

EXHIBIT 1  
DATE 3-21-07  
SB 248

## **SB 248**

# **Montana-U.S. Forest Service Compact**

SB 248  
House Natural Resources Committee  
Prepared by Montana Reserved Water Rights Compact Commission  
March 21, 2007

## **SB 248 – FACT SHEET**

### **MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION – UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE WATER RIGHTS COMPACT**

#### INTRODUCTION

Since 1992, the Montana Reserved Water Rights Compact Commission (RWRCC) and the United States Department of Agriculture, Forest Service (Forest Service) have been in active negotiations concerning federal reserved water rights on National Forest System lands in Montana. In the fall of 2005, the RWRCC and the Forest Service hired a mediator to assist with the negotiations and have reached a settlement (Compact) to present to the Legislature.

#### BACKGROUND

The RWRCC was created by the Montana Legislature in 1979 to act on behalf of the State to negotiate settlement of federal reserved water right claims as part of the state-wide water adjudication. A federal reserved water right is created when an Act of Congress or a Presidential Executive Order or Proclamation sets aside federal land from the public domain for a specified purpose. This includes National Forests, National Parks, Fish and Wildlife Refuges, some BLM lands, Indian reservations, and others. The water right has the priority date of the reservation of the land, even though the water right might not be used at that time. The water right includes the amount of water necessary to accomplish the specified purpose for which the land was reserved.

By state law a negotiated settlement must be enacted by the Montana Legislature, be approved by federal officials, and go through an objection process in the Montana Water Court. After objections to all claims (including objections to the Compact) are resolved, the Water Court issues a final decree for all water rights in each basin, including the reserved rights in the negotiated settlement.

The RWRCC is composed of nine members: four appointed by the Governor; two appointed by the President of the Montana Senate; two appointed by the Speaker of the Montana House of Representatives; and, one appointed by the Attorney General.

RWRCC members that are on the Negotiating Team for Forest Service issues are:

- Former state senator Lorents Grosfield, Negotiating Team Chairman
- Senator Bill Tash
- Former Park County Attorney Tara DePuy
- Chris D. Tweeten, Chief Civil Counsel, Office of the Attorney General, RWRCC Chairman.

Members of the Forest Service Negotiating Team are:

- Kathleen McAllister, Deputy Regional Forester, Missoula
- Eric Johnston and Tim Sullivan, Forest Service, Missoula
- Jody Miller and Lois Witte, Office of General Counsel, Missoula and Denver
- Jim DuBois, United States Department of Justice, Denver.

Because of the vast geographic scope of the National Forest System lands in Montana (20% of the land, with water in 50 of the 85 Water Court Basins), settlement of Forest Service water rights is an important part of completing Montana's water adjudication in a timely and cost effective way.

## PROPOSED COMPACT

In general, the Compact recognizes reserved water rights for the Forest Service for administrative and emergency fire fighting uses and instream flows for the South Fork Flathead Wild and Scenic River. To resolve major differences between the negotiating parties concerning the existence, nature and extent of any possible reserved water rights for instream flows under federal law, the proposed Compact uses state law to create numerous state-based water rights for instream flow on National Forest System lands and to set up a process for applying for additional instream flows under state law. Below is a summary of what the proposed Compact does.

### Federal Reserved Water Rights.

- Recognizes a reserved water right to divert water for the Forest Service for administrative uses (such as for ranger stations, pack stock, road watering) and for emergency fire suppression. Priority date is date of the creation of the National Forest or as specified.
- Recognizes an instream flow right for the South Fork Flathead Wild and Scenic River. Priority date is October 12, 1976, the date this river was designated by Congress.

### Instream Flows under State Law.

- Creates, in the Compact, instream flow water rights under state law for 77 streams and one in-place water right for a fen (wetland) all located on National Forest System lands. All of these water rights will have a priority date of 2007.
- Establishes a process that the Forest Service may use in the future to apply for additional instream flows under state law on other streams throughout the National Forest System lands in Montana. Priority date will be the date of application.
- In exchange for water rights created and the means of acquiring instream flows under state law, the Forest Service will withdraw forever all of its existing or possible claims for reserved water rights for instream flows in the ongoing water adjudication.

As part of the overall agreement, the parties have agreed to seek changes to state law that:

- Continues the ability of the Forest Service to object in the Water Court to any water right claim on or crossing National Forest System lands that adversely affects Forest Service interests.
- Coordinates state and federal permitting processes.
- Allows a change of use from an appropriation to divert or withdraw water on land owned by the Forest Service above or immediately adjacent to the National Forest boundary to an instream flow. This is primarily intended to allow the Forest Service to change irrigation and other rights to instream flow on land that it might acquire in the future.

This Compact settles all federal reserved water rights of the Forest Service. The Forest Service has other water use claims based on state law that are in the adjudication process and are not part of this agreement (for example, campgrounds are not "specific purposes" for which forest service land was originally reserved).

## Public Input

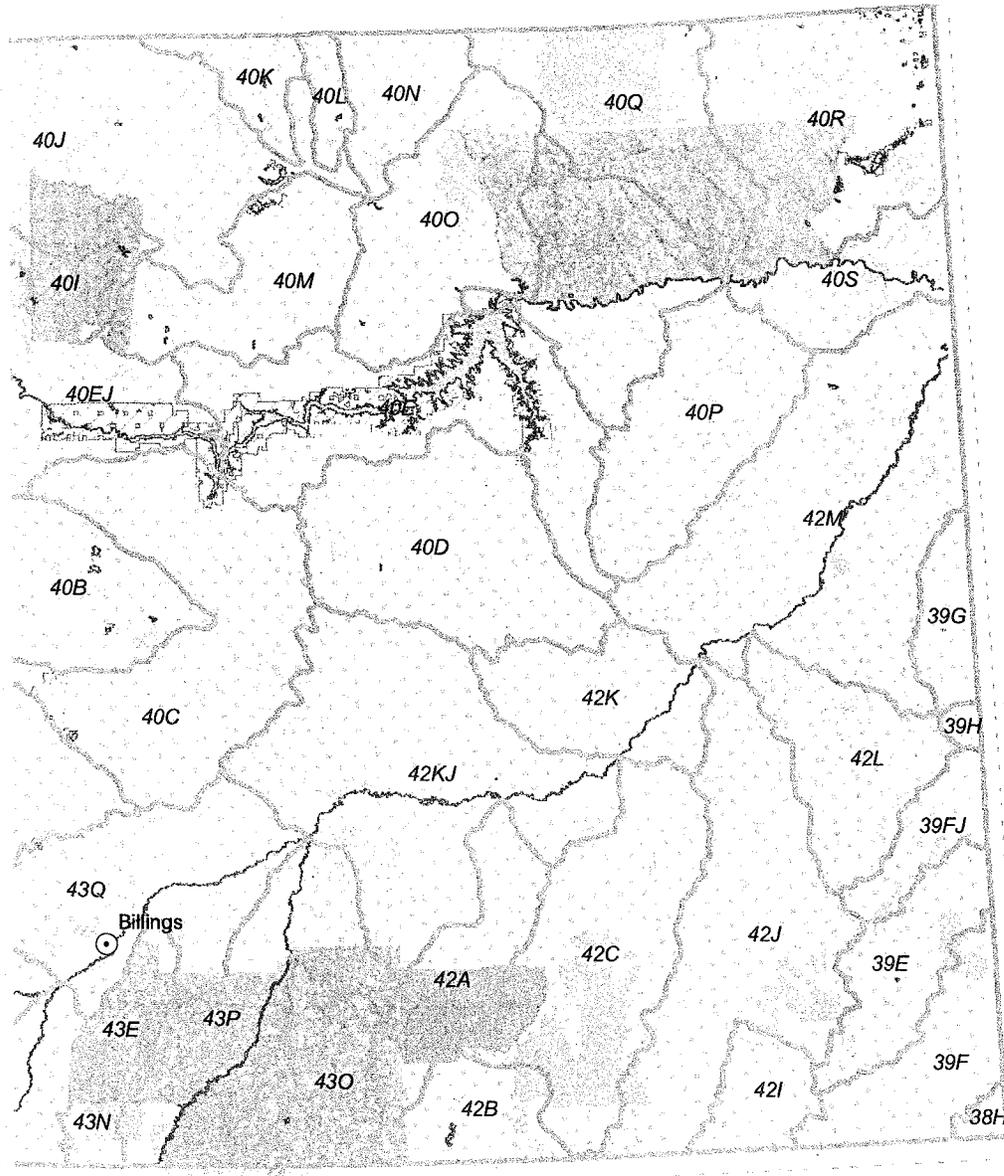
All negotiating sessions are noticed and open to the public. In the fall of 2006, public meetings were held in 17 communities. Meetings with interested individuals and groups were held. A web site was created. Written comments via mail or e-mail were encouraged. *All comments* on this Compact were considered by the negotiating teams.

The following are some of the changes made to the agreement based on public comment:

- Additional streams were included in the Compact. Approximately 57 streams where appropriate data was available were added to Article V based on public input that more instream flow rights should be quantified in the Compact. 77 instream flows are now included in the Compact. These streams were added prior to the general public meetings.
- Concerns were expressed about the priority for administrative uses on lands not originally part a Forest unit, but reserved by later Congressional action. Language was added in Article II, section A.1., to clarify that if a current administrative use has a later priority date, the abstract for that water right will specify the later date.
- Concerns were raised about Forest Service water use for road watering and road construction. Article III, section C.3 now specifies that senior water rights cannot be adversely affected by Forest Service use and withdrawals will cease if affecting seniors.
- Many people and groups commented on a proposed change to § 85-2-233, MCA concerning the Forest Service's ability to object in the adjudication based on land ownership. Based on these comments the proposed changes to this provision were dropped and language put in the Compact that recognized the Forest Service's ownership interest in water and its use within National Forest System lands.
- Concerns were raised that instream flow rights would prevent changes from a direct stock use to an off-stream stock use (even if the Forest Service required riparian protection). Now the Forest Service cannot object to changes in this limited circumstance.
- Concerns were raised about the use of the wetted perimeter methodology with no flexibility to provide for the evolution of the science regarding instream flow methodologies. Language was added that allows for a new methodology to be used under the Compact if the parties agree to it and it is adopted by rule. Criteria for the reliability of the new methodology include that it be a peer reviewed methodology with a track record and that it be generally accepted in the scientific community. The use must be instream flow for certain fish species.
- Comments were received that proposed changes to § 85-2-316, MCA were too broad and would apply to all existing state water reservations as well as new applications under that section. This provision was amended to limit the statutory changes to the Forest Service.
- Concern was expressed that the Forest Service would not go forward to apply for additional instream flow rights and there was no method to monitor the applications once the Compact was passed. The Compact now includes a requirement that DNRC report to the Environmental Quality Council biennially on the status of the Forest Service applications for state water reservations.



# Watersheds included in Compact



**Legend**

- Instream Flow Watersheds
- rivers
- public\_land\_2004oct**
- LAND OWNERSHIP**
- Bureau of Land Management
- U.S. Fish and Wildlife Service
- National Park Service
- Forest Service
- State of Montana
- Montana DFWP
- BIA Trust
- Indian Reservation
- Indian Reservation
- Indian Reservation
- Private
- Plum Creek Timber
- water
- Water Court Basins

INDEX	BASIN	SOURCE
1	41F	Horse Creek
2	41F	Sheep Creek
3	41H	East Fork Hyalite Creek
4	41H	Hyalite Creek
5	41H	West Fork Hyalite Creek
6	41I	Beaver Creek
7	41J	Sheep Creek
8	41J	Tenderfoot Creek
9	41S	Dry Wolf Creek
10	41S	South Fork Judith River
11	43B	Little Mission Creek
12	43B	Pine Creek
13	43B	South Fork Deep Creek
14	43B	Upper Deer Creek
15	76B	North Fork Yaak River
16	76B	Pete Creek
17	76B	Seventeenmile Creek
18	76B	South Fork Yaak River
19	76B	Spread Creek
20	76B	West Fork Yaak River
21	76C	East Fisher
22	76C	Silver Butte/ Fisher River
23	76C	West Fisher River
24	76D	Bannon Creek
25	76D	Big Cherry Creek
26	76D	Big Creek
27	76D	Boblial Creek
28	76D	Bristow Creek
29	76D	Callahan Creek
30	76D	Canyon Creek
31	76D	Cripple Horse Creek
32	76D	Five Mile Creek
33	76D	Granite Creek
34	76D	Libby Creek
35	76D	Midas Creek
36	76D	North Fork Big Creek
37	76D	Pamenter Creek
38	76D	Quartz Creek
39	76D	Ross Creek
40	76D	South Fork Big Creek
41	76D	Therriault Creek
42	76D	Young Creek
43	76E	Middle Fork Rock Creek
44	76E	Rock Creek @ Bitterroot Flat
45	76E	Rock Creek @ Mouth
46	76E	West Fork Rock Creek
47	76F	Cleanwater River @ Lake Alva
48	76F	Copper Creek
49	76F	Morrell Creek
50	76F	North Fork Blackfoot River
51	76F	Placid Creek
52	76F	Pooman Creek
53	76G	Little Blackfoot River
54	76G	Schwartz Creek
55	76H	Lolo Creek
56	76H	South Fork Lolo Creek
57	76J	Wounded Buck Creek
58	76K	Bond Creek
59	76K	Cedar Creek
60	76K	Cold Creek
61	76K	Elk Creek
62	76K	Goat Creek
63	76K	Groom Creek
64	76K	Hall Creek
65	76K	Lion Creek
66	76K	North Fork Lost Creek
67	76K	Piper Creek
68	76K	Scout Creek
69	76K	South Fork Lost Creek
70	76LJ	Red Meadow Creek
71	76LJ	Trail Creek
72	76M	Rattlesnake Creek
73	76M	Trout Creek
74	76N	Bull River
75	76N	Graves Creek
76	76N	Trout Creek
77	76N	Vermilion River
78	76M	Shoofly Meadow

Watersheds with Forest Service instream flow water rights are shown in red.  
 To find the name of the watershed in the table at right. (Number 78 is a "Fen" wetland.)  
 Private lands are shown in green. The Compact provides means for the Forest Service  
 to acquire instream flow water rights in all other streams on national forest lands as well.  
 For more information, see the website at [www.dnrc.mt.gov](http://www.dnrc.mt.gov).




---



---



---



---



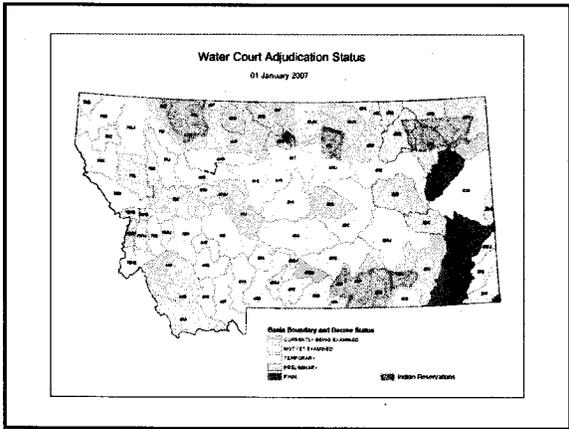
---



---



---




---



---



---



---



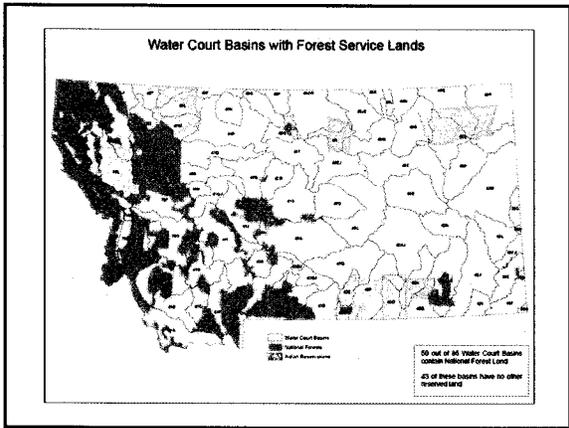
---



---



---




---



---



---



---



---



---



---

## **FOREST SERVICE COMPACT**

- Recognizes federal reserved water rights.
- Creates 78 state water rights in Compact.
- Provides process for acquiring state water rights – changes to state law to implement.
- Changes to state law for sequencing.
- New state law for permanent change of diversionary use to instream flow.

---

---

---

---

---

---

---

---

## **Reserved Water Rights**

[Article II]

- Discrete Administrative Uses – Table 1
  - Current (Abstracts, Appendix 1)
  - Future
- Dispersed Administrative Uses – Table 1
- Emergency Fire Suppression
- South Fork Flathead Wild & Scenic River

---

---

---

---

---

---

---

---

## **State Water Rights Created**

[Article V]

- 77 streams with quantified instream flow under state law based on Wetted Perimeter Methodology – Table 2
- 1 in situ non-consumptive (Fen) based on volume – Table 2
- Water Right created in Compact (akin to Murphy Rights)
- Subject to senior stock water rights

---

---

---

---

---

---

---

---

**Process for Acquiring  
State Water Rights**

- Modifications to State Water Reservation Statute. (§ 85-2-316, MCA) [section 10]
  - No 10 year review.
  - Reallocation provision does not apply to Forest Service.
- Article VI of the Compact [section 1]:
  - Authorizes Forest Service to proceed under state law (§ 85-2-316, MCA) in all basins notwithstanding basin closure. [sections 11-16]
  - Authorizes Forest Service to apply for any authorized federal purpose.
  - Sets time frames.

---

---

---

---

---

---

---

---

**State Water Reservations (Cont.)**

- New Compact provisions for specific procedures in limited circumstances – Article VI
  - Where purpose is fish; and
  - Where amount requested is based on the Wetted Perimeter Methodology
    - Lower inflection point
    - Upper inflection point for an existing population of certain fish species; or

---

---

---

---

---

---

---

---

**State Water Reservations (Cont.)**

- New Compact provisions for specific procedures in limited circumstances – Article VI
  - Where amount requested is based on a new methodology if:
    - Agreed to by the State.
    - Used to establish instream flows for an existing population of certain fish species.
      - Accepted in scientific community for this use.
      - Has been previously used in Montana or relevant location.
      - Based on field data or can be verified by field data.
  - Adopted by rule.

---

---

---

---

---

---

---

---

**State Water Reservation (Cont.)**

New Compact provisions for specific procedures in limited circumstances (cont.)

- Forest Service must submit a correct and complete application – Appendix 3
- Correct and complete application constitutes:
  - Conclusive evidence of purpose
  - Conclusive evidence of need
  - Prima facie evidence of amount
  - Prima facie evidence of public interest

---

---

---

---

---

---

---

---

**State Water Reservation (Cont.)**

New Compact provisions for specific procedures in limited circumstances (cont.)

- DNRC has no discretion to deny application unless there is an objector.
- Objector has the burden to show:
  - The amount was not properly calculated or there is no existing population of fish species applied for; or
  - Various criteria establishing a proposed water development project that conflicts with the application.

---

---

---

---

---

---

---

---

**State Water Reservation (Cont.)**

- Subject to senior stock water rights.
- DNRC reports to EQC on water reservation applications filed by the Forest Service.

---

---

---

---

---

---

---

---

## Standing

- Compact recognized that the Forest Service has an ownership interest in water and its use for every water source within National Forest System Lands based on Administrative Uses and Emergency Fire Suppression. Meets criteria for "good cause" under statute. § 85-2-233, MCA.

---

---

---

---

---

---

---

---

## Sequencing

- Permit applicant for a new water right or a applicant for a change must have special use permit (if one is required) in order to have correct and complete application. [sections 4, 7-9 and 18]
- All appropriations must have special use permit (if one is required) in order to get certificate of water right. [section 5]
- New permits are subject to terms and conditions of special use permit, if required. [section 7]

---

---

---

---

---

---

---

---

## New state law for permanent change of diversionary use to instream flow

- Ability to change diversionary (consumptive) use to instream flow on permanent basis within or immediately adjacent to the exterior boundaries of the National Forest.
- Requires new provision of state law. [section 2]
- Must go through change process with notice and opportunity to object. (§ 85-2-402, MCA) [section 18]
- 10 year window for objections based on adverse affect.

---

---

---

---

---

---

---

---

**What happens if state law is changed?**

- Principles in Article IV
  - Article VIII Process – Time Limit
    - Standing
    - State Water Reservation Process
  - Condition Precedent
    - Sequencing
    - Change of diversionary use to instream flow

---

---

---

---

---

---

---

**PUBLIC MEETINGS**

- |                |                       |
|----------------|-----------------------|
| Libby          | White Sulphur Springs |
| Kalispell      | Helena                |
| Seeley Lake    | Ennis                 |
| Missoula       | Bozeman               |
| Hamilton       | Dillon                |
| Phillipsburg   | Lincoln               |
| Thompson Falls | Butte                 |
| Great Falls    | Billings              |
| Stanford       |                       |

---

---

---

---

---

---

---

## APPENDIX 3

# Water Reservation Application for Instream Flow under Article VI, section B of the Montana-U.S. Forest Service Compact

SB 248  
Montana-U.S. Forest Service Compact  
House Natural Resources Committee  
March 21, 2007

# Water Reservation Application for Instream Flow

**FILING FEE:** \$ \_\_\_\_\_  
(filing fee as set by Rule)

## For Department Use Only

Application No. \_\_\_\_\_ Basin \_\_\_\_\_

Date Received \_\_\_\_\_

Time \_\_\_\_\_

Rec'd by \_\_\_\_\_

Fee Rec'd \_\_\_\_\_

Check No. \_\_\_\_\_

Refund \$ \_\_\_\_\_

Date \_\_\_\_\_

- Use this form to apply for instream flow water reservations allowed under Article VI, section B of the Montana-US Forest Service Compact (Compact).
- A separate application must be submitted for each reach of a water source for which a State water reservation is sought.
- Filing fee should be submitted at the time of application.

1. Applicant Name: U.S. Forest Service

2. Mailing Address: \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

3. Contact Person: \_\_\_\_\_

Check, if contact is an attorney

Mailing Address: \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone Numbers: Home \_\_\_\_\_ Work \_\_\_\_\_ Cell \_\_\_\_\_

Email Address: \_\_\_\_\_

**NOTE:** IF A CONTACT PERSON IS IDENTIFIED AS AN ATTORNEY, ALL COMMUNICATION WILL BE SENT ONLY TO THE ATTORNEY UNLESS THE ATTORNEY PROVIDES WRITTEN INSTRUCTION TO THE CONTRARY.

4. Source of water supply:

Stream Name: \_\_\_\_\_

Tributary to: \_\_\_\_\_

Basin Number: \_\_\_\_\_

5. Purpose (check one): \_\_\_\_\_ beneficial use to maintain a minimum flow of water for fish  
\_\_\_\_\_ other (if other, use Form No. 610B – Application for  
Reservation of Water – Instream Uses)

6. Need (check one): \_\_\_\_\_ instream flow needed for fish  
\_\_\_\_\_ other (if other, use Form No. 610B – Application for  
Reservation of Water – Instream Uses)

7. Amount of instream flow applied for: \_\_\_\_\_ cubic feet per second (cfs)

- Methodology: \_\_\_\_\_ WETP (Wetted Perimeter)  
\_\_\_\_\_ approved methodology; specify \_\_\_\_\_  
(requires approval as described in Article VI, section B of Compact)  
\_\_\_\_\_ other; specify \_\_\_\_\_  
(use Form No. 610B – Application for Reservation of Water –  
Instream Uses)

- Provide evidence that the methodology is appropriate for the stream reach.  
Attach documentation or explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- Fish species present (check):  
\_\_\_\_\_ Bull Trout  
\_\_\_\_\_ Westslope Cutthroat Trout  
\_\_\_\_\_ Columbia River Redband Trout  
\_\_\_\_\_ Yellowstone Cutthroat Trout  
\_\_\_\_\_ Arctic Grayling  
\_\_\_\_\_ T&E Species -- specify: \_\_\_\_\_  
date listed: \_\_\_\_\_  
\_\_\_\_\_ other -- specify: \_\_\_\_\_  
(if other, limited to lower inflection point)

Proof of population present in the stream:  
Attach documentation or explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- Provide evidence that methodology was accurately applied:

Data Collection:

- Location of wetted perimeter quantification point :
  - Latitude \_\_\_\_\_ Longitude \_\_\_\_\_;
  - \_\_\_\_\_ ¼ \_\_\_\_\_ ¼ \_\_\_\_\_ ¼ Section \_\_\_\_\_ Township \_\_\_\_\_ N/S  
Range \_\_\_\_\_ E/W \_\_\_\_\_ County  
Lot \_\_\_\_\_ Block \_\_\_\_\_ Tract No. \_\_\_\_\_
- If quantification point is not close to the downstream end of reach, explain why it is a suitable representation of the downstream end of the reach: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- Flows measured:
  - Date \_\_\_\_\_ cfs \_\_\_\_\_
  - Date \_\_\_\_\_ cfs \_\_\_\_\_
  - Date \_\_\_\_\_ cfs \_\_\_\_\_
- Attach spreadsheet that includes all applicable data.

Data Analysis:

- Name of computer program used for analysis; \_\_\_\_\_
  - Number of cross sections used: \_\_\_\_\_
  - R-square analysis of rating curves: \_\_\_\_\_
  - Inflection point chosen: \_\_\_\_\_ Upper inflection point  
\_\_\_\_\_ Lower inflection point
  - Attach wetted perimeter graphs showing inflection point
- Attach a list of persons involved in developing information used in preparing the application, including a statement of education, qualifications, and experience for all persons involved with collecting and analyzing data used to determine the wetted perimeter method inflection points.

8. Physical Water availability:

- Estimated mean annual flow \_\_\_\_\_ cfs.
- In an attachment, describe any additional flow information, such as mean monthly flow, that is available and explain methodology.

9. Location of downstream end of reach:

\_\_\_\_\_ ¼ \_\_\_\_\_ ¼ \_\_\_\_\_ ¼ Section \_\_\_\_\_ Township \_\_\_\_\_ N/S  
Range \_\_\_\_\_ E/W \_\_\_\_\_ County  
Lot \_\_\_\_\_ Block \_\_\_\_\_ Tract No. \_\_\_\_\_  
(downstream end cannot extend downstream from national forest boundary)

10. Location of upstream end of reach:

\_\_\_\_\_ ¼ \_\_\_\_\_ ¼ \_\_\_\_\_ ¼ Section \_\_\_\_\_ Township \_\_\_\_\_ N/S  
Range \_\_\_\_\_ E/W \_\_\_\_\_ County  
Lot \_\_\_\_\_ Block \_\_\_\_\_ Tract No. \_\_\_\_\_

Indicate whether the upstream end of reach is headwaters, a property boundary, a tributary, etc. \_\_\_\_\_  
\_\_\_\_\_

11. Length of stream to be protected: \_\_\_\_\_ (feet).

12. Legal Description of Stream Reach to be Protected (indicate the legal description of each parcel along the entire stream reach. Attach additional pages if necessary).

_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____
_____ 1/4 _____ 1/4 _____ 1/4	Section _____	TWP _____	N/S RGE _____	E/W County _____

13. Map:

Attach a map, and clearly identify the following items on the map: north arrow, scale, section corners and numbers, township and range numbers, quantification point, place of use (reach of stream to be protected), and property ownership of the place of use. A U.S. Geological Survey quadrangle map or equivalent topographic map with minimum scale of 1:24000 is recommended.

14. Public Interest:

This application is in the public interest if it is otherwise correct and complete because under the Compact an application that is otherwise correct and complete establishes a prima facie showing of public interest that can only be overcome by an objection based on a projected development that satisfies the requirements of Article IV, section B.3.(b) of the Compact.

15. Affidavit:

I declare under oath that the information provided for this application is, to the best of my knowledge and belief, true and correct. In submitting this application, I acknowledge that I serve in a representative capacity for the United States Department of Agriculture, Forest Service.

Applicant's Signature: \_\_\_\_\_ Date \_\_\_\_\_  
(signature of Forest Service Representative)

Name: \_\_\_\_\_  
(typed or printed name of Forest Service Representative)

Title: \_\_\_\_\_  
(title of Forest Service Representative)

Address: \_\_\_\_\_  
(address of Forest Service Representative)

Phone number: \_\_\_\_\_

Subscribed and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Notary's Signature \_\_\_\_\_

(Typed, Stamped, or Printed Name of Notary)

Notary for the State of \_\_\_\_\_

Residing at \_\_\_\_\_

My commission expires \_\_\_\_\_