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INTRODUCED BY *Grasfield* ^{SENATE} *Swanson* ^{BILL NO. 203} *Hallyer*

BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES NATIONAL PARK SERVICE AND THE STATE OF MONTANA FOR THE BIGHORN CANYON NATIONAL RECREATION AREA AND THE LITTLE BIGHORN BATTLEFIELD NATIONAL MONUMENT; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY PROVISION."

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

NEW SECTION. **Section 1. United States National Park Service -- Montana compact ratified.** The compact entered into by the state of Montana and the United States National Park Service and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing] is ratified. The compact is as follows:

WATER RIGHTS COMPACT
STATE OF MONTANA
UNITED STATES OF AMERICA, NATIONAL PARK SERVICE

This Compact is entered into by the State of Montana and the United States of America to settle for all time any and all claims to water for certain lands administered by the National Park Service within the State of Montana at the time of the effective date of this Compact.

A Compact between the State of Montana and the United States of America regarding water rights for National Park Service lands was executed January 31, 1994. The parties were unable to finalize agreement on quantification of the water rights for Bighorn Canyon National Recreation Area and the Little Bighorn Battlefield National Monument prior to the completion of the Compact executed January 31, 1994. This Compact is the final agreement regarding the water rights attributable to these two NPS Units.

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RECITALS

WHEREAS, in 1979 the United States filed in the United States District Court for the District of Montana several actions to adjudicate, inter alia, its rights to water with respect to Glacier National Park, see United States v. Aageson, No. CV-79-21-GF; United States v. Abell, No. CV-79-33-M; and United States v. AMS Ranch, Inc., No. CV-79-22-GF.

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

WHEREAS, 85-2-703, MCA, provides that the state may negotiate settlement of claims by the federal government to non-Indian reserved waters within the State of Montana;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of the existing National Park Service units in the State of Montana;

WHEREAS, the United States, in quantifying its reserved water rights recognizes the need to accommodate the interests of the state and its citizens by providing for the development and use of water in the vicinity of the Park units to the extent that it is possible to do so without materially affecting the rights and interests of the United States;

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute this Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. §§ 516-17 (1968);

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

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

ARTICLE I
DEFINITIONS

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

(1) "Abstract" means the copy of the document entitled "Abstract of National Park Service Water

1 Rights - BCNRA and LBBNM" referenced in this compact as Appendix 2.

2 (2) "Bighorn Canyon National Recreation Area" or "BCNRA" means those lands located in Montana
3 that were acquired pursuant to, or designated as such by Act of October 15, 1966, 80 Stat. 913.

4 (3) "Bureau" means the Montana Bureau of Mines and Geology or its successor.

5 (4) "Category 1 stream" means a stream that headwaters on the reserved land administered by the
6 National Park Service.

7 (5) "Category 1a stream" means a stream that headwaters on the reserved land administered by
8 the National Park Service and which, in part, carries water that drains non-federal land within the
9 boundaries of the same reserved land.

10 (6) "Category 3 stream" means a stream that headwaters in Montana outside the reserved land
11 administered by the National Park Service that flows into the reserved land and is the source for
12 consumptive use water rights recognized under state law on the effective date of this Compact.

13 (7) "Category 4 stream" means a stream that is treated individually due to special circumstances.

14 (8) "Consumptive use" means use of surface water not considered a non-consumptive use under
15 (18) and use of groundwater which is shown to be hydrologically connected to surface water pursuant to
16 Article II.

17 (a) "Current consumptive use", when referring to water rights recognized under state law only,
18 means all consumptive use water rights recognized under state law with a priority date on or before the
19 effective date of the compact.

20 (b) "Future consumptive use", when referring to a water right recognized under state law only,
21 means a consumptive use water right recognized under state law with a priority date after the effective date
22 of the compact.

23 (9) "Credible information" means credible evidence sufficient to support a prima facie basis for the
24 theory asserted.

25 (10) "Crow Tribal Water Rights" means those senior reserved water rights and any aboriginal water
26 rights held by the United States in trust for the Crow Tribe which are being quantified as part of the general
27 adjudication of water rights in Montana.

28 (11) "Curtailement" means action pursuant to this Compact to reduce or shut-off diversions by a
29 junior water user to satisfy the senior instream flow right of the National Park Service.

30 (12) "Department" means the Montana Department of Natural Resources and Conservation or its

1 successor.

2 (13) "Effective date of this Compact" means the date of the ratification of the Compact by the
3 Montana legislature, written approval by the United States Department of the Interior, or written approval
4 by the United States Department of Justice, whichever is later.

5 (14) "Groundwater" means water that is beneath the ground surface.

6 (15) "Hydrologically connected", for the purposes of Articles II and III, means groundwater that is
7 connected to surface water such that appropriation at the proposed rate will cause a calculable reduction
8 in surface water flow. A "calculable reduction in surface water flow" means a theoretical reduction based
9 on credible information as opposed to a measured reduction.

10 (16) "Instream flow" means the water that the parties agree shall remain in the stream in
11 satisfaction of the United States' reserved water right for the purposes of the reserved land.

12 (17) "Little Bighorn Battlefield National Monument" or "LBBNM" means those lands located in
13 Montana that were acquired pursuant to or withdrawn and reserved by Presidential Proclamation of
14 December 7, 1886, and by Act of March 22, 1946, 60 Stat. 59.

15 (18) (a) "Non-consumptive use" when applied to a mining or hydropower use for which a water
16 right is recognized under state law with a priority date after the effective date of this compact, means an
17 appropriation that does not cause a net loss in the surface source of supply, and where substantially all of
18 the diverted water becomes return flow with little or no delay between the time of diversion and the time
19 of return, and without adverse effect on the quantity or quality of water necessary to fulfill the purposes
20 of the reserved land.

21 (b) "Non-consumptive use" when applied to a water right recognized under state law other than
22 a mining or hydropower use with a priority date after the effective date of this compact, or a water right
23 recognized under state law with a priority date on or before the effective date of this compact, means a
24 water right considered to be non-consumptive by the decree, permit or law authorizing the use.

25 (19) "Parkman Sandstone" means the unit as defined in Moulder, E.A., Klug, M.F., Morris, D.A.,
26 and Swenson, F.A. (1960) "Geology and Ground-Water Resources of the Lower Little Bighorn River Valley
27 Big Horn County, Montana," USGS Water Supply Paper 1487, where it occurs along the Little Bighorn River
28 and its tributaries between the Montana-Wyoming line and the Little Bighorn Battlefield National Monument.

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

30 (21) "Person" means an individual, association, partnership, corporation, state agency, political

1 subdivision, or any other entity, but does not include the United States.

2 (22) "Quaternary Alluvium" means the unit as defined in Moulder, E.A., Klug, M.F., Morris, D.A.,
3 and Swenson, F.A. (1960) "Geology and Ground-Water Resources of the Lower Little Bighorn River Valley
4 Big Horn County, Montana," USGS Water Supply Paper 1487, where it occurs along the Little Bighorn River
5 and its tributaries between the Montana-Wyoming line and the Little Bighorn Battlefield National Monument.

6 (23) "Quaternary Terrace Deposits" means the unit as defined in Moulder, E.A., Klug, M.F., Morris,
7 D.A., and Swenson, F.A. (1960) "Geology and Ground-Water Resources of the Lower Little Bighorn River
8 Valley Big Horn County, Montana," USGS Water Supply Paper 1487, where it occurs along the Little
9 Bighorn River and its tributaries between the Montana-Wyoming line and the Little Bighorn Battlefield
10 National Monument.

11 (24) "Recognized under state law" when referring to a water right or use means a water right or
12 use protected by state law, but does not include state recognition of a federal or tribal reserved water right.

13 (25) "Return flow" means the portion of water diverted from a source that is returned to the same
14 source, at or near the point of diversion.

15 (26) "State" means the State of Montana and all officers, agents, departments, and political
16 subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent, "state" means
17 the Director of the Montana Department of Natural Resources and Conservation or his or her designee.

18 (27) "Tributary to" means surface water that originates in the same hydrologic basin or subbasin
19 as the stream referred to and which contributes water to the same stream.

20 (28) "United States" means the federal government and all officers, agencies, departments and
21 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than
22 service in litigation, "United States" means the Secretary of the Department of the Interior, or his or her
23 designees.

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ARTICLE II

26

IMPLEMENTATION

27

28 A. Abstract:

29 Concurrent with this Compact, the parties prepared an Abstract, a copy of which is referenced as
30 Appendix 2, which is a specific listing of all of the United States' water rights for Bighorn Canyon National

1 Recreation Area and the Little Bighorn Battlefield National Monument that are described in this Compact
2 and quantified in accordance with this Compact. The parties prepared the Abstract to comply with the
3 requirements for a final decree as set forth in 85-2-234(4) and (7), MCA, and in an effort to assist the state
4 courts in the process of entering decrees accurately and comprehensively reflecting the rights described
5 in this Compact. The rights specified in the Abstract are subject to the terms of the Compact. In the event
6 of a discrepancy between a right listed in the Abstract and that same right as quantified in accordance with
7 Articles II and III of the Compact, the parties intend that the quantification in accordance with Articles II
8 and III of this Compact shall be reflected in a final decree.

9 B. Method of Allocation of Water on Category 3 and 4 Streams and of Determining Rights Subject
10 to Curtailment on the Little Bighorn River and its Tributaries:

11 This section explains the method of quantification of the reserved instream flow water rights of the
12 United States for Category 3 and 4 streams and the method of calculating the quantity of consumptive use
13 pursuant to state law within a basin to which the United States agrees to subordinate its reserved instream
14 flow water rights. The method set forth in this section shall be used to determine whether the limits on
15 consumptive use pursuant to state law set forth in Article III have been reached and whether a water right
16 on the Little Bighorn River and its tributaries upstream from the LBBNM shall be subject to curtailment to
17 satisfy the reserved instream flow water right for LBBNM. Addition to the Abstract of a reserved instream
18 flow water right on a stream inadvertently omitted by the parties or reclassification of a stream due to a
19 water right recognized under state law and inadvertently omitted by the parties shall be consistent with this
20 section and shall not be deemed a modification of this Compact.

21 1. Allocation to Instream Flow:

22 With the exception of the reserved instream flow rights for LBBNM, the allocation of water to
23 instream flow on Category 3 and 4 streams is arrived at using the following method as explained in general
24 terms:

25 a. The United States' reserved water right for instream flow includes the entire flow of that stream
26 within the State of Montana at the point where the stream flows over or forms the boundary of the
27 specified reserved land after: (1) all consumptive use water rights of any agency of the United States
28 recognized under federal or state law are satisfied; and (2) subordination of the reserved water right for
29 instream flow to water rights recognized under state law as set forth in and limited by Article III and more
30 specifically in the Abstract.

1 b. Actual use of water in Wyoming shall not diminish the quantity of water designated for
2 consumptive use pursuant to state law as set forth in Article III.

3 2. Method of Calculation of Consumptive Use Rights Recognized Under State Law:

4 To determine whether water is available for appropriation for consumptive use pursuant to state
5 law on Category 3 and 4 streams, and for determining whether the limit on subordination of the United
6 States' water rights to consumptive uses has been reached, the following provisions shall apply:

7 a. Tributary Water: The calculation of total consumptive use on a Category 3 or 4 stream shall
8 include all current and future consumptive use, recognized under state law, of surface water tributary to
9 the stream to the point it enters the reserved land. The limits on total consumptive use on a Category 4
10 stream that forms the boundary of the reserved land shall include all current and future consumptive use
11 recognized under state law, of surface water tributary to the stream to the most downstream point that the
12 stream forms the boundary of the reserved land.

13 b. Groundwater:

14 The following sections i. and ii., shall apply to BCNRA. The following sections i., and iii., shall apply
15 to LBBNM.

16 i. Within 2 years after the effective date of this Compact, the Department, in consultation with the
17 United States, is directed to promulgate rules as may be necessary to implement Article II, section B.2.b.
18 Said rules shall not alter the rights or obligations of the parties hereto.

19 ii. The calculation of total future consumptive use on Category 3 or 4 streams at BCNRA shall
20 include appropriations of groundwater as follows:

21 (1) The calculation of total future consumptive use shall not include appropriation of groundwater
22 by means of a well or developed spring with an appropriation of 35 gallons per minute (gpm) or less that
23 does not exceed 10 acre feet per year (afy).

24 (2) The limit on total consumptive use shall not include an appropriation of groundwater by means
25 of a well or developed spring with a permit amount in excess of 35 gpm or with a volume of use greater
26 than 10 afy, including a combined appropriation from the same source from two or more wells or developed
27 springs that exceeds these limitations, unless the United States shows by a preponderance of the evidence
28 that the proposed appropriation is hydrologically connected to surface water tributary to the reserved
29 portion of a Category 3 or 4 stream. If the United States meets this burden, the Department shall include
30 the appropriation in the calculation of total consumptive use.

1 (a) The Department shall provide notice of the proposed appropriation to the United States
2 concurrent with notice pursuant to 85-2-307, MCA.

3 (b) Within 60 days of the mailing of notice, the United States may file an objection to the proposed
4 appropriation on the basis that it is hydrologically connected to surface water.

5 (c) If the proposed appropriation is determined not to be hydrologically connected to surface water,
6 or if the limit on consumptive use has not been reached, the Department may issue a permit in accordance
7 with state law and the applicant may complete the appropriation.

8 iii. Determination of whether an appropriation of groundwater after the effective date of the this
9 Compact shall be subject to a curtailment to satisfy the instream flow water right at LBBNM shall be made
10 as follows:

11 (1) Groundwater appropriations subject to curtailment shall not include an appropriation of
12 groundwater for stock or domestic purposes by means of a well or developed spring with an appropriation
13 of 35 gpm or less that does not exceed 10 afy.

14 (2) Groundwater appropriations subject to curtailment to satisfy the 51 cfs instream flow water
15 rights for LBBNM shall not include an appropriation of groundwater by means of a well or developed spring
16 with a permit amount in excess of 35 gpm or with a volume of use greater than 10 afy, including a
17 combined appropriation from the same source from two or more wells or developed springs that exceeds
18 these limitations, unless the United States shows by a preponderance of the evidence that the proposed
19 appropriation is hydrologically connected to the Little Bighorn River or its tributaries upstream from LBBNM.

20 (a) The Department shall provide notice of the proposed appropriation to the United States
21 concurrent with notice pursuant to 85-2-307, MCA.

22 (b) Within 60 days of the mailing of notice, the United States may file an objection to the proposed
23 appropriation on the basis that it is hydrologically connected to surface water.

24 (c) If the proposed appropriation is determined not to be hydrologically connected to surface water
25 the Department may issue a permit in accordance with state law and the applicant may complete the
26 appropriation.

27 (d) If the proposed appropriation is determined to be hydrologically connected to surface water the
28 Department may issue the permit in accordance with state law with notice that the appropriation is subject
29 to curtailment to satisfy the instream flow water right of the LBBNM and the applicant may complete the
30 appropriation.

1 (3) Groundwater appropriations subject to curtailment to satisfy the 950 cfs instream flow water
2 rights for LBBNM shall not include an appropriation of groundwater by means of a well or developed spring
3 with a permit amount in excess of 35 gpm or with a volume of use greater than 10 afy, including a
4 combined appropriation from the same source from two or more wells or developed springs that exceeds
5 these limitations, unless the United States shows by a preponderance of the evidence that the proposed
6 appropriation is hydrologically connected to the Little Bighorn River or its tributaries upstream from LBBNM
7 and the appropriation is completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the
8 Parkman Sandstone.

9 (a) The Department shall provide notice of the proposed appropriation to the United States
10 concurrent with notice pursuant to 85-2-307, MCA.

11 (b) Within 60 days of the mailing of notice, the United States may file an objection to the proposed
12 appropriation on the basis that it is hydrologically connected to surface water and the proposed
13 appropriation is to be completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the Parkman
14 Sandstone.

15 (c) If the proposed appropriation is determined not to be hydrologically connected to surface water
16 or not to be completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the Parkman Sandstone
17 the Department may issue a permit in accordance with state law and the applicant may complete the
18 appropriation.

19 (d) If the proposed appropriation is determined to be hydrologically connected to surface water and
20 to be completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the Parkman Sandstone the
21 Department may issue the permit in accordance with state law with notice that the appropriation is subject
22 to curtailment to satisfy the instream flow water right of the LBBNM and the applicant may complete the
23 appropriation.

24 c. Abandonment: When a consumptive use right recognized under state law on a Category 3 or
25 4 stream is abandoned and such abandonment causes water to become available for appropriation within
26 the limits of the total amounts of water allocated to consumptive use rights recognized under state law
27 established for that stream by Article III, the increment of water below that limit is available for new
28 appropriation in accordance with state law and this Compact. State law governs the issue of whether an
29 abandonment has occurred.

30 d. Non-Consumptive Use: The limit on total consumptive use rights recognized under state law

1 shall not include non-consumptive uses as defined by this Compact.

2 C. Subordination of Instream Flow Right:

3 1. The United States agrees to subordinate its reserved water right for instream flow to
4 consumptive uses calculated according to this Article in a manner that is specific to each stream on which
5 a reserved water right is described. This subordination is set forth for each stream in Article III. Curtailment
6 of uses to which the reserved water rights described in this Compact have not been subordinated during
7 periods of low flow shall proceed on the basis of priority and may be initiated in a state or federal court of
8 competent jurisdiction pursuant to Article II, sections I and K.

9 2. The reserved water rights described in this Compact shall not be subordinate to water rights
10 which were forfeited by § 85-2-212 as interpreted in In the Matter of the Adjudication of the Water Rights
11 within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), nor shall any claimant of such
12 forfeited water right have standing, based solely on such claimed right, to object to this Compact or any
13 reserved water right described in this Compact, provided that water allocated to future consumptive use
14 pursuant to Article III of this Compact may be used to satisfy claims filed pursuant to 85-2-221(3), MCA
15 in order of priority.

16 D. Location of Instream Flow Rights: The United States' reserved water rights for instream flow
17 apply to the portion of the Categories 1 through 4 streams specified in this Compact that flow over or form
18 the boundary to reserved land administered by the National Park Service.

19 E. Change in Instream Flow Right: Except as provided in Article II, section J.2.b., the water rights
20 dedicated to instream flow by this Compact shall not be changed to any other use.

21 F. Prohibition on Future Impoundments: No new impoundments may be permitted on the mainstem
22 of the Little Bighorn River in Montana upstream of the LBBNM after the effective date of this Compact.
23 This prohibition shall include impoundments that are exempt from permit requirements under state law.
24 Reclamation, repair or rehabilitation of an existing impoundment shall not be considered a new
25 impoundment, provided that without the consent of the United States, reclamation, repair or rehabilitation
26 shall not cause the impoundment to exceed the original constructed capacity of the impoundment. This
27 prohibition shall not apply to impoundments constructed to store a senior Tribal water right or to implement
28 settlement of litigation regarding quantification of a Tribal water right.

29 G. Management to Maximize Use by Montana Water Users of the Water Allocated to Consumptive
30 Use Rights Recognized Under State Law: If any type of conservation or water distribution plan which

1 includes measurement of actual water use, including use pursuant to rights recognized under state law with
2 a priority date before the effective date of this compact, is adopted pursuant to state law, the limits
3 established for consumptive use appropriated pursuant to state law shall apply to actual measured use, not
4 permitted and decreed or claimed rights, provided that records of actual use be made available to the United
5 States on request and provided further that, such plan shall not diminish the reserved water right of the
6 United States as described in this Compact.

7 H. Basin Closure

8 1. Except as provided in Article II, section B.2.c., in the following drainage basins upstream of the
9 portion of the stream for which a reserved water right for instream flow is described in this Compact, the
10 Department shall not process or grant an application or registration for a permit to appropriate or to reserve
11 water for future consumptive use as defined by this Compact once the limits on consumptive use tabulated
12 in Article III and set forth more specifically in the Abstract are reached:

13 Big Horn Canyon National Recreation Area:

14 Dry Head, Deadman, Davis and Layout Creeks

15 2. If a temporary or permanent basin closure is enacted under state law for a drainage basin or
16 subbasin for which future consumptive water use is limited under this Compact, the most restrictive
17 measures applicable to consumptive use of surface or groundwater shall control.

18 I. Enforcement of Water Right

19 1. The United States, the state, or the holder of a water right recognized under state law, may
20 petition a state or federal court of competent jurisdiction for relief when a controversy arises between the
21 United States' reserved water right described by this Compact, and a holder of a water right recognized
22 under state law. Resolution of the controversy shall be governed by the terms of this Compact where
23 applicable, or to the extent not applicable, by applicable state or federal law.

24 2. The United States agrees that a water commissioner appointed by a state or federal court of
25 competent jurisdiction, or other official authorized by future changes in law, may enter a federal reservation
26 for which a water right is described in this Compact for the purpose of data collection, including the
27 collection of information necessary for water distribution on or off the federal reservation, and to inspect
28 structures for the diversion and measurement of water described in this Compact for consumptive use and
29 for the measurement of instream flow. The terms of entry shall be as specified in an order of a state or
30 federal court of competent jurisdiction.

1 3. The Department or the Bureau may enter a federal enclave for which a reserved water right is
2 described in this Compact, at a reasonable hour of the day, for the purposes of data collection on water
3 diversion and stream flow or inspection of devices maintained by the United States pursuant to this
4 Compact. The Department or Bureau shall notify the United States by certified mail or in person, at least
5 24 hours prior to entry.

6 4. The United States may request an investigation by the Department of a diversion located
7 upstream of the reserved portion of a stream for which a reserved water right is described in this Compact.
8 The Department may investigate. If an investigation occurs, the United States may accompany the
9 Department.

10 5. The United States shall maintain structures, including wellhead equipment and casing, for the
11 diversion and measurement of water authorized for consumptive use by this Compact. The United States
12 shall maintain the devices it deems necessary for enforcement of its reserved water right for instream flow
13 described in this Compact. The United States shall install and maintain a rated gauge to measure instream
14 flows in the Little Bighorn River. The gauge on the Little Bighorn River shall be on the reach of the river
15 which forms the boundary of the LBBNM, the exact location of which shall be at the discretion of the NPS.
16 The NPS shall resurvey the channel cross section as necessary to maintain gauge accuracy, but in any
17 event not less frequently than every three (3) years. The United States may not seek curtailment of junior
18 water uses unless the channel has been resurveyed within three (3) years of the date on which curtailment
19 is sought.

20 6. A person who violates or refuses or neglects to comply with the provisions of this Compact,
21 an order of the Department pursuant to this Compact, or an action by the Bureau pursuant to this Compact
22 is subject to the penalties provided by state law.

23 7. For any appeal to state court of an administrative decision authorized by this Compact, venue
24 shall be the First Judicial District in Helena and the review shall be conducted according to the procedures
25 for judicial review of contested cases under the Montana Administrative Procedures Act, Title 2, Chapter
26 4, of the Montana Code Annotated.

27 8. In any contested case proceeding held under the Montana Administrative Procedures Act, Title
28 2, Chapter 4, of the Montana Code Annotated, pursuant to this Compact, the common law and statutory
29 rules of evidence shall apply only upon stipulation of all parties to a proceeding.

30 J. Change in Use

1 1. Change in Use Defined: For the purpose of this Article, the following actions affecting the use
2 of a reserved water right for consumptive use described in this Compact shall be considered a change in
3 use:

4 a. An action that alters type of use, place of use, point of diversion, place or means of storage,
5 period of use or point of return flow that will:

6 i. increase the net depletion on a source; or

7 ii. adversely affect water quality at the point the reserved water right ends; or

8 iii. result in a change in point of diversion or point of return flow relative to a holder of a water right
9 recognized under state law; or

10 iv. change the point of diversion from groundwater to surface water, or from surface to
11 groundwater; or

12 v. in any other manner, adversely affects the reasonable exercise of a water right that is recognized
13 under state law.

14 b. The exercise of a reserved water right to future consumptive use as authorized by this Compact
15 shall not be considered a change in use.

16 2. Instream flow: Reserved water rights specified in this Compact for instream flow shall not be
17 subject to change to any other use, provided that:

18 a. the emergency use of water for fire suppression as provided for in Article III.C. shall not be
19 deemed a change or alteration in use, or violation of a reserved water right for instream flow; and

20 b. the United States may seek to appropriate water for a consumptive use on a source for which
21 no consumptive use is described in this Compact by seeking a permit under state law for consumptive use,
22 provided that the water right granted shall not be counted against the limits on allocation for state
23 consumptive use water rights imposed by this Compact. The water right so acquired shall be administered
24 in accordance with Article V, section B.

25 3. Consumptive uses: The United States may take action affecting the use of its consumptive use
26 water rights provided that (1) the action shall be in fulfillment of the purposes of the reservation; (2) the
27 total use shall not exceed the amount described in this Compact; and (3) the action shall not adversely
28 affect a water right that is recognized under state law.

29 4. Notice of intent to change use: At least 180 days prior to a change in use, the United States
30 agrees to provide notice to the Department.

- 1 a. The notice shall contain the facts pertinent to the proposed change including, where applicable:
- 2 i. The location of a new point of diversion.
- 3 ii. The new source of water.
- 4 iii. The new means of diversion.
- 5 iv. If a well is involved, the depth and locations of the old and new well.
- 6 v. The new use and its impact on actual consumption and water quality.
- 7 vi. If the change includes storage, the location, period and capacity of the storage facility.
- 8 vii. An estimate of when the change will be effective.
- 9 viii. A map showing the existing system and the proposed change.
- 10 b. At least 120 days prior to the proposed change, the United States agrees to publish the notice
- 11 required by Article II, section J.4.a. with a statement that within 60 days following publication or service
- 12 of notice, relief may be sought in a state or federal court of competent jurisdiction, once in a newspaper
- 13 of general circulation in the area of the source, and to serve the notice by first-class mail on interested and
- 14 potentially affected persons as identified by the records of the Department, including:
- 15 i. an appropriator of water or applicant for or holder of a permit who, according to the records of
- 16 the Department, may be affected by the proposed appropriation;
- 17 ii. a purchaser under contract for deed that, according to the records of the Department, may be
- 18 affected by the proposed appropriation;
- 19 iii. any public agency that has reserved water in the source recognized under state law; and
- 20 iv. a federal agency or Tribe that claims a reserved water right or other water rights in the source.
- 21 c. On request by the United States, the Department shall provide the information contained in its
- 22 records identifying any person potentially affected by the proposed change. The United States agrees to
- 23 reimburse the Department for the expense of providing this information.
- 24 d. In the event that future changes in state law establish a method of notice of a proposed change
- 25 in use to interested and potentially affected persons other than by first-class mail, the United States may
- 26 alter the method of notification accordingly.
- 27 e. Prior to the actual change, the United States agrees to provide the Department with proof of
- 28 notice by affidavit.
- 29 5. Objection to proposed change: Within 60 days following the notice pursuant to Article II,
- 30 section J.4.b., the Department or any other person may bring an action against the proposed change in use

1 in a state or federal court of competent jurisdiction, if a property right, water right, or other interest
2 protected under state law would be adversely affected, or if the proposed change is not in compliance with
3 this Compact.

4 6. Notice of Change:

5 a. The United States agrees to notify the state and provide a copy of the final order within 60 days
6 of its entry by a state or federal court of competent jurisdiction resolving any objections to the change in
7 use of a federal reserved water right described in this Compact.

8 b. The United States agrees to provide the state with notice of completion of the change within
9 60 days after the completion.

10 7. Reporting by the United States: For any action affecting the use of a consumptive right whether
11 or not such action is deemed a change in use, the United States agrees to provide the following information
12 to the Department:

13 a. Well log: For a use that includes the drilling of a well or enlargement of an existing wellbore,
14 the United States agrees to provide a well log to the state within 60 days of the completion of the well.

15 b. Emergency Use: Within 60 days after the commencement of a temporary emergency use for
16 fire suppression described in Section III.C. of this Compact, the United States agrees to notify the state of
17 the use to which the water was put, the dates of use, and the estimated amount of water used.

18 c. Annual Report: Between April 1 and May 1 of each year, the United States agrees to provide
19 the Department with a report on (1) actions during the preceding year affecting the use of a consumptive
20 use right described in this Compact, regardless of whether the action is deemed a change in use pursuant
21 to Article II, section J.1.; (2) the initiation of new uses that were completed during the preceding year; and
22 (3) any data and documents generated or received by the National Park Service during the preceding year
23 on measurement of instream flow on a Category 3 or 4 stream.

24 8. Reporting by the State: Between December 1 and December 31 of each year, the Department
25 shall provide the United States with a report of: (1) changes in use during the preceding year, as defined
26 by state law, of water rights upstream of or within the boundaries of reserved land for which a reserved
27 water right is described in this Compact; (2) new permits issued during the preceding year according to the
28 records of the Department; and (3) any data and documents generated by the Department during the
29 preceding year on the measurement of streamflows, diversions and well use on or tributary to Category 3
30 or 4 streams.

1 K. Administration of Little Bighorn Instream Flow

2 This section governs the administration of instream flow rights of the United States on the Little
3 Bighorn River described in Article III. section B.3., in relation to junior water rights initiated after the
4 effective date of this Compact to which the United States has not subordinated and which are not a part
5 of the Crow Tribal Water Rights. Nothing in these provisions, or in this Compact, regarding administration
6 affects or in any way impairs any ability or authority of the Crow Tribe to administer, regulate or manage
7 any water rights within the boundaries of the Crow Indian Reservation.

8 1. For purposes of administering the instream flow water right of the United States described in
9 Article III. section B. 3. the United States shall establish and maintain a discharge gauge at the LBBNM
10 gauge site. The United States shall keep a record of daily flows for the period from March 1 through June
11 30 of each year in which the United States seeks curtailment of junior water rights.

12 2. The United States may seek curtailment to enforce its 950 cfs instream flow water right,
13 described in Article III. section B.3.b., at the LBBNM gauge site any time from May 1 through June 30.
14 The decision to seek curtailment shall be initiated by the NPS and at the NPS's discretion.

15 a. A decision to seek curtailment to enforce the 950 cfs instream flow water right shall be based
16 on a determination that the flow at the LBBNM gauge site plus claimed or permitted appropriations by
17 non-subordinated junior water users equals 950 cfs or more.

18 b. Once curtailment is sought and confirmed as set forth in Article II. section K.3, it may last for
19 up to 15 consecutive days, or through June 30, whichever occurs first, provided, however, that the 15
20 days shall be reduced by subtracting the number of days between March 1st and the date of confirmation
21 of curtailment that the flow at the LBBNM gauge site has equalled or exceeded 950 cfs

22 c. Any curtailment based upon the 950 cfs water right shall be limited to direct surface diversions
23 from the Little Bighorn River and its tributaries, and wells completed in the Quaternary Alluvium, Quaternary
24 Terrace Deposits, or the Parkman Sandstone, as described in Article II. section B.2.b.iii.(3).

25 3. Notice by NPS that it seeks curtailment to enforce the 950 cfs instream flow water right shall
26 be by either written or verbal notice to the appropriate DNRC office. The NPS shall use its best efforts to
27 maintain contact with the DNRC beginning May 1st of each year to provide advance warning of stream flow
28 conditions.

29 a. Upon receipt of notice from the NPS that the United States requests curtailment to enforce the
30 950 cfs instream flow water right, the DNRC shall, within 24 hours, verify actual diversions by

1 non-subordinated junior water users and confirm that the sum of flow at the LBBNM and actual diversions
2 by non-subordinated junior water users equals or exceeds 950 cfs. If the DNRC determines that the actual
3 diversions are insufficient to bring the flow at the LBBNM gauge site to 950 cfs, it shall not proceed with
4 curtailment. If a decision is made not to proceed with curtailment, the DNRC shall notify the NPS the same
5 day. After notification, the NPS may again seek curtailment beginning the following day if conditions of
6 flow and time of year meet the conditions set forth in Article II. section K.2.

7 b. If the DNRC proceeds with curtailment to enforce the 950 cfs water right, the DNRC shall,
8 without delay, shut off non-subordinated junior water uses in reverse order of priority to the extent
9 necessary to bring the flow at the LBBNM gauge site to 950 cfs, provided that, DNRC has the discretion
10 to forgo curtailment of a particular water right if it determines that curtailment of that water right to satisfy
11 the 950 cfs instream flow right would be futile.

12 c. Should flow at the LBBNM gauge site exceed 950 cfs at any time during curtailment, the DNRC
13 may reopen diversions in order of priority until 950 cfs is reached. Should the flow at the LBBNM gauge
14 site drop below 950 cfs at any time during the curtailment, non-subordinated junior water uses shall remain
15 shut off provided that, if the NPS reasonably determines the flow at the LBBNM gauge site is not likely to
16 come back up to 950 cfs during the remainder of the curtailment period, it may consent to end the
17 curtailment.

18 4. Notice by NPS that it seeks curtailment to enforce the 51 cfs instream flow water right
19 described in Article III. section B.3.a., shall be by either written or verbal notice to the appropriate DNRC
20 office. Upon receipt of notice from the NPS that the United States requests a curtailment to enforce the
21 51 cfs instream flow water right, the DNRC shall, within 24 hours, verify actual diversions by
22 non-subordinated junior water users. If diversions are being made by non-subordinated junior water users,
23 the DNRC shall, without delay, shut off non-subordinated junior water uses in order of priority to the extent
24 necessary to bring the flow at the LBBNM gauge site to 51 cfs, provided that, DNRC has the discretion to
25 forgo curtailment of a particular water right if it determines that curtailment of that water right to satisfy
26 the 51 cfs instream flow right would be futile.

27 5. All permits within the Little Bighorn River Basin upstream of the LBBNM gauge site with a priority
28 date after the effective date of this Compact shall be conditioned on the prior right of the NPS for 950 cfs
29 instream flow water right at the LBBNM during May and June, and for the 51 cfs instream flow water right
30 during any portion of the year, and on the authority of DNRC to curtail use to satisfy the instream flow

1 right.

2 6. All diversions from the Little Bighorn River or its tributaries above LBBNM with a priority date
3 after the effective date of this Compact, shall have the duty to establish and maintain a controllable
4 headgate and an adequate measuring device and shall also be required to maintain a record of daily water
5 diversions, including noting the number of hours for which diversions are made for each day and the flow
6 rate at which water is diverted.

7 7. DNRC and NPS shall work together to develop a quantitative prediction relationship between
8 the flow at the LBBNM gauge site, diversions by non-subordinated junior water users, and the prediction
9 of curtailment requirements.

10 8. Either party has the right to petition a court of competent jurisdiction for administration of water
11 rights or for appointment of a water commissioner should cooperative administration not be proceeding as
12 planned or should cooperative administration become burdensome. Any water commissioner shall enforce
13 the curtailment as described in this Compact. Exhaustion of administrative remedies pursuant to this article
14 is not a prerequisite to any such suit.

15

16

ARTICLE III

17

WATER RIGHT

18

19 The parties agree that the following water rights are in settlement of the reserved water rights of
20 the United States for the reservations described. The parties to this agreement recognize that the water
21 rights for these NPS Units are junior to Crow Tribal Water Rights. All reserved water rights described in
22 this Article are subject to Article V, section A.

23

A. Bighorn Canyon National Recreation Area

24

1. Priority Date: The United States has a priority date of October 15, 1966 for the water rights
25 described in this Compact for Bighorn Canyon National Recreation Area. The United States recognizes that
26 its water rights for the BCNRA are junior in priority to Crow Tribal Water Rights.

27

2. Consumptive Use: The United States has water rights for current and future consumptive
28 use for the purposes of the Bighorn Canyon National Recreation Area (BCNRA) as set forth in the following
29 Table. The period of use shall be from January 1 through December 31. The source and place of use shall
30 be as set forth more specifically in the Abstract.

TABLE 1

United States National Park Service
 Bighorn Canyon National Recreation Area Consumptive Use

Place of Use	Total Volume (ac-ft)	Maximum Flow Rate (gpm)
Fort Smith Visitor center	17.6	110
Ok-A Beh/Marina	6.9	35
Grapevine Creek Overflow Campground	12.5	110
Barry's Landing, Trail Creek, Chain Canyon	29.3	180
Bighorn River Ranch	4.7	35
Layout Creek Ranger Station, Sorenson Ranch	140.4	230
Lockhart Ranch	25.6	110
Hillsboro Site	11.0	230
Stock and Wildlife Watering	3.5	
Total Volume of Use:	<u>251.5 acre-feet</u>	

3. Instream Flow

The United States has water rights for instream flow in the streams which flow over the land of Bighorn Canyon National Recreation Area. These water rights for instream flow are quantified and defined as follows:

a. Category 1a:

i. Identification: The following streams are designated as "Category 1a": North Fork Trail Creek, South Fork Trail Creek, and Trail Creek.

ii. Instream Flow: The United States has a water right for instream flow on the Category 1a streams where they enter the BCNRA in the amount of the entire flow of the streams, less (1) any United

1 States' consumptive use rights described in this Compact and any Crow Tribal Water Rights; and (2) all
 2 water rights appurtenant to nonfederal land within the boundaries of BCNRA recognized under state law
 3 and having a priority date before the effective date of this Compact.

4 In the event that all non-federal land on a Category 1a stream is acquired by the United States for
 5 the purpose of addition to BCNRA, the stream may be reclassified as a Category 1 stream at the request
 6 of the United States.

7 b. Category 3:

8 i. Identification: The following streams are designated as "Category 3": Dry Head Creek, Deadman
 9 Creek, Davis Creek (aka Medicine Creek), and Layout Creek.

10 ii. The United States has a water right for instream flow on Category 3 streams in the amount of
 11 the entire flow of the streams, less any United States' consumptive use rights described in this Compact,
 12 and any Crow Tribal Water Rights, provided that, the instream flow right is subordinate to (1) the sum of
 13 all water rights recognized under state law with a priority date before the effective date of this Compact,
 14 plus any future consumptive use rights calculated according to Article II of this Compact until the limit on
 15 future consumptive use set forth in the table below is reached; (2) any use considered non-consumptive
 16 as defined by this Compact; (3) any use for instream stockwatering or for stockwater or domestic uses by
 17 wells or developed springs with an appropriation of 35 gpm or less that does not exceed 10 afy; and (4)
 18 any use of groundwater not included in the calculation of consumptive use according to Article II of this
 19 Compact.

20

21

TABLE 2

22

23

State Law Based

24

Total Future Consumptive Use Rights (cfs)

25

Tributary to the Reserved Portion of Category 3 Streams

26

27

Dry Head	Deadman	Davis	Layout
----------	---------	-------	--------

28

29

2.23*	1.59**	0.50	0.11
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30

1 * Or the amount of net depletions reasonably necessary to irrigate 20 acres, whichever is largest.

2 ** Or the amount of net depletions reasonably necessary to irrigate 35 acres, whichever is largest.

3

4 c. Category 4:

5 i. Identification: The following streams are designated as "Category 4": Pete's Canyon Creek, the
6 tributary of Deadman Creek that issues from Annerer Spring and flows across BCNRA land in the
7 N1/2NW1/4 Sec. 8, T8S, R29E, M.P.M.

8 (1) The United States has a water right for instream flow on Pete's Canyon Creek in the amount
9 of one-half (1/2) of the naturally occurring flow that originates from Pete's Spring.

10 (2) The United States has a water right for the tributary of Deadman Creek, in the amount of one
11 (1) gallon per minute.

12 4. Springs

13 The United States has a water right for instream flows for the following springs identified by
14 location, in the amount of the entire flow of the springs, less any consumptive use rights of the United
15 States described by this Compact.

16

17 Sorenson Spring Sec. 09, T9S, R28E

18 Lockhart #1 Spring Sec. 13, T8S, R28E

19 Lockhart #2 Spring Sec. 13, T8S, R28E

20 Hillsboro Spring Sec. 36, T8S, R28E

21

22 This list of springs may be modified based on field verification of any spring located entirely within
23 the boundaries of the BCNRA that is not the source of a water right recognized under state law. Springs
24 that occur on Crow Reservation lands are excluded from any water rights for springs.

25 B. Little Bighorn National Battlefield

26 1. Priority Date

27 a. The United States has a priority date of December 7, 1886 for current and future consumptive
28 uses under the water rights reserved for the irrigation, maintenance and administration of the Little Bighorn
29 Battlefield National Monument. The United States recognizes that its water rights for the BCNRA are junior
30 in priority to Crow Tribal Water Rights.

1 instream flow water right is subordinate to:

2 (1) any water rights recognized under the state law with a priority date before the effective date
3 of this Compact;

4 (2) any instream stockwater use;

5 (3) any use of groundwater through wells or developed springs with an appropriation of 35 gpm
6 or less that does not exceed 10 afy;

7 (4) any use considered non-consumptive as defined by this Compact;

8 (5) any use of groundwater not included in the calculation of consumptive use according to Article
9 II of this Compact.

10 b. The United States has a reserved water right for instream flow in the amount of 950 cfs, with
11 a priority date of March 22, 1946, for 15 days during the period of May 1st through June 30th, subject
12 to the terms and conditions regarding implementation as set forth in Article II, section K, provided that,
13 the instream flow water right is subordinate to:

14 (1) any water rights recognized under the state law with a priority date before the effective date
15 of this Compact;

16 (2) any instream stockwater use;

17 (3) any use of ground water from wells completed outside of the Quaternary Alluvium or
18 Quaternary Terrace Deposits of the Little Bighorn River and its tributaries or the Parkman Sandstone;

19 (4) any use of groundwater from wells or developed springs completed in the Quaternary Alluvium,
20 Quaternary Terrace Deposits, or the Parkman Sandstone with an appropriation of 35 gpm or less that does
21 not exceed 10 afy;

22 (5) any use of groundwater from wells completed in the Quaternary Alluvium, Quaternary Terrace
23 Deposits, or the Parkman Sandstone with a permit amount in excess of 35 gpm or 10 afy that is not
24 determined to be hydrologically connected to the Little Bighorn River or its tributaries pursuant to Article
25 II, section B.2.b.iii. of this Compact;

26 (6) any use considered non-consumptive as defined by this Compact.

27 c. Instream Flow Rights Not Cumulative: The 950 cfs instream flow, when it occurs, is not
28 additive to the 51.0 cfs year-round minimum flow.

29 C. Emergency Fire Suppression

30 The use of water for emergency fire suppression benefits the public, and is necessary for the

1 purposes of the various Park reservations. The United States, may as part of its reserved water right, divert
2 water for fire suppression at all of the National Park Service Units as needed, and without a definition of
3 the specific elements of a recordable water right. Use of water for fire suppression shall not be deemed
4 an exercise of the United States' reserved water rights for consumptive use or a violation of its reserved
5 water rights for instream flow.

6 7 ARTICLE IV

8 GENERAL PROVISIONS

9 10 A. No Effect on Tribal Rights or Other Federal Reserved Water Rights:

11 1. Nothing in this Compact may be construed or interpreted in any manner to establish the nature
12 or extent of the rights to water or the right to administer water of an Indian Tribe in Montana, or of a water
13 right of an individual that is derivative of such right, or of the United States on behalf of such tribe or tribal
14 member. The relationship between the water rights of the National Park Service described herein and any
15 rights to water of an Indian Tribe in Montana, or of a water right of an individual that is derivative of such
16 right, or of the United States on behalf of such tribe or tribal member shall be determined by the rule of
17 priority. The United States specifically recognizes the seniority of the Crow Tribal Water Rights.

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

20 3. Nothing in this Compact may be construed or interpreted in any manner to establish the nature,
21 extent or manner of administration of the rights to water of any other federal agency or federal lands in
22 Montana other than those of the National Park Service. The exercise of a water right of the United States,
23 if any, to water for a consumptive use on land administered by the United States Forest Service upstream
24 of a water right to instream flow described in this Compact shall be allocated from the United States' share
25 for instream flow, not the state's share for consumptive use.

26 B. State Water Rights

27 Nothing in this Compact may limit the exclusive authority of the state, including the authority of
28 a water commissioner authorized by state law, to administer all current and future water rights recognized
29 under state law within and upstream of the reserved land covered by this Compact, provided that in
30 administration of those water rights in which the United States has an interest, such authority is limited to

1 that granted under federal law.

2 C. General Disclaimers

3 Nothing in this Compact may be construed or interpreted:

4 1. as a precedent for the litigation or the interpretation or administration of future compacts
5 between the United States and the state; or of the United States and any other state;

6 2. as a waiver by the United States of its right under state law to raise objections in state court
7 to individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code
8 Annotated, in the basins affected by this Compact;

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

11 4. to establish a precedent for other agreements between the state and the United States or an
12 Indian tribe;

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

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

16 7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of
17 the effective date of this Compact;

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

21 9. to affect in any manner the entitlement to or quantification of other federal water rights. This
22 Compact is only binding on the United States with regard to the water rights of the National Park Service,
23 and does not affect the water rights of any other federal agency.

24 10. to alter or amend any provisions of the Yellowstone River Compact, Act of October 30, 1951,
25 ch. 629, 65 Stat. 663 (1951).

26 D. Use of Water Right

27 Except as otherwise provided in this Compact, the rights of the United States described in this
28 agreement are federal reserved water rights. Non-use of all or a part of the federal reserved water rights
29 described in this Compact shall not constitute abandonment of the right. The federal reserved water rights
30 described in this Compact need not be applied to a use deemed beneficial under state law, but shall be

1 restricted to uses necessary to fulfill the purposes of the associated reserved land.

2 E. Appropriation Pursuant to State Law

3 Nothing in this Compact may prevent the United States from seeking a permit to appropriate water
4 under state law for use outside the boundaries of the federal reservations for which a water right is
5 described in this Compact, provided that, no such use may be included in the calculation of total current
6 or future consumptive use rights allocated to use pursuant to state law by this Compact, and provided
7 further that, a water right obtained in this manner shall be considered a state water right and shall be
8 administered pursuant to general provisions of state law as provided in Article II, section J.2.b.

9 F. Reservation of Rights

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

11 G. Severability

12 The provisions of this Compact are not severable, provided that for the purposes of Sec.
13 85-2-702(3) MCA, the water rights described in this Compact for the LBBNM and BCNRA Units shall be
14 considered as separate Compacts.

15 H. Multiple Originals

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

18 I. Notice

19 Unless otherwise specifically provided for in this Compact, service of notice required hereunder,
20 except service in litigation, shall be:

21 1. State: Upon the Director of the Department and such other officials as he or she may designate
22 in writing.

23 2. United States: Upon the Secretary of the Interior and such other officials as he or she may
24 designate in writing.

25

26

ARTICLE V

27

FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES

28

29 A. Binding Effect

30 1. The effective date of this Compact is the date of the ratification of this Compact by the Montana

1 legislature, written approval by the United States Department of the Interior, or written approval by the
2 United States Department of Justice, whichever occurs later. Once effective, all of the provisions of this
3 Compact shall be binding on:

4 a. The state and a person or entity of any nature whatsoever using, claiming or in any manner
5 asserting a right under the authority of the state to the use of water; and

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

9 2. Following the effective date, this Compact shall not be modified without the consent of both
10 parties. Either party may seek enforcement of this Compact in a court of competent jurisdiction. Attempt
11 to unilaterally modify this Compact by either party shall render this Compact voidable at the election of the
12 other party.

13 3. On approval of this Compact by a state or federal court of competent jurisdiction and entry of
14 a decree by such court confirming the rights described herein, this Compact and such rights are binding
15 on all persons bound by the final order of the court.

16 4. If an objection to this Compact is sustained pursuant to 85-2-702(3), MCA, this Compact shall
17 be voidable by action of and without prejudice to either party.

18 B. Disposition of Actions

19 Subject to the following stipulations and within one hundred eighty (180) days of the effective date,
20 the parties shall submit this Compact to an appropriate state court or courts having jurisdiction over this
21 matter in an action commenced pursuant to 43 U.S.C. § 666, for approval in accordance with state law
22 and for the incorporation of the reserved water rights described in this Compact into a decree or decrees
23 entered therein. The parties understand and agree that the submission of this Compact to a state court or
24 courts, as provided for in this Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and
25 does not expand the jurisdiction of the state court or expand in any manner the limited waiver or sovereign
26 immunity of the United States in the McCarran Amendment, 43 U.S.C. § 666 or other provision of federal
27 law.

28 1. Dismissal of Filed Claims: At the time the state courts approve the reserved water rights
29 described in this Compact and enter a decree or decrees confirming the rights described herein, such courts
30 shall dismiss, with prejudice, all of the water right claims specified in Appendix 3 to this Compact. If this

1 Compact fails approval or a reserved water right described herein is not confirmed, the specified claims shall
2 not be dismissed.

3 2. Disposition of Federal Suits: Within ninety (90) days of the issuance of a final decree or decrees
4 by the state courts approving this Compact and confirming the reserved water rights described herein, and
5 the completion of any direct appeals therefrom or the expiration of the time for filing such appeal, the
6 parties shall execute and file joint motions pursuant to Rule 41(a) Fed. R. Civ. P. to dismiss with prejudice
7 any claims made by the United States for LBBNM or BCNRA in federal court. This Compact may be filed
8 as a consent decree in those federal suits, only if, prior to the dismissal of the federal suits as provided in
9 this Article, it is finally determined in a judgment binding on the State of Montana that the state courts lack
10 jurisdiction over some or all of the reserved water rights described in this Compact. Within one year of
11 such judgment the United States agrees to commence such additional proceedings in the federal district
12 court for the District of Montana as may be necessary to judicially confirm the reserved water rights
13 described herein which are not included within an existing action.

14 C. Settlement of Claims

15 The parties intend that, with the exceptions noted herein, the water rights described in this
16 Compact are in full and final settlement of the water right claims for the reserved land administered by the
17 National Park Service in Montana on the effective date of this Compact. Pursuant to this settlement, by
18 which certain federal reserved water rights are expressly recognized by the state in this Compact and other
19 water rights claims of the United States are expressly retained in Article III, sections D. and F. in the
20 Compact for YNP, GNP and BBNM, the United States hereby and in full settlement of any and all claims
21 filed by the United States or which could have been filed by the United States for reserved land
22 administered by the National Park Service in Montana relinquishes forever all said claims on the effective
23 date of this Compact to water within the State of Montana for reserved land administered by the National
24 Park Service. The state agrees to recognize the reserved water rights described and quantified herein, and
25 shall, except as expressly provided for herein, treat them in the same manner as a water right recognized
26 by the state.

27 Specifically excepted from this final settlement of water rights are water rights Claims No.
28 43P-W-162354-00 and 43P-W-162348-00, both of which are claimed in the general adjudication of water
29 rights as state law based water rights. Claim No. 43P-W-162354-00 is for 0.75 cfs from the Big Horn
30 Canal for irrigation purposes at the Bighorn River Ranch site within BCNRA. Claim No. 43P-W-162348-00

1 is for 50 gpm from Pete's Spring for recreation and wildlife purposes and is located outside of the BCNRA
2 boundary.

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

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

7
8 **NEW SECTION. Section 2. Codification instruction.** [Section 1] is intended to be codified as an
9 integral part of the United States National Park Service-Montana Water Rights Compact, as provided in
10 85-20-401, and the provisions of the United States National Park Service-Montana Water Rights Compact,
11 as provided in 85-20-401, apply to [section 1].

12
13 **NEW SECTION. Section 3. Effective date -- applicability.** (1) [This act] is effective upon signature
14 by the parties as provided in [this act].

15 (2) Because [this act] requires Montana and United States approval and incorporates provisions of
16 the existing water rights compact between the United States National Park Service and the State of
17 Montana as provided in 85-20-401, [this act] applies only to the Bighorn Canyon National Recreation Area
18 and the Little Bighorn Battlefield National Monument. The provisions of the existing compact, as provided
19 in 85-20-401, continue in effect and are not affected by [this act] and are incorporated into [this act].

20 -END-

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INTRODUCED BY Grasfield Swanson Halley ^{SENATE} BILL NO. 203
BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES NATIONAL PARK SERVICE AND THE STATE OF MONTANA FOR THE BIGHORN CANYON NATIONAL RECREATION AREA AND THE LITTLE BIGHORN BATTLEFIELD NATIONAL MONUMENT; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY PROVISION."

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

THERE ARE NO CHANGES ON THIS BILL AND WILL NOT BE REPRINTED. PLEASE REFER TO INTRODUCED (WHITE) BILL FOR COMPLETE TEXT.

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SENATE BILL NO. 203
INTRODUCED BY Garfield Swanson Hallya
BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES NATIONAL PARK SERVICE AND THE STATE OF MONTANA FOR THE BIGHORN CANYON NATIONAL RECREATION AREA AND THE LITTLE BIGHORN BATTLEFIELD NATIONAL MONUMENT; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY PROVISION."

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

THERE ARE NO CHANGES ON THIS BILL AND WILL NOT BE REPRINTED. PLEASE REFER TO INTRODUCED (WHITE) BILL FOR COMPLETE TEXT.

1 SENATE BILL NO. 203

2 INTRODUCED BY GROSFIELD, SWANSON, HALLIGAN

3 BY REQUEST OF THE RESERVED WATER RIGHTS COMPACT COMMISSION

4
 5 A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN
 6 THE UNITED STATES NATIONAL PARK SERVICE AND THE STATE OF MONTANA FOR THE BIGHORN
 7 CANYON NATIONAL RECREATION AREA AND THE LITTLE BIGHORN BATTLEFIELD NATIONAL
 8 MONUMENT; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY PROVISION."

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

11
 12 NEW SECTION. **Section 1. United States National Park Service -- Montana compact ratified.** The
 13 compact entered into by the state of Montana and the United States National Park Service and filed with
 14 the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing] is ratified.
 15 The compact is as follows:

16
17 WATER RIGHTS COMPACT

18 STATE OF MONTANA

19 UNITED STATES OF AMERICA, NATIONAL PARK SERVICE

20
 21 This Compact is entered into by the State of Montana and the United States of America to settle
 22 for all time any and all claims to water for certain lands administered by the National Park Service within
 23 the State of Montana at the time of the effective date of this Compact.

24
 25 A Compact between the State of Montana and the United States of America regarding water rights
 26 for National Park Service lands was executed January 31, 1994. The parties were unable to finalize
 27 agreement on quantification of the water rights for Bighorn Canyon National Recreation Area and the Little
 28 Bighorn Battlefield National Monument prior to the completion of the Compact executed January 31, 1994.
 29 This Compact is the final agreement regarding the water rights attributable to these two NPS Units.
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RECITALS

WHEREAS, in 1979 the United States filed in the United States District Court for the District of Montana several actions to adjudicate, inter alia, its rights to water with respect to Glacier National Park, see United States v. Aageson, No. CV-79-21-GF; United States v. Abell, No. CV-79-33-M; and United States v. AMS Ranch, Inc., No. CV-79-22-GF.

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

WHEREAS, 85-2-703, MCA, provides that the state may negotiate settlement of claims by the federal government to non-Indian reserved waters within the State of Montana;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of the existing National Park Service units in the State of Montana;

WHEREAS, the United States, in quantifying its reserved water rights recognizes the need to accommodate the interests of the state and its citizens by providing for the development and use of water in the vicinity of the Park units to the extent that it is possible to do so without materially affecting the rights and interests of the United States;

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute this Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. §§ 516-17 (1968);

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

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

ARTICLE I

DEFINITIONS

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

(1) "Abstract" means the copy of the document entitled "Abstract of National Park Service Water

1 Rights - BCNRA and LBBNM" referenced in this compact as Appendix 2.

2 (2) "Bighorn Canyon National Recreation Area" or "BCNRA" means those lands located in Montana
3 that were acquired pursuant to, or designated as such by Act of October 15, 1966, 80 Stat. 913.

4 (3) "Bureau" means the Montana Bureau of Mines and Geology or its successor.

5 (4) "Category 1 stream" means a stream that headwaters on the reserved land administered by the
6 National Park Service.

7 (5) "Category 1a stream" means a stream that headwaters on the reserved land administered by
8 the National Park Service and which, in part, carries water that drains non-federal land within the
9 boundaries of the same reserved land.

10 (6) "Category 3 stream" means a stream that headwaters in Montana outside the reserved land
11 administered by the National Park Service that flows into the reserved land and is the source for
12 consumptive use water rights recognized under state law on the effective date of this Compact.

13 (7) "Category 4 stream" means a stream that is treated individually due to special circumstances.

14 (8) "Consumptive use" means use of surface water not considered a non-consumptive use under
15 (18) and use of groundwater which is shown to be hydrologically connected to surface water pursuant to
16 Article II.

17 (a) "Current consumptive use", when referring to water rights recognized under state law only,
18 means all consumptive use water rights recognized under state law with a priority date on or before the
19 effective date of the compact.

20 (b) "Future consumptive use", when referring to a water right recognized under state law only,
21 means a consumptive use water right recognized under state law with a priority date after the effective date
22 of the compact.

23 (9) "Credible information" means credible evidence sufficient to support a prima facie basis for the
24 theory asserted.

25 (10) "Crow Tribal Water Rights" means those senior reserved water rights and any aboriginal water
26 rights held by the United States in trust for the Crow Tribe which are being quantified as part of the general
27 adjudication of water rights in Montana.

28 (11) "Curtailment" means action pursuant to this Compact to reduce or shut-off diversions by a
29 junior water user to satisfy the senior instream flow right of the National Park Service.

30 (12) "Department" means the Montana Department of Natural Resources and Conservation or its

1 successor.

2 (13) "Effective date of this Compact" means the date of the ratification of the Compact by the
3 Montana legislature, written approval by the United States Department of the Interior, or written approval
4 by the United States Department of Justice, whichever is later.

5 (14) "Groundwater" means water that is beneath the ground surface.

6 (15) "Hydrologically connected", for the purposes of Articles II and III, means groundwater that is
7 connected to surface water such that appropriation at the proposed rate will cause a calculable reduction
8 in surface water flow. A "calculable reduction in surface water flow" means a theoretical reduction based
9 on credible information as opposed to a measured reduction.

10 (16) "Instream flow" means the water that the parties agree shall remain in the stream in
11 satisfaction of the United States' reserved water right for the purposes of the reserved land.

12 (17) "Little Bighorn Battlefield National Monument" or "LBBNM" means those lands located in
13 Montana that were acquired pursuant to or withdrawn and reserved by Presidential Proclamation of
14 December 7, 1886, and by Act of March 22, 1946, 60 Stat. 59.

15 (18) (a) "Non-consumptive use" when applied to a mining or hydropower use for which a water
16 right is recognized under state law with a priority date after the effective date of this compact, means an
17 appropriation that does not cause a net loss in the surface source of supply, and where substantially all of
18 the diverted water becomes return flow with little or no delay between the time of diversion and the time
19 of return, and without adverse effect on the quantity or quality of water necessary to fulfill the purposes
20 of the reserved land.

21 (b) "Non-consumptive use" when applied to a water right recognized under state law other than
22 a mining or hydropower use with a priority date after the effective date of this compact, or a water right
23 recognized under state law with a priority date on or before the effective date of this compact, means a
24 water right considered to be non-consumptive by the decree, permit or law authorizing the use.

25 (19) "Parkman Sandstone" means the unit as defined in Moulder, E.A., Klug, M.F., Morris, D.A.,
26 and Swenson, F.A. (1960) "Geology and Ground-Water Resources of the Lower Little Bighorn River Valley
27 Big Horn County, Montana," USGS Water Supply Paper 1487, where it occurs along the Little Bighorn River
28 and its tributaries between the Montana-Wyoming line and the Little Bighorn Battlefield National Monument.

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

30 (21) "Person" means an individual, association, partnership, corporation, state agency, political

1 subdivision, or any other entity, but does not include the United States.

2 (22) "Quaternary Alluvium" means the unit as defined in Moulder, E.A., Klug, M.F., Morris, D.A.,
3 and Swenson, F.A. (1960) "Geology and Ground-Water Resources of the Lower Little Bighorn River Valley
4 Big Horn County, Montana," USGS Water Supply Paper 1487, where it occurs along the Little Bighorn River
5 and its tributaries between the Montana-Wyoming line and the Little Bighorn Battlefield National Monument.

6 (23) "Quaternary Terrace Deposits" means the unit as defined in Moulder, E.A., Klug, M.F., Morris,
7 D.A., and Swenson, F.A. (1960) "Geology and Ground-Water Resources of the Lower Little Bighorn River
8 Valley Big Horn County, Montana," USGS Water Supply Paper 1487, where it occurs along the Little
9 Bighorn River and its tributaries between the Montana-Wyoming line and the Little Bighorn Battlefield
10 National Monument.

11 (24) "Recognized under state law" when referring to a water right or use means a water right or
12 use protected by state law, but does not include state recognition of a federal or tribal reserved water right.

13 (25) "Return flow" means the portion of water diverted from a source that is returned to the same
14 source, at or near the point of diversion.

15 (26) "State" means the State of Montana and all officers, agents, departments, and political
16 subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent, "state" means
17 the Director of the Montana Department of Natural Resources and Conservation or his or her designee.

18 (27) "Tributary to" means surface water that originates in the same hydrologic basin or subbasin
19 as the stream referred to and which contributes water to the same stream.

20 (28) "United States" means the federal government and all officers, agencies, departments and
21 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than
22 service in litigation, "United States" means the Secretary of the Department of the Interior, or his or her
23 designees.

24

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ARTICLE II

26

IMPLEMENTATION

27

28 A. Abstract:

29 Concurrent with this Compact, the parties prepared an Abstract, a copy of which is referenced as
30 Appendix 2, which is a specific listing of all of the United States' water rights for Bighorn Canyon National

1 Recreation Area and the Little Bighorn Battlefield National Monument that are described in this Compact
 2 and quantified in accordance with this Compact. The parties prepared the Abstract to comply with the
 3 requirements for a final decree as set forth in 85-2-234(4) and (7), MCA, and in an effort to assist the state
 4 courts in the process of entering decrees accurately and comprehensively reflecting the rights described
 5 in this Compact. The rights specified in the Abstract are subject to the terms of the Compact. In the event
 6 of a discrepancy between a right listed in the Abstract and that same right as quantified in accordance with
 7 Articles II and III of the Compact, the parties intend that the quantification in accordance with Articles II
 8 and III of this Compact shall be reflected in a final decree.

9 B. Method of Allocation of Water on Category 3 and 4 Streams and of Determining Rights Subject
 10 to Curtailment on the Little Bighorn River and its Tributaries:

11 This section explains the method of quantification of the reserved instream flow water rights of the
 12 United States for Category 3 and 4 streams and the method of calculating the quantity of consumptive use
 13 pursuant to state law within a basin to which the United States agrees to subordinate its reserved instream
 14 flow water rights. The method set forth in this section shall be used to determine whether the limits on
 15 consumptive use pursuant to state law set forth in Article III have been reached and whether a water right
 16 on the Little Bighorn River and its tributaries upstream from the LBBNM shall be subject to curtailment to
 17 satisfy the reserved instream flow water right for LBBNM. Addition to the Abstract of a reserved instream
 18 flow water right on a stream inadvertently omitted by the parties or reclassification of a stream due to a
 19 water right recognized under state law and inadvertently omitted by the parties shall be consistent with this
 20 section and shall not be deemed a modification of this Compact.

21 1. Allocation to Instream Flow:

22 With the exception of the reserved instream flow rights for LBBNM, the allocation of water to
 23 instream flow on Category 3 and 4 streams is arrived at using the following method as explained in general
 24 terms:

25 a. The United States' reserved water right for instream flow includes the entire flow of that stream
 26 within the State of Montana at the point where the stream flows over or forms the boundary of the
 27 specified reserved land after: (1) all consumptive use water rights of any agency of the United States
 28 recognized under federal or state law are satisfied; and (2) subordination of the reserved water right for
 29 instream flow to water rights recognized under state law as set forth in and limited by Article III and more
 30 specifically in the Abstract.

1 b. Actual use of water in Wyoming shall not diminish the quantity of water designated for
2 consumptive use pursuant to state law as set forth in Article III.

3 2. Method of Calculation of Consumptive Use Rights Recognized Under State Law:

4 To determine whether water is available for appropriation for consumptive use pursuant to state
5 law on Category 3 and 4 streams, and for determining whether the limit on subordination of the United
6 States' water rights to consumptive uses has been reached, the following provisions shall apply:

7 a. Tributary Water: The calculation of total consumptive use on a Category 3 or 4 stream shall
8 include all current and future consumptive use, recognized under state law, of surface water tributary to
9 the stream to the point it enters the reserved land. The limits on total consumptive use on a Category 4
10 stream that forms the boundary of the reserved land shall include all current and future consumptive use
11 recognized under state law, of surface water tributary to the stream to the most downstream point that the
12 stream forms the boundary of the reserved land.

13 b. Groundwater:

14 The following sections i. and ii., shall apply to BCNRA. The following sections i., and iii., shall apply
15 to LBBNM.

16 i. Within 2 years after the effective date of this Compact, the Department, in consultation with the
17 United States, is directed to promulgate rules as may be necessary to implement Article II, section B.2.b.
18 Said rules shall not alter the rights or obligations of the parties hereto.

19 ii. The calculation of total future consumptive use on Category 3 or 4 streams at BCNRA shall
20 include appropriations of groundwater as follows:

21 (1) The calculation of total future consumptive use shall not include appropriation of groundwater
22 by means of a well or developed spring with an appropriation of 35 gallons per minute (gpm) or less that
23 does not exceed 10 acre feet per year (afy).

24 (2) The limit on total consumptive use shall not include an appropriation of groundwater by means
25 of a well or developed spring with a permit amount in excess of 35 gpm or with a volume of use greater
26 than 10 afy, including a combined appropriation from the same source from two or more wells or developed
27 springs that exceeds these limitations, unless the United States shows by a preponderance of the evidence
28 that the proposed appropriation is hydrologically connected to surface water tributary to the reserved
29 portion of a Category 3 or 4 stream. If the United States meets this burden, the Department shall include
30 the appropriation in the calculation of total consumptive use.

1 (a) The Department shall provide notice of the proposed appropriation to the United States
2 concurrent with notice pursuant to 85-2-307, MCA.

3 (b) Within 60 days of the mailing of notice, the United States may file an objection to the proposed
4 appropriation on the basis that it is hydrologically connected to surface water.

5 (c) If the proposed appropriation is determined not to be hydrologically connected to surface water,
6 or if the limit on consumptive use has not been reached, the Department may issue a permit in accordance
7 with state law and the applicant may complete the appropriation.

8 iii. Determination of whether an appropriation of groundwater after the effective date of the this
9 Compact shall be subject to a curtailment to satisfy the instream flow water right at LBBNM shall be made
10 as follows:

11 (1) Groundwater appropriations subject to curtailment shall not include an appropriation of
12 groundwater for stock or domestic purposes by means of a well or developed spring with an appropriation
13 of 35 gpm or less that does not exceed 10 afy.

14 (2) Groundwater appropriations subject to curtailment to satisfy the 51 cfs instream flow water
15 rights for LBBNM shall not include an appropriation of groundwater by means of a well or developed spring
16 with a permit amount in excess of 35 gpm or with a volume of use greater than 10 afy, including a
17 combined appropriation from the same source from two or more wells or developed springs that exceeds
18 these limitations, unless the United States shows by a preponderance of the evidence that the proposed
19 appropriation is hydrologically connected to the Little Bighorn River or its tributaries upstream from LBBNM.

20 (a) The Department shall provide notice of the proposed appropriation to the United States
21 concurrent with notice pursuant to 85-2-307, MCA.

22 (b) Within 60 days of the mailing of notice, the United States may file an objection to the proposed
23 appropriation on the basis that it is hydrologically connected to surface water.

24 (c) If the proposed appropriation is determined not to be hydrologically connected to surface water
25 the Department may issue a permit in accordance with state law and the applicant may complete the
26 appropriation.

27 (d) If the proposed appropriation is determined to be hydrologically connected to surface water the
28 Department may issue the permit in accordance with state law with notice that the appropriation is subject
29 to curtailment to satisfy the instream flow water right of the LBBNM and the applicant may complete the
30 appropriation.

1 (3) Groundwater appropriations subject to curtailment to satisfy the 950 cfs instream flow water
2 rights for LBBNM shall not include an appropriation of groundwater by means of a well or developed spring
3 with a permit amount in excess of 35 gpm or with a volume of use greater than 10 afy, including a
4 combined appropriation from the same source from two or more wells or developed springs that exceeds
5 these limitations, unless the United States shows by a preponderance of the evidence that the proposed
6 appropriation is hydrologically connected to the Little Bighorn River or its tributaries upstream from LBBNM
7 and the appropriation is completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the
8 Parkman Sandstone.

9 (a) The Department shall provide notice of the proposed appropriation to the United States
10 concurrent with notice pursuant to 85-2-307, MCA.

11 (b) Within 60 days of the mailing of notice, the United States may file an objection to the proposed
12 appropriation on the basis that it is hydrologically connected to surface water and the proposed
13 appropriation is to be completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the Parkman
14 Sandstone.

15 (c) If the proposed appropriation is determined not to be hydrologically connected to surface water
16 or not to be completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the Parkman Sandstone
17 the Department may issue a permit in accordance with state law and the applicant may complete the
18 appropriation.

19 (d) If the proposed appropriation is determined to be hydrologically connected to surface water and
20 to be completed in the Quaternary Alluvium, Quaternary Terrace Deposits, or the Parkman Sandstone the
21 Department may issue the permit in accordance with state law with notice that the appropriation is subject
22 to curtailment to satisfy the instream flow water right of the LBBNM and the applicant may complete the
23 appropriation.

24 c. Abandonment: When a consumptive use right recognized under state law on a Category 3 or
25 4 stream is abandoned and such abandonment causes water to become available for appropriation within
26 the limits of the total amounts of water allocated to consumptive use rights recognized under state law
27 established for that stream by Article III, the increment of water below that limit is available for new
28 appropriation in accordance with state law and this Compact. State law governs the issue of whether an
29 abandonment has occurred.

30 d. Non-Consumptive Use: The limit on total consumptive use rights recognized under state law

1 shall not include non-consumptive uses as defined by this Compact.

2 C. Subordination of Instream Flow Right:

3 1. The United States agrees to subordinate its reserved water right for instream flow to
4 consumptive uses calculated according to this Article in a manner that is specific to each stream on which
5 a reserved water right is described. This subordination is set forth for each stream in Article III. Curtailment
6 of uses to which the reserved water rights described in this Compact have not been subordinated during
7 periods of low flow shall proceed on the basis of priority and may be initiated in a state or federal court of
8 competent jurisdiction pursuant to Article II, sections I and K.

9 2. The reserved water rights described in this Compact shall not be subordinate to water rights
10 which were forfeited by § 85-2-212 as interpreted in In the Matter of the Adjudication of the Water Rights
11 within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), nor shall any claimant of such
12 forfeited water right have standing, based solely on such claimed right, to object to this Compact or any
13 reserved water right described in this Compact, provided that water allocated to future consumptive use
14 pursuant to Article III of this Compact may be used to satisfy claims filed pursuant to 85-2-221(3), MCA
15 in order of priority.

16 D. Location of Instream Flow Rights: The United States' reserved water rights for instream flow
17 apply to the portion of the Categories 1 through 4 streams specified in this Compact that flow over or form
18 the boundary to reserved land administered by the National Park Service.

19 E. Change in Instream Flow Right: Except as provided in Article II, section J.2.b., the water rights
20 dedicated to instream flow by this Compact shall not be changed to any other use.

21 F. Prohibition on Future Impoundments: No new impoundments may be permitted on the mainstem
22 of the Little Bighorn River in Montana upstream of the LBBNM after the effective date of this Compact.
23 This prohibition shall include impoundments that are exempt from permit requirements under state law.
24 Reclamation, repair or rehabilitation of an existing impoundment shall not be considered a new
25 impoundment, provided that without the consent of the United States, reclamation, repair or rehabilitation
26 shall not cause the impoundment to exceed the original constructed capacity of the impoundment. This
27 prohibition shall not apply to impoundments constructed to store a senior Tribal water right or to implement
28 settlement of litigation regarding quantification of a Tribal water right.

29 G. Management to Maximize Use by Montana Water Users of the Water Allocated to Consumptive
30 Use Rights Recognized Under State Law: If any type of conservation or water distribution plan which

1 includes measurement of actual water use, including use pursuant to rights recognized under state law with
2 a priority date before the effective date of this compact, is adopted pursuant to state law, the limits
3 established for consumptive use appropriated pursuant to state law shall apply to actual measured use, not
4 permitted and decreed or claimed rights, provided that records of actual use be made available to the United
5 States on request and provided further that, such plan shall not diminish the reserved water right of the
6 United States as described in this Compact.

7 H. Basin Closure

8 1. Except as provided in Article II, section B.2.c., in the following drainage basins upstream of the
9 portion of the stream for which a reserved water right for instream flow is described in this Compact, the
10 Department shall not process or grant an application or registration for a permit to appropriate or to reserve
11 water for future consumptive use as defined by this Compact once the limits on consumptive use tabulated
12 in Article III and set forth more specifically in the Abstract are reached:

13 Big Horn Canyon National Recreation Area:

14 Dry Head, Deadman, Davis and Layout Creeks

15 2. If a temporary or permanent basin closure is enacted under state law for a drainage basin or
16 subbasin for which future consumptive water use is limited under this Compact, the most restrictive
17 measures applicable to consumptive use of surface or groundwater shall control.

18 I. Enforcement of Water Right

19 1. The United States, the state, or the holder of a water right recognized under state law, may
20 petition a state or federal court of competent jurisdiction for relief when a controversy arises between the
21 United States' reserved water right described by this Compact, and a holder of a water right recognized
22 under state law. Resolution of the controversy shall be governed by the terms of this Compact where
23 applicable, or to the extent not applicable, by applicable state or federal law.

24 2. The United States agrees that a water commissioner appointed by a state or federal court of
25 competent jurisdiction, or other official authorized by future changes in law, may enter a federal reservation
26 for which a water right is described in this Compact for the purpose of data collection, including the
27 collection of information necessary for water distribution on or off the federal reservation, and to inspect
28 structures for the diversion and measurement of water described in this Compact for consumptive use and
29 for the measurement of instream flow. The terms of entry shall be as specified in an order of a state or
30 federal court of competent jurisdiction.

1 3. The Department or the Bureau may enter a federal enclave for which a reserved water right is
2 described in this Compact, at a reasonable hour of the day, for the purposes of data collection on water
3 diversion and stream flow or inspection of devices maintained by the United States pursuant to this
4 Compact. The Department or Bureau shall notify the United States by certified mail or in person, at least
5 24 hours prior to entry.

6 4. The United States may request an investigation by the Department of a diversion located
7 upstream of the reserved portion of a stream for which a reserved water right is described in this Compact.
8 The Department may investigate. If an investigation occurs, the United States may accompany the
9 Department.

10 5. The United States shall maintain structures, including wellhead equipment and casing, for the
11 diversion and measurement of water authorized for consumptive use by this Compact. The United States
12 shall maintain the devices it deems necessary for enforcement of its reserved water right for instream flow
13 described in this Compact. The United States shall install and maintain a rated gauge to measure instream
14 flows in the Little Bighorn River. The gauge on the Little Bighorn River shall be on the reach of the river
15 which forms the boundary of the LBBNM, the exact location of which shall be at the discretion of the NPS.
16 The NPS shall resurvey the channel cross section as necessary to maintain gauge accuracy, but in any
17 event not less frequently than every three (3) years. The United States may not seek curtailment of junior
18 water uses unless the channel has been resurveyed within three (3) years of the date on which curtailment
19 is sought.

20 6. A person who violates or refuses or neglects to comply with the provisions of this Compact,
21 an order of the Department pursuant to this Compact, or an action by the Bureau pursuant to this Compact
22 is subject to the penalties provided by state law.

23 7. For any appeal to state court of an administrative decision authorized by this Compact, venue
24 shall be the First Judicial District in Helena and the review shall be conducted according to the procedures
25 for judicial review of contested cases under the Montana Administrative Procedures Act, Title 2, Chapter
26 4, of the Montana Code Annotated.

27 8. In any contested case proceeding held under the Montana Administrative Procedures Act, Title
28 2, Chapter 4, of the Montana Code Annotated, pursuant to this Compact, the common law and statutory
29 rules of evidence shall apply only upon stipulation of all parties to a proceeding.

30 J. Change in Use

1 1. Change in Use Defined: For the purpose of this Article, the following actions affecting the use
2 of a reserved water right for consumptive use described in this Compact shall be considered a change in
3 use:

4 a. An action that alters type of use, place of use, point of diversion, place or means of storage,
5 period of use or point of return flow that will:

6 i. increase the net depletion on a source; or

7 ii. adversely affect water quality at the point the reserved water right ends; or

8 iii. result in a change in point of diversion or point of return flow relative to a holder of a water right
9 recognized under state law; or

10 iv. change the point of diversion from groundwater to surface water, or from surface to
11 groundwater; or

12 v. in any other manner, adversely affects the reasonable exercise of a water right that is recognized
13 under state law.

14 b. The exercise of a reserved water right to future consumptive use as authorized by this Compact
15 shall not be considered a change in use.

16 2. Instream flow: Reserved water rights specified in this Compact for instream flow shall not be
17 subject to change to any other use, provided that:

18 a. the emergency use of water for fire suppression as provided for in Article III.C. shall not be
19 deemed a change or alteration in use, or violation of a reserved water right for instream flow; and

20 b. the United States may seek to appropriate water for a consumptive use on a source for which
21 no consumptive use is described in this Compact by seeking a permit under state law for consumptive use,
22 provided that the water right granted shall not be counted against the limits on allocation for state
23 consumptive use water rights imposed by this Compact. The water right so acquired shall be administered
24 in accordance with Article V, section B.

25 3. Consumptive uses: The United States may take action affecting the use of its consumptive use
26 water rights provided that (1) the action shall be in fulfillment of the purposes of the reservation; (2) the
27 total use shall not exceed the amount described in this Compact; and (3) the action shall not adversely
28 affect a water right that is recognized under state law.

29 4. Notice of intent to change use: At least 180 days prior to a change in use, the United States
30 agrees to provide notice to the Department.

- 1 a. The notice shall contain the facts pertinent to the proposed change including, where applicable:
- 2 i. The location of a new point of diversion.
- 3 ii. The new source of water.
- 4 iii. The new means of diversion.
- 5 iv. If a well is involved, the depth and locations of the old and new well.
- 6 v. The new use and its impact on actual consumption and water quality.
- 7 vi. If the change includes storage, the location, period and capacity of the storage facility.
- 8 vii. An estimate of when the change will be effective.
- 9 viii. A map showing the existing system and the proposed change.
- 10 b. At least 120 days prior to the proposed change, the United States agrees to publish the notice
- 11 required by Article II, section J.4.a. with a statement that within 60 days following publication or service
- 12 of notice, relief may be sought in a state or federal court of competent jurisdiction, once in a newspaper
- 13 of general circulation in the area of the source, and to serve the notice by first-class mail on interested and
- 14 potentially affected persons as identified by the records of the Department, including:
- 15 i. an appropriator of water or applicant for or holder of a permit who, according to the records of
- 16 the Department, may be affected by the proposed appropriation;
- 17 ii. a purchaser under contract for deed that, according to the records of the Department, may be
- 18 affected by the proposed appropriation;
- 19 iii. any public agency that has reserved water in the source recognized under state law; and
- 20 iv. a federal agency or Tribe that claims a reserved water right or other water rights in the source.
- 21 c. On request by the United States, the Department shall provide the information contained in its
- 22 records identifying any person potentially affected by the proposed change. The United States agrees to
- 23 reimburse the Department for the expense of providing this information.
- 24 d. In the event that future changes in state law establish a method of notice of a proposed change
- 25 in use to interested and potentially affected persons other than by first-class mail, the United States may
- 26 alter the method of notification accordingly.
- 27 e. Prior to the actual change, the United States agrees to provide the Department with proof of
- 28 notice by affidavit.
- 29 5. Objection to proposed change: Within 60 days following the notice pursuant to Article II,
- 30 section J.4.b., the Department or any other person may bring an action against the proposed change in use

1 in a state or federal court of competent jurisdiction, if a property right, water right, or other interest
2 protected under state law would be adversely affected, or if the proposed change is not in compliance with
3 this Compact.

4 6. Notice of Change:

5 a. The United States agrees to notify the state and provide a copy of the final order within 60 days
6 of its entry by a state or federal court of competent jurisdiction resolving any objections to the change in
7 use of a federal reserved water right described in this Compact.

8 b. The United States agrees to provide the state with notice of completion of the change within
9 60 days after the completion.

10 7. Reporting by the United States: For any action affecting the use of a consumptive right whether
11 or not such action is deemed a change in use, the United States agrees to provide the following information
12 to the Department:

13 a. Well log: For a use that includes the drilling of a well or enlargement of an existing wellbore,
14 the United States agrees to provide a well log to the state within 60 days of the completion of the well.

15 b. Emergency Use: Within 60 days after the commencement of a temporary emergency use for
16 fire suppression described in Section III.C. of this Compact, the United States agrees to notify the state of
17 the use to which the water was put, the dates of use, and the estimated amount of water used.

18 c. Annual Report: Between April 1 and May 1 of each year, the United States agrees to provide
19 the Department with a report on (1) actions during the preceding year affecting the use of a consumptive
20 use right described in this Compact, regardless of whether the action is deemed a change in use pursuant
21 to Article II, section J.1.; (2) the initiation of new uses that were completed during the preceding year; and
22 (3) any data and documents generated or received by the National Park Service during the preceding year
23 on measurement of instream flow on a Category 3 or 4 stream.

24 8. Reporting by the State: Between December 1 and December 31 of each year, the Department
25 shall provide the United States with a report of: (1) changes in use during the preceding year, as defined
26 by state law, of water rights upstream of or within the boundaries of reserved land for which a reserved
27 water right is described in this Compact; (2) new permits issued during the preceding year according to the
28 records of the Department; and (3) any data and documents generated by the Department during the
29 preceding year on the measurement of streamflows, diversions and well use on or tributary to Category 3
30 or 4 streams.

1 K. Administration of Little Bighorn Instream Flow

2 This section governs the administration of instream flow rights of the United States on the Little
3 Bighorn River described in Article III. section B.3., in relation to junior water rights initiated after the
4 effective date of this Compact to which the United States has not subordinated and which are not a part
5 of the Crow Tribal Water Rights. Nothing in these provisions, or in this Compact, regarding administration
6 affects or in any way impairs any ability or authority of the Crow Tribe to administer, regulate or manage
7 any water rights within the boundaries of the Crow Indian Reservation.

8 1. For purposes of administering the instream flow water right of the United States described in
9 Article III. section B. 3. the United States shall establish and maintain a discharge gauge at the LBBNM
10 gauge site. The United States shall keep a record of daily flows for the period from March 1 through June
11 30 of each year in which the United States seeks curtailment of junior water rights.

12 2. The United States may seek curtailment to enforce its 950 cfs instream flow water right,
13 described in Article III. section B.3.b., at the LBBNM gauge site any time from May 1 through June 30.
14 The decision to seek curtailment shall be initiated by the NPS and at the NPS's discretion.

15 a. A decision to seek curtailment to enforce the 950 cfs instream flow water right shall be based
16 on a determination that the flow at the LBBNM gauge site plus claimed or permitted appropriations by
17 non-subordinated junior water users equals 950 cfs or more.

18 b. Once curtailment is sought and confirmed as set forth in Article II. section K.3, it may last for
19 up to 15 consecutive days, or through June 30, whichever occurs first, provided, however, that the 15
20 days shall be reduced by subtracting the number of days between March 1st and the date of confirmation
21 of curtailment that the flow at the LBBNM gauge site has equalled or exceeded 950 cfs

22 c. Any curtailment based upon the 950 cfs water right shall be limited to direct surface diversions
23 from the Little Bighorn River and its tributaries, and wells completed in the Quaternary Alluvium, Quaternary
24 Terrace Deposits, or the Parkman Sandstone, as described in Article II. section B.2.b.iii.(3).

25 3. Notice by NPS that it seeks curtailment to enforce the 950 cfs instream flow water right shall
26 be by either written or verbal notice to the appropriate DNRC office. The NPS shall use its best efforts to
27 maintain contact with the DNRC beginning May 1st of each year to provide advance warning of stream flow
28 conditions.

29 a. Upon receipt of notice from the NPS that the United States requests curtailment to enforce the
30 950 cfs instream flow water right, the DNRC shall, within 24 hours, verify actual diversions by

1 non-subordinated junior water users and confirm that the sum of flow at the LBBNM and actual diversions
2 by non-subordinated junior water users equals or exceeds 950 cfs. If the DNRC determines that the actual
3 diversions are insufficient to bring the flow at the LBBNM gauge site to 950 cfs, it shall not proceed with
4 curtailment. If a decision is made not to proceed with curtailment, the DNRC shall notify the NPS the same
5 day. After notification, the NPS may again seek curtailment beginning the following day if conditions of
6 flow and time of year meet the conditions set forth in Article II. section K.2.

7 b. If the DNRC proceeds with curtailment to enforce the 950 cfs water right, the DNRC shall,
8 without delay, shut off non-subordinated junior water uses in reverse order of priority to the extent
9 necessary to bring the flow at the LBBNM gauge site to 950 cfs, provided that, DNRC has the discretion
10 to forgo curtailment of a particular water right if it determines that curtailment of that water right to satisfy
11 the 950 cfs instream flow right would be futile.

12 c. Should flow at the LBBNM gauge site exceed 950 cfs at any time during curtailment, the DNRC
13 may reopen diversions in order of priority until 950 cfs is reached. Should the flow at the LBBNM gauge
14 site drop below 950 cfs at any time during the curtailment, non-subordinated junior water uses shall remain
15 shut off provided that, if the NPS reasonably determines the flow at the LBBNM gauge site is not likely to
16 come back up to 950 cfs during the remainder of the curtailment period, it may consent to end the
17 curtailment.

18 4. Notice by NPS that it seeks curtailment to enforce the 51 cfs instream flow water right
19 described in Article III. section B.3.a., shall be by either written or verbal notice to the appropriate DNRC
20 office. Upon receipt of notice from the NPS that the United States requests a curtailment to enforce the
21 51 cfs instream flow water right, the DNRC shall, within 24 hours, verify actual diversions by
22 non-subordinated junior water users. If diversions are being made by non-subordinated junior water users,
23 the DNRC shall, without delay, shut off non-subordinated junior water uses in order of priority to the extent
24 necessary to bring the flow at the LBBNM gauge site to 51 cfs, provided that, DNRC has the discretion to
25 forgo curtailment of a particular water right if it determines that curtailment of that water right to satisfy
26 the 51 cfs instream flow right would be futile.

27 5. All permits within the Little Bighorn River Basin upstream of the LBBNM gauge site with a priority
28 date after the effective date of this Compact shall be conditioned on the prior right of the NPS for 950 cfs
29 instream flow water right at the LBBNM during May and June, and for the 51 cfs instream flow water right
30 during any portion of the year, and on the authority of DNRC to curtail use to satisfy the instream flow

1 right.

2 6. All diversions from the Little Bighorn River or its tributaries above LBBNM with a priority date
3 after the effective date of this Compact, shall have the duty to establish and maintain a controllable
4 headgate and an adequate measuring device and shall also be required to maintain a record of daily water
5 diversions, including noting the number of hours for which diversions are made for each day and the flow
6 rate at which water is diverted.

7 7. DNRC and NPS shall work together to develop a quantitative prediction relationship between
8 the flow at the LBBNM gauge site, diversions by non-subordinated junior water users, and the prediction
9 of curtailment requirements.

10 8. Either party has the right to petition a court of competent jurisdiction for administration of water
11 rights or for appointment of a water commissioner should cooperative administration not be proceeding as
12 planned or should cooperative administration become burdensome. Any water commissioner shall enforce
13 the curtailment as described in this Compact. Exhaustion of administrative remedies pursuant to this article
14 is not a prerequisite to any such suit.

15

16

ARTICLE III

17

WATER RIGHT

18

19 The parties agree that the following water rights are in settlement of the reserved water rights of
20 the United States for the reservations described. The parties to this agreement recognize that the water
21 rights for these NPS Units are junior to Crow Tribal Water Rights. All reserved water rights described in
22 this Article are subject to Article V, section A.

23

A. Bighorn Canyon National Recreation Area

24

1. Priority Date: The United States has a priority date of October 15, 1966 for the water rights
25 described in this Compact for Bighorn Canyon National Recreation Area. The United States recognizes that
26 its water rights for the BCNRA are junior in priority to Crow Tribal Water Rights.

27

2. Consumptive Use: The United States has water rights for current and future consumptive
28 use for the purposes of the Bighorn Canyon National Recreation Area (BCNRA) as set forth in the following
29 Table. The period of use shall be from January 1 through December 31. The source and place of use shall
30 be as set forth more specifically in the Abstract.

TABLE 1

United States National Park Service
 Bighorn Canyon National Recreation Area Consumptive Use

Place of Use	Total Volume (ac-ft)	Maximum Flow Rate (gpm)
Fort Smith Visitor center	17.6	110
Ok-A Beh/Marina	6.9	35
Grapevine Creek Overflow Campground	12.5	110
Barry's Landing, Trail Creek, Chain Canyon	29.3	180
Bighorn River Ranch	4.7	35
Layout Creek Ranger Station, Sorenson Ranch	140.4	230
Lockhart Ranch	25.6	110
Hillsboro Site	11.0	230
Stock and Wildlife Watering	3.5	
Total Volume of Use:	<u>251.5 acre-feet</u>	

3. Instream Flow

The United States has water rights for instream flow in the streams which flow over the land of Bighorn Canyon National Recreation Area. These water rights for instream flow are quantified and defined as follows:

a. Category 1a:

i. Identification: The following streams are designated as "Category 1a": North Fork Trail Creek, South Fork Trail Creek, and Trail Creek.

ii. Instream Flow: The United States has a water right for instream flow on the Category 1a streams where they enter the BCNRA in the amount of the entire flow of the streams, less (1) any United

1 States' consumptive use rights described in this Compact and any Crow Tribal Water Rights; and (2) all
 2 water rights appurtenant to nonfederal land within the boundaries of BCNRA recognized under state law
 3 and having a priority date before the effective date of this Compact.

4 In the event that all non-federal land on a Category 1a stream is acquired by the United States for
 5 the purpose of addition to BCNRA, the stream may be reclassified as a Category 1 stream at the request
 6 of the United States.

7 b. Category 3:

8 i. Identification: The following streams are designated as "Category 3": Dry Head Creek, Deadman
 9 Creek, Davis Creek (aka Medicine Creek), and Layout Creek.

10 ii. The United States has a water right for instream flow on Category 3 streams in the amount of
 11 the entire flow of the streams, less any United States' consumptive use rights described in this Compact,
 12 and any Crow Tribal Water Rights, provided that, the instream flow right is subordinate to (1) the sum of
 13 all water rights recognized under state law with a priority date before the effective date of this Compact,
 14 plus any future consumptive use rights calculated according to Article II of this Compact until the limit on
 15 future consumptive use set forth in the table below is reached; (2) any use considered non-consumptive
 16 as defined by this Compact; (3) any use for instream stockwatering or for stockwater or domestic uses by
 17 wells or developed springs with an appropriation of 35 gpm or less that does not exceed 10 afy; and (4)
 18 any use of groundwater not included in the calculation of consumptive use according to Article II of this
 19 Compact.

20
 21 TABLE 2

22
 23 State Law Based
 24 Total Future Consumptive Use Rights (cfs)
 25 Tributary to the Reserved Portion of Category 3 Streams

26	27 Dry Head	28 Deadman	29 Davis	30 Layout
	2.23*	1.59**	0.50	0.11

1 * Or the amount of net depletions reasonably necessary to irrigate 20 acres, whichever is largest.

2 ** Or the amount of net depletions reasonably necessary to irrigate 35 acres, whichever is largest.

3

4 c. Category 4:

5 i. Identification: The following streams are designated as "Category 4": Pete's Canyon Creek, the
6 tributary of Deadman Creek that issues from Annerer Spring and flows across BCNRA land in the
7 N1/2NW1/4 Sec. 8, T8S, R29E, M.P.M.

8 (1) The United States has a water right for instream flow on Pete's Canyon Creek in the amount
9 of one-half (1/2) of the naturally occurring flow that originates from Pete's Spring.

10 (2) The United States has a water right for the tributary of Deadman Creek, in the amount of one
11 (1) gallon per minute.

12 4. Springs

13 The United States has a water right for instream flows for the following springs identified by
14 location, in the amount of the entire flow of the springs, less any consumptive use rights of the United
15 States described by this Compact.

16

17	Sorenson Spring	Sec. 09, T9S, R28E
18	Lockhart #1 Spring	Sec. 13, T8S, R28E
19	Lockhart #2 Spring	Sec. 13, T8S, R28E
20	Hillsboro Spring	Sec. 36, T8S, R28E

21

22 This list of springs may be modified based on field verification of any spring located entirely within
23 the boundaries of the BCNRA that is not the source of a water right recognized under state law. Springs
24 that occur on Crow Reservation lands are excluded from any water rights for springs.

25 B. Little Bighorn National Battlefield

26 1. Priority Date

27 a. The United States has a priority date of December 7, 1886 for current and future consumptive
28 uses under the water rights reserved for the irrigation, maintenance and administration of the Little Bighorn
29 Battlefield National Monument. The United States recognizes that its water rights for the BCNRA are junior
30 in priority to Crow Tribal Water Rights.

1 instream flow water right is subordinate to:

2 (1) any water rights recognized under the state law with a priority date before the effective date
3 of this Compact;

4 (2) any instream stockwater use;

5 (3) any use of groundwater through wells or developed springs with an appropriation of 35 gpm
6 or less that does not exceed 10 afy;

7 (4) any use considered non-consumptive as defined by this Compact;

8 (5) any use of groundwater not included in the calculation of consumptive use according to Article
9 II of this Compact.

10 b. The United States has a reserved water right for instream flow in the amount of 950 cfs, with
11 a priority date of March 22, 1946, for 15 days during the period of May 1st through June 30th, subject
12 to the terms and conditions regarding implementation as set forth in Article II, section K, provided that,
13 the instream flow water right is subordinate to:

14 (1) any water rights recognized under the state law with a priority date before the effective date
15 of this Compact;

16 (2) any instream stockwater use;

17 (3) any use of ground water from wells completed outside of the Quaternary Alluvium or
18 Quaternary Terrace Deposits of the Little Bighorn River and its tributaries or the Parkman Sandstone;

19 (4) any use of groundwater from wells or developed springs completed in the Quaternary Alluvium,
20 Quaternary Terrace Deposits, or the Parkman Sandstone with an appropriation of 35 gpm or less that does
21 not exceed 10 afy;

22 (5) any use of groundwater from wells completed in the Quaternary Alluvium, Quaternary Terrace
23 Deposits, or the Parkman Sandstone with a permit amount in excess of 35 gpm or 10 afy that is not
24 determined to be hydrologically connected to the Little Bighorn River or its tributaries pursuant to Article
25 II, section B.2.b.iii. of this Compact;

26 (6) any use considered non-consumptive as defined by this Compact.

27 c. Instream Flow Rights Not Cumulative: The 950 cfs instream flow, when it occurs, is not
28 additive to the 51.0 cfs year-round minimum flow.

29 C. Emergency Fire Suppression

30 The use of water for emergency fire suppression benefits the public, and is necessary for the

1 purposes of the various Park reservations. The United States, may as part of its reserved water right, divert
2 water for fire suppression at all of the National Park Service Units as needed, and without a definition of
3 the specific elements of a recordable water right. Use of water for fire suppression shall not be deemed
4 an exercise of the United States' reserved water rights for consumptive use or a violation of its reserved
5 water rights for instream flow.

6
7 ARTICLE IV
8 GENERAL PROVISIONS
9

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

11 1. Nothing in this Compact may be construed or interpreted in any manner to establish the nature
12 or extent of the rights to water or the right to administer water of an Indian Tribe in Montana, or of a water
13 right of an individual that is derivative of such right, or of the United States on behalf of such tribe or tribal
14 member. The relationship between the water rights of the National Park Service described herein and any
15 rights to water of an Indian Tribe in Montana, or of a water right of an individual that is derivative of such
16 right, or of the United States on behalf of such tribe or tribal member shall be determined by the rule of
17 priority. The United States specifically recognizes the seniority of the Crow Tribal Water Rights.

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

20 3. Nothing in this Compact may be construed or interpreted in any manner to establish the nature,
21 extent or manner of administration of the rights to water of any other federal agency or federal lands in
22 Montana other than those of the National Park Service. The exercise of a water right of the United States,
23 if any, to water for a consumptive use on land administered by the United States Forest Service upstream
24 of a water right to instream flow described in this Compact shall be allocated from the United States' share
25 for instream flow, not the state's share for consumptive use.

26 B. State Water Rights

27 Nothing in this Compact may limit the exclusive authority of the state, including the authority of
28 a water commissioner authorized by state law, to administer all current and future water rights recognized
29 under state law within and upstream of the reserved land covered by this Compact, provided that in
30 administration of those water rights in which the United States has an interest, such authority is limited to

1 that granted under federal law.

2 C. General Disclaimers

3 Nothing in this Compact may be construed or interpreted:

4 1. as a precedent for the litigation or the interpretation or administration of future compacts
5 between the United States and the state; or of the United States and any other state;

6 2. as a waiver by the United States of its right under state law to raise objections in state court
7 to individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code
8 Annotated, in the basins affected by this Compact;

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

11 4. to establish a precedent for other agreements between the state and the United States or an
12 Indian tribe;

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

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

16 7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of
17 the effective date of this Compact;

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

21 9. to affect in any manner the entitlement to or quantification of other federal water rights. This
22 Compact is only binding on the United States with regard to the water rights of the National Park Service,
23 and does not affect the water rights of any other federal agency.

24 10. to alter or amend any provisions of the Yellowstone River Compact, Act of October 30, 1951,
25 ch. 629, 65 Stat. 663 (1951).

26 D. Use of Water Right

27 Except as otherwise provided in this Compact, the rights of the United States described in this
28 agreement are federal reserved water rights. Non-use of all or a part of the federal reserved water rights
29 described in this Compact shall not constitute abandonment of the right. The federal reserved water rights
30 described in this Compact need not be applied to a use deemed beneficial under state law, but shall be

1 restricted to uses necessary to fulfill the purposes of the associated reserved land.

2 E. Appropriation Pursuant to State Law

3 Nothing in this Compact may prevent the United States from seeking a permit to appropriate water
4 under state law for use outside the boundaries of the federal reservations for which a water right is
5 described in this Compact, provided that, no such use may be included in the calculation of total current
6 or future consumptive use rights allocated to use pursuant to state law by this Compact, and provided
7 further that, a water right obtained in this manner shall be considered a state water right and shall be
8 administered pursuant to general provisions of state law as provided in Article II, section J.2.b.

9 F. Reservation of Rights

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

11 G. Severability

12 The provisions of this Compact are not severable, provided that for the purposes of Sec.
13 85-2-702(3) MCA, the water rights described in this Compact for the LBBNM and BCNRA Units shall be
14 considered as separate Compacts.

15 H. Multiple Originals

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

18 I. Notice

19 Unless otherwise specifically provided for in this Compact, service of notice required hereunder,
20 except service in litigation, shall be:

21 1. State: Upon the Director of the Department and such other officials as he or she may designate
22 in writing.

23 2. United States: Upon the Secretary of the Interior and such other officials as he or she may
24 designate in writing.

25

26

ARTICLE V

27

FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES

28

29 A. Binding Effect

30 1. The effective date of this Compact is the date of the ratification of this Compact by the Montana

1 legislature, written approval by the United States Department of the Interior, or written approval by the
2 United States Department of Justice, whichever occurs later. Once effective, all of the provisions of this
3 Compact shall be binding on:

4 a. The state and a person or entity of any nature whatsoever using, claiming or in any manner
5 asserting a right under the authority of the state to the use of water; and

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

9 2. Following the effective date, this Compact shall not be modified without the consent of both
10 parties. Either party may seek enforcement of this Compact in a court of competent jurisdiction. Attempt
11 to unilaterally modify this Compact by either party shall render this Compact voidable at the election of the
12 other party.

13 3. On approval of this Compact by a state or federal court of competent jurisdiction and entry of
14 a decree by such court confirming the rights described herein, this Compact and such rights are binding
15 on all persons bound by the final order of the court.

16 4. If an objection to this Compact is sustained pursuant to 85-2-702(3), MCA, this Compact shall
17 be voidable by action of and without prejudice to either party.

18 B. Disposition of Actions

19 Subject to the following stipulations and within one hundred eighty (180) days of the effective date,
20 the parties shall submit this Compact to an appropriate state court or courts having jurisdiction over this
21 matter in an action commenced pursuant to 43 U.S.C. § 666, for approval in accordance with state law
22 and for the incorporation of the reserved water rights described in this Compact into a decree or decrees
23 entered therein. The parties understand and agree that the submission of this Compact to a state court or
24 courts, as provided for in this Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and
25 does not expand the jurisdiction of the state court or expand in any manner the limited waiver or sovereign
26 immunity of the United States in the McCarran Amendment, 43 U.S.C. § 666 or other provision of federal
27 law.

28 1. Dismissal of Filed Claims: At the time the state courts approve the reserved water rights
29 described in this Compact and enter a decree or decrees confirming the rights described herein, such courts
30 shall dismiss, with prejudice, all of the water right claims specified in Appendix 3 to this Compact. If this

1 Compact fails approval or a reserved water right described herein is not confirmed, the specified claims shall
2 not be dismissed.

3 2. Disposition of Federal Suits: Within ninety (90) days of the issuance of a final decree or decrees
4 by the state courts approving this Compact and confirming the reserved water rights described herein, and
5 the completion of any direct appeals therefrom or the expiration of the time for filing such appeal, the
6 parties shall execute and file joint motions pursuant to Rule 41(a) Fed. R. Civ. P. to dismiss with prejudice
7 any claims made by the United States for LBBNM or BCNRA in federal court. This Compact may be filed
8 as a consent decree in those federal suits, only if, prior to the dismissal of the federal suits as provided in
9 this Article, it is finally determined in a judgment binding on the State of Montana that the state courts lack
10 jurisdiction over some or all of the reserved water rights described in this Compact. Within one year of
11 such judgment the United States agrees to commence such additional proceedings in the federal district
12 court for the District of Montana as may be necessary to judicially confirm the reserved water rights
13 described herein which are not included within an existing action.

14 C. Settlement of Claims

15 The parties intend that, with the exceptions noted herein, the water rights described in this
16 Compact are in full and final settlement of the water right claims for the reserved land administered by the
17 National Park Service in Montana on the effective date of this Compact. Pursuant to this settlement, by
18 which certain federal reserved water rights are expressly recognized by the state in this Compact and other
19 water rights claims of the United States are expressly retained in Article III, sections D. and F. in the
20 Compact for YNP, GNP and BHNM, the United States hereby and in full settlement of any and all claims
21 filed by the United States or which could have been filed by the United States for reserved land
22 administered by the National Park Service in Montana relinquishes forever all said claims on the effective
23 date of this Compact to water within the State of Montana for reserved land administered by the National
24 Park Service. The state agrees to recognize the reserved water rights described and quantified herein, and
25 shall, except as expressly provided for herein, treat them in the same manner as a water right recognized
26 by the state.

27 Specifically excepted from this final settlement of water rights are water rights Claims No.
28 43P-W-162354-00 and 43P-W-162348-00, both of which are claimed in the general adjudication of water
29 rights as state law based water rights. Claim No. 43P-W-162354-00 is for 0.75 cfs from the Big Horn
30 Canal for irrigation purposes at the Bighorn River Ranch site within BCNRA. Claim No. 43P-W-162348-00

1 is for 50 gpm from Pete’s Spring for recreation and wildlife purposes and is located outside of the BCNRA
2 boundary.

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

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

7

8 **NEW SECTION. Section 2. Codification instruction.** [Section 1] is intended to be codified as an
9 integral part of the United States National Park Service-Montana Water Rights Compact, as provided in
10 85-20-401, and the provisions of the United States National Park Service-Montana Water Rights Compact,
11 as provided in 85-20-401, apply to [section 1].

12

13 **NEW SECTION. Section 3. Effective date -- applicability.** (1) [This act] is effective upon signature
14 by the parties as provided in [this act].

15 (2) Because [this act] requires Montana and United States approval and incorporates provisions of
16 the existing water rights compact between the United States National Park Service and the State of
17 Montana as provided in 85-20-401, [this act] applies only to the Bighorn Canyon National Recreation Area
18 and the Little Bighorn Battlefield National Monument. The provisions of the existing compact, as provided
19 in 85-20-401, continue in effect and are not affected by [this act] and are incorporated into [this act].

20

-END-