

SENATE BILL NO. 467

INTRODUCED BY GALT, MAZUREK

BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

IN THE SENATE

April 8, 1985 On motion, rules suspended to allow introduction of SB No. 467. Motion adopted.

April 11, 1985 Introduced and referred to Committee on Agriculture, Livestock and Irrigation.

April 16, 1985 Committee recommend bill do pass as amended. Report adopted.

April 17, 1985 Bill printed and placed on members' desks.

 Second reading, do pass as amended.

 On motion, rules suspended. Bill placed on calendar for third reading this day.

 Considered correctly engrossed.

 Third reading, passed. Ayes, 49; Noes, 0.

 Transmitted to House.

IN THE HOUSE

April 18, 1985 On motion, rules suspended to allow introduction of SB No. 467 in House.

 Introduced and referred to Committee on Agriculture, Livestock and Irrigation.

April 19, 1985	Committee recommend bill be concurred in. Report adopted.
April 22, 1985	Second reading, concurred in.
April 23, 1985	Third reading, concurred in. Returned to Senate.

IN THE SENATE

April 23, 1985	Received from House.
April 24, 1985	Sent to enrolling. Reported correctly enrolled.

Senate BILL NO. 467
Galt Nazumah

1 INTRODUCTION BY
2 BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

3 A BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT
4 ENTERED INTO BY THE STATE OF MONTANA AND THE ASSINIBOINE AND
5 SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION."

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

7 Section 1. Fort Peck-Montana compact ratified. The
8 compact entered into by the state of Montana and the
9 Assiniboine and Sioux tribes of the Fort Peck Indian
10 reservation and filed with the secretary of state of the
11 state of Montana under the provisions of 85-2-702 on [date
12 of filing] is ratified. The compact is as follows:

13 FORT PECK -- MONTANA COMPACT

14 This Compact is entered into by and between THE STATE
15 OF MONTANA and THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT
16 PECK INDIAN RESERVATION (herein called the "Parties") and
17 shall become effective as set forth hereinafter.

18 The Parties agree as follows:

19 ARTICLE I

20 GENERAL PURPOSES

21 The basic purposes of this Compact are to determine
22 finally and forever all rights of the Assiniboine and Sioux

1 Tribes of the Fort Peck Indian Reservation in the State of
2 Montana to water on, under, adjacent to, or otherwise
3 appurtenant to the Reservation, to settle existing disputes
4 and remove causes of future controversy between the Tribes
5 and the State and between Indians of the Fort Peck
6 Reservation and other persons concerning waters of the
7 Missouri River, its tributaries, and ground water, and to
8 settle all claims by the Tribes and by the United States on
9 behalf of the Tribes in United States v. Aageson, Civ. No.
10 79-21-GF (D. Mont.), United States v. Aasheim, Civ. No.
11 79-40-BLG (D. Mont.) and the pending adjudication in the
12 state water court initiated pursuant to the provisions of
13 Chapter 697, Laws of Montana 1979.

14 ARTICLE II

15 DEFINITIONS

16 For purposes of this Compact, and for no other
17 purposes, the following definitions apply:

18 (1) "Acre-foot" means the amount of water necessary to
19 cover one acre to a depth of one foot and is equivalent to
20 43,560 cubic feet.

21 (2) "Annual" or "per year" means the calendar year
22 commencing January 1 and ending December 31.

23 (3) "Board" means the Fort Peck-Montana Compact Board
24 established by Article VI.

25 (4) "Conservation (carry-over) storage" is storage



1 provided in a reservoir to capture and hold water that would
 2 otherwise go downstream. Such storage holds the water for
 3 beneficial use later in the season or is carried over to a
 4 subsequent season or seasons. Evaporation from the surface
 5 of such reservoir is considered to be a consumptive use to
 6 the extent that it exceeds the evaporative and
 7 transpirational losses which occurred in the reservoir area
 8 prior to its construction.

9 (5) "Consumptive use" means the amount of irrigation
 10 water that is transpired by vegetation, converted in the
 11 processes of photosynthesis and plant tissue growth, and
 12 evaporated from adjacent soils, water surfaces and foliage.
 13 For uses other than irrigation, consumptive use means the
 14 quantity of water diverted less the quantity of reusable
 15 return flow within the State.

16 (6) "Court of competent jurisdiction" means a state or
 17 federal district court which otherwise has jurisdiction of
 18 the subject matter and the parties, or a tribal court which
 19 otherwise has such jurisdiction provided that all parties to
 20 the case consent to tribal court jurisdiction.

21 (7) "Diversion" means the removal of water from its
 22 natural course or location by means of a ditch, canal,
 23 flume, bypass, pipeline, conduit, well, pump, or other
 24 structure or device, or the impoundment of water in a
 25 reservoir. Where a reservoir is constructed or operated on a

1 stream, the annual diversion shall be the greater of:

2 (a) the inflow into the reservoir minus the outflow
 3 for releases or spills downstream from the reservoir, or

4 (b) withdrawals of water from the reservoir for actual
 5 use.

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

11 (9) "Fort Peck Irrigation Project" means those
 12 irrigation systems and works constructed pursuant to the Act
 13 of May 30, 1908, 35 Stat. 558, and all lands receiving water
 14 from such systems and works.

15 (10) "Fort Peck Reservoir" means that body of surface
 16 water impounded by Fort Peck Dam, at the current spillway
 17 elevation.

18 (11) "Full service irrigation" means any form of
 19 irrigation that distributes water on a regularly scheduled
 20 basis in order to satisfy the full seasonal crop and soil
 21 water requirements.

22 (12) "Ground water" means any water located under the
 23 surface of the land or the bed of any stream, lake,
 24 reservoir, or other body of surface water. All other water
 25 shall be considered surface water.

1 (13) "Indian" means any person who:
 2 (a) is an enrolled member of the Tribes; or
 3 (b) is a member of a tribe that is recognized as
 4 eligible for the special programs and services provided by
 5 the United States to Indians because of their status as
 6 Indians; or
 7 (c) holds or is recognized by the Secretary of the
 8 Interior as eligible to hold trust or restricted property on
 9 the Reservation.

10 (14) "Industrial" means the use of water for any uses
 11 that benefit an industrial enterprise including, but not
 12 limited to, industrial cooling, energy production, and
 13 evaporation associated with any industrial operation. Among
 14 the purposes excluded from the industrial use category are
 15 irrigation, stockwater, and domestic uses.

16 (15) "Instream flow" means that quantity of water
 17 scheduled to remain in a stream to maintain fish and
 18 wildlife resources.

19 (16) "Missouri River" means the river formed by the
 20 confluence of the Gallatin, Jefferson and Madison Rivers in
 21 southwestern Montana, and flowing easterly beyond the
 22 eastern boundary of Montana.

23 (17) "Partial service irrigation" means the diversion
 24 of flood runoff from natural channels or water courses and
 25 spreading such water for the purpose of applying as much

1 water as practicable to the land during periods of high
 2 stream flow to increase crop production.

3 (18) "Parties" means the Tribes and the State.

4 (19) "Person" means an individual or any other entity,
 5 public or private, including the State, the Tribes, and the
 6 government of the United States and all officers, agents,
 7 and departments thereof.

8 (20) "Regulatory Storage" is storage provided as a part
 9 of a water distribution system for operational purposes.
 10 Evaporation loss from the distribution system itself is
 11 accounted for and is a part of the unit consumptive use rate
 12 established in this Compact and is therefore not considered
 13 to be a separate item of consumptive use.

14 (21) "Reservation" means the Fort Peck Indian
 15 Reservation as established in the agreement of December 28
 16 and December 31, 1886, and confirmed by the Act of May 1,
 17 1888, 25 Stat. 113.

18 (22) "Reusable" means capable of further beneficial
 19 use.

20 (23) "State" means the State of Montana and all
 21 officers, agents, departments, and political subdivisions
 22 thereof. Unless otherwise indicated, for purposes of
 23 notification or consent, "State" means the Director of the
 24 State Department of Natural Resources and Conservation or
 25 its successor agency.

1 (24) "Transfer" means any authorization for the
2 delivery or use of water by a joint venture, service
3 contract, lease, sale, exchange or other similar agreement.

4 (25) "Tribal Water Right" means the right to divert and
5 use water as confirmed by Article III of this Compact.

6 (26) "Tribes" means the Assiniboine and Sioux Tribes of
7 the Fort Peck Indian Reservation and all officers, agents
8 and departments thereof. Unless otherwise indicated, for
9 purposes of notification or consent, "Tribes" means the
10 Tribal Chairman or the Chief Executive Official of the
11 Tribes at the time.

12 (27) "Tributary" or "tributaries of the Missouri River
13 that flow through or adjacent to the Reservation" means
14 those tributaries of the Missouri River that traverse the
15 Reservation, generally in a north to south direction,
16 including:

17 (a) streams that form the east and west boundaries of
18 the Reservation (Big Muddy Creek, Porcupine Creek and the
19 Milk River);

20 (b) streams that originate outside the Reservation but
21 empty into the Missouri River within the boundaries of the
22 Reservation (the Poplar River and its tributaries);

23 (c) streams that are wholly contained within the
24 boundaries of the Reservation (Chelsea Creek, Tule Creek,
25 Wolf Creek, Oswego Creek, and Little Porcupine Creek); and

1 (d) all other watercourses that traverse the
2 Reservation.

3 (28) "Wasteful" means the unreasonable loss of water
4 through the design or negligent operation of a diversion or
5 of a water distribution facility.

6 ARTICLE III

7 TRIBAL WATER RIGHT

8 A. General Statement of the Tribal Water Right. The
9 Assiniboine and Sioux Tribes of the Fort Peck Indian
10 Reservation have the right to divert annually from the
11 Missouri River, certain of its tributaries, and ground water
12 beneath the Reservation the lesser of (i) 1,050,472
13 acre-feet of water, or (ii) the quantity of water necessary
14 to supply a consumptive use of 525,236 acre-feet per year
15 for the uses and purposes set forth in this Compact with a
16 priority date of May 1, 1888, provided that no more than
17 950,000 acre-feet of water, or the quantity of water
18 necessary to supply a consumptive use of 475,000 acre-feet
19 may be diverted annually from surface water sources. This
20 right is held in trust by the United States for the benefit
21 of the Tribes and is further defined and limited as set
22 forth in this Compact.

23 B. Persons Who May Use the Tribal Water Right. All
24 uses of water authorized under any applicable law by the
25 following persons shall be considered and calculated as uses

1 of the Tribal Water Right:

- 2 1. the Tribes within or outside the Reservation;
- 3 2. all individual Indians using water within the
4 Reservation including, but not limited to, Indians
5 exercising uses established pursuant to state law prior to
6 the effective date of this Compact;
- 7 3. all non-Indian successors-in-interest to any
8 allottee actually using water within the Reservation by
9 virtue of a water right arising under the laws of the United
10 States, which water right was acquired directly or
11 indirectly from an Indian predecessor-in-interest;
- 12 4. all other persons receiving water from the Fort
13 Peck Irrigation Project including, but not limited to,
14 persons exercising uses established pursuant to state law
15 prior to the effective date of this Compact;
- 16 5. all other persons authorized to use water by the
17 Tribes pursuant to this Compact, within or outside the
18 Reservation;
- 19 6. the United States as trustee for the Tribes or any
20 Indian including, but not limited to, persons exercising
21 uses established pursuant to state law prior to the
22 effective date of this Compact.

23 C. Measure of Consumptive Use for Irrigation.
24 Irrigation usage of the Tribal Water Right shall be
25 conclusively deemed to cause a consumptive use of 1.8

1 acre-feet per acre per year for full service irrigation and
2 0.48 acre-feet per acre per year for partial service
3 irrigation. Any loss of water due to evaporation from
4 reservoirs constructed in the future for conservation
5 (carry-over) storage rather than for regulatory storage by
6 the United States for the benefit of the Tribes or any
7 Indian, or constructed for such conservation storage by the
8 Tribes or by any Indian, shall be counted as a consumptive
9 use.

10 D. Purposes for Which the Tribal Water Right May be
11 Used. Within the Reservation, use of water in the exercise
12 of the Tribal Water Right for any purpose may be authorized
13 by the Tribes without regard to whether such use is
14 beneficial as defined by valid state law. No use of the
15 Tribal Water Right may be wasteful or inconsistent with the
16 terms of this Compact. Outside the Reservation, any use of
17 water in the exercise of the Tribal Water Right shall be
18 beneficial as defined by valid state law on the date the
19 Tribes give notice to the State of a proposed use outside
20 the Reservation.

21 E. Facilities Diverting or Using the Tribal Water
22 Right Outside the Reservation. All persons diverting or
23 using the Tribal Water Right outside the Reservation,
24 including the Tribes as sovereign, shall apply for all
25 permits, certificates, variances and other authorizations

1 required by valid state laws regulating, conditioning or
 2 permitting the siting, construction, operation, alteration
 3 or use of any equipment, device, facility or associated
 4 facility proposed to use or transport water located outside
 5 the Reservation, and shall comply with all applicable
 6 provisions of this Compact. A diversion or use of water in
 7 the exercise of the Tribal Water Right may be made only
 8 after all permits, certificates, variances or other
 9 authorizations applied for pursuant to this paragraph have
 10 been obtained, and the diversion or use has not been found
 11 unlawful by a court of competent jurisdiction.

12 F. Amounts To Be Diverted from the Missouri River.

13 1. Diversions of water for use within or outside the
 14 Reservation may be made in the exercise of the Tribal Water
 15 Right from Fort Peck Reservoir and the mainstem of the
 16 Missouri River--but without utilization of the conservation
 17 (carry-over) storage of Fort Peck Reservoir--in the
 18 following amounts:

19 (a) during the months of November, December, January,
 20 February and March, not to exceed 40,000 acre-feet per
 21 month;

22 (b) during the months of April and October, not to
 23 exceed 50,000 acre-feet per month;

24 (c) during the months of May and September, not to
 25 exceed 105,000 acre-feet per month;

1 (d) during the month of June, not to exceed 145,000
 2 acre-feet;

3 (e) during the month of July, not to exceed 215,000
 4 acre-feet;

5 (f) during the month of August, not to exceed 180,000
 6 acre-feet.

7 Provided that the aggregate of monthly diversions in
 8 the exercise of the Tribal Water Right from surface water
 9 shall not exceed 950,000 acre-feet per year, and the total
 10 annual consumptive use shall not exceed 475,000 acre-feet.

11 2. The Tribes shall report the amount of all actual
 12 diversions from Fort Peck Reservoir and the mainstem of the
 13 Missouri River to the United States Army Corps of Engineers
 14 by April 1st of the calendar year following the year in
 15 which such diversions are made in accordance with paragraph
 16 5 of section J of this Article.

17 3. All diversions authorized by paragraph 1 of this
 18 section may be made without payment to the United States,
 19 but the Tribes and any user of the Tribal Water Right shall
 20 otherwise comply with all generally applicable laws and
 21 regulations of the United States.

22 G. Export of the Tribal Water Right Outside the State.
 23 Use of the Tribal Water Right outside the State shall be in
 24 compliance with all valid provisions of state law in effect
 25 at the time of the proposed transfer that prohibit,

1 regulate, condition, or permit the transportation of water
2 outside the State.

3 H. Non-use of the Tribal Water Right not a Forfeiture.
4 Non-use of any part of the Tribal Water Right shall not
5 constitute a relinquishment, forfeiture or abandonment of
6 the right to such use.

7 I. Sources of Diversions of the Tribal Water Right. In
8 the exercise of the Tribal Water Right water may be
9 diverted:

10 1. Within the Reservation for use within the
11 Reservation from:

12 (a) the mainstem of the Missouri River within or
13 adjacent to the Reservation;

14 (b) any tributary of the Missouri River that flows
15 through or adjacent to the Reservation, except the mainstem
16 of the Milk River; and

17 (c) any ground water source.

18 2. Outside the Reservation for use within the
19 Reservation from:

20 (a) Fort Peck Reservoir;

21 (b) any tributary of the Missouri River that flows
22 through or adjacent to the Reservation, except the mainstem
23 of the Milk River; and

24 (c) the mainstem of the Missouri River below Fort Peck
25 Dam.

1 Diversions authorized by subparagraphs (a) and (c)
2 shall comply with paragraph 1 of section J of this Article.

3 3. Within or outside the Reservation for use outside
4 the Reservation from:

5 (a) Fort Peck Reservoir;

6 (b) any tributary of the Missouri River that flows
7 through or adjacent to the Reservation, except the mainstem
8 of the Milk River, provided that water from these sources
9 shall not be transported outside the respective watershed of
10 each stream;

11 (c) the mainstem of the Missouri River below Fort Peck
12 Dam; and

13 (d) the mainstem of the Missouri River above Fort Peck
14 Reservoir.

15 Diversions authorized by subparagraphs (a) and (c)
16 shall comply with paragraph 1 of section J of this Article.

17 Diversions authorized by subparagraph (b) shall comply with
18 paragraph 4 of section K of this Article. Diversions
19 authorized by subparagraph (d) shall comply with paragraph 3
20 of section J of this Article.

21 J. Notice of and Conditions upon Diversions and Uses
22 of the Tribal Water Right.

23 1. The Tribes shall give the State not less than 180
24 days advance written notice of any proposed diversion or use
25 of the Tribal Water Right authorized by subparagraphs 2(a)

1 and 2(c) and subparagraphs 3(a) and 3(c) of section I of
 2 this Article and shall, in the case of any transfer of the
 3 Tribal Water Right, except agreements on the tributaries
 4 pursuant to paragraph 4 of section K of this Article, offer
 5 the State an opportunity to participate as provided in
 6 paragraph 2 of section K of this Article. Such notice shall
 7 include sufficient documentation to demonstrate that:

8 (a) the proposed use of water complies with section D
 9 of this Article;

10 (b) for diversions outside the Reservation, the
 11 proposed means of diversion and the construction and
 12 operation of the diversion works are adequate;

13 (c) the proposed use and diversion will not adversely
 14 affect, except with the consent of the owner of such right,
 15 any of the following rights to the use of water existing at
 16 that time:

17 (i) any water right arising under the laws of the
 18 United States;

19 (ii) any appropriative right to the use of water
 20 established pursuant to the laws of the State that has not
 21 been abandoned, but excluding any reservation of water made
 22 pursuant to the laws of the State which has not been put to
 23 actual beneficial use by the date notice is given;

24 (d) the proposed use does not cause any unreasonable
 25 significant adverse environmental impact; and

1 (e) proposed diversions in excess of 4,000 acre-feet
 2 per year and 5.5 cubic feet per second of water will not:

3 (i) substantially impair the quality of water for
 4 existing uses in the source of water from which the
 5 diversion is made;

6 (ii) be made where low quality water which can
 7 economically be used is legally and physically available to
 8 the Tribes for the proposed use;

9 (iii) create or substantially contribute to saline
 10 seep; or

11 (iv) substantially injure fish or wildlife populations
 12 in the source of water from which the diversion is made.

13 The requirements of subparagraph (c) of this paragraph
 14 may be satisfied by a showing that the owner of such right
 15 has consented to the adverse effect. Subparagraph (c) shall
 16 not be construed to alter or avoid in any way the
 17 consequences resulting from such consent under state law.

18 2. A proposed diversion or use of the Tribal Water
 19 Right outside the Reservation authorized by subparagraphs
 20 2(a) and 2(c) and subparagraphs 3(a) and 3(c) of section I
 21 of this Article may be challenged only:

22 (a) within 30 days after the expiration of the notice
 23 period provided in paragraph 1 of this section;

24 (b) in a court of competent jurisdiction; and

25 (c) by the State or by a person whose rights are

1 adversely affected by the proposed diversion or use.

2 In any such case, the Tribes shall have the burden of
3 going forward and the burden of proving by a preponderance
4 of the evidence that they have satisfied the requirements of
5 paragraph 1 of this section.

6 3. Diversions of water in the exercise of the Tribal
7 Water Right outside the Reservation from the mainstem of the
8 Missouri River above Fort Peck Reservoir, as authorized in
9 subparagraph 3(d) of section I of this Article, may be made
10 so long as the Tribes or any user of the Tribal Water Right:

11 (a) comply with all the laws of the State in effect at
12 the time the diversion is proposed, including but not
13 limited to state water use statutes;

14 (b) give not less than 180 days advance written notice
15 of any proposed diversion in the manner required in
16 paragraph 5 of this section:

17 (i) if the diversion is to be made from a reservoir,
18 to the operator of the reservoir; or

19 (ii) if the diversion is not to be made from a
20 reservoir, to the operator of the first dam, upstream and
21 downstream, if any, from the point of diversion;

22 (c) obtain approval of the diversion from the State
23 legislature.

24 4. For purposes of demonstrating compliance with
25 subparagraph 1(c) and subparagraph 3(a) of this section and

1 paragraph 6 of Section K of this Article, the portion of the
2 Tribal Water Right to be diverted will be deemed an
3 appropriative right which has:

4 (a) been acquired on May 1, 1888;

5 (b) a point of diversion and use where the water is
6 actually being diverted and used or, if not actually being
7 diverted, where the water would first flow on or adjacent to
8 the Reservation;

9 (c) the existing use or, if not actually in use, an
10 irrigation use provided, however, that the use can be
11 transferred to a purpose other than irrigation without
12 restriction as to period of use so long as the requirements
13 of Section F of this Article are observed;

14 (d) the actual consumptive use or, if not actually in
15 use or if being used for irrigation purposes, a consumptive
16 use of 1.8 acre-feet per acre per year; and

17 (e) not been abandoned or forfeited.

18 5. Any notice of a diversion required by paragraph 3
19 of this section and any report of a diversion required by
20 paragraph 2 of section F of this Article shall specify:

21 (a) the person authorized to make the diversion;

22 (b) the amount of water proposed or authorized to be
23 diverted annually;

24 (c) the amount proposed or authorized for annual
25 consumptive use;

- 1 (d) the point of diversion;
 2 (e) the period of use;
 3 (f) the place of use; and
 4 (g) the purposes for which the water may be used.

5 K. Transfers of the Tribal Water Right.

6 1. As an incident to and in the exercise of the Tribal
 7 Water Right, the Tribes may transfer within or outside the
 8 Reservation, as authorized by federal law and this Compact,
 9 the right to use water but may not permanently alienate such
 10 right or any part thereof. Any such transfer of water by the
 11 Tribes shall be subject to all provisions of this Compact.

12 2. Prior to making any transfer which authorizes use
 13 of water outside the Reservation to be diverted from the
 14 mainstem of the Missouri River, including Fort Peck
 15 Reservoir, the Tribes shall give not less than 180 days
 16 advance written notice to the State of the proposed terms
 17 and conditions of the transfer, and shall offer the State
 18 the opportunity to participate in the transfer as a
 19 substantially equal partner with the Tribes, assuming
 20 obligations and receiving benefits of the transfer under
 21 terms and conditions agreed to by the Parties. If the State
 22 does not accept the opportunity within the 180-day notice
 23 period, or if the State unreasonably delays the institution
 24 or completion of approval processes required by state law or
 25 unreasonably delays resolution of any litigation arising

1 from its decision to accept the opportunity, the Tribes may
 2 proceed with the proposed transfer without State
 3 participation, provided that the proposed transfer shall be
 4 subject to all other provisions of this Compact. If the
 5 State does not accept the opportunity, or if State
 6 participation in the joint transfer is not approved, the
 7 State shall not later pursue the opportunity, except in
 8 accordance with all the terms of this Compact, including
 9 paragraph 3 of this section.

10 3. Prior to making any transfer allowing use or
 11 diversion of water from Fort Peck Reservoir or from the
 12 mainstem of the Missouri River below Fort Peck Dam, the
 13 State shall give not less than 180 days advance written
 14 notice to the Tribes of the proposed terms and conditions of
 15 the transfer and shall offer the Tribes the same opportunity
 16 to participate in the transfer as a substantially equal
 17 partner with the State, assuming obligations and receiving
 18 benefits of the transfer on terms and conditions agreed to
 19 by the Parties. If the Tribes do not accept the opportunity
 20 within the 180 day notice period, the State may proceed with
 21 the proposed transfer without the Tribes' participation, and
 22 the Tribes shall not later pursue the opportunity except in
 23 accordance with all the terms of this Compact, including
 24 paragraph 2 of this section.

25 4. If otherwise authorized by federal law, the Tribes

1 may enter into an agreement with any person who is
 2 exercising or proposing to exercise a right under the laws
 3 of the State to use surface water outside the Reservation on
 4 any tributary of the Missouri River that flows through or
 5 adjacent to the Reservation, except the mainstem of the Milk
 6 River, which agreement allows such person's diversion and
 7 use and protects it from any other exercise of the Tribal
 8 Water Right provided, however, that:

9 (a) before use of such water, the person shall have
 10 complied with all applicable state laws concerning the
 11 acquisition of a water right;

12 (b) subsequent to acquisition of the state water
 13 right, regulation of its use shall be subject to state law;

14 (c) the amount of water subject to the agreement shall
 15 be considered a consumptive use of the Tribal Water Right;

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

18 5. The Tribes may transfer annually only the following
 19 amounts of water for consumptive use outside the
 20 Reservation:

21 (a) 50,000 acre-feet;

22 (b) plus 35 percent of any amount over 200,000
 23 acre-feet but less than 300,000 acre-feet authorized by
 24 state law to be transferred annually by the State from
 25 waters within the State;

1 (c) plus 50 percent of any amount over 300,000
 2 acre-feet authorized by state law to be transferred annually
 3 by the State from waters within the State.

4 Transfers of the Tribal Water Right shall not be
 5 considered as part of any amounts authorized by state law to
 6 be transferred annually by the State.

7 6. In no event shall the Tribes be authorized to
 8 transfer less than 50,000 acre-feet of water per year
 9 outside the Reservation. The limits established in paragraph
 10 5 of this section shall apply so long as the State is
 11 authorized to transfer annually at least 50,000 acre-feet of
 12 water pursuant to state law. If statutory authorization for
 13 the State to transfer water is not enacted, is repealed, or
 14 is held invalid, or if the amount of water authorized by
 15 state law to be transferred by the State is less than 50,000
 16 acre-feet per year, then for any period in which the
 17 authorization or the limitation is not in force the Tribes
 18 may transfer water in accordance with all terms and
 19 conditions of this Compact other than paragraph 5 of this
 20 section. However, such transfers will be subject to any
 21 volume limitations provided by federal law or, in the
 22 absence of any federal volume limitations, the Tribes may
 23 transfer water in accordance with all terms and conditions
 24 in this Compact other than paragraph 5 of this section and
 25 with any volume limitations imposed by state law which would

1 apply to a holder of a right to the use of water established
2 pursuant to state law. For the purposes of complying with
3 volume limitations imposed by state law, the Tribal Water
4 Right will be deemed to have the characteristics set forth
5 in paragraph 4 of section J of this Article.

6 7. Unless authorized by federal law, the State shall
7 not in any manner whatsoever tax any proceeds received by
8 the Tribes as consideration for any transfer of the Tribal
9 Water Right.

10 L. Instream Flows.

11 1. At any time within five years after the effective
12 date of this Compact, the Tribes may establish a schedule of
13 instream flows to maintain any fish or wildlife resource in
14 those portions of streams, excluding the mainstem of the
15 Milk River, which are tributaries of the Missouri River that
16 flow through or adjacent to the Reservation. These instream
17 flows shall be a part of the Tribal Water Right with a
18 priority date of May 1, 1888. Water remaining in a stream to
19 maintain instream flows pursuant to such a schedule shall be
20 counted by the Tribes as a consumptive use of surface water.

21 2. Instream flows may be established by the Tribes
22 only in accordance with this section. The Tribes may change
23 the use of water for maintenance of instream flows to
24 another purpose only with the consent of the State.

25 M. No Other Diversion or Use of the Tribal Water

1 Right. No other diversion or use of the Tribal Water Right
2 shall be made other than those authorized or recognized by
3 this Article.

4 ARTICLE IV

5 PROTECTION OF USES UNDER STATE LAW

6 A. Uses Protected.

7 1. The following existing uses of water by Indians
8 within the Reservation are protected and shall not be
9 subordinated to any other uses by subsequent provisions of
10 this Article:

11 (a) a maximum of 113 acres of irrigated land within
12 the Wolf Creek watershed;

13 (b) a maximum of 11 acres of irrigated land within the
14 Poplar River watershed; and

15 (c) a maximum of 523 acres of irrigated land within
16 the Big Muddy Creek watershed.

17 2. Uses of water by Indians within the Reservation for
18 stockwatering purposes not in excess of 20 acre-feet per
19 year for each impoundment and for all domestic uses are
20 protected and shall not be subordinated to any other uses by
21 subsequent provisions of this Article.

22 3. With the exception of the uses protected in
23 paragraphs 1 and 2 of this section, diversion and use of
24 water in the exercise of the Tribal Water Right except from
25 the mainstem of the Missouri River, including water

1 allocated to instream flow purposes, shall be subordinate to
 2 the following uses of water in the Porcupine Creek, Poplar
 3 River, Big Muddy Creek, Little Porcupine Creek, Wolf Creek,
 4 Tule Creek, and Chelsea Creek watersheds, including all
 5 tributary streams within those watersheds, and all
 6 underlying ground water whether or not hydrologically
 7 connected with the surface water:

8 (a) the beneficial uses of water with a priority date
 9 of December 31, 1984 or earlier established under the laws
 10 of the State and identified in Appendix A to this Compact;

11 (b) such rights of the United States Fish and Wildlife
 12 Service to the waters of Big Muddy Creek for the Medicine
 13 Lake National Wildlife Refuge as may be finally determined
 14 by the state water court;

15 (c) beneficial uses of water for domestic purposes;

16 (d) beneficial uses of water for stock watering
 17 purposes in existence prior to December 31, 1984, and
 18 beneficial uses of water for stock watering subsequent to
 19 that date not in excess of 20 acre-feet per year for each
 20 impoundment.

21 4. Except as to the rights protected in paragraph 3 of
 22 this section, the Tribal Water Right shall be prior to all
 23 rights to the use of surface and ground water established
 24 under the laws of the State with a priority date later than
 25 May 1, 1888.

1 B. Changes of Protected Uses.

2 1. The rights to the use of water protected by
 3 paragraph 3 of section A of this Article may be changed in
 4 accordance with state law as to point of diversion, period
 5 of use, place of use, purpose of use, or ownership of the
 6 right provided that:

7 (a) the proposed change will not adversely affect any
 8 use of the Tribal Water Right existing at the time of the
 9 proposed change;

10 (b) the amount of surface water flowing onto the
 11 Reservation within the Poplar River, the Big Muddy Creek, or
 12 the Porcupine Creek watersheds, will not be changed; and

13 (c) the source of the water will not be changed from
 14 surface to ground water, or from ground to surface water, or
 15 from one watershed to another.

16 2. Upon receiving an application for a proposed change
 17 authorized by paragraph 1 of this section, the State shall
 18 give the Tribes such advance written notice as is required
 19 by state law.

20 3. If an irrigation use is changed in any manner, or
 21 if a reservoir is constructed or operated which results in
 22 the consumptive use of water by evaporation, the following
 23 limitations apply:

24 (a) no more than 1.8 acre-feet of consumptive use per
 25 year may be authorized for each acre of land retired from

1 full service irrigation; and

2 (b) no more than 0.48 acre-feet of consumptive use per
3 year may be authorized for each acre of land retired from
4 partial service irrigation;

5 (c) evaporation from any reservoir shall be charged as
6 a consumptive use in accordance with definition 4 in Article
7 II.

8 4. If an irrigation use is changed to an industrial
9 use, all diversions and return flows shall be measured by a
10 device acceptable to and subject to periodic inspection and
11 testing by the State and the Tribes at the expense of the
12 owner. The owner shall also have the quality of the return
13 flows sampled and tested by a laboratory acceptable to the
14 State and the Tribes as often as reasonably required by the
15 State and the Tribes and at the expense of the owner.

16 ARTICLE V

17 ADMINISTRATION OF WATER RIGHTS

18 A. United States Administration. All rights to the
19 use of water received from the Fort Peck Irrigation Project
20 shall be administered by the United States, and the United
21 States has the final and exclusive jurisdiction to resolve
22 all disputes concerning uses of water received from the Fort
23 Peck Irrigation Project subject to any judicial review
24 provided by applicable law.

25 B. Tribal Administration.

1 1. The Tribal Water Right shall be administered by the
2 Tribes, and the Tribes have the final and exclusive
3 jurisdiction to resolve all disputes between users of the
4 Tribal Water Right, except for disputes concerning uses of
5 water received from the Fort Peck Irrigation Project and
6 disputes involving users of the Tribal Water Right pursuant
7 to agreements authorized in Article III, section K,
8 paragraph 4.

9 2. Administration and enforcement of the Tribal Water
10 Right shall be pursuant to a water code, which shall be
11 adopted by the Tribes and submitted for approval to the
12 Secretary of the Interior within one year after ratification
13 of this Compact by the Parties. Such code shall take effect
14 18 months after ratification of this Compact unless sooner
15 disapproved by the Secretary of the Interior. Pending the
16 adoption and approval of the tribal water code,
17 administration and enforcement of the Tribal Water Right
18 shall be by the Secretary of the Interior as trustee for the
19 Tribes. The Tribes shall not administer the Tribal Water
20 Right in a manner which denies any person a water right
21 owned by that person which arises under the laws of the
22 United States.

23 3. Within six months after adoption of the tribal
24 water code, the Tribes shall provide the State with notice
25 of each existing use of the Tribal Water Right which shall

1 show:

- 2 (a) the person authorized to make the diversion;
- 3 (b) the amount of water authorized to be diverted
- 4 annually;
- 5 (c) the amount of water authorized for annual
- 6 consumptive use;
- 7 (d) the point of diversion;
- 8 (e) the period of use;
- 9 (f) the place of use;
- 10 (g) the uses for which the water may be diverted; and
- 11 (h) the relative priority of the use as against other
- 12 uses of the Tribal Water Right.

13 4. The Tribes shall thereafter notify the State within

14 sixty days after the end of each quarter year of all new

15 uses of surface and ground water authorized by the Tribes

16 during the preceding quarter year and of all new uses of the

17 Tribal Water Right actually commenced during that quarter

18 year.

19 C. State Administration.

20 1. The State shall administer all rights to the use of

21 surface water and ground water within or outside the

22 Reservation which are not a part of the Tribal Water Right

23 to the fullest extent allowed by law. The State shall have

24 the final and exclusive jurisdiction to resolve all disputes

25 between users of rights established under state law.

1 2. Within two years after ratification of this

2 Compact, the State shall notify the Tribes of all existing

3 uses authorized by the State on the mainstem of the Missouri

4 River below Fort Peck Dam and on all tributaries of the

5 Missouri River that flow through or adjacent to the

6 Reservation, except the mainstem of the Milk River. The

7 State shall notify the Tribes within sixty days after the

8 end of each quarter year of all new uses of surface and

9 ground water permitted by the State on each of these sources

10 during the preceding quarter year and of all new uses of

11 water actually commenced pursuant to the laws of the State

12 during that quarter year on each of these sources. Notices

13 required by this paragraph shall include the information

14 required by paragraph 3 of section B of this Article.

15 3. No agency of the State shall administer any part of

16 the Tribal Water Right. From and after the effective date of

17 this Compact, unless the Tribal Water Right confirmed in

18 Article III is fully utilized at the time application is

19 made for a permit or other authorization, the State shall

20 issue no permit or other authorization to divert or use

21 water within the Reservation to the following persons:

- 22 (a) the Tribes;
- 23 (b) any Indian;
- 24 (c) any non-Indian successor-in-interest to any
- 25 allottee on the Reservation by virtue of that person's

1 assertion of a right arising under the laws of the United
2 States; or

3 (d) the United States for the benefit of the Tribes or
4 any Indian or any non-Indian successor-in-interest to any
5 allottee.

6 D. Regulation of Ground Water.

7 1. With the exception of uses protected in Article IV,
8 neither the State nor the Tribes shall authorize or continue
9 the use of ground water without the consent of the other if
10 such use will:

11 (a) result in degradation of instream flows
12 established pursuant to section L of Article III; or

13 (b) contribute to the permanent depletion or the
14 significant degradation of the quality of a ground water
15 source which in whole or in part underlies the Reservation.

16 2. With the exception of uses protected in Article IV,
17 the State shall not, without the Tribes' consent, authorize
18 or continue the use of ground water that unreasonably
19 interferes with a use of ground water authorized by the
20 Tribes. The Tribes shall not, without the consent of the
21 State, authorize or continue the use of ground water that
22 unreasonably interferes with a use of ground water
23 authorized by the State and protected by Article IV of this
24 Compact.

25 ARTICLE VI

1 FORT PECK-MONTANA COMPACT BOARD

2 A. Board established. There is hereby established the
3 Fort Peck-Montana Compact Board, which shall exercise powers
4 and responsibilities as set forth in this Article.

5 B. Membership.

6 1. The Board shall consist of three members. One
7 member shall be appointed by the Governor of the State of
8 Montana or, in lieu of such appointment, shall be the
9 Governor. The salary and expenses of that member shall be
10 paid by the State. One member shall be appointed by the
11 Chairman of the Tribes, or in lieu of such appointment,
12 shall be the Tribal Chairman. The salary and expenses of
13 that member shall be paid by the Tribes. The third member
14 shall be selected by agreement of the other two members. The
15 salary and expenses of that member and all other expenses of
16 the Board shall be shared equally by the State and the
17 Tribes subject to the availability of funds. Each member
18 duly appointed or selected shall hold office for a term of
19 six years, and for so long thereafter until a successor
20 shall be appointed or selected. The initial term of each
21 member shall be staggered, with one member serving a
22 six-year term, one a four-year term, and one a two-year
23 term. The initial term of each member shall be chosen by
24 lot, or by any other procedure and agreed upon in writing by
25 the first three members of the Board. If the Governor or the

1 Tribal Chairman serves on the Board, such person shall not
2 serve on the Board beyond his or her term as Governor or
3 Tribal Chairman.

4 2. Should the two appointed members fail to agree
5 within sixty days of the effective date of this Compact or
6 within thirty days after any vacancy occurs, on the
7 selection of the third member, the following procedure shall
8 be utilized:

9 (a) within five days each member shall nominate no
10 more than five and no less than three persons to serve as a
11 member of the Board;

12 (b) within fifteen days thereafter each member shall
13 reject all but one of the persons nominated by the other
14 member;

15 (c) the chief judge of the United States District
16 Court for the District of Montana shall select the third
17 member of the Board from the remaining two nominees. If the
18 chief judge declines for any reason to select the third
19 member, the chief justice of the Montana Supreme Court shall
20 make the selection from the remaining two nominees.

21 3. Vacancies on the board shall be filled by
22 appointment of a person to serve the unexpired term of the
23 member whose seat has become vacant. If the member appointed
24 by the Governor becomes unable or unwilling to serve on the
25 Board, the Governor shall make the appointment within

1 fifteen days. If the member appointed by the Tribal Chairman
2 becomes unable or unwilling to serve, the Tribal Chairman
3 shall make the appointment within fifteen days. If the
4 third member of the Board becomes unable or unwilling to
5 serve on the Board, the remaining members shall fill the
6 vacancy under the procedure set forth in paragraphs 1 and 2
7 of this section.

8 C. Quorum and Vote Required. Two members of the Board
9 shall constitute a quorum if reasonable notice has been
10 provided in advance to the absent member. Meetings may be in
11 person or, in appropriate circumstances, by telephone. All
12 Board decisions shall be by a majority of the Board, shall
13 be in writing and, together with any dissenting opinions,
14 shall be delivered to all parties in the proceeding before
15 the Board, and to both Parties to this Compact.

16 D. Jurisdiction of the Board. The Board shall have
17 exclusive jurisdiction, only as provided in this Compact, to
18 resolve any controversy over the use of ground water to
19 which this Compact pertains, any controversy over the use of
20 surface water within the Reservation or from any tributary
21 of the Missouri River that flows through or adjacent to the
22 Reservation, except the mainstem of the Milk River, and any
23 controversy as to the meaning of this Compact between: (i)
24 on the one hand, the Tribes or any person or persons
25 claiming a right to use the Tribal Water Right; and (ii) on

1 the other hand, the State or any person or persons claiming
2 a right to use water under the laws of the State.

3 E. Powers and Duties of the Board.

4 1. The Board shall have power to administer oaths to
5 witnesses, to take evidence under oath, and to issue
6 subpoenas to compel the attendance of witnesses or for the
7 production of books, records, documents and other evidence.
8 The courts of the Tribes and the State shall enforce any
9 subpoena issued by the Board in the same manner as
10 prescribed by the laws of the Tribes and the State for
11 enforcing a subpoena issued in a civil action by courts of
12 the Tribes and the State.

13 2. The Board shall hold hearings in proceedings before
14 it and shall give advance notice to the Tribes, the State
15 and all parties to any proceeding personally or by
16 registered mail not less than five days before any hearing.
17 Appearance at a hearing waives such notice. The Board may
18 hear and determine the controversy upon the evidence
19 produced notwithstanding the failure of a party duly
20 notified to appear. The Tribes, the State and all parties to
21 the proceeding are entitled to be heard, to present evidence
22 material to the controversy, to cross-examine witnesses
23 appearing at the hearing, and to be represented by counsel
24 at their own expense.

25 3. The Board may enter an order after hearing granting

1 any party to the dispute before it temporary or preliminary
2 injunctive relief, or any other relief which the Board deems
3 appropriate except money damages. The Board or any party to
4 a proceeding before the Board may invoke the jurisdiction of
5 a court of competent jurisdiction to enforce any temporary
6 or preliminary injunction so issued by the Board by filing a
7 petition for enforcement naming the enjoined person as
8 respondent. Upon filing the petition, the court shall enter
9 any order it deems appropriate for enforcement of the
10 injunction ordered by the Board, including but not limited
11 to injunctive relief on such terms as to bond or otherwise
12 as it deems proper for the security of the rights of the
13 enjoined party. The United States, the State, and the Tribes
14 shall not be required to post any bond. The court may
15 appoint a water commissioner or master to monitor compliance
16 with such relief.

17 4. The Board shall adopt rules and regulations to
18 govern its procedures and to carry out its responsibilities
19 under this Compact. Such rules and regulations must be
20 consistent with all provisions of this Compact. All records
21 of the Board shall be open to public inspection except for
22 privileged information.

23 5. The Board may employ or seek assistance of such
24 clerical or other personnel and may establish such offices
25 as it deems necessary for the performance of its functions

1 according to this Compact. Pending the establishment of a
2 principal office, the Board's office shall be located at
3 Fort Peck Agency of the Bureau of Indian Affairs.

4 6. The annual budget of the Board shall be subject to
5 approval of the Parties to this Compact and to the
6 availability of funds appropriated by the Parties.

7 F. Review and Enforcement of Board Decisions.

8 1. Decisions by the Board shall be effective
9 immediately, unless stayed for a period of time prescribed
10 by the Board. On application of a party within a reasonable
11 time, but in any event no more than ninety days after a
12 decision is rendered, the Board may modify or correct any
13 decision:

14 (a) where there was an evident material miscalculation
15 of figures or an evident material mistake in the description
16 of any person, thing or property referred to in the
17 decision;

18 (b) where the decision is imperfect in a matter of
19 form not affecting the merits of the controversy; or

20 (c) where the decision requires clarification.

21 2. Any party before the Board may, within ten days of
22 any final decision, apply to the Board to modify or set
23 aside any aspect of the decision. Notice of such application
24 shall be served personally or by registered mail upon all
25 parties to the proceeding. Any other party shall have ten

1 days within which to respond to the application. The Board
2 shall act on such application within ten days after a
3 response is filed or, if no response is filed, within
4 fifteen days after the application is filed. If the Board
5 fails to act within the time limitations set forth in this
6 paragraph, the application shall be deemed denied. The time
7 for appeal provided in paragraph 3 of this section shall not
8 begin to run until the application is determined as provided
9 in this paragraph.

10 3. Any party before the Board may appeal any final
11 decision by the Board to a court of competent jurisdiction
12 within thirty days of such decision. The notice of appeal
13 shall be filed with the Board and served personally or by
14 registered mail upon the Tribes, the State and all parties
15 to the proceeding before the Board, and all such persons
16 shall thereafter have the right to participate in the
17 appeal.

18 4. In any appeal, the Board's decision shall be
19 presumed to be valid, and may be vacated by the court only
20 on one of the following grounds:

21 (a) the decision is not supported by substantial
22 evidence;

23 (b) the decision was procured by corruption, fraud or
24 undue means;

25 (c) there was evident partiality or corruption by the

1 Board or by any member;

2 (d) the Board was guilty of misconduct in refusing to
3 hear the dispute, or in refusing to hear evidence pertinent
4 and material to the controversy, or any other clear
5 misbehavior by which the rights of any party have been
6 substantially prejudiced;

7 (e) the Board exceeded its authority under the terms
8 of this Compact; or

9 (f) the decision is contrary to law.

10 5. Unless an appeal is timely filed as provided in
11 paragraph 3 of this section, any decision of the Board shall
12 be confirmed or enforced by any court of competent
13 jurisdiction on petition of the Board, the Tribes, the State
14 or any party before the Board in the proceeding in which the
15 decision was made.

16 6. A court of competent jurisdiction in which a timely
17 appeal is filed pursuant to paragraph 3 of this section, or
18 in which a petition to confirm or enforce is filed pursuant
19 to paragraph 5 of this section, may order such temporary or
20 permanent relief as it considers just and proper.

21 7. An appeal may be taken from any decision of the
22 court in which a timely appeal is filed pursuant to
23 paragraph 3 of this section, or in which a petition to
24 confirm or enforce is filed pursuant to paragraph 5 of this
25 section, in the manner and to the same extent as from orders

1 or judgments of the court in a civil action.

2 8. In any appeal or petition to confirm or enforce the
3 Board's decision, the Board shall file with the court the
4 record of the proceedings before the Board.

5 G. Waiver of Immunity. The Tribes and the State
6 hereby waive their respective immunities from suit,
7 including any defense the State shall have under the
8 Eleventh Amendment of the Constitution of the United States,
9 to permit the appeal or judicial enforcement of Board
10 decisions as provided in this Compact, except that such
11 waivers shall not extend to any action for money damages
12 including costs and attorneys' fees as a result of such
13 judicial action.

14 ARTICLE VII

15 FINALITY AND EFFECTIVENESS OF COMPACT

16 A. Ratification. This Compact shall become effective
17 as to both parties when ratified by the Legislature of the
18 State of Montana and by the Fort Peck Tribal Executive
19 Board. Ratification by the State and by the Tribes is
20 irrevocable, and this Compact may not be modified in any
21 manner whatsoever except with the joint consent of the
22 legislative body of both Parties.

23 B. Incorporation into Decrees and Disposition of
24 Federal Suits.

25 1. The Parties and the United States shall petition

1 for incorporation of this Compact into the preliminary
 2 decrees and final decrees in any state water court
 3 proceedings to adjudicate any right to the use of water to
 4 which this Compact pertains, and this Compact may not be
 5 modified in any manner whatsoever without the consent of
 6 both Parties as provided in section A of this Article. The
 7 United States shall not be bound by provisions of this
 8 Compact until it is incorporated into the final decree, as
 9 provided in this paragraph.

10 2. This Compact shall only be filed in United States
 11 v. Aageson, Civ. No. 79-21-GF (D. Mont.), or United States
 12 v. Aasheim, Civ. No. 79-40-BLG (D. Mont.) if there is a
 13 final determination by the state courts that they lack
 14 jurisdiction over, or that the state proceedings are
 15 inadequate to adjudicate, some or all of the water rights
 16 asserted in either of the above cases. Upon a final
 17 determination that the state courts have jurisdiction over,
 18 and that the state proceedings are adequate to adjudicate
 19 all of the water rights in the above cases, the United
 20 States and the Parties will immediately execute a joint
 21 motion pursuant to Rule 41(a) of the Federal Rules of Civil
 22 Procedure to dismiss with prejudice and on their merits all
 23 claims by the Tribes and the United States on behalf of the
 24 Tribes in the pending cases.

ARTICLE VIII

DISCLAIMERS AND RESERVATION OF RIGHTS

1
 2 A. Disclaimers. Nothing in this Compact shall be so
 3 construed or interpreted:

4 1. to establish the nature, extent, transferability,
 5 or manner of enforcement of water rights of any Indian
 6 reservation other than the Fort Peck Indian Reservation;

7 2. to preclude the acquisition or exercise of an
 8 appropriative right to the use of water under state law by
 9 the Tribes or any individual Indian outside the Reservation
 10 by purchase of such right or by purchase of land, or by
 11 application to the State;

12 3. to preclude the acquisition or exercise of an
 13 appropriative right to the use of water under state law by
 14 the Tribes or any individual Indian within the Reservation:

15 (a) by purchase of such right or by purchase of land,
 16 provided that water rights acquired by such purchase after
 17 ratification of this Compact shall be deemed to be an
 18 exercise of the Tribal Water Right; or

19 (b) by application to the State, provided that the
 20 Tribal Water Right confirmed in Article III has been fully
 21 utilized at the time an application is made;

22 4. to determine the relative rights inter sese of
 23 persons using water under the authority of the State or the
 24 Tribes;

25 5. to limit in any way the rights of the Parties or

1 any other person to litigate any issues or questions not
2 resolved by this Compact;

3 6. to authorize the taking of a water right which is
4 vested under state or federal law;

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

7 8. to address or prejudge whether, in any interstate
8 apportionment of the waters of the Missouri River Basin, the
9 Tribal Water Right shall be counted as a part of the waters
10 apportioned to the state.

11 B. Reservation of Rights. The Parties expressly
12 reserve all rights not granted, recognized or relinquished
13 in this Compact.

14 ARTICLE IX

15 TRIBAL RELINQUISHMENT OF OTHER WATER CLAIMS

16 The Tribal Water Right confirmed in Article III shall
17 be final and conclusive. With the exception of the Tribal
18 Water Right recognized herein and rights established under
19 state law as authorized by this Compact, the Tribes and the
20 United States as trustee for the Tribes hereby relinquish
21 forever any and all existing and future claims to water from
22 any source and for any purpose. This relinquishment
23 includes, but is not limited to, any claim for water derived
24 from: aboriginal use of land or water; any Indian treaties;
25 any act of Congress; and any executive act of the United

1 States.

2 ARTICLE X

3 BINDING EFFECT

4 A. Persons Bound. Upon the effectiveness of this
5 Compact, its terms will be binding:

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

13 2. upon the Tribes and any person or entity of any
14 nature whatsoever using, claiming or in any manner asserting
15 any right to the use of the Tribal Water Right, or any right
16 arising under any doctrine of reserved or aboriginal water
17 rights for the Tribes, or any right arising under tribal
18 law, provided that for purposes of consent, ratification, or
19 authorization the validity of consent, ratification or
20 authorization is to be determined by Tribal law.
21 Notwithstanding any other provision of law, the Tribal Water
22 Right confirmed in Article III of the Fort Peck-Montana
23 Compact includes conclusively and forever the water rights
24 arising under the laws of the United States of all persons
25 on the Fort Peck Reservation by virtue of the ownership or

1 purchase of any Indian allotment, and the courts of the
2 State shall not have jurisdiction to adjudicate or decree
3 any such right claimed by any such person.

4 B. Effect on Other Laws. The provisions of the Fort
5 Peck-Montana Compact shall supersede any present or future
6 enactment or common law rule inconsistent with such Compact
7 including but not limited to Montana Code Annotated
8 28-2-708.

9 ARTICLE XI

10 SEVERABILITY

11 Should any part of this Compact other than Articles
12 III, IV, VII, or IX be held to be invalid, all other parts
13 thereof shall continue to be in full force and effect.
14 Should any part of Articles III, IV, VII, or IX be held
15 invalid, either party may withdraw from the remaining
16 provisions of this Compact by action of its legislative body
17 taken within one year from the determination of such
18 invalidity.

19 ARTICLE XII

20 LEGISLATION

21 A. Future legislation. The parties agree to seek
22 enactment of further legislation if it becomes necessary to
23 effectuate the provisions and purposes of this Compact, and
24 to protect such provisions and purposes from challenge and
25 attack, provided that no provisions of the Compact shall be

1 modified as to substance except as provided in Article VII.

2 B. Petition to Congress.

3 1. The Parties hereby request the Montana legislature
4 to petition Congress to enact the following legislation in
5 substantially the following form:

6 "Sec. 2. For purposes of this Act, the term:

7 (a) "Fort Peck-Montana Compact" means that Compact
8 pertaining to the reserved water rights of the Assiniboine
9 and Sioux Tribes of the Fort Peck Reservation ratified by
10 the legislature of the State of Montana on ____, 1985 and by
11 the Tribes on ____, 1985.

12 (b) "Reservation" means the Fort Peck Indian
13 Reservation as defined in the agreement of December 28 and
14 December 31, 1886, and confirmed by the Act of May 1, 1888,
15 25 Stat. 113.

16 (c) "Secretary" means the Secretary of the Interior.

17 (d) "Tribes" means the Assiniboine and Sioux Tribes of
18 the Fort Peck Indian Reservation.

19 "Sec. 3.

20 "(a) The Tribes, subject to the approval of the
21 Secretary, may enter into any joint venture, service
22 contract, lease, exchange or other agreement, or any
23 amendment, supplement or other modification of such
24 agreement (hereinafter referred to as a "Water Agreement")
25 authorizing the delivery, use or transfer of any part of the

1 water right confirmed in the Tribes by the Fort Peck-Montana
2 Compact for a specified term, not to exceed fifty years,
3 inclusive of all renewal periods. A Water Agreement may
4 authorize the diversion or use of water within or outside
5 the Reservation subject to all terms of the Fort
6 Peck-Montana Compact.

7 "(b) The Secretary shall approve or disapprove any
8 Water Agreement within (1) one hundred and eighty days after
9 submission or (2) sixty days after compliance, if required,
10 with section 102(2)(C) of the National Environmental Policy
11 Act of 1969 (42 U.S.C. 4332(2)(C) and any other requirement
12 of federal law, whichever is later. Any party to such an
13 agreement may enforce the provisions of this subsection
14 pursuant to 28 U.S.C. 1361. Notwithstanding any other law,
15 all projections, studies, data or other information
16 possessed by the Department of the Interior regarding the
17 terms and conditions of the Water Agreement or the financial
18 return to the Tribes, shall be held by the Department of the
19 Interior as privileged proprietary information of the
20 Tribes."

21 2. The provisions of this Compact shall have no force
22 and effect until the resolution set forth in paragraph 1 of
23 this section is approved by the Montana Legislature and
24 submitted to Congress.

25 IN WITNESS WHEREOF the representatives of the State of

1 Montana and the Assiniboine and Sioux Tribes of the Fort
2 Peck Indian Reservation have signed this Compact in five
3 original counterparts on the ___ day of _____, 1985.

4 For the Assiniboine and Sioux
5 Tribes of the Fort Peck Indian Reservation

6 -----

7 Walter Clark

8 -----

9 Norman Hollow

10 -----

11 Caleb Shields

12 For the State of Montana

13 Montana Reserved Water Rights Compact Commission

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15 W. Gordon McOmber, Chairman

Daniel O. Kemmis

16 -----

17 Jack E. Galt, Vice Chairman

A.B. Linford

18 -----

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Joseph P. Mazurek

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21 William M. Day

Audrey G. Roth

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23 Everett C. Elliott

Chris D. Tweeten

24 APPROVED:

25 For the Secretary of the

LC 1961/01

1 Interior
2 -----
3 For the Attorney General of
4 the United States
5 -----

-End-

APPROVED BY COMMITTEE
ON AGRICULTURE LIVESTOCK
& IRRIGATION

1 SENATE BILL NO. 467
2 INTRODUCED BY GALT, MAZUREK
3 BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION
4
5 A BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT
6 ENTERED INTO BY THE STATE OF MONTANA AND THE ASSINIBOINE AND
7 SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; PROVIDING
8 AN IMMEDIATE EFFECTIVE DATE."
9

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

11 Section 1. Fort Peck-Montana compact ratified. The
12 compact entered into by the state of Montana and the
13 Assiniboine and Sioux tribes of the Fort Peck Indian
14 reservation and filed with the secretary of state of the
15 state of Montana under the provisions of 85-2-702 on [date
16 of filing] is ratified. The compact is as follows:

17 FORT PECK -- MONTANA COMPACT

18 This Compact is entered into by and between THE STATE
19 OF MONTANA and THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT
20 PECK INDIAN RESERVATION (herein called the "Parties") and
21 shall become effective as set forth hereinafter.

22 The Parties agree as follows:

23 ARTICLE I

24 GENERAL PURPOSES

25 The basic purposes of this Compact are to determine

1 finally and forever all rights of the Assiniboine and Sioux
2 Tribes of the Fort Peck Indian Reservation in the State of
3 Montana to water on, under, adjacent to, or otherwise
4 appurtenant to the Reservation, to settle existing disputes
5 and remove causes of future controversy between the Tribes
6 and the State and between Indians of the Fort Peck
7 Reservation and other persons concerning waters of the
8 Missouri River, its tributaries, and ground water, and to
9 settle all claims by the Tribes and by the United States on
10 behalf of the Tribes in United States v. Aageson, Civ. No.
11 79-21-GF (D. Mont.), United States v. Aasheim, Civ. No.
12 79-40-BLG (D. Mont.) and the pending adjudication in the
13 state water court initiated pursuant to the provisions of
14 Chapter 697, Laws of Montana 1979.

15 ARTICLE II

16 DEFINITIONS

17 For purposes of this Compact, and for no other
18 purposes, the following definitions apply:

19 (1) "Acre-foot" means the amount of water necessary to
20 cover one acre to a depth of one foot and is equivalent to
21 43,560 cubic feet.

22 (2) "Annual" or "per year" means the calendar year
23 commencing January 1 and ending December 31.

24 (3) "Board" means the Fort Peck-Montana Compact Board
25 established by Article VI.



1 (4) "Conservation (carry-over) storage" is storage
 2 provided in a reservoir to capture and hold water that would
 3 otherwise go downstream. Such storage holds the water for
 4 beneficial use later in the season or is carried over to a
 5 subsequent season or seasons. Evaporation from the surface
 6 of such reservoir is considered to be a consumptive use to
 7 the extent that it exceeds the evaporative and
 8 transpirational losses which occurred in the reservoir area
 9 prior to its construction.

10 (5) "Consumptive use" means the amount of irrigation
 11 water that is transpired by vegetation, converted in the
 12 processes of photosynthesis and plant tissue growth, and
 13 evaporated from adjacent soils, water surfaces and foliage.
 14 For uses other than irrigation, consumptive use means the
 15 quantity of water diverted less the quantity of reusable
 16 return flow within the State.

17 (6) "Court of competent jurisdiction" means a state or
 18 federal district court which otherwise has jurisdiction of
 19 the subject matter and the parties, or a tribal court which
 20 otherwise has such jurisdiction provided that all parties to
 21 the case consent to tribal court jurisdiction.

22 (7) "Diversion" means the removal of water from its
 23 natural course or location by means of a ditch, canal,
 24 flume, bypass, pipeline, conduit, well, pump, or other
 25 structure or device, or the impoundment of water in a

1 reservoir. Where a reservoir is constructed or operated on a
 2 stream, the annual diversion shall be the greater of:

3 (a) the inflow into the reservoir minus the outflow
 4 for releases or spills downstream from the reservoir, or
 5 (b) withdrawals of water from the reservoir for actual
 6 use.

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

12 (9) "Fort Peck Irrigation Project" means those
 13 irrigation systems and works constructed pursuant to the Act
 14 of May 30, 1908, 35 Stat. 558, and all lands receiving water
 15 from such systems and works.

16 (10) "Fort Peck Reservoir" means that body of surface
 17 water impounded by Fort Peck Dam, at the current spillway
 18 elevation.

19 (11) "Full service irrigation" means any form of
 20 irrigation that distributes water on a regularly scheduled
 21 basis in order to satisfy the full seasonal crop and soil
 22 water requirements.

23 (12) "Ground water" means any water located under the
 24 surface of the land or the bed of any stream, lake,
 25 reservoir, or other body of surface water. All other water

1 shall be considered surface water.

2 (13) "Indian" means any person who:

3 (a) is an enrolled member of the Tribes; or

4 (b) is a member of a tribe that is recognized as
5 eligible for the special programs and services provided by
6 the United States to Indians because of their status as
7 Indians; or

8 (c) holds or is recognized by the Secretary of the
9 Interior as eligible to hold trust or restricted property on
10 the Reservation.

11 (14) "Industrial" means the use of water for any uses
12 that benefit an industrial enterprise including, but not
13 limited to, industrial cooling, energy production, and
14 evaporation associated with any industrial operation. Among
15 the purposes excluded from the industrial use category are
16 irrigation, stockwater, and domestic uses.

17 (15) "Instream flow" means that quantity of water
18 scheduled to remain in a stream to maintain fish and
19 wildlife resources.

20 (16) "Missouri River" means the river formed by the
21 confluence of the Gallatin, Jefferson and Madison Rivers in
22 southwestern Montana, and flowing easterly beyond the
23 eastern boundary of Montana.

24 (17) "Partial service irrigation" means the diversion
25 of flood runoff from natural channels or water courses and

1 spreading such water for the purpose of applying as much
2 water as practicable to the land during periods of high
3 stream flow to increase crop production.

4 (18) "Parties" means the Tribes and the State.

5 (19) "Person" means an individual or any other entity,
6 public or private, including the State, the Tribes, and the
7 government of the United States and all officers, agents,
8 and departments thereof.

9 (20) "Regulatory Storage" is storage provided as a part
10 of a water distribution system for operational purposes.
11 Evaporation loss from the distribution system itself is
12 accounted for and is a part of the unit consumptive use rate
13 established in this Compact and is therefore not considered
14 to be a separate item of consumptive use.

15 (21) "Reservation" means the Fort Peck Indian
16 Reservation as established in the agreement of December 28
17 and December 31, 1886, and confirmed by the Act of May 1,
18 1888, 25 Stat. 113.

19 (22) "Reusable" means capable of further beneficial
20 use.

21 (23) "State" means the State of Montana and all
22 officers, agents, departments, and political subdivisions
23 thereof. Unless otherwise indicated, for purposes of
24 notification or consent, "State" means the Director of the
25 State Department of Natural Resources and Conservation or

1 its successor agency.

2 (24) "Transfer" means any authorization for the
3 delivery or use of water by a joint venture, service
4 contract, lease, sale, exchange or other similar agreement.

5 (25) "Tribal Water Right" means the right to divert and
6 use water as confirmed by Article III of this Compact.

7 (26) "Tribes" means the Assiniboine and Sioux Tribes of
8 the Fort Peck Indian Reservation and all officers, agents
9 and departments thereof. Unless otherwise indicated, for
10 purposes of notification or consent, "Tribes" means the
11 Tribal Chairman or the Chief Executive Official of the
12 Tribes at the time.

13 (27) "Tributary" or "tributaries of the Missouri River
14 that flow through or adjacent to the Reservation" means
15 those tributaries of the Missouri River that traverse the
16 Reservation, generally in a north to south direction,
17 including:

18 (a) streams that form the east and west boundaries of
19 the Reservation (Big Muddy Creek, Porcupine Creek and the
20 Milk River);

21 (b) streams that originate outside the Reservation but
22 empty into the Missouri River within the boundaries of the
23 Reservation (the Poplar River and its tributaries);

24 (c) streams that are wholly contained within the
25 boundaries of the Reservation (Chelsea Creek, Tule Creek,

1 Wolf Creek, Oswego Creek, and Little Porcupine Creek); and
2 (d) all other watercourses that traverse the
3 Reservation.

4 (28) "Wasteful" means the unreasonable loss of water
5 through the design or negligent operation of a diversion or
6 of a water distribution facility.

7 ARTICLE III

8 TRIBAL WATER RIGHT

9 A. General Statement of the Tribal Water Right. The
10 Assiniboine and Sioux Tribes of the Fort Peck Indian
11 Reservation have the right to divert annually from the
12 Missouri River, certain of its tributaries, and ground water
13 beneath the Reservation the lesser of (i) 1,050,472
14 acre-feet of water, or (ii) the quantity of water necessary
15 to supply a consumptive use of 525,236 acre-feet per year
16 for the uses and purposes set forth in this Compact with a
17 priority date of May 1, 1888, provided that no more than
18 950,000 acre-feet of water, or the quantity of water
19 necessary to supply a consumptive use of 475,000 acre-feet
20 may be diverted annually from surface water sources. This
21 right is held in trust by the United States for the benefit
22 of the Tribes and is further defined and limited as set
23 forth in this Compact.

24 B. Persons Who May Use the Tribal Water Right. All
25 uses of water authorized under any applicable law by the

1 following persons shall be considered and calculated as uses
2 of the Tribal Water Right:

3 1. the Tribes within or outside the Reservation;

4 2. all individual Indians using water within the
5 Reservation including, but not limited to, Indians
6 exercising uses established pursuant to state law prior to
7 the effective date of this Compact;

8 3. all non-Indian successors-in-interest to any
9 allottee actually using water within the Reservation by
10 virtue of a water right arising under the laws of the United
11 States, which water right was acquired directly or
12 indirectly from an Indian predecessor-in-interest;

13 4. all other persons receiving water from the Fort
14 Peck Irrigation Project including, but not limited to,
15 persons exercising uses established pursuant to state law
16 prior to the effective date of this Compact;

17 5. all other persons authorized to use water by the
18 Tribes pursuant to this Compact, within or outside the
19 Reservation;

20 6. the United States as trustee for the Tribes or any
21 Indian including, but not limited to, persons exercising
22 uses established pursuant to state law prior to the
23 effective date of this Compact.

24 C. Measure of Consumptive Use for Irrigation.
25 Irrigation usage of the Tribal Water Right shall be

1 conclusively deemed to cause a consumptive use of 1.8
2 acre-feet per acre per year for full service irrigation and
3 0.48 acre-feet per acre per year for partial service
4 irrigation. Any loss of water due to evaporation from
5 reservoirs constructed in the future for conservation
6 (carry-over) storage rather than for regulatory storage by
7 the United States for the benefit of the Tribes or any
8 Indian, or constructed for such conservation storage by the
9 Tribes or by any Indian, shall be counted as a consumptive
10 use.

11 D. Purposes for Which the Tribal Water Right May be
12 Used. Within the Reservation, use of water in the exercise
13 of the Tribal Water Right for any purpose may be authorized
14 by the Tribes without regard to whether such use is
15 beneficial as defined by valid state law. No use of the
16 Tribal Water Right may be wasteful or inconsistent with the
17 terms of this Compact. Outside the Reservation, any use of
18 water in the exercise of the Tribal Water Right shall be
19 beneficial as defined by valid state law on the date the
20 Tribes give notice to the State of a proposed use outside
21 the Reservation.

22 E. Facilities Diverting or Using the Tribal Water
23 Right Outside the Reservation. All persons diverting or
24 using the Tribal Water Right outside the Reservation,
25 including the Tribes as sovereign, shall apply for all

1 permits, certificates, variances and other authorizations
 2 required by valid state laws regulating, conditioning or
 3 permitting the siting, construction, operation, alteration
 4 or use of any equipment, device, facility or associated
 5 facility proposed to use or transport water located outside
 6 the Reservation, and shall comply with all applicable
 7 provisions of this Compact. A diversion or use of water in
 8 the exercise of the Tribal Water Right may be made only
 9 after all permits, certificates, variances or other
 10 authorizations applied for pursuant to this paragraph have
 11 been obtained, and the diversion or use has not been found
 12 unlawful by a court of competent jurisdiction.

13 F. Amounts To Be Diverted from the Missouri River.

14 1. Diversions of water for use within or outside the
 15 Reservation may be made in the exercise of the Tribal Water
 16 Right from Fort Peck Reservoir and the mainstem of the
 17 Missouri River--but without utilization of the conservation
 18 (carry-over) storage of Fort Peck Reservoir--in the
 19 following amounts:

20 (a) during the months of November, December, January,
 21 February and March, not to exceed 40,000 acre-feet per
 22 month;

23 (b) during the months of April and October, not to
 24 exceed 50,000 acre-feet per month;

25 (c) during the months of May and September, not to

1 exceed 105,000 acre-feet per month;

2 (d) during the month of June, not to exceed 145,000
 3 acre-feet;

4 (e) during the month of July, not to exceed 215,000
 5 acre-feet;

6 (f) during the month of August, not to exceed 180,000
 7 acre-feet.

8 Provided that the aggregate of monthly diversions in
 9 the exercise of the Tribal Water Right from surface water
 10 shall not exceed 950,000 acre-feet per year, and the total
 11 annual consumptive use shall not exceed 475,000 acre-feet.

12 2. The Tribes shall report the amount of all actual
 13 diversions from Fort Peck Reservoir and the mainstem of the
 14 Missouri River to the United States Army Corps of Engineers
 15 by April 1st of the calendar year following the year in
 16 which such diversions are made in accordance with paragraph
 17 5 of section J of this Article.

18 3. All diversions authorized by paragraph 1 of this
 19 section may be made without payment to the United States,
 20 but the Tribes and any user of the Tribal Water Right shall
 21 otherwise comply with all generally applicable laws and
 22 regulations of the United States.

23 G. Export of the Tribal Water Right Outside the State.
 24 Use of the Tribal Water Right outside the State shall be in
 25 compliance with all valid provisions of state law in effect

1 at the time of the proposed transfer that prohibit,
2 regulate, condition, or permit the transportation of water
3 outside the State.

4 H. Non-use of the Tribal Water Right not a Forfeiture.
5 Non-use of any part of the Tribal Water Right shall not
6 constitute a relinquishment, forfeiture or abandonment of
7 the right to such use.

8 I. Sources of Diversions of the Tribal Water Right. In
9 the exercise of the Tribal Water Right water may be
10 diverted:

11 1. Within the Reservation for use within the
12 Reservation from:

13 (a) the mainstem of the Missouri River within or
14 adjacent to the Reservation;

15 (b) any tributary of the Missouri River that flows
16 through or adjacent to the Reservation, except the mainstem
17 of the Milk River; and

18 (c) any ground water source.

19 2. Outside the Reservation for use within the
20 Reservation from:

21 (a) Fort Peck Reservoir;

22 (b) any tributary of the Missouri River that flows
23 through or adjacent to the Reservation, except the mainstem
24 of the Milk River; and

25 (c) the mainstem of the Missouri River below Fort Peck

1 Dam.

2 Diversions authorized by subparagraphs (a) and (c)
3 shall comply with paragraph 1 of section J of this Article.

4 3. Within or outside the Reservation for use outside
5 the Reservation from:

6 (a) Fort Peck Reservoir;

7 (b) any tributary of the Missouri River that flows
8 through or adjacent to the Reservation, except the mainstem
9 of the Milk River, provided that water from these sources
10 shall not be transported outside the respective watershed of
11 each stream;

12 (c) the mainstem of the Missouri River below Fort Peck
13 Dam; and

14 (d) the mainstem of the Missouri River above Fort Peck
15 Reservoir.

16 Diversions authorized by subparagraphs (a) and (c)
17 shall comply with paragraph 1 of section J of this Article.

18 Diversions authorized by subparagraph (b) shall comply with
19 paragraph 4 of section K of this Article. Diversions
20 authorized by subparagraph (d) shall comply with paragraph 3
21 of section J of this Article.

22 J. Notice of and Conditions upon Diversions and Uses
23 of the Tribal Water Right.

24 1. The Tribes shall give the State not less than 180
25 days advance written notice of any proposed diversion or use

1 of the Tribal Water Right authorized by subparagraphs 2(a)
 2 and 2(c) and subparagraphs 3(a) and 3(c) of section I of
 3 this Article and shall, in the case of any transfer of the
 4 Tribal Water Right, except agreements on the tributaries
 5 pursuant to paragraph 4 of section K of this Article, offer
 6 the State an opportunity to participate as provided in
 7 paragraph 2 of section K of this Article. Such notice shall
 8 include sufficient documentation to demonstrate that:

9 (a) the proposed use of water complies with section D
 10 of this Article;

11 (b) for diversions outside the Reservation, the
 12 proposed means of diversion and the construction and
 13 operation of the diversion works are adequate;

14 (c) the proposed use and diversion will not adversely
 15 affect, except with the consent of the owner of such right,
 16 any of the following rights to the use of water existing at
 17 that time:

18 (i) any water right arising under the laws of the
 19 United States;

20 (ii) any appropriative right to the use of water
 21 established pursuant to the laws of the State that has not
 22 been abandoned, but excluding any reservation of water made
 23 pursuant to the laws of the State which has not been put to
 24 actual beneficial use by the date notice is given;

25 (d) the proposed use does not cause any unreasonable

1 significant adverse environmental impact; and

2 (e) proposed diversions in excess of 4,000 acre-feet
 3 per year and 5.5 cubic feet per second of water will not:

4 (i) substantially impair the quality of water for
 5 existing uses in the source of water from which the
 6 diversion is made;

7 (ii) be made where low quality water which can
 8 economically be used is legally and physically available to
 9 the Tribes for the proposed use;

10 (iii) create or substantially contribute to saline
 11 seep; or

12 (iv) substantially injure fish or wildlife populations
 13 in the source of water from which the diversion is made.

14 The requirements of subparagraph (c) of this paragraph
 15 may be satisfied by a showing that the owner of such right
 16 has consented to the adverse effect. Subparagraph (c) shall
 17 not be construed to alter or avoid in any way the
 18 consequences resulting from such consent under state law.

19 2. A proposed diversion or use of the Tribal Water
 20 Right outside the Reservation authorized by subparagraphs
 21 2(a) and 2(c) and subparagraphs 3(a) and 3(c) of section I
 22 of this Article may be challenged only:

23 (a) within 30 days after the expiration of the notice
 24 period provided in paragraph 1 of this section;

25 (b) in a court of competent jurisdiction; and

1 (c) by the State or by a person whose rights are
2 adversely affected by the proposed diversion or use.

3 In any such case, the Tribes shall have the burden of
4 going forward and the burden of proving by a preponderance
5 of the evidence that they have satisfied the requirements of
6 paragraph 1 of this section.

7 3. Diversions of water in the exercise of the Tribal
8 Water Right outside the Reservation from the mainstem of the
9 Missouri River above Fort Peck Reservoir, as authorized in
10 subparagraph 3(d) of section I of this Article, may be made
11 so long as the Tribes or any user of the Tribal Water Right:

12 (a) comply with all the laws of the State in effect at
13 the time the diversion is proposed, including but not
14 limited to state water use statutes;

15 (b) give not less than 180 days advance written notice
16 of any proposed diversion in the manner required in
17 paragraph 5 of this section:

18 (i) if the diversion is to be made from a reservoir,
19 to the operator of the reservoir; or

20 (ii) if the diversion is not to be made from a
21 reservoir, to the operator of the first dam, upstream and
22 downstream, if any, from the point of diversion;

23 (c) obtain approval of the diversion from the State
24 legislature.

25 4. For purposes of demonstrating compliance with

1 subparagraph 1(c) and subparagraph 3(a) of this section and
2 paragraph 6 of Section K of this Article, the portion of the
3 Tribal Water Right to be diverted will be deemed an
4 appropriative right which has:

5 (a) been acquired on May 1, 1888;

6 (b) a point of diversion and use where the water is
7 actually being diverted and used or, if not actually being
8 diverted, where the water would first flow on or adjacent to
9 the Reservation;

10 (c) the existing use or, if not actually in use, an
11 irrigation use provided, however, that the use can be
12 transferred to a purpose other than irrigation without
13 restriction as to period of use so long as the requirements
14 of Section F of this Article are observed;

15 (d) the actual consumptive use or, if not actually in
16 use or if being used for irrigation purposes, a consumptive
17 use of 1.8 acre-feet per acre per year; and

18 (e) not been abandoned or forfeited.

19 5. Any notice of a diversion required by paragraph 3
20 of this section and any report of a diversion required by
21 paragraph 2 of section F of this Article shall specify:

22 (a) the person authorized to make the diversion;

23 (b) the amount of water proposed or authorized to be
24 diverted annually;

25 (c) the amount proposed or authorized for annual

1 consumptive use;

2 (d) the point of diversion;

3 (e) the period of use;

4 (f) the place of use; and

5 (g) the purposes for which the water may be used.

6 K. Transfers of the Tribal Water Right.

7 1. As an incident to and in the exercise of the Tribal

8 Water Right, the Tribes may transfer within or outside the

9 Reservation, as authorized by federal law and this Compact,

10 the right to use water but may not permanently alienate such

11 right or any part thereof. Any such transfer of water by the

12 Tribes shall be subject to all provisions of this Compact.

13 2. Prior to making any transfer which authorizes use

14 of water outside the Reservation to be diverted from the

15 mainstem of the Missouri River, including Fort Peck

16 Reservoir, the Tribes shall give not less than 180 days

17 advance written notice to the State of the proposed terms

18 and conditions of the transfer, and shall offer the State

19 the opportunity to participate in the transfer as a

20 substantially equal partner with the Tribes, assuming

21 obligations and receiving benefits of the transfer under

22 terms and conditions agreed to by the Parties. If the State

23 does not accept the opportunity within the 180-day notice

24 period, or if the State unreasonably delays the institutio

25 or completion of approval processes required by state law or

1 unreasonably delays resolution of any litigation arising

2 from its decision to accept the opportunity, the Tribes may

3 proceed with the proposed transfer without State

4 participation, provided that the proposed transfer shall be

5 subject to all other provisions of this Compact. If the

6 State does not accept the opportunity, or if State

7 participation in the joint transfer is not approved, the

8 State shall not later pursue the opportunity, except in

9 accordance with all the terms of this Compact, including

10 paragraph 3 of this section.

11 3. Prior to making any transfer allowing use or

12 diversion of water from Fort Peck Reservoir or from the

13 mainstem of the Missouri River below Fort Peck Dam, the

14 State shall give not less than 180 days advance written

15 notice to the Tribes of the proposed terms and conditions of

16 the transfer and shall offer the Tribes the same opportunity

17 to participate in the transfer as a substantially equal

18 partner with the State, assuming obligations and receiving

19 benefits of the transfer on terms and conditions agreed to

20 by the Parties. If the Tribes do not accept the opportunity

21 within the 180 day notice period, the State may proceed with

22 the proposed transfer without the Tribes' participation, and

23 the Tribes shall not later pursue the opportunity except in

24 accordance with all the terms of this Compact, including

25 paragraph 2 of this section.

1 4. If otherwise authorized by federal law, the Tribes
 2 may enter into an agreement with any person who is
 3 exercising or proposing to exercise a right under the laws
 4 of the State to use surface water outside the Reservation on
 5 any tributary of the Missouri River that flows through or
 6 adjacent to the Reservation, except the mainstem of the Milk
 7 River, which agreement allows such person's diversion and
 8 use and protects it from any other exercise of the Tribal
 9 Water Right provided, however, that:

10 (a) before use of such water, the person shall have
 11 complied with all applicable state laws concerning the
 12 acquisition of a water right;

13 (b) subsequent to acquisition of the state water
 14 right, regulation of its use shall be subject to state law;

15 (c) the amount of water subject to the agreement shall
 16 be considered a consumptive use of the Tribal Water Right;

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

19 5. The Tribes may transfer annually only the following
 20 amounts of water for consumptive use outside the
 21 Reservation:

22 (a) 50,000 acre-feet;

23 (b) plus 35 percent of any amount over 200,000
 24 acre-feet but less than 300,000 acre-feet authorized by
 25 state law to be transferred annually by the State from

1 waters within the State;

2 (c) plus 50 percent of any amount over 300,000
 3 acre-feet authorized by state law to be transferred annually
 4 by the State from waters within the State.

5 Transfers of the Tribal Water Right shall not be
 6 considered as part of any amounts authorized by state law to
 7 be transferred annually by the State.

8 6. In no event shall the Tribes be authorized to
 9 transfer less than 50,000 acre-feet of water per year
 10 outside the Reservation. The limits established in paragraph
 11 5 of this section shall apply so long as the State is
 12 authorized to transfer annually at least 50,000 acre-feet of
 13 water pursuant to state law. If statutory authorization for
 14 the State to transfer water is not enacted, is repealed, or
 15 is held invalid, or if the amount of water authorized by
 16 state law to be transferred by the State is less than 50,000
 17 acre-feet per year, then for any period in which the
 18 authorization or the limitation is not in force the Tribes
 19 may transfer water in accordance with all terms and
 20 conditions of this Compact other than paragraph 5 of this
 21 section. However, such transfers will be subject to any
 22 volume limitations provided by federal law or, in the
 23 absence of any federal volume limitations, the Tribes may
 24 transfer water in accordance with all terms and conditions
 25 in this Compact other than paragraph 5 of this section and

1 with any volume limitations imposed by state law which would
 2 apply to a holder of a right to the use of water established
 3 pursuant to state law. For the purposes of complying with
 4 volume limitations imposed by state law, the Tribal Water
 5 Right will be deemed to have the characteristics set forth
 6 in paragraph 4 of section J of this Article.

7 7. Unless authorized by federal law, the State shall
 8 not in any manner whatsoever tax any proceeds received by
 9 the Tribes as consideration for any transfer of the Tribal
 10 Water Right.

11 L. Instream Flows.

12 1. At any time within five years after the effective
 13 date of this Compact, the Tribes may establish a schedule of
 14 instream flows to maintain any fish or wildlife resource in
 15 those portions of streams, excluding the mainstem of the
 16 Milk River, which are tributaries of the Missouri River that
 17 flow through or adjacent to the Reservation. These instream
 18 flows shall be a part of the Tribal Water Right with a
 19 priority date of May 1, 1888. Water remaining in a stream to
 20 maintain instream flows pursuant to such a schedule shall be
 21 counted by the Tribes as a consumptive use of surface water.

22 2. Instream flows may be established by the Tribes
 23 only in accordance with this section. The Tribes may change
 24 the use of water for maintenance of instream flows to
 25 another purpose only with the consent of the State.

1 M. No Other Diversion or Use of the Tribal Water
 2 Right. No other diversion or use of the Tribal Water Right
 3 shall be made other than those authorized or recognized by
 4 this Article.

5 ARTICLE IV

6 PROTECTION OF USES UNDER STATE LAW

7 A. Uses Protected.

8 1. The following existing AND PROPOSED uses of water
 9 by Indians within the Reservation are protected and shall
 10 not be subordinated to any other uses by subsequent
 11 provisions of this Article:

12 (a) a maximum of 113 acres of irrigated land within
 13 the Wolf Creek watershed;

14 (b) a maximum of 11 acres of irrigated land within the
 15 Poplar River watershed; and

16 (c) a maximum of 523 acres of irrigated land within
 17 the Big Muddy Creek watershed; AND

18 (D) A MAXIMUM OF 300 ACRES OF LAND IRRIGATED WITH
 19 GROUND WATER NEAR THE CONFLUENCE OF PORCUPINE CREEK AND THE
 20 MILK RIVER.

21 2. Uses of water by Indians within the Reservation for
 22 stockwatering purposes not in excess of 20 acre-feet per
 23 year for each impoundment and for all domestic uses are
 24 protected and shall not be subordinated to any other uses by
 25 subsequent provisions of this Article.

1 3. With the exception of the uses protected in
2 paragraphs 1 and 2 of this section, diversion and use of
3 water in the exercise of the Tribal Water Right except from
4 the mainstem of the Missouri River, including water
5 allocated to instream flow purposes, shall be subordinate to
6 the following uses of water in the Porcupine Creek, Poplar
7 River, Big Muddy Creek, Little Porcupine Creek, Wolf Creek,
8 Tule Creek, and Chelsea Creek watersheds, including all
9 tributary streams within those watersheds, and all
10 underlying ground water whether or not hydrologically
11 connected with the surface water:

12 (a) the beneficial uses of water with a priority date
13 of December 31, 1984 or earlier established under the laws
14 of the State and identified in Appendix A to this Compact;

15 (b) such rights of the United States Fish and Wildlife
16 Service to the waters of Big Muddy Creek for the Medicine
17 Lake National Wildlife Refuge as may be finally determined
18 by the state water court;

19 (c) beneficial uses of water for domestic purposes;

20 (d) beneficial uses of water for stock watering
21 purposes in existence prior to December 31, 1984, and
22 beneficial uses of water for stock watering subsequent to
23 that date not in excess of 20 acre-feet per year for each
24 impoundment.

25 4. Except as to the rights protected in paragraph 3 of

1 this section, the Tribal Water Right shall be prior to all
2 rights to the use of surface and ground water established
3 under the laws of the State with a priority date later than
4 May 1, 1888.

5 B. Changes of Protected Uses.

6 1. The rights to the use of water protected by
7 paragraph 3 of section A of this Article may be changed in
8 accordance with state law as to point of diversion, period
9 of use, place of use, purpose of use, or ownership of the
10 right provided that:

11 (a) the proposed change will not adversely affect any
12 use of the Tribal Water Right existing at the time of the
13 proposed change;

14 (b) the amount of surface water flowing onto the
15 Reservation within the Poplar River, the Big Muddy Creek, or
16 the Porcupine Creek watersheds, will not be changed; and

17 (c) the source of the water will not be changed from
18 surface to ground water, or from ground to surface water, or
19 from one watershed to another.

20 2. Upon receiving an application for a proposed change
21 authorized by paragraph 1 of this section, the State shall
22 give the Tribes such advance written notice as is required
23 by state law.

24 3. If an irrigation use is changed in any manner, or
25 if a reservoir is constructed or operated which results in

1 the consumptive use of water by evaporation, the following
2 limitations apply:

3 (a) no more than 1.8 acre-feet of consumptive use per
4 year may be authorized for each acre of land retired from
5 full service irrigation; and

6 (b) no more than 0.48 acre-feet of consumptive use per
7 year may be authorized for each acre of land retired from
8 partial service irrigation;

9 (c) evaporation from any reservoir shall be charged as
10 a consumptive use in accordance with definition 4 in Article
11 II.

12 4. If an irrigation use is changed to an industrial
13 use, all diversions and return flows shall be measured by a
14 device acceptable to and subject to periodic inspection and
15 testing by the State and the Tribes at the expense of the
16 owner. The owner shall also have the quality of the return
17 flows sampled and tested by a laboratory acceptable to the
18 State and the Tribes as often as reasonably required by the
19 State and the Tribes and at the expense of the owner.

20 ARTICLE V

21 ADMINISTRATION OF WATER RIGHTS

22 A. United States Administration. All rights to the
23 use of water received from the Fort Peck Irrigation Project
24 shall be administered by the United States, and the United
25 States has the final and exclusive jurisdiction to resolve

1 all disputes concerning uses of water received from the Fort
2 Peck Irrigation Project subject to any judicial review
3 provided by applicable law.

4 B. Tribal Administration.

5 1. The Tribal Water Right shall be administered by the
6 Tribes, and the Tribes have the final and exclusive
7 jurisdiction to resolve all disputes between users of the
8 Tribal Water Right, except for disputes concerning uses of
9 water received from the Fort Peck Irrigation Project and
10 disputes involving users of the Tribal Water Right pursuant
11 to agreements authorized in Article III, section K,
12 paragraph 4.

13 2. Administration and enforcement of the Tribal Water
14 Right shall be pursuant to a water code, which shall be
15 adopted by the Tribes and submitted for approval to the
16 Secretary of the Interior within one year after ratification
17 of this Compact by the Parties. Such code shall take effect
18 18 months after ratification of this Compact unless sooner
19 disapproved by the Secretary of the Interior. Pending the
20 adoption and approval of the tribal water code,
21 administration and enforcement of the Tribal Water Right
22 shall be by the Secretary of the Interior as trustee for the
23 Tribes. The Tribes shall not administer the Tribal Water
24 Right in a manner which denies any person a water right
25 owned by that person which arises under the laws of the

1 United States.

2 3. Within six months after adoption--of the tribal
3 water code TAKES EFFECT OR WITHIN SIX MONTHS AFTER
4 DISAPPROVAL BY THE SECRETARY, the Tribes OR THE SECRETARY OF
5 THE INTERIOR shall provide the State with notice of each
6 existing use of the Tribal Water Right which shall show:

7 (a) the person authorized to make the diversion;

8 (b) the amount of water authorized to be diverted
9 annually;

10 (c) the amount of water authorized for annual
11 consumptive use;

12 (d) the point of diversion;

13 (e) the period of use;

14 (f) the place of use;

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

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

18 4. The Tribes shall thereafter notify the State within
19 sixty days after the end of each quarter year of all new
20 uses of surface and ground water authorized by the Tribes
21 during the preceding quarter year and of all new uses of the
22 Tribal Water Right actually commenced during that quarter
23 year.

24 C. State Administration.

25 1. The State shall administer all rights to the use of

1 surface water and ground water within or outside the
2 Reservation which are not a part of the Tribal Water Right
3 to the fullest extent allowed by law. The State shall have
4 the final and exclusive jurisdiction to resolve all disputes
5 between users of rights established under state law.

6 2. Within two years after ratification of this
7 Compact, the State shall notify the Tribes of all existing
8 uses authorized by the State on the mainstem of the Missouri
9 River below Fort Peck Dam and on all tributaries of the
10 Missouri River that flow through or adjacent to the
11 Reservation, except the mainstem of the Milk River. The
12 State shall notify the Tribes within sixty days after the
13 end of each quarter year of all new uses of surface and
14 ground water permitted by the State on each of these sources
15 during the preceding quarter year and of all new uses of
16 water actually commenced pursuant to the laws of the State
17 during that quarter year on each of these sources. Notices
18 required by this paragraph shall include the information
19 required by paragraph 3 of section B of this Article.

20 3. No agency of the State shall administer any part of
21 the Tribal Water Right. From and after the effective date of
22 this Compact, unless the Tribal Water Right confirmed in
23 Article III is fully utilized at the time application is
24 made for a permit or other authorization, the State shall
25 issue no permit or other authorization to divert or use

1 water within the Reservation to the following persons:
 2 (a) the Tribes;
 3 (b) any Indian;
 4 (c) any non-Indian successor-in-interest to any
 5 allottee on the Reservation by virtue of that person's
 6 assertion of a right arising under the laws of the United
 7 States; or
 8 (d) the United States for the benefit of the Tribes or
 9 any Indian or any non-Indian successor-in-interest to any
 10 allottee.

11 D. Regulation of Ground Water.

12 1. With the exception of uses protected in Article IV,
 13 neither the State nor the Tribes shall authorize or continue
 14 the use of ground water without the consent of the other if
 15 such use will:

16 (a) result in degradation of instream flows
 17 established pursuant to section L of Article III; or

18 (b) contribute to the permanent depletion or the
 19 significant degradation of the quality of a ground water
 20 source which in whole or in part underlies the Reservation.

21 2. With the exception of uses protected in Article IV,
 22 the State shall not, without the Tribes' consent, authorize
 23 or continue the use of ground water that unreasonably
 24 interferes with a use of ground water authorized by the
 25 Tribes. The Tribes shall not, without the consent of the

1 State, authorize or continue the use of ground water that
 2 unreasonably interferes with a use of ground water
 3 authorized by the State and protected by Article IV of this
 4 Compact.

5 ARTICLE VI

6 FORT PECK-MONTANA COMPACT BOARD

7 A. Board established. There is hereby established the
 8 Fort Peck-Montana Compact Board, which shall exercise powers
 9 and responsibilities as set forth in this Article.

10 B. Membership.

11 1. The Board shall consist of three members. One
 12 member shall be appointed by the Governor of the State of
 13 Montana or, in lieu of such appointment, shall be the
 14 Governor. The salary and expenses of that member shall be
 15 paid by the State. One member shall be appointed by the
 16 Chairman of the Tribes, or in lieu of such appointment,
 17 shall be the Tribal Chairman. The salary and expenses of
 18 that member shall be paid by the Tribes. The third member
 19 shall be selected by agreement of the other two members. The
 20 salary and expenses of that member and all other expenses of
 21 the Board shall be shared equally by the State and the
 22 Tribes subject to the availability of funds. Each member
 23 duly appointed or selected shall hold office for a term of
 24 six years, and for so long thereafter until a successor
 25 shall be appointed or selected. The initial term of each

1 member shall be staggered, with one member serving a
 2 six-year term, one a four-year term, and one a two-year
 3 term. The initial term of each member shall be chosen by
 4 lot, or by any other procedure and agreed upon in writing by
 5 the first three members of the Board. If the Governor or the
 6 Tribal Chairman serves on the Board, such person shall not
 7 serve on the Board beyond his or her term as Governor or
 8 Tribal Chairman.

9 2. Should the two appointed members fail to agree
 10 within sixty days of the effective date of this Compact or
 11 within thirty days after any vacancy occurs, on the
 12 selection of the third member, the following procedure shall
 13 be utilized:

14 (a) within five days each member shall nominate no
 15 more than five and no less than three persons to serve as a
 16 member of the Board;

17 (b) within fifteen days thereafter each member shall
 18 reject all but one of the persons nominated by the other
 19 member;

20 (c) the chief judge of the United States District
 21 Court for the District of Montana shall select the third
 22 member of the Board from the remaining two nominees. If the
 23 chief judge declines for any reason to select the third
 24 member, the chief justice of the Montana Supreme Court shall
 25 make the selection from the remaining two nominees.

1 3. Vacancies on the board shall be filled by
 2 appointment of a person to serve the unexpired term of the
 3 member whose seat has become vacant. If the member appointed
 4 by the Governor becomes unable or unwilling to serve on the
 5 Board, the Governor shall make the appointment within
 6 fifteen days. If the member appointed by the Tribal Chairman
 7 becomes unable or unwilling to serve, the Tribal Chairman
 8 shall make the appointment within fifteen days. If the
 9 third member of the Board becomes unable or unwilling to
 10 serve on the Board, the remaining members shall fill the
 11 vacancy under the procedure set forth in paragraphs 1 and 2
 12 of this section.

13 C. Quorum and Vote Required. Two members of the Board
 14 shall constitute a quorum if reasonable notice has been
 15 provided in advance to the absent member. Meetings may be in
 16 person or, in appropriate circumstances, by telephone. All
 17 Board decisions shall be by a majority of the Board, shall
 18 be in writing and, together with any dissenting opinions,
 19 shall be delivered to all parties in the proceeding before
 20 the Board, and to both Parties to this Compact.

21 D. Jurisdiction of the Board. The Board shall have
 22 exclusive jurisdiction, only as provided in this Compact, to
 23 resolve any controversy over the use of ground water to
 24 which this Compact pertains, any controversy over the use of
 25 surface water within the Reservation or from any tributary

1 of the Missouri River that flows through or adjacent to the
 2 Reservation, except the mainstem of the Milk River, and any
 3 controversy as to the meaning of this Compact between: (i)
 4 on the one hand, the Tribes or any person or persons
 5 claiming a right to use the Tribal Water Right; and (ii) on
 6 the other hand, the State or any person or persons claiming
 7 a right to use water under the laws of the State.

8 E. Powers and Duties of the Board.

9 1. The Board shall have power to administer oaths to
 10 witnesses, to take evidence under oath, and to issue
 11 subpoenas to compel the attendance of witnesses or for the
 12 production of books, records, documents and other evidence.
 13 The courts of the Tribes and the State shall enforce any
 14 subpoena issued by the Board in the same manner as
 15 prescribed by the laws of the Tribes and the State for
 16 enforcing a subpoena issued in a civil action by courts of
 17 the Tribes and the State.

18 2. The Board shall hold hearings in proceedings before
 19 it and shall give advance notice to the Tribes, the State
 20 and all parties to any proceeding personally or by
 21 registered mail not less than five days before any hearing.
 22 Appearance at a hearing waives such notice. The Board may
 23 hear and determine the controversy upon the evidence
 24 produced notwithstanding the failure of a party duly
 25 notified to appear. The Tribes, the State and all parties to

1 the proceeding are entitled to be heard, to present evidence
 2 material to the controversy, to cross-examine witnesses
 3 appearing at the hearing, and to be represented by counsel
 4 at their own expense.

5 3. The Board may enter an order after hearing granting
 6 any party to the dispute before it temporary or preliminary
 7 injunctive relief, or any other relief which the Board deems
 8 appropriate except money damages. The Board or any party to
 9 a proceeding before the Board may invoke the jurisdiction of
 10 a court of competent jurisdiction to enforce any temporary
 11 or preliminary injunction so issued by the Board by filing a
 12 petition for enforcement naming the enjoined person as
 13 respondent. Upon filing the petition, the court shall enter
 14 any order it deems appropriate for enforcement of the
 15 injunction ordered by the Board, including but not limited
 16 to injunctive relief on such terms as to bond or otherwise
 17 as it deems proper for the security of the rights of the
 18 enjoined party. The United States, the State, and the Tribes
 19 shall not be required to post any bond. The court may
 20 appoint a water commissioner or master to monitor compliance
 21 with such relief.

22 4. The Board shall adopt rules and regulations to
 23 govern its procedures and to carry out its responsibilities
 24 under this Compact. Such rules and regulations must be
 25 consistent with all provisions of this Compact. All records

1 of the Board shall be open to public inspection except for
2 privileged information.

3 5. The Board may employ or seek assistance of such
4 clerical or other personnel and may establish such offices
5 as it deems necessary for the performance of its functions
6 according to this Compact. Pending the establishment of a
7 principal office, the Board's office shall be located at
8 Fort Peck Agency of the Bureau of Indian Affairs.

9 6. The annual budget of the Board shall be subject to
10 approval of the Parties to this Compact and to the
11 availability of funds appropriated by the Parties.

12 F. Review and Enforcement of Board Decisions.

13 1. Decisions by the Board shall be effective
14 immediately, unless stayed for a period of time prescribed
15 by the Board. On application of a party within a reasonable
16 time, but in any event no more than ninety days after a
17 decision is rendered, the Board may modify or correct any
18 decision:

19 (a) where there was an evident material miscalculation
20 of figures or an evident material mistake in the description
21 of any person, thing or property referred to in the
22 decision;

23 (b) where the decision is imperfect in a matter of
24 form not affecting the merits of the controversy; or

25 (c) where the decision requires clarification.

1 2. Any party before the Board may, within ten days of
2 any final decision, apply to the Board to modify or set
3 aside any aspect of the decision. Notice of such application
4 shall be served personally or by registered mail upon all
5 parties to the proceeding. Any other party shall have ten
6 days within which to respond to the application. The Board
7 shall act on such application within ten days after a
8 response is filed or, if no response is filed, within
9 fifteen days after the application is filed. If the Board
10 fails to act within the time limitations set forth in this
11 paragraph, the application shall be deemed denied. The time
12 for appeal provided in paragraph 3 of this section shall not
13 begin to run until the application is determined as provided
14 in this paragraph.

15 3. Any party before the Board may appeal any final
16 decision by the Board to a court of competent jurisdiction
17 within thirty days of such decision. The notice of appeal
18 shall be filed with the Board and served personally or by
19 registered mail upon the Tribes, the State and all parties
20 to the proceeding before the Board, and all such persons
21 shall thereafter have the right to participate in the
22 appeal.

23 4. In any appeal, the Board's decision shall be
24 presumed to be valid, and may be vacated by the court only
25 on one of the following grounds:

1 (a) the decision is not supported by substantial
2 evidence;

3 (b) the decision was procured by corruption, fraud or
4 undue means;

5 (c) there was evident partiality or corruption by the
6 Board or by any member;

7 (d) the Board was guilty of misconduct in refusing to
8 hear the dispute, or in refusing to hear evidence pertinent
9 and material to the controversy, or any other clear
10 misbehavior by which the rights of any party have been
11 substantially prejudiced;

12 (e) the Board exceeded its authority under the terms
13 of this Compact; or

14 (f) the decision is contrary to law.

15 5. Unless an appeal is timely filed as provided in
16 paragraph 3 of this section, any decision of the Board shall
17 be confirmed or enforced by any court of competent
18 jurisdiction on petition of the Board, the Tribes, the State
19 or any party before the Board in the proceeding in which the
20 decision was made.

21 6. A court of competent jurisdiction in which a timely
22 appeal is filed pursuant to paragraph 3 of this section, or
23 in which a petition to confirm or enforce is filed pursuant
24 to paragraph 5 of this section, may order such temporary or
25 permanent relief as it considers just and proper.

1 7. An appeal may be taken from any decision of the
2 court in which a timely appeal is filed pursuant to
3 paragraph 3 of this section, or in which a petition to
4 confirm or enforce is filed pursuant to paragraph 5 of this
5 section, in the manner and to the same extent as from orders
6 or judgments of the court in a civil action.

7 8. In any appeal or petition to confirm or enforce the
8 Board's decision, the Board shall file with the court the
9 record of the proceedings before the Board.

10 G. Waiver of Immunity. The Tribes and the State
11 hereby waive their respective immunities from suit,
12 including any defense the State shall have under the
13 Eleventh Amendment of the Constitution of the United States,
14 to permit the appeal or judicial enforcement of Board
15 decisions as provided in this Compact, except that such
16 waivers shall not extend to any action for money damages
17 including costs and attorneys' fees as a result of such
18 judicial action.

19 ARTICLE VII

20 FINALITY AND EFFECTIVENESS OF COMPACT

21 A. Ratification. This Compact shall become effective
22 as to both parties when ratified by the Legislature of the
23 State of Montana and by the Fort Peck Tribal Executive Board
24 AND APPROVED BY THE UNITED STATES DEPARTMENTS OF JUSTICE AND
25 THE INTERIOR. Ratification by the State and by the Tribes is

1 irrevocable, and this Compact may not be modified in any
2 manner whatsoever except with the joint consent of the
3 legislative body of both Parties.

4 B. Incorporation into Decrees and Disposition of
5 Federal Suits.

6 1. The Parties and the United States shall petition
7 for incorporation of this Compact into the preliminary
8 decrees and final decrees in any state water court
9 proceedings to adjudicate any right to the use of water to
10 which this Compact pertains, and this Compact may not be
11 modified in any manner whatsoever without the consent of
12 both Parties as provided in section A of this Article. The
13 United States shall not be bound by provisions of this
14 Compact until it is incorporated into the final decree, as
15 provided in this paragraph SECTION.

16 2. This Compact shall only be filed AS A PROPOSED
17 CONSENT DECREE in United States v. Aageson, Civ. No.
18 79-21-GF (D. Mont.), or United States v. Aasheim, Civ. No.
19 79-40-BLG (D. Mont.) if there is a final determination by
20 the state courts that they lack jurisdiction over, or that
21 the state proceedings are inadequate to adjudicate, some or
22 all of the water rights asserted in either of the above
23 cases. Upon a final determination that the state courts have
24 jurisdiction over, and that the state proceedings are
25 adequate to adjudicate all of the water rights in the above

1 cases, the United States and the Parties will immediately
2 execute a joint motion pursuant to Rule 41(a) of the Federal
3 Rules of Civil Procedure to dismiss with prejudice and on
4 their merits all claims by the Tribes and the United States
5 on behalf of the Tribes in the pending cases.

6 ARTICLE VIII

7 DISCLAIMERS AND RESERVATION OF RIGHTS

8 A. Disclaimers. Nothing in this Compact shall be so
9 construed or interpreted:

10 1. to establish the nature, extent, transferability,
11 or manner of enforcement of water rights of any Indian
12 reservation other than the Fort Peck Indian Reservation;

13 2. to preclude the acquisition or exercise of an
14 appropriative right to the use of water under state law by
15 the Tribes or any individual Indian outside the Reservation
16 by purchase of such right or by purchase of land, or by
17 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 by
20 the Tribes or any individual Indian within the Reservation:

21 (a) by purchase of such right or by purchase of land,
22 provided that water rights acquired by such purchase after
23 ratification of this Compact shall be deemed to be an
24 exercise of the Tribal Water Right; or

25 (b) by application to the State, provided that the

1 Tribal Water Right confirmed in Article III has been fully
2 utilized at the time an application is made;

3 4. to determine the relative rights inter sese of
4 persons using water under the authority of the State or the
5 Tribes;

6 5. to limit in any way the rights of the Parties or
7 any other person to litigate any issues or questions not
8 resolved by this Compact;

9 6. to authorize the taking of a water right which is
10 vested under state or federal law;

11 7. to create or deny substantive rights through
12 headings or captions used in this Compact; or

13 8. to address or prejudge whether, in any interstate
14 apportionment of the waters of the Missouri River Basin, the
15 Tribal Water Right shall be counted as a part of the waters
16 apportioned to the state STATE.

17 B. Reservation of Rights. The Parties expressly
18 reserve all rights not granted, recognized or relinquished
19 in this Compact.

20 ARTICLE IX

21 TRIBAL RELINQUISHMENT OF OTHER WATER CLAIMS

22 The Tribal Water Right confirmed in Article III shall
23 be final and conclusive. With the exception of the Tribal
24 Water Right recognized herein and rights established under
25 state law as authorized by this Compact, the Tribes and the

1 United States as trustee for the Tribes hereby relinquish
2 forever any and all existing and future claims to water from
3 any source and for any purpose. This relinquishment
4 includes, but is not limited to, any claim for water derived
5 from: aboriginal use of land or water; any Indian treaties;
6 any act of Congress; and any executive act of the United
7 States.

8 ARTICLE X

9 BINDING EFFECT

10 A. Persons Bound. Upon the effectiveness of this
11 Compact, its terms will be binding:

12 1. upon the State and any person or entity of any
13 nature whatsoever using, claiming or in any manner asserting
14 any right under the authority of the State to the use of
15 water in the State of Montana, provided that for purposes of
16 consent, ratification, or authorization the validity of
17 consent, ratification, or authorization is to be determined
18 by Montana law; and

19 2. upon the Tribes and any person or entity of any
20 nature whatsoever using, claiming or in any manner asserting
21 any right to the use of the Tribal Water Right, or any right
22 arising under any doctrine of reserved or aboriginal water
23 rights for the Tribes, or any right arising under tribal
24 law, provided that for purposes of consent, ratification, or
25 authorization the validity of consent, ratification or

1 authorization is to be determined by Tribal law.
 2 Notwithstanding any other provision of law, the Tribal Water
 3 Right confirmed in Article III of the Fort Peck-Montana
 4 Compact includes conclusively and forever the water rights
 5 arising under the laws of the United States of all persons
 6 on the Fort Peck Reservation by virtue of the ownership or
 7 purchase of any Indian allotment, and the courts of the
 8 State shall not have jurisdiction to adjudicate or decree
 9 any such right claimed by any such person.

10 B. Effect on Other Laws. The provisions of the Fort
 11 Peck-Montana Compact shall supersede any present or future
 12 enactment or common law rule inconsistent with such Compact
 13 including but not limited to Montana Code Annotated
 14 28-2-708.

15 ARTICLE XI

16 SEVERABILITY

17 Should any part of this Compact other than Articles
 18 III, IV, VII, or IX be held to be invalid, all other parts
 19 thereof shall continue to be in full force and effect.
 20 Should any part of Articles III, IV, VII, or IX be held
 21 invalid, either party may withdraw from the remaining
 22 provisions of this Compact by action of its legislative body
 23 taken within one year from the determination of such
 24 invalidity.

25 ARTICLE XII

1 LEGISLATION

2 A. Future legislation. The parties agree to seek
 3 enactment of further legislation if it becomes necessary to
 4 effectuate the provisions and purposes of this Compact, and
 5 to protect such provisions and purposes from challenge and
 6 attack, provided that no provisions of the Compact shall be
 7 modified as to substance except as provided in Article VII.

8 B. Petition to Congress.

9 1. The Parties hereby request the Montana legislature
 10 to petition Congress to enact the following legislation in
 11 substantially the following form:

12 "Sec. 2. For purposes of this Act, the term:

13 (a) "Fort Peck-Montana Compact" means that Compact
 14 pertaining to the reserved water rights of the Assiniboine
 15 and Sioux Tribes of the Fort Peck Reservation ratified by
 16 the legislature of the State of Montana on ____, 1985 and by
 17 the Tribes on ____, 1985.

18 (b) "Reservation" means the Fort Peck Indian
 19 Reservation as defined in the agreement of December 28 and
 20 December 31, 1886, and confirmed by the Act of May 1, 1888,
 21 25 Stat. 113.

22 (c) "Secretary" means the Secretary of the Interior.

23 (d) "Tribes" means the Assiniboine and Sioux Tribes of
 24 the Fort Peck Indian Reservation.

25 "Sec. 3.

1 "(a) The Tribes, subject to the approval of the
 2 Secretary, may enter into any joint venture, service
 3 contract, lease, exchange or other agreement, or any
 4 amendment, supplement or other modification of such
 5 agreement (hereinafter referred to as a "Water Agreement")
 6 authorizing the delivery, use or transfer of any part of the
 7 water right confirmed in the Tribes by the Fort Peck-Montana
 8 Compact for a specified term, not to exceed fifty years,
 9 inclusive of all renewal periods. A Water Agreement may
 10 authorize the diversion or use of water within or outside
 11 the Reservation subject to all terms of the Fort
 12 Peck-Montana Compact.

13 "(b) The Secretary shall approve or disapprove any
 14 Water Agreement within (1) one hundred and eighty days after
 15 submission or (2) sixty days after compliance, if required,
 16 with section 102(2)(C) of the National Environmental Policy
 17 Act of 1969 (42 U.S.C. 4332(2)(C) and any other requirement
 18 of federal law, whichever is later. Any party to such an
 19 agreement may enforce the provisions of this subsection
 20 pursuant to 28 U.S.C. 1361. Notwithstanding any other law,
 21 all projections, studies, data or other information
 22 possessed by the Department of the Interior regarding the
 23 terms and conditions of the Water Agreement or the financial
 24 return to the Tribes, shall be held by the Department of the
 25 Interior as privileged proprietary information of the

1 Tribes."

2 2. The provisions of this Compact shall have no force
 3 and effect until the resolution set forth in paragraph 1 of
 4 this section is approved by the Montana Legislature and
 5 submitted to Congress.

6 IN WITNESS WHEREOF the representatives of the State of
 7 Montana and the Assiniboine and Sioux Tribes of the Fort
 8 Peck Indian Reservation have signed this Compact in five
 9 original counterparts on the ___ day of _____, 1985.

10 For the Assiniboine and Sioux
 11 Tribes of the Fort Peck Indian Reservation

12 -----
 13 Walter Clark

14 -----
 15 Norman Hollow

16 -----
 17 Caleb Shields

18 For the State of Montana
 19 Montana Reserved Water Rights Compact Commission

20 -----
 21 W. Gordon McOmber, Chairman Daniel O. Kemmis

22 -----
 23 Jack E. Galt, Vice Chairman A.B. Linford

24 -----
 25 Joseph P. Mazurek

1 -----
2 William M. Day Audrey G. Roth
3 -----
4 Everett C. Elliott Chris D. Tweeten

5 APPROVED:
6 For the Secretary of the
7 Interior
8 -----
9 For the Attorney General of
10 the United States

11 -----
12 SECTION 2. EFFECTIVE DATE. THIS ACT IS EFFECTIVE ON
13 PASSAGE AND APPROVAL.

-End-

1 SENATE BILL NO. 467

2 INTRODUCED BY GALT, MAZUREK

3 BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT
6 ENTERED INTO BY THE STATE OF MONTANA AND THE ASSINIBOINE AND
7 SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; PROVIDING
8 AN IMMEDIATE EFFECTIVE DATE."

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 Section 1. Fort Peck-Montana compact ratified. The
12 compact entered into by the state of Montana and the
13 Assiniboine and Sioux tribes of the Fort Peck Indian
14 reservation and filed with the secretary of state of the
15 state of Montana under the provisions of 85-2-702 on [date
16 of filing] is ratified. The compact is as follows:

17 FORT PECK -- MONTANA COMPACT

18 This Compact is entered into by and between THE STATE
19 OF MONTANA and THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT
20 PECK INDIAN RESERVATION (herein called the "Parties") and
21 shall become effective as set forth hereinafter.

22 The Parties agree as follows:

23 ARTICLE I

24 GENERAL PURPOSES

25 The basic purposes of this Compact are to determine

There are no changes in SB467, and due to length will not be rerun. Please refer to yellow copy for complete text.

SENATE BILL NO. 467

INTRODUCED BY GALT, MAZUREK

BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT TO RATIFY THE COMPACT ENTERED INTO BY THE STATE OF MONTANA AND THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Fort Peck-Montana compact ratified. The compact entered into by the state of Montana and the Assiniboine and Sioux tribes of the Fort Peck 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:

FORT PECK -- MONTANA COMPACT

This Compact is entered into by and between THE STATE OF MONTANA and THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION (herein called the "Parties") and shall become effective as set forth hereinafter.

The Parties agree as follows:

ARTICLE I

GENERAL PURPOSES

The basic purposes of this Compact are to determine

finally and forever all rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in the State of Montana to water on, under, adjacent to, or otherwise appurtenant to the Reservation, to settle existing disputes and remove causes of future controversy between the Tribes and the State and between Indians of the Fort Peck Reservation and other persons concerning waters of the Missouri River, its tributaries, and ground water, and to settle all claims by the Tribes and by the United States on behalf of the Tribes in United States v. Aageson, Civ. No. 79-21-GP (D. Mont.), United States v. Aasheim, Civ. No. 79-40-BLG (D. Mont.) and the pending adjudication in the state water court initiated pursuant to the provisions of Chapter 697, Laws of Montana 1979.

ARTICLE II

DEFINITIONS

For purposes of this Compact, and for no other purposes, the following definitions apply:

(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) "Annual" or "per year" means the calendar year commencing January 1 and ending December 31.

(3) "Board" means the Fort Peck-Montana Compact Board established by Article VI.



1 (4) "Conservation (carry-over) storage" is storage
 2 provided in a reservoir to capture and hold water that would
 3 otherwise go downstream. Such storage holds the water for
 4 beneficial use later in the season or is carried over to a
 5 subsequent season or seasons. Evaporation from the surface
 6 of such reservoir is considered to be a consumptive use to
 7 the extent that it exceeds the evaporative and
 8 transpirational losses which occurred in the reservoir area
 9 prior to its construction.

10 (5) "Consumptive use" means the amount of irrigation
 11 water that is transpired by vegetation, converted in the
 12 processes of photosynthesis and plant tissue growth, and
 13 evaporated from adjacent soils, water surfaces and foliage.
 14 For uses other than irrigation, consumptive use means the
 15 quantity of water diverted less the quantity of reusable
 16 return flow within the State.

17 (6) "Court of competent jurisdiction" means a state or
 18 federal district court which otherwise has jurisdiction of
 19 the subject matter and the parties, or a tribal court which
 20 otherwise has such jurisdiction provided that all parties to
 21 the case consent to tribal court jurisdiction.

22 (7) "Diversion" means the removal of water from its
 23 natural course or location by means of a ditch, canal,
 24 flume, bypass, pipeline, conduit, well, pump, or other
 25 structure or device, or the impoundment of water in a

1 reservoir. Where a reservoir is constructed or operated on a
 2 stream, the annual diversion shall be the greater of:

3 (a) the inflow into the reservoir minus the outflow
 4 for releases or spills downstream from the reservoir, or

5 (b) withdrawals of water from the reservoir for actual
 6 use.

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

12 (9) "Fort Peck Irrigation Project" means those
 13 irrigation systems and works constructed pursuant to the Act
 14 of May 30, 1908, 35 Stat. 558, and all lands receiving water
 15 from such systems and works.

16 (10) "Fort Peck Reservoir" means that body of surface
 17 water impounded by Fort Peck Dam, at the current spillway
 18 elevation.

19 (11) "Full service irrigation" means any form of
 20 irrigation that distributes water on a regularly scheduled
 21 basis in order to satisfy the full seasonal crop and soil
 22 water requirements.

23 (12) "Ground water" means any water located under the
 24 surface of the land or the bed of any stream, lake,
 25 reservoir, or other body of surface water. All other water

1 shall be considered surface water.

2 (13) "Indian" means any person who:

3 (a) is an enrolled member of the Tribes; or

4 (b) is a member of a tribe that is recognized as
5 eligible for the special programs and services provided by
6 the United States to Indians because of their status as
7 Indians; or

8 (c) holds or is recognized by the Secretary of the
9 Interior as eligible to hold trust or restricted property on
10 the Reservation.

11 (14) "Industrial" means the use of water for any uses
12 that benefit an industrial enterprise including, but not
13 limited to, industrial cooling, energy production, and
14 evaporation associated with any industrial operation. Among
15 the purposes excluded from the industrial use category are
16 irrigation, stockwater, and domestic uses.

17 (15) "Instream flow" means that quantity of water
18 scheduled to remain in a stream to maintain fish and
19 wildlife resources.

20 (16) "Missouri River" means the river formed by the
21 confluence of the Gallatin, Jefferson and Madison Rivers in
22 southwestern Montana, and flowing easterly beyond the
23 eastern boundary of Montana.

24 (17) "Partial service irrigation" means the diversion
25 of flood runoff from natural channels or water courses and

1 spreading such water for the purpose of applying as much
2 water as practicable to the land during periods of high
3 stream flow to increase crop production.

4 (18) "Parties" means the Tribes and the State.

5 (19) "Person" means an individual or any other entity,
6 public or private, including the State, the Tribes, and the
7 government of the United States and all officers, agents,
8 and departments thereof.

9 (20) "Regulatory Storage" is storage provided as a part
10 of a water distribution system for operational purposes.
11 Evaporation loss from the distribution system itself is
12 accounted for and is a part of the unit consumptive use rate
13 established in this Compact and is therefore not considered
14 to be a separate item of consumptive use.

15 (21) "Reservation" means the Fort Peck Indian
16 Reservation as established in the agreement of December 28
17 and December 31, 1886, and confirmed by the Act of May 1,
18 1888, 25 Stat. 113.

19 (22) "Reusable" means capable of further beneficial
20 use.

21 (23) "State" means the State of Montana and all
22 officers, agents, departments, and political subdivisions
23 thereof. Unless otherwise indicated, for purposes of
24 notification or consent, "State" means the Director of the
25 State Department of Natural Resources and Conservation or

1 its successor agency.

2 (24) "Transfer" means any authorization for the
3 delivery or use of water by a joint venture, service
4 contract, lease, sale, exchange or other similar agreement.

5 (25) "Tribal Water Right" means the right to divert and
6 use water as confirmed by Article III of this Compact.

7 (26) "Tribes" means the Assiniboine and Sioux Tribes of
8 the Fort Peck Indian Reservation and all officers, agents
9 and departments thereof. Unless otherwise indicated, for
10 purposes of notification or consent, "Tribes" means the
11 Tribal Chairman or the Chief Executive Official of the
12 Tribes at the time.

13 (27) "Tributary" or "tributaries of the Missouri River
14 that flow through or adjacent to the Reservation" means
15 those tributaries of the Missouri River that traverse the
16 Reservation, generally in a north to south direction,
17 including:

18 (a) streams that form the east and west boundaries of
19 the Reservation (Big Muddy Creek, Porcupine Creek and the
20 Milk River);

21 (b) streams that originate outside the Reservation but
22 empty into the Missouri River within the boundaries of the
23 Reservation (the Poplar River and its tributaries);

24 (c) streams that are wholly contained within the
25 boundaries of the Reservation (Chelsea Creek, Tule Creek,

1 Wolf Creek, Oswego Creek, and Little Porcupine Creek); and

2 (d) all other watercourses that traverse the
3 Reservation.

4 (28) "Wasteful" means the unreasonable loss of water
5 through the design or negligent operation of a diversion or
6 of a water distribution facility.

7 ARTICLE III

8 TRIBAL WATER RIGHT

9 A. General Statement of the Tribal Water Right. The
10 Assiniboine and Sioux Tribes of the Fort Peck Indian
11 Reservation have the right to divert annually from the
12 Missouri River, certain of its tributaries, and ground water
13 beneath the Reservation the lesser of (i) 1,050,472
14 acre-feet of water, or (ii) the quantity of water necessary
15 to supply a consumptive use of 525,236 acre-feet per year
16 for the uses and purposes set forth in this Compact with a
17 priority date of May 1, 1888, provided that no more than
18 950,000 acre-feet of water, or the quantity of water
19 necessary to supply a consumptive use of 475,000 acre-feet
20 may be diverted annually from surface water sources. This
21 right is held in trust by the United States for the benefit
22 of the Tribes and is further defined and limited as set
23 forth in this Compact.

24 B. Persons Who May Use the Tribal Water Right. All
25 uses of water authorized under any applicable law by the

1 following persons shall be considered and calculated as uses
2 of the Tribal Water Right:

- 3 1. the Tribes within or outside the Reservation;
- 4 2. all individual Indians using water within the
5 Reservation including, but not limited to, Indians
6 exercising uses established pursuant to state law prior to
7 the effective date of this Compact;
- 8 3. all non-Indian successors-in-interest to any
9 allottee actually using water within the Reservation by
10 virtue of a water right arising under the laws of the United
11 States, which water right was acquired directly or
12 indirectly from an Indian predecessor-in-interest;
- 13 4. all other persons receiving water from the Fort
14 Peck Irrigation Project including, but not limited to,
15 persons exercising uses established pursuant to state law
16 prior to the effective date of this Compact;
- 17 5. all other persons authorized to use water by the
18 Tribes pursuant to this Compact, within or outside the
19 Reservation;
- 20 6. the United States as trustee for the Tribes or any
21 Indian including, but not limited to, persons exercising
22 uses established pursuant to state law prior to the
23 effective date of this Compact.

24 C. Measure of Consumptive Use for Irrigation.
25 Irrigation usage of the Tribal Water Right shall be

1 conclusively deemed to cause a consumptive use of 1.8
2 acre-feet per acre per year for full service irrigation and
3 0.48 acre-feet per acre per year for partial service
4 irrigation. Any loss of water due to evaporation from
5 reservoirs constructed in the future for conservation
6 (carry-over) storage rather than for regulatory storage by
7 the United States for the benefit of the Tribes or any
8 Indian, or constructed for such conservation storage by the
9 Tribes or by any Indian, shall be counted as a consumptive
10 use.

11 D. Purposes for Which the Tribal Water Right May be
12 Used. Within the Reservation, use of water in the exercise
13 of the Tribal Water Right for any purpose may be authorized
14 by the Tribes without regard to whether such use is
15 beneficial as defined by valid state law. No use of the
16 Tribal Water Right may be wasteful or inconsistent with the
17 terms of this Compact. Outside the Reservation, any use of
18 water in the exercise of the Tribal Water Right shall be
19 beneficial as defined by valid state law on the date the
20 Tribes give notice to the State of a proposed use outside
21 the Reservation.

22 E. Facilities Diverting or Using the Tribal Water
23 Right Outside the Reservation. All persons diverting or
24 using the Tribal Water Right outside the Reservation,
25 including the Tribes as sovereign, shall apply for all

1 permits, certificates, variances and other authorizations
 2 required by valid state laws regulating, conditioning or
 3 permitting the siting, construction, operation, alteration
 4 or use of any equipment, device, facility or associated
 5 facility proposed to use or transport water located outside
 6 the Reservation, and shall comply with all applicable
 7 provisions of this Compact. A diversion or use of water in
 8 the exercise of the Tribal Water Right may be made only
 9 after all permits, certificates, variances or other
 10 authorizations applied for pursuant to this paragraph have
 11 been obtained, and the diversion or use has not been found
 12 unlawful by a court of competent jurisdiction.

13 F. Amounts To Be Diverted from the Missouri River.

14 1. Diversions of water for use within or outside the
 15 Reservation may be made in the exercise of the Tribal Water
 16 Right from Fort Peck Reservoir and the mainstem of the
 17 Missouri River--but without utilization of the conservation
 18 (carry-over) storage of Fort Peck Reservoir--in the
 19 following amounts:

20 (a) during the months of November, December, January,
 21 February and March, not to exceed 40,000 acre-feet per
 22 month;

23 (b) during the months of April and October, not to
 24 exceed 50,000 acre-feet per month;

25 (c) during the months of May and September, not to

1 exceed 105,000 acre-feet per month;

2 (d) during the month of June, not to exceed 145,000
 3 acre-feet;

4 (e) during the month of July, not to exceed 215,000
 5 acre-feet;

6 (f) during the month of August, not to exceed 180,000
 7 acre-feet.

8 Provided that the aggregate of monthly diversions in
 9 the exercise of the Tribal Water Right from surface water
 10 shall not exceed 950,000 acre-feet per year, and the total
 11 annual consumptive use shall not exceed 475,000 acre-feet.

12 2. The Tribes shall report the amount of all actual
 13 diversions from Fort Peck Reservoir and the mainstem of the
 14 Missouri River to the United States Army Corps of Engineers
 15 by April 1st of the calendar year following the year in
 16 which such diversions are made in accordance with paragraph
 17 5 of section J of this Article.

18 3. All diversions authorized by paragraph 1 of this
 19 section may be made without payment to the United States,
 20 but the Tribes and any user of the Tribal Water Right shall
 21 otherwise comply with all generally applicable laws and
 22 regulations of the United States.

23 G. Export of the Tribal Water Right Outside the State.
 24 Use of the Tribal Water Right outside the State shall be in
 25 compliance with all valid provisions of state law in effect

1 at the time of the proposed transfer that prohibit,
2 regulate, condition, or permit the transportation of water
3 outside the State.

4 H. Non-use of the Tribal Water Right not a Forfeiture.

5 Non-use of any part of the Tribal Water Right shall not
6 constitute a relinquishment, forfeiture or abandonment of
7 the right to such use.

8 I. Sources of Diversions of the Tribal Water Right. In
9 the exercise of the Tribal Water Right water may be
10 diverted:

11 1. Within the Reservation for use within the
12 Reservation from:

13 (a) the mainstem of the Missouri River within or
14 adjacent to the Reservation;

15 (b) any tributary of the Missouri River that flows
16 through or adjacent to the Reservation, except the mainstem
17 of the Milk River; and

18 (c) any ground water source.

19 2. Outside the Reservation for use within the
20 Reservation from:

21 (a) Fort Peck Reservoir;

22 (b) any tributary of the Missouri River that flows
23 through or adjacent to the Reservation, except the mainstem
24 of the Milk River; and

25 (c) the mainstem of the Missouri River below Fort Peck

1 Dam.

2 Diversions authorized by subparagraphs (a) and (c)
3 shall comply with paragraph 1 of section J of this Article.

4 3. Within or outside the Reservation for use outside
5 the Reservation from:

6 (a) Fort Peck Reservoir;

7 (b) any tributary of the Missouri River that flows
8 through or adjacent to the Reservation, except the mainstem
9 of the Milk River, provided that water from these sources
10 shall not be transported outside the respective watershed of
11 each stream;

12 (c) the mainstem of the Missouri River below Fort Peck
13 Dam; and

14 (d) the mainstem of the Missouri River above Fort Peck
15 Reservoir.

16 Diversions authorized by subparagraphs (a) and (c)
17 shall comply with paragraph 1 of section J of this Article.

18 Diversions authorized by subparagraph (b) shall comply with
19 paragraph 4 of section K of this Article. Diversions
20 authorized by subparagraph (d) shall comply with paragraph 3
21 of section J of this Article.

22 J. Notice of and Conditions upon Diversions and Uses
23 of the Tribal Water Right.

24 1. The Tribes shall give the State not less than 180
25 days advance written notice of any proposed diversion or use

1 of the Tribal Water Right authorized by subparagraphs 2(a)
 2 and 2(c) and subparagraphs 3(a) and 3(c) of section I of
 3 this Article and shall, in the case of any transfer of the
 4 Tribal Water Right, except agreements on the tributaries
 5 pursuant to paragraph 4 of section K of this Article, offer
 6 the State an opportunity to participate as provided in
 7 paragraph 2 of section K of this Article. Such notice shall
 8 include sufficient documentation to demonstrate that:

9 (a) the proposed use of water complies with section D
 10 of this Article;

11 (b) for diversions outside the Reservation, the
 12 proposed means of diversion and the construction and
 13 operation of the diversion works are adequate;

14 (c) the proposed use and diversion will not adversely
 15 affect, except with the consent of the owner of such right,
 16 any of the following rights to the use of water existing at
 17 that time:

18 (i) any water right arising under the laws of the
 19 United States;

20 (ii) any appropriative right to the use of water
 21 established pursuant to the laws of the State that has not
 22 been abandoned, but excluding any reservation of water made
 23 pursuant to the laws of the State which has not been put to
 24 actual beneficial use by the date notice is given;

25 (d) the proposed use does not cause any unreasonable

1 significant adverse environmental impact; and

2 (e) proposed diversions in excess of 4,000 acre-feet
 3 per year and 5.5 cubic feet per second of water will not:

4 (i) substantially impair the quality of water for
 5 existing uses in the source of water from which the
 6 diversion is made;

7 (ii) be made where low quality water which can
 8 economically be used is legally and physically available to
 9 the Tribes for the proposed use;

10 (iii) create or substantially contribute to saline
 11 seep; or

12 (iv) substantially injure fish or wildlife populations
 13 in the source of water from which the diversion is made.

14 The requirements of subparagraph (c) of this paragraph
 15 may be satisfied by a showing that the owner of such right
 16 has consented to the adverse effect. Subparagraph (c) shall
 17 not be construed to alter or avoid in any way the
 18 consequences resulting from such consent under state law.

19 2. A proposed diversion or use of the Tribal Water
 20 Right outside the Reservation authorized by subparagraphs
 21 2(a) and 2(c) and subparagraphs 3(a) and 3(c) of section I
 22 of this Article may be challenged only:

23 (a) within 30 days after the expiration of the notice
 24 period provided in paragraph 1 of this section;

25 (b) in a court of competent jurisdiction; and

1 (c) by the State or by a person whose rights are
2 adversely affected by the proposed diversion or use.

3 In any such case, the Tribes shall have the burden of
4 going forward and the burden of proving by a preponderance
5 of the evidence that they have satisfied the requirements of
6 paragraph 1 of this section.

7 3. Diversions of water in the exercise of the Tribal
8 Water Right outside the Reservation from the mainstem of the
9 Missouri River above Fort Peck Reservoir, as authorized in
10 subparagraph 3(d) of section I of this Article, may be made
11 so long as the Tribes or any user of the Tribal Water Right:

12 (a) comply with all the laws of the State in effect at
13 the time the diversion is proposed, including but not
14 limited to state water use statutes;

15 (b) give not less than 180 days advance written notice
16 of any proposed diversion in the manner required in
17 paragraph 5 of this section:

18 (i) if the diversion is to be made from a reservoir,
19 to the operator of the reservoir; or

20 (ii) if the diversion is not to be made from a
21 reservoir, to the operator of the first dam, upstream and
22 downstream, if any, from the point of diversion;

23 (c) obtain approval of the diversion from the State
24 legislature.

25 4. For purposes of demonstrating compliance with

1 subparagraph 1(c) and subparagraph 3(a) of this section and
2 paragraph 6 of Section K of this Article, the portion of the
3 Tribal Water Right to be diverted will be deemed an
4 appropriative right which has:

5 (a) been acquired on May 1, 1888;

6 (b) a point of diversion and use where the water is
7 actually being diverted and used or, if not actually being
8 diverted, where the water would first flow on or adjacent to
9 the Reservation;

10 (c) the existing use or, if not actually in use, an
11 irrigation use provided, however, that the use can be
12 transferred to a purpose other than irrigation without
13 restriction as to period of use so long as the requirements
14 of Section F of this Article are observed;

15 (d) the actual consumptive use or, if not actually in
16 use or if being used for irrigation purposes, a consumptive
17 use of 1.8 acre-feet per acre per year; and

18 (e) not been abandoned or forfeited.

19 5. Any notice of a diversion required by paragraph 3
20 of this section and any report of a diversion required by
21 paragraph 2 of section F of this Article shall specify:

22 (a) the person authorized to make the diversion;

23 (b) the amount of water proposed or authorized to be
24 diverted annually;

25 (c) the amount proposed or authorized for annual

- 1 consumptive use;
- 2 (d) the point of diversion;
- 3 (e) the period of use;
- 4 (f) the place of use; and
- 5 (g) the purposes for which the water may be used.

6 K. Transfers of the Tribal Water Right.

7 1. As an incident to and in the exercise of the Tribal
 8 Water Right, the Tribes may transfer within or outside the
 9 Reservation, as authorized by federal law and this Compact,
 10 the right to use water but may not permanently alienate such
 11 right or any part thereof. Any such transfer of water by the
 12 Tribes shall be subject to all provisions of this Compact.

13 2. Prior to making any transfer which authorizes use
 14 of water outside the Reservation to be diverted from the
 15 mainstem of the Missouri River, including Fort Peck
 16 Reservoir, the Tribes shall give not less than 180 days
 17 advance written notice to the State of the proposed terms
 18 and conditions of the transfer, and shall offer the State
 19 the opportunity to participate in the transfer as a
 20 substantially equal partner with the Tribes, assuming
 21 obligations and receiving benefits of the transfer under
 22 terms and conditions agreed to by the Parties. If the State
 23 does not accept the opportunity within the 180-day notice
 24 period, or if the State unreasonably delays the institution
 25 or completion of approval processes required by state law or

1 unreasonably delays resolution of any litigation arising
 2 from its decision to accept the opportunity, the Tribes may
 3 proceed with the proposed transfer without State
 4 participation, provided that the proposed transfer shall be
 5 subject to all other provisions of this Compact. If the
 6 State does not accept the opportunity, or if State
 7 participation in the joint transfer is not approved, the
 8 State shall not later pursue the opportunity, except in
 9 accordance with all the terms of this Compact, including
 10 paragraph 3 of this section.

11 3. Prior to making any transfer allowing use or
 12 diversion of water from Fort Peck Reservoir or from the
 13 mainstem of the Missouri River below Fort Peck Dam, the
 14 State shall give not less than 180 days advance written
 15 notice to the Tribes of the proposed terms and conditions of
 16 the transfer and shall offer the Tribes the same opportunity
 17 to participate in the transfer as a substantially equal
 18 partner with the State, assuming obligations and receiving
 19 benefits of the transfer on terms and conditions agreed to
 20 by the Parties. If the Tribes do not accept the opportunity
 21 within the 180 day notice period, the State may proceed with
 22 the proposed transfer without the Tribes' participation, and
 23 the Tribes shall not later pursue the opportunity except in
 24 accordance with all the terms of this Compact, including
 25 paragraph 2 of this section.

1 4. If otherwise authorized by federal law, the Tribes
 2 may enter into an agreement with any person who is
 3 exercising or proposing to exercise a right under the laws
 4 of the State to use surface water outside the Reservation on
 5 any tributary of the Missouri River that flows through or
 6 adjacent to the Reservation, except the mainstem of the Milk
 7 River, which agreement allows such person's diversion and
 8 use and protects it from any other exercise of the Tribal
 9 Water Right provided, however, that:

10 (a) before use of such water, the person shall have
 11 complied with all applicable state laws concerning the
 12 acquisition of a water right;

13 (b) subsequent to acquisition of the state water
 14 right, regulation of its use shall be subject to state law;

15 (c) the amount of water subject to the agreement shall
 16 be considered a consumptive use of the Tribal Water Right;

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

19 5. The Tribes may transfer annually only the following
 20 amounts of water for consumptive use outside the
 21 Reservation:

22 (a) 50,000 acre-feet;

23 (b) plus 35 percent of any amount over 200,000
 24 acre-feet but less than 300,000 acre-feet authorized by
 25 state law to be transferred annually by the State from

1 waters within the State;

2 (c) plus 50 percent of any amount over 300,000
 3 acre-feet authorized by state law to be transferred annually
 4 by the State from waters within the State.

5 Transfers of the Tribal Water Right shall not be
 6 considered as part of any amounts authorized by state law to
 7 be transferred annually by the State.

8 6. In no event shall the Tribes be authorized to
 9 transfer less than 50,000 acre-feet of water per year
 10 outside the Reservation. The limits established in paragraph
 11 5 of this section shall apply so long as the State is
 12 authorized to transfer annually at least 50,000 acre-feet of
 13 water pursuant to state law. If statutory authorization for
 14 the State to transfer water is not enacted, is repealed, or
 15 is held invalid, or if the amount of water authorized by
 16 state law to be transferred by the State is less than 50,000
 17 acre-feet per year, then for any period in which the
 18 authorization or the limitation is not in force the Tribes
 19 may transfer water in accordance with all terms and
 20 conditions of this Compact other than paragraph 5 of this
 21 section. However, such transfers will be subject to any
 22 volume limitations provided by federal law or, in the
 23 absence of any federal volume limitations, the Tribes may
 24 transfer water in accordance with all terms and conditions
 25 in this Compact other than paragraph 5 of this section and

1 with any volume limitations imposed by state law which would
 2 apply to a holder of a right to the use of water established
 3 pursuant to state law. For the purposes of complying with
 4 volume limitations imposed by state law, the Tribal Water
 5 Right will be deemed to have the characteristics set forth
 6 in paragraph 4 of section J of this Article.

7 7. Unless authorized by federal law, the State shall
 8 not in any manner whatsoever tax any proceeds received by
 9 the Tribes as consideration for any transfer of the Tribal
 10 Water Right.

11 L. Instream Flows.

12 1. At any time within five years after the effective
 13 date of this Compact, the Tribes may establish a schedule of
 14 instream flows to maintain any fish or wildlife resource in
 15 those portions of streams, excluding the mainstem of the
 16 Milk River, which are tributaries of the Missouri River that
 17 flow through or adjacent to the Reservation. These instream
 18 flows shall be a part of the Tribal Water Right with a
 19 priority date of May 1, 1888. Water remaining in a stream to
 20 maintain instream flows pursuant to such a schedule shall be
 21 counted by the Tribes as a consumptive use of surface water.

22 2. Instream flows may be established by the Tribes
 23 only in accordance with this section. The Tribes may change
 24 the use of water for maintenance of instream flows to
 25 another purpose only with the consent of the State.

1 M. No Other Diversion or Use of the Tribal Water
 2 Right. No other diversion or use of the Tribal Water Right
 3 shall be made other than those authorized or recognized by
 4 this Article.

5 ARTICLE IV

6 PROTECTION OF USES UNDER STATE LAW

7 A. Uses Protected.

8 1. The following existing AND PROPOSED uses of water
 9 by Indians within the Reservation are protected and shall
 10 not be subordinated to any other uses by subsequent
 11 provisions of this Article:

12 (a) a maximum of 113 acres of irrigated land within
 13 the Wolf Creek watershed;

14 (b) a maximum of 11 acres of irrigated land within the
 15 Poplar River watershed; and

16 (c) a maximum of 523 acres of irrigated land within
 17 the Big Muddy Creek watershed; AND

18 (D) A MAXIMUM OF 300 ACRES OF LAND IRRIGATED WITH
 19 GROUND WATER NEAR THE CONFLUENCE OF PORCUPINE CREEK AND THE
 20 MILK RIVER.

21 2. Uses of water by Indians within the Reservation for
 22 stockwatering purposes not in excess of 20 acre-feet per
 23 year for each impoundment and for all domestic uses are
 24 protected and shall not be subordinated to any other uses by
 25 subsequent provisions of this Article.

1 3. With the exception of the uses protected in
2 paragraphs 1 and 2 of this section, diversion and use of
3 water in the exercise of the Tribal Water Right except from
4 the mainstem of the Missouri River, including water
5 allocated to instream flow purposes, shall be subordinate to
6 the following uses of water in the Porcupine Creek, Poplar
7 River, Big Muddy Creek, Little Porcupine Creek, Wolf Creek,
8 Tule Creek, and Chelsea Creek watersheds, including all
9 tributary streams within those watersheds, and all
10 underlying ground water whether or not hydrologically
11 connected with the surface water:

12 (a) the beneficial uses of water with a priority date
13 of December 31, 1984 or earlier established under the laws
14 of the State and identified in Appendix A to this Compact;

15 (b) such rights of the United States Fish and Wildlife
16 Service to the waters of Big Muddy Creek for the Medicine
17 Lake National Wildlife Refuge as may be finally determined
18 by the state water court;

19 (c) beneficial uses of water for domestic purposes;

20 (d) beneficial uses of water for stock watering
21 purposes in existence prior to December 31, 1984, and
22 beneficial uses of water for stock watering subsequent to
23 that date not in excess of 20 acre-feet per year for each
24 impoundment.

25 4. Except as to the rights protected in paragraph 3 of

1 this section, the Tribal Water Right shall be prior to all
2 rights to the use of surface and ground water established
3 under the laws of the State with a priority date later than
4 May 1, 1888.

5 B. Changes of Protected Uses.

6 1. The rights to the use of water protected by
7 paragraph 3 of section A of this Article may be changed in
8 accordance with state law as to point of diversion, period
9 of use, place of use, purpose of use, or ownership of the
10 right provided that:

11 (a) the proposed change will not adversely affect any
12 use of the Tribal Water Right existing at the time of the
13 proposed change;

14 (b) the amount of surface water flowing onto the
15 Reservation within the Poplar River, the Big Muddy Creek, or
16 the Porcupine Creek watersheds, will not be changed; and

17 (c) the source of the water will not be changed from
18 surface to ground water, or from ground to surface water, or
19 from one watershed to another.

20 2. Upon receiving an application for a proposed change
21 authorized by paragraph 1 of this section, the State shall
22 give the Tribes such advance written notice as is required
23 by state law.

24 3. If an irrigation use is changed in any manner, or
25 if a reservoir is constructed or operated which results in

1 the consumptive use of water by evaporation, the following
2 limitations apply:

3 (a) no more than 1.8 acre-feet of consumptive use per
4 year may be authorized for each acre of land retired from
5 full service irrigation; and

6 (b) no more than 0.48 acre-feet of consumptive use per
7 year may be authorized for each acre of land retired from
8 partial service irrigation;

9 (c) evaporation from any reservoir shall be charged as
10 a consumptive use in accordance with definition 4 in Article
11 II.

12 4. If an irrigation use is changed to an industrial
13 use, all diversions and return flows shall be measured by a
14 device acceptable to and subject to periodic inspection and
15 testing by the State and the Tribes at the expense of the
16 owner. The owner shall also have the quality of the return
17 flows sampled and tested by a laboratory acceptable to the
18 State and the Tribes as often as reasonably required by the
19 State and the Tribes and at the expense of the owner.

20 ARTICLE V

21 ADMINISTRATION OF WATER RIGHTS

22 A. United States Administration. All rights to the
23 use of water received from the Fort Peck Irrigation Project
24 shall be administered by the United States, and the United
25 States has the final and exclusive jurisdiction to resolve

1 all disputes concerning uses of water received from the Fort
2 Peck Irrigation Project subject to any judicial review
3 provided by applicable law.

4 B. Tribal Administration.

5 1. The Tribal Water Right shall be administered by the
6 Tribes, and the Tribes have the final and exclusive
7 jurisdiction to resolve all disputes between users of the
8 Tribal Water Right, except for disputes concerning uses of
9 water received from the Fort Peck Irrigation Project and
10 disputes involving users of the Tribal Water Right pursuant
11 to agreements authorized in Article III, section K,
12 paragraph 4.

13 2. Administration and enforcement of the Tribal Water
14 Right shall be pursuant to a water code, which shall be
15 adopted by the Tribes and submitted for approval to the
16 Secretary of the Interior within one year after ratification
17 of this Compact by the Parties. Such code shall take effect
18 18 months after ratification of this Compact unless sooner
19 disapproved by the Secretary of the Interior. Pending the
20 adoption and approval of the tribal water code,
21 administration and enforcement of the Tribal Water Right
22 shall be by the Secretary of the Interior as trustee for the
23 Tribes. The Tribes shall not administer the Tribal Water
24 Right in a manner which denies any person a water right
25 owned by that person which arises under the laws of the

1 United States.

2 3. Within six months after adoption--of the tribal
3 water code TAKES EFFECT OR WITHIN SIX MONTHS AFTER
4 DISAPPROVAL OF THE CODE BY THE SECRETARY, the Tribes OR THE
5 SECRETARY OF THE INTERIOR shall provide the State with
6 notice of each existing use of the Tribal Water Right which
7 shall show:

- 8 (a) the person authorized to make the diversion;
9 (b) the amount of water authorized to be diverted
10 annually;
11 (c) the amount of water authorized for annual
12 consumptive use;
13 (d) the point of diversion;
14 (e) the period of use;
15 (f) the place of use;
16 (g) the uses for which the water may be diverted; and
17 (h) the relative priority of the use as against other
18 uses of the Tribal Water Right.

19 4. The Tribes shall thereafter notify the State within
20 sixty days after the end of each quarter year of all new
21 uses of surface and ground water authorized by the Tribes
22 during the preceding quarter year and of all new uses of the
23 Tribal Water Right actually commenced during that quarter
24 year.

25 C. State Administration.

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

7 2. Within two years after ratification of this
8 Compact, the State shall notify the Tribes of all existing
9 uses authorized by the State on the mainstem of the Missouri
10 River below Fort Peck Dam and on all tributaries of the
11 Missouri River that flow through or adjacent to the
12 Reservation, except the mainstem of the Milk River. The
13 State shall notify the Tribes within sixty days after the
14 end of each quarter year of all new uses of surface and
15 ground water permitted by the State on each of these sources
16 during the preceding quarter year and of all new uses of
17 water actually commenced pursuant to the laws of the State
18 during that quarter year on each of these sources. Notices
19 required by this paragraph shall include the information
20 required by paragraph 3 of section B of this Article.

21 3. No agency of the State shall administer any part of
22 the Tribal Water Right. From and after the effective date of
23 this Compact, unless the Tribal Water Right confirmed in
24 Article III is fully utilized at the time application is
25 made for a permit or other authorization, the State shall

1 issue no permit or other authorization to divert or use
2 water within the Reservation to the following persons:

- 3 (a) the Tribes;
- 4 (b) any Indian;
- 5 (c) any non-Indian successor-in-interest to any
6 allottee on the Reservation by virtue of that person's
7 assertion of a right arising under the laws of the United
8 States; or
- 9 (d) the United States for the benefit of the Tribes or
10 any Indian or any non-Indian successor-in-interest to any
11 allottee.

12 D. Regulation of Ground Water.

13 1. With the exception of uses protected in Article IV,
14 neither the State nor the Tribes shall authorize or continue
15 the use of ground water without the consent of the other if
16 such use will:

- 17 (a) result in degradation of instream flows
18 established pursuant to section L of Article III; or
- 19 (b) contribute to the permanent depletion or the
20 significant degradation of the quality of a ground water
21 source which in whole or in part underlies the Reservation.

22 2. With the exception of uses protected in Article IV,
23 the State shall not, without the Tribes' consent, authorize
24 or continue the use of ground water that unreasonably
25 interferes with a use of ground water authorized by the

1 Tribes. The Tribes shall not, without the consent of the
2 State, authorize or continue the use of ground water that
3 unreasonably interferes with a use of ground water
4 authorized by the State and protected by Article IV of this
5 Compact.

6 ARTICLE VI

7 FORT PECK-MONTANA COMPACT BOARD

8 A. Board established. There is hereby established the
9 Fort Peck-Montana Compact Board, which shall exercise powers
10 and responsibilities as set forth in this Article.

11 B. Membership.

12 1. The Board shall consist of three members. One
13 member shall be appointed by the Governor of the State of
14 Montana or, in lieu of such appointment, shall be the
15 Governor. The salary and expenses of that member shall be
16 paid by the State. One member shall be appointed by the
17 Chairman of the Tribes, or in lieu of such appointment,
18 shall be the Tribal Chairman. The salary and expenses of
19 that member shall be paid by the Tribes. The third member
20 shall be selected by agreement of the other two members. The
21 salary and expenses of that member and all other expenses of
22 the Board shall be shared equally by the State and the
23 Tribes subject to the availability of funds. Each member
24 duly appointed or selected shall hold office for a term of
25 six years, and for so long thereafter until a successor

1 shall be appointed or selected. The initial term of each
 2 member shall be staggered, with one member serving a
 3 six-year term, one a four-year term, and one a two-year
 4 term. The initial term of each member shall be chosen by
 5 lot, or by any other procedure and agreed upon in writing by
 6 the first three members of the Board. If the Governor or the
 7 Tribal Chairman serves on the Board, such person shall not
 8 serve on the Board beyond his or her term as Governor or
 9 Tribal Chairman.

10 2. Should the two appointed members fail to agree
 11 within sixty days of the effective date of this Compact or
 12 within thirty days after any vacancy occurs, on the
 13 selection of the third member, the following procedure shall
 14 be utilized:

15 (a) within five days each member shall nominate no
 16 more than five and no less than three persons to serve as a
 17 member of the Board;

18 (b) within fifteen days thereafter each member shall
 19 reject all but one of the persons nominated by the other
 20 member;

21 (c) the chief judge of the United States District
 22 Court for the District of Montana shall select the third
 23 member of the Board from the remaining two nominees. If the
 24 chief judge declines for any reason to select the third
 25 member, the chief justice of the Montana Supreme Court shall

1 make the selection from the remaining two nominees.

2 3. Vacancies on the board shall be filled by
 3 appointment of a person to serve the unexpired term of the
 4 member whose seat has become vacant. If the member appointed
 5 by the Governor becomes unable or unwilling to serve on the
 6 Board, the Governor shall make the appointment within
 7 fifteen days. If the member appointed by the Tribal Chairman
 8 becomes unable or unwilling to serve, the Tribal Chairman
 9 shall make the appointment within fifteen days. If the
 10 third member of the Board becomes unable or unwilling to
 11 serve on the Board, the remaining members shall fill the
 12 vacancy under the procedure set forth in paragraphs 1 and 2
 13 of this section.

14 C. Quorum and Vote Required. Two members of the Board
 15 shall constitute a quorum if reasonable notice has been
 16 provided in advance to the absent member. Meetings may be in
 17 person or, in appropriate circumstances, by telephone. All
 18 Board decisions shall be by a majority of the Board, shall
 19 be in writing and, together with any dissenting opinions,
 20 shall be delivered to all parties in the proceeding before
 21 the Board, and to both Parties to this Compact.

22 D. Jurisdiction of the Board. The Board shall have
 23 exclusive jurisdiction, only as provided in this Compact, to
 24 resolve any controversy over the use of ground water to
 25 which this Compact pertains, any controversy over the use of

1 surface water within the Reservation or from any tributary
 2 of the Missouri River that flows through or adjacent to the
 3 Reservation, except the mainstem of the Milk River, and any
 4 controversy as to the meaning of this Compact between: (i)
 5 on the one hand, the Tribes or any person or persons
 6 claiming a right to use the Tribal Water Right; and (ii) on
 7 the other hand, the State or any person or persons claiming
 8 a right to use water under the laws of the State.

9 E. Powers and Duties of the Board.

10 1. The Board shall have power to administer oaths to
 11 witnesses, to take evidence under oath, and to issue
 12 subpoenas to compel the attendance of witnesses or for the
 13 production of books, records, documents and other evidence.
 14 The courts of the Tribes and the State shall enforce any
 15 subpoena issued by the Board in the same manner as
 16 prescribed by the laws of the Tribes and the State for
 17 enforcing a subpoena issued in a civil action by courts of
 18 the Tribes and the State.

19 2. The Board shall hold hearings in proceedings before
 20 it and shall give advance notice to the Tribes, the State
 21 and all parties to any proceeding personally or by
 22 registered mail not less than five days before any hearing.
 23 Appearance at a hearing waives such notice. The Board may
 24 hear and determine the controversy upon the evidence
 25 produced notwithstanding the failure of a party duly

1 notified to appear. The Tribes, the State and all parties to
 2 the proceeding are entitled to be heard, to present evidence
 3 material to the controversy, to cross-examine witnesses
 4 appearing at the hearing, and to be represented by counsel
 5 at their own expense.

6 3. The Board may enter an order after hearing granting
 7 any party to the dispute before it temporary or preliminary
 8 injunctive relief, or any other relief which the Board deems
 9 appropriate except money damages. The Board or any party to
 10 a proceeding before the Board may invoke the jurisdiction of
 11 a court of competent jurisdiction to enforce any temporary
 12 or preliminary injunction so issued by the Board by filing a
 13 petition for enforcement naming the enjoined person as
 14 respondent. Upon filing the petition, the court shall enter
 15 any order it deems appropriate for enforcement of the
 16 injunction ordered by the Board, including but not limited
 17 to injunctive relief on such terms as to bond or otherwise
 18 as it deems proper for the security of the rights of the
 19 enjoined party. The United States, the State, and the Tribes
 20 shall not be required to post any bond. The court may
 21 appoint a water commissioner or master to monitor compliance
 22 with such relief.

23 4. The Board shall adopt rules and regulations to
 24 govern its procedures and to carry out its responsibilities
 25 under this Compact. Such rules and regulations must be

1 consistent with all provisions of this Compact. All records
2 of the Board shall be open to public inspection except for
3 privileged information.

4 5. The Board may employ or seek assistance of such
5 clerical or other personnel and may establish such offices
6 as it deems necessary for the performance of its functions
7 according to this Compact. Pending the establishment of a
8 principal office, the Board's office shall be located at
9 Fort Peck Agency of the Bureau of Indian Affairs.

10 6. The annual budget of the Board shall be subject to
11 approval of the Parties to this Compact and to the
12 availability of funds appropriated by the Parties.

13 F. Review and Enforcement of Board Decisions.

14 1. Decisions by the Board shall be effective
15 immediately, unless stayed for a period of time prescribed
16 by the Board. On application of a party within a reasonable
17 time, but in any event no more than ninety days after a
18 decision is rendered, the Board may modify or correct any
19 decision:

20 (a) where there was an evident material miscalculation
21 of figures or an evident material mistake in the description
22 of any person, thing or property referred to in the
23 decision;

24 (b) where the decision is imperfect in a matter of
25 form not affecting the merits of the controversy; or

1 (c) where the decision requires clarification.

2 2. Any party before the Board may, within ten days of
3 any final decision, apply to the Board to modify or set
4 aside any aspect of the decision. Notice of such application
5 shall be served personally or by registered mail upon all
6 parties to the proceeding. Any other party shall have ten
7 days within which to respond to the application. The Board
8 shall act on such application within ten days after a
9 response is filed or, if no response is filed, within
10 fifteen days after the application is filed. If the Board
11 fails to act within the time limitations set forth in this
12 paragraph, the application shall be deemed denied. The time
13 for appeal provided in paragraph 3 of this section shall not
14 begin to run until the application is determined as provided
15 in this paragraph.

16 3. Any party before the Board may appeal any final
17 decision by the Board to a court of competent jurisdiction
18 within thirty days of such decision. The notice of appeal
19 shall be filed with the Board and served personally or by
20 registered mail upon the Tribes, the State and all parties
21 to the proceeding before the Board, and all such persons
22 shall thereafter have the right to participate in the
23 appeal.

24 4. In any appeal, the Board's decision shall be
25 presumed to be valid, and may be vacated by the court only

1 on one of the following grounds:

2 (a) the decision is not supported by substantial
3 evidence;

4 (b) the decision was procured by corruption, fraud or
5 undue means;

6 (c) there was evident partiality or corruption by the
7 Board or by any member;

8 (d) the Board was guilty of misconduct in refusing to
9 hear the dispute, or in refusing to hear evidence pertinent
10 and material to the controversy, or any other clear
11 misbehavior by which the rights of any party have been
12 substantially prejudiced;

13 (e) the Board exceeded its authority under the terms
14 of this Compact; or

15 (f) the decision is contrary to law.

16 5. Unless an appeal is timely filed as provided in
17 paragraph 3 of this section, any decision of the Board shall
18 be confirmed or enforced by any court of competent
19 jurisdiction on petition of the Board, the Tribes, the State
20 or any party before the Board in the proceeding in which the
21 decision was made.

22 6. A court of competent jurisdiction in which a timely
23 appeal is filed pursuant to paragraph 3 of this section, or
24 in which a petition to confirm or enforce is filed pursuant
25 to paragraph 5 of this section, may order such temporary or

1 permanent relief as it considers just and proper.

2 7. An appeal may be taken from any decision of the
3 court in which a timely appeal is filed pursuant to
4 paragraph 3 of this section, or in which a petition to
5 confirm or enforce is filed pursuant to paragraph 5 of this
6 section, in the manner and to the same extent as from orders
7 or judgments of the court in a civil action.

8 8. In any appeal or petition to confirm or enforce the
9 Board's decision, the Board shall file with the court the
10 record of the proceedings before the Board.

11 G. Waiver of Immunity. The Tribes and the State
12 hereby waive their respective immunities from suit,
13 including any defense the State shall have under the
14 Eleventh Amendment of the Constitution of the United States,
15 to permit the appeal or judicial enforcement of Board
16 decisions as provided in this Compact, except that such
17 waivers shall not extend to any action for money damages
18 including costs and attorneys' fees as a result of such
19 judicial action.

20 ARTICLE VII

21 FINALITY AND EFFECTIVENESS OF COMPACT

22 A. Ratification. This Compact shall become effective
23 as to both parties when ratified by the Legislature of the
24 State of Montana and by the Fort Peck Tribal Executive Board
25 AND APPROVED BY THE UNITED STATES DEPARTMENTS OF JUSTICE AND

1 THE INTERIOR. Ratification by the State and by the Tribes is
 2 irrevocable, and this Compact may not be modified in any
 3 manner whatsoever except with the joint consent of the
 4 legislative body of both Parties.

5 B. Incorporation into Decrees and Disposition of
 6 Federal Suits.

7 1. The Parties and the United States shall petition
 8 for incorporation of this Compact into the preliminary
 9 decrees and final decrees in any state water court
 10 proceedings to adjudicate any right to the use of water to
 11 which this Compact pertains, and this Compact may not be
 12 modified in any manner whatsoever without the consent of
 13 both Parties as provided in section A of this Article. The
 14 United States shall not be bound by provisions of this
 15 Compact until it is incorporated into the final decree, as
 16 provided in this paragraph SECTION.

17 2. This Compact shall only be filed AS A PROPOSED
 18 CONSENT DECREE in United States v. Aageson, Civ. No.
 19 79-21-GP (D. Mont.), or United States v. Aasheim, Civ. No.
 20 79-40-BLG (D. Mont.) if there is a final determination by
 21 the state courts that they lack jurisdiction over, or that
 22 the state proceedings are inadequate to adjudicate, some or
 23 all of the water rights asserted in either of the above
 24 cases. Upon a final determination that the state courts have
 25 jurisdiction over, and that the state proceedings are

1 adequate to adjudicate all of the water rights in the above
 2 cases, the United States and the Parties will immediately
 3 execute a joint motion pursuant to Rule 41(a) of the Federal
 4 Rules of Civil Procedure to dismiss with prejudice and on
 5 their merits all claims by the Tribes and the United States
 6 on behalf of the Tribes in the pending cases.

7 ARTICLE VIII

8 DISCLAIMERS AND RESERVATION OF RIGHTS

9 A. Disclaimers. Nothing in this Compact shall be so
 10 construed or interpreted:

11 1. to establish the nature, extent, transferability,
 12 or manner of enforcement of water rights of any Indian
 13 reservation other than the Fort Peck Indian Reservation;

14 2. to preclude the acquisition or exercise of an
 15 appropriative right to the use of water under state law by
 16 the Tribes or any individual Indian outside the Reservation
 17 by purchase of such right or by purchase of land, or by
 18 application to the State;

19 3. to preclude the acquisition or exercise of an
 20 appropriative right to the use of water under state law by
 21 the Tribes or any individual Indian within the Reservation:

22 (a) by purchase of such right or by purchase of land,
 23 provided that water rights acquired by such purchase after
 24 ratification of this Compact shall be deemed to be an
 25 exercise of the Tribal Water Right; or

1 (b) by application to the State, provided that the
2 Tribal Water Right confirmed in Article III has been fully
3 utilized at the time an application is made;

4 4. to determine the relative rights inter sese of
5 persons using water under the authority of the State or the
6 Tribes;

7 5. to limit in any way the rights of the Parties or
8 any other person to litigate any issues or questions not
9 resolved by this Compact;

10 6. to authorize the taking of a water right which is
11 vested under state or federal law;

12 7. to create or deny substantive rights through
13 headings or captions used in this Compact; or

14 8. to address or prejudge whether, in any interstate
15 apportionment of the waters of the Missouri River Basin, the
16 Tribal Water Right shall be counted as a part of the waters
17 apportioned to the state STATE.

18 B. Reservation of Rights. The Parties expressly
19 reserve all rights not granted, recognized or relinquished
20 in this Compact.

21 ARTICLE IX

22 TRIBAL RELINQUISHMENT OF OTHER WATER CLAIMS

23 The Tribal Water Right confirmed in Article III shall
24 be final and conclusive. With the exception of the Tribal
25 Water Right recognized herein and rights established under

1 state law as authorized by this Compact, the Tribes and the
2 United States as trustee for the Tribes hereby relinquish
3 forever any and all existing and future claims to water from
4 any source and for any purpose. This relinquishment
5 includes, but is not limited to, any claim for water derived
6 from: aboriginal use of land or water; any Indian treaties;
7 any act of Congress; and any executive act of the United
8 States.

9 ARTICLE X

10 BINDING EFFECT

11 A. Persons Bound. Upon the effectiveness of this
12 Compact, its terms will be binding:

13 1. upon the State and any person or entity of any
14 nature whatsoever using, claiming or in any manner asserting
15 any right under the authority of the State to the use of
16 water in the State of Montana, provided that for purposes of
17 consent, ratification, or authorization the validity of
18 consent, ratification, or authorization is to be determined
19 by Montana law; and

20 2. upon the Tribes and any person or entity of any
21 nature whatsoever using, claiming or in any manner asserting
22 any right to the use of the Tribal Water Right, or any right
23 arising under any doctrine of reserved or aboriginal water
24 rights for the Tribes, or any right arising under tribal
25 law, provided that for purposes of consent, ratification, or

1 authorization the validity of consent, ratification or
 2 authorization is to be determined by Tribal law.
 3 Notwithstanding any other provision of law, the Tribal Water
 4 Right confirmed in Article III of the Fort Peck-Montana
 5 Compact includes conclusively and forever the water rights
 6 arising under the laws of the United States of all persons
 7 on the Fort Peck Reservation by virtue of the ownership or
 8 purchase of any Indian allotment, and the courts of the
 9 State shall not have jurisdiction to adjudicate or decree
 10 any such right claimed by any such person.

11 B. Effect on Other Laws. The provisions of the Fort
 12 Peck-Montana Compact shall supersede any present or future
 13 enactment or common law rule inconsistent with such Compact
 14 including but not limited to Montana Code Annotated
 15 28-2-708.

16 ARTICLE XI
 17 SEVERABILITY

18 Should any part of this Compact other than Articles
 19 III, IV, VII, or IX be held to be invalid, all other parts
 20 thereof shall continue to be in full force and effect.
 21 Should any part of Articles III, IV, VII, or IX be held
 22 invalid, either party may withdraw from the remaining
 23 provisions of this Compact by action of its legislative body
 24 taken within one year from the determination of such
 25 invalidity.

1 ARTICLE XII
 2 LEGISLATION

3 A. Future legislation. The parties agree to seek
 4 enactment of further legislation if it becomes necessary to
 5 effectuate the provisions and purposes of this Compact, and
 6 to protect such provisions and purposes from challenge and
 7 attack, provided that no provisions of the Compact shall be
 8 modified as to substance except as provided in Article VII.

9 B. Petition to Congress.

10 1. The Parties hereby request the Montana legislature
 11 to petition Congress to enact the following legislation in
 12 substantially the following form:

13 "Sec. 2. For purposes of this Act, the term:

14 (a) "Fort Peck-Montana Compact" means that Compact
 15 pertaining to the reserved water rights of the Assiniboine
 16 and Sioux Tribes of the Fort Peck Reservation ratified by
 17 the legislature of the State of Montana on ____, 1985 and by
 18 the Tribes on ____, 1985.

19 (b) "Reservation" means the Fort Peck Indian
 20 Reservation as defined in the agreement of December 28 and
 21 December 31, 1886, and confirmed by the Act of May 1, 1888,
 22 25 Stat. 113.

23 (c) "Secretary" means the Secretary of the Interior.

24 (d) "Tribes" means the Assiniboine and Sioux Tribes of
 25 the Fort Peck Indian Reservation.

1 "Sec. 3.
2 "(a) The Tribes, subject to the approval of the
3 Secretary, may enter into any joint venture, service
4 contract, lease, exchange or other agreement, or any
5 amendment, supplement or other modification of such
6 agreement (hereinafter referred to as a "Water Agreement")
7 authorizing the delivery, use or transfer of any part of the
8 water right confirmed in the Tribes by the Fort Peck-Montana
9 Compact for a specified term, not to exceed fifty years,
10 inclusive of all renewal periods. A Water Agreement may
11 authorize the diversion or use of water within or outside
12 the Reservation subject to all terms of the Fort
13 Peck-Montana Compact.
14 "(b) The Secretary shall approve or disapprove any
15 Water Agreement within (1) one hundred and eighty days after
16 submission or (2) sixty days after compliance, if required,
17 with section 102(2)(C) of the National Environmental Policy
18 Act of 1969 (42 U.S.C. 4332(2)(C) and any other requirement
19 of federal law, whichever is later. Any party to such an
20 agreement may enforce the provisions of this subsection
21 pursuant to 28 U.S.C. 1361. Notwithstanding any other law,
22 all projections, studies, data or other information
23 possessed by the Department of the Interior regarding the
24 terms and conditions of the Water Agreement or the financial
25 return to the Tribes, shall be held by the Department of the

1 Interior as privileged proprietary information of the
2 Tribes."
3 2. The provisions of this Compact shall have no force
4 and effect until the resolution set forth in paragraph 1 of
5 this section is approved by the Montana Legislature and
6 submitted to Congress.
7 IN WITNESS WHEREOF the representatives of the State of
8 Montana and the Assiniboine and Sioux Tribes of the Fort
9 Peck Indian Reservation have signed this Compact in five
10 original counterparts on the ___ day of _____, 1985.
11 For the Assiniboine and Sioux
12 Tribes of the Fort Peck Indian Reservation
13 -----
14 Walter Clark
15 -----
16 Norman Hollow
17 -----
18 Caleb Shields
19 For the State of Montana
20 Montana Reserved Water Rights Compact Commission
21 -----
22 W. Gordon McOmber, Chairman Daniel O. Kemmis
23 -----
24 Jack E. Galt, Vice Chairman A.B. Linford
25 -----

1		Joseph P. Mazurek
2	-----	-----
3	William M. Day	Audrey G. Roth
4	-----	-----
5	Everett C. Elliott	Chris D. Tweeten
6	APPROVED:	
7	For the Secretary of the	
8	Interior	
9	-----	
10	For the Attorney General of	
11	the United States	
12	-----	

13 SECTION 2. EFFECTIVE DATE. THIS ACT IS EFFECTIVE ON
14 PASSAGE AND APPROVAL.

-End-