legislature, written approval by the United States Department of the Interior, and written approval by the United States Department of Justice. Once effective, all of the provisions of this Compact shall be binding on:

a. the State and a person or entity of any nature whatsoever 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, a person or entity of any nature whatsoever 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 may not be modified without the written consent of both parties. Any attempt to unilaterally modify this Compact by either party shall render this Compact voidable at the election of the other party.

B. Settlement of Claims. The parties intend that the Reserved Water Rights described in this Compact are in full and final settlement of the reserved water right claims of the United States for the Upper Missouri River Breaks National Monument. Pursuant to this settlement, by which certain federal Reserved Water Rights are expressly recognized by the State in this Compact, 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 Monument relinquishes forever all said claims on the Effective Date of this Compact to water within the State of Montana for Reserved Water Rights for the above mentioned unit. The State agrees to recognize the Reserved Water Right described and quantified herein, and shall, except as expressly provided for herein, treat them in the same manner as any other appropriation.

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

IN WITNESS WHEREOF the representatives of the State of Montana and the United States have signed this Compact on the day of, 2013.