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House BILL NO. 283
INTRODUCED BY Swanson J. Stansberger Carl Feld

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE STATE OF MONTANA."

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

NEW SECTION. Section 1. United States Fish and Wildlife Service-Montana compact ratified. The compact entered into by the State of Montana and the United States Fish and Wildlife 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, FISH AND WILDLIFE 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 existing on the effective date of the Compact to water for Black Coulee and Benton Lake National Wildlife Refuges administered by the U.S. Fish and Wildlife Service within the State of Montana.

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 Black Coulee National Wildlife Refuge, see United States v. Ageson, No. CV-79-21-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 Benton Lake and Black Coulee National Wildlife Refuges, in the State of Montana;

1 (9) "Person" means an individual, association, partnership, corporation, state agency, political
2 subdivision, or any other entity, but does not include the United States.

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

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

8 (12) "United States" means the federal government and all officers, agencies, departments and
9 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than
10 service in litigation, "United States" means the Secretary of the Department of the Interior, or his or her
11 designees.

12 ARTICLE II

13 WATER RIGHT

14 The parties agree that the following water rights are in settlement of the reserved water rights of
15 the United States for the Refuges described. The parties to this agreement recognize that the water rights
16 described in this Compact are junior to any tribal water rights with a priority date before the effective date
17 of the Compact, including aboriginal rights, if any, in the basins affected. All reserved water rights
18 described in this Article are subject to Article IV, section A of this Compact.

19 A. Benton Lake National Wildlife Refuge

20 1. Quantification: The United States shall have the right to water from the following sources where
21 they occur on the Refuge:

22 a. Consumptive Use: The United States has a reserved water right to 2 acre-feet per year diverted
23 at a maximum rate of 45 gpm from groundwater beneath the Benton Lake National Wildlife Refuge.

24 b. Natural Flow: The United States has a reserved water right to the natural flow in the Lake Creek
25 drainage including the unnamed tributaries to Benton lake where the drainage enters the Refuge in the
26 amount of the natural flow remaining after satisfaction of the following rights:

27 (1) all rights recognized under state law with a priority date prior to the effective date of this
28 Compact;

29 (2) any rights for stock watering ponds with a priority date after the effective date of this Compact
30 and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less

1 than 30 acre-feet per year from a source other than a perennial flowing stream; and

2 (3) any right to appropriate groundwater with a priority date after the effective date of this
3 Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute
4 or less that does not exceed a total appropriation of 10 acre-feet per year.

5 2. a. Priority Date: The United States has a priority date of November 21, 1929, for the reserved
6 water rights described in this Compact for Benton Lake National Wildlife Refuge.

7 b. Subordination: The natural flow water right is subordinate to:

8 (1) any use recognized under state law with a priority date before the effective date of this
9 Compact;

10 (2) any use considered non-consumptive as defined by this Compact;

11 (3) stock watering ponds with a priority date after the effective date of this Compact and with a
12 maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than
13 30 acre-feet per year from a source other than a perennial flowing stream; and

14 (4) appropriation of groundwater with a priority date after the effective date of this Compact by
15 means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that
16 does not exceed a total appropriation of 10 acre-feet per year.

17 3. Period of Use: The period of use of this water right shall be from January 1 through December
18 31 of each year.

19 4. Points and means of diversion: Any point on the Refuge and by any means subject to the terms
20 of this Compact.

21 5. Purposes: The United States right to water may be used for the following purposes, provided
22 that, subject to the limitations set forth in Article III. section E., the United States may change the use of
23 water identified for consumptive use.

24 a. Consumptive Use: The United States water right to groundwater shall be used at the Refuge
25 headquarters for the purposes of the Refuge.

26 b. Natural Flow: The United States water right to natural flow shall be used on the Benton Lake
27 National Wildlife Refuge for wildlife habitat maintenance and enhancement.

28 B. Black Coulee National Wildlife Refuge

29 1. Quantification: The United States shall have the right to water from the following sources where
30 they occur on Black Coulee National Wildlife Refuge:

1 2. Natural Flow: The United States has a reserved water right for the natural flow in the Black
2 Coulee drainage where the drainage enters the Refuge in the amount of the natural flow remaining after
3 satisfaction of the following rights:

4 (1) all rights recognized under state law with a priority date prior to the effective date of this
5 Compact;

6 (2) any rights for stock watering ponds with a priority date after the effective date of this Compact
7 and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less
8 than 30 acre-feet per year from a source other than a perennial flowing stream; and

9 (3) any right to appropriate groundwater with a priority date after the effective date of this
10 Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute
11 or less that does not exceed a total appropriation of 10 acre-feet per year.

12 3. a. Priority Date: The United States has a priority date of January 28, 1938 for the water rights
13 described in this Compact for Black Coulee National Wildlife Refuge.

14 b. Subordination: The natural flow water right is subordinate to:

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

17 (2) any use considered non-consumptive as defined by this Compact;

18 (3) stock watering ponds with a priority date after the effective date of this Compact and with a
19 maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than
20 30 acre-feet per year from a source other than a perennial flowing stream; and

21 (4) appropriation of groundwater with a priority date after the effective date of this Compact by
22 means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that
23 does not exceed a total appropriation of 10 acre-feet per year.

24 4. Period of Use: The period of use of this water right shall be from January 1 through December
25 31 of each year.

26 5. Points and means of diversion: any point on the Refuge and by any means subject to the terms
27 of this Compact.

28 6. Purposes: The United States water right to natural flow shall be used on the Black Coulee
29 National Wildlife Refuge for wildlife habitat maintenance and enhancement.

30 C. Emergency Fire Suppression

1 United States' reserved water right described by this Compact, and a holder of a water right recognized
2 under state law. Resolution of the controversy shall be governed by the terms of this Compact where
3 applicable, or to the extent not applicable, by applicable state or federal law.

4 2. The United States agrees that a water commissioner appointed by a state or federal court of
5 competent jurisdiction, or other official authorized by future changes in law, may enter a refuge for which
6 a water right is described in this Compact for the purpose of data collection, including the collection of
7 information necessary for water distribution on or off the refuge, and to inspect structures for the diversion
8 and measurement of water described in this Compact for consumptive use and for the measurement of
9 natural flow. The terms of entry shall be as specified in an order of a state or federal court of competent
10 jurisdiction.

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

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

19 5. The United States shall maintain structures, including wellhead equipment and casing, for the
20 diversion and measurement of water authorized for consumptive use by this Compact. The United States
21 shall maintain the devices it deems necessary for enforcement of its reserved water right for natural flow
22 described in this Compact.

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

26 **C. Use of Water Right**

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

1 of the associated reserved land described in Article II, sections A.5. and B.5 and C.

2 D. Location of Natural Flow Rights

3 The United States' reserved water rights for natural flow apply to the portion of the streams
4 specified in this Compact that flow over or form the boundary to land administered by the Fish and Wildlife
5 Service.

6 E. Change in Use

7 1. Natural flow: Reserved water rights specified in this Compact for natural flow shall not be
8 subject to change to any other use, provided that: the emergency use of water for fire suppression as
9 provided for in Article II.C. shall not be deemed a change or alteration in use, or violation of a reserved
10 water right for natural flow.

11 2. Consumptive uses: The United States may take action affecting the use of its consumptive use
12 water rights provided that:

13 (1) the action shall be in fulfillment of the purposes of the refuge described in Article II, sections
14 A.5;

15 (2) the total use shall not exceed the amount described in this Compact; and

16 (3) the action shall not adversely affect a water right that is recognized under state law.

17 3. Reporting by the United States: For any action affecting the use of a consumptive right whether
18 or not such action is deemed a change in use, the United States agrees to provide the following information
19 to the Department:

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

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

25 c. Annual Report: Between April 1 and May 1 of each year, the United States agrees to provide
26 the Department with a report on:

27 (1) actions during the preceding year affecting the use of a consumptive use right described in this
28 Compact;

29 (2) the initiation of new uses that were completed during the preceding year; and

30 (3) any data and documents generated or received by the Fish and Wildlife Service during the

1 preceding year on measurement of stream flow on a stream with a natural flow water right set forth in this
2 Compact.

3 4. Reporting by the State: Between December 1 and December 31 of each year, the Department
4 shall provide the United States with a report of:

5 (1) changes in use during the preceding year, as defined by state law, of water rights upstream
6 of or within the boundaries of reserved land for which a reserved water right is described in this Compact;

7 (2) any data and documents generated by the Department during the preceding year on the
8 measurement of streamflows, diversions and well use on or tributary to a stream for which a water right
9 for natural flow is described in this Compact;

10 (3) any certificate of water right issued during the preceding year for appropriation of groundwater;
11 and

12 (4) any permit issued during the preceding year for a stock watering pond.

13 ARTICLE IV

14 GENERAL PROVISIONS

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

16 1. The relationship between the water rights of the Fish and Wildlife Service described herein and
17 any rights to water of an Indian Tribe in Montana, or of any federally derived water right of an individual,
18 or of the United States on behalf of such tribe or individual shall be determined by the rule of priority. The
19 parties to this agreement recognize that the water rights described in this Compact are junior to any tribal
20 water rights with a priority date before the effective date of the Compact, including aboriginal rights, if any,
21 in the basins affected.

22 2. Nothing in this Compact may be construed or interpreted in any manner to establish the nature,
23 extent or manner of administration of the rights to water of any other federal agency or federal lands in
24 Montana other than those of the Fish and Wildlife Service.

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

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

30 B. State Water Rights

1 Nothing in this Compact may limit the exclusive authority of the state, including the authority of
2 a water commissioner authorized by state law, to administer all current and future water rights recognized
3 under state law within and upstream of the reserved land covered by this Compact, provided that in
4 administration of those water rights in which the United States has an interest, such authority is limited to
5 that granted under federal law.

6 C. Abstract

7 Concurrent with this Compact, the parties have prepared an Abstract, a copy of which is referenced
8 as Appendix 1, which is a specific listing of all of the United States' water rights for Benton Lake and Black
9 Coulee National Wildlife Refuges, that are described in this Compact and quantified in accordance with this
10 Compact. The parties prepared the Abstract to comply with the requirements for a final decree as set forth
11 in 85-2-234, MCA, and in an effort to assist the state courts in the process of entering decrees accurately
12 and comprehensively reflecting the rights described in this Compact. The rights specified in the Abstract
13 are subject to the terms of this Compact. In the event of a discrepancy between a right listed in the
14 Abstract and that same right as quantified in accordance with Articles II and III of this Compact, the parties
15 intend that the quantification in accordance with Articles II and III of this Compact shall be reflected in a
16 final decree.

17 D. General Disclaimers

18 Nothing in this Compact may be construed or interpreted:

- 19 1. as a precedent for the litigation of reserved water rights or the interpretation or administration
20 of future compacts between the United States and the State; or of the United States and any other state;
- 21 2. as a waiver by the United States of its right under state law to raise objections in state court
22 to individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code
23 Annotated, in the basins affected by this Compact; or any right to raise objections in an appropriate forum
24 to individual water rights subject to a provisional permit under the state Water Use Act, Title 85, of the
25 Montana Code Annotated, in the basins affected by this Compact;
- 26 3. as a waiver by the United States of its right to seek relief from a conflicting water use not
27 entitled to protection under the terms of this Compact;
- 28 4. to establish a precedent for other agreements between the state and the United States or an
29 Indian tribe;
- 30 5. to determine the relative rights, inter sese, of persons using water under the authority of state

- 1 law or to limit the rights of the parties or a person to litigate an issue not resolved by this Compact;
- 2 6. to create or deny substantive rights through headings or captions used in this Compact;
- 3 7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of
4 the effective date of this Compact;
- 5 8. to affect the right of the state to seek fees or reimbursement for costs or the right of the United
6 States to contest the imposition of such fees or costs, pursuant to a ruling by a state or federal court of
7 competent jurisdiction or Act of Congress;
- 8 9. to affect in any manner the entitlement to or quantification of other federal water rights. This
9 Compact is only binding on the United States with regard to the water rights of the Fish and Wildlife
10 Service, and does not affect the water rights of any other federal agency that is not a successor in interest
11 to the water rights subject to this Compact;
- 12 10. to prevent the United States from constructing or modifying an outlet to an impoundment at
13 a Refuge in compliance with all applicable law;
- 14 11. to prevent the United States from seeking a permit to appropriate water under state law from
15 a source not closed to new permits by this Compact or any other law.

16 E. Reservation of Rights

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

18 F. Severability

19 The provisions of this Compact are not severable, provided that for the purposes of Sec.
20 85-2-702(3), MCA, the water rights described in this Compact for each Fish and Wildlife Service Refuge
21 shall be considered as separate Compacts.

22 G. Multiple Originals

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

25 H. Notice

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

- 28 1. State: Upon the Director of the Department and such other officials as he or she may designate
29 in writing.
- 30 2. United States: Upon the Secretary of the Interior and such other officials as he or she may

1 designate in writing.

2 ARTICLE V

3 FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES

4 A. Binding Effect

5 1. The effective date of this Compact is the date of the ratification of this Compact by the Montana
6 legislature, written approval by the United States Department of the Interior, or written approval by the
7 United States Department of Justice, whichever occurs later. Once effective, all of the provisions of this
8 Compact shall be binding on:

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

11 b. Except as otherwise provided in Article IV, section A., the United States, a person or entity of
12 any nature whatsoever using, claiming, or in any manner asserting a right under the authority of the United
13 States to the use of water.

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

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

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

23 B. Disposition of Actions

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

1 immunity of the United States in the McCarran Amendment, 43 U.S.C. § 666 or other provision of federal
2 law.

3 1. Dismissal of Filed Claims: At the time the state courts approve the reserved water rights
4 described in this Compact and enter a decree or decrees confirming the rights described herein, such courts
5 shall dismiss, with prejudice, all of the water right claims specified in Appendix 2 for Benton Lake National
6 Wildlife Refuge and Appendix 3 for Black Coulee National Wildlife Refuge to this Compact. If this Compact
7 fails approval or a reserved water right described herein is not confirmed, the specified claims shall not be
8 dismissed.

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

21 3. Continuation of Negotiations: The parties were unable to finalize agreement on quantification
22 of the water rights for: Red Rocks National Wildlife Refuge and Wilderness Area; the National Bison Range;
23 Bowdoin National Wildlife Area; and Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend
24 Wilderness Area, prior to the effective date of this Compact. The parties agree to continue to pursue, in
25 good faith, quantification of water rights for these areas. In the event the parties are unable to agree on
26 quantification, the United States retains its right to have the quantity of any reserved water right for these
27 areas adjudicated in a state or federal court of competent jurisdiction.

28 C. Settlement of Claims

29 The parties intend that the water rights described in this Compact are in full and final settlement
30 of the water right claims for the reserved land described in this Compact and administered by the Fish and

1 Wildlife Service in Montana on the effective date of this Compact. Pursuant to this settlement, the United
2 States hereby and in full settlement of any and all claims filed by the United States or which could have
3 been filed by the United States for Black Coulee and Benton Lake National Wildlife Refuges, relinquishes
4 forever on the effective date of this Compact all said claims to water within the State of Montana for Black
5 Coulee and Benton Lake National Wildlife Refuges. The state agrees to recognize the reserved water rights
6 described and quantified herein, and shall, except as expressly provided for herein, treat them in the same
7 manner as a water right recognized by the state.

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

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

12

13 NEW SECTION. Section 2. Codification instruction. [Section 1] is intended to be codified as an
14 integral part of Title 85, chapter 20, and the provisions of Title 85, chapter 20, apply to [section 1].

15

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0283, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act ratifying a reserved water rights compact between the United States Fish and Wildlife Service and the State of Montana.

ASSUMPTIONS:

1. There is no known fiscal impact to state agencies.

FISCAL IMPACT:

None

Dave Lewis 2-10-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Emily Swanson
EMILY SWANSON, PRIMARY SPONSOR DATE
Fiscal Note for HB0283, as introduced
HB 283

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House BILL NO. 283
Swanson Stacy Suppiger Gov. Hill

INTRODUCED BY
A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE STATE OF MONTANA."

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

NEW SECTION. Section 1. United States Fish and Wildlife Service-Montana compact ratified. The compact entered into by the State of Montana and the United States Fish and Wildlife 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, FISH AND WILDLIFE 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 existing on the effective date of the Compact to water for Black Coulee and Benton Lake National Wildlife Refuges administered by the U.S. Fish and Wildlife Service within the State of Montana.

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 Black Coulee National Wildlife Refuge, see United States v. Aageson, No. CV-79-21-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 Benton Lake and Black Coulee National Wildlife Refuges, in the State of Montana;



1 WHEREAS, the United States, in quantifying its reserved water rights recognizes the need to
2 accommodate the interests of the state and its citizens by providing for the development and use of water
3 in the vicinity of the Fish and Wildlife Service Refuges to the extent that it is possible to do so without
4 materially affecting the rights and interests of the United States;

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

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

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

12 ARTICLE I

13 DEFINITIONS

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

15 (1) "Abstract" means the copy of the document entitled "Abstract of U.S. Fish and Wildlife Service
16 Water Rights" referenced in this Compact as Appendix 1.

17 (2) "Benton Lake National Wildlife Refuge" means those lands located in Montana that were
18 withdrawn and reserved by Executive Order No. 5228 of November 21, 1929.

19 (3) "Black Coulee National Wildlife Refuge" means those lands and interests in lands located in
20 Montana that were acquired pursuant to, or withdrawn and reserved by Executive Order 7801 of January
21 28, 1938.

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

24 (5) "Effective date of this Compact" means the date of the ratification of the Compact by the
25 Montana legislature, written approval by the United States Department of the Interior, or written approval
26 by the United States Department of Justice, whichever is later.

27 (6) "Groundwater" means water that is beneath the ground surface.

28 (7) "Non-consumptive" means a water right considered to be non-consumptive by the decree,
29 permit or law authorizing the use, because it results in no depletion of water from the source.

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

1 (9) "Person" means an individual, association, partnership, corporation, state agency, political
2 subdivision, or any other entity, but does not include the United States.

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

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

8 (12) "United States" means the federal government and all officers, agencies, departments and
9 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than
10 service in litigation, "United States" means the Secretary of the Department of the Interior, or his or her
11 designees.

12 ARTICLE II

13 WATER RIGHT

14 The parties agree that the following water rights are in settlement of the reserved water rights of
15 the United States for the Refuges described. The parties to this agreement recognize that the water rights
16 described in this Compact are junior to any tribal water rights with a priority date before the effective date
17 of the Compact, including aboriginal rights, if any, in the basins affected. All reserved water rights
18 described in this Article are subject to Article IV, section A of this Compact.

19 A. Benton Lake National Wildlife Refuge

20 1. Quantification: The United States shall have the right to water from the following sources where
21 they occur on the Refuge:

22 a. Consumptive Use: The United States has a reserved water right to 2 acre-feet per year diverted
23 at a maximum rate of 45 gpm from groundwater beneath the Benton Lake National Wildlife Refuge.

24 b. Natural Flow: The United States has a reserved water right to the natural flow in the Lake Creek
25 drainage including the unnamed tributaries to Benton lake where the drainage enters the Refuge in the
26 amount of the natural flow remaining after satisfaction of the following rights:

27 (1) all rights recognized under state law with a priority date prior to the effective date of this
28 Compact;

29 (2) any rights for stock watering ponds with a priority date after the effective date of this Compact
30 and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less

1 than 30 acre-feet per year from a source other than a perennial flowing stream; and

2 (3) any right to appropriate groundwater with a priority date after the effective date of this
3 Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute
4 or less that does not exceed a total appropriation of 10 acre-feet per year.

5 2. a. Priority Date: The United States has a priority date of November 21, 1929, for the reserved
6 water rights described in this Compact for Benton Lake National Wildlife Refuge.

7 b. Subordination: The natural flow water right is subordinate to:

8 (1) any use recognized under state law with a priority date before the effective date of this
9 Compact;

10 (2) any use considered non-consumptive as defined by this Compact;

11 (3) stock watering ponds with a priority date after the effective date of this Compact and with a
12 maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than
13 30 acre-feet per year from a source other than a perennial flowing stream; and

14 (4) appropriation of groundwater with a priority date after the effective date of this Compact by
15 means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that
16 does not exceed a total appropriation of 10 acre-feet per year.

17 3. Period of Use: The period of use of this water right shall be from January 1 through December
18 31 of each year.

19 4. Points and means of diversion: Any point on the Refuge and by any means subject to the terms
20 of this Compact.

21 5. Purposes: The United States right to water may be used for the following purposes, provided
22 that, subject to the limitations set forth in Article III. section E., the United States may change the use of
23 water identified for consumptive use.

24 a. Consumptive Use: The United States water right to groundwater shall be used at the Refuge
25 headquarters for the purposes of the Refuge.

26 b. Natural Flow: The United States water right to natural flow shall be used on the Benton Lake
27 National Wildlife Refuge for wildlife habitat maintenance and enhancement.

28 B. Black Coulee National Wildlife Refuge

29 1. Quantification: The United States shall have the right to water from the following sources where
30 they occur on Black Coulee National Wildlife Refuge:

1 2. Natural Flow: The United States has a reserved water right for the natural flow in the Black
2 Coulee drainage where the drainage enters the Refuge in the amount of the natural flow remaining after
3 satisfaction of the following rights:

4 (1) all rights recognized under state law with a priority date prior to the effective date of this
5 Compact;

6 (2) any rights for stock watering ponds with a priority date after the effective date of this Compact
7 and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less
8 than 30 acre-feet per year from a source other than a perennial flowing stream; and

9 (3) any right to appropriate groundwater with a priority date after the effective date of this
10 Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute
11 or less that does not exceed a total appropriation of 10 acre-feet per year.

12 3. a. Priority Date: The United States has a priority date of January 28, 1938 for the water rights
13 described in this Compact for Black Coulee National Wildlife Refuge.

14 b. Subordination: The natural flow water right is subordinate to:

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

17 (2) any use considered non-consumptive as defined by this Compact;

18 (3) stock watering ponds with a priority date after the effective date of this Compact and with a
19 maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than
20 30 acre-feet per year from a source other than a perennial flowing stream; and

21 (4) appropriation of groundwater with a priority date after the effective date of this Compact by
22 means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that
23 does not exceed a total appropriation of 10 acre-feet per year.

24 4. Period of Use: The period of use of this water right shall be from January 1 through December
25 31 of each year.

26 5. Points and means of diversion: any point on the Refuge and by any means subject to the terms
27 of this Compact.

28 6. Purposes: The United States water right to natural flow shall be used on the Black Coulee
29 National Wildlife Refuge for wildlife habitat maintenance and enhancement.

30 C. Emergency Fire Suppression

1 United States' reserved water right described by this Compact, and a holder of a water right recognized
2 under state law. Resolution of the controversy shall be governed by the terms of this Compact where
3 applicable, or to the extent not applicable, by applicable state or federal law.

4 2. The United States agrees that a water commissioner appointed by a state or federal court of
5 competent jurisdiction, or other official authorized by future changes in law, may enter a refuge for which
6 a water right is described in this Compact for the purpose of data collection, including the collection of
7 information necessary for water distribution on or off the refuge, and to inspect structures for the diversion
8 and measurement of water described in this Compact for consumptive use and for the measurement of
9 natural flow. The terms of entry shall be as specified in an order of a state or federal court of competent
10 jurisdiction.

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

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

19 5. The United States shall maintain structures, including wellhead equipment and casing, for the
20 diversion and measurement of water authorized for consumptive use by this Compact. The United States
21 shall maintain the devices it deems necessary for enforcement of its reserved water right for natural flow
22 described in this Compact.

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

26 **C. Use of Water Right**

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

1 of the associated reserved land described in Article II, sections A.5. and B.5 and C.

2 **D. Location of Natural Flow Rights**

3 The United States' reserved water rights for natural flow apply to the portion of the streams
4 specified in this Compact that flow over or form the boundary to land administered by the Fish and Wildlife
5 Service.

6 **E. Change in Use**

7 1. **Natural flow:** Reserved water rights specified in this Compact for natural flow shall not be
8 subject to change to any other use, provided that: the emergency use of water for fire suppression as
9 provided for in Article II.C. shall not be deemed a change or alteration in use, or violation of a reserved
10 water right for natural flow.

11 2. **Consumptive uses:** The United States may take action affecting the use of its consumptive use
12 water rights provided that:

13 (1) the action shall be in fulfillment of the purposes of the refuge described in Article II, sections
14 A.5;

15 (2) the total use shall not exceed the amount described in this Compact; and

16 (3) the action shall not adversely affect a water right that is recognized under state law.

17 3. **Reporting by the United States:** For any action affecting the use of a consumptive right whether
18 or not such action is deemed a change in use, the United States agrees to provide the following information
19 to the Department:

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

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

25 c. **Annual Report:** Between April 1 and May 1 of each year, the United States agrees to provide
26 the Department with a report on:

27 (1) actions during the preceding year affecting the use of a consumptive use right described in this
28 Compact;

29 (2) the initiation of new uses that were completed during the preceding year; and

30 (3) any data and documents generated or received by the Fish and Wildlife Service during the

1 preceding year on measurement of stream flow on a stream with a natural flow water right set forth in this
2 Compact.

3 4. Reporting by the State: Between December 1 and December 31 of each year, the Department
4 shall provide the United States with a report of:

5 (1) changes in use during the preceding year, as defined by state law, of water rights upstream
6 of or within the boundaries of reserved land for which a reserved water right is described in this Compact;

7 (2) any data and documents generated by the Department during the preceding year on the
8 measurement of streamflows, diversions and well use on or tributary to a stream for which a water right
9 for natural flow is described in this Compact;

10 (3) any certificate of water right issued during the preceding year for appropriation of groundwater;

11 and

12 (4) any permit issued during the preceding year for a stock watering pond.

13 ARTICLE IV

14 GENERAL PROVISIONS

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

16 1. The relationship between the water rights of the Fish and Wildlife Service described herein and
17 any rights to water of an Indian Tribe in Montana, or of any federally derived water right of an individual,
18 or of the United States on behalf of such tribe or individual shall be determined by the rule of priority. The
19 parties to this agreement recognize that the water rights described in this Compact are junior to any tribal
20 water rights with a priority date before the effective date of the Compact, including aboriginal rights, if any,
21 in the basins affected.

22 2. Nothing in this Compact may be construed or interpreted in any manner to establish the nature,
23 extent or manner of administration of the rights to water of any other federal agency or federal lands in
24 Montana other than those of the Fish and Wildlife Service.

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

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

30 B. State Water Rights

1 Nothing in this Compact may limit the exclusive authority of the state, including the authority of
2 a water commissioner authorized by state law, to administer all current and future water rights recognized
3 under state law within and upstream of the reserved land covered by this Compact, provided that in
4 administration of those water rights in which the United States has an interest, such authority is limited to
5 that granted under federal law.

6 C. Abstract

7 Concurrent with this Compact, the parties have prepared an Abstract, a copy of which is referenced
8 as Appendix 1, which is a specific listing of all of the United States' water rights for Benton Lake and Black
9 Coulee National Wildlife Refuges, that are described in this Compact and quantified in accordance with this
10 Compact. The parties prepared the Abstract to comply with the requirements for a final decree as set forth
11 in 85-2-234, MCA, and in an effort to assist the state courts in the process of entering decrees accurately
12 and comprehensively reflecting the rights described in this Compact. The rights specified in the Abstract
13 are subject to the terms of this Compact. In the event of a discrepancy between a right listed in the
14 Abstract and that same right as quantified in accordance with Articles II and III of this Compact, the parties
15 intend that the quantification in accordance with Articles II and III of this Compact shall be reflected in a
16 final decree.

17 D. General Disclaimers

18 Nothing in this Compact may be construed or interpreted:

- 19 1. as a precedent for the litigation of reserved water rights or the interpretation or administration
20 of future compacts between the United States and the State; or of the United States and any other state;
- 21 2. as a waiver by the United States of its right under state law to raise objections in state court
22 to individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code
23 Annotated, in the basins affected by this Compact; or any right to raise objections in an appropriate forum
24 to individual water rights subject to a provisional permit under the state Water Use Act, Title 85, of the
25 Montana Code Annotated, in the basins affected by this Compact;
- 26 3. as a waiver by the United States of its right to seek relief from a conflicting water use not
27 entitled to protection under the terms of this Compact;
- 28 4. to establish a precedent for other agreements between the state and the United States or an
29 Indian tribe;
- 30 5. to determine the relative rights, inter sese, of persons using water under the authority of state

- 1 law or to limit the rights of the parties or a person to litigate an issue not resolved by this Compact;
- 2 6. to create or deny substantive rights through headings or captions used in this Compact;
- 3 7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of
- 4 the effective date of this Compact;
- 5 8. to affect the right of the state to seek fees or reimbursement for costs or the right of the United
- 6 States to contest the imposition of such fees or costs, pursuant to a ruling by a state or federal court of
- 7 competent jurisdiction or Act of Congress;
- 8 9. to affect in any manner the entitlement to or quantification of other federal water rights. This
- 9 Compact is only binding on the United States with regard to the water rights of the Fish and Wildlife
- 10 Service, and does not affect the water rights of any other federal agency that is not a successor in interest
- 11 to the water rights subject to this Compact;
- 12 10. to prevent the United States from constructing or modifying an outlet to an impoundment at
- 13 a Refuge in compliance with all applicable law;
- 14 11. to prevent the United States from seeking a permit to appropriate water under state law from
- 15 a source not closed to new permits by this Compact or any other law.

16 **E. Reservation of Rights**

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

18 **F. Severability**

19 The provisions of this Compact are not severable, provided that for the purposes of Sec.

20 85-2-702(3), MCA, the water rights described in this Compact for each Fish and Wildlife Service Refuge

21 shall be considered as separate Compacts.

22 **G. Multiple Originals**

23 This Compact is executed in quintuplicate. Each of the five (5) Compacts bearing original signatures

24 shall be deemed an original.

25 **H. Notice**

26 Unless otherwise specifically provided for in this Compact, service of notice required hereunder,

27 except service in litigation, shall be:

- 28 1. **State**: Upon the Director of the Department and such other officials as he or she may designate
- 29 in writing.
- 30 2. **United States**: Upon the Secretary of the Interior and such other officials as he or she may

1 designate in writing.

2 ARTICLE V

3 FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES

4 A. Binding Effect

5 1. The effective date of this Compact is the date of the ratification of this Compact by the Montana
6 legislature, written approval by the United States Department of the Interior, or written approval by the
7 United States Department of Justice, whichever occurs later. Once effective, all of the provisions of this
8 Compact shall be binding on:

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

11 b. Except as otherwise provided in Article IV, section A., the United States, a person or entity of
12 any nature whatsoever using, claiming, or in any manner asserting a right under the authority of the United
13 States to the use of water.

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

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

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

23 B. Disposition of Actions

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

1 immunity of the United States in the McCarran Amendment, 43 U.S.C. § 666 or other provision of federal
2 law.

3 1. Dismissal of Filed Claims: At the time the state courts approve the reserved water rights
4 described in this Compact and enter a decree or decrees confirming the rights described herein, such courts
5 shall dismiss, with prejudice, all of the water right claims specified in Appendix 2 for Benton Lake National
6 Wildlife Refuge and Appendix 3 for Black Coulee National Wildlife Refuge to this Compact. If this Compact
7 fails approval or a reserved water right described herein is not confirmed, the specified claims shall not be
8 dismissed.

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

21 3. Continuation of Negotiations: The parties were unable to finalize agreement on quantification
22 of the water rights for: Red Rocks National Wildlife Refuge and Wilderness Area; the National Bison Range;
23 Bowdoin National Wildlife Area; and Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend
24 Wilderness Area, prior to the effective date of this Compact. The parties agree to continue to pursue, in
25 good faith, quantification of water rights for these areas. In the event the parties are unable to agree on
26 quantification, the United States retains its right to have the quantity of any reserved water right for these
27 areas adjudicated in a state or federal court of competent jurisdiction.

28 C. Settlement of Claims

29 The parties intend that the water rights described in this Compact are in full and final settlement
30 of the water right claims for the reserved land described in this Compact and administered by the Fish and

1 Wildlife Service in Montana on the effective date of this Compact. Pursuant to this settlement, the United
2 States hereby and in full settlement of any and all claims filed by the United States or which could have
3 been filed by the United States for Black Coulee and Benton Lake National Wildlife Refuges, relinquishes
4 forever on the effective date of this Compact all said claims to water within the State of Montana for Black
5 Coulee and Benton Lake National Wildlife Refuges. The state agrees to recognize the reserved water rights
6 described and quantified herein, and shall, except as expressly provided for herein, treat them in the same
7 manner as a water right recognized by the state.

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

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

12

13 NEW SECTION. Section 2. Codification instruction. [Section 1] is intended to be codified as an
14 integral part of Title 85, chapter 20, and the provisions of Title 85, chapter 20, apply to [section 1].

15

-END-

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House BILL NO. 283
Swanson Stacy Swappell Gov. Bell

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE STATE OF MONTANA."

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

THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE REPRINTED. PLEASE REFER TO SECOND READING COPY (YELLOW) FOR COMPLETE TEXT.

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House BILL NO. 283
Swanson *R. Stone* *Supervisor* *Gov. Fall*

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE STATE OF MONTANA."

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

NEW SECTION. Section 1. United States Fish and Wildlife Service-Montana compact ratified. The compact entered into by the State of Montana and the United States Fish and Wildlife 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:

THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE REPRINTED. PLEASE REFER TO SECOND READING COPY (YELLOW) FOR COMPLETE TEXT.

1 HOUSE BILL NO. 283

2 INTRODUCED BY SWANSON, STORY, SWYSGOOD, GROSFIELD

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN
5 THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE STATE OF MONTANA."

6

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

8

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

13 WATER RIGHTS COMPACT

14 STATE OF MONTANA

15 UNITED STATES OF AMERICA, FISH AND WILDLIFE SERVICE

16 This Compact is entered into by the State of Montana and the United States of America to settle
17 for all time any and all claims existing on the effective date of the Compact to water for Black Coulee and
18 Benton Lake National Wildlife Refuges administered by the U.S. Fish and Wildlife Service within the State
19 of Montana.

20 RECITALS

21 WHEREAS, in 1979 the United States filed in the United States District Court for the District of
22 Montana several actions to adjudicate, inter alia, its rights to water with respect to Black Coulee National
23 Wildlife Refuge, see United States v. Aageson, No. CV-79-21-GF;24 WHEREAS, the State of Montana, in 1979 pursuant to Title 85, Chapter 2 of the Montana Code
25 Annotated, commenced a general adjudication of the rights to the use of water within the State of Montana
26 including all federal reserved and appropriative water rights;27 WHEREAS, 85-2-703, MCA, provides that the state may negotiate settlement of claims by the
28 federal government to non-Indian reserved waters within the State of Montana;29 WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary
30 to fulfill the purposes of Benton Lake and Black Coulee National Wildlife Refuges, in the State of Montana;

1 (9) "Person" means an individual, association, partnership, corporation, state agency, political
2 subdivision, or any other entity, but does not include the United States.

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

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

8 (12) "United States" means the federal government and all officers, agencies, departments and
9 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than
10 service in litigation, "United States" means the Secretary of the Department of the Interior, or his or her
11 designees.

12 ARTICLE II

13 WATER RIGHT

14 The parties agree that the following water rights are in settlement of the reserved water rights of
15 the United States for the Refuges described. The parties to this agreement recognize that the water rights
16 described in this Compact are junior to any tribal water rights with a priority date before the effective date
17 of the Compact, including aboriginal rights, if any, in the basins affected. All reserved water rights
18 described in this Article are subject to Article IV, section A of this Compact.

19 A. Benton Lake National Wildlife Refuge

20 1. Quantification: The United States shall have the right to water from the following sources where
21 they occur on the Refuge:

22 a. Consumptive Use: The United States has a reserved water right to 2 acre-feet per year diverted
23 at a maximum rate of 45 gpm from groundwater beneath the Benton Lake National Wildlife Refuge.

24 b. Natural Flow: The United States has a reserved water right to the natural flow in the Lake Creek
25 drainage including the unnamed tributaries to Benton lake where the drainage enters the Refuge in the
26 amount of the natural flow remaining after satisfaction of the following rights:

27 (1) all rights recognized under state law with a priority date prior to the effective date of this
28 Compact;

29 (2) any rights for stock watering ponds with a priority date after the effective date of this Compact
30 and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less

1 than 30 acre-feet per year from a source other than a perennial flowing stream; and

2 (3) any right to appropriate groundwater with a priority date after the effective date of this
3 Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute
4 or less that does not exceed a total appropriation of 10 acre-feet per year.

5 2. a. Priority Date: The United States has a priority date of November 21, 1929, for the reserved
6 water rights described in this Compact for Benton Lake National Wildlife Refuge.

7 b. Subordination: The natural flow water right is subordinate to:

8 (1) any use recognized under state law with a priority date before the effective date of this
9 Compact;

10 (2) any use considered non-consumptive as defined by this Compact;

11 (3) stock watering ponds with a priority date after the effective date of this Compact and with a
12 maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than
13 30 acre-feet per year from a source other than a perennial flowing stream; and

14 (4) appropriation of groundwater with a priority date after the effective date of this Compact by
15 means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that
16 does not exceed a total appropriation of 10 acre-feet per year.

17 3. Period of Use: The period of use of this water right shall be from January 1 through December
18 31 of each year.

19 4. Points and means of diversion: Any point on the Refuge and by any means subject to the terms
20 of this Compact.

21 5. Purposes: The United States right to water may be used for the following purposes, provided
22 that, subject to the limitations set forth in Article III. section E., the United States may change the use of
23 water identified for consumptive use.

24 a. Consumptive Use: The United States water right to groundwater shall be used at the Refuge
25 headquarters for the purposes of the Refuge.

26 b. Natural Flow: The United States water right to natural flow shall be used on the Benton Lake
27 National Wildlife Refuge for wildlife habitat maintenance and enhancement.

28 B. Black Coulee National Wildlife Refuge

29 1. Quantification: The United States shall have the right to water from the following sources where
30 they occur on Black Coulee National Wildlife Refuge:

1 2. Natural Flow: The United States has a reserved water right for the natural flow in the Black
2 Coulee drainage where the drainage enters the Refuge in the amount of the natural flow remaining after
3 satisfaction of the following rights:

4 (1) all rights recognized under state law with a priority date prior to the effective date of this
5 Compact;

6 (2) any rights for stock watering ponds with a priority date after the effective date of this Compact
7 and a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less
8 than 30 acre-feet per year from a source other than a perennial flowing stream; and

9 (3) any right to appropriate groundwater with a priority date after the effective date of this
10 Compact by means of a well or developed spring with a maximum appropriation of 35 gallons per minute
11 or less that does not exceed a total appropriation of 10 acre-feet per year.

12 3. a. Priority Date: The United States has a priority date of January 28, 1938 for the water rights
13 described in this Compact for Black Coulee National Wildlife Refuge.

14 b. Subordination: The natural flow water right is subordinate to:

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

17 (2) any use considered non-consumptive as defined by this Compact;

18 (3) stock watering ponds with a priority date after the effective date of this Compact and with a
19 maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation of less than
20 30 acre-feet per year from a source other than a perennial flowing stream; and

21 (4) appropriation of groundwater with a priority date after the effective date of this Compact by
22 means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less that
23 does not exceed a total appropriation of 10 acre-feet per year.

24 4. Period of Use: The period of use of this water right shall be from January 1 through December
25 31 of each year.

26 5. Points and means of diversion: any point on the Refuge and by any means subject to the terms
27 of this Compact.

28 6. Purposes: The United States water right to natural flow shall be used on the Black Coulee
29 National Wildlife Refuge for wildlife habitat maintenance and enhancement.

30 C. Emergency Fire Suppression

1 United States' reserved water right described by this Compact, and a holder of a water right recognized
2 under state law. Resolution of the controversy shall be governed by the terms of this Compact where
3 applicable, or to the extent not applicable, by applicable state or federal law.

4 2. The United States agrees that a water commissioner appointed by a state or federal court of
5 competent jurisdiction, or other official authorized by future changes in law, may enter a refuge for which
6 a water right is described in this Compact for the purpose of data collection, including the collection of
7 information necessary for water distribution on or off the refuge, and to inspect structures for the diversion
8 and measurement of water described in this Compact for consumptive use and for the measurement of
9 natural flow. The terms of entry shall be as specified in an order of a state or federal court of competent
10 jurisdiction.

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

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

19 5. The United States shall maintain structures, including wellhead equipment and casing, for the
20 diversion and measurement of water authorized for consumptive use by this Compact. The United States
21 shall maintain the devices it deems necessary for enforcement of its reserved water right for natural flow
22 described in this Compact.

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

26 C. Use of Water Right

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

1 of the associated reserved land described in Article II, sections A.5. and B.5 and C.

2 D. Location of Natural Flow Rights

3 The United States' reserved water rights for natural flow apply to the portion of the streams
4 specified in this Compact that flow over or form the boundary to land administered by the Fish and Wildlife
5 Service.

6 E. Change in Use

7 1. Natural flow: Reserved water rights specified in this Compact for natural flow shall not be
8 subject to change to any other use, provided that: the emergency use of water for fire suppression as
9 provided for in Article II.C. shall not be deemed a change or alteration in use, or violation of a reserved
10 water right for natural flow.

11 2. Consumptive uses: The United States may take action affecting the use of its consumptive use
12 water rights provided that:

13 (1) the action shall be in fulfillment of the purposes of the refuge described in Article II, sections
14 A.5;

15 (2) the total use shall not exceed the amount described in this Compact; and

16 (3) the action shall not adversely affect a water right that is recognized under state law.

17 3. Reporting by the United States: For any action affecting the use of a consumptive right whether
18 or not such action is deemed a change in use, the United States agrees to provide the following information
19 to the Department:

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

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

25 c. Annual Report: Between April 1 and May 1 of each year, the United States agrees to provide
26 the Department with a report on:

27 (1) actions during the preceding year affecting the use of a consumptive use right described in this
28 Compact;

29 (2) the initiation of new uses that were completed during the preceding year; and

30 (3) any data and documents generated or received by the Fish and Wildlife Service during the

1 preceding year on measurement of stream flow on a stream with a natural flow water right set forth in this
2 Compact.

3 4. Reporting by the State: Between December 1 and December 31 of each year, the Department
4 shall provide the United States with a report of:

5 (1) changes in use during the preceding year, as defined by state law, of water rights upstream
6 of or within the boundaries of reserved land for which a reserved water right is described in this Compact;

7 (2) any data and documents generated by the Department during the preceding year on the
8 measurement of streamflows, diversions and well use on or tributary to a stream for which a water right
9 for natural flow is described in this Compact;

10 (3) any certificate of water right issued during the preceding year for appropriation of groundwater;
11 and

12 (4) any permit issued during the preceding year for a stock watering pond.

13 ARTICLE IV

14 GENERAL PROVISIONS

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

16 1. The relationship between the water rights of the Fish and Wildlife Service described herein and
17 any rights to water of an Indian Tribe in Montana, or of any federally derived water right of an individual,
18 or of the United States on behalf of such tribe or individual shall be determined by the rule of priority. The
19 parties to this agreement recognize that the water rights described in this Compact are junior to any tribal
20 water rights with a priority date before the effective date of the Compact, including aboriginal rights, if any,
21 in the basins affected.

22 2. Nothing in this Compact may be construed or interpreted in any manner to establish the nature,
23 extent or manner of administration of the rights to water of any other federal agency or federal lands in
24 Montana other than those of the Fish and Wildlife Service.

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

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

30 B. State Water Rights

1 Nothing in this Compact may limit the exclusive authority of the state, including the authority of
2 a water commissioner authorized by state law, to administer all current and future water rights recognized
3 under state law within and upstream of the reserved land covered by this Compact, provided that in
4 administration of those water rights in which the United States has an interest, such authority is limited to
5 that granted under federal law.

6 C. Abstract

7 Concurrent with this Compact, the parties have prepared an Abstract, a copy of which is referenced
8 as Appendix 1, which is a specific listing of all of the United States' water rights for Benton Lake and Black
9 Coulee National Wildlife Refuges, that are described in this Compact and quantified in accordance with this
10 Compact. The parties prepared the Abstract to comply with the requirements for a final decree as set forth
11 in 85-2-234, MCA, and in an effort to assist the state courts in the process of entering decrees accurately
12 and comprehensively reflecting the rights described in this Compact. The rights specified in the Abstract
13 are subject to the terms of this Compact. In the event of a discrepancy between a right listed in the
14 Abstract and that same right as quantified in accordance with Articles II and III of this Compact, the parties
15 intend that the quantification in accordance with Articles II and III of this Compact shall be reflected in a
16 final decree.

17 D. General Disclaimers

18 Nothing in this Compact may be construed or interpreted:

- 19 1. as a precedent for the litigation of reserved water rights or the interpretation or administration
20 of future compacts between the United States and the State; or of the United States and any other state;
- 21 2. as a waiver by the United States of its right under state law to raise objections in state court
22 to individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code
23 Annotated, in the basins affected by this Compact; or any right to raise objections in an appropriate forum
24 to individual water rights subject to a provisional permit under the state Water Use Act, Title 85, of the
25 Montana Code Annotated, in the basins affected by this Compact;
- 26 3. as a waiver by the United States of its right to seek relief from a conflicting water use not
27 entitled to protection under the terms of this Compact;
- 28 4. to establish a precedent for other agreements between the state and the United States or an
29 Indian tribe;
- 30 5. to determine the relative rights, inter sese, of persons using water under the authority of state

- 1 law or to limit the rights of the parties or a person to litigate an issue not resolved by this Compact;
- 2 6. to create or deny substantive rights through headings or captions used in this Compact;
- 3 7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of
- 4 the effective date of this Compact;
- 5 8. to affect the right of the state to seek fees or reimbursement for costs or the right of the United
- 6 States to contest the imposition of such fees or costs, pursuant to a ruling by a state or federal court of
- 7 competent jurisdiction or Act of Congress;
- 8 9. to affect in any manner the entitlement to or quantification of other federal water rights. This
- 9 Compact is only binding on the United States with regard to the water rights of the Fish and Wildlife
- 10 Service, and does not affect the water rights of any other federal agency that is not a successor in interest
- 11 to the water rights subject to this Compact;
- 12 10. to prevent the United States from constructing or modifying an outlet to an impoundment at
- 13 a Refuge in compliance with all applicable law;
- 14 11. to prevent the United States from seeking a permit to appropriate water under state law from
- 15 a source not closed to new permits by this Compact or any other law.

16 E. Reservation of Rights

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

18 F. Severability

19 The provisions of this Compact are not severable, provided that for the purposes of Sec.

20 85-2-702(3), MCA, the water rights described in this Compact for each Fish and Wildlife Service Refuge

21 shall be considered as separate Compacts.

22 G. Multiple Originals

23 This Compact is executed in quintuplicate. Each of the five (5) Compacts bearing original signatures

24 shall be deemed an original.

25 H. Notice

26 Unless otherwise specifically provided for in this Compact, service of notice required hereunder,

27 except service in litigation, shall be:

28 1. State: Upon the Director of the Department and such other officials as he or she may designate

29 in writing.

30 2. United States: Upon the Secretary of the Interior and such other officials as he or she may

1 designate in writing.

2 ARTICLE V

3 FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES

4 A. Binding Effect

5 1. The effective date of this Compact is the date of the ratification of this Compact by the Montana
6 legislature, written approval by the United States Department of the Interior, or written approval by the
7 United States Department of Justice, whichever occurs later. Once effective, all of the provisions of this
8 Compact shall be binding on:

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

11 b. Except as otherwise provided in Article IV, section A., the United States, a person or entity of
12 any nature whatsoever using, claiming, or in any manner asserting a right under the authority of the United
13 States to the use of water.

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

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

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

23 B. Disposition of Actions

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

1 immunity of the United States in the McCarran Amendment, 43 U.S.C. § 666 or other provision of federal
2 law.

3 1. Dismissal of Filed Claims: At the time the state courts approve the reserved water rights
4 described in this Compact and enter a decree or decrees confirming the rights described herein, such courts
5 shall dismiss, with prejudice, all of the water right claims specified in Appendix 2 for Benton Lake National
6 Wildlife Refuge and Appendix 3 for Black Coulee National Wildlife Refuge to this Compact. If this Compact
7 fails approval or a reserved water right described herein is not confirmed, the specified claims shall not be
8 dismissed.

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

21 3. Continuation of Negotiations: The parties were unable to finalize agreement on quantification
22 of the water rights for: Red Rocks National Wildlife Refuge and Wilderness Area; the National Bison Range;
23 Bowdoin National Wildlife Area; and Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend
24 Wilderness Area, prior to the effective date of this Compact. The parties agree to continue to pursue, in
25 good faith, quantification of water rights for these areas. In the event the parties are unable to agree on
26 quantification, the United States retains its right to have the quantity of any reserved water right for these
27 areas adjudicated in a state or federal court of competent jurisdiction.

28 C. Settlement of Claims

29 The parties intend that the water rights described in this Compact are in full and final settlement
30 of the water right claims for the reserved land described in this Compact and administered by the Fish and

1 Wildlife Service in Montana on the effective date of this Compact. Pursuant to this settlement, the United
2 States hereby and in full settlement of any and all claims filed by the United States or which could have
3 been filed by the United States for Black Coulee and Benton Lake National Wildlife Refuges, relinquishes
4 forever on the effective date of this Compact all said claims to water within the State of Montana for Black
5 Coulee and Benton Lake National Wildlife Refuges. The state agrees to recognize the reserved water rights
6 described and quantified herein, and shall, except as expressly provided for herein, treat them in the same
7 manner as a water right recognized by the state.

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

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

12

13 NEW SECTION. **Section 2. Codification instruction.** [Section 1] is intended to be codified as an
14 integral part of Title 85, chapter 20, and the provisions of Title 85, chapter 20, apply to [section 1].

15

-END-