

SB BILL NO. 175

INTRODUCED BY

[Handwritten signature]

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN THE UNITED STATES BUREAU OF LAND MANAGEMENT AND THE STATE OF MONTANA."

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

NEW SECTION. Section 1. United States Bureau of Land Management-Montana compact ratified.

The compact entered into by the state of Montana and the United States Bureau of Land Management 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, BUREAU OF LAND MANAGEMENT

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 Bureau of Land Management within the State of Montana at the time of the effective date of this Compact.

RECITALS

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

WHEREAS, 85-2-228, MCA, provides that a federal reserved water right with a priority date of July 1, 1973, or later be subject to the same process and adjudication as a federal reserved water right with a priority date before July 1, 1973;

WHEREAS, 85-2-703 and 85-2-228(3), MCA, provide that the state may negotiate settlement of claims by the federal government to non-Indian reserved waters within the State of Montana;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of two Bureau of Land Management units in the State of Montana, specifically those reserved water rights necessary to preserve the Upper Missouri National Wild and Scenic River and the Bear Trap

1 Canyon Public Recreation Site;

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

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

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

9 ARTICLE I

10 DEFINITIONS

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

12 (1) "Annual Report" means the report prepared by the Montana Department of Natural Resources and
13 Conservation providing information concerning water appropriations issued, modified, revoked, or
14 abandoned in that year that affects the quantity of water in the Available Water Supply, and the current
15 status of the Available Water Supply.

16 (2) "Available Water Supply" or "AWS" means those monthly amounts of surface and groundwater
17 available to meet the state's projected demands, as identified in Table 1, in the Missouri River basin
18 upstream from the point the Missouri River leaves the boundary of the Upper Missouri National Wild &
19 Scenic River beyond that necessary to satisfy the United States' reserved water right. All depletions from
20 appropriations completed after December 31, 1987, shall be subtracted from the Available Water Supply.

21
22 (3) "Bear Trap Canyon Public Recreation Site" or "BTCPRS" means those lands located in Montana that,
23 pursuant to authority granted by Executive Order No. 10355 of May 26, 1952, were withdrawn and
24 reserved by Secretary of the Interior Public Land Order 5062 (Montana 17093), published in the Federal
25 Register on June 9, 1971.

26 (4) "BLM" means the United States Bureau of Land Management or its successor.

27 (5) "Department" means the Montana Department of Natural Resources and Conservation or its
28 successor.

29 (6) "Depletion" means, for water uses subtracted from the Available Water Supply, the amount of
30 water reduced in the source of supply for each month as calculated in accordance with the Method for

1 Calculation of Monthly Depletions. A depletion is a standard reduction amount based on depletion factors
2 for the type of use as opposed to a measured deduction or a term, condition, restriction, or limitation on
3 an appropriation.

4 (7) "Groundwater" means any water that is beneath the ground surface.

5 (8) "HYDROSS Model" means the United States Bureau of Reclamation's Hydrologic Operations Study
6 (HYDROSS) model for the Missouri River basin upstream from the point that the Missouri River leaves the
7 boundary of the Upper Missouri National Wild & Scenic River. The HYDROSS Model is a water supply
8 model that uses monthly water supply studies derived from a period of flow records to simulate the effect
9 of existing and proposed water demands on the historic naturalized flow of the Missouri River. The
10 HYDROSS model and information used to develop the model are archived in the Montana state library.

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

13 (10) "Method for Calculation of Monthly Depletions" means the procedure the Department will follow
14 in calculating depletions subtracted from the Available Water Supply for appropriations completed after
15 December 31, 1987. The Method for Calculation of Monthly Depletions is incorporated in this Compact
16 and attached as Appendix 1.

17 (11) "Non-Consumptive Use" means a beneficial use of water that does not cause a reduction in the
18 source of supply and in which substantially all of the water returns without delay to the source of supply,
19 causing little or no disruption in stream conditions.

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

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

24 (14) "Supplemental Water" means a new appropriation issued for the same purpose of use and place
25 of use already covered by a valid appropriation, with the same (or reduced) period of use, flow rate and,
26 if applicable, volume of water. To be considered supplemental, no aspect of the new appropriation may
27 exceed that of the original valid appropriation and only one appropriation or part of each may be used at
28 the same time.

29 (15) "Upper Missouri National Wild & Scenic River" or "UMNW&SR" means the segment of the Missouri
30 River located in Montana that, pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. 1271, et seq, (1986,

1 Supp. 1992), was designated as a component of the National Wild and Scenic Rivers System by Public Law
2 94-486, Title II, 90 Stat. 2327-2329, on October 12, 1976.

3 (16) "United States" means the federal government and all officers, agencies, departments, and political
4 subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than service
5 in litigation, "United States" means the Secretary of the Department of the Interior or the Secretary's
6 designee.

7 ARTICLE II

8 WATER RIGHT

9 The parties agree that the following water rights are in settlement of the reserved water rights of the United
10 States for the reservations described. The parties to this Compact recognize that the water rights described
11 in this Compact are junior to any Tribal water rights with a priority date before the effective date of this
12 Compact, including aboriginal rights, if any, in the basins affected. All reserved water rights described in
13 this Article are subject to Article V, section A.

14 A. Instream Flow for the Upper Missouri National Wild and Scenic River.

15

16 1. Priority Date: The United States has a priority date of October 12, 1976, for the water right
17 described in this Compact for the UMNW&SR.

18 2. Instream Flow: The United States has a water right for instream flow in the Missouri River from
19 Fort Benton one hundred and forty-nine miles downstream to Fred Robinson Bridge, as specifically
20 depicted on the map attached as Appendix 2. The water right is in the amount of the remaining
21 flow of the river after (1) all water appropriations completed before December 31, 1987; (2) the
22 volumes of water designated for the Available Water Supply as provided in Article III, section A;
23 and (3) uses not subtracted from the Available Water Supply as provided in Article III, section C.

24 B. Instream Flow for the Bear Trap Canyon Public Recreation Site.

25

26 1. Priority Date: The United States has a priority date of June 9, 1971, for the water right described
27 in this Compact for the BTCPRS.

28 2. Instream Flow: The United States has a water right for instream flow in the Madison River which
29 flows over the reserved land of Bear Trap Canyon Public Recreation Site, more specifically
30 described as T4S R1E Sec. 20 SW1/4 downstream to T3S R1E Sec. 15 NE1/4. The water right

1 is in the amount of 1,100 cubic feet per second from January 1 through December 31.

2 ARTICLE III

3 UMNW&SR WATER RIGHT IMPLEMENTATION

4 A. Available Water Supply.

5 The HYDROSS model incorporates information on water uses completed on or before December 31, 1987.
6 The Department will calculate depletions from appropriations completed after December 31, 1987, on a
7 monthly basis in accordance with Article III, section B and subtract such depletions from the water volumes
8 designated for the Available Water Supply as set forth in Table 1.

9 TABLE 1

10 AVAILABLE WATER SUPPLY

11 MONTHLY AMOUNTS

| 12 | Month | Acre-feet |
|----|-----------|-----------|
| 13 | January | 104,000 |
| 14 | February | 121,000 |
| 15 | March | 124,000 |
| 16 | April | 185,000 |
| 17 | May | 219,000 |
| 18 | June | 62,000 |
| 19 | July | 82,000 |
| 20 | August | 66,000 |
| 21 | September | 40,000 |
| 22 | October | 35,000 |
| 23 | November | 57,000 |
| 24 | December | 98,000 |

25 B. Method for Calculation of Monthly Depletions Subtracted from the Available Water Supply.

26
27 1. Surface Water. Except as provided in Article III, section C, the Department will calculate depletions
28 from surface water based on monthly depletion factors for various types of water use in accordance with
29 the Method for Calculation of Monthly Depletions attached as Appendix 1 in the month that the use occurs.
30 The Department will subtract monthly depletions from the AWS monthly amounts.

1 2. Groundwater. Except as provided in Article III, section C, the Department will calculate depletions from
2 groundwater based on monthly depletion factors for various types of water use in accordance with the
3 Method for Calculation of Monthly Depletions attached as Appendix 1 and spread the depletions in equal
4 increments throughout the year with 1/12th of the annual depletion volume subtracted from each AWS
5 monthly amount.

6 3. Stored Water. Except as provided in Article III, section C, the Department will calculate depletions from
7 stored water based on monthly depletion factors for various types of water use for the months of use in
8 accordance with the Method for Calculation of Monthly Depletions attached as Appendix 1, but subtract
9 such depletions from the AWS in the months when diverted as calculated in accordance with the Method
10 for Calculation of Monthly Depletions attached as Appendix 1. The Department will calculate evaporation
11 depletions in accordance with the Method for Calculation of Monthly Depletions attached as Appendix 1
12 and subtract such depletions from the AWS monthly amounts.

13 4. Water Reservations. Except as provided in Article III, section C, the Department will calculate depletions
14 from state water reservations granted pursuant to 85-2-316 but not completed on or before December 31,
15 1987, based on the monthly depletion factors for various types of water use in accordance with the Method
16 for Calculation of Monthly Depletions attached as Appendix 1 and subtract such depletions from the AWS
17 monthly amounts. The Department will process state water reservations that are abandoned, revoked,
18 modified, or found invalid pursuant to Article III, section D.

19 C. Uses Not Subtracted from the Available Water Supply.

20
21 1. Non-Consumptive Use. The Department will not subtract non-consumptive uses from the AWS monthly
22 amounts.

23 2. Uses of 35 gallons per minute or less, not to exceed 10 acre feet per year. The Department will not
24 subtract groundwater uses of 35 gallons per minute or less, not to exceed 10 acre feet per year, and
25 surface water appropriations of 35 gallons per minute or less, not to exceed 10 acre feet per year for
26 domestic use from the AWS monthly amounts.

27 3. Supplemental Water. The Department will not subtract supplemental water uses from the AWS monthly
28 amounts.

29 4. Lawn and Garden. The Department will not subtract depletions for appropriations to irrigate an area
30 5 acres or less from the AWS monthly amounts.

1 5. Instream Stock Uses. The Department will not subtract instream stock uses from the AWS monthly
2 amounts.

3 6. Late Claims. The Department will not subtract valid late claims as defined by 85-2-221, MCA (1995)
4 from the AWS monthly amounts.

5 7. Federal and Tribal Water Rights. The Department will not subtract water rights created under federal
6 law, water rights recognized in satisfaction of water rights created under federal law, and water rights
7 owned by individuals that are derived from water rights created under federal law from the AWS monthly
8 amounts.

9 D. Additions to the Available Water Supply.

10 1. Abandonment. When an appropriation right on a stream affected by this Compact is abandoned after
11 December 31, 1987, and such abandonment causes water to become available for appropriation, the
12 Department will calculate the previous depletion amount in accordance with the Method for Calculation of
13 Monthly Depletions and add such amount to the water volumes designated for the Available Water Supply.
14 State law governs the issue of whether an abandonment has occurred.

15 2. Modified, Revoked, or Invalid Appropriations. When an appropriation right on a stream affected by this
16 Compact is modified, revoked, or found invalid and such modification, revocation, or invalidation causes
17 water to become available for appropriation, the Department will calculate the previous depletion amount
18 in accordance with the Method for Calculation of Monthly Depletions and add such amount to the water
19 volumes designated for the Available Water Supply.

20 E. Basin Closure. Except for the uses provided for in Article III, section C, in the Missouri River basin
21 upstream from the point that the Missouri River leaves the boundary of the UMNW&SR the Department
22 shall not process or grant an application for an appropriation in any month in which the water volume
23 designated for the Available Water Supply has been exhausted.

24 F. Prohibition on Future Mainstem Impoundment. No new impoundments may be permitted on the
25 mainstem of the Missouri River upstream from the UMNW&SR. Reclamation, repair, or rehabilitation of an
26 existing impoundment shall not be considered a new impoundment, provided that, without the consent of
27 the United States, reclamation, repair, or rehabilitation shall not cause the impoundment to exceed the
28 original constructed capacity of the impoundment.

29 G. Administration and Reporting by the State.

30 1. Department Administration. The Department will administer the AWS by subtracting depletions from

1 the monthly available water amounts following the procedures set forth in the Method for Calculation of
2 Monthly Depletions attached as Appendix 1. In order to monitor the water volumes in the AWS, the
3 Department will calculate preliminary monthly depletions and subtract the amounts from the AWS. The
4 Department will make final subtractions from the AWS when the Department determines that an
5 appropriation is complete pursuant to 85-2-315 or 85-2-316(8)(b), MCA.

6 2. Annual Report. The Department will produce an Annual Report by March 1st of each year detailing its
7 actions in administering the AWS for the previous calendar year, provided that the first Annual Report after
8 ratification of this Compact shall include information concerning water appropriations issued, completed,
9 modified, revoked, found invalid, or abandoned since January 1, 1988, through the previous calendar year.
10 The Annual Report is final on April 15 of the year issued unless on or before that date the BLM submits
11 written comments or a request for an annual meeting to the Department. If an annual meeting is requested,
12 it shall be held within thirty days of the request. The Department will make a final decision and issue a final
13 Annual Report by June 1, unless the Department and the BLM agree to a different date.

14 3. Cooperative Review Process. The Department and the BLM will create a cooperative review process
15 to allow discussion of depletion factors and depletion amounts assigned to the undefined uses as listed in
16 the Method for Calculation of Monthly Depletions attached as Appendix 1 and any other issues concerning
17 the Annual Report. Subject to Article III, section H(1), the Department will make the final decision
18 concerning the administration of the AWS. The Department and the BLM will develop a Memorandum of
19 Understanding describing the cooperative review process within six months of the ratification of this
20 Compact.

21 4. Changes to the Method for Calculation of Monthly Depletions. The parties may make changes to the
22 Method for Calculation of Monthly Depletions attached as Appendix 1 by written agreement and such
23 changes shall not be deemed a modification of this Compact.

24 H. Action for Enforcement of Provisions of Article III.

25 The United States may file an action in a court of competent jurisdiction to enforce the provisions of Article
26 III as follows:

27 1. Enforcement of Administration of Available Water Supply. After the Annual Report becomes final in
28 accordance with Article III, section G(2), the United States shall have 90 days to file an action for
29 enforcement of the provisions of Article III, section G of this Compact concerning the administration of the
30 AWS. Any action challenging the administration of the AWS may consist only of trial de novo of the

1 Department's actions for the previous calendar year. The United States may not challenge the
 2 Department's actions concerning administration of the AWS contained in previous Annual Reports. Except
 3 for appropriations issued in violation of Article III, section E, any court order concerning this subsection shall
 4 be limited to calculating depletion amounts from the AWS and does not affect the appropriations issued,
 5 revoked, modified, or abandoned or any other decision of the Department.

6 2. Enforcement of Other Provisions of Article III. The United States may file an action for enforcement of
 7 any provision of Article III except Article III, section G at any time.

8 3. No Standing to Object. The United States does not have standing to object to an application for an
 9 appropriation or change in appropriation right, or to participate in a revocation or modification proceeding,
 10 based on the property, water right, or interests of the United States for the UMNW&SR, provided that, for
 11 an appropriation applied for with a point of diversion or means of conveyance within the boundaries of the
 12 UMNW&SR, the Department shall not grant the appropriation unless the Department expressly conditions
 13 the appropriation on obtaining the necessary authorization for entry and use from the United States, and
 14 provided further that nothing in this Compact shall limit the United States' standing to object based on any
 15 other water rights of the United States or the reserved water right for the BTCPRS.

16 4. Exclusive Remedy. The remedy set forth in this section is the exclusive remedy for enforcement of
 17 Article III of this Compact. The United States shall not have to exhaust any administrative remedies in order
 18 to enforce Article III of this Compact.

19 ARTICLE IV

20 BTCPRS WATER RIGHT IMPLEMENTATION

21 A. Subject to Prior Uses. The United States' federal reserved water right for instream flow for the segment
 22 of the Madison River which flows over the reserved land of Bear Trap Canyon Public Recreation Site is
 23 subject to all water rights with a priority date before June 9, 1971 recognized under state or federal law.
 24 Nothing in this Compact may affect an existing right to divert water from a point within the BTCPRS and
 25 transport it for use outside the BTCPRS.

26 B. Change in Instream Flow Right. The federal reserved water right for instream flow as described in
 27 Article II, section B, shall not be changed to any other use.

28 C. Notice of Reopening of Madison River Basin. The Department shall notify the BLM if an application for
 29 a state water reservation pursuant to 85-2-316, MCA, may be processed and granted within the Madison
 30 River basin, as such basin is defined by 85-2-340(4).

1 D. Enforcement of Water Right. The United States may file an action in a court of competent jurisdiction
2 to enforce the federal reserved water right described in Article II, section B.

3 E. Venue for Appeal of Administrative Decisions. For any appeal of an administrative decision, venue shall
4 be the First Judicial District in Helena and the review shall be conducted according to the procedures for
5 judicial review of contested cases under the Montana Administrative Procedures Act, Title 2, chapter 4,
6 of the Montana Code Annotated.

7 ARTICLE V

8 GENERAL PROVISIONS

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

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

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

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

17 4. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent,
18 or manner of administration of the rights to water of any other federal agency or federal lands in Montana
19 other than those of the Bureau of Land Management for the UMNW&SR and the BTCPRS.

20 B. General Disclaimers.

21 Nothing in this Compact may be construed or interpreted:

22 1. as a precedent for the litigation of reserved water rights or the interpretation or administration of future
23 compacts between the United States and the state; or of the United States and any other state;

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

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

- 1 4. to establish a precedent for other agreements between the state and the United States or an Indian
- 2 tribe;
- 3 5. to determine the relative rights, inter sese, of persons using water under the authority of state law or
- 4 to limit the rights of the parties or a person to litigate an issue not resolved by this Compact;
- 5 6. to create or deny substantive rights through headings or captions used in this Compact;
- 6 7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the
- 7 effective date of this Compact;
- 8 8. to affect the right of the state to seek fees or reimbursement for costs or the right of the United States
- 9 to contest the imposition of such fees or costs, pursuant to a ruling by a state or federal court of competent
- 10 jurisdiction or Act of Congress;
- 11 9. to affect in any manner the entitlement to or quantification of other federal water rights. This Compact
- 12 is only binding on the United States with regard to the water rights of the BLM, and does not affect the
- 13 water rights of any other federal agency that is not a successor in interest to the water rights subject to
- 14 this Compact.

15 C. Use of Water Right.

16 The rights of the United States described in Article II of this Compact are federal reserved water rights.

17 Non-use of all or a part of the federal reserved water rights described in this Compact shall not constitute

18 abandonment of the right. The federal reserved water rights described in this Compact need not be applied

19 to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the purposes

20 outlined in applicable federal law.

21 D. Concurrent with other Non-consumptive Water Uses.

22 The federal reserved water right for instream flows for the UMNW&SR and the BTCPRS recognized by this

23 Compact shall run concurrently with any other non-consumptive water uses including but not limited to all

24 hydropower uses and other instream flow uses.

25 E. Appropriation Pursuant to State Law.

26 Nothing in this Compact may prevent the United States from seeking a water appropriation pursuant to

27 state law for use on the reserved land within the UMNW&SR or the BTCPRS or for use outside the

28 boundaries of the federal reservations for which a water right is described in this Compact, provided that

29 a water right obtained in this manner shall be considered a state water right and shall be administered

30 pursuant to state law.

1 F. Reservation of Rights.

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

3 G. Severability.

4 The provisions of this Compact are not severable, provided that for the purposes of 85-2-702(3), MCA, the
5 water rights described in this Compact for the Upper Missouri National Wild and Scenic River and Bear Trap
6 Canyon Public Recreation Site shall be considered as separate Compacts.

7 H. Multiple Originals.

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

10 I. Notice.

11 Unless otherwise specifically provided for in this Compact, service of notice, except service in litigation,
12 shall be:

13 1. State: Upon the Director of the Department and such other officials as the Director may designate in
14 writing.

15 2. United States: Upon the Secretary of the Interior and such other officials as the Secretary may designate
16 in writing.

17 ARTICLE VI

18 FINALITY OF COMPACT

19 A. Binding Effect.

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

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

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

29 2. Following the effective date, this Compact shall not be modified without the consent of both parties.

30 Any attempt to unilaterally modify this Compact by either party shall render this Compact voidable at the

1 election of the other party.

2 B. Settlement of Claims.

3 The parties intend that the water rights described in this Compact are in full and final settlement of the
 4 reserved water right claims for the UMNW&SR and the BTCPRS. Pursuant to this settlement, by which
 5 certain federal reserved water rights are expressly recognized by the state in this Compact, the United
 6 States hereby and in full settlement of any and all claims filed by the United States or which could have
 7 been filed by the United States for the UMNW&SR and the BTCPRS relinquishes forever all said claims on
 8 the effective date of this Compact to water within the State of Montana for reserved water rights for the
 9 above mentioned units. The state agrees to recognize the reserved water rights described and quantified
 10 herein, and shall, except as expressly provided for herein, treat them in the same manner as any other
 11 appropriation.

12 C. The parties agree to defend the provisions and purposes of this Compact from all challenges and
 13 attacks.

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

16 Appendix 1

17 Method for Calculation of Monthly Depletions

18 A. Surface Water.

19
 20 Depletion factors are grouped by the use codes now employed by the Department, and the monthly
 21 depletion factors for each type of water use are set forth below.

22 1. Fishery, Wildlife, Recreational, and Wildlife/Waterfowl Uses:

23 FS Fishery
 24 FW Fish and Wildlife
 25 RC Recreation
 26 WW Wildlife/Waterfowl.

27 The water loss resulting from fishery, wildlife, recreational, and wildlife/waterfowl uses occurs as
 28 evaporation from small ponds. The following table lists the monthly depletion factors for evaporative loss
 29 in feet per surface acre:

30 Monthly Depletion Factors

| | | |
|----|-----------------|------|
| 1 | for Evaporation | |
| 2 | January | 0.00 |
| 3 | February | 0.00 |
| 4 | March | 0.00 |
| 5 | April | 0.08 |
| 6 | May | 0.17 |
| 7 | June | 0.26 |
| 8 | July | 0.50 |
| 9 | August | 0.51 |
| 10 | September | 0.35 |
| 11 | October | 0.26 |
| 12 | November | 0.04 |
| 13 | December | 0.00 |

14

15 The Department will calculate monthly depletions from evaporation by multiplying the above factors by
 16 maximum reservoir surface area (acres).

17 2. Geothermal and Power Generation Uses:

18 GE Geothermal

19 PG Power Generation.

20 The Department will determine depletions from geothermal and power generation uses on a case-by-case
 21 basis.

22 3. Domestic, Multiple Domestic, and Municipal Uses:

23 DM Domestic

24 MD Multiple Domestic

25 MC Municipal.

26 The Department will calculate monthly depletions from domestic uses over 35 gallons per minute, exceeding
 27 10 acre feet per year, multi-family domestic, and municipal uses by multiplying the annual volume by the
 28 monthly depletion factors set forth below.

29 Monthly Depletion Factors for Domestic,

30 Multiple Domestic, and Municipal Uses

| | | |
|----|-----------|-------|
| 1 | | |
| 2 | January | .0135 |
| 3 | February | .0135 |
| 4 | March | .0270 |
| 5 | April | .0315 |
| 6 | May | .0450 |
| 7 | June | .0585 |
| 8 | July | .0810 |
| 9 | August | .0675 |
| 10 | September | .0495 |
| 11 | October | .0360 |
| 12 | November | .0135 |
| 13 | December | .0135 |

14 4. Irrigation including Lawn and Garden over 5 Acres:

- 15 IR Irrigation
- 16 LG Lawn and Garden.

17 The Department will calculate monthly depletions from irrigation uses (in acre feet) by multiplying the
 18 number of acres by the depletion factors set forth below.

19 Monthly Depletion Factors for Irrigation Uses

| 20 | Monthly Depletion Factor | |
|----|--------------------------|-----------------|
| 21 | Month | (feet per acre) |
| 22 | January | 0.0 |
| 23 | February | 0.0 |
| 24 | March | 0.0 |
| 25 | April | 0.0 |
| 26 | May | 0.2604 |
| 27 | June | 0.4656 |
| 28 | July | 0.7417 |
| 29 | August | 0.5885 |
| 30 | September | 0.1177 |

| | | |
|---|----------|-----|
| 1 | October | 0.0 |
| 2 | November | 0.0 |
| 3 | December | 0.0 |

4 The Department will calculate monthly depletions from lawn and garden uses to irrigate an area greater than
5 5 acres using the method for irrigation set forth above.

6 5. Stock Uses:

7 ST Stock.

8 The Department will calculate monthly depletions from stock ponds using the monthly depletion factors for
9 evaporation listed in Appendix 1, section A(1).

10 6. Commercial, Industrial, Institutional, Mining, and Other Uses:

11 CM Commercial

12 IN Industrial

13 IS Institutional

14 MN Mining.

15 OP Other Purpose

16 The Department will assign monthly depletions from commercial, industrial, institutional, mining, and other
17 undefined uses as 50% of the annual volume spread in equal increments throughout the period of use. The
18 Department will make any necessary changes to the assigned monthly depletions to reflect actual depletions
19 when the appropriation is complete. The Department and the BLM may discuss the monthly depletions at
20 the annual meeting and the Department will make the final monthly depletion determination.

21 7. Transbasin Diversions: The Department will calculate monthly depletions for transbasin diversions
22 outside the drainage area of the Missouri River and its tributaries upstream from the point that the Missouri
23 River leaves the boundary of the Upper Missouri National Wild & Scenic River at 100% of the diverted
24 amount.

25 B. GROUNDWATER.

26 The Department will subtract all groundwater uses over 35 gallons per minute, exceeding 10 acre feet per
27 year, from the AWS monthly amounts regardless of location or source aquifer. The Department will
28 calculate depletions from groundwater uses based on monthly depletion factors for the type of water use
29 as listed in Appendix 1, section A and spread the depletions in equal increments throughout the year with
30 1/12th of the annual depletion volume subtracted from each AWS monthly amount.

1 **C. STORED WATER.**

2 The Department will calculate depletions from storage projects by determining the annual depletion based
 3 on the monthly depletion factors for the type of use for which the water is stored as listed in Appendix 1,
 4 section A and subtract such depletion from the AWS monthly amounts as set forth in the schedule below.
 5 For purposes of subtracting the annual depletion for the type of use from the AWS monthly amounts, the
 6 Department will apply the following depletion schedule to all reservoirs unless the appropriation issued
 7 specifies a different fill regimen.

8 **Monthly Storage Depletion Schedule**

| 9 | Month | % of Calculated |
|----|----------|------------------|
| 10 | | Annual Depletion |
| 11 | November | 7% |
| 12 | December | 8% |
| 13 | January | 7% |
| 14 | February | 7% |
| 15 | March | 10% |
| 16 | April | 21% |
| 17 | May | 38% |
| 18 | June | 2% |
| 19 | Total | 100% |

20 The Department will also subtract the monthly depletions from evaporation based on the monthly depletion
 21 factors for evaporation listed in Appendix 1, section A(1).

22
 23 **NEW SECTION. Section 2. Codification instruction.** [Section 1] is intended to be codified as an
 24 integral part of Title 85, chapter 20, and the provisions of Title 85, chapter 20, apply to [section 1].

25 -END-

1 SENATE BILL NO. 175

2 INTRODUCED BY SWYSGOOD

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN
5 THE UNITED STATES BUREAU OF LAND MANAGEMENT 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 Bureau of Land Management-Montana compact ratified.

10 The compact entered into by the state of Montana and the United States Bureau of Land Management and
11 filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing]
12 is ratified. The compact is as follows:

13 WATER RIGHTS COMPACT

14 STATE OF MONTANA

15 UNITED STATES OF AMERICA, BUREAU OF LAND MANAGEMENT

16 This Compact is entered into by the State of Montana and the United States of America to settle for all time
17 any and all claims to water for certain lands administered by the Bureau of Land Management within the
18 State of Montana at the time of the effective date of this Compact.

19 RECITALS

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

23 WHEREAS, 85-2-228, MCA, provides that a federal reserved water right with a priority date of July
24 1, 1973, or later be subject to the same process and adjudication as a federal reserved water right with a
25 priority date before July 1, 1973;

26 WHEREAS, 85-2-703 and 85-2-228(3), MCA, provide that the state may negotiate settlement of
27 claims by the federal government to non-Indian reserved waters within the State of Montana;

28 WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary
29 to fulfill the purposes of two Bureau of Land Management units in the State of Montana, specifically those
30 reserved water rights necessary to preserve the Upper Missouri National Wild and Scenic River and the Bear

1 Trap Canyon Public Recreation Site;

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

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

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

9 ARTICLE I

10 DEFINITIONS

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

12 (1) "Annual Report" means the report prepared by the Montana Department of Natural Resources
13 and Conservation providing information concerning water appropriations issued, modified, revoked, or
14 abandoned in that year that affects the quantity of water in the Available Water Supply, and the current
15 status of the Available Water Supply.

16 (2) "Available Water Supply" or "AWS" means those monthly amounts of surface and groundwater
17 available to meet the state's projected demands, as identified in Table 1, in the Missouri River basin
18 upstream from the point the Missouri River leaves the boundary of the Upper Missouri National Wild &
19 Scenic River beyond that necessary to satisfy the United States' reserved water right. All depletions from
20 appropriations completed after December 31, 1987, shall be subtracted from the Available Water Supply.

21 (3) "Bear Trap Canyon Public Recreation Site" or "BTCPRS" means those lands located in Montana
22 that, pursuant to authority granted by Executive Order No. 10355 of May 26, 1952, were withdrawn and
23 reserved by Secretary of the Interior Public Land Order 5062 (Montana 17093), published in the Federal
24 Register on June 9, 1971.

25 (4) "BLM" means the United States Bureau of Land Management or its successor.

26 (5) "Department" means the Montana Department of Natural Resources and Conservation or its
27 successor.

28 (6) "Depletion" means, for water uses subtracted from the Available Water Supply, the amount
29 of water reduced in the source of supply for each month as calculated in accordance with the Method for
30 Calculation of Monthly Depletions. A depletion is a standard reduction amount based on depletion factors

1 for the type of use as opposed to a measured deduction or a term, condition, restriction, or limitation on
2 an appropriation.

3 (7) "Groundwater" means any water that is beneath the ground surface.

4 (8) "HYDROSS Model" means the United States Bureau of Reclamation's Hydrologic Operations
5 Study (HYDROSS) model for the Missouri River basin upstream from the point that the Missouri River leaves
6 the boundary of the Upper Missouri National Wild & Scenic River. The HYDROSS Model is a water supply
7 model that uses monthly water supply studies derived from a period of flow records to simulate the effect
8 of existing and proposed water demands on the historic naturalized flow of the Missouri River. The
9 HYDROSS model and information used to develop the model are archived in the Montana state library.

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

12 (10) "Method for Calculation of Monthly Depletions" means the procedure the Department will
13 follow in calculating depletions subtracted from the Available Water Supply for appropriations completed
14 after December 31, 1987. The Method for Calculation of Monthly Depletions is incorporated in this
15 Compact and attached as Appendix 1.

16 (11) "Non-Consumptive Use" means a beneficial use of water that does not cause a reduction in
17 the source of supply and in which substantially all of the water returns without delay to the source of
18 supply, causing little or no disruption in stream conditions.

19 (12) "Parties" means the State of Montana and the United States.

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

23 (14) "Supplemental Water" means a new appropriation issued for the same purpose of use and
24 place of use already covered by a valid appropriation, with the same (or reduced) period of use, flow rate
25 and, if applicable, volume of water. To be considered supplemental, no aspect of the new appropriation
26 may exceed that of the original valid appropriation and only one appropriation or part of each may be used
27 at the same time.

28 (15) "Upper Missouri National Wild & Scenic River" or "UMNW&SR" means the segment of the
29 Missouri River located in Montana that, pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. 1271, et
30 seq, (1986, Supp. 1992), was designated as a component of the National Wild and Scenic Rivers System

1 by Public Law 94-486, Title II, 90 Stat. 2327-2329, on October 12, 1976.

2 (16) "United States" means the federal government and all officers, agencies, departments, and
 3 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than
 4 service in litigation, "United States" means the Secretary of the Department of the Interior or the
 5 Secretary's designee.

6 ARTICLE II
 7 WATER RIGHT

8 The parties agree that the following water rights are in settlement of the reserved water rights of the United
 9 States for the reservations described. The parties to this Compact recognize that the water rights described
 10 in this Compact are junior to any Tribal water rights with a priority date before the effective date of this
 11 Compact, including aboriginal rights, if any, in the basins affected. All reserved water rights described in
 12 this Article are subject to Article V, section A.

13 A. Instream Flow for the Upper Missouri National Wild and Scenic River.

- 14 1. Priority Date: The United States has a priority date of October 12, 1976, for the water right
 15 described in this Compact for the UMNW&SR.
- 16 2. Instream Flow: The United States has a water right for instream flow in the Missouri River from
 17 Fort Benton one hundred and forty-nine miles downstream to Fred Robinson Bridge, as specifically
 18 depicted on the map attached as Appendix 2. The water right is in the amount of the remaining
 19 flow of the river after (1) all water appropriations completed before December 31, 1987; (2) the
 20 volumes of water designated for the Available Water Supply as provided in Article III, section A;
 21 and (3) uses not subtracted from the Available Water Supply as provided in Article III, section C.

22 B. Instream Flow for the Bear Trap Canyon Public Recreation Site.

- 23 1. Priority Date: The United States has a priority date of June 9, 1971, for the water right described
 24 in this Compact for the BTCPRS.
- 25 2. Instream Flow: The United States has a water right for instream flow in the Madison River which
 26 flows over the reserved land of Bear Trap Canyon Public Recreation Site, more specifically
 27 described as T4S R1E Sec. 20 SW1/4 downstream to T3S R1E Sec. 15 NE1/4. The water right
 28 is in the amount of 1,100 cubic feet per second from January 1 through December 31.

29 ARTICLE III
 30 UMNW&SR WATER RIGHT IMPLEMENTATION

1 A. Available Water Supply.

2 The HYDROSS model incorporates information on water uses completed on or before December 31, 1987.
 3 The Department will calculate depletions from appropriations completed after December 31, 1987, on a
 4 monthly basis in accordance with Article III, section B and subtract such depletions from the water volumes
 5 designated for the Available Water Supply as set forth in Table 1.

6 TABLE 1

7 AVAILABLE WATER SUPPLY

8 MONTHLY AMOUNTS

| 9 | Month | Acre-feet |
|----|-----------|-----------|
| 10 | January | 104,000 |
| 11 | February | 121,000 |
| 12 | March | 124,000 |
| 13 | April | 185,000 |
| 14 | May | 219,000 |
| 15 | June | 62,000 |
| 16 | July | 82,000 |
| 17 | August | 66,000 |
| 18 | September | 40,000 |
| 19 | October | 35,000 |
| 20 | November | 57,000 |
| 21 | December | 98,000 |

22 B. Method for Calculation of Monthly Depletions Subtracted from the Available Water Supply.

23 1. Surface Water. Except as provided in Article III, section C, the Department will calculate depletions
 24 from surface water based on monthly depletion factors for various types of water use in accordance with
 25 the Method for Calculation of Monthly Depletions attached as Appendix 1 in the month that the use occurs.
 26 The Department will subtract monthly depletions from the AWS monthly amounts.

27 2. Groundwater. Except as provided in Article III, section C, the Department will calculate depletions from
 28 groundwater based on monthly depletion factors for various types of water use in accordance with the
 29 Method for Calculation of Monthly Depletions attached as Appendix 1 and spread the depletions in equal
 30 increments throughout the year with 1/12th of the annual depletion volume subtracted from each AWS

1 monthly amount.

2 3. Stored Water. Except as provided in Article III, section C, the Department will calculate depletions from
3 stored water based on monthly depletion factors for various types of water use for the months of use in
4 accordance with the Method for Calculation of Monthly Depletions attached as Appendix 1, but subtract
5 such depletions from the AWS in the months when diverted as calculated in accordance with the Method
6 for Calculation of Monthly Depletions attached as Appendix 1. The Department will calculate evaporation
7 depletions in accordance with the Method for Calculation of Monthly Depletions attached as Appendix 1
8 and subtract such depletions from the AWS monthly amounts.

9 4. Water Reservations. Except as provided in Article III, section C, the Department will calculate depletions
10 from state water reservations granted pursuant to 85-2-316 but not completed on or before December 31,
11 1987, based on the monthly depletion factors for various types of water use in accordance with the Method
12 for Calculation of Monthly Depletions attached as Appendix 1 and subtract such depletions from the AWS
13 monthly amounts, EXCEPT THAT THE DEPARTMENT WILL NOT SUBTRACT DEPLETIONS FROM WATER
14 RESERVATION NO. 72579-41T FROM THE AWS MONTHLY AMOUNTS. The Department will process state
15 water reservations SUBTRACTED FROM THE AWS MONTHLY AMOUNTS that are abandoned, revoked,
16 modified, or found invalid pursuant to Article III, section D.

17 C. Uses Not Subtracted from the Available Water Supply.

18 1. Non-Consumptive Use. The Department will not subtract non-consumptive uses from the AWS monthly
19 amounts.

20 2. Uses of 35 gallons per minute or less, not to exceed 10 acre feet per year. The Department will not
21 subtract groundwater uses of 35 gallons per minute or less, not to exceed 10 acre feet per year, and
22 surface water appropriations of 35 gallons per minute or less, not to exceed 10 acre feet per year for
23 domestic use from the AWS monthly amounts.

24 3. Supplemental Water. The Department will not subtract supplemental water uses from the AWS monthly
25 amounts.

26 4. Lawn and Garden. The Department will not subtract depletions for appropriations to irrigate an area
27 5 acres or less from the AWS monthly amounts.

28 5. Instream Stock Uses. The Department will not subtract instream stock uses from the AWS monthly
29 amounts.

30 6. Late Claims. The Department will not subtract valid late claims as defined by 85-2-221, MCA (1995)

1 from the AWS monthly amounts.

2 7. Federal and Tribal Water Rights. The Department will not subtract water rights created under federal
3 law, water rights recognized in satisfaction of water rights created under federal law, and water rights
4 owned by individuals that are derived from water rights created under federal law from the AWS monthly
5 amounts.

6 D. Additions to the Available Water Supply.

7 1. Abandonment. When an appropriation right on a stream affected by this Compact is abandoned after
8 December 31, 1987, and such abandonment causes water to become available for appropriation, the
9 Department will calculate the previous depletion amount in accordance with the Method for Calculation of
10 Monthly Depletions and add such amount to the water volumes designated for the Available Water Supply.
11 State law governs the issue of whether an abandonment has occurred.

12 2. Modified, Revoked, or Invalid Appropriations. When an appropriation right on a stream affected by this
13 Compact is modified, revoked, or found invalid and such modification, revocation, or invalidation causes
14 water to become available for appropriation, the Department will calculate the previous depletion amount
15 in accordance with the Method for Calculation of Monthly Depletions and add such amount to the water
16 volumes designated for the Available Water Supply.

17 E. Basin Closure. Except for the uses provided for in Article III, section C, in the Missouri River basin
18 upstream from the point that the Missouri River leaves the boundary of the UMNW&SR the Department
19 shall not process or grant an application for an appropriation in any month in which the water volume
20 designated for the Available Water Supply has been exhausted.

21 F. Prohibition on Future Mainstem Impoundment. No new impoundments may be permitted on the
22 mainstem of the Missouri River upstream from the UMNW&SR. Reclamation, repair, or rehabilitation of an
23 existing impoundment shall not be considered a new impoundment, provided that, without the consent of
24 the United States, WHICH FOR NONFEDERAL POWER GENERATING IMPOUNDMENTS UNDER THE
25 FEDERAL ENERGY REGULATORY COMMISSION'S JURISDICTION SHALL BE OBTAINED THROUGH THE
26 FEDERAL ENERGY REGULATORY COMMISSION, reclamation, repair, or rehabilitation shall not cause the
27 impoundment to exceed the original constructed capacity of the impoundment.

28 G. Administration and Reporting by the State.

29 1. Department Administration. The Department will administer the AWS by subtracting depletions from
30 the monthly available water amounts following the procedures set forth in the Method for Calculation of

1 Monthly Depletions attached as Appendix 1. In order to monitor the water volumes in the AWS, the
2 Department will calculate preliminary monthly depletions and subtract the amounts from the AWS. The
3 Department will make final subtractions from the AWS when the Department determines that an
4 appropriation is complete pursuant to 85-2-315 or 85-2-316(8)(b), MCA.

5 2. Annual Report. The Department will produce an Annual Report by March 1st of each year detailing its
6 actions in administering the AWS for the previous calendar year, provided that the first Annual Report after
7 ratification of this Compact shall include information concerning water appropriations issued, completed,
8 modified, revoked, found invalid, or abandoned since January 1, 1988, through the previous calendar year.
9 The Annual Report is final on April 15 of the year issued unless on or before that date the BLM submits
10 written comments or a request for an annual meeting to the Department. If an annual meeting is requested,
11 it shall be held within thirty days of the request. The Department will make a final decision and issue a final
12 Annual Report by June 1, unless the Department and the BLM agree to a different date.

13 3. Cooperative Review Process. The Department and the BLM will create a cooperative review process
14 to allow discussion of depletion factors and depletion amounts assigned to the undefined uses as listed in
15 the Method for Calculation of Monthly Depletions attached as Appendix 1 and any other issues concerning
16 the Annual Report. Subject to Article III, section H(1), the Department will make the final decision
17 concerning the administration of the AWS. The Department and the BLM will develop a Memorandum of
18 Understanding describing the cooperative review process within six months of the ratification of this
19 Compact.

20 4. Changes to the Method for Calculation of Monthly Depletions. The parties may make changes to the
21 Method for Calculation of Monthly Depletions attached as Appendix 1 by written agreement and such
22 changes shall not be deemed a modification of this Compact.

23 H. Action for Enforcement of Provisions of Article III.

24 The United States may file an action in a court of competent jurisdiction to enforce the provisions of Article
25 III as follows:

26 1. Enforcement of Administration of Available Water Supply. After the Annual Report becomes final in
27 accordance with Article III, section G(2), the United States shall have 90 days to file an action for
28 enforcement of the provisions of Article III, section G of this Compact concerning the administration of the
29 AWS. Any action challenging the administration of the AWS may consist only of trial de novo of the
30 Department's actions for the previous calendar year. The United States may not challenge the

1 Department's actions concerning administration of the AWS contained in previous Annual Reports. Except
 2 for appropriations issued in violation of Article III, section E, any court order concerning this subsection shall
 3 be limited to calculating depletion amounts from the AWS and does not affect the appropriations issued,
 4 revoked, modified, or abandoned or any other decision of the Department.

5 2. Enforcement of Other Provisions of Article III. The United States may file an action for enforcement of
 6 any provision of Article III except Article III, section G at any time.

7 3. No Standing to Object. The United States does not have standing to object to an application for an
 8 appropriation or change in appropriation right, or to participate in a revocation or modification proceeding,
 9 based on the property, water right, or interests of the United States for the UMNW&SR, provided that, for
 10 an appropriation applied for with a point of diversion or means of conveyance within the boundaries of the
 11 UMNW&SR, the Department shall not grant the appropriation unless the Department expressly conditions
 12 the appropriation on obtaining the necessary authorization for entry and use from the United States, and
 13 provided further that nothing in this Compact shall limit the United States' standing to object based on any
 14 other water rights of the United States or the reserved water right for the BTCPRS.

15 4. Exclusive Remedy. The remedy set forth in this section is the exclusive remedy for enforcement of
 16 Article III of this Compact. The United States shall not have to exhaust any administrative remedies in order
 17 to enforce Article III of this Compact.

18 ARTICLE IV

19 BTCPRS WATER RIGHT IMPLEMENTATION

20 A. Subject to Prior Uses. The United States' federal reserved water right for instream flow for the segment
 21 of the Madison River which flows over the reserved land of Bear Trap Canyon Public Recreation Site is
 22 subject to all water rights with a priority date before June 9, 1971 recognized under state or federal law.
 23 Nothing in this Compact may affect an existing right to divert water from a point within the BTCPRS and
 24 transport it for use outside the BTCPRS.

25 B. Change in Instream Flow Right. The federal reserved water right for instream flow as described in
 26 Article II, section B, shall not be changed to any other use.

27 C. Notice of Reopening of Madison River Basin. The Department shall notify the BLM if an application for
 28 a state water reservation pursuant to 85-2-316, MCA, may be processed and granted within the Madison
 29 River basin, as such basin is defined by 85-2-340(4).

30 D. Enforcement of Water Right. The United States may file an action in a court of competent jurisdiction

1 to enforce the federal reserved water right described in Article II, section B.

2 E. Venue for Appeal of Administrative Decisions. For any appeal of an administrative decision, venue shall
3 be the First Judicial District in Helena and the review shall be conducted according to the procedures for
4 judicial review of contested cases under the Montana Administrative Procedures Act, Title 2, chapter 4,
5 of the Montana Code Annotated.

6 ARTICLE V

7 GENERAL PROVISIONS

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

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

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

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

16 4. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent,
17 or manner of administration of the rights to water of any other federal agency or federal lands in Montana
18 other than those of the Bureau of Land Management for the UMNW&SR and the BTCPRS.

19 B. General Disclaimers.

20 Nothing in this Compact may be construed or interpreted:

21 1. as a precedent for the litigation of reserved water rights or the interpretation or administration of future
22 compacts between the United States and the state; or of the United States and any other state;

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

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

30 4. to establish a precedent for other agreements between the state and the United States or an Indian

1 tribe;

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

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

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

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

10 9. to affect in any manner the entitlement to or quantification of other federal water rights. This Compact
11 is only binding on the United States with regard to the water rights of the BLM, and does not affect the
12 water rights of any other federal agency that is not a successor in interest to the water rights subject to
13 this Compact.

14 C. Use of Water Right.

15 The rights of the United States described in Article II of this Compact are federal reserved water rights.
16 Non-use of all or a part of the federal reserved water rights described in this Compact shall not constitute
17 abandonment of the right. The federal reserved water rights described in this Compact need not be applied
18 to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the purposes
19 outlined in applicable federal law.

20 D. Concurrent with other Non-consumptive Water Uses.

21 The federal reserved water right for instream flows for the UMNW&SR and the BTCPRS recognized by this
22 Compact shall run concurrently with any other non-consumptive water uses including but not limited to all
23 hydropower uses and other instream flow uses.

24 E. Appropriation Pursuant to State Law.

25 Nothing in this Compact may prevent the United States from seeking a water appropriation pursuant to
26 state law for use on the reserved land within the UMNW&SR or the BTCPRS or for use outside the
27 boundaries of the federal reservations for which a water right is described in this Compact, provided that
28 a water right obtained in this manner shall be considered a state water right and shall be administered
29 pursuant to state law.

30 F. Reservation of Rights.

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

2 G. Severability.

3 The provisions of this Compact are not severable, provided that for the purposes of 85-2-702(3), MCA, the
4 water rights described in this Compact for the Upper Missouri National Wild and Scenic River and Bear Trap
5 Canyon Public Recreation Site shall be considered as separate Compacts.

6 H. Multiple Originals.

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

9 I. Notice.

10 Unless otherwise specifically provided for in this Compact, service of notice, except service in litigation,
11 shall be:

12 1. State: Upon the Director of the Department and such other officials as the Director may designate in
13 writing.

14 2. United States: Upon the Secretary of the Interior and such other officials as the Secretary may designate
15 in writing.

16 ARTICLE VI

17 FINALITY OF COMPACT

18 A. Binding Effect.

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

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

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

28 2. Following the effective date, this Compact shall not be modified without the consent of both parties.
29 Any attempt to unilaterally modify this Compact by either party shall render this Compact voidable at the
30 election of the other party.

1 B. Settlement of Claims.

2 The parties intend that the water rights described in this Compact are in full and final settlement of the
3 reserved water right claims for the UMNW&SR and the BTCPRS. Pursuant to this settlement, by which
4 certain federal reserved water rights are expressly recognized by the state in this Compact, the United
5 States hereby and in full settlement of any and all claims filed by the United States or which could have
6 been filed by the United States for the UMNW&SR and the BTCPRS relinquishes forever all said claims on
7 the effective date of this Compact to water within the State of Montana for reserved water rights for the
8 above mentioned units. The state agrees to recognize the reserved water rights described and quantified
9 herein, and shall, except as expressly provided for herein, treat them in the same manner as any other
10 appropriation.

11 C. The parties agree to defend the provisions and purposes of this Compact from all challenges and
12 attacks.

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

15 Appendix 1

16 Method for Calculation of Monthly Depletions

17 A. Surface Water.

18 Depletion factors are grouped by the use codes now employed by the Department, and the monthly
19 depletion factors for each type of water use are set forth below.

20 1. Fishery, Wildlife, Recreational, and Wildlife/Waterfowl Uses:

- 21 FS Fishery
- 22 FW Fish and Wildlife
- 23 RC Recreation
- 24 WW Wildlife/Waterfowl.

25 The water loss resulting from fishery, wildlife, recreational, and wildlife/waterfowl uses occurs as
26 evaporation from small ponds. The following table lists the monthly depletion factors for evaporative loss
27 in feet per surface acre:

28 Monthly Depletion Factors
29 for Evaporation

30 January 0.00

| | | |
|----|-----------|------|
| 1 | February | 0.00 |
| 2 | March | 0.00 |
| 3 | April | 0.08 |
| 4 | May | 0.17 |
| 5 | June | 0.26 |
| 6 | July | 0.50 |
| 7 | August | 0.51 |
| 8 | September | 0.35 |
| 9 | October | 0.26 |
| 10 | November | 0.04 |
| 11 | December | 0.00 |

12 The Department will calculate monthly depletions from evaporation by multiplying the above factors by
 13 maximum reservoir surface area (acres).

14 2. Geothermal and Power Generation Uses:

- 15 GE Geothermal
- 16 PG Power Generation.

17 The Department will determine depletions from geothermal and power generation uses on a case-by-case
 18 basis.

19 3. Domestic, Multiple Domestic, and Municipal Uses:

- 20 DM Domestic
- 21 MD Multiple Domestic
- 22 MC Municipal.

23 The Department will calculate monthly depletions from domestic uses over 35 gallons per minute, exceeding
 24 10 acre feet per year, multi-family domestic, and municipal uses by multiplying the annual volume by the
 25 monthly depletion factors set forth below.

26 Monthly Depletion Factors for Domestic,
 27 Multiple Domestic, and Municipal Uses

| | | |
|----|----------|-------|
| 28 | January | .0135 |
| 29 | February | .0135 |
| 30 | March | .0270 |

| | | |
|---|-----------|-------|
| 1 | April | .0315 |
| 2 | May | .0450 |
| 3 | June | .0585 |
| 4 | July | .0810 |
| 5 | August | .0675 |
| 6 | September | .0495 |
| 7 | October | .0360 |
| 8 | November | .0135 |
| 9 | December | .0135 |

10 4. Irrigation including Lawn and Garden over 5 Acres:

- 11 IR Irrigation
- 12 LG Lawn and Garden.

13 The Department will calculate monthly depletions from irrigation uses (in acre feet) by multiplying the
 14 number of acres by the depletion factors set forth below.

15 Monthly Depletion Factors for Irrigation Uses

16 Monthly Depletion Factor

| 17 | Month | (feet per acre) |
|----|-----------|-----------------|
| 18 | January | 0.0 |
| 19 | February | 0.0 |
| 20 | March | 0.0 |
| 21 | April | 0.0 |
| 22 | May | 0.2604 |
| 23 | June | 0.4656 |
| 24 | July | 0.7417 |
| 25 | August | 0.5885 |
| 26 | September | 0.1177 |
| 27 | October | 0.0 |
| 28 | November | 0.0 |
| 29 | December | 0.0 |

30 The Department will calculate monthly depletions from lawn and garden uses to irrigate an area greater than

1 5 acres using the method for irrigation set forth above.

2 5. Stock Uses:

3 ST Stock.

4 The Department will calculate monthly depletions from stock ponds using the monthly depletion factors for
5 evaporation listed in Appendix 1, section A(1).

6 6. Commercial, Industrial, Institutional, Mining, and Other Uses:

7 CM Commercial

8 IN Industrial

9 IS Institutional

10 MN Mining.

11 OP Other Purpose

12 The Department will assign monthly depletions from commercial, industrial, institutional, mining, and other
13 undefined uses as 50% of the annual volume spread in equal increments throughout the period of use. The
14 Department will make any necessary changes to the assigned monthly depletions to reflect actual depletions
15 when the appropriation is complete. The Department and the BLM may discuss the monthly depletions at
16 the annual meeting and the Department will make the final monthly depletion determination.

17 7. Transbasin Diversions: The Department will calculate monthly depletions for transbasin diversions
18 outside the drainage area of the Missouri River and its tributaries upstream from the point that the Missouri
19 River leaves the boundary of the Upper Missouri National Wild & Scenic River at 100% of the diverted
20 amount.

21 B. GROUNDWATER.

22 The Department will subtract all groundwater uses over 35 gallons per minute, exceeding 10 acre feet per
23 year, from the AWS monthly amounts regardless of location or source aquifer. The Department will
24 calculate depletions from groundwater uses based on monthly depletion factors for the type of water use
25 as listed in Appendix 1, section A and spread the depletions in equal increments throughout the year with
26 1/12th of the annual depletion volume subtracted from each AWS monthly amount.

27 C. STORED WATER.

28 The Department will calculate depletions from storage projects by determining the annual depletion based
29 on the monthly depletion factors for the type of use for which the water is stored as listed in Appendix 1,
30 section A and subtract such depletion from the AWS monthly amounts as set forth in the schedule below.

1 For purposes of subtracting the annual depletion for the type of use from the AWS monthly amounts, the
 2 Department will apply the following depletion schedule to all reservoirs unless the appropriation issued
 3 specifies a different fill regimen.

4 Monthly Storage Depletion Schedule

| 5 | Month | % of Calculated |
|----|----------|------------------|
| 6 | | Annual Depletion |
| 7 | November | 7% |
| 8 | December | 8% |
| 9 | January | 7% |
| 10 | February | 7% |
| 11 | March | 10% |
| 12 | April | 21% |
| 13 | May | 38% |
| 14 | June | 2% |
| 15 | Total | 100% |

16 The Department will also subtract the monthly depletions from evaporation based on the monthly depletion
 17 factors for evaporation listed in Appendix 1, section A(1).

18

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

21

-END-

1 SENATE BILL NO. 175

2 INTRODUCED BY SWYSGOOD

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN
5 THE UNITED STATES BUREAU OF LAND MANAGEMENT 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 Bureau of Land Management-Montana compact ratified.10 The compact entered into by the state of Montana and the United States Bureau of Land Management and
11 filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing]
12 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
2
3
4
5
6
7

SENATE BILL NO. 175
INTRODUCED BY SWYSGOOD

A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN
THE UNITED STATES BUREAU OF LAND MANAGEMENT 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.**

1 SENATE BILL NO. 175

2 INTRODUCED BY SWYSGOOD

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT RATIFYING A RESERVED WATER RIGHTS COMPACT BETWEEN
5 THE UNITED STATES BUREAU OF LAND MANAGEMENT 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 Bureau of Land Management-Montana compact ratified.**10 The compact entered into by the state of Montana and the United States Bureau of Land Management and
11 filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on [date of filing]
12 is ratified. The compact is as follows:

13 WATER RIGHTS COMPACT

14 STATE OF MONTANA

15 UNITED STATES OF AMERICA, BUREAU OF LAND MANAGEMENT

16 This Compact is entered into by the State of Montana and the United States of America to settle for all time
17 any and all claims to water for certain lands administered by the Bureau of Land Management within the
18 State of Montana at the time of the effective date of this Compact.

19 RECITALS

20 WHEREAS, the State of Montana, in 1979 pursuant to Title 85, chapter 2 of the Montana Code
21 Annotated, commenced a general adjudication of the rights to the use of water within the State of Montana
22 including all federal reserved and appropriative water rights;23 WHEREAS, 85-2-228, MCA, provides that a federal reserved water right with a priority date of July
24 1, 1973, or later be subject to the same process and adjudication as a federal reserved water right with a
25 priority date before July 1, 1973;26 WHEREAS, 85-2-703 and 85-2-228(3), MCA, provide that the state may negotiate settlement of
27 claims by the federal government to non-Indian reserved waters within the State of Montana;28 WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary
29 to fulfill the purposes of two Bureau of Land Management units in the State of Montana, specifically those
30 reserved water rights necessary to preserve the Upper Missouri National Wild and Scenic River and the Bear

1 Trap Canyon Public Recreation Site;

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

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

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

9 ARTICLE I

10 DEFINITIONS

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

12 (1) "Annual Report" means the report prepared by the Montana Department of Natural Resources
13 and Conservation providing information concerning water appropriations issued, modified, revoked, or
14 abandoned in that year that affects the quantity of water in the Available Water Supply, and the current
15 status of the Available Water Supply.

16 (2) "Available Water Supply" or "AWS" means those monthly amounts of surface and groundwater
17 available to meet the state's projected demands, as identified in Table 1, in the Missouri River basin
18 upstream from the point the Missouri River leaves the boundary of the Upper Missouri National Wild &
19 Scenic River beyond that necessary to satisfy the United States' reserved water right. All depletions from
20 appropriations completed after December 31, 1987, shall be subtracted from the Available Water Supply.

21 (3) "Bear Trap Canyon Public Recreation Site" or "BTCPRS" means those lands located in Montana
22 that, pursuant to authority granted by Executive Order No. 10355 of May 26, 1952, were withdrawn and
23 reserved by Secretary of the Interior Public Land Order 5062 (Montana 17093), published in the Federal
24 Register on June 9, 1971.

25 (4) "BLM" means the United States Bureau of Land Management or its successor.

26 (5) "Department" means the Montana Department of Natural Resources and Conservation or its
27 successor.

28 (6) "Depletion" means, for water uses subtracted from the Available Water Supply, the amount
29 of water reduced in the source of supply for each month as calculated in accordance with the Method for
30 Calculation of Monthly Depletions. A depletion is a standard reduction amount based on depletion factors

1 for the type of use as opposed to a measured deduction or a term, condition, restriction, or limitation on
2 an appropriation.

3 (7) "Groundwater" means any water that is beneath the ground surface.

4 (8) "HYDROSS Model" means the United States Bureau of Reclamation's Hydrologic Operations
5 Study (HYDROSS) model for the Missouri River basin upstream from the point that the Missouri River leaves
6 the boundary of the Upper Missouri National Wild & Scenic River. The HYDROSS Model is a water supply
7 model that uses monthly water supply studies derived from a period of flow records to simulate the effect
8 of existing and proposed water demands on the historic naturalized flow of the Missouri River. The
9 HYDROSS model and information used to develop the model are archived in the Montana state library.

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

12 (10) "Method for Calculation of Monthly Depletions" means the procedure the Department will
13 follow in calculating depletions subtracted from the Available Water Supply for appropriations completed
14 after December 31, 1987. The Method for Calculation of Monthly Depletions is incorporated in this
15 Compact and attached as Appendix 1.

16 (11) "Non-Consumptive Use" means a beneficial use of water that does not cause a reduction in
17 the source of supply and in which substantially all of the water returns without delay to the source of
18 supply, causing little or no disruption in stream conditions.

19 (12) "Parties" means the State of Montana and the United States.

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

23 (14) "Supplemental Water" means a new appropriation issued for the same purpose of use and
24 place of use already covered by a valid appropriation, with the same (or reduced) period of use, flow rate
25 and, if applicable, volume of water. To be considered supplemental, no aspect of the new appropriation
26 may exceed that of the original valid appropriation and only one appropriation or part of each may be used
27 at the same time.

28 (15) "Upper Missouri National Wild & Scenic River" or "UMNW&SR" means the segment of the
29 Missouri River located in Montana that, pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. 1271, et
30 seq, (1986, Supp. 1992), was designated as a component of the National Wild and Scenic Rivers System

1 by Public Law 94-486, Title II, 90 Stat. 2327-2329, on October 12, 1976.

2 (16) "United States" means the federal government and all officers, agencies, departments, and
3 political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than
4 service in litigation, "United States" means the Secretary of the Department of the Interior or the
5 Secretary's designee.

6 ARTICLE II

7 WATER RIGHT

8 The parties agree that the following water rights are in settlement of the reserved water rights of the United
9 States for the reservations described. The parties to this Compact recognize that the water rights described
10 in this Compact are junior to any Tribal water rights with a priority date before the effective date of this
11 Compact, including aboriginal rights, if any, in the basins affected. All reserved water rights described in
12 this Article are subject to Article V, section A.

13 A. Instream Flow for the Upper Missouri National Wild and Scenic River.

14 1. Priority Date: The United States has a priority date of October 12, 1976, for the water right
15 described in this Compact for the UMNW&SR.

16 2. Instream Flow: The United States has a water right for instream flow in the Missouri River from
17 Fort Benton one hundred and forty-nine miles downstream to Fred Robinson Bridge, as specifically
18 depicted on the map attached as Appendix 2. The water right is in the amount of the remaining
19 flow of the river after (1) all water appropriations completed before December 31, 1987; (2) the
20 volumes of water designated for the Available Water Supply as provided in Article III, section A;
21 and (3) uses not subtracted from the Available Water Supply as provided in Article III, section C.

22 B. Instream Flow for the Bear Trap Canyon Public Recreation Site.

23 1. Priority Date: The United States has a priority date of June 9, 1971, for the water right described
24 in this Compact for the BTCPRS.

25 2. Instream Flow: The United States has a water right for instream flow in the Madison River which
26 flows over the reserved land of Bear Trap Canyon Public Recreation Site, more specifically
27 described as T4S R1E Sec. 20 SW1/4 downstream to T3S R1E Sec. 15 NE1/4. The water right
28 is in the amount of 1,100 cubic feet per second from January 1 through December 31.

29 ARTICLE III

30 UMNW&SR WATER RIGHT IMPLEMENTATION

1 A. Available Water Supply.

2 The HYDROSS model incorporates information on water uses completed on or before December 31, 1987.
 3 The Department will calculate depletions from appropriations completed after December 31, 1987, on a
 4 monthly basis in accordance with Article III, section B and subtract such depletions from the water volumes
 5 designated for the Available Water Supply as set forth in Table 1.

6 TABLE 1

7 AVAILABLE WATER SUPPLY

8 MONTHLY AMOUNTS

| 9 | Month | Acre-feet |
|----|-----------|-----------|
| 10 | January | 104,000 |
| 11 | February | 121,000 |
| 12 | March | 124,000 |
| 13 | April | 185,000 |
| 14 | May | 219,000 |
| 15 | June | 62,000 |
| 16 | July | 82,000 |
| 17 | August | 66,000 |
| 18 | September | 40,000 |
| 19 | October | 35,000 |
| 20 | November | 57,000 |
| 21 | December | 98,000 |

22 B. Method for Calculation of Monthly Depletions Subtracted from the Available Water Supply.

23 1. Surface Water. Except as provided in Article III, section C, the Department will calculate depletions
 24 from surface water based on monthly depletion factors for various types of water use in accordance with
 25 the Method for Calculation of Monthly Depletions attached as Appendix 1 in the month that the use occurs.

26 The Department will subtract monthly depletions from the AWS monthly amounts.

27 2. Groundwater. Except as provided in Article III, section C, the Department will calculate depletions from
 28 groundwater based on monthly depletion factors for various types of water use in accordance with the
 29 Method for Calculation of Monthly Depletions attached as Appendix 1 and spread the depletions in equal
 30 increments throughout the year with 1/12th of the annual depletion volume subtracted from each AWS

- 1 monthly amount.
- 2 3. Stored Water. Except as provided in Article III, section C, the Department will calculate depletions from
3 stored water based on monthly depletion factors for various types of water use for the months of use in
4 accordance with the Method for Calculation of Monthly Depletions attached as Appendix 1, but subtract
5 such depletions from the AWS in the months when diverted as calculated in accordance with the Method
6 for Calculation of Monthly Depletions attached as Appendix 1. The Department will calculate evaporation
7 depletions in accordance with the Method for Calculation of Monthly Depletions attached as Appendix 1
8 and subtract such depletions from the AWS monthly amounts.
- 9 4. Water Reservations. Except as provided in Article III, section C, the Department will calculate depletions
10 from state water reservations granted pursuant to 85-2-316 but not completed on or before December 31,
11 1987, based on the monthly depletion factors for various types of water use in accordance with the Method
12 for Calculation of Monthly Depletions attached as Appendix 1 and subtract such depletions from the AWS
13 monthly amounts, EXCEPT THAT THE DEPARTMENT WILL NOT SUBTRACT DEPLETIONS FROM WATER
14 RESERVATION NO. 72579-41T FROM THE AWS MONTHLY AMOUNTS. The Department will process state
15 water reservations SUBTRACTED FROM THE AWS MONTHLY AMOUNTS that are abandoned, revoked,
16 modified, or found invalid pursuant to Article III, section D.
- 17 C. Uses Not Subtracted from the Available Water Supply.
- 18 1. Non-Consumptive Use. The Department will not subtract non-consumptive uses from the AWS monthly
19 amounts.
- 20 2. Uses of 35 gallons per minute or less, not to exceed 10 acre feet per year. The Department will not
21 subtract groundwater uses of 35 gallons per minute or less, not to exceed 10 acre feet per year, and
22 surface water appropriations of 35 gallons per minute or less, not to exceed 10 acre feet per year for
23 domestic use from the AWS monthly amounts.
- 24 3. Supplemental Water. The Department will not subtract supplemental water uses from the AWS monthly
25 amounts.
- 26 4. Lawn and Garden. The Department will not subtract depletions for appropriations to irrigate an area
27 5 acres or less from the AWS monthly amounts.
- 28 5. Instream Stock Uses. The Department will not subtract instream stock uses from the AWS monthly
29 amounts.
- 30 6. Late Claims. The Department will not subtract valid late claims as defined by 85-2-221, MCA (1995)

1 from the AWS monthly amounts.

2 7. Federal and Tribal Water Rights. The Department will not subtract water rights created under federal
3 law, water rights recognized in satisfaction of water rights created under federal law, and water rights
4 owned by individuals that are derived from water rights created under federal law from the AWS monthly
5 amounts.

6 D. Additions to the Available Water Supply.

7 1. Abandonment. When an appropriation right on a stream affected by this Compact is abandoned after
8 December 31, 1987, and such abandonment causes water to become available for appropriation, the
9 Department will calculate the previous depletion amount in accordance with the Method for Calculation of
10 Monthly Depletions and add such amount to the water volumes designated for the Available Water Supply.
11 State law governs the issue of whether an abandonment has occurred.

12 2. Modified, Revoked, or Invalid Appropriations. When an appropriation right on a stream affected by this
13 Compact is modified, revoked, or found invalid and such modification, revocation, or invalidation causes
14 water to become available for appropriation, the Department will calculate the previous depletion amount
15 in accordance with the Method for Calculation of Monthly Depletions and add such amount to the water
16 volumes designated for the Available Water Supply.

17 E. Basin Closure. Except for the uses provided for in Article III, section C, in the Missouri River basin
18 upstream from the point that the Missouri River leaves the boundary of the UMNW&SR the Department
19 shall not process or grant an application for an appropriation in any month in which the water volume
20 designated for the Available Water Supply has been exhausted.

21 F. Prohibition on Future Mainstem Impoundment. No new impoundments may be permitted on the
22 mainstem of the Missouri River upstream from the UMNW&SR. Reclamation, repair, or rehabilitation of an
23 existing impoundment shall not be considered a new impoundment, provided that, without the consent of
24 the United States, WHICH FOR NONFEDERAL POWER GENERATING IMPOUNDMENTS UNDER THE
25 FEDERAL ENERGY REGULATORY COMMISSION'S JURISDICTION SHALL BE OBTAINED THROUGH THE
26 FEDERAL ENERGY REGULATORY COMMISSION, reclamation, repair, or rehabilitation shall not cause the
27 impoundment to exceed the original constructed capacity of the impoundment.

28 G. Administration and Reporting by the State.

29 1. Department Administration. The Department will administer the AWS by subtracting depletions from
30 the monthly available water amounts following the procedures set forth in the Method for Calculation of

1 Monthly Depletions attached as Appendix 1. In order to monitor the water volumes in the AWS, the
2 Department will calculate preliminary monthly depletions and subtract the amounts from the AWS. The
3 Department will make final subtractions from the AWS when the Department determines that an
4 appropriation is complete pursuant to 85-2-315 or 85-2-316(8)(b), MCA.

5 2. Annual Report. The Department will produce an Annual Report by March 1st of each year detailing its
6 actions in administering the AWS for the previous calendar year, provided that the first Annual Report after
7 ratification of this Compact shall include information concerning water appropriations issued, completed,
8 modified, revoked, found invalid, or abandoned since January 1, 1988, through the previous calendar year.
9 The Annual Report is final on April 15 of the year issued unless on or before that date the BLM submits
10 written comments or a request for an annual meeting to the Department. If an annual meeting is requested,
11 it shall be held within thirty days of the request. The Department will make a final decision and issue a final
12 Annual Report by June 1, unless the Department and the BLM agree to a different date.

13 3. Cooperative Review Process. The Department and the BLM will create a cooperative review process
14 to allow discussion of depletion factors and depletion amounts assigned to the undefined uses as listed in
15 the Method for Calculation of Monthly Depletions attached as Appendix 1 and any other issues concerning
16 the Annual Report. Subject to Article III, section H(1), the Department will make the final decision
17 concerning the administration of the AWS. The Department and the BLM will develop a Memorandum of
18 Understanding describing the cooperative review process within six months of the ratification of this
19 Compact.

20 4. Changes to the Method for Calculation of Monthly Depletions. The parties may make changes to the
21 Method for Calculation of Monthly Depletions attached as Appendix 1 by written agreement and such
22 changes shall not be deemed a modification of this Compact.

23 H. Action for Enforcement of Provisions of Article III.

24 The United States may file an action in a court of competent jurisdiction to enforce the provisions of Article
25 III as follows:

26 1. Enforcement of Administration of Available Water Supply. After the Annual Report becomes final in
27 accordance with Article III, section G(2), the United States shall have 90 days to file an action for
28 enforcement of the provisions of Article III, section G of this Compact concerning the administration of the
29 AWS. Any action challenging the administration of the AWS may consist only of trial de novo of the
30 Department's actions for the previous calendar year. The United States may not challenge the

1 Department's actions concerning administration of the AWS contained in previous Annual Reports. Except
2 for appropriations issued in violation of Article III, section E, any court order concerning this subsection shall
3 be limited to calculating depletion amounts from the AWS and does not affect the appropriations issued,
4 revoked, modified, or abandoned or any other decision of the Department.

5 2. Enforcement of Other Provisions of Article III. The United States may file an action for enforcement of
6 any provision of Article III except Article III, section G at any time.

7 3. No Standing to Object. The United States does not have standing to object to an application for an
8 appropriation or change in appropriation right, or to participate in a revocation or modification proceeding,
9 based on the property, water right, or interests of the United States for the UMNW&SR, provided that, for
10 an appropriation applied for with a point of diversion or means of conveyance within the boundaries of the
11 UMNW&SR, the Department shall not grant the appropriation unless the Department expressly conditions
12 the appropriation on obtaining the necessary authorization for entry and use from the United States, and
13 provided further that nothing in this Compact shall limit the United States' standing to object based on any
14 other water rights of the United States or the reserved water right for the BTCPRS.

15 4. Exclusive Remedy. The remedy set forth in this section is the exclusive remedy for enforcement of
16 Article III of this Compact. The United States shall not have to exhaust any administrative remedies in order
17 to enforce Article III of this Compact.

18 ARTICLE IV

19 BTCPRS WATER RIGHT IMPLEMENTATION

20 A. Subject to Prior Uses. The United States' federal reserved water right for instream flow for the segment
21 of the Madison River which flows over the reserved land of Bear Trap Canyon Public Recreation Site is
22 subject to all water rights with a priority date before June 9, 1971 recognized under state or federal law.
23 Nothing in this Compact may affect an existing right to divert water from a point within the BTCPRS and
24 transport it for use outside the BTCPRS.

25 B. Change in Instream Flow Right. The federal reserved water right for instream flow as described in
26 Article II, section B, shall not be changed to any other use.

27 C. Notice of Reopening of Madison River Basin. The Department shall notify the BLM if an application for
28 a state water reservation pursuant to 85-2-316, MCA, may be processed and granted within the Madison
29 River basin, as such basin is defined by 85-2-340(4).

30 D. Enforcement of Water Right. The United States may file an action in a court of competent jurisdiction

1 to enforce the federal reserved water right described in Article II, section B.

2 E. Venue for Appeal of Administrative Decisions. For any appeal of an administrative decision, venue shall
3 be the First Judicial District in Helena and the review shall be conducted according to the procedures for
4 judicial review of contested cases under the Montana Administrative Procedures Act, Title 2, chapter 4,
5 of the Montana Code Annotated.

6 ARTICLE V

7 GENERAL PROVISIONS

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

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

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

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

16 4. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent,
17 or manner of administration of the rights to water of any other federal agency or federal lands in Montana
18 other than those of the Bureau of Land Management for the UMNW&SR and the BTCPRS.

19 B. General Disclaimers.

20 Nothing in this Compact may be construed or interpreted:

21 1. as a precedent for the litigation of reserved water rights or the interpretation or administration of future
22 compacts between the United States and the state; or of the United States and any other state;

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

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

30 4. to establish a precedent for other agreements between the state and the United States or an Indian

1 tribe;

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

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

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

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

10 9. to affect in any manner the entitlement to or quantification of other federal water rights. This Compact
11 is only binding on the United States with regard to the water rights of the BLM, and does not affect the
12 water rights of any other federal agency that is not a successor in interest to the water rights subject to
13 this Compact.

14 C. Use of Water Right.

15 The rights of the United States described in Article II of this Compact are federal reserved water rights.
16 Non-use of all or a part of the federal reserved water rights described in this Compact shall not constitute
17 abandonment of the right. The federal reserved water rights described in this Compact need not be applied
18 to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the purposes
19 outlined in applicable federal law.

20 D. Concurrent with other Non-consumptive Water Uses.

21 The federal reserved water right for instream flows for the UMNW&SR and the BTCPRS recognized by this
22 Compact shall run concurrently with any other non-consumptive water uses including but not limited to all
23 hydropower uses and other instream flow uses.

24 E. Appropriation Pursuant to State Law.

25 Nothing in this Compact may prevent the United States from seeking a water appropriation pursuant to
26 state law for use on the reserved land within the UMNW&SR or the BTCPRS or for use outside the
27 boundaries of the federal reservations for which a water right is described in this Compact, provided that
28 a water right obtained in this manner shall be considered a state water right and shall be administered
29 pursuant to state law.

30 F. Reservation of Rights.

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

2 G. Severability.

3 The provisions of this Compact are not severable, provided that for the purposes of 85-2-702(3), MCA, the
4 water rights described in this Compact for the Upper Missouri National Wild and Scenic River and Bear Trap
5 Canyon Public Recreation Site shall be considered as separate Compacts.

6 H. Multiple Originals.

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

9 I. Notice.

10 Unless otherwise specifically provided for in this Compact, service of notice, except service in litigation,
11 shall be:

12 1. State: Upon the Director of the Department and such other officials as the Director may designate in
13 writing.

14 2. United States: Upon the Secretary of the Interior and such other officials as the Secretary may designate
15 in writing.

16 ARTICLE VI

17 FINALITY OF COMPACT

18 A. Binding Effect.

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

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

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

28 2. Following the effective date, this Compact shall not be modified without the consent of both parties.

29 Any attempt to unilaterally modify this Compact by either party shall render this Compact voidable at the
30 election of the other party.

1 B. Settlement of Claims.

2 The parties intend that the water rights described in this Compact are in full and final settlement of the
 3 reserved water right claims for the UMNW&SR and the BTCPRS. Pursuant to this settlement, by which
 4 certain federal reserved water rights are expressly recognized by the state in this Compact, the United
 5 States hereby and in full settlement of any and all claims filed by the United States or which could have
 6 been filed by the United States for the UMNW&SR and the BTCPRS relinquishes forever all said claims on
 7 the effective date of this Compact to water within the State of Montana for reserved water rights for the
 8 above mentioned units. The state agrees to recognize the reserved water rights described and quantified
 9 herein, and shall, except as expressly provided for herein, treat them in the same manner as any other
 10 appropriation.

11 C. The parties agree to defend the provisions and purposes of this Compact from all challenges and
 12 attacks.

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

15 Appendix 1

16 Method for Calculation of Monthly Depletions

17 A. Surface Water.

18 Depletion factors are grouped by the use codes now employed by the Department, and the monthly
 19 depletion factors for each type of water use are set forth below.

20 1. Fishery, Wildlife, Recreational, and Wildlife/Waterfowl Uses:

- 21 FS Fishery
- 22 FW Fish and Wildlife
- 23 RC Recreation
- 24 WW Wildlife/Waterfowl.

25 The water loss resulting from fishery, wildlife, recreational, and wildlife/waterfowl uses occurs as
 26 evaporation from small ponds. The following table lists the monthly depletion factors for evaporative loss
 27 in feet per surface acre:

28 Monthly Depletion Factors

29 for Evaporation

30 January 0.00

| | | |
|----|-----------|------|
| 1 | February | 0.00 |
| 2 | March | 0.00 |
| 3 | April | 0.08 |
| 4 | May | 0.17 |
| 5 | June | 0.26 |
| 6 | July | 0.50 |
| 7 | August | 0.51 |
| 8 | September | 0.35 |
| 9 | October | 0.26 |
| 10 | November | 0.04 |
| 11 | December | 0.00 |

12 The Department will calculate monthly depletions from evaporation by multiplying the above factors by
 13 maximum reservoir surface area (acres).

14 2. Geothermal and Power Generation Uses:

- 15 GE Geothermal
- 16 PG Power Generation.

17 The Department will determine depletions from geothermal and power generation uses on a case-by-case
 18 basis.

19 3. Domestic, Multiple Domestic, and Municipal Uses:

- 20 DM Domestic
- 21 MD Multiple Domestic
- 22 MC Municipal.

23 The Department will calculate monthly depletions from domestic uses over 35 gallons per minute, exceeding
 24 10 acre feet per year, multi-family domestic, and municipal uses by multiplying the annual volume by the
 25 monthly depletion factors set forth below.

| | | |
|----|---|-------|
| 26 | Monthly Depletion Factors for Domestic, | |
| 27 | Multiple Domestic, and Municipal Uses | |
| 28 | January | .0135 |
| 29 | February | .0135 |
| 30 | March | .0270 |

| | | |
|---|-----------|-------|
| 1 | April | .0315 |
| 2 | May | .0450 |
| 3 | June | .0585 |
| 4 | July | .0810 |
| 5 | August | .0675 |
| 6 | September | .0495 |
| 7 | October | .0360 |
| 8 | November | .0135 |
| 9 | December | .0135 |

10 4. Irrigation including Lawn and Garden over 5 Acres:

11 IR Irrigation

12 LG Lawn and Garden.

13 The Department will calculate monthly depletions from irrigation uses (in acre feet) by multiplying the
14 number of acres by the depletion factors set forth below.

15 Monthly Depletion Factors for Irrigation Uses

| 16 | Monthly Depletion Factor | |
|----|--------------------------|-----------------|
| 17 | Month | (feet per acre) |
| 18 | January | 0.0 |
| 19 | February | 0.0 |
| 20 | March | 0.0 |
| 21 | April | 0.0 |
| 22 | May | 0.2604 |
| 23 | June | 0.4656 |
| 24 | July | 0.7417 |
| 25 | August | 0.5885 |
| 26 | September | 0.1177 |
| 27 | October | 0.0 |
| 28 | November | 0.0 |
| 29 | December | 0.0 |

30 The Department will calculate monthly depletions from lawn and garden uses to irrigate an area greater than

1 5 acres using the method for irrigation set forth above.

2 5. Stock Uses:

3 ST Stock.

4 The Department will calculate monthly depletions from stock ponds using the monthly depletion factors for
5 evaporation listed in Appendix 1, section A(1).

6 6. Commercial, Industrial, Institutional, Mining, and Other Uses:

7 CM Commercial

8 IN Industrial

9 IS Institutional

10 MN Mining.

11 OP Other Purpose

12 The Department will assign monthly depletions from commercial, industrial, institutional, mining, and other
13 undefined uses as 50% of the annual volume spread in equal increments throughout the period of use. The
14 Department will make any necessary changes to the assigned monthly depletions to reflect actual depletions
15 when the appropriation is complete. The Department and the BLM may discuss the monthly depletions at
16 the annual meeting and the Department will make the final monthly depletion determination.

17 7. Transbasin Diversions: The Department will calculate monthly depletions for transbasin diversions
18 outside the drainage area of the Missouri River and its tributaries upstream from the point that the Missouri
19 River leaves the boundary of the Upper Missouri National Wild & Scenic River at 100% of the diverted
20 amount.

21 B. GROUNDWATER.

22 The Department will subtract all groundwater uses over 35 gallons per minute, exceeding 10 acre feet per
23 year, from the AWS monthly amounts regardless of location or source aquifer. The Department will
24 calculate depletions from groundwater uses based on monthly depletion factors for the type of water use
25 as listed in Appendix 1, section A and spread the depletions in equal increments throughout the year with
26 1/12th of the annual depletion volume subtracted from each AWS monthly amount.

27 C. STORED WATER.

28 The Department will calculate depletions from storage projects by determining the annual depletion based
29 on the monthly depletion factors for the type of use for which the water is stored as listed in Appendix 1,
30 section A and subtract such depletion from the AWS monthly amounts as set forth in the schedule below.

1 For purposes of subtracting the annual depletion for the type of use from the AWS monthly amounts, the
 2 Department will apply the following depletion schedule to all reservoirs unless the appropriation issued
 3 specifies a different fill regimen.

4 Monthly Storage Depletion Schedule

| 5 | Month | % of Calculated |
|----|----------|------------------|
| 6 | | Annual Depletion |
| 7 | November | 7% |
| 8 | December | 8% |
| 9 | January | 7% |
| 10 | February | 7% |
| 11 | March | 10% |
| 12 | April | 21% |
| 13 | May | 38% |
| 14 | June | 2% |
| 15 | Total | 100% |

16 The Department will also subtract the monthly depletions from evaporation based on the monthly depletion
 17 factors for evaporation listed in Appendix 1, section A(1).

18
 19 **NEW SECTION. Section 2. Codification instruction.** [Section 1] is intended to be codified as an
 20 integral part of Title 85, chapter 20, and the provisions of Title 85, chapter 20, apply to [section 1].

21 -END-