

SENATE BILL NO. 472

INTRODUCED BY MAZUREK, CRIPPEN, WATERMAN, M. HANSON,
STICKNEY, SVRCEK, YELLOWTAIL, WEEDING, DEVLIN,
BRADLEY, ZOOK, MCCAFFREE

IN THE SENATE

APRIL 13, 1991

ON MOTION, RULES SUSPENDED TO ALLOW
LATE INTRODUCTION OF BILL.

INTRODUCED AND REFERRED TO COMMITTEE
ON NATURAL RESOURCES.

FIRST READING.

APRIL 18, 1991

COMMITTEE RECOMMEND BILL
DO PASS. REPORT ADOPTED.

PRINTING REPORT.

ON MOTION, RULES SUSPENDED AND BILL
PLACED ON SECOND READING THIS DAY.

SECOND READING, DO PASS AS AMENDED.

ON MOTION, RULES SUSPENDED AND BILL
PLACED ON THIRD READING THIS DAY.

THIRD READING, PASSED.
AYES, 48; NOES, 1.

TRANSMITTED TO HOUSE.

IN THE HOUSE

APRIL 19, 1991

ON MOTION, RULES SUSPENDED TO ALLOW
LATE INTRODUCTION OF BILL.

INTRODUCED AND REFERRED TO COMMITTEE
ON JUDICIARY.

FIRST READING.

APRIL 23, 1991

COMMITTEE RECOMMEND BILL BE
CONCURRED IN AS AMENDED. REPORT
ADOPTED.

APRIL 24, 1991

SECOND READING, CONCURRED IN.

ON MOTION, RULES SUSPENDED AND BILL

PLACED ON THIRD READING THIS DAY.

THIRD READING, CONCURRED IN.
AYES, 83; NOES, 17.

RETURNED TO SENATE WITH AMENDMENTS.

IN THE SENATE

APRIL 25, 1991

RECEIVED FROM HOUSE.

SECOND READING, AMENDMENTS
CONCURRED IN.

ON MOTION, RULES SUSPENDED AND
PLACED ON THIRD READING THIS DAY.

THIRD READING, AMENDMENTS
CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

SENATE BILL NO. 472

INTRODUCED BY

M. Hanson

Snake Yellowtail

Alceding Berber

Handwritten signatures: M. Hanson, Snake Yellowtail, Alceding Berber, Bradley, W. Coffey

A BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT ENTERED INTO BY THE STATE OF MONTANA AND THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE RESERVATION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

NEW SECTION. Section 1. Northern Cheyenne-Montana

compact ratified. The compact entered into by the state of Montana and the Northern Cheyenne tribe of the Northern Cheyenne Indian reservation and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing] is ratified. The compact is as follows:

NORTHERN CHEYENNE-MONTANA COMPACT

This Compact is entered into by and among THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, THE STATE OF MONTANA, and THE UNITED STATES OF AMERICA (herein called the "parties") and becomes effective as set forth hereinafter. The parties agree as follows:

WHEREAS, in 1975, the Northern Cheyenne Tribe and the United States on behalf of the Tribe brought suits in the

United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights; and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Northern Cheyenne water rights; and

WHEREAS, the federal district court suits were stayed in 1983, pending the outcome of Montana state court water adjudication proceedings; and

WHEREAS, the adjudication of Northern Cheyenne water rights under state law has been suspended while negotiations have proceeded to conclude a compact resolving all reserved water rights claims of the Northern Cheyenne Tribe; and

WHEREAS, the Northern Cheyenne Tribe and the United States agree that the tribal water right described in this compact are in satisfaction of the Tribe's reserved water rights claims and any claims to water rights made on behalf of the Tribe by the United States; and

WHEREAS, it is in the best interest of all parties that the reserved water rights claims of the Northern Cheyenne Tribe be settled through a water rights compact; and

WHEREAS, the parties agree that settlement of the reserved water rights claims of the Northern Cheyenne Tribe is dependent on the repair and enlargement of the Tongue

1 River Reservoir.

2 NOW, THEREFORE, the parties agree as follows:

3 ARTICLE I

4 DEFINITIONS

5 The following definitions apply for purposes of this
6 Compact:

7 (1) "Acre-foot" means the amount of water necessary to
8 cover 1 acre to a depth of 1 foot and is equivalent to
9 43,560 cubic feet.

10 (2) "Alluvial ground water" means water located below
11 the land surface within the Quaternary hydrostratigraphic
12 unit that borders or underlies major perennial and
13 intermittent streams in the Tongue River and Rosebud Creek
14 basins. This unit is composed of unconsolidated alluvial
15 deposits of clay, silt, sand, and gravel. For the purposes
16 of this Compact, all other water below the land surface is
17 considered nonalluvial ground water.

18 (3) "Annual" or "per year" means during 1 year as
19 defined by this Compact.

20 (4) "Board" means the Northern Cheyenne-Montana Compact
21 Board established by Article IV.

22 (5) "Completion date" means the date of completion of a
23 project to repair and enlarge the Tongue River Dam to a
24 degree sufficient to provide the storage component of the
25 Tribal Water Right subject to the conditions provided in

1 this Compact.

2 (6) "Depletion" means, for any diversion of water, the
3 difference between the quantity of water diverted and the
4 quantity of return flows within the basin.

5 (7) "Direct flow of the Tongue River" means the water
6 in the Tongue River and its tributaries that has not been
7 stored in the Tongue River Reservoir.

8 (8) "Domestic use" means the diversion of water by one
9 or more individuals, family units, or households for
10 drinking, cooking, laundering, sanitation, and other
11 personal comforts and necessities and for the irrigation of
12 a family garden or orchard not exceeding 1/2 acre in area.

13 (9) "Excess water" means increases in the Tongue River
14 basin water supply resulting from conditions different from
15 those assumed in the Tongue River water model.

16 (10) "Exchange water" means water available to the Tribe
17 from the Tongue River direct flow or from the Tongue River
18 Reservoir storage in exchange for Tribal return flows made
19 available to other Tongue River water users.

20 (11) "Indian" means a person who:

21 (a) is an enrolled member of the Northern Cheyenne
22 Tribe;

23 (b) is a member of a tribe that is recognized as
24 eligible for the special programs and services provided by
25 the United States to Indians because of their status as

1 Indians; or

2 (c) holds, or is recognized by the Secretary of the
3 Interior as eligible to hold, trust and restricted property
4 on the Northern Cheyenne Reservation.

5 (12) "Manifolded well system" means a water distribution
6 or conveyance facility that is supplied by two or more
7 wells.

8 (13) "Miles City decree water right" means a water
9 right, finally decreed in any general adjudication of the
10 Tongue River or recognized under state law until such final
11 adjudication, that is based on the decree entered in Miles
12 City Canal & Irrigating Co. v. Lee, et al., Montana Seventh
13 Judicial District, No. 2809, May 20, 1914, and which has a
14 priority date of March 24, 1909, or earlier.

15 (14) "Parties" means the Tribe, the State, and the
16 United States.

17 (15) "Person" means an individual or any other entity,
18 public or private, including the State, the Tribe, and the
19 government of the United States and all officers, agents,
20 and departments thereof.

21 (16) "Ratification date" means the date this Compact is
22 approved by the Northern Cheyenne Tribal Council and the
23 Legislature of the State of Montana.

24 (17) "Reservation" means the Northern Cheyenne
25 Reservation as established by executive orders of November

1 26, 1884, and March 19, 1900.

2 (18) "State" means the State of Montana and all
3 officers, agents, departments, and political subdivisions
4 thereof. Unless otherwise indicated, for purposes of
5 notification or consent, the term State means the Director
6 of the Department of Natural Resources and Conservation or
7 its successor agency.

8 (19) "State contract right" means a right to receive
9 stored water from the Tongue River Reservoir, not to exceed
10 a cumulative total of 40,000 acre-feet per year, pursuant to
11 a contract that allocates the storage rights of the
12 Department of Natural Resources and Conservation or its
13 successor agency.

14 (20) "Tongue River water model" means the Tongue River
15 Reservoir operations computer model that is documented in
16 Tongue River Modeling Study, Final Report, submitted on July
17 20, 1990, to the Engineering Bureau of the Water Resources
18 Division of the Montana Department of Natural Resources and
19 Conservation or any revision agreed to by the parties. The
20 Final Report and any agreed-upon revisions are incorporated
21 in this Compact by reference as though set forth in full.

22 (21) "Transfer" means any authorization for the delivery
23 or use of water from the Tribe or any person authorized by
24 the Tribe to any other person by a service contract, lease,
25 sale, exchange, or other similar agreement.

1 (22) "Tribal water right" means the right to divert or
2 use water as described by Articles II and III.

3 (23) "Tribe" means the Northern Cheyenne Tribe of the
4 Northern Cheyenne Reservation and all officers, agents, and
5 departments thereof. Unless otherwise indicated, for
6 purposes of notification or consent, the term Tribe means
7 the Tribal President or the Chief Executive Official of the
8 Tribe.

9 (24) "United States" means the federal government and
10 all officers, agencies, departments, and political
11 subdivisions thereof. Unless otherwise indicated, for
12 purposes of notification or consent, the term United States
13 means the Secretary of the Department of the Interior.

14 (25) "Year" means the 12-month period beginning April 1
15 and ending March 31.

16 ARTICLE II

17 TRIBAL WATER RIGHT

18 A. Quantification of Water Right. The water rights of
19 the Northern Cheyenne Tribe are as follows:

20 (1) Existing Nonagricultural Uses. Tribal and
21 individual Indian stock, domestic, and municipal water uses
22 on the Reservation and in existence as of the ratification
23 date are hereby recognized and protected as part of the
24 Tribal Water Right and are in addition to the water rights
25 set forth in subsections (2), (3), and (4). All such

1 existing uses are governed by the terms of this Compact.

2 (2) Tongue River. Subject to the terms of this Compact,
3 the Tribal Water Right in the Tongue River basin consists of
4 the right to divert or use or to permit the diversion or use
5 of up to 32,500 acre-feet of water per year, from a
6 combination of direct-flow, storage, and exchange water.
7 Tribal and individual Indian irrigation uses in existence on
8 the Reservation in the Tongue River basin as of the
9 ratification date are recognized and protected, and shall be
10 counted as a use of the 32,500-acre-feet-per-year right
11 described in this subsection.

12 (a) Direct-Flow Right. The Tribe has a right to divert
13 or use or permit the diversion or use of up to 12,500
14 acre-feet of water per year from direct flow of the Tongue
15 River and its tributaries with a priority date of October 1,
16 1881, provided that:

17 (i) the Tribe's annual depletion of its direct-flow
18 water right in the Tongue River and its tributaries shall
19 not exceed 75% of the amount diverted or 9,375 acre-feet per
20 year; and

21 (ii) the Tribe's direct-flow water right in the Tongue
22 River and its tributaries may not be used in a manner that
23 adversely affects:

24 (A) Miles City decree water rights; or

25 (B) water rights from off-reservation tributaries of

1 the Tongue River, which are finally decreed in any general
 2 adjudication of the Tongue River or are recognized under
 3 state law until such final adjudication, and which have a
 4 priority date of June 30, 1973, or earlier and are based on
 5 the use of an irrigation system in place and not abandoned
 6 as of June 30, 1973.

7 (b) Storage and Exchange Water. The Tribe has a right
 8 to divert or deplete or to permit the diversion or depletion
 9 of up to 20,000 acre-feet of water per year from a
 10 combination of water stored in the Tongue River Reservoir
 11 and exchange water. The availability of the 20,000 acre-feet
 12 of water per year, as provided in the Tongue River water
 13 model, depends upon the annual schedule used by the Tribe
 14 for diversions of Tongue River direct flows. Except as
 15 provided in section A(2)(c)(ii), any reduction in Tongue
 16 River Reservoir stored water resulting from Tribal
 17 diversions of Tongue River direct flows may not affect state
 18 contract rights, as defined in this Compact, but must be
 19 satisfied exclusively from the right described in this
 20 subsection. Tribal use of stored water from the Tongue River
 21 Reservoir must be measured at the Reservoir.

22 (c) Shortages. (i) The Tribal Water Right in the
 23 Tongue River basin is subject to shortages due to natural
 24 low flows that are consistent with the period of record used
 25 in the Tongue River water model in diversion amounts not to

1 exceed 50% in any 1 year and 100% cumulative in any 10-year
 2 period.

3 (ii) Decreases in the amount of water stored in the
 4 Tongue River Reservoir that are caused by:

5 (A) sedimentation;

6 (B) reservoir inflows lower than those assumed in the
 7 Tongue River water model;

8 (C) normal and expected maintenance of the Tongue River
 9 Dam and associated structures; or

10 (D) normal and expected deterioration of the Tongue
 11 River Dam and associated structures shall not be considered
 12 a failure of the Tongue River Dam as that term is used in
 13 section A(2)(f). All such decreases in water availability
 14 shall be shared pro rata among all users of stored water
 15 including the Tribe.

16 (d) Excess Water. The Tribe, as part of the Tribal
 17 Water Right, has the first right to use excess water, as
 18 defined in this Compact, provided that total use of the
 19 Tongue River Tribal Water Right shall not exceed 32,500
 20 acre-feet of water per year diverted from direct-flow,
 21 storage, and exchange water. Tribal nonuse of excess water
 22 in any 1 year does not affect the right of the Tribe to use
 23 excess water in any subsequent year.

24 (e) Contract Water. Nothing in this Compact shall
 25 affect the water, and any rights therein secured to the

1 Tribe by Water Purchase Contract No. 232 for 7,500 acre-feet
 2 of water per year, dated March 15, 1938, between the Tongue
 3 River Water Users Association, the Water Conservation Board
 4 of the State of Montana, and the United States, through the
 5 Secretary of the Interior. Any water entitlement pursuant to
 6 the Contract is in addition to and not a part of the
 7 32,500-acre-feet-per-year Tribal Water Right set forth
 8 above.

9 (f) Failure of Tongue River Dam. In the event of a
 10 failure of the Tongue River Dam that causes a substantial
 11 diminution of the Tribe's storage right set forth in section
 12 A(2)(b), and notwithstanding the provisions of Article V,
 13 section A, either the State or the Tribe may, within 180
 14 days of the failure, request the other to renegotiate this
 15 Compact. The parties have 3 years from the date of the
 16 request to reach a new agreement, during which time all of
 17 the provisions in this Compact remain in full force and
 18 effect. If neither party requests renegotiation or if a new
 19 agreement is not reached within 3 years of the request, the
 20 provisions of section A(2)(a)(ii) concerning the
 21 subordination of the Tongue River direct-flow Tribal Water
 22 Right to other specified water rights become null and void;
 23 provided, however, that all other provisions of this Compact
 24 shall remain in full force and effect. The Tribe is not
 25 entitled to void or terminate this Compact, or to assert

1 that the State is in breach of the Compact, for a failure of
 2 the Tongue River Dam; provided, however, that all other
 3 rights of the Tribe arising from such an event are not
 4 affected by this subsection.

5 (3) Rosebud Creek.

6 (a) Water Right. The Tribe has a right to divert or use
 7 or to permit the diversion or use from Rosebud Creek and its
 8 tributaries, for agricultural purposes only, of 1,800
 9 acre-feet of water per year or enough water to irrigate 600
 10 acres of land per year, whichever is less, with a priority
 11 date of October 1, 1881. Tribal and individual Indian
 12 on-reservation irrigation uses in existence in the Rosebud
 13 Creek Basin as of the ratification date are recognized and
 14 protected, and shall be considered a use of the 1,800
 15 acre-feet per year right described in this subsection.

16 (b) Implementation. The Tribe agrees that in the period
 17 between May 1, 1991, and July 1, 1993, the Tribe or persons
 18 authorized by it shall develop not more than 200 acres of
 19 land in addition to irrigation uses in existence as of May
 20 1, 1991, through irrigation methods involving pumping of
 21 alluvial ground water, except that the Tribe or persons
 22 authorized by it may develop up to the full 600 acres of
 23 land, or any portion thereof, by any other irrigation
 24 method. During this period, the Tribe and the State agree to
 25 share any hydrologic data available for use in connection

1 with any test that the State undertakes to evaluate the
 2 impacts, if any, of the development of on-reservation lands
 3 on off-reservation lands. After July 1, 1993, the Tribe or
 4 persons authorized by it may develop the full 600 acres of
 5 land by any irrigation method.

6 (c) Additional Water Right. In addition to the water
 7 right described in subsection (3)(a), the Tribe has a right
 8 to divert or use or permit the diversion or use from Rosebud
 9 Creek and its tributaries, for any purpose, of up to 19,530
 10 acre-feet of water per year or enough water to irrigate
 11 5,510 acres of land per year, whichever is less, with a
 12 priority date of October 1, 1881. The Tribe may not exercise
 13 the water right set forth in this subsection in a manner
 14 that adversely affects a water right finally decreed in any
 15 general adjudication of the Rosebud Creek basin or, until
 16 such final decree is issued, a water right recognized under
 17 state law, which has a priority date of June 30, 1973, or
 18 earlier, and which is based on the use of an irrigation
 19 system in place and not abandoned as of June 30, 1973,
 20 provided that the state law water rights protected in this
 21 subsection may not exceed:

22 (i) north of the Reservation, 8,100 acre-feet of water
 23 per year or enough water to irrigate 2,700 acres of land per
 24 year, whichever is less; and

25 (ii) south of the Reservation, 540 acre-feet of water

1 per year or enough water to irrigate 180 acres of land per
 2 year, whichever is less.

3 (d) Dams and Impoundments. The Tribe may not construct,
 4 within the Rosebud Creek basin, any dams or impoundments to
 5 store water naturally arising in Rosebud Creek or its
 6 tributaries, provided that the Tribe may construct
 7 stockwater impoundments pursuant to section A(5) and,
 8 subject to other applicable provisions of this Compact, may
 9 construct dams or impoundments within the Rosebud Creek
 10 basin to store water from sources outside the basin,
 11 including nonalluvial ground water.

12 (e) Moratorium on Permits. The Department of Natural
 13 Resources and Conservation shall order a moratorium on the
 14 issuance of permits in the Rosebud Creek basin concurrent
 15 with the ratification date of this Compact. The moratorium
 16 shall not apply to applications for permits by persons who
 17 have entered into deferral agreements with the Tribe for
 18 Rosebud Creek basin water as provided in section G. The
 19 Department may order the moratorium lifted if it determines
 20 that water is available over and above the amount necessary
 21 to fulfill the Tribal Water Right described in section
 22 A(3)(a) and (3)(c). The Tribe may challenge the Department's
 23 determination to lift the moratorium under the procedure set
 24 forth in Article IV.

25 (4) Ground Water.

1 (a) Alluvial Ground Water. The Tribe has a right to
 2 withdraw and use or to permit the withdrawal and use of
 3 alluvial ground water in lieu of surface water diversions of
 4 the Tongue River and Rosebud Creek Tribal Water Right,
 5 subject to the same terms and conditions of this Compact
 6 that apply to such surface water diversions. Alluvial ground
 7 water withdrawn from wells or manifolded well systems with a
 8 capacity of 100 gallons per minute or less shall not be
 9 deducted from the Tribal Water Right. For wells or
 10 manifolded well systems with a capacity of withdrawing
 11 greater than 100 gallons per minute of alluvial ground
 12 water, the entire amount withdrawn shall be deducted from
 13 the Tribal Water Right.

14 (b) Nonalluvial Ground Water. Except where a Tribal
 15 right to nonalluvial ground water is established pursuant to
 16 Article VII, section B, Tribal use or authorization of use
 17 of nonalluvial ground water must, at the election of the
 18 Tribe, comply with state law in effect at the time of the
 19 use or with the alluvial ground water provisions of section
 20 A(4)(a).

21 (5) Stockwater Impoundments. The Tribe may construct or
 22 permit the construction of stockwater impoundments on the
 23 Reservation if the capacity of the impoundment is less than
 24 15 acre-feet and the impoundment is constructed on a source
 25 other than a perennial flowing stream. The amount of water

1 so impounded shall not be deducted from the Tribal Water
 2 Right.

3 (6) Subirrigation. The Tribe is entitled to take
 4 advantage of any natural subirrigation occurring on the
 5 Reservation. Where otherwise consistent with state law,
 6 persons outside the Reservation are also entitled to take
 7 advantage of natural subirrigation.

8 (7) Big Horn Reservoir (Yellowtail) Storage.

9 (a) Tribal Allocation. As a part of the Tribal Water
 10 Right, the Secretary of the Interior shall allocate 30,000
 11 acre-feet per year of stored water in Big Horn Reservoir,
 12 Yellowtail Unit, Lower Bighorn Division, Pick-Sloan Missouri
 13 Program, Montana, measured at the dam, for use or
 14 disposition by the Tribe for any beneficial purpose, either
 15 on or off the Reservation, pursuant to the terms of this
 16 Compact.

17 (b) Payment for Tribal Allocation. The Tribe shall not
 18 be required to make payments to the United States for any
 19 portion of the Tribal Water Right stored in Yellowtail
 20 Reservoir unless and until the water is used or sold by the
 21 Tribe, in which case the Tribe shall make annual payments to
 22 the United States as hereinafter provided.

23 (i) Use or Sale for Municipal and Industrial (M&I)
 24 Purposes. For each acre-foot of stored water used or sold
 25 for M&I purposes, the Tribe shall pay annually to the United

1 States an amount to cover the proportionate share of the
 2 annual operation, maintenance, and replacement (OM&R) costs
 3 and the proportionate share of the capital costs with
 4 appropriate interest for the Yellowtail Unit allocable to
 5 the Tribe's stored water. Upon full payment of the capital
 6 costs allocable to the Tribe's stored water supply, the
 7 annual payments shall include only a proportionate share of
 8 the annual OM&R costs. Such annual payments shall be
 9 reviewed and adjusted, as appropriate, to reflect the actual
 10 capital and OM&R costs for the Yellowtail Unit.

11 (ii) Agricultural, Domestic, Livestock, and Other Uses.

12 For each acre-foot of stored water used or sold for other
 13 than M&I purposes, the Tribe shall pay annually to the
 14 United States an amount to cover the OM&R costs for the
 15 Yellowtail Unit allocable to the Tribe's stored water, which
 16 amount shall be reviewed and adjusted, as appropriate, to
 17 reflect the actual OM&R costs for the Yellowtail Unit. The
 18 Bureau of Indian Affairs shall transfer sufficient funds on
 19 a nonreimbursable basis to the Bureau of Reclamation to
 20 cover allocable OM&R costs under this subsection.

21 (c) Rates and Revenues. Except for payments required to
 22 be made to the United States as set forth above, the Tribe
 23 shall set such rates as it considers proper for its use or
 24 sale of stored water and shall retain all revenues from its
 25 use or sale of the stored water, provided that the United

1 States reserves the right to use any and all water stored in
 2 Yellowtail Reservoir for hydropower generation.

3 (d) Agreement. Following ratification of this Compact
 4 and upon development of a demand for the water under this
 5 section, the United States and the Tribe shall enter into an
 6 appropriate agreement, if required, setting forth the terms
 7 and conditions under which water will be made available to
 8 the Tribe, and for the collection and disposition of
 9 revenues in connection therewith.

10 B. Persons Entitled to Use Tribal Water Right. The
 11 Tribal Water Right may be used by the Tribe or persons
 12 authorized to use water by the Tribe pursuant to Article
 13 III, provided that:

14 (1) the use is in accordance with the terms of this
 15 Compact;

16 (2) the Tribe shall give preference to Tribal members
 17 to use the Tribal Water Right; and

18 (3) the Tribal Water Right may be transferred from one
 19 Tribal member to another Tribal member, for agricultural
 20 purposes only, upon the transfer of land on the Reservation
 21 from one Tribal member to another Tribal member.

22 C. Place of Use of Tribal Water Right. Pursuant to a
 23 Tribal water code adopted as prescribed in Article III and
 24 subject to all other provisions of this Compact, the Tribe
 25 has the right to use or to permit the use of the Tribal

1 Water Right with any point of diversion or any place of use
 2 on or off the Reservation; provided, however, that any use
 3 of the Tribal Water Right off the Reservation shall not be
 4 considered to convert the Tribal Water Right to a state
 5 water right, and subsequent nonuse of the Tribal Water Right
 6 off the Reservation shall not constitute a relinquishment,
 7 forfeiture, or abandonment of the Right.

8 D. Purposes of Tribal Water Right. Except as provided
 9 in section A(3)(a), the Tribe may authorize use of the
 10 Tribal Water Right on the Reservation for any purpose
 11 without regard to whether the use is beneficial as defined
 12 by state law. Off the Reservation, any use of the Tribal
 13 Water Right shall comply with Article III, section B.

14 E. Conditions Upon Uses of Tribal Water Right. The
 15 Tribe shall adopt appropriate regulations to ensure that use
 16 of the Tribal Water Right is not wasteful and does not
 17 degrade water quality.

18 F. Transfer of Tribal Water Right. The Tribe shall not
 19 transfer water naturally arising in Rosebud Creek or its
 20 tributaries for use off the Reservation. The Tribe may
 21 transfer any other part of the Tribal Water Right for use on
 22 or off the Reservation pursuant to the terms of this
 23 Compact. This subsection does not affect the right of the
 24 Tribe to enter into a deferral agreement regarding Rosebud
 25 Creek water pursuant to section G.

1 G. Deferral Agreements. After the ratification date,
 2 the Tribe may enter into an agreement with any person who is
 3 exercising or proposing to exercise a right under state law
 4 to use surface water off the Reservation, which agreement
 5 protects the person's right from any exercise of the Tribal
 6 Water Right; provided, however, that:

7 (1) before using the water, the person has complied
 8 with all applicable state laws concerning the acquisition of
 9 a water right;

10 (2) subsequent to acquisition of the state water right,
 11 regulation of its use shall be subject to state law;

12 (3) the amount of water subject to the agreement shall
 13 be deducted from the amount of water available for depletion
 14 by the Tribe in the basin from which the water is being
 15 diverted; and

16 (4) the agreement shall not permanently alienate the
 17 Tribal Water Right or any part thereof.

18 H. Effect of Nonuse of Tribal Water Right. Nonuse of
 19 any part of the Tribal Water Right shall not constitute a
 20 relinquishment, forfeiture, or abandonment of the right.

21 I. Tribal Water Right to Be Held in Trust. The Tribal
 22 Water Right must be held in trust by the United States for
 23 the benefit of the Tribe.

24 ARTICLE III

25 ADMINISTRATION OF WATER RIGHTS

1 A. Tribal Administration.

2 (1) Except as otherwise provided in this Compact, the
3 use of the Tribal Water Right shall be administered by the
4 Tribe and the Tribe has the final and exclusive jurisdiction
5 to resolve all disputes between users of the Tribal Water
6 Right. Administration and enforcement of the Tribal Water
7 Right shall be pursuant to a water code, which shall be
8 developed and adopted by the Tribe and submitted for
9 approval to the Secretary of the Interior within 1 year
10 after ratification of this Compact. Pending the adoption and
11 approval of the Tribal water code, the administration and
12 enforcement of the Tribal Water Right must be by the
13 Secretary of the Interior.

14 (2) Within 6 months after the Tribal water code takes
15 effect, the Tribe shall provide the State with notice of
16 each use of the Tribal Water Right, including uses in
17 existence as of the ratification date and those established
18 since that time, which must include:

19 (a) the name of the person authorized to make the
20 diversion;

21 (b) the amount of water authorized to be diverted
22 annually;

23 (c) the amount of water authorized for annual
24 consumption;

25 (d) the point of diversion;

1 (e) the period of use;

2 (f) the place of use;

3 (g) the uses for which the water may be diverted; and

4 (h) the relative priority of the use as against other
5 uses of the Tribal Water Right.

6 (3) The Tribe shall thereafter notify the State, within
7 60 days after the end of each quarter year, of all new uses
8 of surface and ground water authorized by the Tribe during
9 the preceding quarter year and of all new uses of the Tribal
10 Water Right actually commenced during that quarter year. The
11 notice must be in the same format as that prescribed in
12 section A(2).

13 (4) The Tribe shall provide the State with not less
14 than 180 days' written notice prior to the start of
15 construction of any project to divert any portion of the
16 Tribal Water Right from the Big Horn River or the Big Horn
17 Reservoir for use on the Reservation, or from the Tongue
18 River or the Tongue River Reservoir for use on the
19 Reservation in the Rosebud Creek basin. The notice must
20 describe any diversion, conveyance, and storage facilities,
21 the amounts of water to be diverted and consumed, and the
22 purpose, place, and period of the proposed use. Diversion or
23 use of water from a project may be made only after all
24 permits, certificates, variances, or other authorizations
25 described in section B(3) have been obtained. With respect

1 to any such project or diversion, the State or any affected
 2 person may seek such remedies as may be available under
 3 federal, state, or tribal law, and nothing in this Compact
 4 shall be construed to affect the rights of any party under
 5 such law.

6 B. Off-Reservation Uses of Tribal Water Right.

7 (1) Off-Reservation Uses. Any use of the Tribal Water
 8 Right involving a point of diversion or place of use located
 9 off the Reservation must be considered an off-reservation
 10 use, provided that releases or diversions from Big Horn
 11 Reservoir or Tongue River Reservoir for use on the
 12 Reservation shall not be considered off-reservation uses.

13 (2) Subsequent Federal or State Law. All
 14 off-reservation uses of the Tribal Water Right shall comply
 15 with the requirements set forth in this section until such
 16 time as the statutory or common law of the United States or
 17 the State establishes that off-reservation uses of Indian
 18 water rights may occur without regard to state law.

19 (3) Diversion Facilities. With respect to diversion
 20 or transportation facilities located off the Reservation,
 21 the Tribe or persons using the Tribal Water Right shall
 22 apply for all permits, certificates, variances, and other
 23 authorizations required by state law that regulate,
 24 condition, or permit the siting, construction, operation,
 25 alteration, or use of any equipment, device, or associated

1 facility proposed to use or transport water. A diversion or
 2 use of water in the exercise of the Tribal Water Right may
 3 be made only after all permits, certificates, variances, or
 4 other authorizations applied for pursuant to this subsection
 5 have been obtained.

6 (4) Off-Reservation Uses in Tongue River and Rosebud
 7 Creek Basins.

8 (a) The Tribe shall provide the State with not less
 9 than 180 days' advance written notice of any off-reservation
 10 use, transfer, or change of use of the Tribal Water Right:

11 (i) within the Tongue River basin; or

12 (ii) using Tongue River water off-reservation in the
 13 Rosebud Creek basin.

14 (b) The notice must include sufficient documentation to
 15 demonstrate that:

16 (i) the proposed use of water is a beneficial use as
 17 defined by Montana law in effect at that time;

18 (ii) the proposed means of diversion and the
 19 construction and operation of the diversion works are
 20 adequate;

21 (iii) the proposed use, transfer, or change of use will
 22 not adversely affect, except with the consent of the owner
 23 of such right:

24 (A) any water right arising under the laws of the
 25 United States; or

1 (B) any right to the use of water established pursuant
 2 to the laws of the State, except that if the portion of the
 3 Tribal Water Right that is the subject of the proposed
 4 off-reservation use, transfer, or change of use is the
 5 storage and exchange right set forth in Article II, section
 6 A(2)(b), the Tribe need only demonstrate that Miles City
 7 decree water rights will not be adversely affected by such
 8 use, transfer, or change of use.

9 (iv) the proposed use, transfer, or change of use will
 10 not cause any unreasonable significant adverse environmental
 11 impact; and

12 (v) proposed uses, transfers, or changes in use in
 13 excess of 4,000 acre-feet per year and 5.5 cubic feet per
 14 second of water will not:

15 (A) substantially impair the quality of water for
 16 existing uses in the source of water from which the
 17 diversion is made;

18 (B) be made where low quality water that can
 19 economically be used is legally and physically available to
 20 the Tribe for the proposed use;

21 (C) create or substantially contribute to saline seep;
 22 or

23 (D) substantially injure fish or wildlife populations
 24 that use the source of water from which the diversion is
 25 made.

1 (c) A proposed use, transfer, or change of use of the
 2 Tribal Water Right pursuant to section B(4)(b) may be
 3 challenged:

4 (i) within 30 days after the expiration of the notice
 5 period provided in section B(4)(a);

6 (ii) in a court of competent jurisdiction; and

7 (iii) by the State or by a person whose rights are
 8 adversely affected by the proposed use, transfer, or change
 9 of use.

10 In a challenge to a proposed use, transfer, or change of
 11 use of the Tribal Water Right, the Tribe has the burden of
 12 proving by a preponderance of the evidence that it has
 13 satisfied the requirements of section B(4)(b). A Tribal
 14 notice that conforms to the requirements of section B(4)(b)
 15 is prima facie evidence of its contents.

16 (5) Off-Reservation Uses Outside Tongue River and
 17 Rosebud Creek Basins. Except as provided in section B(4), no
 18 person may initiate an off-reservation use, transfer, or
 19 change of use of the Tribal Water Right without first
 20 applying for and receiving authorization for the use,
 21 transfer, or change of use pursuant to Montana law in effect
 22 at the time of the application.

23 C. State Administration.

24 (1) The State shall administer all rights to the use of
 25 surface water and ground water within the Reservation that

1 are not a part of the Tribal Water Right. The State has the
2 final and exclusive jurisdiction to resolve all disputes
3 between users of water rights established under state law.

4 (2) Within 1 year after the ratification date, the
5 State shall notify the Tribe of all existing uses of surface
6 and ground water for which a permit has been issued by the
7 State in the Tongue River basin or Rosebud Creek basin. The
8 notice must state:

9 (a) the name of the person authorized to make the
10 diversion;

11 (b) the amount of water authorized to be diverted
12 annually;

13 (c) the amount of water authorized for annual
14 consumption;

15 (d) the point of diversion;

16 (e) the period of use;

17 (f) the place of use;

18 (g) the uses for which the water may be diverted; and

19 (h) the priority date of the use.

20 (3) The State shall notify the Tribe within 60 days
21 after the end of each quarter year of all new uses of
22 surface and ground water for which a permit has been issued
23 by the State in the Tongue River basin or Rosebud Creek
24 basin during the preceding quarter year and of all new uses
25 of water actually commenced pursuant to the laws of the

1 State during that quarter year on each of these sources. The
2 notice must be in the same format as that prescribed in
3 section C(2).

4 D. Operation of Tongue River Reservoir.

5 (1) To provide for Tongue River Reservoir operation
6 procedures that are consistent with the purposes of this
7 Compact, a reservoir operation plan shall be developed by a
8 five-member advisory committee. The committee shall have one
9 representative each from the State, the Tongue River Water
10 Users Association, the Northern Cheyenne Tribe, and the
11 United States, and a fifth member to be selected by the
12 other four. The advisory committee shall annually agree upon
13 a reservoir operation schedule setting forth proposed uses
14 of storage and direct flow for the year. The Department of
15 Natural Resources and Conservation or its successor shall
16 thereupon be responsible, consistent with the terms of this
17 Compact and other applicable law, for the daily operation of
18 the Reservoir and for implementation of the reservoir
19 operation plan.

20 (2) The reservoir operation plan shall provide for the
21 operation of the project for fish and wildlife purposes
22 depending on the availability of water on an annual basis.
23 This provision shall not create an operational preference
24 for fish and wildlife purposes relative to other project
25 purposes.

1 (3) The Secretary of the Interior shall pay annually to
 2 the State an amount to cover the proportionate share of the
 3 annual OM&R costs for the Tongue River Dam that are
 4 allocable to the Tribe's stored water in the Reservoir.

5 **ARTICLE IV**

6 **NORTHERN CHEYENNE-MONTANA COMPACT BOARD**

7 A. Establishment of Board. There is hereby established
 8 the Northern Cheyenne-Montana Compact Board. The Board
 9 consists of three members, including one member appointed by
 10 the Governor, one member appointed by the Northern Cheyenne
 11 Tribal Council, and one member selected by the other two
 12 members. All members must be appointed within 6 months of
 13 the ratification date and within 30 days of the date any
 14 vacancy occurs. Each member shall serve a 5-year term and is
 15 eligible for reappointment. The initial term of each member
 16 must be staggered, with one member serving a 5-year term,
 17 one a 4-year term, and one a 3-year term. The initial term
 18 of each member shall be chosen by lot. Expenses of the
 19 members appointed by the State and Tribe shall be borne by
 20 the entity appointing the member. The expenses of the third
 21 member and all other expenses shall be borne equally by the
 22 Tribe and the State, subject to the availability of funds.

23 B. Membership. Should the two appointed members fail to
 24 agree on the selection of a third member within 60 days of
 25 the ratification date or within 30 days after any vacancy

1 occurs, the following procedure shall be used to select the
 2 third member:

3 (1) Within 5 days, each member shall nominate three
 4 persons to serve as a member of the Board.

5 (2) Within 15 days thereafter, each member shall reject
 6 two of the persons nominated by the other member.

7 (3) The Chief Judge of the United States District Court
 8 for the District of Montana shall select the third member of
 9 the Board from the remaining two nominees. If the Chief
 10 Judge declines for any reason to select the third member,
 11 the Chief Justice of the Montana Supreme Court shall make
 12 the selection from the remaining two nominees.

13 C. Quorum and Vote Required. Two members of the Board
 14 constitute a quorum if reasonable notice has been provided
 15 in advance to the absent member. All Board decisions must be
 16 by a majority of the Board, must be in writing, and,
 17 together with any dissenting opinions, must be served on all
 18 parties in the proceeding before the Board and on the
 19 parties to this Compact.

20 D. Jurisdiction of Board. The Northern Cheyenne-Montana
 21 Compact Board has jurisdiction to resolve controversies over
 22 the right to the use of water between users of the Tribal
 23 Water Right on the one hand and users of state water rights
 24 on the other hand. Such controversies may include, but not
 25 be limited to, disputes as to the meaning of this Compact

1 and disputes concerning the operation of the Tongue River
2 Reservoir as it affects the Tribal Water Right.

3 E. Powers and Duties. The Board shall, upon notice,
4 hold hearings on proceedings before it and shall have the
5 power to administer oaths, take evidence, and issue
6 subpoenas to compel attendance of witnesses or production of
7 documents or other evidence. The Tribe, the State, and the
8 United States shall enforce the Board's subpoenas in the
9 same manner as prescribed by the laws of the Tribe, the
10 State, or the United States for enforcing a subpoena issued
11 by a court in a civil action. The parties to the controversy
12 may present evidence and cross-examine any witnesses. The
13 Board shall determine the controversy based on the evidence
14 and grant any appropriate relief, except money damages. All
15 decisions of the Board must be by majority and in writing.
16 The Board shall adopt necessary rules and regulations to
17 carry out its responsibilities within 6 months after its
18 first meeting. All records of the Board are open to public
19 inspection except for privileged information.

20 F. Review and Enforcement of Board Decisions.

21 (1) Decisions by the Board are effective immediately
22 unless stayed for a period of time prescribed by the Board.
23 Any party before the Board may appeal a final decision by
24 the Board to a court of competent jurisdiction within 30
25 days of the decision. The notice of appeal must be filed

1 with the Board and served personally or by certified mail
2 upon the Tribe, the State, the United States, and all
3 parties to the proceeding before the Board, and all such
4 persons have the right to participate in the appeal.

5 (2) In any appeal, the Board's decision is presumed to
6 be valid and may be vacated by the court only on one of the
7 following grounds:

8 (a) the decision is not supported by substantial
9 evidence;

10 (b) the decision was procured by corruption, fraud, or
11 undue means;

12 (c) there was evident partiality or corruption by the
13 Board or by any member of the Board;

14 (d) the Board was guilty of misconduct in refusing to
15 hear the dispute or in refusing to hear evidence pertinent
16 and material to the controversy or was guilty of any other
17 clear misbehavior by which the rights of any party have been
18 substantially prejudiced;

19 (e) the Board exceeded its authority under the terms of
20 this Compact; or

21 (f) the decision is contrary to law.

22 (3) Unless an appeal is timely filed as provided in
23 subsection (1), any decision of the Board may be confirmed
24 or enforced by any court of competent jurisdiction on
25 petition of the Board, the Tribe, the State, the United

1 States, or any party before the Board in the proceeding in
2 which the decision was made.

3 (4) A court of competent jurisdiction in which a timely
4 appeal is filed pursuant to subsection (1) or in which a
5 petition to confirm or enforce is filed pursuant to
6 subsection (3) may order such temporary or permanent relief
7 as it considers just and proper.

8 (5) Any appeal may be taken from any decision of the
9 court in which a timely appeal is filed pursuant to
10 subsection (1) or in which a petition to confirm or enforce
11 is filed pursuant to subsection (3) in the manner and to the
12 same extent as from orders or judgments of the court in a
13 civil action.

14 (6) In any appeal or petition to confirm or enforce the
15 Board's decision, the Board shall file with the court the
16 record of the proceedings before the Board.

17 G. Waiver of Immunity. The Tribe, the State, and the
18 United States hereby waive their respective immunities from
19 suit, including any defense the State has under the Eleventh
20 Amendment of the Constitution of the United States, in order
21 to permit the resolution of disputes under this Compact by
22 the Northern Cheyenne-Montana Compact Board and the appeal
23 or judicial enforcement of Board decisions as provided in
24 this Compact, except that such waivers of sovereign immunity
25 by the Tribe, the State, or the United States shall not

1 extend to any action for money damages including costs and
2 attorney fees.

3 ARTICLE V

4 FINALITY AND EFFECTIVENESS OF COMPACT

5 A. Ratification and Effectiveness of Compact.

6 (1) Upon ratification by the Northern Cheyenne Tribal
7 Council and the Legislature of the State of Montana, the
8 terms of this Compact may not be altered, voided, or
9 modified in any respect without the consent of the parties;
10 provided, however, that except as provided in section A(2),
11 this Compact shall not become effective until it is ratified
12 by the United States Congress and until the completion date
13 occurs, notwithstanding the provisions of 85-2-702(2). If
14 the completion date does not occur on or before December 31,
15 1997, or any later date agreed to in writing by the parties,
16 this Compact, including all provisions that become effective
17 on the ratification date, shall become null and void without
18 further action by any party. Notwithstanding the provisions
19 of 85-2-702(3), this Compact shall not be included in any
20 preliminary decree or final decree in any State water court
21 proceeding unless and until this Compact becomes effective
22 as set forth in this Article.

23 (2) As between the State and the Tribe, the provisions
24 of this Compact shall become effective upon the ratification
25 date except insofar as they:

1 (a) quantify or provide for the administration of the
2 Tongue River Tribal Water Right;

3 (b) provide for the management or operation of the
4 Tongue River Reservoir; or

5 (c) require Congressional authorization.

6 (3) All of the provisions that do not become effective
7 upon the ratification date become effective on the
8 completion date unless Congress provides otherwise.

9 B. Incorporation Into Decrees and Disposition of
10 Federal Suits. Within 60 days after the completion date, the
11 parties shall petition for incorporation of this Compact
12 into a decree in any appropriate State court proceeding
13 commenced in accordance with 43 U.S.C. 666. Upon the
14 issuance of a final decree by the State water court or its
15 successor and the completion of any direct appeals
16 therefrom, or upon the expiration of the time for filing any
17 such appeal, the Tribe, the State, and the United States
18 shall within 30 days execute and file joint motions pursuant
19 to Rule 41(a), Fed.R.Civ.P., to dismiss with prejudice the
20 Tribe's claims and any claims made by the United States as
21 trustee for the Tribe in Northern Cheyenne Tribe of the
22 Northern Cheyenne Reservation v. Adsit, et al., No. 75-6 BLG
23 (D. Mont.); United States v. Big Horn Low Line Canal
24 Company, et al., No. 75-34 BLG (D. Mont.); and United States
25 v. Tongue River Water Users Association, et al., No. 75-20

1 BLG (D. Mont.), hereinafter collectively referred to as the
2 federal suits. This Compact may be filed as a consent decree
3 in the federal suits only if, prior to the dismissal of the
4 federal suits as provided in this Article, it is finally
5 determined in a judgment binding upon the State that the
6 State courts lack jurisdiction over or that the State court
7 proceedings are inadequate to adjudicate some or all of the
8 water rights asserted in the federal suits.

9 ARTICLE VI

10 GENERAL PROVISIONS

11 A. Nothing in this Compact may be construed or
12 interpreted:

13 (1) to establish the nature, extent, or manner of
14 administration of water rights of any Indian reservation or
15 other federal reservation other than the Northern Cheyenne
16 Reservation;

17 (2) to preclude the acquisition or exercise of a right
18 to the use of water by the Tribe or any individual Indian
19 outside the Reservation by purchase of such right, by
20 acquisition of land, or by application to the State;

21 (3) to preclude the acquisition or exercise of an
22 appropriative right to the use of water under state law by
23 the Tribe or any individual Indian within the Reservation:

24 (a) by purchase of such right or by purchase of land,
25 provided that water rights acquired by such purchase after

1 the ratification date are in addition to and become part of
2 the Tribal Water Right and shall be governed by this
3 Compact; or

4 (b) by application to the State. Except for
5 applications for nonalluvial ground water pursuant to
6 Article II, section A(4)(b), and applications for storage
7 appropriations authorized by section A(8) of this Article,
8 any such application may not be granted by the State until
9 the tribal water right in the basin where the diversion that
10 is the subject of the application is located has been fully
11 used.

12 (4) to determine the relative rights inter sese of
13 persons using water under the authority of the State or the
14 Tribe;

15 (5) to limit in any way the rights of the parties or
16 any other person to litigate any issues or questions not
17 resolved by this Compact;

18 (6) to authorize the taking of a water right that is
19 vested under state or federal law;

20 (7) to create or deny substantive rights through
21 headings or captions used in this Compact;

22 (8) to preclude or to discourage the Tribe from
23 establishing the right to or contracting for water from any
24 further enlargements of the Tongue River Dam or from any
25 future storage facilities that may be built within the

1 Rosebud Creek basin or Tongue River basin or in any other
2 water basins;

3 (9) to address or prejudice whether, in any interstate
4 apportionment, the Tribe's water right may be counted as
5 part of the waters apportioned to the State;

6 (10) to alter or amend any provisions of the Yellowstone
7 River Compact; or

8 (11) to prohibit the Tribe or the United States from
9 challenging any claims to water in any general adjudication
10 of the Tongue River basin or Rosebud Creek basin.

11 B. The parties expressly reserve all rights not
12 granted, recognized, or relinquished in this Compact.

13 C. The Secretary of the Interior shall comply with all
14 aspects of the National Environmental Policy Act, 42 U.S.C.
15 4331 through 4335, and the Endangered Species Act, 16 U.S.C.
16 1531, et seq., and other applicable environmental Acts and
17 regulations in implementing this Compact.

18 ARTICLE VII

19 TRIBAL RELINQUISHMENT OF OTHER WATER CLAIMS

20 A. With the exception of the Tribe's claim to
21 nonalluvial ground water in section B and any rights to
22 water that may exist with respect to land held by the Tribe
23 or a Tribal member outside the present Reservation, the
24 Tribe and the United States as trustee for the Tribe hereby
25 relinquish forever all claims in existence on the

1 ratification date to water within the State. The
 2 relinquishment includes but is not limited to any claim for
 3 water derived from aboriginal use of land or water, any
 4 Indian treaties, any Act of Congress, and any executive act
 5 of the United States.

6 B. The parties intend that the water right as confirmed
 7 to the Tribe in Article II is in full satisfaction of its
 8 federal reserved water right based on Winters v. United
 9 States, 207 U.S. 564 (1908). Notwithstanding the provisions
 10 of section A, the Tribe retains the right to assert a claim
 11 that it has a right, not based on the federal reserved water
 12 rights doctrine, to the use of any nonalluvial ground water
 13 underlying the Reservation. In any such action, the Tribe is
 14 estopped from asserting that its right to nonalluvial ground
 15 water is a federal reserved water right, or that the Tribal
 16 Water Right confirmed in Article II is inadequate to satisfy
 17 the purposes for which the Reservation was created, or from
 18 collaterally attacking this Compact in any manner. Any right
 19 to nonalluvial ground water established by the Tribe under
 20 this section is not subject to this Compact. Nothing in this
 21 Compact may be construed to waive any defenses of the State
 22 or any water user to a Tribal claim for nonalluvial ground
 23 water.

24 ARTICLE VIII
 25 BINDING EFFECT

1 Upon the effectiveness of any provision of this Compact,
 2 its terms will be binding:

3 (1) upon the State and any person or entity of any
 4 nature whatsoever using, claiming, or in any manner
 5 asserting any right under the authority of the State to the
 6 use of water in the State, provided that for purposes of
 7 consent, ratification, or authorization, the validity of
 8 consent, ratification, or authorization is to be determined
 9 by Montana law;

10 (2) upon the Tribe and any person or entity of any
 11 nature whatsoever using, claiming, or in any manner
 12 asserting any right to the use of the Tribe's water right,
 13 any right arising under any doctrine of reserved or
 14 aboriginal water rights for the Tribe, or any right arising
 15 under tribal law, provided that for purposes of consent,
 16 ratification, or authorization, the validity of consent,
 17 ratification, or authorization is to be determined by tribal
 18 law; and

19 (3) upon the United States and any person or entity of
 20 any nature whatsoever using, claiming, or in any manner
 21 asserting any right under the authority of the United States
 22 to the use of water in the State, provided that for purposes
 23 of consent, ratification, or authorization, the validity of
 24 consent, ratification, or authorization is to be determined
 25 by federal law.

ARTICLE IX

CONTRIBUTIONS TO SETTLEMENT

1 A. The United States agrees to provide \$31,500,000 to
 2 repair the Tongue River Dam and spillway, to raise the
 3 Tongue River Dam spillway crest to secure the Tribe's
 4 existing contract water under Article II, section A(2)(e),
 5 and to provide additional storage capacity to secure the
 6 Tribe's storage and exchange water right under Article II,
 7 section A(2)(b).
 8

9 B. The State agrees to provide \$16,500,000 to repair
 10 the Tongue River Dam and spillway with the understanding
 11 that the State's portion will be paid through a combination
 12 of cash and federal loans in proportions to be agreed upon
 13 by the parties.
 14

15 C. The provisions of this Article are subject to the
 16 separate Letter of Agreement dated April 17, 1991, between
 17 the State and the United States explaining in detail the
 18 allocation of the costs of the project. The State and the
 19 United States shall enter into a further agreement providing
 20 for the expenditure of the contributions and loans of the
 21 United States under this Article.
 22

23 D. The United States agrees to provide \$10 million for
 24 a tribal development fund, payable in equal amounts of \$2
 25 million each fiscal year for 5 years. These funds shall not
 be distributed on a per capita basis to members of the Tribe

1 and shall be used only for land and natural resources
 2 administration, planning, and development within the
 3 Northern Cheyenne Reservation or for land acquisition by the
 4 Tribe within the Northern Cheyenne Reservation.

5 E. Federal financial contributions to section A must be
 6 budgeted for, subject to the availability of funds, by
 7 October 1 of the year following the ratification of this
 8 Compact by Congress and the authorization by Congress of
 9 the Tongue River Dam project. Federal financial
 10 contributions to section D will be budgeted for, subject to
 11 the availability of funds, by October 1 of the second year
 12 following the ratification of this Compact by Congress and
 13 the authorization by Congress of the Tongue River Dam
 14 project.

15 F. The Tribe and the United States agree to pursue,
 16 through the normal Bureau of Indian Affairs and Department
 17 of the Interior budget process, such additional sums as are
 18 necessary to implement the terms of this Compact, to develop
 19 a Tribal water code, and to provide increased agricultural
 20 development on the Reservation. The State agrees to support
 21 the efforts of the Tribe and the United States in this
 22 regard.

ARTICLE X

LEGISLATION

23 The parties agree to seek enactment of any legislation
 24
 25

1 necessary to effectuate the provisions and purposes of this
2 Compact and to defend the provisions and purposes of this
3 Compact from all challenges and attacks, provided that no
4 provision of the Compact may be modified as to substance
5 except as may be provided herein.

6 IN WITNESS WHEREOF the representatives of the State of
7 Montana, the Northern Cheyenne Tribe, and the United States
8 have signed this Compact on the ____ day of
9 _____, 19__.

10 For the Northern Cheyenne Tribe

11 _____

12 For the State of Montana

13 Reserved Water Rights Compact Commission

14 _____

15 _____

16 _____

17 _____

18 _____

19 _____

20 _____

21 _____

22 _____

23 APPROVED:

24 For the Secretary of the Interior

25 _____

1 For the United States Attorney General

2 _____

3 NEW SECTION. Section 2. Effective date. [This act] is
4 effective on passage and approval.

-End-

APPROVED BY COMM. ON NATURAL RESOURCES

SENATE BILL NO. 472

INTRODUCED BY [Signatures] M. Hanson [Signatures] K BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT"

ENTERED INTO BY THE STATE OF MONTANA AND THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE RESERVATION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

NEW SECTION. Section 1. Northern Cheyenne-Montana compact ratified. The compact entered into by the state of Montana and the Northern Cheyenne tribe of the Northern Cheyenne Indian reservation and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing] is ratified. The compact is as follows:

NORTHERN CHEYENNE-MONTANA COMPACT

This Compact is entered into by and among THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, THE STATE OF MONTANA, and THE UNITED STATES OF AMERICA (herein called the "parties") and becomes effective as set forth hereinafter. The parties agree as follows:

WHEREAS, in 1975, the Northern Cheyenne Tribe and the United States on behalf of the Tribe brought suits in the

United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights; and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Northern Cheyenne water rights; and

WHEREAS, the federal district court suits were stayed in 1983, pending the outcome of Montana state court water adjudication proceedings; and

WHEREAS, the adjudication of Northern Cheyenne water rights under state law has been suspended while negotiations have proceeded to conclude a compact resolving all reserved water rights claims of the Northern Cheyenne Tribe; and

WHEREAS, the Northern Cheyenne Tribe and the United States agree that the tribal water right described in this compact are in satisfaction of the Tribe's reserved water rights claims and any claims to water rights made on behalf of the Tribe by the United States; and

WHEREAS, it is in the best interest of all parties that the reserved water rights claims of the Northern Cheyenne Tribe be settled through a water rights compact; and

WHEREAS, the parties agree that settlement of the reserved water rights claims of the Northern Cheyenne Tribe is dependent on the repair and enlargement of the Tongue

1 River Reservoir.

2 NOW, THEREFORE, the parties agree as follows:

3 ARTICLE I
4 DEFINITIONS

5 The following definitions apply for purposes of this
6 Compact:

7 (1) "Acre-foot" means the amount of water necessary to
8 cover 1 acre to a depth of 1 foot and is equivalent to
9 43,560 cubic feet.

10 (2) "Alluvial ground water" means water located below
11 the land surface within the Quaternary hydrostratigraphic
12 unit that borders or underlies major perennial and
13 intermittent streams in the Tongue River and Rosebud Creek
14 basins. This unit is composed of unconsolidated alluvial
15 deposits of clay, silt, sand, and gravel. For the purposes
16 of this Compact, all other water below the land surface is
17 considered nonalluvial ground water.

18 (3) "Annual" or "per year" means during 1 year as
19 defined by this Compact.

20 (4) "Board" means the Northern Cheyenne-Montana Compact
21 Board established by Article IV.

22 (5) "Completion date" means the date of completion of a
23 project to repair and enlarge the Tongue River Dam to a
24 degree sufficient to provide the storage component of the
25 Tribal Water Right subject to the conditions provided in

1 this Compact.

2 (6) "Depletion" means, for any diversion of water, the
3 difference between the quantity of water diverted and the
4 quantity of return flows within the basin.

5 (7) "Direct flow of the Tongue River" means the water
6 in the Tongue River and its tributaries that has not been
7 stored in the Tongue River Reservoir.

8 (8) "Domestic use" means the diversion of water by one
9 or more individuals, family units, or households for
10 drinking, cooking, laundering, sanitation, and other
11 personal comforts and necessities and for the irrigation of
12 a family garden or orchard not exceeding 1/2 acre in area.

13 (9) "Excess water" means increases in the Tongue River
14 basin water supply resulting from conditions different from
15 those assumed in the Tongue River water model.

16 (10) "Exchange water" means water available to the Tribe
17 from the Tongue River direct flow or from the Tongue River
18 Reservoir storage in exchange for Tribal return flows made
19 available to other Tongue River water users.

20 (11) "Indian" means a person who:

21 (a) is an enrolled member of the Northern Cheyenne
22 Tribe;

23 (b) is a member of a tribe that is recognized as
24 eligible for the special programs and services provided by
25 the United States to Indians because of their status as

1 Indians; or

2 (c) holds, or is recognized by the Secretary of the
3 Interior as eligible to hold, trust and restricted property
4 on the Northern Cheyenne Reservation.

5 (12) "Manifolded well system" means a water distribution
6 or conveyance facility that is supplied by two or more
7 wells.

8 (13) "Miles City decree water right" means a water
9 right, finally decreed in any general adjudication of the
10 Tongue River or recognized under state law until such final
11 adjudication, that is based on the decree entered in Miles
12 City Canal & Irrigating Co. v. Lee, et al., Montana Seventh
13 Judicial District, No. 2809, May 20, 1914, and which has a
14 priority date of March 24, 1909, or earlier.

15 (14) "Parties" means the Tribe, the State, and the
16 United States.

17 (15) "Person" means an individual or any other entity,
18 public or private, including the State, the Tribe, and the
19 government of the United States and all officers, agents,
20 and departments thereof.

21 (16) "Ratification date" means the date this Compact is
22 approved by the Northern Cheyenne Tribal Council and the
23 Legislature of the State of Montana.

24 (17) "Reservation" means the Northern Cheyenne
25 Reservation as established by executive orders of November

1 26, 1884, and March 19, 1900.

2 (18) "State" means the State of Montana and all
3 officers, agents, departments, and political subdivisions
4 thereof. Unless otherwise indicated, for purposes of
5 notification or consent, the term State means the Director
6 of the Department of Natural Resources and Conservation or
7 its successor agency.

8 (19) "State contract right" means a right to receive
9 stored water from the Tongue River Reservoir, not to exceed
10 a cumulative total of 40,000 acre-feet per year, pursuant to
11 a contract that allocates the storage rights of the
12 Department of Natural Resources and Conservation or its
13 successor agency.

14 (20) "Tongue River water model" means the Tongue River
15 Reservoir operations computer model that is documented in
16 Tongue River Modeling Study, Final Report, submitted on July
17 20, 1990, to the Engineering Bureau of the Water Resources
18 Division of the Montana Department of Natural Resources and
19 Conservation or any revision agreed to by the parties. The
20 Final Report and any agreed-upon revisions are incorporated
21 in this Compact by reference as though set forth in full.

22 (21) "Transfer" means any authorization for the delivery
23 or use of water from the Tribe or any person authorized by
24 the Tribe to any other person by a service contract, lease,
25 sale, exchange, or other similar agreement.

1 (22) "Tribal water right" means the right to divert or
2 use water as described by Articles II and III.

3 (23) "Tribe" means the Northern Cheyenne Tribe of the
4 Northern Cheyenne Reservation and all officers, agents, and
5 departments thereof. Unless otherwise indicated, for
6 purposes of notification or consent, the term Tribe means
7 the Tribal President or the Chief Executive Official of the
8 Tribe.

9 (24) "United States" means the federal government and
10 all officers, agencies, departments, and political
11 subdivisions thereof. Unless otherwise indicated, for
12 purposes of notification or consent, the term United States
13 means the Secretary of the Department of the Interior.

14 (25) "Year" means the 12-month period beginning April 1
15 and ending March 31.

16 ARTICLE II

17 TRIBAL WATER RIGHT

18 A. Quantification of Water Right. The water rights of
19 the Northern Cheyenne Tribe are as follows:

20 (1) Existing Nonagricultural Uses. Tribal and
21 individual Indian stock, domestic, and municipal water uses
22 on the Reservation and in existence as of the ratification
23 date are hereby recognized and protected as part of the
24 Tribal Water Right and are in addition to the water rights
25 set forth in subsections (2), (3), and (4). All such

1 existing uses are governed by the terms of this Compact.

2 (2) Tongue River. Subject to the terms of this Compact,
3 the Tribal Water Right in the Tongue River basin consists of
4 the right to divert or use or to permit the diversion or use
5 of up to 32,500 acre-feet of water per year, from a
6 combination of direct-flow, storage, and exchange water.
7 Tribal and individual Indian irrigation uses in existence on
8 the Reservation in the Tongue River basin as of the
9 ratification date are recognized and protected, and shall be
10 counted as a use of the 32,500-acre-feet-per-year right
11 described in this subsection.

12 (a) Direct-Flow Right. The Tribe has a right to divert
13 or use or permit the diversion or use of up to 12,500
14 acre-feet of water per year from direct flow of the Tongue
15 River and its tributaries with a priority date of October 1,
16 1881, provided that:

17 (i) the Tribe's annual depletion of its direct-flow
18 water right in the Tongue River and its tributaries shall
19 not exceed 75% of the amount diverted or 9,375 acre-feet per
20 year; and

21 (ii) the Tribe's direct-flow water right in the Tongue
22 River and its tributaries may not be used in a manner that
23 adversely affects:

24 (A) Miles City decree water rights; or

25 (B) water rights from off-reservation tributaries of

1 the Tongue River, which are finally decreed in any general
 2 adjudication of the Tongue River or are recognized under
 3 state law until such final adjudication, and which have a
 4 priority date of June 30, 1973, or earlier and are based on
 5 the use of an irrigation system in place and not abandoned
 6 as of June 30, 1973.

7 (b) Storage and Exchange Water. The Tribe has a right
 8 to divert or deplete or to permit the diversion or depletion
 9 of up to 20,000 acre-feet of water per year from a
 10 combination of water stored in the Tongue River Reservoir
 11 and exchange water. The availability of the 20,000 acre-feet
 12 of water per year, as provided in the Tongue River water
 13 model, depends upon the annual schedule used by the Tribe
 14 for diversions of Tongue River direct flows. Except as
 15 provided in section A(2)(c)(ii), any reduction in Tongue
 16 River Reservoir stored water resulting from Tribal
 17 diversions of Tongue River direct flows may not affect state
 18 contract rights, as defined in this Compact, but must be
 19 satisfied exclusively from the right described in this
 20 subsection. Tribal use of stored water from the Tongue River
 21 Reservoir must be measured at the Reservoir.

22 (c) Shortages. (i) The Tribal Water Right in the
 23 Tongue River basin is subject to shortages due to natural
 24 low flows that are consistent with the period of record used
 25 in the Tongue River water model in diversion amounts not to

1 exceed 50% in any 1 year and 100% cumulative in any 10-year
 2 period.

3 (ii) Decreases in the amount of water stored in the
 4 Tongue River Reservoir that are caused by:

5 (A) sedimentation;

6 (B) reservoir inflows lower than those assumed in the
 7 Tongue River water model;

8 (C) normal and expected maintenance of the Tongue River
 9 Dam and associated structures; or

10 (D) normal and expected deterioration of the Tongue
 11 River Dam and associated structures shall not be considered
 12 a failure of the Tongue River Dam as that term is used in
 13 section A(2)(f). All such decreases in water availability
 14 shall be shared pro rata among all users of stored water
 15 including the Tribe.

16 (d) Excess Water. The Tribe, as part of the Tribal
 17 Water Right, has the first right to use excess water, as
 18 defined in this Compact, provided that total use of the
 19 Tongue River Tribal Water Right shall not exceed 32,500
 20 acre-feet of water per year diverted from direct-flow,
 21 storage, and exchange water. Tribal nonuse of excess water
 22 in any 1 year does not affect the right of the Tribe to use
 23 excess water in any subsequent year.

24 (e) Contract Water. Nothing in this Compact shall
 25 affect the water, and any rights therein secured to the

1 Tribe by Water Purchase Contract No. 232 for 7,500 acre-feet
 2 of water per year, dated March 15, 1938, between the Tongue
 3 River Water Users Association, the Water Conservation Board
 4 of the State of Montana, and the United States, through the
 5 Secretary of the Interior. Any water entitlement pursuant to
 6 the Contract is in addition to and not a part of the
 7 32,500-acre-feet-per-year Tribal Water Right set forth
 8 above.

9 (f) Failure of Tongue River Dam. In the event of a
 10 failure of the Tongue River Dam that causes a substantial
 11 diminution of the Tribe's storage right set forth in section
 12 A(2)(b), and notwithstanding the provisions of Article V,
 13 section A, either the State or the Tribe may, within 180
 14 days of the failure, request the other to renegotiate this
 15 Compact. The parties have 3 years from the date of the
 16 request to reach a new agreement, during which time all of
 17 the provisions in this Compact remain in full force and
 18 effect. If neither party requests renegotiation or if a new
 19 agreement is not reached within 3 years of the request, the
 20 provisions of section A(2)(a)(ii) concerning the
 21 subordination of the Tongue River direct-flow Tribal Water
 22 Right to other specified water rights become null and void;
 23 provided, however, that all other provisions of this Compact
 24 shall remain in full force and effect. The Tribe is not
 25 entitled to void or terminate this Compact, or to assert

1 that the State is in breach of the Compact, for a failure of
 2 the Tongue River Dam; provided, however, that all other
 3 rights of the Tribe arising from such an event are not
 4 affected by this subsection.

5 (3) Rosebud Creek.

6 (a) Water Right. The Tribe has a right to divert or use
 7 or to permit the diversion or use from Rosebud Creek and its
 8 tributaries, for agricultural purposes only, of 1,800
 9 acre-feet of water per year or enough water to irrigate 600
 10 acres of land per year, whichever is less, with a priority
 11 date of October 1, 1881. Tribal and individual Indian
 12 on-reservation irrigation uses in existence in the Rosebud
 13 Creek Basin as of the ratification date are recognized and
 14 protected, and shall be considered a use of the 1,800
 15 acre-feet per year right described in this subsection.

16 (b) Implementation. The Tribe agrees that in the period
 17 between May 1, 1991, and July 1, 1993, the Tribe or persons
 18 authorized by it shall develop not more than 200 acres of
 19 land in addition to irrigation uses in existence as of May
 20 1, 1991, through irrigation methods involving pumping of
 21 alluvial ground water, except that the Tribe or persons
 22 authorized by it may develop up to the full 600 acres of
 23 land, or any portion thereof, by any other irrigation
 24 method. During this period, the Tribe and the State agree to
 25 share any hydrologic data available for use in connection

1 with any test that the State undertakes to evaluate the
 2 impacts, if any, of the development of on-reservation lands
 3 on off-reservation lands. After July 1, 1993, the Tribe or
 4 persons authorized by it may develop the full 600 acres of
 5 land by any irrigation method.

6 (c) Additional Water Right. In addition to the water
 7 right described in subsection (3)(a), the Tribe has a right
 8 to divert or use or permit the diversion or use from Rosebud
 9 Creek and its tributaries, for any purpose, of up to 19,530
 10 acre-feet of water per year or enough water to irrigate
 11 6,510 acres of land per year, whichever is less, with a
 12 priority date of October 1, 1881. The Tribe may not exercise
 13 the water right set forth in this subsection in a manner
 14 that adversely affects a water right finally decreed in any
 15 general adjudication of the Rosebud Creek basin or, until
 16 such final decree is issued, a water right recognized under
 17 state law, which has a priority date of June 30, 1973, or
 18 earlier, and which is based on the use of an irrigation
 19 system in place and not abandoned as of June 30, 1973,
 20 provided that the state law water rights protected in this
 21 subsection may not exceed:

22 (i) north of the Reservation, 8,100 acre-feet of water
 23 per year or enough water to irrigate 2,700 acres of land per
 24 year, whichever is less; and

25 (ii) south of the Reservation, 540 acre-feet of water

1 per year or enough water to irrigate 180 acres of land per
 2 year, whichever is less.

3 (d) Dams and Impoundments. The Tribe may not construct,
 4 within the Rosebud Creek basin, any dams or impoundments to
 5 store water naturally arising in Rosebud Creek or its
 6 tributaries, provided that the Tribe may construct
 7 stockwater impoundments pursuant to section A(5) and,
 8 subject to other applicable provisions of this Compact, may
 9 construct dams or impoundments within the Rosebud Creek
 10 basin to store water from sources outside the basin,
 11 including nonalluvial ground water.

12 (e) Moratorium on Permits. The Department of Natural
 13 Resources and Conservation shall order a moratorium on the
 14 issuance of permits in the Rosebud Creek basin concurrent
 15 with the ratification date of this Compact. The moratorium
 16 shall not apply to applications for permits by persons who
 17 have entered into deferral agreements with the Tribe for
 18 Rosebud Creek basin water as provided in section G. The
 19 Department may order the moratorium lifted if it determines
 20 that water is available over and above the amount necessary
 21 to fulfill the Tribal Water Right described in section
 22 A(3)(a) and (3)(c). The Tribe may challenge the Department's
 23 determination to lift the moratorium under the procedure set
 24 forth in Article IV.

25 (4) Ground Water.

1 (a) Alluvial Ground Water. The Tribe has a right to
 2 withdraw and use or to permit the withdrawal and use of
 3 alluvial ground water in lieu of surface water diversions of
 4 the Tongue River and Rosebud Creek Tribal Water Right,
 5 subject to the same terms and conditions of this Compact
 6 that apply to such surface water diversions. Alluvial ground
 7 water withdrawn from wells or manifolded well systems with a
 8 capacity of 100 gallons per minute or less shall not be
 9 deducted from the Tribal Water Right. For wells or
 10 manifolded well systems with a capacity of withdrawing
 11 greater than 100 gallons per minute of alluvial ground
 12 water, the entire amount withdrawn shall be deducted from
 13 the Tribal Water Right.

14 (b) Nonalluvial Ground Water. Except where a Tribal
 15 right to nonalluvial ground water is established pursuant to
 16 Article VII, section B, Tribal use or authorization of use
 17 of nonalluvial ground water must, at the election of the
 18 Tribe, comply with state law in effect at the time of the
 19 use or with the alluvial ground water provisions of section
 20 A(4)(a).

21 (5) Stockwater Impoundments. The Tribe may construct or
 22 permit the construction of stockwater impoundments on the
 23 Reservation if the capacity of the impoundment is less than
 24 15 acre-feet and the impoundment is constructed on a source
 25 other than a perennial flowing stream. The amount of water

1 so impounded shall not be deducted from the Tribal Water
 2 Right.

3 (6) Subirrigation. The Tribe is entitled to take
 4 advantage of any natural subirrigation occurring on the
 5 Reservation. Where otherwise consistent with state law,
 6 persons outside the Reservation are also entitled to take
 7 advantage of natural subirrigation.

8 (7) Big Horn Reservoir (Yellowtail) Storage.

9 (a) Tribal Allocation. As a part of the Tribal Water
 10 Right, the Secretary of the Interior shall allocate 30,000
 11 acre-feet per year of stored water in Big Horn Reservoir,
 12 Yellowtail Unit, Lower Bighorn Division, Pick-Sloan Missouri
 13 Program, Montana, measured at the dam, for use or
 14 disposition by the Tribe for any beneficial purpose, either
 15 on or off the Reservation, pursuant to the terms of this
 16 Compact.

17 (b) Payment for Tribal Allocation. The Tribe shall not
 18 be required to make payments to the United States for any
 19 portion of the Tribal Water Right stored in Yellowtail
 20 Reservoir unless and until the water is used or sold by the
 21 Tribe, in which case the Tribe shall make annual payments to
 22 the United States as hereinafter provided.

23 (i) Use or Sale for Municipal and Industrial (M&I)
 24 Purposes. For each acre-foot of stored water used or sold
 25 for M&I purposes, the Tribe shall pay annually to the United

1 States an amount to cover the proportionate share of the
 2 annual operation, maintenance, and replacement (OM&R) costs
 3 and the proportionate share of the capital costs with
 4 appropriate interest for the Yellowtail Unit allocable to
 5 the Tribe's stored water. Upon full payment of the capital
 6 costs allocable to the Tribe's stored water supply, the
 7 annual payments shall include only a proportionate share of
 8 the annual OM&R costs. Such annual payments shall be
 9 reviewed and adjusted, as appropriate, to reflect the actual
 10 capital and OM&R costs for the Yellowtail Unit.

11 (ii) Agricultural, Domestic, Livestock, and Other Uses.

12 For each acre-foot of stored water used or sold for other
 13 than M&I purposes, the Tribe shall pay annually to the
 14 United States an amount to cover the OM&R costs for the
 15 Yellowtail Unit allocable to the Tribe's stored water, which
 16 amount shall be reviewed and adjusted, as appropriate, to
 17 reflect the actual OM&R costs for the Yellowtail Unit. The
 18 Bureau of Indian Affairs shall transfer sufficient funds on
 19 a nonreimbursable basis to the Bureau of Reclamation to
 20 cover allocable OM&R costs under this subsection.

21 (c) Rates and Revenues. Except for payments required to
 22 be made to the United States as set forth above, the Tribe
 23 shall set such rates as it considers proper for its use or
 24 sale of stored water and shall retain all revenues from its
 25 use or sale of the stored water, provided that the United

1 States reserves the right to use any and all water stored in
 2 Yellowtail Reservoir for hydropower generation.

3 (d) Agreement. Following ratification of this Compact
 4 and upon development of a demand for the water under this
 5 section, the United States and the Tribe shall enter into an
 6 appropriate agreement, if required, setting forth the terms
 7 and conditions under which water will be made available to
 8 the Tribe, and for the collection and disposition of
 9 revenues in connection therewith.

10 B. Persons Entitled to Use Tribal Water Right. The
 11 Tribal Water Right may be used by the Tribe or persons
 12 authorized to use water by the Tribe pursuant to Article
 13 III, provided that:

14 (1) the use is in accordance with the terms of this
 15 Compact;

16 (2) the Tribe shall give preference to Tribal members
 17 to use the Tribal Water Right; and

18 (3) the Tribal Water Right may be transferred from one
 19 Tribal member to another Tribal member, for agricultural
 20 purposes only, upon the transfer of land on the Reservation
 21 from one Tribal member to another Tribal member.

22 C. Place of Use of Tribal Water Right. Pursuant to a
 23 Tribal water code adopted as prescribed in Article III and
 24 subject to all other provisions of this Compact, the Tribe
 25 has the right to use or to permit the use of the Tribal

1 Water Right with any point of diversion or any place of use
 2 on or off the Reservation; provided, however, that any use
 3 of the Tribal Water Right off the Reservation shall not be
 4 considered to convert the Tribal Water Right to a state
 5 water right, and subsequent nonuse of the Tribal Water Right
 6 off the Reservation shall not constitute a relinquishment,
 7 forfeiture, or abandonment of the Right.

8 D. Purposes of Tribal Water Right. Except as provided
 9 in section A(3)(a), the Tribe may authorize use of the
 10 Tribal Water Right on the Reservation for any purpose
 11 without regard to whether the use is beneficial as defined
 12 by state law. Off the Reservation, any use of the Tribal
 13 Water Right shall comply with Article III, section B.

14 E. Conditions Upon Uses of Tribal Water Right. The
 15 Tribe shall adopt appropriate regulations to ensure that use
 16 of the Tribal Water Right is not wasteful and does not
 17 degrade water quality.

18 F. Transfer of Tribal Water Right. The Tribe shall not
 19 transfer water naturally arising in Rosebud Creek or its
 20 tributaries for use off the Reservation. The Tribe may
 21 transfer any other part of the Tribal Water Right for use on
 22 or off the Reservation pursuant to the terms of this
 23 Compact. This subsection does not affect the right of the
 24 Tribe to enter into a deferral agreement regarding Rosebud
 25 Creek water pursuant to section G.

1 G. Deferral Agreements. After the ratification date,
 2 the Tribe may enter into an agreement with any person who is
 3 exercising or proposing to exercise a right under state law
 4 to use surface water off the Reservation, which agreement
 5 protects the person's right from any exercise of the Tribal
 6 Water Right; provided, however, that:

7 (1) before using the water, the person has complied
 8 with all applicable state laws concerning the acquisition of
 9 a water right;

10 (2) subsequent to acquisition of the state water right,
 11 regulation of its use shall be subject to state law;

12 (3) the amount of water subject to the agreement shall
 13 be deducted from the amount of water available for depletion
 14 by the Tribe in the basin from which the water is being
 15 diverted; and

16 (4) the agreement shall not permanently alienate the
 17 Tribal Water Right or any part thereof.

18 H. Effect of Nonuse of Tribal Water Right. Nonuse of
 19 any part of the Tribal Water Right shall not constitute a
 20 relinquishment, forfeiture, or abandonment of the right.

21 I. Tribal Water Right to Be Held in Trust. The Tribal
 22 Water Right must be held in trust by the United States for
 23 the benefit of the Tribe.

24 ARTICLE III

25 ADMINISTRATION OF WATER RIGHTS

1 A. Tribal Administration.

2 (1) Except as otherwise provided in this Compact, the
3 use of the Tribal Water Right shall be administered by the
4 Tribe and the Tribe has the final and exclusive jurisdiction
5 to resolve all disputes between users of the Tribal Water
6 Right. Administration and enforcement of the Tribal Water
7 Right shall be pursuant to a water code, which shall be
8 developed and adopted by the Tribe and submitted for
9 approval to the Secretary of the Interior within 1 year
10 after ratification of this Compact. Pending the adoption and
11 approval of the Tribal water code, the administration and
12 enforcement of the Tribal Water Right must be by the
13 Secretary of the Interior.

14 (2) Within 6 months after the Tribal water code takes
15 effect, the Tribe shall provide the State with notice of
16 each use of the Tribal Water Right, including uses in
17 existence as of the ratification date and those established
18 since that time, which must include:

19 (a) the name of the person authorized to make the
20 diversion;

21 (b) the amount of water authorized to be diverted
22 annually;

23 (c) the amount of water authorized for annual
24 consumption;

25 (d) the point of diversion;

1 (e) the period of use;

2 (f) the place of use;

3 (g) the uses for which the water may be diverted; and

4 (h) the relative priority of the use as against other
5 uses of the Tribal Water Right.

6 (3) The Tribe shall thereafter notify the State, within
7 60 days after the end of each quarter year, of all new uses
8 of surface and ground water authorized by the Tribe during
9 the preceding quarter year and of all new uses of the Tribal
10 Water Right actually commenced during that quarter year. The
11 notice must be in the same format as that prescribed in
12 section A(2).

13 (4) The Tribe shall provide the State with not less
14 than 180 days' written notice prior to the start of
15 construction of any project to divert any portion of the
16 Tribal Water Right from the Big Horn River or the Big Horn
17 Reservoir for use on the Reservation, or from the Tongue-
18 River or the Tongue River Reservoir for use on the
19 Reservation in the Rosebud Creek basin. The notice must
20 describe any diversion, conveyance, and storage facilities,
21 the amounts of water to be diverted and consumed, and the
22 purpose, place, and period of the proposed use. Diversion or
23 use of water from a project may be made only after all
24 permits, certificates, variances, or other authorizations
25 described in section B(3) have been obtained. With respect

1 to any such project or diversion, the State or any affected
2 person may seek such remedies as may be available under
3 federal, state, or tribal law, and nothing in this Compact
4 shall be construed to affect the rights of any party under
5 such law.

6 B. Off-Reservation Uses of Tribal Water Right.

7 (1) Off-Reservation Uses. Any use of the Tribal Water
8 Right involving a point of diversion or place of use located
9 off the Reservation must be considered an off-reservation
10 use, provided that releases or diversions from Big Horn
11 Reservoir or Tongue River Reservoir for use on the
12 Reservation shall not be considered off-reservation uses.

13 (2) Subsequent Federal or State Law. All
14 off-reservation uses of the Tribal Water Right shall comply
15 with the requirements set forth in this section until such
16 time as the statutory or common law of the United States or
17 the State establishes that off-reservation uses of Indian
18 water rights may occur without regard to state law.

19 (3) Diversion Facilities. With respect to diversion
20 or transportation facilities located off the Reservation,
21 the Tribe or persons using the Tribal Water Right shall
22 apply for all permits, certificates, variances, and other
23 authorizations required by state law that regulate,
24 condition, or permit the siting, construction, operation,
25 alteration, or use of any equipment, device, or associated

1 facility proposed to use or transport water. A diversion or
2 use of water in the exercise of the Tribal Water Right may
3 be made only after all permits, certificates, variances, or
4 other authorizations applied for pursuant to this subsection
5 have been obtained.

6 (4) Off-Reservation Uses in Tongue River and Rosebud
7 Creek Basins.

8 (a) The Tribe shall provide the State with not less
9 than 180 days' advance written notice of any off-reservation
10 use, transfer, or change of use of the Tribal Water Right:

- 11 (i) within the Tongue River basin; or
- 12 (ii) using Tongue River water off-reservation in the
13 Rosebud Creek basin.

14 (b) The notice must include sufficient documentation to
15 demonstrate that:

- 16 (i) the proposed use of water is a beneficial use as
17 defined by Montana law in effect at that time;
- 18 (ii) the proposed means of diversion and the
19 construction and operation of the diversion works are
20 adequate;
- 21 (iii) the proposed use, transfer, or change of use will
22 not adversely affect, except with the consent of the owner
23 of such right:

- 24 (A) any water right arising under the laws of the
25 United States; or

1 (B) any right to the use of water established pursuant
 2 to the laws of the State, except that if the portion of the
 3 Tribal Water Right that is the subject of the proposed
 4 off-reservation use, transfer, or change of use is the
 5 storage and exchange right set forth in Article II, section
 6 A(2)(b), the Tribe need only demonstrate that Miles City
 7 decree water rights will not be adversely affected by such
 8 use, transfer, or change of use.

9 (iv) the proposed use, transfer, or change of use will
 10 not cause any unreasonable significant adverse environmental
 11 impact; and

12 (v) proposed uses, transfers, or changes in use in
 13 excess of 4,000 acre-feet per year and 5.5 cubic feet per
 14 second of water will not:

15 (A) substantially impair the quality of water for
 16 existing uses in the source of water from which the
 17 diversion is made;

18 (B) be made where low quality water that can
 19 economically be used is legally and physically available to
 20 the Tribe for the proposed use;

21 (C) create or substantially contribute to saline seep;
 22 or

23 (D) substantially injure fish or wildlife populations
 24 that use the source of water from which the diversion is
 25 made.

1 (c) A proposed use, transfer, or change of use of the
 2 Tribal Water Right pursuant to section B(4)(b) may be
 3 challenged:

4 (i) within 30 days after the expiration of the notice
 5 period provided in section B(4)(a);

6 (ii) in a court of competent jurisdiction; and

7 (iii) by the State or by a person whose rights are
 8 adversely affected by the proposed use, transfer, or change
 9 of use.

10 In a challenge to a proposed use, transfer, or change of
 11 use of the Tribal Water Right, the Tribe has the burden of
 12 proving by a preponderance of the evidence that it has
 13 satisfied the requirements of section B(4)(b). A Tribal
 14 notice that conforms to the requirements of section B(4)(b)
 15 is prima facie evidence of its contents.

16 (5) Off-Reservation Uses Outside Tongue River and
 17 Rosebud Creek Basins. Except as provided in section B(4), no
 18 person may initiate an off-reservation use, transfer, or
 19 change of use of the Tribal Water Right without first
 20 applying for and receiving authorization for the use,
 21 transfer, or change of use pursuant to Montana law in effect
 22 at the time of the application.

23 C. State Administration.

24 (1) The State shall administer all rights to the use of
 25 surface water and ground water within the Reservation that

1 are not a part of the Tribal Water Right. The State has the
2 final and exclusive jurisdiction to resolve all disputes
3 between users of water rights established under state law.

4 (2) Within 1 year after the ratification date, the
5 State shall notify the Tribe of all existing uses of surface
6 and ground water for which a permit has been issued by the
7 State in the Tongue River basin or Rosebud Creek basin. The
8 notice must state:

9 (a) the name of the person authorized to make the
10 diversion;

11 (b) the amount of water authorized to be diverted
12 annually;

13 (c) the amount of water authorized for annual
14 consumption;

15 (d) the point of diversion;

16 (e) the period of use;

17 (f) the place of use;

18 (g) the uses for which the water may be diverted; and

19 (h) the priority date of the use.

20 (3) The State shall notify the Tribe within 60 days
21 after the end of each quarter year of all new uses of
22 surface and ground water for which a permit has been issued
23 by the State in the Tongue River basin or Rosebud Creek
24 basin during the preceding quarter year and of all new uses
25 of water actually commenced pursuant to the laws of the

1 State during that quarter year on each of these sources. The
2 notice must be in the same format as that prescribed in
3 section C(2).

4 D. Operation of Tongue River Reservoir.

5 (1) To provide for Tongue River Reservoir operation
6 procedures that are consistent with the purposes of this
7 Compact, a reservoir operation plan shall be developed by a
8 five-member advisory committee. The committee shall have one
9 representative each from the State, the Tongue River Water
10 Users Association, the Northern Cheyenne Tribe, and the
11 United States, and a fifth member to be selected by the
12 other four. The advisory committee shall annually agree upon
13 a reservoir operation schedule setting forth proposed uses
14 of storage and direct flow for the year. The Department of
15 Natural Resources and Conservation or its successor shall
16 thereupon be responsible, consistent with the terms of this
17 Compact and other applicable law, for the daily operation of
18 the Reservoir and for implementation of the reservoir
19 operation plan.

20 (2) The reservoir operation plan shall provide for the
21 operation of the project for fish and wildlife purposes
22 depending on the availability of water on an annual basis.
23 This provision shall not create an operational preference
24 for fish and wildlife purposes relative to other project
25 purposes.

1 (3) The Secretary of the Interior shall pay annually to
 2 the State an amount to cover the proportionate share of the
 3 annual OM&R costs for the Tongue River Dam that are
 4 allocable to the Tribe's stored water in the Reservoir.

5 ARTICLE IV

6 NORTHERN CHEYENNE-MONTANA COMPACT BOARD

7 A. Establishment of Board. There is hereby established
 8 the Northern Cheyenne-Montana Compact Board. The Board
 9 consists of three members, including one member appointed by
 10 the Governor, one member appointed by the Northern Cheyenne
 11 Tribal Council, and one member selected by the other two
 12 members. All members must be appointed within 6 months of
 13 the ratification date and within 30 days of the date any
 14 vacancy occurs. Each member shall serve a 5-year term and is
 15 eligible for reappointment. The initial term of each member
 16 must be staggered, with one member serving a 5-year term,
 17 one a 4-year term, and one a 3-year term. The initial term
 18 of each member shall be chosen by lot. Expenses of the
 19 members appointed by the State and Tribe shall be borne by
 20 the entity appointing the member. The expenses of the third
 21 member and all other expenses shall be borne equally by the
 22 Tribe and the State, subject to the availability of funds.

23 B. Membership. Should the two appointed members fail to
 24 agree on the selection of a third member within 60 days of
 25 the ratification date or within 30 days after any vacancy

1 occurs, the following procedure shall be used to select the
 2 third member:

3 (1) Within 5 days, each member shall nominate three
 4 persons to serve as a member of the Board.

5 (2) Within 15 days thereafter, each member shall reject
 6 two of the persons nominated by the other member.

7 (3) The Chief Judge of the United States District Court
 8 for the District of Montana shall select the third member of
 9 the Board from the remaining two nominees. If the Chief
 10 Judge declines for any reason to select the third member,
 11 the Chief Justice of the Montana Supreme Court shall make
 12 the selection from the remaining two nominees.

13 C. Quorum and Vote Required. Two members of the Board
 14 constitute a quorum if reasonable notice has been provided
 15 in advance to the absent member. All Board decisions must be
 16 by a majority of the Board, must be in writing, and,
 17 together with any dissenting opinions, must be served on all
 18 parties in the proceeding before the Board and on the
 19 parties to this Compact.

20 D. Jurisdiction of Board. The Northern Cheyenne-Montana
 21 Compact Board has jurisdiction to resolve controversies over
 22 the right to the use of water between users of the Tribal
 23 Water Right on the one hand and users of state water rights
 24 on the other hand. Such controversies may include, but not
 25 be limited to, disputes as to the meaning of this Compact

1 and disputes concerning the operation of the Tongue River
2 Reservoir as it affects the Tribal Water Right.

3 E. Powers and Duties. The Board shall, upon notice,
4 hold hearings on proceedings before it and shall have the
5 power to administer oaths, take evidence, and issue
6 subpoenas to compel attendance of witnesses or production of
7 documents or other evidence. The Tribe, the State, and the
8 United States shall enforce the Board's subpoenas in the
9 same manner as prescribed by the laws of the Tribe, the
10 State, or the United States for enforcing a subpoena issued
11 by a court in a civil action. The parties to the controversy
12 may present evidence and cross-examine any witnesses. The
13 Board shall determine the controversy based on the evidence
14 and grant any appropriate relief, except money damages. All
15 decisions of the Board must be by majority and in writing.
16 The Board shall adopt necessary rules and regulations to
17 carry out its responsibilities within 6 months after its
18 first meeting. All records of the Board are open to public
19 inspection except for privileged information.

20 F. Review and Enforcement of Board Decisions.

21 (1) Decisions by the Board are effective immediately
22 unless stayed for a period of time prescribed by the Board.
23 Any party before the Board may appeal a final decision by
24 the Board to a court of competent jurisdiction within 30
25 days of the decision. The notice of appeal must be filed

1 with the Board and served personally or by certified mail
2 upon the Tribe, the State, the United States, and all
3 parties to the proceeding before the Board, and all such
4 persons have the right to participate in the appeal.

5 (2) In any appeal, the Board's decision is presumed to
6 be valid and may be vacated by the court only on one of the
7 following grounds:

8 (a) the decision is not supported by substantial
9 evidence;

10 (b) the decision was procured by corruption, fraud, or
11 undue means;

12 (c) there was evident partiality or corruption by the
13 Board or by any member of the Board;

14 (d) the Board was guilty of misconduct in refusing to
15 hear the dispute or in refusing to hear evidence pertinent
16 and material to the controversy or was guilty of any other
17 clear misbehavior by which the rights of any party have been
18 substantially prejudiced;

19 (e) the Board exceeded its authority under the terms of
20 this Compact; or

21 (f) the decision is contrary to law.

22 (3) Unless an appeal is timely filed as provided in
23 subsection (1), any decision of the Board may be confirmed
24 or enforced by any court of competent jurisdiction on
25 petition of the Board, the Tribe, the State, the United

1 States, or any party before the Board in the proceeding in
2 which the decision was made.

3 (4) A court of competent jurisdiction in which a timely
4 appeal is filed pursuant to subsection (1) or in which a
5 petition to confirm or enforce is filed pursuant to
6 subsection (3) may order such temporary or permanent relief
7 as it considers just and proper.

8 (5) Any appeal may be taken from any decision of the
9 court in which a timely appeal is filed pursuant to
10 subsection (1) or in which a petition to confirm or enforce
11 is filed pursuant to subsection (3) in the manner and to the
12 same extent as from orders or judgments of the court in a
13 civil action.

14 (6) In any appeal or petition to confirm or enforce the
15 Board's decision, the Board shall file with the court the
16 record of the proceedings before the Board.

17 G. Waiver of Immunity. The Tribe, the State, and the
18 United States hereby waive their respective immunities from
19 suit, including any defense the State has under the Eleventh
20 Amendment of the Constitution of the United States, in order
21 to permit the resolution of disputes under this Compact by
22 the Northern Cheyenne-Montana Compact Board and the appeal
23 or judicial enforcement of Board decisions as provided in
24 this Compact, except that such waivers of sovereign immunity
25 by the Tribe, the State, or the United States shall not

1 extend to any action for money damages including costs and
2 attorney fees.

3 ARTICLE V

4 FINALITY AND EFFECTIVENESS OF COMPACT

5 A. Ratification and Effectiveness of Compact.

6 (1) Upon ratification by the Northern Cheyenne Tribal
7 Council and the Legislature of the State of Montana, the
8 terms of this Compact may not be altered, voided, or
9 modified in any respect without the consent of the parties;
10 provided, however, that except as provided in section A(2),
11 this Compact shall not become effective until it is ratified
12 by the United States Congress and until the completion date
13 occurs, notwithstanding the provisions of 85-2-702(2). If
14 the completion date does not occur on or before December 31,
15 1997, or any later date agreed to in writing by the parties,
16 this Compact, including all provisions that become effective
17 on the ratification date, shall become null and void without
18 further action by any party. Notwithstanding the provisions
19 of 85-2-702(3), this Compact shall not be included in any
20 preliminary decree or final decree in any State water court
21 proceeding unless and until this Compact becomes effective
22 as set forth in this Article.

23 (2) As between the State and the Tribe, the provisions
24 of this Compact shall become effective upon the ratification
25 date except insofar as they:

1 (a) quantify or provide for the administration of the
2 Tongue River Tribal Water Right;

3 (b) provide for the management or operation of the
4 Tongue River Reservoir; or

5 (c) require Congressional authorization.

6 (3) All of the provisions that do not become effective
7 upon the ratification date become effective on the
8 completion date unless Congress provides otherwise.

9 B. Incorporation Into Decrees and Disposition of
10 Federal Suits. Within 60 days after the completion date, the
11 parties shall petition for incorporation of this Compact
12 into a decree in any appropriate State court proceeding
13 commenced in accordance with 43 U.S.C. 666. Upon the
14 issuance of a final decree by the State water court or its
15 successor and the completion of any direct appeals
16 therefrom, or upon the expiration of the time for filing any
17 such appeal, the Tribe, the State, and the United States
18 shall within 30 days execute and file joint motions pursuant
19 to Rule 41(a), Fed.R.Civ.P., to dismiss with prejudice the
20 Tribe's claims and any claims made by the United States as
21 trustee for the Tribe in Northern Cheyenne Tribe of the
22 Northern Cheyenne Reservation v. Adsit, et al., No. 75-6 BLG
23 (D. Mont.); United States v. Big Horn Low Line Canal
24 Company, et al., No. 75-34 BLG (D. Mont.); and United States
25 v. Tongue River Water Users Association, et al., No. 75-20

1 BLG (D. Mont.), hereinafter collectively referred to as the
2 federal suits. This Compact may be filed as a consent decree
3 in the federal suits only if, prior to the dismissal of the
4 federal suits as provided in this Article, it is finally
5 determined in a judgment binding upon the State that the
6 State courts lack jurisdiction over or that the State court
7 proceedings are inadequate to adjudicate some or all of the
8 water rights asserted in the federal suits.

9 ARTICLE VI

10 GENERAL PROVISIONS

11 A. Nothing in this Compact may be construed or
12 interpreted:

13 (1) to establish the nature, extent, or manner of
14 administration of water rights of any Indian reservation or
15 other federal reservation other than the Northern Cheyenne
16 Reservation;

17 (2) to preclude the acquisition or exercise of a right
18 to the use of water by the Tribe or any individual Indian
19 outside the Reservation by purchase of such right, by
20 acquisition of land, or by application to the State;

21 (3) to preclude the acquisition or exercise of an
22 appropriative right to the use of water under state law by
23 the Tribe or any individual Indian within the Reservation:

24 (a) by purchase of such right or by purchase of land,
25 provided that water rights acquired by such purchase after

1 the ratification date are in addition to and become part of
 2 the Tribal Water Right and shall be governed by this
 3 Compact; or

4 (b) by application to the State. Except for
 5 applications for nonalluvial ground water pursuant to
 6 Article II, section A(4)(b), and applications for storage
 7 appropriations authorized by section A(8) of this Article,
 8 any such application may not be granted by the State until
 9 the tribal water right in the basin where the diversion that
 10 is the subject of the application is located has been fully
 11 used.

12 (4) to determine the relative rights inter sese of
 13 persons using water under the authority of the State or the
 14 Tribe;

15 (5) to limit in any way the rights of the parties or
 16 any other person to litigate any issues or questions not
 17 resolved by this Compact;

18 (6) to authorize the taking of a water right that is
 19 vested under state or federal law;

20 (7) to create or deny substantive rights through
 21 headings or captions used in this Compact;

22 (8) to preclude or to discourage the Tribe from
 23 establishing the right to or contracting for water from any
 24 further enlargements of the Tongue River Dam or from any
 25 future storage facilities that may be built within the

1 Rosebud Creek basin or Tongue River basin or in any other
 2 water basins;

3 (9) to address or prejudge whether, in any interstate
 4 apportionment, the Tribe's water right may be counted as
 5 part of the waters apportioned to the State;

6 (10) to alter or amend any provisions of the Yellowstone
 7 River Compact; or

8 (11) to prohibit the Tribe or the United States from
 9 challenging any claims to water in any general adjudication
 10 of the Tongue River basin or Rosebud Creek basin.

11 B. The parties expressly reserve all rights not
 12 granted, recognized, or relinquished in this Compact.

13 C. The Secretary of the Interior shall comply with all
 14 aspects of the National Environmental Policy Act, 42 U.S.C.
 15 4331 through 4335, and the Endangered Species Act, 16 U.S.C.
 16 1531, et seq., and other applicable environmental Acts and
 17 regulations in implementing this Compact.

ARTICLE VII

TRIBAL RELINQUISHMENT OF OTHER WATER CLAIMS

20 A. With the exception of the Tribe's claim to
 21 nonalluvial ground water in section B and any rights to
 22 water that may exist with respect to land held by the Tribe
 23 or a Tribal member outside the present Reservation, the
 24 Tribe and the United States as trustee for the Tribe hereby
 25 relinquish forever all claims in existence on the

1 ratification date to water within the State. The
 2 relinquishment includes but is not limited to any claim for
 3 water derived from aboriginal use of land or water, any
 4 Indian treaties, any Act of Congress, and any executive act
 5 of the United States.

6 B. The parties intend that the water right as confirmed
 7 to the Tribe in Article II is in full satisfaction of its
 8 federal reserved water right based on Winters v. United
 9 States, 207 U.S. 564 (1908). Notwithstanding the provisions
 10 of section A, the Tribe retains the right to assert a claim
 11 that it has a right, not based on the federal reserved water
 12 rights doctrine, to the use of any nonalluvial ground water
 13 underlying the Reservation. In any such action, the Tribe is
 14 estopped from asserting that its right to nonalluvial ground
 15 water is a federal reserved water right, or that the Tribal
 16 Water Right confirmed in Article II is inadequate to satisfy
 17 the purposes for which the Reservation was created, or from
 18 collaterally attacking this Compact in any manner. Any right
 19 to nonalluvial ground water established by the Tribe under
 20 this section is not subject to this Compact. Nothing in this
 21 Compact may be construed to waive any defenses of the State
 22 or any water user to a Tribal claim for nonalluvial ground
 23 water.

24 **ARTICLE VIII**
 25 **BINDING EFFECT**

1 Upon the effectiveness of any provision of this Compact,
 2 its terms will be binding:

3 (1) upon the State and any person or entity of any
 4 nature whatsoever using, claiming, or in any manner
 5 asserting any right under the authority of the State to the
 6 use of water in the State, provided that for purposes of
 7 consent, ratification, or authorization, the validity of
 8 consent, ratification, or authorization is to be determined
 9 by Montana law;

10 (2) upon the Tribe and any person or entity of any
 11 nature whatsoever using, claiming, or in any manner
 12 asserting any right to the use of the Tribe's water right,
 13 any right arising under any doctrine of reserved or
 14 aboriginal water rights for the Tribe, or any right arising
 15 under tribal law, provided that for purposes of consent,
 16 ratification, or authorization, the validity of consent,
 17 ratification, or authorization is to be determined by tribal
 18 law; and

19 (3) upon the United States and any person or entity of
 20 any nature whatsoever using, claiming, or in any manner
 21 asserting any right under the authority of the United States
 22 to the use of water in the State, provided that for purposes
 23 of consent, ratification, or authorization, the validity of
 24 consent, ratification, or authorization is to be determined
 25 by federal law.

1 **ARTICLE IX**

2 **CONTRIBUTIONS TO SETTLEMENT**

3 A. The United States agrees to provide \$31,500,000 to
4 repair the Tongue River Dam and spillway, to raise the
5 Tongue River Dam spillway crest to secure the Tribe's
6 existing contract water under Article II, section A(2)(e),
7 and to provide additional storage capacity to secure the
8 Tribe's storage and exchange water right under Article II,
9 section A(2)(b).

10 B. The State agrees to provide \$16,500,000 to repair
11 the Tongue River Dam and spillway with the understanding
12 that the State's portion will be paid through a combination
13 of cash and federal loans in proportions to be agreed upon
14 by the parties.

15 C. The provisions of this Article are subject to the
16 separate Letter of Agreement dated April 17, 1991, between
17 the State and the United States explaining in detail the
18 allocation of the costs of the project. The State and the
19 United States shall enter into a further agreement providing
20 for the expenditure of the contributions and loans of the
21 United States under this Article.

22 D. The United States agrees to provide \$10 million for
23 a tribal development fund, payable in equal amounts of \$2
24 million each fiscal year for 5 years. These funds shall not
25 be distributed on a per capita basis to members of the Tribe

1 and shall be used only for land and natural resources
2 administration, planning, and development within the
3 Northern Cheyenne Reservation or for land acquisition by the
4 Tribe within the Northern Cheyenne Reservation.

5 E. Federal financial contributions to section A must be
6 budgeted for, subject to the availability of funds, by
7 October 1 of the year following the ratification of this
8 Compact by Congress and the authorization by Congress of
9 the Tongue River Dam project. Federal financial
10 contributions to section D will be budgeted for, subject to
11 the availability of funds, by October 1 of the second year
12 following the ratification of this Compact by Congress and
13 the authorization by Congress of the Tongue River Dam
14 project.

15 F. The Tribe and the United States agree to pursue,
16 through the normal Bureau of Indian Affairs and Department
17 of the Interior budget process, such additional sums as are
18 necessary to implement the terms of this Compact, to develop
19 a Tribal water code, and to provide increased agricultural
20 development on the Reservation. The State agrees to support
21 the efforts of the Tribe and the United States in this
22 regard.

23 **ARTICLE X**

24 **LEGISLATION**

25 The parties agree to seek enactment of any legislation

1 necessary to effectuate the provisions and purposes of this
2 Compact and to defend the provisions and purposes of this
3 Compact from all challenges and attacks, provided that no
4 provision of the Compact may be modified as to substance
5 except as may be provided herein.

6 IN WITNESS WHEREOF the representatives of the State of
7 Montana, the Northern Cheyenne Tribe, and the United States
8 have signed this Compact on the ____ day of
9 _____, 19__.

10 For the Northern Cheyenne Tribe

11 _____

12 For the State of Montana

13 Reserved Water Rights Compact Commission

14 _____

15 _____

16 _____

17 _____

18 _____

19 _____

20 _____

21 _____

22 _____

23 APPROVED:

24 For the Secretary of the Interior

25 _____

1 For the United States Attorney General

2 _____

3 NEW SECTION. Section 2. Effective date. [This act] is
4 effective on passage and approval.

-End-

SENATE BILL NO. 472

INTRODUCED BY MAZUREK, CRIPPEN, WATERMAN, M. HANSON,

STICKNEY, SVRCEK, YELLOWTAIL, WEEDING, DEVLIN,

BRADLEY, ZOOK, MCCAFFREE

A BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT ENTERED INTO BY THE STATE OF MONTANA AND THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE RESERVATION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

(Refer to Second Reading Copy)

Strike everything after the enacting clause and insert:

NEW SECTION. Section 1. Northern Cheyenne-Montana compact ratified. The compact entered into by the state of Montana and the Northern Cheyenne tribe of the Northern Cheyenne Indian reservation and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing] is ratified. The compact is as follows:

WATER RIGHTS COMPACT

STATE OF MONTANA

NORTHERN CHEYENNE TRIBE

UNITED STATES OF AMERICA

This Compact is entered into by and among the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, the State of Montana, and the United States of America to settle, for all time,

any and all existing claims of or on behalf of the Northern Cheyenne Tribe to water within the State of Montana.

RECITALS

WHEREAS, in 1975, the Northern Cheyenne Tribe and the United States, on behalf of the Tribe, brought suits in the United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights;

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Northern Cheyenne water rights;

WHEREAS, the federal district court suits were stayed in 1983 pending the outcome of Montana State court water adjudication proceedings;

WHEREAS, the adjudication of Northern Cheyenne water rights under state law has been suspended while negotiations have proceeded to conclude a compact resolving all reserved water rights claims of the Northern Cheyenne Tribe;

WHEREAS, the Northern Cheyenne Tribe and the United States agree that the Tribal Water Right described in this Compact shall be in satisfaction of the Tribe's reserved water rights claims and any claims to water rights made on behalf of the Tribe by the United States;

WHEREAS, it is in the best interest of all parties that the reserved water rights claims of the Northern Cheyenne Tribe be settled through a Water Rights Compact;

WHEREAS, the parties agree that settlement of the reserved

1 water rights claims of the Northern Cheyenne Tribe is dependent on
2 the repair and enlargement of the Tongue River Reservoir;

3 NOW THEREFORE, the parties agree as follows:

4 **Article I**

5 **Definitions**

6 The following definitions shall apply for purposes of this
7 Compact:

- 8 1. "Acre-foot" means the amount of water necessary to cover one
9 acre to a depth of one foot and is equivalent to 43,560 cubic
10 feet.
- 11 2. "Alluvial groundwater" means water located below the land
12 surface within the Quaternary hydrostratigraphic unit that
13 borders or underlies major perennial and intermittent streams
14 in the Tongue River and Rosebud Creek basins. This unit is
15 composed of unconsolidated alluvial deposits of clay, silt,
16 sand, and gravel. For the purposes of this Compact, all other
17 water below the land surface will be deemed nonalluvial
18 groundwater.
- 19 3. "Annual" or "per year" means during one year as defined by
20 this Compact.
- 21 4. "Board" means the Northern Cheyenne-Montana Compact Board
22 established by Article IV of this Compact.
- 23 5. "Completion date" means the date of completion of a project to
24 repair and enlarge the Tongue River Dam to a degree sufficient
25 to provide the storage component of the Tribal Water Right
26 subject to the conditions provided in this Compact.

- 1 6. "Depletion" means, for any diversion of water, the difference
2 between the quantity of water diverted and the quantity of
3 return flows within the basin.
- 4 7. "Direct flow of the Tongue River" means the water in the
5 Tongue River and its tributaries that has not been stored in
6 the Tongue River Reservoir.
- 7 8. "Domestic use" means the diversion of water by one or more
8 individuals, family units or households for drinking, cooking,
9 laundering, sanitation and other personal comforts and
10 necessities; and for the irrigation of a family garden or
11 orchard not exceeding one-half acre in area.
- 12 9. "Excess water" means increases in the Tongue River basin water
13 supply resulting from conditions different from those assumed
14 in the Tongue River Water Model.
- 15 10. "Exchange water" means water available to the Tribe from the
16 Tongue River direct flow or from the Tongue River Reservoir
17 storage in exchange for Tribal return flows made available to
18 other Tongue River water users.
- 19 11. "Indian" means any person who: a) is an enrolled member of
20 the Northern Cheyenne Tribe; or b) is a member of a tribe that
21 is recognized as eligible for the special programs and
22 services provided by the United States to Indians because of
23 their status as Indians; or c) holds, or is recognized by the
24 Secretary of the Interior as eligible to hold, trust and
25 restricted property on the Northern Cheyenne Reservation.
- 26 12. "Manifolded well system" means a water distribution or

- 1 conveyance facility that is supplied by two or more wells.
- 2 13. "Miles City Decree water right" means a water right, finally
3 decreed in any general adjudication of the Tongue River, or
4 recognized under state law until such final adjudication,
5 which is based on the decree entered in Miles City Canal &
6 Irrigating Co. v. Lee, et al., Montana Seventh Judicial
7 District, No. 2809, May 20, 1914, and which has a priority
8 date of March 24, 1909, or earlier.
- 9 14. "Parties" means the Tribe, the State of Montana, and the
10 United States.
- 11 15. "Person" means an individual or any other entity, public or
12 private, including the State, the Tribe, and the government of
13 the United States and all officers, agents, and departments
14 thereof.
- 15 16. "Ratification date" means the date this Compact has been
16 approved by the Northern Cheyenne Tribal Council and the
17 Legislature of the State of Montana.
- 18 17. "Reservation" means the Northern Cheyenne Reservation as
19 established by Executive Orders of November 26, 1884 and March
20 19, 1900.
- 21 18. "State" means the State of Montana and all officers, agents,
22 departments, and political subdivisions thereof. Unless
23 otherwise indicated, for purposes of notification or consent,
24 "State" means the Director of the State Department of Natural
25 Resources and Conservation or its successor agency.
- 26 19. "State contract right" means a right to receive stored water

- 1 from the Tongue River Reservoir, not to exceed a cumulative
2 total of 40,000 acre-feet per year, pursuant to a contract
3 that allocates the storage rights of the Montana Department of
4 Natural Resources and Conservation or its successor agency.
- 5 20. "Tongue River Water Model" means the Tongue River Reservoir
6 Operations computer model that is documented in: Tongue River
7 Modeling Study. Final Report, submitted on July 20, 1990, to
8 the Engineering Bureau of the Water Resources Division of the
9 Montana Department of Natural Resources and Conservation, or
10 any revision agreed to by the parties. The Final Report and
11 any agreed revisions are incorporated herein by reference as
12 though set forth in full.
- 13 21. "Transfer" means any authorization for the delivery or use of
14 water from the Tribe or any person authorized by the Tribe to
15 any other person by a service contract, lease, sale, exchange
16 or other similar agreement.
- 17 22. "Tribal Water Right" means the right to divert or use water as
18 described by Articles II and III of this Compact.
- 19 23. "Tribe" means the Northern Cheyenne Tribe of the Northern
20 Cheyenne Reservation and all officers, agents and departments
21 thereof. Unless otherwise indicated, for purposes of
22 notification or consent, "Tribe" means the Tribal President or
23 the Chief Executive Official of the Tribe.
- 24 24. "United States" means the federal government and all officers,
25 agencies, departments and political subdivisions thereof.
26 Unless otherwise indicated, for purposes of notification or

1 consent, "United States" means the Secretary of the Department
2 of the Interior.

3 25. "Year" means the twelve-month period beginning April 1st and
4 ending March 31st.

5 Article II

6 Tribal Water Right

7 A. Quantification of Water Right.

8 The water rights of the Northern Cheyenne Tribe are as
9 follows:

10 1. Existing Non-Agricultural Uses.

11 Tribal and individual Indian stockwater, domestic and
12 municipal water uses on the Reservation and in existence
13 as of the ratification date are hereby recognized and
14 protected as part of the Tribal Water Right, and are in
15 addition to the water rights set forth in Sections A.2.,
16 A.3., and A.4. of this Article. All such existing uses
17 shall be governed by the terms of this Compact.

18 2. Tongue River.

19 Subject to the terms of this Compact, the Tribal Water
20 Right in the Tongue River basin consists of the right to
21 divert or use or to permit the diversion or use of up to
22 32,500 acre-feet per year, from a combination of direct
23 flow, storage, and exchange water. Tribal and individual
24 Indian irrigation uses in existence on the Reservation in
25 the Tongue River basin as of the ratification date are
26 recognized and protected, and shall be counted as a use

1 of the 32,500 acre-feet per year right described in
2 Section A.2. of this Article.

3 a. Direct Flow Right. The Tribe has a right to divert
4 or use or permit the diversion or use of up to
5 12,500 acre-feet of water per year from direct flow
6 of the Tongue River and its tributaries with a
7 priority date of October 1, 1881; provided, that:

8 i. The Tribe's annual depletion of its direct
9 flow water right in the Tongue River and its
10 tributaries shall not exceed 75 percent of the
11 amount diverted, or 9,375 acre-feet per year;
12 and

13 ii. The Tribe's direct flow water right in the
14 Tongue River and its tributaries may not be
15 used in a manner that adversely affects:

16 A. Miles City Decree water rights, or

17 B. Water rights from off-Reservation
18 tributaries of the Tongue River, which are
19 finally decreed in any general adjudication of
20 the Tongue River, or are recognized under
21 state law until such final adjudication, and
22 which have a priority date of June 30, 1973 or
23 earlier and are based on the use of an
24 irrigation system in place and not abandoned
25 as of June 30, 1973.

26 b. Storage and Exchange Water. The Tribe has a right

1 to divert or deplete, or permit the diversion or
 2 depletion of, up to 20,000 acre-feet per year from
 3 a combination of water stored in the Tongue River
 4 Reservoir and exchange water. The availability of
 5 the 20,000 acre-feet per year depends, as provided
 6 in the Tongue River Water Model, upon the annual
 7 schedule utilized by the Tribe for diversions of
 8 Tongue River direct flows. Except as provided in
 9 paragraph A.2.c.ii. of this Article, any reduction
 10 in Tongue River Reservoir stored water resulting
 11 from Tribal diversions of Tongue River direct flows
 12 shall not affect State contract rights, as defined
 13 in this Compact, but shall be satisfied exclusively
 14 from the right described in this paragraph. Tribal
 15 use of stored water from the Tongue River Reservoir
 16 shall be measured at the Reservoir.

17 c. Shortages.

18
 19 i. The Tribal Water Right in the Tongue River
 20 basin shall be subject to shortages due to
 21 natural low flows that are consistent with the
 22 period of record used in the Tongue River
 23 Water Model in diversion amounts not to exceed
 24 50% in any one year and 100% cumulative in any
 25 ten-year period.

26 ii. Decreases in the amount of water stored in the

1 Tongue River Reservoir that are caused by: (i)
 2 sedimentation; (ii) Reservoir inflows lower
 3 than those assumed in the Tongue River Water
 4 Model; (iii) normal and expected maintenance
 5 of the Tongue River Dam and associated
 6 structures; or (iv) normal and expected
 7 deterioration of the Tongue River Dam and
 8 associated structures shall not be considered
 9 a failure of the Tongue River Dam as that term
 10 is utilized in paragraph A.2.f. of this
 11 Article. All such decreases in water
 12 availability shall be shared pro rata among
 13 all users of stored water including the Tribe.

14 d. Excess Water. The Tribe shall, as part of the
 15 Tribal Water Right, have the first right to use
 16 excess water, as defined in this Compact; provided,
 17 that total use of the Tongue River Tribal Water
 18 Right shall not exceed 32,500 acre-feet per year
 19 diverted from direct flow, storage, and exchange
 20 water. Tribal nonuse of excess water in any one
 21 year shall not affect the right of the Tribe to use
 22 excess water in any subsequent year.

23 e. Contract Water. Nothing in this Compact shall
 24 affect the water, and any rights therein, secured
 25 to the Tribe by Water Purchase Contract No. 232 for
 26 7,500 acre-feet per year, dated March 15, 1938,

1 between the Tongue River Water Users Association,
 2 the Water Conservation Board of the State of
 3 Montana and the United States, through the
 4 Secretary of the Interior. Any water entitlement
 5 pursuant to the Contract shall be in addition to
 6 and not a part of the 32,500 acre-feet per year
 7 Tribal Water Right set forth above.

8 f. Failure of Tongue River Dam. In the event of a
 9 failure of the Tongue River Dam which causes a
 10 substantial diminution of the Tribe's storage right
 11 set forth in paragraph A.2.b. of this Article, and
 12 notwithstanding the provisions of Article V.A. of
 13 this Compact, any party may within 180 days of said
 14 failure request the others to renegotiate this
 15 Compact. The parties shall have three years from
 16 the date of the request to reach a new agreement,
 17 during which time all of the provisions in this
 18 Compact shall remain in full force and effect. If
 19 no party requests renegotiation, or if a new
 20 agreement is not reached within three years of the
 21 request, the provisions of paragraph A.2.a.ii. of
 22 this Article concerning the subordination of the
 23 Tongue River direct flow Tribal Water Right to
 24 other specified water rights, shall become null and
 25 void; provided, that all other provisions of this
 26 Compact shall remain in full force and effect. The

1 Tribe shall not be entitled to void or terminate
 2 this Compact, or to assert that the State is in
 3 breach of the Compact, for a failure of the Tongue
 4 River Dam; provided, that any and all other rights
 5 of the Tribe arising from such event shall not be
 6 affected by this paragraph.

7 3. Rosebud Creek.

8 a. Water Right. The Tribe has a right to divert or
 9 use or to permit the diversion or use from Rosebud
 10 Creek and its tributaries, for agricultural
 11 purposes only, of 1,800 acre-feet of water per
 12 year, or enough water to irrigate 600 acres of land
 13 per year, whichever is less, with a priority date
 14 of October 1, 1881. Tribal and individual Indian
 15 irrigation uses in existence as of the
 16 ratification date on-Reservation in the Rosebud
 17 Creek basin are recognized and protected, and
 18 shall be considered a use of the 1,800 acre-feet
 19 per year right described in this paragraph.

20 b. Implementation. The Tribe agrees that in the
 21 period between May 1, 1991 and July 1, 1993, the
 22 Tribe, or persons authorized by it, will develop no
 23 more than 200 acres of land in addition to
 24 irrigation uses in existence as of May 1, 1991,
 25 through irrigation methods involving pumping of
 26 alluvial groundwater, except that the Tribe, or

1 persons authorized by it, may develop up to the
 2 full 600 acres of land, or any portion thereof, by
 3 any other method. During this period, the Tribe
 4 and the State agree to share any hydrologic data
 5 available for use in connection with any test which
 6 the State undertakes to evaluate impacts, if any,
 7 of development of on-Reservation lands on off-
 8 Reservation lands. After July 1, 1993, the Tribe,
 9 or persons authorized by it, may develop the full
 10 600 acres of land by any irrigation method.

11 c. Additional Water Right. In addition to the water
 12 right described in paragraph A.3.a. of this
 13 Article, the Tribe has a right to divert or use or
 14 permit the diversion or use from Rosebud Creek and
 15 its tributaries, for any purpose, of up to 19,530
 16 acre-feet of water per year, or enough water to
 17 irrigate 6,510 acres of land per year, whichever is
 18 less, with a priority date of October 1, 1881. The
 19 Tribe may not exercise the water right set forth in
 20 this paragraph in a manner that adversely affects a
 21 water right finally decreed in any general
 22 adjudication of the Rosebud Creek basin or, until
 23 such final decree is issued, a water right
 24 recognized under state law, which 1) has a priority
 25 date of June 30, 1973 or earlier, and 2) is based
 26 on the use of an irrigation system in place and not

1 abandoned as of June 30, 1973; provided, that the
 2 state law water rights protected in this paragraph
 3 shall not exceed:

4 i. North of the Reservation, 8,100 acre-feet of
 5 water per year or enough water to irrigate
 6 2,700 acres of land per year, whichever is
 7 less; and

8 ii. South of the Reservation, 540 acre-feet of
 9 water per year or enough water to irrigate 180
 10 acres of land per year, whichever is less.

11 d. Dams and Impoundments. The Tribe shall not
 12 construct, within the Rosebud Creek basin, any dams
 13 or impoundments to store water naturally arising in
 14 Rosebud Creek and its tributaries; provided, that
 15 the Tribe may construct stockwater impoundments
 16 pursuant to paragraph A.5. of this Article, and,
 17 subject to other applicable provisions of this
 18 Compact, may construct dams or impoundments within
 19 the Rosebud Creek basin to store water from sources
 20 outside the basin, including non-alluvial
 21 groundwater.

22 e. Moratorium on Permits. The Montana Department of
 23 Natural Resources and Conservation shall order a
 24 moratorium on the issuance of permits in the
 25 Rosebud Creek basin concurrent with the
 26 ratification date of this Compact. The moratorium

shall not apply to applications for permits by persons who have entered into deferral agreements with the Tribe for Rosebud Creek basin water as provided in Section G. of this Article. The Department may order the moratorium lifted if it determines that water is available over and above the amount necessary to fulfill the Tribal Water Right described in paragraph A.3.a. and Section A.3.c. of this Article. The Tribe may challenge the Department's determination to lift the moratorium under the procedure set forth in Article IV of this Compact.

4. Groundwater.

a. Alluvial Groundwater. The Tribe has a right to withdraw and use, or permit the withdrawal and use of, alluvial groundwater in lieu of surface water diversions of the Tongue River and Rosebud Creek Tribal Water Right, subject to the same terms and conditions of this Compact that apply to such surface water diversions. Alluvial water withdrawn from wells or manifolded well systems with a capacity of 100 gallons per minute or less shall not be deducted from the Tribal Water Right. For wells or manifolded well systems with a capacity of withdrawing greater than 100 gallons per minute of alluvial water, the entire amount withdrawn shall

be deducted from the Tribal Water Right.

b. Non-alluvial Groundwater. Except where a Tribal right to non-alluvial groundwater is established pursuant to Article VII.B. of this Compact, Tribal use or authorization of use of non-alluvial groundwater shall, at the election of the Tribe, comply with state law in effect at the time of the use or with the alluvial groundwater provisions of paragraph A.4.a. of this Article.

5. Stockwater Impoundments. The Tribe may construct, or permit the construction of, stockwater impoundments on the Reservation, where the capacity of the impoundment is less than 15 acre-feet and the impoundment is constructed on a source other than a perennial flowing stream. The amount of water so impounded shall not be deducted from the Tribal Water Right.

6. Subirrigation. The Tribe shall be entitled to take advantage of any natural subirrigation occurring on the Reservation. Where otherwise consistent with state law, persons outside the Reservation shall also be entitled to take advantage of natural subirrigation.

7. Big Horn Reservoir (Yellowtail) Storage.

a. Tribal Allocation. As a part of the Tribal Water Right, the Secretary of the Interior shall allocate 30,000 acre-feet per year of stored water in Big Horn Reservoir, Yellowtail Unit, Lower Bighorn

1 Division, Pick-Sloan Missouri Program, Montana,
 2 measured at the dam, for use or disposition by the
 3 Tribe for any beneficial purpose, either on or off
 4 the Reservation, pursuant to the terms of this
 5 Compact. THIS ALLOCATION IS SUBJECT TO THE PRIOR
 6 RESERVED WATER RIGHTS, IF ANY, OF ANY INDIAN TRIBE,
 7 OR OF PERSONS CLAIMING WATER THROUGH THAT TRIBE, TO
 8 THAT WATER.

9 b. Payment for Tribal Allocation. The Tribe shall not
 10 be required to make payments to the United States
 11 for any portion of the Tribal Water Right stored in
 12 Yellowtail Reservoir unless and until the water is
 13 used or sold by the Tribe in which case the Tribe
 14 shall make annual payments to the United States as
 15 hereinafter provided.

16 i. Use or Sale for Municipal and Industrial (M&I)
 17 Purposes. For each acre-foot of stored water
 18 used or sold for M&I purposes, the Tribe shall
 19 pay annually to the United States an amount to
 20 cover the proportionate share of the annual
 21 operation, maintenance and replacement (OM&R)
 22 costs, and the proportionate share of the
 23 capital costs with appropriate interest for
 24 the Yellowtail Unit allocable to the Tribe's
 25 stored water. Upon full payment of the capital
 26 costs allocable to the Tribe's stored water

1 supply, the annual payments shall include only
 2 a proportionate share of the annual OM&R
 3 costs. Such annual payments shall be reviewed
 4 and adjusted, as appropriate, to reflect the
 5 actual capital and OM&R costs for the
 6 Yellowtail Unit.

7 ii. Agricultural, Domestic, Livestock, and Other
 8 Uses. For each acre-foot of stored water used
 9 or sold for other than M&I purposes, the Tribe
 10 shall pay annually to the United States an
 11 amount to cover the OM&R cost for the
 12 Yellowtail Unit allocable to the Tribe's
 13 stored water, which amount shall be reviewed
 14 and adjusted, as appropriate, to reflect the
 15 actual OM&R costs for the Yellowtail Unit.
 16 The Bureau of Indian Affairs shall transfer
 17 sufficient funds on a nonreimbursable basis to
 18 the Bureau of Reclamation to cover allocable
 19 OM&R costs under this paragraph.

20 c. Rates and Revenues. Except for payments required
 21 to be made to the United States as set forth above,
 22 the Tribe shall set such rates as it deems proper
 23 for its use or sale of stored water and shall
 24 retain all revenues from its use or sale of said
 25 stored water; provided, that the United States
 26 reserves the right to use any and all water stored

in Yellowtail Reservoir for hydropower generation.

d. Agreement. Following ratification of this Compact, and upon development of a demand for the water under Section A.7. of this Article, the United States and the Tribe shall enter into an appropriate agreement, if required, setting forth the terms and conditions under which water will be made available to the Tribe, and for the collection and disposition of revenues in connection therewith.

B. Persons Entitled to Use the Tribal Water Right.

The Tribal Water Right may be used by the Tribe, or persons authorized to use water by the Tribe pursuant to Article III; provided, that:

1. Such use is in accordance with the terms of this Compact;
2. That the Tribe shall give preference to Tribal members to use the Tribal Water Right; and
3. Such water right may be transferred from one Tribal member to another Tribal member for agricultural purposes only upon the transfer of land on the Reservation from one Tribal member to another Tribal member.

C. Place of Use of the Tribal Water Right.

Pursuant to a Tribal water code adopted as prescribed in Article III of this Compact, and subject to all other provisions of this Compact, the Tribe shall have the right to use or permit use of the Tribal Water Right with any point of

diversion or any place of use on or off the Reservation; provided, that any use of the Tribal Water Right off the Reservation shall not be deemed to convert the Tribal Water Right to a state water right, and subsequent nonuse of the Tribal Water Right off the Reservation shall not constitute a relinquishment, forfeiture, or abandonment of the Right.

D. Purposes of the Tribal Water Right.

Except as provided in paragraph A.3.a. of this Article, the Tribe may authorize use of the Tribal Water Right on the Reservation for any purpose without regard to whether such use is beneficial as defined by state law. Off the Reservation, any use of the Tribal Water Right shall comply with Article III.B.

E. Conditions Upon Uses of the Tribal Water Right.

The Tribe shall adopt appropriate regulations to ensure that use of the Tribal Water Right is not wasteful and does not degrade water quality.

F. Transfer of Tribal Water Right.

The Tribe shall not transfer water naturally arising in Rosebud Creek or its tributaries for use off the Reservation. The Tribe may transfer any other part of the Tribal Water Right for use on or off the Reservation pursuant to the terms of this Compact. This paragraph shall not affect the right of the Tribe to enter into a deferral agreement regarding Rosebud Creek water pursuant to Section G. of this Article.

G. Deferral Agreements.

1 After the ratification date, the Tribe may enter into an
2 agreement with any person who is exercising or proposing to
3 exercise a right under state law to use surface water off the
4 Reservation, which agreement protects the person's right from
5 any exercise of the Tribal Water Right; provided, that:

- 6 1. Before use of such water, the person shall have complied
7 with all applicable state laws concerning the acquisition
8 of a water right;
- 9 2. Subsequent to acquisition of the state water right,
10 regulation of its use shall be subject to state law;
- 11 3. The amount of water subject to the agreement shall be
12 deducted from the amount of water available for depletion
13 by the Tribe in the basin from which the water is being
14 diverted; and
- 15 4. The agreement shall not permanently alienate the Tribal
16 Water Right or any part thereof.

17 H. Effect of Non-Use of Tribal Water Right.

18 Non-use of any part of the Tribal Water Right shall not
19 constitute a relinquishment, forfeiture or abandonment of the
20 Right.

21 I. Tribal Water Right to be Held in Trust.

22 The Tribal Water Right shall be held in trust by the United
23 States for the benefit of the Tribe.

24 **Article III**

25 **Administration of Water Rights**

26 A. Tribal Administration.

1 1. Except as otherwise provided in this Compact, the use of
2 the Tribal Water Right shall be administered by the
3 Tribe, and the Tribe has the final and exclusive
4 jurisdiction to resolve all disputes between users of the
5 Tribal Water Right. Administration and enforcement of
6 the Tribal Water Right shall be pursuant to a water code,
7 which shall be developed and adopted by the Tribe and
8 submitted for approval to the Secretary of the Interior
9 within one year after ratification of this Compact.
10 Pending the adoption and approval of the Tribal water
11 code, the administration and enforcement of the Tribal
12 Water Right shall be by the Secretary of the Interior.

13 2. Within six months after the Tribal water code takes
14 effect, the Tribe shall provide the State with notice of
15 each use of the Tribal Water Right, including uses in
16 existence as of the ratification date of this Compact and
17 those established since that time, which shall show:

- 18 a. The person authorized to make the diversion;
- 19 b. The amount of water authorized to be diverted
20 annually;
- 21 c. The amount of water authorized for annual
22 consumption;
- 23 d. The point of diversion;
- 24 e. The period of use;
- 25 f. The place of use;
- 26 g. The uses for which the water may be diverted; and

1 h. The relative priority of the use as against other
2 uses of the Tribal Water Right.

3 3. The Tribe shall thereafter notify the State within sixty
4 days after the end of each quarter year of all new uses
5 of surface and groundwater authorized by the Tribe during
6 the preceding quarter year and of all new uses of the
7 Tribal Water Right actually commenced during that quarter
8 year. The notice shall be in the same format as that
9 prescribed in Section A.2. of this Article.

10 4. The Tribe shall provide the State with not less than 180-
11 days written notice prior to the start of construction of
12 any project to divert any portion of the Tribal Water
13 Right from the Big Horn River or the Big Horn Reservoir
14 for use on the Reservation, or from the Tongue River or
15 the Tongue River Reservoir for use on the Reservation in
16 the Rosebud Creek basin. The notice shall describe: any
17 diversion, conveyance and storage facilities; the amounts
18 of water to be diverted and consumed; and the purpose,
19 place, and period of the proposed use. Diversion or use
20 of water from such project may be made only after all
21 permits, certificates, variances or other authorizations
22 described in paragraph B.3. of this Article have been
23 obtained. With respect to any such project or diversion,
24 the State or any affected person may seek such remedies
25 as may be available under federal, state, or tribal law,
26 and nothing in this Compact shall be construed to affect

1 the rights of any party under such law.

2 B. Off-Reservation Uses of the Tribal Water Right.

3 1. Off-Reservation Uses. Any use of the Tribal Water Right
4 involving a point of diversion or place of use located
5 off the Reservation shall be considered an off-
6 Reservation use; provided, that releases or diversions
7 from Big Horn Reservoir or Tongue River Reservoir for use
8 on the Reservation shall not be considered off-
9 Reservation uses.

10 2. Subsequent Federal or State Law. All off-Reservation
11 uses of the Tribal Water Right shall comply with the
12 requirements set forth in Section B. of this Article
13 until such time as the statutory or common law of the
14 United States or the State of Montana establishes that
15 off-Reservation uses of Indian water rights may occur
16 without regard to state law.

17 3. Diversion Facilities.

18 With respect to diversion or transportation facilities
19 located off the Reservation, the Tribe or persons using
20 the Tribal Water Right shall apply for all permits,
21 certificates, variances and other authorizations required
22 by state laws regulating, conditioning or permitting the
23 siting, construction, operation, alteration or use of any
24 equipment, device, facility or associated facility
25 proposed to use or transport water. A diversion or use
26 of water in the exercise of the Tribal Water Right may be

1 made only after all permits, certificates, variances or
2 other authorizations applied for pursuant to this
3 paragraph have been obtained.

4 4. Off-Reservation Uses in Tongue and Rosebud Basins.

5 a. The Tribe shall provide the State with not less
6 than 180-days advance written notice of any off-
7 Reservation use, transfer, or change of use of the
8 Tribal Water Right:

- 9 i. Within the Tongue River basin, or
- 10 ii. Utilizing Tongue River water off-Reservation
- 11 in the Rosebud Creek basin.

12 b. The notice shall include sufficient documentation
13 to demonstrate that:

- 14 i. The proposed use of water is a beneficial use
- 15 as defined by Montana law in effect at that
- 16 time;
- 17 ii. The proposed means of diversion, and the
- 18 construction and operation of the diversion
- 19 works are adequate;
- 20 iii. The proposed use, transfer, or change of use
- 21 will not adversely affect, except with the
- 22 consent of the owner of such right:
 - 23 A. Any water right arising under the laws of
 - 24 the United States, or
 - 25 B. Any right to the use of water established
 - 26 pursuant to the laws of the State; except

1 that, if the portion of the Tribal Water Right
2 that is the subject of the proposed off-
3 Reservation use, transfer or change of use is
4 the storage and exchange right set forth in
5 Article II.A.2.b. of this Compact, the Tribe
6 need only demonstrate that Miles City Decree
7 rights will not be adversely affected by such
8 use, transfer, or change of use.

9 iv. The proposed use, transfer, or change of use
10 does not cause any unreasonable significant
11 adverse environmental impact; and

12 v. Proposed uses, transfers, or changes in use
13 in excess of 4,000 acre-feet per year and 5.5
14 cubic feet per second of water will not:

- 15 A. Substantially impair the quality of water
- 16 for existing uses in the source of water from
- 17 which the diversion is made;
- 18 B. Be made where low quality water which can
- 19 economically be used is legally and physically
- 20 available to the Tribe for the proposed use;
- 21 C. Create or substantially contribute to
- 22 saline seep; or
- 23 D. Substantially injure fish or wildlife
- 24 populations in the source of water from which
- 25 the diversion is made.

26 c. A proposed use, transfer or change of use of the

1 Tribal Water Right pursuant to Section B.4. of this
2 Article may be challenged:

- 3 i. Within 30 days after the expiration of the
4 notice period provided in Section B.4.a. of
5 this Article;
6 ii. In a court of competent jurisdiction; and
7 iii. By the State or by a person whose rights are
8 adversely affected by the proposed use,
9 transfer, or change of use.

10 In any such case, the Tribe shall have the burden
11 of proving by a preponderance of the evidence that
12 it has satisfied the requirements of Section B.4.b.
13 of this Article. A Tribal notice that conforms to
14 the requirements of Section B.4.b. of this Article
15 shall be prima facie evidence of its contents.

16 5. Off-Reservation Uses Outside Tongue and Rosebud Basins.

17 Except as provided in Section B.4. of this Article, no
18 person may initiate an off-Reservation use, transfer, or
19 change of use of the Tribal Water Right without first
20 applying for and receiving authorization for the use,
21 transfer, or change of use pursuant to Montana law in
22 effect at the time of the application.

23 C. State Administration.

- 24 1. The State shall administer all rights to the use of
25 surface water and groundwater within the Reservation
26 which are not a part of the Tribal Water Right. The

1 State shall have the final and exclusive jurisdiction to
2 resolve all disputes between users of rights established
3 under state law.

- 4 2. Within one year after ratification of this Compact, the
5 State shall notify the Tribe of all existing uses of
6 surface and groundwater for which a permit has been
7 issued by the State in the Tongue River or Rosebud Creek
8 basins. The notice shall state:

- 9 a. The person authorized to make the diversion;
10 b. The amount of water authorized to be diverted
11 annually;
12 c. The amount of water authorized for annual
13 consumption;
14 d. The point of diversion;
15 e. The period of use;
16 f. The place of use;
17 g. The uses for which the water may be diverted; and
18 h. The priority date of the use.

- 19 3. The State shall notify the Tribe within sixty days after
20 the end of each quarter year of all new uses of surface
21 and groundwater for which a permit has been issued by the
22 State in the Tongue River or Rosebud Creek basins during
23 the preceding quarter year and of all new uses of water
24 actually commenced pursuant to the laws of the State
25 during that quarter year on each of these sources. The
26 notice shall be in the same format as that prescribed in

- 1 Section C.2. of this Article.
- 2 D. Operation of Tongue River Reservoir.
- 3 1. To provide for Tongue River Reservoir operation
- 4 procedures that are consistent with the purposes of this
- 5 Compact, a reservoir operation plan shall be developed
- 6 by a five-member advisory committee. The committee shall
- 7 have representatives from the State of Montana, the
- 8 Tongue River Water Users Association, the Northern
- 9 Cheyenne Tribe, the United States, and a fifth member to
- 10 be selected by the other four. The advisory committee
- 11 shall annually agree upon a reservoir operation schedule
- 12 setting forth proposed uses of storage and direct flow
- 13 for the year. The Department of Natural Resources and
- 14 Conservation or its successor shall thereupon be
- 15 responsible, consistent with the terms of this Compact
- 16 and other applicable law, for the daily operation of the
- 17 Reservoir and for implementation of the reservoir
- 18 operation plan.
- 19 2. The reservoir operation plan shall provide for the
- 20 operation of the project for fish and wildlife purposes
- 21 depending on the availability of water on an annual
- 22 basis. This provision shall not create an operational
- 23 preference for fish and wildlife purposes relative to
- 24 other project purposes.
- 25 3. The Secretary of the Interior shall pay annually to the
- 26 State an amount to cover the proportionate share of the

- 1 annual operation, maintenance and replacement (OM&R)
- 2 costs for the Tongue River Dam allocable to the Tribe's
- 3 stored water in the Reservoir.

4 Article IV

5 Northern Cheyenne-Montana Compact Board

- 6 A. Establishment of Board.
- 7 There is hereby established the Northern Cheyenne-Montana
- 8 Compact Board. The Board shall consist of three members:
- 9 one member appointed by the Governor of the State of Montana;
- 10 one member appointed by the Northern Cheyenne Tribal Council;
- 11 and one member selected by the other two members. All members
- 12 shall be appointed within six months of the ratification date
- 13 of this Compact and within thirty days of the date any vacancy
- 14 occurs. Each member shall serve a five-year term and shall be
- 15 eligible for reappointment. The initial term of each member
- 16 shall be staggered with one member serving a five-year term,
- 17 one a four-year term, and one a three-year term. The initial
- 18 term of each member shall be chosen by lot. Expenses of the
- 19 members appointed by the State and the Tribe shall be borne by
- 20 the entity appointing the member. The expenses of the third
- 21 member and all other expenses shall be borne equally by the
- 22 Tribe and the State, subject to the availability of funds.
- 23 B. Membership.
- 24 Should the two appointed members fail to agree on the
- 25 selection of a third member within sixty days of the
- 26 ratification date of this Compact or within thirty days after

any vacancy occurs, the following procedure shall be utilized:

1. Within five days each member shall nominate three persons to serve as a member of the Board;
2. Within fifteen days thereafter each member shall reject two of the persons nominated by the other member;
3. The chief judge of the United States District Court for the District of Montana shall select the third member of the Board from the remaining two nominees. If the chief judge declines for any reason to select the third member, the chief justice of the Montana Supreme Court shall make the selection from the remaining two nominees.

C. Quorum and Vote Required.

Two members of the Board shall constitute a quorum if reasonable notice has been provided in advance to the absent member. All Board decisions shall be by a majority of the Board, shall be in writing and, together with any dissenting opinions, shall be served on all parties in the proceeding before the Board, and on the parties to this Compact.

D. Jurisdiction of the Board.

The Northern Cheyenne-Montana Compact Board shall have jurisdiction to resolve controversies over the right to the use of water between users of the Tribal Water Right on the one hand and users of state water rights on the other hand. Such controversies shall include, but shall not be limited to, disputes as to the meaning of this Compact, and disputes concerning the operation of the Tongue River Reservoir as it

affects the Tribal Water Right.

E. Powers and Duties.

The Board shall hold hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence. The Tribe, the State, and the United States shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribe, the State, or the United States for enforcing a subpoena issued by its courts in a civil action. The parties to the controversy may present evidence and cross examine any witnesses. The Board shall determine the controversy based on the evidence, and grant any appropriate relief, except money damages. All decisions of the Board shall be by majority and in writing. The Board shall adopt necessary rules and regulations to carry out its responsibilities within six months after its first meeting. All records of the Board shall be open to public inspection except for privileged information.

F. Review and Enforcement of Board Decisions.

1. Decisions by the Board shall be effective immediately, unless stayed for a period of time prescribed by the Board. Any party before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty days of such decision. The notice of appeal shall be filed with the Board and served

- 1 personally or by registered mail upon the Tribe, the
 2 State, the United States and all parties to the
 3 proceeding before the Board, and all such persons shall
 4 thereafter have the right to participate in the appeal.
- 5 2. In any appeal, the Board's decision shall be presumed to
 6 be valid, and may be vacated by the court only on one of
 7 the following grounds:
- 8 a. The decision is not supported by substantial
 9 evidence;
- 10 b. The decision was procured by corruption, fraud or
 11 undue means;
- 12 c. There was evident partiality or corruption by the
 13 Board or by any member;
- 14 d. The Board was guilty of misconduct in refusing to
 15 hear the dispute, or in refusing to hear evidence
 16 pertinent and material to the controversy, or any
 17 other clear misbehavior by which the rights of any
 18 party have been substantially prejudiced;
- 19 e. The Board exceeded its authority under the terms of
 20 this Compact; or
- 21 f. The decision is contrary to law.
- 22 3. Unless an appeal is timely filed as provided in paragraph
 23 F.1. of this Article, any decision of the Board shall be
 24 confirmed or enforced by any court of competent
 25 jurisdiction on petition of the Board, the Tribe, the
 26 State, the United States, or any party before the Board

- 1 in the proceeding in which the decision was made.
- 2 4. A court of competent jurisdiction in which a timely
 3 appeal is filed pursuant to paragraph F.1. of this
 4 Article, or in which a petition to confirm or enforce is
 5 filed pursuant to paragraph F.3. of this Article, may
 6 order such temporary or permanent relief as it considers
 7 just and proper.
- 8 5. Any appeal may be taken from any decision of the court in
 9 which a timely appeal is filed pursuant to paragraph F.1.
 10 of this Article, or in which a petition to confirm or
 11 enforce is filed pursuant to paragraph F.3. of this
 12 Article, in the manner and to the same extent as from
 13 orders or judgments of the court in a civil action.
- 14 6. In any appeal or petition to confirm or enforce the
 15 Board's decision, the Board shall file with the court the
 16 record of the proceedings before the Board.
- 17 G. Waiver of Immunity.
- 18 The Tribe, the United States and the State hereby waive their
 19 respective immunities from suit, including any defense the
 20 State shall have under the Eleventh Amendment of the
 21 Constitution of the United States, in order to permit the
 22 resolution of disputes under this Compact by the Northern
 23 Cheyenne-Montana Compact Board, and the appeal or judicial
 24 enforcement of Board decisions as provided herein, except that
 25 such waivers of sovereign immunity by the Tribe, the United
 26 States, or the State shall not extend to any action for money

damages including costs and attorneys' fees.

Article V

Finality and Effectiveness of Compact

A. Ratification and Effectiveness of Compact.

- 1. Upon ratification by the Northern Cheyenne Tribal Council and the Legislature of the State of Montana, the terms of this Compact may not be altered, voided, or modified in any respect without the consent of the parties; provided, that except as set forth in Section A.2. of this Article, this Compact shall not become effective until ratification by the United States Congress and the completion date occurs, notwithstanding the provisions of Section 85-2-702(2), MCA. If the completion date does not occur on or before December 31, 1997, or any later date agreed to in writing by the parties, this Compact, including all provisions that become effective on the ratification date, shall become null and void without further action by any party. Notwithstanding the provisions of Section 85-2-702(3), MCA, this Compact shall not be included in any preliminary decree or final decree in any State water court proceeding unless and until this Compact becomes effective as set forth in this Article.
- 2. As between the State and the Tribe, all of the provisions of this Compact shall become effective upon the ratification date except insofar as they:

- a. Quantify or provide for the administration of the Tongue River Tribal Water Right;
 - b. Provide for the management or operation of the Tongue River Reservoir; or
 - c. Require Congressional authorization.
- All of the provisions that do not become effective upon the ratification date shall become effective on the completion date, unless Congress provides otherwise.

B. Incorporation Into Decrees and Disposition of Federal Suits.

Within sixty days after the completion date, the parties shall petition for incorporation of this Compact into a decree in any appropriate State court proceeding commenced in accordance with 43 U.S.C. §666. Upon the issuance of a final decree by the State water court, or its successor, and the completion of any direct appeals therefrom, or upon the expiration of the time for filing any such appeal, the United States, the Tribe, and the State shall within thirty days execute and file joint motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss the Tribe's claims, and any claims made by the United States as trustee for the Tribe, in Northern Cheyenne Tribe of the Northern Cheyenne Reservation v. Adsit, et al., No. 75-6-BLG (D. Mont.); United States v. Big Horn Low Line Canal Company, et al., No. 75-34-BLG (D. Mont.); and United States v. Tongue River Water Users Association, et al., No. 75-20-BLG (D. Mont.), (hereinafter collectively referred to as "the federal suits"), with prejudice. This Compact shall be filed as a

1 consent decree in the federal suits only if, prior to the
 2 dismissal of the federal suits as provided in this Article, it
 3 is finally determined in a judgment binding upon the State of
 4 Montana that the State courts lack jurisdiction over, or that
 5 the State court proceedings are inadequate to adjudicate, some
 6 or all of the water rights asserted in the federal suits.

7 Article VI

8 General Provisions

- 9 A. Nothing in this Compact shall be so construed or interpreted:
- 10 1. To establish the nature, extent, or manner of
 - 11 administration of water rights of any Indian reservation
 - 12 or other federal reservation other than the Northern
 - 13 Cheyenne Reservation;
 - 14 2. To preclude the acquisition or exercise of a right to the
 - 15 use of water by the Tribe or any individual Indian
 - 16 outside the Reservation by purchase of such right or by
 - 17 acquisition of land, or by application to the State;
 - 18 3. To preclude the acquisition or exercise of an
 - 19 appropriative right to the use of water under state law
 - 20 by the Tribe or any individual Indian within the
 - 21 Reservation:
 - 22 a. By purchase of such right or by purchase of land;
 - 23 provided, that water rights acquired by such
 - 24 purchase after the ratification date of this
 - 25 Compact shall be in addition to and shall become
 - 26 part of the Tribal Water Right and shall be

- 1 governed by this Compact; or
- 2 b. By application to the State. Except for
 - 3 applications for non-alluvial groundwater pursuant
 - 4 to Article II.A.4.b., and applications for storage
 - 5 appropriations authorized by paragraph A.8. of this
 - 6 Article, any such application shall not be granted
 - 7 by the State until the Tribal Water Right in the
 - 8 basin where the diversion that is the subject of
 - 9 the application is located has been fully utilized;
 - 10 4. To determine the relative rights inter sese of persons
 - 11 using water under the authority of the State or the
 - 12 Tribe;
 - 13 5. To limit in any way the rights of the parties or any
 - 14 other person to litigate any issues or questions not
 - 15 resolved by this Compact;
 - 16 6. To authorize the taking of a water right which is vested
 - 17 under state or federal law;
 - 18 7. To create or deny substantive rights through headings or
 - 19 captions used in this Compact;
 - 20 8. To preclude or to discourage the Tribe from establishing
 - 21 the right to, or contracting for, water from any further
 - 22 enlargements of the Tongue River Dam, or from any future
 - 23 storage facilities that may be built within the Tongue
 - 24 River or Rosebud Creek basins, or in any other water
 - 25 basins;
 - 26 9. To address or prejudge whether, in any interstate

1 apportionment, the Tribe's water right shall be counted
2 as part of the waters apportioned to the State; or

3 10. To alter or amend any provisions of the Yellowstone River
4 Compact, Act of October 30, 1951, ch. 629, 65 Stat. 663
5 (1951).

6 11. To prohibit the Tribe or the United States from
7 challenging any claims to water in any general
8 adjudication of the Tongue River or Rosebud Creek basins.

9 B. The parties expressly reserve all rights not granted,
10 recognized or relinquished in this Compact.

11 C. The Secretary of the Interior shall comply with all aspects of
12 the National Environmental Policy Act, 42 U.S.C. §§4331-4335,
13 and the Endangered Species Act, 16 U.S.C. §1531, et seq., and
14 other applicable environmental acts and regulations in
15 implementing this Compact.

16 Article VII

17 Tribal Relinquishment of Other Water Claims

18 A. With the exception of the Tribe's claim to non-alluvial
19 groundwater in paragraph B. of this Article and any rights to
20 water which may exist with respect to land held by the Tribe
21 or a Tribal member outside the present Reservation, the Tribe
22 and the United States as trustee for the Tribe hereby
23 relinquish forever any and all claims, in existence on the
24 ratification date of this Compact, to water within the State
25 of Montana. The relinquishment includes, but is not limited
26 to, any claim for water derived from aboriginal use of land or

1 water, any Indian treaties, any Act of Congress, and any
2 executive act of the United States.

3 B. The parties intend that the water right as confirmed to the
4 Tribe in Article II is in full satisfaction of its federal
5 reserved water right based on Winters v. United States, 207
6 U.S. 564 (1908). Notwithstanding the provisions of paragraph
7 A. of this Article, the Tribe retains the right to assert a
8 claim that it has a right, not based on the federal reserved
9 water rights doctrine, to the use of any non-alluvial
10 groundwater underlying the Reservation. In any such action,
11 the Tribe shall be estopped to assert that its right to non-
12 alluvial groundwater is a federal reserved water right, that
13 the Tribal Water Right confirmed in Article II is inadequate
14 to satisfy the purposes for which the Reservation was created,
15 or from collaterally attacking this Compact in any manner.
16 Any right to non-alluvial groundwater established by the Tribe
17 under this paragraph is not subject to this Compact. Nothing
18 in this Compact shall be construed to waive any defenses of
19 the State or any water user to a Tribal claim for non-alluvial
20 groundwater.

21 Article VIII

22 Binding Effect

23 Upon the effectiveness of any provision of this Compact, its terms
24 will be binding:

25 A. Upon the State and any person or entity of any nature
26 whatsoever using, claiming or in any manner asserting any

1 right under the authority of the State to the use of water in
 2 the State of Montana; provided, that for purposes of consent,
 3 ratification, or authorization, the validity of consent,
 4 ratification, or authorization is to be determined by Montana
 5 law;

6 B. Upon the Tribe and any person or entity of any nature
 7 whatsoever using, claiming or in any manner asserting any
 8 right to the use of the Tribe's water right, or any right
 9 arising under any doctrine of reserved or aboriginal water
 10 rights for the Tribe, or any right arising under tribal law;
 11 provided, that for purposes of consent, ratification, or
 12 authorization, the validity of consent, ratification or
 13 authorization is to be determined by tribal law; and

14 C. Upon the United States and any person or entity of any nature
 15 whatsoever using, claiming or in any manner asserting any
 16 right under the authority of the United States to the use of
 17 water in the State of Montana; provided, that for purposes of
 18 consent, ratification, or authorization, the validity of
 19 consent, ratification or authorization is to be determined by
 20 federal law, AND FURTHER PROVIDED THAT NOTHING CONTAINED IN
 21 THIS COMPACT AFFECTS ANY CLAIM OF ANY INDIAN TRIBE, OR OF
 22 PERSONS CLAIMING WATER THROUGH THAT TRIBE, OR THE RIGHT OF ANY
 23 INDIAN TRIBE, OR PERSONS CLAIMING WATER THROUGH THAT TRIBE, TO
 24 PURSUE A CLAIM TO ANY WATER FROM ANY SOURCE BASED ON ANY
 25 THEORY OF RIGHT OR ENTITLEMENT.

Article IX

Contributions to Settlement

1
 2 A. The United States agrees to provide \$31,500,000 to repair the
 3 Tongue River Dam and spillway and to raise the Tongue River
 4 Dam spillway crest to secure the Tribe's existing contract
 5 water under Article II.A.2.e. and to provide additional
 6 storage capacity to secure the Tribe's storage and exchange
 7 water right under Article II.A.2.b.

8 B. The State agrees to provide \$16,500,000 to repair the Tongue
 9 River Dam and spillway with the understanding that the State's
 10 portion will be paid through a combination of cash and federal
 11 loans, in proportions to be agreed upon by the parties.

12 C. The Provisions of this Article are subject to the separate
 13 Letter of Agreement dated April 17, 1991, between the State
 14 and the United States explaining in detail the allocation of
 15 the costs of the project. The State and the United States
 16 will enter into a further agreement providing for the
 17 expenditure of the contributions and loans of the United
 18 States hereunder.

19 D. The United States agrees to provide \$10,000,000 for a Tribal
 20 Development Fund payable in equal amounts of \$2,000,000 each
 21 fiscal year for five years. These funds shall not be
 22 distributed on a per capita basis to members of the Tribe and
 23 shall only be used for land and natural resources
 24 administration, planning and development within the Northern
 25 Cheyenne Reservation or for land acquisition by the Tribe
 26 within the Northern Cheyenne Reservation.

1 E. Federal financial contributions to paragraph A of this Article
 2 will be budgeted for, subject to the availability of funds, by
 3 October 1 of the year following the ratification of this
 4 Compact by Congress and the authorization by Congress of the
 5 Tongue River Dam project. Federal financial contributions to
 6 paragraph D of this Article will be budgeted for, subject to
 7 the availability of funds, by October 1 of the second year
 8 following the ratification of this Compact by Congress and the
 9 authorization by Congress of the Tongue River Dam project.

10 F. The Tribe and the United States agree to pursue through the
 11 normal Bureau of Indian Affairs and Department of the Interior
 12 budget process such additional sums as are necessary to
 13 implement the terms of this Compact, to develop a Tribal water
 14 code, and to provide increased agricultural development on the
 15 Reservation. The State agrees to support the efforts of the
 16 Tribe and the United States in this regard.

Article X

Legislation

17 The Parties agree to seek enactment of any legislation
 18 necessary to effectuate the provisions and purposes of this
 19 Compact, and to defend the provisions and purposes of this Compact
 20 from all challenges and attacks; provided, that no provision of the
 21 Compact shall be modified as to substance except as may be provided
 22 herein.

23 IN WITNESS WHEREOF the representatives of the State of
 24 Montana, the Northern Cheyenne Tribe, and the United States have

1 signed this Compact on the ____ day of _____, 19__.

2 FOR THE STATE OF MONTANA

3 MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

4 _____
 5 Jack E. Galt, Chairman

6 _____
 7 Gene J. Etchart

8 _____
 9 Chris D. Tweeten, Vice Chairman

10 _____
 11 Dennis Iverson

12 _____
 13 Carl M. Davis

14 _____
 15 Senator Joseph P. Mazurek

16 _____
 17 Everett C. Elliott

18 _____
 19 Gordon McOmber

20 Gary L. Spaeth

21 FOR THE NORTHERN CHEYENNE TRIBE

22 _____
 23 FOR THE SECRETARY OF
 24 THE INTERIOR

25 _____
 26 FOR THE UNITED STATES ATTORNEY
 GENERAL

27 NEW SECTION. Section 2. Effective date. [This act] is
 28 effective on passage and approval.

29 -END-

HOUSE STANDING COMMITTEE REPORT

April 23, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report that Senate Bill 472 (third reading copy -- blue) be concurred in as amended .

Signed: Bob Raney
Bob Raney, Chairman

Carried by: Rep. O'Keefe

And, that such amendments read:

1. Page 17, line 8.

Following: "WATER."

Insert: "Any use or disposition of water from Big Horn Reservoir off the Reservation by the Tribe is subject to the specific provisions relating to such use or disposition in any act of Congress ratifying this Compact."

HOUSE
SB 472

871614SC.HSF

SENATE BILL NO. 472

INTRODUCED BY MAZUREK, CRIPPEN, WATERMAN, M. HANSON,

STICKNEY, SVRCEK, YELLOWTAIL, WEEDING, DEVLIN,

BRADLEY, ZOOK, MCCAFFREE

A BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT ENTERED INTO BY THE STATE OF MONTANA AND THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE RESERVATION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

(Refer to Second Reading Copy)

Strike everything after the enacting clause and insert:

NEW SECTION. Section 1. Northern Cheyenne-Montana compact ratified. The compact entered into by the state of Montana and the Northern Cheyenne tribe of the Northern Cheyenne Indian reservation and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing] is ratified. The compact is as follows:

WATER RIGHTS COMPACT

STATE OF MONTANA

NORTHERN CHEYENNE TRIBE

UNITED STATES OF AMERICA

This Compact is entered into by and among the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, the State of Montana, and the United States of America to settle, for all time,

any and all existing claims of or on behalf of the Northern Cheyenne Tribe to water within the State of Montana.

RECITALS

WHEREAS, in 1975, the Northern Cheyenne Tribe and the United States, on behalf of the Tribe, brought suits in the United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights;

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Northern Cheyenne water rights;

WHEREAS, the federal district court suits were stayed in 1983 pending the outcome of Montana State court water adjudication proceedings;

WHEREAS, the adjudication of Northern Cheyenne water rights under state law has been suspended while negotiations have proceeded to conclude a compact resolving all reserved water rights claims of the Northern Cheyenne Tribe;

WHEREAS, the Northern Cheyenne Tribe and the United States agree that the Tribal Water Right described in this Compact shall be in satisfaction of the Tribe's reserved water rights claims and any claims to water rights made on behalf of the Tribe by the United States;

WHEREAS, it is in the best interest of all parties that the reserved water rights claims of the Northern Cheyenne Tribe be settled through a Water Rights Compact;

WHEREAS, the parties agree that settlement of the reserved

1 water rights claims of the Northern Cheyenne Tribe is dependent on
2 the repair and enlargement of the Tongue River Reservoir;

3 NOW THEREFORE, the parties agree as follows:

4 **Article I**

5 **Definitions**

6 The following definitions shall apply for purposes of this
7 Compact:

- 8 1. "Acre-foot" means the amount of water necessary to cover one
9 acre to a depth of one foot and is equivalent to 43,560 cubic
10 feet.
- 11 2. "Alluvial groundwater" means water located below the land
12 surface within the Quaternary hydrostratigraphic unit that
13 borders or underlies major perennial and intermittent streams
14 in the Tongue River and Rosebud Creek basins. This unit is
15 composed of unconsolidated alluvial deposits of clay, silt,
16 sand, and gravel. For the purposes of this Compact, all other
17 water below the land surface will be deemed nonalluvial
18 groundwater.
- 19 3. "Annual" or "per year" means during one year as defined by
20 this Compact.
- 21 4. "Board" means the Northern Cheyenne-Montana Compact Board
22 established by Article IV of this Compact.
- 23 5. "Completion date" means the date of completion of a project to
24 repair and enlarge the Tongue River Dam to a degree sufficient
25 to provide the storage component of the Tribal Water Right
26 subject to the conditions provided in this Compact.

- 1 6. "Depletion" means, for any diversion of water, the difference
2 between the quantity of water diverted and the quantity of
3 return flows within the basin.
- 4 7. "Direct flow of the Tongue River" means the water in the
5 Tongue River and its tributaries that has not been stored in
6 the Tongue River Reservoir.
- 7 8. "Domestic use" means the diversion of water by one or more
8 individuals, family units or households for drinking, cooking,
9 laundering, sanitation and other personal comforts and
10 necessities; and for the irrigation of a family garden or
11 orchard not exceeding one-half acre in area.
- 12 9. "Excess water" means increases in the Tongue River basin water
13 supply resulting from conditions different from those assumed
14 in the Tongue River Water Model.
- 15 10. "Exchange water" means water available to the Tribe from the
16 Tongue River direct flow or from the Tongue River Reservoir
17 storage in exchange for Tribal return flows made available to
18 other Tongue River water users.
- 19 11. "Indian" means any person who: a) is an enrolled member of
20 the Northern Cheyenne Tribe; or b) is a member of a tribe that
21 is recognized as eligible for the special programs and
22 services provided by the United States to Indians because of
23 their status as Indians; or c) holds, or is recognized by the
24 Secretary of the Interior as eligible to hold, trust and
25 restricted property on the Northern Cheyenne Reservation.
- 26 12. "Manifolded well system" means a water distribution or

- 1 conveyance facility that is supplied by two or more wells.
- 2 13. "Miles City Decree water right" means a water right, finally
3 decreed in any general adjudication of the Tongue River, or
4 recognized under state law until such final adjudication,
5 which is based on the decree entered in Miles City Canal &
6 Irrigating Co. v. Lee, et al., Montana Seventh Judicial
7 District, No. 2809, May 20, 1914, and which has a priority
8 date of March 24, 1909, or earlier.
- 9 14. "Parties" means the Tribe, the State of Montana, and the
10 United States.
- 11 15. "Person" means an individual or any other entity, public or
12 private, including the State, the Tribe, and the government of
13 the United States and all officers, agents, and departments
14 thereof.
- 15 16. "Ratification date" means the date this Compact has been
16 approved by the Northern Cheyenne Tribal Council and the
17 Legislature of the State of Montana.
- 18 17. "Reservation" means the Northern Cheyenne Reservation as
19 established by Executive Orders of November 26, 1884 and March
20 19, 1900.
- 21 18. "State" means the State of Montana and all officers, agents,
22 departments, and political subdivisions thereof. Unless
23 otherwise indicated, for purposes of notification or consent,
24 "State" means the Director of the State Department of Natural
25 Resources and Conservation or its successor agency.
- 26 19. "State contract right" means a right to receive stored water

- 1 from the Tongue River Reservoir, not to exceed a cumulative
2 total of 40,000 acre-feet per year, pursuant to a contract
3 that allocates the storage rights of the Montana Department of
4 Natural Resources and Conservation or its successor agency.
- 5 20. "Tongue River Water Model" means the Tongue River Reservoir
6 Operations computer model that is documented in: Tongue River
7 Modeling Study, Final Report, submitted on July 20, 1990, to
8 the Engineering Bureau of the Water Resources Division of the
9 Montana Department of Natural Resources and Conservation, or
10 any revision agreed to by the parties. The Final Report and
11 any agreed revisions are incorporated herein by reference as
12 though set forth in full.
- 13 21. "Transfer" means any authorization for the delivery or use of
14 water from the Tribe or any person authorized by the Tribe to
15 any other person by a service contract, lease, sale, exchange
16 or other similar agreement.
- 17 22. "Tribal Water Right" means the right to divert or use water as
18 described by Articles II and III of this Compact.
- 19 23. "Tribe" means the Northern Cheyenne Tribe of the Northern
20 Cheyenne Reservation and all officers, agents and departments
21 thereof. Unless otherwise indicated, for purposes of
22 notification or consent, "Tribe" means the Tribal President or
23 the Chief Executive Official of the Tribe.
- 24 24. "United States" means the federal government and all officers,
25 agencies, departments and political subdivisions thereof.
26 Unless otherwise indicated, for purposes of notification or

1 consent, "United States" means the Secretary of the Department
 2 of the Interior.
 3 25. "Year" means the twelve-month period beginning April 1st and
 4 ending March 31st.

5 Article II

6 Tribal Water Right

7 A. Quantification of Water Right.

8 The water rights of the Northern Cheyenne Tribe are as
 9 follows:

10 1. Existing Non-Agricultural Uses.

11 Tribal and individual Indian stockwater, domestic and
 12 municipal water uses on the Reservation and in existence
 13 as of the ratification date are hereby recognized and
 14 protected as part of the Tribal Water Right, and are in
 15 addition to the water rights set forth in Sections A.2.,
 16 A.3., and A.4. of this Article. All such existing uses
 17 shall be governed by the terms of this Compact.

18 2. Tongue River.

19 Subject to the terms of this Compact, the Tribal Water
 20 Right in the Tongue River basin consists of the right to
 21 divert or use or to permit the diversion or use of up to
 22 32,500 acre-feet per year, from a combination of direct
 23 flow, storage, and exchange water. Tribal and individual
 24 Indian irrigation uses in existence on the Reservation in
 25 the Tongue River basin as of the ratification date are
 26 recognized and protected, and shall be counted as a use

1 of the 32,500 acre-feet per year right described in
 2 Section A.2. of this Article.

3 a. Direct Flow Right. The Tribe has a right to divert
 4 or use or permit the diversion or use of up to
 5 12,500 acre-feet of water per year from direct flow
 6 of the Tongue River and its tributaries with a
 7 priority date of October 1, 1881; provided, that:

8 i. The Tribe's annual depletion of its direct
 9 flow water right in the Tongue River and its
 10 tributaries shall not exceed 75 percent of the
 11 amount diverted, or 9,375 acre-feet per year;
 12 and

13 ii. The Tribe's direct flow water right in the
 14 Tongue River and its tributaries may not be
 15 used in a manner that adversely affects:

- 16 A. Miles City Decree water rights, or
- 17 B. Water rights from off-Reservation
- 18 tributaries of the Tongue River, which are
- 19 finally decreed in any general adjudication of
- 20 the Tongue River, or are recognized under
- 21 state law until such final adjudication, and
- 22 which have a priority date of June 30, 1973 or
- 23 earlier and are based on the use of an
- 24 irrigation system in place and not abandoned
- 25 as of June 30, 1973.

26 b. Storage and Exchange Water. The Tribe has a right

1 to divert or deplete, or permit the diversion or
 2 depletion of, up to 20,000 acre-feet per year from
 3 a combination of water stored in the Tongue River
 4 Reservoir and exchange water. The availability of
 5 the 20,000 acre-feet per year depends, as provided
 6 in the Tongue River Water Model, upon the annual
 7 schedule utilized by the Tribe for diversions of
 8 Tongue River direct flows. Except as provided in
 9 paragraph A.2.c.ii. of this Article, any reduction
 10 in Tongue River Reservoir stored water resulting
 11 from Tribal diversions of Tongue River direct flows
 12 shall not affect State contract rights, as defined
 13 in this Compact, but shall be satisfied exclusively
 14 from the right described in this paragraph. Tribal
 15 use of stored water from the Tongue River Reservoir
 16 shall be measured at the Reservoir.

17 c. Shortages.

18
 19 i. The Tribal Water Right in the Tongue River
 20 basin shall be subject to shortages due to
 21 natural low flows that are consistent with the
 22 period of record used in the Tongue River
 23 Water Model in diversion amounts not to exceed
 24 50% in any one year and 100% cumulative in any
 25 ten-year period.

26 ii. Decreases in the amount of water stored in the

1 Tongue River Reservoir that are caused by: (i)
 2 sedimentation; (ii) Reservoir inflows lower
 3 than those assumed in the Tongue River Water
 4 Model; (iii) normal and expected maintenance
 5 of the Tongue River Dam and associated
 6 structures; or (iv) normal and expected
 7 deterioration of the Tongue River Dam and
 8 associated structures shall not be considered
 9 a failure of the Tongue River Dam as that term
 10 is utilized in paragraph A.2.f. of this
 11 Article. All such decreases in water
 12 availability shall be shared pro rata among
 13 all users of stored water including the Tribe.

14 d. Excess Water. The Tribe shall, as part of the
 15 Tribal Water Right, have the first right to use
 16 excess water, as defined in this Compact; provided,
 17 that total use of the Tongue River Tribal Water
 18 Right shall not exceed 32,500 acre-feet per year
 19 diverted from direct flow, storage, and exchange
 20 water. Tribal nonuse of excess water in any one
 21 year shall not affect the right of the Tribe to use
 22 excess water in any subsequent year.

23 e. Contract Water. Nothing in this Compact shall
 24 affect the water, and any rights therein, secured
 25 to the Tribe by Water Purchase Contract No. 232 for
 26 7,500 acre-feet per year, dated March 15, 1938,

1 between the Tongue River Water Users Association,
 2 the Water Conservation Board of the State of
 3 Montana and the United States, through the
 4 Secretary of the Interior. Any water entitlement
 5 pursuant to the Contract shall be in addition to
 6 and not a part of the 32,500 acre-feet per year
 7 Tribal Water Right set forth above.

8 f. Failure of Tongue River Dam. In the event of a
 9 failure of the Tongue River Dam which causes a
 10 substantial diminution of the Tribe's storage right
 11 set forth in paragraph A.2.b. of this Article, and
 12 notwithstanding the provisions of Article V.A. of
 13 this Compact, any party may within 180 days of said
 14 failure request the others to renegotiate this
 15 Compact. The parties shall have three years from
 16 the date of the request to reach a new agreement,
 17 during which time all of the provisions in this
 18 Compact shall remain in full force and effect. If
 19 no party requests renegotiation, or if a new
 20 agreement is not reached within three years of the
 21 request, the provisions of paragraph A.2.a.ii. of
 22 this Article concerning the subordination of the
 23 Tongue River direct flow Tribal Water Right to
 24 other specified water rights, shall become null and
 25 void; provided, that all other provisions of this
 26 Compact shall remain in full force and effect. The

1 Tribe shall not be entitled to void or terminate
 2 this Compact, or to assert that the State is in
 3 breach of the Compact, for a failure of the Tongue
 4 River Dam; provided, that any and all other rights
 5 of the Tribe arising from such event shall not be
 6 affected by this paragraph.

7 3. Rosebud Creek.

8 a. Water Right. The Tribe has a right to divert or
 9 use or to permit the diversion or use from Rosebud
 10 Creek and its tributaries, for agricultural
 11 purposes only, of 1,800 acre-feet of water per
 12 year, or enough water to irrigate 600 acres of land
 13 per year, whichever is less, with a priority date
 14 of October 1, 1881. Tribal and individual Indian
 15 irrigation uses in existence as of the
 16 ratification date on-Reservation in the Rosebud
 17 Creek basin are recognized and protected, and
 18 shall be considered a use of the 1,800 acre-feet
 19 per year right described in this paragraph.

20 b. Implementation. The Tribe agrees that in the
 21 period between May 1, 1991 and July 1, 1993, the
 22 Tribe, or persons authorized by it, will develop no
 23 more than 200 acres of land in addition to
 24 irrigation uses in existence as of May 1, 1991,
 25 through irrigation methods involving pumping of
 26 alluvial groundwater, except that the Tribe, or

1 persons authorized by it, may develop up to the
 2 full 600 acres of land, or any portion thereof, by
 3 any other method. During this period, the Tribe
 4 and the State agree to share any hydrologic data
 5 available for use in connection with any test which
 6 the State undertakes to evaluate impacts, if any,
 7 of development of on-Reservation lands on off-
 8 Reservation lands. After July 1, 1993, the Tribe,
 9 or persons authorized by it, may develop the full
 10 600 acres of land by any irrigation method.

11 c. Additional Water Right. In addition to the water
 12 right described in paragraph A.3.a. of this
 13 Article, the Tribe has a right to divert or use or
 14 permit the diversion or use from Rosebud Creek and
 15 its tributaries, for any purpose, of up to 19,530
 16 acre-feet of water per year, or enough water to
 17 irrigate 6,510 acres of land per year, whichever is
 18 less, with a priority date of October 1, 1881. The
 19 Tribe may not exercise the water right set forth in
 20 this paragraph in a manner that adversely affects a
 21 water right finally decreed in any general
 22 adjudication of the Rosebud Creek basin or, until
 23 such final decree is issued, a water right
 24 recognized under state law, which 1) has a priority
 25 date of June 30, 1973 or earlier, and 2) is based
 26 on the use of an irrigation system in place and not

1 abandoned as of June 30, 1973; provided, that the
 2 state law water rights protected in this paragraph
 3 shall not exceed:

- 4 i. North of the Reservation, 8,100 acre-feet of
 5 water per year or enough water to irrigate
 6 2,700 acres of land per year, whichever is
 7 less; and
- 8 ii. South of the Reservation, 540 acre-feet of
 9 water per year or enough water to irrigate 180
 10 acres of land per year, whichever is less.

11 d. Dams and Impoundments. The Tribe shall not
 12 construct, within the Rosebud Creek basin, any dams
 13 or impoundments to store water naturally arising in
 14 Rosebud Creek and its tributaries; provided, that
 15 the Tribe may construct stockwater impoundments
 16 pursuant to paragraph A.5. of this Article, and,
 17 subject to other applicable provisions of this
 18 Compact, may construct dams or impoundments within
 19 the Rosebud Creek basin to store water from sources
 20 outside the basin, including non-alluvial
 21 groundwater.

22 e. Moratorium on Permits. The Montana Department of
 23 Natural Resources and Conservation shall order a
 24 moratorium on the issuance of permits in the
 25 Rosebud Creek basin concurrent with the
 26 ratification date of this Compact. The moratorium

shall not apply to applications for permits by persons who have entered into deferral agreements with the Tribe for Rosebud Creek basin water as provided in Section G. of this Article. The Department may order the moratorium lifted if it determines that water is available over and above the amount necessary to fulfill the Tribal Water Right described in paragraph A.3.a. and Section A.3.c. of this Article. The Tribe may challenge the Department's determination to lift the moratorium under the procedure set forth in Article IV of this Compact.

4. Groundwater.

- a. Alluvial Groundwater. The Tribe has a right to withdraw and use, or permit the withdrawal and use of, alluvial groundwater in lieu of surface water diversions of the Tongue River and Rosebud Creek Tribal Water Right, subject to the same terms and conditions of this Compact that apply to such surface water diversions. Alluvial water withdrawn from wells or manifolded well systems with a capacity of 100 gallons per minute or less shall not be deducted from the Tribal Water Right. For wells or manifolded well systems with a capacity of withdrawing greater than 100 gallons per minute of alluvial water, the entire amount withdrawn shall

be deducted from the Tribal Water Right.

- b. Non-alluvial Groundwater. Except where a Tribal right to non-alluvial groundwater is established pursuant to Article VII.B. of this Compact, Tribal use or authorization of use of non-alluvial groundwater shall, at the election of the Tribe, comply with state law in effect at the time of the use or with the alluvial groundwater provisions of paragraph A.4.a. of this Article.

5. Stockwater Impoundments. The Tribe may construct, or permit the construction of, stockwater impoundments on the Reservation, where the capacity of the impoundment is less than 15 acre-feet and the impoundment is constructed on a source other than a perennial flowing stream. The amount of water so impounded shall not be deducted from the Tribal Water Right.

6. Subirrigation. The Tribe shall be entitled to take advantage of any natural subirrigation occurring on the Reservation. Where otherwise consistent with state law, persons outside the Reservation shall also be entitled to take advantage of natural subirrigation.

7. Big Horn Reservoir (Yellowtail) Storage.

- a. Tribal Allocation. As a part of the Tribal Water Right, the Secretary of the Interior shall allocate 30,000 acre-feet per year of stored water in Big Horn Reservoir, Yellowtail Unit, Lower Bighorn

1 Division, Pick-Sloan Missouri Program, Montana,
 2 measured at the dam, for use or disposition by the
 3 Tribe for any beneficial purpose, either on or off
 4 the Reservation, pursuant to the terms of this
 5 Compact. THIS ALLOCATION IS SUBJECT TO THE PRIOR
 6 RESERVED WATER RIGHTS, IF ANY, OF ANY INDIAN TRIBE,
 7 OR OF PERSONS CLAIMING WATER THROUGH THAT TRIBE, TO
 8 THAT WATER. ANY USE OR DISPOSITION OF WATER FROM
 9 BIG HORN RESERVOIR OFF THE RESERVATION BY THE TRIBE
 10 IS SUBJECT TO THE SPECIFIC PROVISIONS RELATING TO
 11 SUCH USE OR DISPOSITION IN ANY ACT OF CONGRESS
 12 RATIFYING THIS COMPACT.

13 b. Payment for Tribal Allocation. The Tribe shall not
 14 be required to make payments to the United States
 15 for any portion of the Tribal Water Right stored in
 16 Yellowtail Reservoir unless and until the water is
 17 used or sold by the Tribe in which case the Tribe
 18 shall make annual payments to the United States as
 19 hereinafter provided.

20 i. Use or Sale for Municipal and Industrial (M&I)
 21 Purposes. For each acre-foot of stored water
 22 used or sold for M&I purposes, the Tribe shall
 23 pay annually to the United States an amount to
 24 cover the proportionate share of the annual
 25 operation, maintenance and replacement (OM&R)
 26 costs, and the proportionate share of the

capital costs with appropriate interest for
 the Yellowtail Unit allocable to the Tribe's
 stored water. Upon full payment of the capital
 costs allocable to the Tribe's stored water
 supply, the annual payments shall include only
 a proportionate share of the annual OM&R
 costs. Such annual payments shall be reviewed
 and adjusted, as appropriate, to reflect the
 actual capital and OM&R costs for the
 Yellowtail Unit.

ii. Agricultural, Domestic, Livestock, and Other
Uses. For each acre-foot of stored water used
 or sold for other than M&I purposes, the Tribe
 shall pay annually to the United States an
 amount to cover the OM&R cost for the
 Yellowtail Unit allocable to the Tribe's
 stored water, which amount shall be reviewed
 and adjusted, as appropriate, to reflect the
 actual OM&R costs for the Yellowtail Unit.
 The Bureau of Indian Affairs shall transfer
 sufficient funds on a nonreimbursable basis to
 the Bureau of Reclamation to cover allocable
 OM&R costs under this paragraph.

c. Rates and Revenues. Except for payments required
 to be made to the United States as set forth above,
 the Tribe shall set such rates as it deems proper

1 for its use or sale of stored water and shall
 2 retain all revenues from its use or sale of said
 3 stored water; provided, that the United States
 4 reserves the right to use any and all water stored
 5 in Yellowtail Reservoir for hydropower generation.

6 d. Agreement. Following ratification of this Compact,
 7 and upon development of a demand for the water
 8 under Section A.7. of this Article, the United
 9 States and the Tribe shall enter into an
 10 appropriate agreement, if required, setting forth
 11 the terms and conditions under which water will be
 12 made available to the Tribe, and for the collection
 13 and disposition of revenues in connection
 14 therewith.

15 B. Persons Entitled to Use the Tribal Water Right.

16 The Tribal Water Right may be used by the Tribe, or persons
 17 authorized to use water by the Tribe pursuant to Article III;
 18 provided, that:

- 19 1. Such use is in accordance with the terms of this Compact;
- 20 2. That the Tribe shall give preference to Tribal members to
 21 use the Tribal Water Right; and
- 22 3. Such water right may be transferred from one Tribal
 23 member to another Tribal member for agricultural purposes
 24 only upon the transfer of land on the Reservation from
 25 one Tribal member to another Tribal member.

26 C. Place of Use of the Tribal Water Right.

1 Pursuant to a Tribal water code adopted as prescribed in
 2 Article III of this Compact, and subject to all other
 3 provisions of this Compact, the Tribe shall have the right to
 4 use or permit use of the Tribal Water Right with any point of
 5 diversion or any place of use on or off the Reservation;
 6 provided, that any use of the Tribal Water Right off the
 7 Reservation shall not be deemed to convert the Tribal Water
 8 Right to a state water right, and subsequent nonuse of the
 9 Tribal Water Right off the Reservation shall not constitute a
 10 relinquishment, forfeiture, or abandonment of the Right.

11 D. Purposes of the Tribal Water Right.

12 Except as provided in paragraph A.3.a. of this Article, the
 13 Tribe may authorize use of the Tribal Water Right on the
 14 Reservation for any purpose without regard to whether such use
 15 is beneficial as defined by state law. Off the Reservation,
 16 any use of the Tribal Water Right shall comply with Article
 17 III.B.

18 E. Conditions Upon Uses of the Tribal Water Right.

19 The Tribe shall adopt appropriate regulations to ensure that
 20 use of the Tribal Water Right is not wasteful and does not
 21 degrade water quality.

22 F. Transfer of Tribal Water Right.

23 The Tribe shall not transfer water naturally arising in
 24 Rosebud Creek or its tributaries for use off the Reservation.
 25 The Tribe may transfer any other part of the Tribal Water
 26 Right for use on or off the Reservation pursuant to the terms

1 of this Compact. This paragraph shall not affect the right of
2 the Tribe to enter into a deferral agreement regarding Rosebud
3 Creek water pursuant to Section G. of this Article.

4 G. Deferral Agreements.

5 After the ratification date, the Tribe may enter into an
6 agreement with any person who is exercising or proposing to
7 exercise a right under state law to use surface water off the
8 Reservation, which agreement protects the person's right from
9 any exercise of the Tribal Water Right; provided, that:

- 10 1. Before use of such water, the person shall have complied
- 11 with all applicable state laws concerning the acquisition
- 12 of a water right;
- 13 2. Subsequent to acquisition of the state water right,
- 14 regulation of its use shall be subject to state law;
- 15 3. The amount of water subject to the agreement shall be
- 16 deducted from the amount of water available for depletion
- 17 by the Tribe in the basin from which the water is being
- 18 diverted; and
- 19 4. The agreement shall not permanently alienate the Tribal
- 20 Water Right or any part thereof.

21 H. Effect of Non-Use of Tribal Water Right.

22 Non-use of any part of the Tribal Water Right shall not
23 constitute a relinquishment, forfeiture or abandonment of the
24 Right.

25 I. Tribal Water Right to be Held in Trust.

26 The Tribal Water Right shall be held in trust by the United

1 States for the benefit of the Tribe.

2 **Article III**

3 **Administration of Water Rights**

4 A. Tribal Administration.

5 1. Except as otherwise provided in this Compact, the use of
6 the Tribal Water Right shall be administered by the
7 Tribe, and the Tribe has the final and exclusive
8 jurisdiction to resolve all disputes between users of the
9 Tribal Water Right. Administration and enforcement of
10 the Tribal Water Right shall be pursuant to a water code,
11 which shall be developed and adopted by the Tribe and
12 submitted for approval to the Secretary of the Interior
13 within one year after ratification of this Compact.
14 Pending the adoption and approval of the Tribal water
15 code, the administration and enforcement of the Tribal
16 Water Right shall be by the Secretary of the Interior.

17 2. Within six months after the Tribal water code takes
18 effect, the Tribe shall provide the State with notice of
19 each use of the Tribal Water Right, including uses in
20 existence as of the ratification date of this Compact and
21 those established since that time, which shall show:

- 22 a. The person authorized to make the diversion;
- 23 b. The amount of water authorized to be diverted
- 24 annually;
- 25 c. The amount of water authorized for annual
- 26 consumption;

- 1 d. The point of diversion;
- 2 e. The period of use;
- 3 f. The place of use;
- 4 g. The uses for which the water may be diverted; and
- 5 h. The relative priority of the use as against other
- 6 uses of the Tribal Water Right.
- 7 3. The Tribe shall thereafter notify the State within sixty
- 8 days after the end of each quarter year of all new uses
- 9 of surface and groundwater authorized by the Tribe during
- 10 the preceding quarter year and of all new uses of the
- 11 Tribal Water Right actually commenced during that quarter
- 12 year. The notice shall be in the same format as that
- 13 prescribed in Section A.2. of this Article.
- 14 4. The Tribe shall provide the State with not less than 180-
- 15 days written notice prior to the start of construction of
- 16 any project to divert any portion of the Tribal Water
- 17 Right from the Big Horn River or the Big Horn Reservoir
- 18 for use on the Reservation, or from the Tongue River or
- 19 the Tongue River Reservoir for use on the Reservation in
- 20 the Rosebud Creek basin. The notice shall describe: any
- 21 diversion, conveyance and storage facilities; the amounts
- 22 of water to be diverted and consumed; and the purpose,
- 23 place, and period of the proposed use. Diversion or use
- 24 of water from such project may be made only after all
- 25 permits, certificates, variances or other authorizations
- 26 described in paragraph B.3. of this Article have been

1 obtained. With respect to any such project or diversion,

2 the State or any affected person may seek such remedies

3 as may be available under federal, state, or tribal law,

4 and nothing in this Compact shall be construed to affect

5 the rights of any party under such law.

6 B. Off-Reservation Uses of the Tribal Water Right.

- 7 1. Off-Reservation Uses. Any use of the Tribal Water Right
- 8 involving a point of diversion or place of use located
- 9 off the Reservation shall be considered an off-
- 10 Reservation use; provided, that releases or diversions
- 11 from Big Horn Reservoir or Tongue River Reservoir for use
- 12 on the Reservation shall not be considered off-
- 13 Reservation uses.
- 14 2. Subsequent Federal or State Law. All off-Reservation
- 15 uses of the Tribal Water Right shall comply with the
- 16 requirements set forth in Section B. of this Article
- 17 until such time as the statutory or common law of the
- 18 United States or the State of Montana establishes that
- 19 off-Reservation uses of Indian water rights may occur
- 20 without regard to state law.
- 21 3. Diversion Facilities.
- 22 With respect to diversion or transportation facilities
- 23 located off the Reservation, the Tribe or persons using
- 24 the Tribal Water Right shall apply for all permits,
- 25 certificates, variances and other authorizations required
- 26 by state laws regulating, conditioning or permitting the

1 siting, construction, operation, alteration or use of any
 2 equipment, device, facility or associated facility
 3 proposed to use or transport water. A diversion or use
 4 of water in the exercise of the Tribal Water Right may be
 5 made only after all permits, certificates, variances or
 6 other authorizations applied for pursuant to this
 7 paragraph have been obtained.

8 4. Off-Reservation Uses in Tongue and Rosebud Basins.

9 a. The Tribe shall provide the State with not less
 10 than 180-days advance written notice of any off-
 11 Reservation use, transfer, or change of use of the
 12 Tribal Water Right:

13 i. Within the Tongue River basin, or

14 ii. Utilizing Tongue River water off-Reservation
 15 in the Rosebud Creek basin.

16 b. The notice shall include sufficient documentation
 17 to demonstrate that:

18 i. The proposed use of water is a beneficial use
 19 as defined by Montana law in effect at that
 20 time;

21 ii. The proposed means of diversion, and the
 22 construction and operation of the diversion
 23 works are adequate;

24 iii. The proposed use, transfer, or change of use
 25 will not adversely affect, except with the
 26 consent of the owner of such right:

1 A. Any water right arising under the laws of
 2 the United States, or

3 B. Any right to the use of water established
 4 pursuant to the laws of the State; except
 5 that, if the portion of the Tribal Water Right
 6 that is the subject of the proposed off-
 7 Reservation use, transfer or change of use is
 8 the storage and exchange right set forth in
 9 Article II.A.2.b. of this Compact, the Tribe
 10 need only demonstrate that Miles City Decree
 11 rights will not be adversely affected by such
 12 use, transfer, or change of use.

13 iv. The proposed use, transfer, or change of use
 14 does not cause any unreasonable significant
 15 adverse environmental impact; and

16 v. Proposed uses, transfers, or changes in use
 17 in excess of 4,000 acre-feet per year and 5.5
 18 cubic feet per second of water will not:

19 A. Substantially impair the quality of water
 20 for existing uses in the source of water from
 21 which the diversion is made;

22 B. Be made where low quality water which can
 23 economically be used is legally and physically
 24 available to the Tribe for the proposed use;

25 C. Create or substantially contribute to
 26 saline seep; or

1 D. Substantially injure fish or wildlife
2 populations in the source of water from which
3 the diversion is made.

4 c. A proposed use, transfer or change of use of the
5 Tribal Water Right pursuant to Section B.4. of this
6 Article may be challenged:

7 i. Within 30 days after the expiration of the
8 notice period provided in Section B.4.a. of
9 this Article;

10 ii. In a court of competent jurisdiction; and

11 iii. By the State or by a person whose rights are
12 adversely affected by the proposed use,
13 transfer, or change of use.

14 In any such case, the Tribe shall have the burden
15 of proving by a preponderance of the evidence that
16 it has satisfied the requirements of Section B.4.b.
17 of this Article. A Tribal notice that conforms to
18 the requirements of Section B.4.b. of this Article
19 shall be prima facie evidence of its contents.

20 5. Off-Reservation Uses Outside Tongue and Rosebud Basins.
21 Except as provided in Section B.4. of this Article, no
22 person may initiate an off-Reservation use, transfer, or
23 change of use of the Tribal Water Right without first
24 applying for and receiving authorization for the use,
25 transfer, or change of use pursuant to Montana law in
26 effect at the time of the application.

1 C. State Administration.

2 1. The State shall administer all rights to the use of
3 surface water and groundwater within the Reservation
4 which are not a part of the Tribal Water Right. The
5 State shall have the final and exclusive jurisdiction to
6 resolve all disputes between users of rights established
7 under state law.

8 2. Within one year after ratification of this Compact, the
9 State shall notify the Tribe of all existing uses of
10 surface and groundwater for which a permit has been
11 issued by the State in the Tongue River or Rosebud Creek
12 basins. The notice shall state:

13 a. The person authorized to make the diversion;

14 b. The amount of water authorized to be diverted
15 annually;

16 c. The amount of water authorized for annual
17 consumption;

18 d. The point of diversion;

19 e. The period of use;

20 f. The place of use;

21 g. The uses for which the water may be diverted; and

22 h. The priority date of the use.

23 3. The State shall notify the Tribe within sixty days after
24 the end of each quarter year of all new uses of surface
25 and groundwater for which a permit has been issued by the
26 State in the Tongue River or Rosebud Creek basins during

1 the preceding quarter year and of all new uses of water
 2 actually commenced pursuant to the laws of the State
 3 during that quarter year on each of these sources. The
 4 notice shall be in the same format as that prescribed in
 5 Section C.2. of this Article.

6 D. Operation of Tongue River Reservoir.

7 1. To provide for Tongue River Reservoir operation
 8 procedures that are consistent with the purposes of this
 9 Compact, a reservoir operation plan shall be developed
 10 by a five-member advisory committee. The committee shall
 11 have representatives from the State of Montana, the
 12 Tongue River Water Users Association, the Northern
 13 Cheyenne Tribe, the United States, and a fifth member to
 14 be selected by the other four. The advisory committee
 15 shall annually agree upon a reservoir operation schedule
 16 setting forth proposed uses of storage and direct flow
 17 for the year. The Department of Natural Resources and
 18 Conservation or its successor shall thereupon be
 19 responsible, consistent with the terms of this Compact
 20 and other applicable law, for the daily operation of the
 21 Reservoir and for implementation of the reservoir
 22 operation plan.

23 2. The reservoir operation plan shall provide for the
 24 operation of the project for fish and wildlife purposes
 25 depending on the availability of water on an annual
 26 basis. This provision shall not create an operational

1 preference for fish and wildlife purposes relative to
 2 other project purposes.

3 3. The Secretary of the Interior shall pay annually to the
 4 State an amount to cover the proportionate share of the
 5 annual operation, maintenance and replacement (OM&R)
 6 costs for the Tongue River Dam allocable to the Tribe's
 7 stored water in the Reservoir.

8 **Article IV**

9 **Northern Cheyenne-Montana Compact Board**

10 A. Establishment of Board.

11 There is hereby established the Northern Cheyenne-Montana
 12 Compact Board. The Board shall consist of three members:
 13 one member appointed by the Governor of the State of Montana;
 14 one member appointed by the Northern Cheyenne Tribal Council;
 15 and one member selected by the other two members. All members
 16 shall be appointed within six months of the ratification date
 17 of this Compact and within thirty days of the date any vacancy
 18 occurs. Each member shall serve a five-year term and shall be
 19 eligible for reappointment. The initial term of each member
 20 shall be staggered with one member serving a five-year term,
 21 one a four-year term, and one a three-year term. The initial
 22 term of each member shall be chosen by lot. Expenses of the
 23 members appointed by the State and the Tribe shall be borne by
 24 the entity appointing the member. The expenses of the third
 25 member and all other expenses shall be borne equally by the
 26 Tribe and the State, subject to the availability of funds.

- 1 B. Membership.
 2 Should the two appointed members fail to agree on the
 3 selection of a third member within sixty days of the
 4 ratification date of this Compact or within thirty days after
 5 any vacancy occurs, the following procedure shall be utilized:
 6 1. Within five days each member shall nominate three persons
 7 to serve as a member of the Board;
 8 2. Within fifteen days thereafter each member shall reject
 9 two of the persons nominated by the other member;
 10 3. The chief judge of the United States District Court for
 11 the District of Montana shall select the third member of
 12 the Board from the remaining two nominees. If the chief
 13 judge declines for any reason to select the third member,
 14 the chief justice of the Montana Supreme Court shall make
 15 the selection from the remaining two nominees.
- 16 C. Quorum and Vote Required.
 17 Two members of the Board shall constitute a quorum if
 18 reasonable notice has been provided in advance to the absent
 19 member. All Board decisions shall be by a majority of the
 20 Board, shall be in writing and, together with any dissenting
 21 opinions, shall be served on all parties in the proceeding
 22 before the Board, and on the parties to this Compact.
- 23 D. Jurisdiction of the Board.
 24 The Northern Cheyenne-Montana Compact Board shall have
 25 jurisdiction to resolve controversies over the right to the
 26 use of water between users of the Tribal Water Right on the

- 1 one hand and users of state water rights on the other hand.
 2 Such controversies shall include, but shall not be limited to,
 3 disputes as to the meaning of this Compact, and disputes
 4 concerning the operation of the Tongue River Reservoir as it
 5 affects the Tribal Water Right.
- 6 E. Powers and Duties.
 7 The Board shall hold hearings upon notice in proceedings
 8 before it and shall have the power to administer oaths, take
 9 evidence and issue subpoenas to compel attendance of witnesses
 10 or production of documents or other evidence. The Tribe, the
 11 State, and the United States shall enforce the Board's
 12 subpoenas in the same manner as prescribed by the laws of the
 13 Tribe, the State, or the United States for enforcing a
 14 subpoena issued by its courts in a civil action. The parties
 15 to the controversy may present evidence and cross examine any
 16 witnesses. The Board shall determine the controversy based on
 17 the evidence, and grant any appropriate relief, except money
 18 damages. All decisions of the Board shall be by majority and
 19 in writing. The Board shall adopt necessary rules and
 20 regulations to carry out its responsibilities within six
 21 months after its first meeting. All records of the Board
 22 shall be open to public inspection except for privileged
 23 information.
- 24 F. Review and Enforcement of Board Decisions.
 25 1. Decisions by the Board shall be effective immediately,
 26 unless stayed for a period of time prescribed by the

- 1 Board. Any party before the Board may appeal any final
 2 decision by the Board to a court of competent
 3 jurisdiction within thirty days of such decision. The
 4 notice of appeal shall be filed with the Board and served
 5 personally or by registered mail upon the Tribe, the
 6 State, the United States and all parties to the
 7 proceeding before the Board, and all such persons shall
 8 thereafter have the right to participate in the appeal.
- 9 2. In any appeal, the Board's decision shall be presumed to
 10 be valid, and may be vacated by the court only on one of
 11 the following grounds:
- 12 a. The decision is not supported by substantial
 13 evidence;
- 14 b. The decision was procured by corruption, fraud or
 15 undue means;
- 16 c. There was evident partiality or corruption by the
 17 Board or by any member;
- 18 d. The Board was guilty of misconduct in refusing to
 19 hear the dispute, or in refusing to hear evidence
 20 pertinent and material to the controversy, or any
 21 other clear misbehavior by which the rights of any
 22 party have been substantially prejudiced;
- 23 e. The Board exceeded its authority under the terms of
 24 this Compact; or
- 25 f. The decision is contrary to law.
- 26 3. Unless an appeal is timely filed as provided in paragraph

- 1 F.1. of this Article, any decision of the Board shall be
 2 confirmed or enforced by any court of competent
 3 jurisdiction on petition of the Board, the Tribe, the
 4 State, the United States, or any party before the Board
 5 in the proceeding in which the decision was made.
- 6 4. A court of competent jurisdiction in which a timely
 7 appeal is filed pursuant to paragraph F.1. of this
 8 Article, or in which a petition to confirm or enforce is
 9 filed pursuant to paragraph F.3. of this Article, may
 10 order such temporary or permanent relief as it considers
 11 just and proper.
- 12 5. Any appeal may be taken from any decision of the court in
 13 which a timely appeal is filed pursuant to paragraph F.1.
 14 of this Article, or in which a petition to confirm or
 15 enforce is filed pursuant to paragraph F.3. of this
 16 Article, in the manner and to the same extent as from
 17 orders or judgments of the court in a civil action.
- 18 6. In any appeal or petition to confirm or enforce the
 19 Board's decision, the Board shall file with the court the
 20 record of the proceedings before the Board.
- 21 G. Waiver of Immunity.
 22 The Tribe, the United States and the State hereby waive their
 23 respective immunities from suit, including any defense the
 24 State shall have under the Eleventh Amendment of the
 25 Constitution of the United States, in order to permit the
 26 resolution of disputes under this Compact by the Northern

1 Cheyenne-Montana Compact Board, and the appeal or judicial
2 enforcement of Board decisions as provided herein, except that
3 such waivers of sovereign immunity by the Tribe, the United
4 States, or the State shall not extend to any action for money
5 damages including costs and attorneys' fees.

6 **Article V**

7 **Finality and Effectiveness of Compact**

8 A. **Ratification and Effectiveness of Compact.**

9 1. Upon ratification by the Northern Cheyenne Tribal Council
10 and the Legislature of the State of Montana, the terms of
11 this Compact may not be altered, voided, or modified in
12 any respect without the consent of the parties; provided,
13 that except as set forth in Section A.2. of this Article,
14 this Compact shall not become effective until
15 ratification by the United States Congress and the
16 completion date occurs, notwithstanding the provisions of
17 Section 85-2-702(2), MCA. If the completion date does
18 not occur on or before December 31, 1997, or any later
19 date agreed to in writing by the parties, this Compact,
20 including all provisions that become effective on the
21 ratification date, shall become null and void without
22 further action by any party. Notwithstanding the
23 provisions of Section 85-2-702(3), MCA, this Compact
24 shall not be included in any preliminary decree or final
25 decree in any State water court proceeding unless and
26 until this Compact becomes effective as set forth in this

1 Article.

- 2 2. As between the State and the Tribe, all of the provisions
3 of this Compact shall become effective upon the
4 ratification date except insofar as they:
5 a. Quantify or provide for the administration of the
6 Tongue River Tribal Water Right;
7 b. Provide for the management or operation of the
8 Tongue River Reservoir; or
9 c. Require Congressional authorization.

10 All of the provisions that do not become effective upon
11 the ratification date shall become effective on the
12 completion date, unless Congress provides otherwise.

- 13 B. **Incorporation Into Decrees and Disposition of Federal Suits.**
14 Within sixty days after the completion date, the parties shall
15 petition for incorporation of this Compact into a decree in
16 any appropriate State court proceeding commenced in accordance
17 with 43 U.S.C. §666. Upon the issuance of a final decree by
18 the State water court, or its successor, and the completion of
19 any direct appeals therefrom, or upon the expiration of the
20 time for filing any such appeal, the United States, the Tribe,
21 and the State shall within thirty days execute and file joint
22 motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss
23 the Tribe's claims, and any claims made by the United States
24 as trustee for the Tribe, in Northern Cheyenne Tribe of the
25 Northern Cheyenne Reservation v. Adsit, et al., No. 75-6-BLG
26 (D. Mont.); United States v. Big Horn Low Line Canal Company,

1 et al., No. 75-34-BLG (D. Mont.); and United States v. Tongue
 2 River Water Users Association, et al., No. 75-20-BLG (D.
 3 Mont.), (hereinafter collectively referred to as "the federal
 4 suits"), with prejudice. This Compact shall be filed as a
 5 consent decree in the federal suits only if, prior to the
 6 dismissal of the federal suits as provided in this Article, it
 7 is finally determined in a judgment binding upon the State of
 8 Montana that the State courts lack jurisdiction over, or that
 9 the State court proceedings are inadequate to adjudicate, some
 10 or all of the water rights asserted in the federal suits.

11 **Article VI**

12 **General Provisions**

13 **A. Nothing in this Compact shall be so construed or interpreted:**

- 14 1. To establish the nature, extent, or manner of
- 15 administration of water rights of any Indian reservation
- 16 or other federal reservation other than the Northern
- 17 Cheyenne Reservation;
- 18 2. To preclude the acquisition or exercise of a right to the
- 19 use of water by the Tribe or any individual Indian
- 20 outside the Reservation by purchase of such right or by
- 21 acquisition of land, or by application to the State;
- 22 3. To preclude the acquisition or exercise of an
- 23 appropriative right to the use of water under state law
- 24 by the Tribe or any individual Indian within the
- 25 Reservation:
- 26 a. By purchase of such right or by purchase of land;

1 provided, that water rights acquired by such
 2 purchase after the ratification date of this
 3 Compact shall be in addition to and shall become
 4 part of the Tribal Water Right and shall be
 5 governed by this Compact; or

6 b. By application to the State. Except for
 7 applications for non-alluvial groundwater pursuant
 8 to Article II.A.4.b., and applications for storage
 9 appropriations authorized by paragraph A.8. of this
 10 Article, any such application shall not be granted
 11 by the State until the Tribal Water Right in the
 12 basin where the diversion that is the subject of
 13 the application is located has been fully utilized;

- 14 4. To determine the relative rights inter sese of persons
- 15 using water under the authority of the State or the
- 16 Tribe;
- 17 5. To limit in any way the rights of the parties or any
- 18 other person to litigate any issues or questions not
- 19 resolved by this Compact;
- 20 6. To authorize the taking of a water right which is vested
- 21 under state or federal law;
- 22 7. To create or deny substantive rights through headings or
- 23 captions used in this Compact;
- 24 8. To preclude or to discourage the Tribe from establishing
- 25 the right to, or contracting for, water from any further
- 26 enlargements of the Tongue River Dam, or from any future

- 1 storage facilities that may be built within the Tongue
 2 River or Rosebud Creek basins, or in any other water
 3 basins;
- 4 9. To address or prejudice whether, in any interstate
 5 apportionment, the Tribe's water right shall be counted
 6 as part of the waters apportioned to the State; or
- 7 10. To alter or amend any provisions of the Yellowstone River
 8 Compact, Act of October 30, 1951, ch. 629, 65 Stat. 663
 9 (1951).
- 10 11. To prohibit the Tribe or the United States from
 11 challenging any claims to water in any general
 12 adjudication of the Tongue River or Rosebud Creek basins.
- 13 B. The parties expressly reserve all rights not granted,
 14 recognized or relinquished in this Compact.
- 15 C. The Secretary of the Interior shall comply with all aspects of
 16 the National Environmental Policy Act, 42 U.S.C. §§4331-4335,
 17 and the Endangered Species Act, 16 U.S.C. §1531, et seq., and
 18 other applicable environmental acts and regulations in
 19 implementing this Compact.

Article VII

Tribal Relinquishment of Other Water Claims

- 22 A. With the exception of the Tribe's claim to non-alluvial
 23 groundwater in paragraph B. of this Article and any rights to
 24 water which may exist with respect to land held by the Tribe
 25 or a Tribal member outside the present Reservation, the Tribe
 26 and the United States as trustee for the Tribe hereby

- 1 relinquish forever any and all claims, in existence on the
 2 ratification date of this Compact, to water within the State
 3 of Montana. The relinquishment includes, but is not limited
 4 to, any claim for water derived from aboriginal use of land or
 5 water, any Indian treaties, any Act of Congress, and any
 6 executive act of the United States.
- 7 B. The parties intend that the water right as confirmed to the
 8 Tribe in Article II is in full satisfaction of its federal
 9 reserved water right based on Winters v. United States, 207
 10 U.S. 564 (1908). Notwithstanding the provisions of paragraph
 11 A. of this Article, the Tribe retains the right to assert a
 12 claim that it has a right, not based on the federal reserved
 13 water rights doctrine, to the use of any non-alluvial
 14 groundwater underlying the Reservation. In any such action,
 15 the Tribe shall be estopped to assert that its right to non-
 16 alluvial groundwater is a federal reserved water right, that
 17 the Tribal Water Right confirmed in Article II is inadequate
 18 to satisfy the purposes for which the Reservation was created,
 19 or from collaterally attacking this Compact in any manner.
 20 Any right to non-alluvial groundwater established by the Tribe
 21 under this paragraph is not subject to this Compact. Nothing
 22 in this Compact shall be construed to waive any defenses of
 23 the State or any water user to a Tribal claim for non-alluvial
 24 groundwater.

Article VIII

Binding Effect

1 Upon the effectiveness of any provision of this Compact, its terms
2 will be binding:

3 A. Upon the State and any person or entity of any nature
4 whatsoever using, claiming or in any manner asserting any
5 right under the authority of the State to the use of water in
6 the State of Montana; provided, that for purposes of consent,
7 ratification, or authorization, the validity of consent,
8 ratification, or authorization is to be determined by Montana
9 law;

10 B. Upon the Tribe and any person or entity of any nature
11 whatsoever using, claiming or in any manner asserting any
12 right to the use of the Tribe's water right, or any right
13 arising under any doctrine of reserved or aboriginal water
14 rights for the Tribe, or any right arising under tribal law;
15 provided, that for purposes of consent, ratification, or
16 authorization, the validity of consent, ratification or
17 authorization is to be determined by tribal law; and

18 C. Upon the United States and any person or entity of any nature
19 whatsoever using, claiming or in any manner asserting any
20 right under the authority of the United States to the use of
21 water in the State of Montana; provided, that for purposes of
22 consent, ratification, or authorization, the validity of
23 consent, ratification or authorization is to be determined by
24 federal law, AND FURTHER PROVIDED THAT NOTHING CONTAINED IN
25 THIS COMPACT AFFECTS ANY CLAIM OF ANY INDIAN TRIBE, OR OF
26 PERSONS CLAIMING WATER THROUGH THAT TRIBE, OR THE RIGHT OF ANY

1 INDIAN TRIBE, OR PERSONS CLAIMING WATER THROUGH THAT TRIBE, TO
2 PURSUE A CLAIM TO ANY WATER FROM ANY SOURCE BASED ON ANY
3 THEORY OF RIGHT OR ENTITLEMENT.

4 Article IX

5 Contributions to Settlement

6 A. The United States agrees to provide \$31,500,000 to repair the
7 Tongue River Dam and spillway and to raise the Tongue River
8 Dam spillway crest to secure the Tribe's existing contract
9 water under Article II.A.2.e. and to provide additional
10 storage capacity to secure the Tribe's storage and exchange
11 water right under Article II.A.2.b.

12 B. The State agrees to provide \$16,500,000 to repair the Tongue
13 River Dam and spillway with the understanding that the State's
14 portion will be paid through a combination of cash and federal
15 loans, in proportions to be agreed upon by the parties.

16 C. The Provisions of this Article are subject to the separate
17 Letter of Agreement dated April 17, 1991, between the State
18 and the United States explaining in detail the allocation of
19 the costs of the project. The State and the United States
20 will enter into a further agreement providing for the
21 expenditure of the contributions and loans of the United
22 States hereunder.

23 D. The United States agrees to provide \$10,000,000 for a Tribal
24 Development Fund payable in equal amounts of \$2,000,000 each
25 fiscal year for five years. These funds shall not be
26 distributed on a per capita basis to members of the Tribe and

1 shall only be used for land and natural resources
 2 administration, planning and development within the Northern
 3 Cheyenne Reservation or for land acquisition by the Tribe
 4 within the Northern Cheyenne Reservation.

5 E. Federal financial contributions to paragraph A of this Article
 6 will be budgeted for, subject to the availability of funds, by
 7 October 1 of the year following the ratification of this
 8 Compact by Congress and the authorization by Congress of the
 9 Tongue River Dam project. Federal financial contributions to
 10 paragraph D of this Article will be budgeted for, subject to
 11 the availability of funds, by October 1 of the second year
 12 following the ratification of this Compact by Congress and the
 13 authorization by Congress of the Tongue River Dam project.

14 F. The Tribe and the United States agree to pursue through the
 15 normal Bureau of Indian Affairs and Department of the Interior
 16 budget process such additional sums as are necessary to
 17 implement the terms of this Compact, to develop a Tribal water
 18 code, and to provide increased agricultural development on the
 19 Reservation. The State agrees to support the efforts of the
 20 Tribe and the United States in this regard.

21 **Article X**
 22 **Legislation**

23 The Parties agree to seek enactment of any legislation
 24 necessary to effectuate the provisions and purposes of this
 25 Compact, and to defend the provisions and purposes of this Compact
 26 from all challenges and attacks; provided, that no provision of the

1 Compact shall be modified as to substance except as may be provided
 2 herein.

3 IN WITNESS WHEREOF the representatives of the State of
 4 Montana, the Northern Cheyenne Tribe, and the United States have
 5 signed this Compact on the ____ day of _____, 19__.

6 FOR THE STATE OF MONTANA

7 MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

8 _____	_____
9 Jack E. Galt, Chairman	Gene J. Etchart
10 _____	_____
11 Chris D. Tweeten, Vice Chairman	Dennis Iverson
12 _____	_____
13 Carl M. Davis	Senator Joseph P. Mazurek
14 _____	_____
15 Everett C. Elliott	Gordon McOmber

16 _____
 17 Gary L. Spaeth

18 FOR THE NORTHERN CHEYENNE TRIBE

19 _____	_____
20 FOR THE SECRETARY OF	FOR THE UNITED STATES ATTORNEY
21 THE INTERIOR	GENERAL
22 _____	_____

23 NEW SECTION. Section 2. Effective date. [This act] is
 24 effective on passage and approval.

25 -END-



AN ACT TO RATIFY THE COMPACT ENTERED INTO BY THE STATE OF MONTANA AND THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE RESERVATION; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

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

Section 1. Northern Cheyenne-Montana compact ratified. The compact entered into by the state of Montana and the Northern Cheyenne tribe of the Northern Cheyenne Indian reservation and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing] is ratified. The compact is as follows:

WATER RIGHTS COMPACT
STATE OF MONTANA
NORTHERN CHEYENNE TRIBE
UNITED STATES OF AMERICA

This Compact is entered into by and among the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, the State of Montana, and the United States of America to settle, for all time, any and all existing claims of or on behalf of the Northern Cheyenne Tribe to water within the State of Montana.

RECITALS

WHEREAS, in 1975, the Northern Cheyenne Tribe and the United States, on behalf of the Tribe, brought suits in the United States District Court for the District of Montana to obtain a final

determination of the Tribe's water rights;

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Northern Cheyenne water rights;

WHEREAS, the federal district court suits were stayed in 1983 pending the outcome of Montana State court water adjudication proceedings;

WHEREAS, the adjudication of Northern Cheyenne water rights under state law has been suspended while negotiations have proceeded to conclude a compact resolving all reserved water rights claims of the Northern Cheyenne Tribe;

WHEREAS, the Northern Cheyenne Tribe and the United States agree that the Tribal Water Right described in this Compact shall be in satisfaction of the Tribe's reserved water rights claims and any claims to water rights made on behalf of the Tribe by the United States;

WHEREAS, it is in the best interest of all parties that the reserved water rights claims of the Northern Cheyenne Tribe be settled through a Water Rights Compact;

WHEREAS, the parties agree that settlement of the reserved water rights claims of the Northern Cheyenne Tribe is dependent on the repair and enlargement of the Tongue River Reservoir;

NOW THEREFORE, the parties agree as follows:

Article I

Definitions

The following definitions shall apply for purposes of this



Compact:

1. "Acre-foot" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet.
2. "Alluvial groundwater" means water located below the land surface within the Quaternary hydrostratigraphic unit that borders or underlies major perennial and intermittent streams in the Tongue River and Rosebud Creek basins. This unit is composed of unconsolidated alluvial deposits of clay, silt, sand, and gravel. For the purposes of this Compact, all other water below the land surface will be deemed nonalluvial groundwater.
3. "Annual" or "per year" means during one year as defined by this Compact.
4. "Board" means the Northern Cheyenne-Montana Compact Board established by Article IV of this Compact.
5. "Completion date" means the date of completion of a project to repair and enlarge the Tongue River Dam to a degree sufficient to provide the storage component of the Tribal Water Right subject to the conditions provided in this Compact.
6. "Depletion" means, for any diversion of water, the difference between the quantity of water diverted and the quantity of return flows within the basin.
7. "Direct flow of the Tongue River" means the water in the Tongue River and its tributaries that has not been stored in the Tongue River Reservoir.
8. "Domestic use" means the diversion of water by one or more individuals, family units or households for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.
9. "Excess water" means increases in the Tongue River basin water supply resulting from conditions different from those assumed in the Tongue River Water Model.
10. "Exchange water" means water available to the Tribe from the Tongue River direct flow or from the Tongue River Reservoir storage in exchange for Tribal return flows made available to other Tongue River water users.
11. "Indian" means any person who: a) is an enrolled member of the Northern Cheyenne Tribe; or b) is a member of a tribe that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or c) holds, or is recognized by the Secretary of the Interior as eligible to hold, trust and restricted property on the Northern Cheyenne Reservation.
12. "Manifolded well system" means a water distribution or conveyance facility that is supplied by two or more wells.
13. "Miles City Decree water right" means a water right, finally decreed in any general adjudication of the Tongue River, or recognized under state law until such final adjudication, which is based on the decree entered in Miles City Canal & Irrigating Co. v. Lee, et al., Montana Seventh Judicial

District, No. 2809, May 20, 1914, and which has a priority date of March 24, 1909, or earlier.

14. "Parties" means the Tribe, the State of Montana, and the United States.
15. "Person" means an individual or any other entity, public or private, including the State, the Tribe, and the government of the United States and all officers, agents, and departments thereof.
16. "Ratification date" means the date this Compact has been approved by the Northern Cheyenne Tribal Council and the Legislature of the State of Montana.
17. "Reservation" means the Northern Cheyenne Reservation as established by Executive Orders of November 26, 1884 and March 19, 1900.
18. "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent, "State" means the Director of the State Department of Natural Resources and Conservation or its successor agency.
19. "State contract right" means a right to receive stored water from the Tongue River Reservoir, not to exceed a cumulative total of 40,000 acre-feet per year, pursuant to a contract that allocates the storage rights of the Montana Department of Natural Resources and Conservation or its successor agency.
20. "Tongue River Water Model" means the Tongue River Reservoir Operations computer model that is documented in: Tongue River

Modeling Study, Final Report, submitted on July 20, 1990, to the Engineering Bureau of the Water Resources Division of the Montana Department of Natural Resources and Conservation, or any revision agreed to by the parties. The Final Report and any agreed revisions are incorporated herein by reference as though set forth in full.

21. "Transfer" means any authorization for the delivery or use of water from the Tribe or any person authorized by the Tribe to any other person by a service contract, lease, sale, exchange or other similar agreement.
22. "Tribal Water Right" means the right to divert or use water as described by Articles II and III of this Compact.
23. "Tribe" means the Northern Cheyenne Tribe of the Northern Cheyenne Reservation and all officers, agents and departments thereof. Unless otherwise indicated, for purposes of notification or consent, "Tribe" means the Tribal President or the Chief Executive Official of the Tribe.
24. "United States" means the federal government and all officers, agencies, departments and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent, "United States" means the Secretary of the Department of the Interior.
25. "Year" means the twelve-month period beginning April 1st and ending March 31st.

Article II

Tribal Water Right

A. Quantification of Water Right.

The water rights of the Northern Cheyenne Tribe are as follows:

1. Existing Non-Agricultural Uses.

Tribal and individual Indian stockwater, domestic and municipal water uses on the Reservation and in existence as of the ratification date are hereby recognized and protected as part of the Tribal Water Right, and are in addition to the water rights set forth in Sections A.2., A.3., and A.4. of this Article. All such existing uses shall be governed by the terms of this Compact.

2. Tongue River.

Subject to the terms of this Compact, the Tribal Water Right in the Tongue River basin consists of the right to divert or use or to permit the diversion or use of up to 32,500 acre-feet per year, from a combination of direct flow, storage, and exchange water. Tribal and individual Indian irrigation uses in existence on the Reservation in the Tongue River basin as of the ratification date are recognized and protected, and shall be counted as a use of the 32,500 acre-feet per year right described in Section A.2. of this Article.

a. Direct Flow Right. The Tribe has a right to divert or use or permit the diversion or use of up to 12,500 acre-feet of water per year from direct flow of the Tongue River and its tributaries with a

priority date of October 1, 1881; provided, that:

i. The Tribe's annual depletion of its direct flow water right in the Tongue River and its tributaries shall not exceed 75 percent of the amount diverted, or 9,375 acre-feet per year; and

ii. The Tribe's direct flow water right in the Tongue River and its tributaries may not be used in a manner that adversely affects:

A. Miles City Decree water rights, or

B. Water rights from off-Reservation tributaries of the Tongue River, which are finally decreed in any general adjudication of the Tongue River, or are recognized under state law until such final adjudication, and which have a priority date of June 30, 1973 or earlier and are based on the use of an irrigation system in place and not abandoned as of June 30, 1973.

b. Storage and Exchange Water. The Tribe has a right to divert or deplete, or permit the diversion or depletion of, up to 20,000 acre-feet per year from a combination of water stored in the Tongue River Reservoir and exchange water. The availability of the 20,000 acre-feet per year depends, as provided in the Tongue River Water Model, upon the annual

schedule utilized by the Tribe for diversions of Tongue River direct flows. Except as provided in paragraph A.2.c.ii. of this Article, any reduction in Tongue River Reservoir stored water resulting from Tribal diversions of Tongue River direct flows shall not affect State contract rights, as defined in this Compact, but shall be satisfied exclusively from the right described in this paragraph. Tribal use of stored water from the Tongue River Reservoir shall be measured at the Reservoir.

c. Shortages.

- i. The Tribal Water Right in the Tongue River basin shall be subject to shortages due to natural low flows that are consistent with the period of record used in the Tongue River Water Model in diversion amounts not to exceed 50% in any one year and 100% cumulative in any ten-year period.
- ii. Decreases in the amount of water stored in the Tongue River Reservoir that are caused by: (i) sedimentation; (ii) Reservoir inflows lower than those assumed in the Tongue River Water Model; (iii) normal and expected maintenance of the Tongue River Dam and associated structures; or (iv) normal and expected deterioration of the Tongue River Dam and

associated structures shall not be considered a failure of the Tongue River Dam as that term is utilized in paragraph A.2.f. of this Article. All such decreases in water availability shall be shared pro rata among all users of stored water including the Tribe.

- d. Excess Water. The Tribe shall, as part of the Tribal Water Right, have the first right to use excess water, as defined in this Compact; provided, that total use of the Tongue River Tribal Water Right shall not exceed 32,500 acre-feet per year diverted from direct flow, storage, and exchange water. Tribal nonuse of excess water in any one year shall not affect the right of the Tribe to use excess water in any subsequent year.
- e. Contract Water. Nothing in this Compact shall affect the water, and any rights therein, secured to the Tribe by Water Purchase Contract No. 232 for 7,500 acre-feet per year, dated March 15, 1938, between the Tongue River Water Users Association, the Water Conservation Board of the State of Montana and the United States, through the Secretary of the Interior. Any water entitlement pursuant to the Contract shall be in addition to and not a part of the 32,500 acre-feet per year Tribal Water Right set forth above.

f. Failure of Tongue River Dam. In the event of a failure of the Tongue River Dam which causes a substantial diminution of the Tribe's storage right set forth in paragraph A.2.b. of this Article, and notwithstanding the provisions of Article V.A. of this Compact, any party may within 180 days of said failure request the others to renegotiate this Compact. The parties shall have three years from the date of the request to reach a new agreement, during which time all of the provisions in this Compact shall remain in full force and effect. If no party requests renegotiation, or if a new agreement is not reached within three years of the request, the provisions of paragraph A.2.a.ii. of this Article concerning the subordination of the Tongue River direct flow Tribal Water Right to other specified water rights, shall become null and void; provided, that all other provisions of this Compact shall remain in full force and effect. The Tribe shall not be entitled to void or terminate this Compact, or to assert that the State is in breach of the Compact, for a failure of the Tongue River Dam; provided, that any and all other rights of the Tribe arising from such event shall not be affected by this paragraph.

3. Rosebud Creek.

a. Water Right. The Tribe has a right to divert or use or to permit the diversion or use from Rosebud Creek and its tributaries, for agricultural purposes only, of 1,800 acre-feet of water per year, or enough water to irrigate 600 acres of land per year, whichever is less, with a priority date of October 1, 1881. Tribal and individual Indian irrigation uses in existence as of the ratification date on-Reservation in the Rosebud Creek basin are recognized and protected, and shall be considered a use of the 1,800 acre-feet per year right described in this paragraph.

b. Implementation. The Tribe agrees that in the period between May 1, 1991 and July 1, 1993, the Tribe, or persons authorized by it, will develop no more than 200 acres of land in addition to irrigation uses in existence as of May 1, 1991, through irrigation methods involving pumping of alluvial groundwater, except that the Tribe, or persons authorized by it, may develop up to the full 600 acres of land, or any portion thereof, by any other method. During this period, the Tribe and the State agree to share any hydrologic data available for use in connection with any test which the State undertakes to evaluate impacts, if any, of development of on-Reservation lands o 58-

Reservation lands. After July 1, 1993, the Tribe, or persons authorized by it, may develop the full 600 acres of land by any irrigation method.

- c. Additional Water Right. In addition to the water right described in paragraph A.3.a. of this Article, the Tribe has a right to divert or use or permit the diversion or use from Rosebud Creek and its tributaries, for any purpose, of up to 19,530 acre-feet of water per year, or enough water to irrigate 6,510 acres of land per year, whichever is less, with a priority date of October 1, 1881. The Tribe may not exercise the water right set forth in this paragraph in a manner that adversely affects a water right finally decreed in any general adjudication of the Rosebud Creek basin or, until such final decree is issued, a water right recognized under state law, which 1) has a priority date of June 30, 1973 or earlier, and 2) is based on the use of an irrigation system in place and not abandoned as of June 30, 1973; provided, that the state law water rights protected in this paragraph shall not exceed:

- i. North of the Reservation, 8,100 acre-feet of water per year or enough water to irrigate 2,700 acres of land per year, whichever is less; and

- ii. South of the Reservation, 540 acre-feet of water per year or enough water to irrigate 180 acres of land per year, whichever is less.

- d. Dams and Impoundments. The Tribe shall not construct, within the Rosebud Creek basin, any dams or impoundments to store water naturally arising in Rosebud Creek and its tributaries; provided, that the Tribe may construct stockwater impoundments pursuant to paragraph A.5. of this Article, and, subject to other applicable provisions of this Compact, may construct dams or impoundments within the Rosebud Creek basin to store water from sources outside the basin, including non-alluvial groundwater.
- e. Moratorium on Permits. The Montana Department of Natural Resources and Conservation shall order a moratorium on the issuance of permits in the Rosebud Creek basin concurrent with the ratification date of this Compact. The moratorium shall not apply to applications for permits by persons who have entered into deferral agreements with the Tribe for Rosebud Creek basin water as provided in Section G. of this Article. The Department may order the moratorium lifted if it determines that water is available over and above the amount necessary to fulfill the Tribal Water

Right described in paragraph A.3.a. and Section A.3.c. of this Article. The Tribe may challenge the Department's determination to lift the moratorium under the procedure set forth in Article IV of this Compact.

4. Groundwater.

- a. Alluvial Groundwater. The Tribe has a right to withdraw and use, or permit the withdrawal and use of, alluvial groundwater in lieu of surface water diversions of the Tongue River and Rosebud Creek Tribal Water Right, subject to the same terms and conditions of this Compact that apply to such surface water diversions. Alluvial water withdrawn from wells or manifolded well systems with a capacity of 100 gallons per minute or less shall not be deducted from the Tribal Water Right. For wells or manifolded well systems with a capacity of withdrawing greater than 100 gallons per minute of alluvial water, the entire amount withdrawn shall be deducted from the Tribal Water Right.
- b. Non-alluvial Groundwater. Except where a Tribal right to non-alluvial groundwater is established pursuant to Article VII.B. of this Compact, Tribal use or authorization of use of non-alluvial groundwater shall, at the election of the Tribe, comply with state law in effect at the time of the

use or with the alluvial groundwater provisions of paragraph A.4.a. of this Article.

5. Stockwater Impoundments. The Tribe may construct, or permit the construction of, stockwater impoundments on the Reservation, where the capacity of the impoundment is less than 15 acre-feet and the impoundment is constructed on a source other than a perennial flowing stream. The amount of water so impounded shall not be deducted from the Tribal Water Right.
6. Subirrigation. The Tribe shall be entitled to take advantage of any natural subirrigation occurring on the Reservation. Where otherwise consistent with state law, persons outside the Reservation shall also be entitled to take advantage of natural subirrigation.
7. Big Horn Reservoir (Yellowtail) Storage.
- a. Tribal Allocation. As a part of the Tribal Water Right, the Secretary of the Interior shall allocate 30,000 acre-feet per year of stored water in Big Horn Reservoir, Yellowtail Unit, Lower Bighorn Division, Pick-Sloan Missouri Program, Montana, measured at the dam, for use or disposition by the Tribe for any beneficial purpose, either on or off the Reservation, pursuant to the terms of this Compact. This allocation is subject to the prior reserved water rights, if any, of any Indian tribe, or of persons claiming water through that tribe, to

that water. Any use or disposition of water from Big Horn Reservoir off the Reservation by the Tribe is subject to the specific provisions relating to such use or disposition in any act of Congress ratifying this Compact.

- b. Payment for Tribal Allocation. The Tribe shall not be required to make payments to the United States for any portion of the Tribal Water Right stored in Yellowtail Reservoir unless and until the water is used or sold by the Tribe in which case the Tribe shall make annual payments to the United States as hereinafter provided.

- i. Use or Sale for Municipal and Industrial (M&I) Purposes. For each acre-foot of stored water used or sold for M&I purposes, the Tribe shall pay annually to the United States an amount to cover the proportionate share of the annual operation, maintenance and replacement (OM&R) costs, and the proportionate share of the capital costs with appropriate interest for the Yellowtail Unit allocable to the Tribe's stored water. Upon full payment of the capital costs allocable to the Tribe's stored water supply, the annual payments shall include only a proportionate share of the annual OM&R costs. Such annual payments shall be reviewed

and adjusted, as appropriate, to reflect the actual capital and OM&R costs for the Yellowtail Unit.

- ii. Agricultural, Domestic, Livestock, and Other Uses. For each acre-foot of stored water used or sold for other than M&I purposes, the Tribe shall pay annually to the United States an amount to cover the OM&R cost for the Yellowtail Unit allocable to the Tribe's stored water, which amount shall be reviewed and adjusted, as appropriate, to reflect the actual OM&R costs for the Yellowtail Unit.

The Bureau of Indian Affairs shall transfer sufficient funds on a nonreimbursable basis to the Bureau of Reclamation to cover allocable OM&R costs under this paragraph.

- c. Rates and Revenues. Except for payments required to be made to the United States as set forth above, the Tribe shall set such rates as it deems proper for its use or sale of stored water and shall retain all revenues from its use or sale of said stored water; provided, that the United States reserves the right to use any and all water stored in Yellowtail Reservoir for hydropower generation.
- d. Agreement. Following ratification of this Compact, and upon development of a demand for the water

under Section A.7. of this Article, the United States and the Tribe shall enter into an appropriate agreement, if required, setting forth the terms and conditions under which water will be made available to the Tribe, and for the collection and disposition of revenues in connection therewith.

B. Persons Entitled to Use the Tribal Water Right.

The Tribal Water Right may be used by the Tribe, or persons authorized to use water by the Tribe pursuant to Article III; provided, that:

1. Such use is in accordance with the terms of this Compact;
2. That the Tribe shall give preference to Tribal members to use the Tribal Water Right; and
3. Such water right may be transferred from one Tribal member to another Tribal member for agricultural purposes only upon the transfer of land on the Reservation from one Tribal member to another Tribal member.

C. Place of Use of the Tribal Water Right.

Pursuant to a Tribal water code adopted as prescribed in Article III of this Compact, and subject to all other provisions of this Compact, the Tribe shall have the right to use or permit use of the Tribal Water Right with any point of diversion or any place of use on or off the Reservation; provided, that any use of the Tribal Water Right off the Reservation shall not be deemed to convert the Tribal Water

Right to a state water right, and subsequent nonuse of the Tribal Water Right off the Reservation shall not constitute a relinquishment, forfeiture, or abandonment of the Right.

D. Purposes of the Tribal Water Right.

Except as provided in paragraph A.3.a. of this Article, the Tribe may authorize use of the Tribal Water Right on the Reservation for any purpose without regard to whether such use is beneficial as defined by state law. Off the Reservation, any use of the Tribal Water Right shall comply with Article III.B.

E. Conditions Upon Uses of the Tribal Water Right.

The Tribe shall adopt appropriate regulations to ensure that use of the Tribal Water Right is not wasteful and does not degrade water quality.

F. Transfer of Tribal Water Right.

The Tribe shall not transfer water naturally arising in Rosebud Creek or its tributaries for use off the Reservation. The Tribe may transfer any other part of the Tribal Water Right for use on or off the Reservation pursuant to the terms of this Compact. This paragraph shall not affect the right of the Tribe to enter into a deferral agreement regarding Rosebud Creek water pursuant to Section G. of this Article.

G. Deferral Agreements.

After the ratification date, the Tribe may enter into an agreement with any person who is exercising or proposing to exercise a right under state law to use surface water off the

Reservation, which agreement protects the person's right from any exercise of the Tribal Water Right; provided, that:

1. Before use of such water, the person shall have complied with all applicable state laws concerning the acquisition of a water right;
2. Subsequent to acquisition of the state water right, regulation of its use shall be subject to state law;
3. The amount of water subject to the agreement shall be deducted from the amount of water available for depletion by the Tribe in the basin from which the water is being diverted; and
4. The agreement shall not permanently alienate the Tribal Water Right or any part thereof.

H. Effect of Non-Use of Tribal Water Right.

Non-use of any part of the Tribal Water Right shall not constitute a relinquishment, forfeiture or abandonment of the Right.

I. Tribal Water Right to be Held in Trust.

The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribe.

Article III

Administration of Water Rights

A. Tribal Administration.

1. Except as otherwise provided in this Compact, the use of the Tribal Water Right shall be administered by the Tribe, and the Tribe has the final and exclusive

jurisdiction to resolve all disputes between users of the Tribal Water Right. Administration and enforcement of the Tribal Water Right shall be pursuant to a water code, which shall be developed and adopted by the Tribe and submitted for approval to the Secretary of the Interior within one year after ratification of this Compact. Pending the adoption and approval of the Tribal water code, the administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior.

2. Within six months after the Tribal water code takes effect, the Tribe shall provide the State with notice of each use of the Tribal Water Right, including uses in existence as of the ratification date of this Compact and those established since that time, which shall show:
 - a. The person authorized to make the diversion;
 - b. The amount of water authorized to be diverted annually;
 - c. The amount of water authorized for annual consumption;
 - d. The point of diversion;
 - e. The period of use;
 - f. The place of use;
 - g. The uses for which the water may be diverted; and
 - h. The relative priority of the use as against other uses of the Tribal Water Right.
3. The Tribe shall thereafter notify the State within sixty

days after the end of each quarter year of all new uses of surface and groundwater authorized by the Tribe during the preceding quarter year and of all new uses of the Tribal Water Right actually commenced during that quarter year. The notice shall be in the same format as that prescribed in Section A.2. of this Article.

4. The Tribe shall provide the State with not less than 180-days written notice prior to the start of construction of any project to divert any portion of the Tribal Water Right from the Big Horn River or the Big Horn Reservoir for use on the Reservation, or from the Tongue River or the Tongue River Reservoir for use on the Reservation in the Rosebud Creek basin. The notice shall describe: any diversion, conveyance and storage facilities; the amounts of water to be diverted and consumed; and the purpose, place, and period of the proposed use. Diversion or use of water from such project may be made only after all permits, certificates, variances or other authorizations described in paragraph B.3. of this Article have been obtained. With respect to any such project or diversion, the State or any affected person may seek such remedies as may be available under federal, state, or tribal law, and nothing in this Compact shall be construed to affect the rights of any party under such law.

B. Off-Reservation Uses of the Tribal Water Right.

1. Off-Reservation Uses. Any use of the Tribal Water Right

involving a point of diversion or place of use located off the Reservation shall be considered an off-Reservation use; provided, that releases or diversions from Big Horn Reservoir or Tongue River Reservoir for use on the Reservation shall not be considered off-Reservation uses.

2. Subsequent Federal or State Law. All off-Reservation uses of the Tribal Water Right shall comply with the requirements set forth in Section B. of this Article until such time as the statutory or common law of the United States or the State of Montana establishes that off-Reservation uses of Indian water rights may occur without regard to state law.
3. Diversion Facilities. With respect to diversion or transportation facilities located off the Reservation, the Tribe or persons using the Tribal Water Right shall apply for all permits, certificates, variances and other authorizations required by state laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water. A diversion or use of water in the exercise of the Tribal Water Right may be made only after all permits, certificates, variances or other authorizations applied for pursuant to this paragraph have been obtained.

4. Off-Reservation Uses in Tongue and Rosebud Basins.

- a. The Tribe shall provide the State with not less than 180-days advance written notice of any off-Reservation use, transfer, or change of use of the Tribal Water Right:
- i. Within the Tongue River basin, or
 - ii. Utilizing Tongue River water off-Reservation in the Rosebud Creek basin.
- b. The notice shall include sufficient documentation to demonstrate that:
- i. The proposed use of water is a beneficial use as defined by Montana law in effect at that time;
 - ii. The proposed means of diversion, and the construction and operation of the diversion works are adequate;
 - iii. The proposed use, transfer, or change of use will not adversely affect, except with the consent of the owner of such right:
 - A. Any water right arising under the laws of the United States, or
 - B. Any right to the use of water established pursuant to the laws of the State; except that, if the portion of the Tribal Water Right that is the subject of the proposed off-Reservation use, transfer or change of use is

the storage and exchange right set forth in Article II.A.2.b. of this Compact, the Tribe need only demonstrate that Miles City Decree rights will not be adversely affected by such use, transfer, or change of use.

- iv. The proposed use, transfer, or change of use does not cause any unreasonable significant adverse environmental impact; and
- v. Proposed uses, transfers, or changes in use in excess of 4,000 acre-feet per year and 5.5 cubic feet per second of water will not:
 - A. Substantially impair the quality of water for existing uses in the source of water from which the diversion is made;
 - B. Be made where low quality water which can economically be used is legally and physically available to the Tribe for the proposed use;
 - C. Create or substantially contribute to saline seep; or
 - D. Substantially injure fish or wildlife populations in the source of water from which the diversion is made.
- c. A proposed use, transfer or change of use of the Tribal Water Right pursuant to Section B.4. of this Article may be challenged:
 - i. Within 30 days after the expiration of the

notice period provided in Section B.4.a. of this Article;

- ii. In a court of competent jurisdiction; and
- iii. By the State or by a person whose rights are adversely affected by the proposed use, transfer, or change of use.

In any such case, the Tribe shall have the burden of proving by a preponderance of the evidence that it has satisfied the requirements of Section B.4.b. of this Article. A Tribal notice that conforms to the requirements of Section B.4.b. of this Article shall be prima facie evidence of its contents.

5. Off-Reservation Uses Outside Tongue and Rosebud Basins.

Except as provided in Section B.4. of this Article, no person may initiate an off-Reservation use, transfer, or change of use of the Tribal Water Right without first applying for and receiving authorization for the use, transfer, or change of use pursuant to Montana law in effect at the time of the application.

C. State Administration.

1. The State shall administer all rights to the use of surface water and groundwater within the Reservation which are not a part of the Tribal Water Right. The State shall have the final and exclusive jurisdiction to resolve all disputes between users of rights established under state law.

2. Within one year after ratification of this Compact, the State shall notify the Tribe of all existing uses of surface and groundwater for which a permit has been issued by the State in the Tongue River or Rosebud Creek basins. The notice shall state:
 - a. The person authorized to make the diversion;
 - b. The amount of water authorized to be diverted annually;
 - c. The amount of water authorized for annual consumption;
 - d. The point of diversion;
 - e. The period of use;
 - f. The place of use;
 - g. The uses for which the water may be diverted; and
 - h. The priority date of the use.
3. The State shall notify the Tribe within sixty days after the end of each quarter year of all new uses of surface and groundwater for which a permit has been issued by the State in the Tongue River or Rosebud Creek basins during the preceding quarter year and of all new uses of water actually commenced pursuant to the laws of the State during that quarter year on each of these sources. The notice shall be in the same format as that prescribed in Section C.2. of this Article.

D. Operation of Tongue River Reservoir.

1. To provide for Tongue River Reservoir operation

procedures that are consistent with the purposes of this Compact, a reservoir operation plan shall be developed by a five-member advisory committee. The committee shall have representatives from the State of Montana, the Tongue River Water Users Association, the Northern Cheyenne Tribe, the United States, and a fifth member to be selected by the other four. The advisory committee shall annually agree upon a reservoir operation schedule setting forth proposed uses of storage and direct flow for the year. The Department of Natural Resources and Conservation or its successor shall thereupon be responsible, consistent with the terms of this Compact and other applicable law, for the daily operation of the Reservoir and for implementation of the reservoir operation plan.

2. The reservoir operation plan shall provide for the operation of the project for fish and wildlife purposes depending on the availability of water on an annual basis. This provision shall not create an operational preference for fish and wildlife purposes relative to other project purposes.
3. The Secretary of the Interior shall pay annually to the State an amount to cover the proportionate share of the annual operation, maintenance and replacement (OM&R) costs for the Tongue River Dam allocable to the Tribe's stored water in the Reservoir.

Article IV

Northern Cheyenne-Montana Compact Board

A. Establishment of Board.

There is hereby established the Northern Cheyenne-Montana Compact Board. The Board shall consist of three members: one member appointed by the Governor of the State of Montana; one member appointed by the Northern Cheyenne Tribal Council; and one member selected by the other two members. All members shall be appointed within six months of the ratification date of this Compact and within thirty days of the date any vacancy occurs. Each member shall serve a five-year term and shall be eligible for reappointment. The initial term of each member shall be staggered with one member serving a five-year term, one a four-year term, and one a three-year term. The initial term of each member shall be chosen by lot. Expenses of the members appointed by the State and the Tribe shall be borne by the entity appointing the member. The expenses of the third member and all other expenses shall be borne equally by the Tribe and the State, subject to the availability of funds.

B. Membership.

Should the two appointed members fail to agree on the selection of a third member within sixty days of the ratification date of this Compact or within thirty days after any vacancy occurs, the following procedure shall be utilized:

1. Within five days each member shall nominate three persons to serve as a member of the Board;

2. Within fifteen days thereafter each member shall reject two of the persons nominated by the other member;
3. The chief judge of the United States District Court for the District of Montana shall select the third member of the Board from the remaining two nominees. If the chief judge declines for any reason to select the third member, the chief justice of the Montana Supreme Court shall make the selection from the remaining two nominees.

C. Quorum and Vote Required.

Two members of the Board shall constitute a quorum if reasonable notice has been provided in advance to the absent member. All Board decisions shall be by a majority of the Board, shall be in writing and, together with any dissenting opinions, shall be served on all parties in the proceeding before the Board, and on the parties to this Compact.

D. Jurisdiction of the Board.

The Northern Cheyenne-Montana Compact Board shall have jurisdiction to resolve controversies over the right to the use of water between users of the Tribal Water Right on the one hand and users of state water rights on the other hand. Such controversies shall include, but shall not be limited to, disputes as to the meaning of this Compact, and disputes concerning the operation of the Tongue River Reservoir as it affects the Tribal Water Right.

E. Powers and Duties.

The Board shall hold hearings upon notice in proceedings

before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence. The Tribe, the State, and the United States shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribe, the State, or the United States for enforcing a subpoena issued by its courts in a civil action. The parties to the controversy may present evidence and cross examine any witnesses. The Board shall determine the controversy based on the evidence, and grant any appropriate relief, except money damages. All decisions of the Board shall be by majority and in writing. The Board shall adopt necessary rules and regulations to carry out its responsibilities within six months after its first meeting. All records of the Board shall be open to public inspection except for privileged information.

F. Review and Enforcement of Board Decisions.

1. Decisions by the Board shall be effective immediately, unless stayed for a period of time prescribed by the Board. Any party before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty days of such decision. The notice of appeal shall be filed with the Board and served personally or by registered mail upon the Tribe, the State, the United States and all parties to the proceeding before the Board, and all such persons shall

thereafter have the right to participate in the appeal.

2. In any appeal, the Board's decision shall be presumed to be valid, and may be vacated by the court only on one of the following grounds:
 - a. The decision is not supported by substantial evidence;
 - b. The decision was procured by corruption, fraud or undue means;
 - c. There was evident partiality or corruption by the Board or by any member;
 - d. The Board was guilty of misconduct in refusing to hear the dispute, or in refusing to hear evidence pertinent and material to the controversy, or any other clear misbehavior by which the rights of any party have been substantially prejudiced;
 - e. The Board exceeded its authority under the terms of this Compact; or
 - f. The decision is contrary to law.
3. Unless an appeal is timely filed as provided in paragraph F.1. of this Article, any decision of the Board shall be confirmed or enforced by any court of competent jurisdiction on petition of the Board, the Tribe, the State, the United States, or any party before the Board in the proceeding in which the decision was made.
4. A court of competent jurisdiction in which a timely appeal is filed pursuant to paragraph F.1. of this

Article, or in which a petition to confirm or enforce is filed pursuant to paragraph F.3. of this Article, may order such temporary or permanent relief as it considers just and proper.

5. Any appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to paragraph F.1. of this Article, or in which a petition to confirm or enforce is filed pursuant to paragraph F.3. of this Article, in the manner and to the same extent as from orders or judgments of the court in a civil action.
 6. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court the record of the proceedings before the Board.
- G. Waiver of Immunity.

The Tribe, the United States and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under this Compact by the Northern Cheyenne-Montana Compact Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribe, the United States, or the State shall not extend to any action for money damages including costs and attorneys' fees.

Article V

Finality and Effectiveness of Compact

A. Ratification and Effectiveness of Compact.

1. Upon ratification by the Northern Cheyenne Tribal Council and the Legislature of the State of Montana, the terms of this Compact may not be altered, voided, or modified in any respect without the consent of the parties; provided, that except as set forth in Section A.2. of this Article, this Compact shall not become effective until ratification by the United States Congress and the completion date occurs, notwithstanding the provisions of Section 85-2-702(2), MCA. If the completion date does not occur on or before December 31, 1997, or any later date agreed to in writing by the parties, this Compact, including all provisions that become effective on the ratification date, shall become null and void without further action by any party. Notwithstanding the provisions of Section 85-2-702(3), MCA, this Compact shall not be included in any preliminary decree or final decree in any State water court proceeding unless and until this Compact becomes effective as set forth in this Article.
2. As between the State and the Tribe, all of the provisions of this Compact shall become effective upon the ratification date except insofar as they:
 - a. Quantify or provide for the administration of the Tongue River Tribal Water Right;
 - b. Provide for the management or operation of the

Tongue River Reservoir; or

- c. Require Congressional authorization.

All of the provisions that do not become effective upon the ratification date shall become effective on the completion date, unless Congress provides otherwise.

B. Incorporation Into Decrees and Disposition of Federal Suits.

Within sixty days after the completion date, the parties shall petition for incorporation of this Compact into a decree in any appropriate State court proceeding commenced in accordance with 43 U.S.C. §666. Upon the issuance of a final decree by the State water court, or its successor, and the completion of any direct appeals therefrom, or upon the expiration of the time for filing any such appeal, the United States, the Tribe, and the State shall within thirty days execute and file joint motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss the Tribe's claims, and any claims made by the United States as trustee for the Tribe, in Northern Cheyenne Tribe of the Northern Cheyenne Reservation v. Adsit, et al., No. 75-6-BLG (D. Mont.); United States v. Big Horn Low Line Canal Company, et al., No. 75-34-BLG (D. Mont.); and United States v. Tongue River Water Users Association, et al., No. 75-20-BLG (D. Mont.), (hereinafter collectively referred to as "the federal suits"), with prejudice. This Compact shall be filed as a consent decree in the 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 upon the State of

Montana that the State courts lack jurisdiction over, or that the State court proceedings are inadequate to adjudicate, some or all of the water rights asserted in the federal suits.

Article VI

General Provisions

- A. Nothing in this Compact shall be so construed or interpreted:
1. To establish the nature, extent, or manner of administration of water rights of any Indian reservation or other federal reservation other than the Northern Cheyenne Reservation;
 2. To preclude the acquisition or exercise of a right to the use of water by the Tribe or any individual Indian outside the Reservation by purchase of such right or by acquisition of land, or by application to the State;
 3. To preclude the acquisition or exercise of an appropriative right to the use of water under state law by the Tribe or any individual Indian within the Reservation:
 - a. By purchase of such right or by purchase of land; provided, that water rights acquired by such purchase after the ratification date of this Compact shall be in addition to and shall become part of the Tribal Water Right and shall be governed by this Compact; or
 - b. By application to the State. Except for applications for non-alluvial groundwater pursuant

- to Article II.A.4.b., and applications for storage appropriations authorized by paragraph A.8. of this Article, any such application shall not be granted by the State until the Tribal Water Right in the basin where the diversion that is the subject of the application is located has been fully utilized;
4. To determine the relative rights inter sese of persons using water under the authority of the State or the Tribe;
 5. To limit in any way the rights of the parties or any other person to litigate any issues or questions not resolved by this Compact;
 6. To authorize the taking of a water right which is vested under state or federal law;
 7. To create or deny substantive rights through headings or captions used in this Compact;
 8. To preclude or to discourage the Tribe from establishing the right to, or contracting for, water from any further enlargements of the Tongue River Dam, or from any future storage facilities that may be built within the Tongue River or Rosebud Creek basins, or in any other water basins;
 9. To address or prejudice whether, in any interstate apportionment, the Tribe's water right shall be counted as part of the waters apportioned to the State; or
 10. To alter or amend any provisions of the Yellowstone River

Compact, Act of October 30, 1951, ch. 629, 65 Stat. 663 (1951).

11. To prohibit the Tribe or the United States from challenging any claims to water in any general adjudication of the Tongue River or Rosebud Creek basins.
- B. The parties expressly reserve all rights not granted, recognized or relinquished in this Compact.
- C. The Secretary of the Interior shall comply with all aspects of the National Environmental Policy Act, 42 U.S.C. §§4331-4335, and the Endangered Species Act, 16 U.S.C. §1531, et seq., and other applicable environmental acts and regulations in implementing this Compact.

Article VII

Tribal Relinquishment of Other Water Claims

- A. With the exception of the Tribe's claim to non-alluvial groundwater in paragraph B. of this Article and any rights to water which may exist with respect to land held by the Tribe or a Tribal member outside the present Reservation, the Tribe and the United States as trustee for the Tribe hereby relinquish forever any and all claims, in existence on the ratification date of this Compact, to water within the State of Montana. The relinquishment includes, but is not limited to, any claim for water derived from aboriginal use of land or water, any Indian treaties, any Act of Congress, and any executive act of the United States.
- B. The parties intend that the water right as confirmed to the

Tribe in Article II is in full satisfaction of its federal reserved water right based on Winters v. United States, 207 U.S. 564 (1908). Notwithstanding the provisions of paragraph A. of this Article, the Tribe retains the right to assert a claim that it has a right, not based on the federal reserved water rights doctrine, to the use of any non-alluvial groundwater underlying the Reservation. In any such action, the Tribe shall be estopped to assert that its right to non-alluvial groundwater is a federal reserved water right, that the Tribal Water Right confirmed in Article II is inadequate to satisfy the purposes for which the Reservation was created, or from collaterally attacking this Compact in any manner. Any right to non-alluvial groundwater established by the Tribe under this paragraph is not subject to this Compact. Nothing in this Compact shall be construed to waive any defenses of the State or any water user to a Tribal claim for non-alluvial groundwater.

Article VIII

Binding Effect

Upon the effectiveness of any provision of this Compact, its terms will be binding:

- A. Upon the State and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State of Montana; provided, that for purposes of consent, ratification, or authorization, the validity of consent,

ratification, or authorization is to be determined by Montana law;

- B. Upon the Tribe and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the Tribe's water right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribe, or any right arising under tribal law; provided, that for purposes of consent, ratification, or authorization, the validity of consent, ratification or authorization is to be determined by tribal law; and
- C. Upon the United States and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State of Montana; provided, that for purposes of consent, ratification, or authorization, the validity of consent, ratification or authorization is to be determined by federal law, and further provided that nothing contained in this Compact affects any claim of any Indian tribe, or of persons claiming water through that tribe, or the right of any Indian tribe, or persons claiming water through that tribe, to pursue a claim to any water from any source based on any theory of right or entitlement.

Article IX

Contributions to Settlement

- A. The United States agrees to provide \$31,500,000 to repair the Tongue River Dam and spillway and to raise the Tongue River

Dam spillway crest to secure the Tribe's existing contract water under Article II.A.2.e. and to provide additional storage capacity to secure the Tribe's storage and exchange water right under Article II.A.2.b.

- B. The State agrees to provide \$16,500,000 to repair the Tongue River Dam and spillway with the understanding that the State's portion will be paid through a combination of cash and federal loans, in proportions to be agreed upon by the parties.
- C. The Provisions of this Article are subject to the separate Letter of Agreement dated April 17, 1991, between the State and the United States explaining in detail the allocation of the costs of the project. The State and the United States will enter into a further agreement providing for the expenditure of the contributions and loans of the United States hereunder.
- D. The United States agrees to provide \$10,000,000 for a Tribal Development Fund payable in equal amounts of \$2,000,000 each fiscal year for five years. These funds shall not be distributed on a per capita basis to members of the Tribe and shall only be used for land and natural resources administration, planning and development within the Northern Cheyenne Reservation or for land acquisition by the Tribe within the Northern Cheyenne Reservation.
- E. Federal financial contributions to paragraph A of this Article will be budgeted for, subject to the availability of funds, by October 1 of the year following the ratification of this

Compact by Congress and the authorization by Congress of the Tongue River Dam project. Federal financial contributions to paragraph D of this Article will be budgeted for, subject to the availability of funds, by October 1 of the second year following the ratification of this Compact by Congress and the authorization by Congress of the Tongue River Dam project.

F. The Tribe and the United States agree to pursue through the normal Bureau of Indian Affairs and Department of the Interior budget process such additional sums as are necessary to implement the terms of this Compact, to develop a Tribal water code, and to provide increased agricultural development on the Reservation. The State agrees to support the efforts of the Tribe and the United States in this regard.

Article X
Legislation

The Parties agree to seek enactment of any legislation necessary to effectuate the provisions and purposes of this Compact, and to defend the provisions and purposes of this Compact from all challenges and attacks; provided, that no provision of the Compact shall be modified as to substance except as may be provided herein.

IN WITNESS WHEREOF the representatives of the State of Montana, the Northern Cheyenne Tribe, and the United States have signed this Compact on the ____ day of _____, 19__.

FOR THE STATE OF MONTANA

MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

Jack E. Galt, Chairman

Gene J. Etchart

Chris D. Tweeten, Vice Chairman

Dennis Iverson

Carl M. Davis

Senator Joseph P. Mazurek

Everett C. Elliott

Gordon McOmber

Gary L. Spaeth
FOR THE NORTHERN CHEYENNE TRIBE

FOR THE SECRETARY OF
THE INTERIOR

FOR THE UNITED STATES ATTORNEY
GENERAL

Section 2. **Effective date.** [This act] is effective on passage and approval.