

SENATE BILL NO. 88

INTRODUCED BY DICK BARRETT

BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE UPPER MISSOURI RIVER BREAKS NATIONAL MONUMENT COMPACT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. 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-



1 517 (1968);

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

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

6 ARTICLE II

7 DEFINITIONS

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

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

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

14 (3) "Arrow Creek Basin" means the watershed of Arrow Creek designated as Montana Water Court Basin
15 41R.

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

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

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

22 (7) "Effective Date" means the date on which the Compact is given ratification by the Montana
23 Legislature, written approval by the United States Department of the Interior, and written approval by the United
24 States Department of Justice, whichever occurs later.

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

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

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

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

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

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

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

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

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

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

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

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

22 (20) "Upper Missouri River Breaks National Monument" means the federal reservation of land that was
23 designated under the Antiquities Act of 1906, 16 U.S.C. 431-433 (1906, Supp. ____) by Presidential Proclamation
24 7398.

25 (21) "United States" means the federal Government and all officers, agencies, departments, and political
26 subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than service in
27 litigation, "United States" means the Secretary of the Department of the Interior or the Secretary's Designee.

ARTICLE III

WATER RIGHT

30 The Parties agree that the following water rights are in settlement of the reserved water rights claims of

1 the United States for the Monument. All water rights described in this Article are subject to Article IV of this
2 Compact as well as any specific additional conditions set forth below.

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

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

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

16 2. Arrow Creek. From the point furthest upstream where the Monument Boundary crosses the mainstem
17 creek channel on the western boundary of the SW 1/4 of section 6, T.20N., R.15E., MPM, to the confluence with
18 the Missouri River. The water right is in the amount of an instream flow rate of five (5) cfs enforceable at the point
19 immediately upstream of the confluence of Arrow Creek and Flat Creek in the SE 1/4 NE 1/4 of section 6, T.22N.,
20 R15E., MPM (the designated enforcement point). The period of use for this right is from March 1 to July 31.

21 i. Provision for Alternate Enforcement Location. The parties recognize that measurement at the
22 confluence of Arrow Creek and Flat Creek may be difficult to administer and that measurement at an upstream
23 point may be more feasible. The enforceable level of the flow rate shall be adjusted to an amount proportional
24 to the 5 cfs if measurement is conducted at an upstream measurement point rather than at the designated
25 enforcement point described above. The Proportionally Enforceable Stream Flow shall be determined jointly by
26 the BLM and the Department, after additional stream flow monitoring is conducted by the BLM to provide the
27 Parties sufficient data to make a determination. Prior to implementing a Proportionally Enforceable Stream Flow,
28 the Parties shall: (1) provide notice to water users in the affected basin of the proposed revision to the
29 enforceable amount; (2) hold at least one meeting in Stanford, Montana, preceded by such notice as may be
30 required under State law for public meetings, at which the Parties shall explain the proposed revision; and (3)

1 provide a reasonable period for receipt of any written public comment concerning the proposed revision. Any
2 future revision of the designated enforcement point and implementation of a Proportionally Enforceable Stream
3 Flow as provided in this section shall be based solely on stream flow monitoring considerations and shall be
4 subject to the same conditions as provided above. Such future revision shall not be considered a modification
5 of this Compact or an enlargement or diminution of the 5 cfs instream flow right in Arrow Creek.

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

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

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

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

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

16 ARTICLE IV

17 COMPACT IMPLEMENTATION

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

28 B. Arrow Creek. Arrow Creek flows that are not already appropriated as of the Effective Date of this
29 Compact will be available for future development subject to the Reserved Water Right and applicable permit
30 conditions as described herein. The Department may approve new uses after the Effective Date of this Compact

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

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

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

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

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

19 2. Groundwater Uses developed pursuant to 85-2-306, MCA.

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

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

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

1 shall not be subject to call by the Reserved Water Right.

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

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

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

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

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

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

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

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

19 ARTICLE V

20 GENERAL PROVISIONS

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

22 1. The relationship between the water rights of the Bureau of Land Management described herein and
23 any rights to water of an Indian Tribe in Montana, or of any federally derived water right of an individual, or of the
24 United States on behalf of such Tribe or individual shall be determined by the rule of priority.

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

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

29 4. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent,
30 or manner of administration of the rights to water of any other federal agency or federal lands in Montana other

1 than those of the Bureau of Land Management for the Upper Missouri River Breaks National Monument.

2 B. General Disclaimers. Nothing in this Compact may be construed or interpreted:

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

5 2. As a waiver by the United States of its right under state law to raise objections in state court to
6 individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code Annotated,
7 in the basins affected by this Compact, or, except as provided in this Compact, any right to raise objections in an
8 appropriate forum to individual water rights subject to a provisional permit under the State Water Use Act, Title
9 85, of the Montana Code Annotated, in the basins affected by this Compact;

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

12 4. To establish a precedent for other agreements between the State and the United States or an Indian
13 tribe;

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

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

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

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

22 9. To affect, in any manner, the entitlement to or quantification of other federal water rights. This Compact
23 is binding on the United States solely in regard to the water rights of the United States for the Upper Missouri
24 River Breaks National Monument, and this Compact does not affect the water rights of any other federal agency
25 that is not a successor in interest to the water rights subject to this Compact.

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

29 D. Concurrent with other Non-Consumptive Instream Water Uses. The federal reserved water right for
30 instream flows for the Upper Missouri River Breaks National Monument described in this Compact shall run

1 concurrently with any other non-consumptive instream water rights, and shall not be additive to such
2 non-consumptive instream rights.

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

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

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

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

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

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

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

19 ARTICLE VI

20 FINALITY OF COMPACT

21 A. Binding Effect.

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

25 a. the State and a person or entity of any nature whatsoever using, claiming or in any manner asserting
26 a right under the authority of the State to the use of water; and

27 b. except as otherwise provided in Article V.A, the United States, a person or entity of any nature
28 whatsoever using, claiming, or in any manner asserting a right under the authority of the United States to the use
29 of water.

30 2. Following the Effective Date, this Compact may not be modified without the written consent of both

