

1 SENATE BILL NO. 42

2 INTRODUCED BY B. MCCARTHY

3 BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE CONSUMPTIVE USE DATA IN THE UNITED STATES FISH AND WILDLIFE SERVICE,
6 RED ROCK LAKES-MONTANA COMPACT; AMENDING SECTION 85-20-801, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

7

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

9

10 Section 1. Section 85-20-801, MCA, is amended to read:

11 "85-20-801. United States Fish and Wildlife Service, Red Rock Lakes-Montana compact ratified. The compact entered into by the State
12 of Montana and the United States Fish and Wildlife Service and filed with the secretary of state of the State of Montana under the provisions
13 of 85-2-702 on April 20, 1999, is ratified. The compact is as follows:

14 WATER RIGHTS COMPACT

15 STATE OF MONTANA

16 UNITED STATES OF AMERICA, FISH AND WILDLIFE SERVICE

17 This Compact is entered into by the State of Montana and the United States of America to settle for all time any and all claims existing
18 on the effective date of the Compact to water for Red Rock Lakes National Wildlife Refuge and Wilderness Area ("Refuge") administered by the
19 U.S. Fish and Wildlife Service (FWS) within the State of Montana.

20

RECITALS

21 WHEREAS, the State of Montana, in 1979, pursuant to Title 85, Chapter 2 of the Montana Code Annotated, commenced a general



1 adjudication of the rights to the use of water within the State of Montana including all federal reserved and appropriative water rights;

2 WHEREAS, 85-2-703, MCA, provides that the state may negotiate compacts concerning the equitable division and apportionment of water
3 between the state and its people and the federal government with claims to non-Indian reserved water rights within the State of Montana;

4 WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of Red Rock
5 Lakes National Wildlife Refuge and Wilderness Area, in the State of Montana;

6 WHEREAS, the United States, in quantifying its water rights recognizes the need to accommodate the interests of the State and its citizens
7 by providing for the development and use of water in the vicinity of the Fish and Wildlife Service Refuges to the extent that it is possible to do
8 so without materially affecting the rights and interests of the United States;

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

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

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

14 ARTICLE I - DEFINITIONS

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

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

18 2. "Consumptive" when referring to a water right recognized under state law means a use of water which removes water from the source
19 of supply such that the quality or quantity is reduced or the timing of return delayed, making it unusable or unavailable for use by others, and
20 includes evaporative loss from impoundments or natural lakes.

21 3. "Department" means the Montana Department of Natural Resources and Conservation or its successor.

- 1 4. "Developed spring" means any diversion from a spring for beneficial use under state law and does not require augmentation of flow.
- 2 5. "Effective date of this Compact" means the date of the ratification of the Compact by the Montana legislature, written approval by
3 the United States Department of the Interior, or written approval by the United States Department of Justice, whichever is latest.
- 4 6. "Groundwater" means water that is beneath the ground surface.
- 5 7. "Minimum flow" means the flow of water in a stream measured in cubic feet per second at the point designated in Article II of the
6 Compact, at or below which the United States has the right to seek curtailment of junior water rights upstream from the Refuge.
- 7 8. "Natural flow" means the water that the parties agree shall remain in the stream in satisfaction of the United States' water right for
8 the purposes of the federal reservation.
- 9 9. "Non-consumptive" see "consumptive"
- 10 10. "Parties" means the State of Montana and the United States.
- 11 11. "Person" means an individual, association, partnership, corporation, state agency, political subdivision, or any other entity, but does
12 not include the United States.
- 13 12. "Recognized under state law" when referring to a water right or use means a water right or use protected by state law, but does not
14 include state recognition of a federal or tribal reserved water right arising under federal law.
- 15 13. "Red Rock Lakes National Wildlife Refuge" means those lands located in Montana that were withdrawn and reserved by Executive
16 Orders No. 7023 of April 22, 1935, and 7172 of September 4, 1935, and all lands acquired by the United States Fish and Wildlife Service within
17 the boundaries established by Executive Orders 7023 and 7172.
- 18 14. "Red Rock Lakes Wilderness Area" means those lands within Red Rock Lakes National Wildlife Refuge designated as wilderness by
19 Public Law 94-557 of October 19, 1976, 16 USC 1132.
- 20 15. "Refuge" means both the Red Rock Lakes National Wildlife Refuge and the Red Rock Lakes Wilderness Area.
- 21 16. "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof. Unless otherwise

1 indicated, for purposes of notification or consent, "state" means the Director of the Montana Department of Natural Resources and Conservation
 2 or his or her designee.

3 17. "United States" means the federal government and all officers, agencies, departments and political subdivisions thereof. Unless
 4 otherwise indicated, for purposes of notification or consent other than service in litigation, "United States" means the Secretary of the Department
 5 of the Interior, or his or her designees.

6 ARTICLE II - WATER RIGHT

7 The parties agree that the following water rights are in settlement of all of the United States' water rights for the Refuge, including federal
 8 reserved and state-based water rights acquired with the purchase of land. The parties to this agreement recognize that the water rights described
 9 in this Compact are junior to any tribal water rights with a priority date before the effective date of the Compact, including aboriginal rights, if
 10 any, in the basins affected. All water rights described in this Article are subject to Article IV.A. of this Compact.

11 A. **Quantification:** The United States shall have the right to water from the following sources where they occur on the Refuge:

12 1. **Consumptive Use:**

13 ~~Red Rock Lakes National Wildlife Refuge -- Consumptive Use~~

	Legal	Elev.	Surface	Acre-	Future	Natural	Canal	Diversion	Source		
	Description	of Dam	Acres	Feet	Acre-	or		Rate	of Diverted		
	of impoundment or POD		Capacity	Feet	Manmade				Water		
	Qtr	Sec.	Twtnshp	Range				CFS			
18 McDonald Pond	NW	6	14 S	1 E	6629.63	13	44	NWS	Mallard	10	Culver Springs
19 Widgeon Pond	NW	6	14 S	1 E	6636.3	88	585	NWS	Hacket Cr	20	Culver Springs
20 Culver Pond	NW	8	14 S	1 E	6651.7	27	110	NWS			Culver Springs
21 East Pintail Ditch Pnd	N	1	14 S	1 W		3	3	M	Mallard	10	Elk Creek

1	Pintail Ditch Pond	SW	34	13 S	1 W	21	24	M	Mallard	10	Elk Creek	
2	Swan Lake [†]	N	9	14 S	1 W	649	1168	N			Elk Creek	
3	Buck Pond [§]	NE	4	14 S	1 W	11	16	N	Mallard	10	Groundwater	
4	East Swan lake [†]	SW	3	14 S	1 W	65	78	N			Groundwater	
5	Sora Pond ^²	E	33	13 S	1 W	1	2	N			Groundwater	
6	Antelope Pond	N	4	14 S	1 W	10	12	N			Groundwater	
7	Campground Spring	SWSWSE	21	14 S	1 W		8	M		10 gpm	Groundwater	
8	Shambow Pond [†]	S	20	14 S	1 W	7	26	N			Groundwater	
9	Rail Pond ^²	NW	3	14 S	1 W	6	9	N	Mallard	10	Groundwater	
10	Irrigation	SWSW	30	14 S	1 W		3000	M		25	Odell Creek	
11	Sparrow Slough Dam[†]	N	13	14 S	2 W	6627	63	190	M		Odell Creek	
12	Sparrow Slough Pond[†]	SW	13	14 S	2 W	6629.3	21	34	NWS	ditch	17.5	Odell Creek
13	Upper Red Rock Lake	W	8	14 S	1 W	3467			N		Red Rock Creek	
14	Lower Red Rock Lake	NE	6	14 S	2 W	6607.5	5492	89582	NWS		Red Rock Creek	
15	Tuck Slough South	SW	7	14 S	1 E	29	63		M	Harlequin	30	Red Rock Creek
16	Tuck Slough North	N	7	14 S	1 E	103	2003		M	Harlequin	30	Red Rock Creek
17	Shoveler Pond ^²	W	7	14 S	1 E	6	9	N	Harlequin	30	Red Rock Creek	
18	Refuge HQ domestic	SESENW	23	14 S	2 W		8	8	M		Groundwater	
19	Irr. of Refuge HQ	NESW	23	14 S	2 W				M	ditch	0.5	Shambow Creek
20	Irr. of Bunkhse grnds	E2W2E2	23	14 S	2 W				M	ditch	1	Shambow Creek
21	Bold letters denote data taken from the dam safety reports, all other data is derived from topographic maps and Refuge staff estimates.											

1 POD = Point of Diversion ————— N = Natural lake ————— NWS = Natural lake with manmade structure ————— M = Manmade lake

2 ⁺ = Estimated average depth 2 feet ————— ³ = Estimated average depth 3 feet

3 ² = Estimated average depth 2.5 feet ————— ^{*} = Estimated average depth 6 feet

Red Rock Lakes National Wildlife Refuge -- Consumptive Use

	<u>Legal</u>	<u>Elev.</u>	<u>Surface</u>	<u>Acre-</u>	<u>Future</u>	<u>Natural</u>	<u>Canal</u>	<u>Diversion</u>	<u>Source</u>			
	<u>Description</u>	<u>of Dam</u>	<u>Acres</u>	<u>Feet</u>	<u>Acres-</u>	<u>or</u>		<u>Rate</u>	<u>of Diverted</u>			
	<u>of impoundment or POD</u>		<u>Capacity</u>	<u>Feet</u>	<u>Manmade</u>			<u>CFS</u>	<u>Water</u>			
	<u>Qtr</u>	<u>Sec.</u>	<u>Twtnshp</u>	<u>Range</u>								
9	<u>McDonald Pond</u>	<u>NW</u>	<u>6</u>	<u>14 S</u>	<u>1 E</u>	<u>6629.63</u>	<u>14</u>	<u>44</u>	<u>NWS</u>	<u>Mallard</u>	<u>10</u>	<u>Culver Springs</u>
10	<u>Widgeon Pond</u>	<u>NW</u>	<u>6</u>	<u>14 S</u>	<u>1 E</u>	<u>6636.3</u>	<u>150</u>	<u>585</u>	<u>NWS</u>	<u>Hacket Cr</u>	<u>20</u>	<u>Culver Springs</u>
11	<u>Culver Pond</u>	<u>NW</u>	<u>8</u>	<u>14 S</u>	<u>1 E</u>	<u>6651.7</u>	<u>65</u>	<u>110</u>	<u>NWS</u>			<u>Culver Springs</u>
12	<u>East Pintail Ditch Pnd</u>	<u>N2</u>	<u>1</u>	<u>14 S</u>	<u>1 W</u>		<u>3</u>	<u>3</u>	<u>M</u>	<u>Mallard</u>	<u>10</u>	<u>Culver Springs</u>
13												<u>Groundwater</u>
14	<u>Pintail Ditch Pond</u>	<u>SW</u>	<u>34</u>	<u>13 S</u>	<u>1 W</u>		<u>21</u>	<u>24</u>	<u>M</u>	<u>Mallard</u>	<u>10</u>	<u>Culver Springs</u>
15												<u>Groundwater</u>
16	<u>Swan Lake³</u>	<u>N2</u>	<u>9</u>	<u>14 S</u>	<u>1 W</u>		<u>649</u>	<u>1168</u>	<u>N</u>			<u>Elk Creek</u>
17												<u>Groundwater</u>
18	<u>Buck Pond²</u>	<u>NE</u>	<u>4</u>	<u>14 S</u>	<u>1 W</u>		<u>11</u>	<u>16</u>	<u>N</u>			<u>Groundwater</u>
19	<u>East Swan Lake¹</u>	<u>SW</u>	<u>3</u>	<u>14 S</u>	<u>1 W</u>		<u>65</u>	<u>78</u>	<u>N</u>			<u>Groundwater</u>
20	<u>Sora Pond²</u>	<u>E2</u>	<u>33</u>	<u>13 S</u>	<u>1 W</u>		<u>1</u>	<u>2</u>	<u>N</u>			<u>Groundwater</u>
21	<u>Antelope Pond</u>	<u>N2</u>	<u>4</u>	<u>14 S</u>	<u>1 W</u>		<u>10</u>	<u>12</u>	<u>N</u>			<u>Groundwater</u>



1	<u>Campground Spring</u>	<u>SWSWSE</u>	<u>21</u>	<u>14 S</u>	<u>1 W</u>			<u>8</u>		<u>M</u>		<u>10 gpm</u>	<u>Groundwater</u>
2	<u>Shambow Pond⁴</u>	<u>S2</u>	<u>20</u>	<u>14 S</u>	<u>1 W</u>		<u>7</u>	<u>26</u>		<u>N</u>			<u>Groundwater</u>
3	<u>Rail Pond²</u>	<u>NW</u>	<u>3</u>	<u>14 S</u>	<u>1 W</u>		<u>6</u>	<u>9</u>		<u>N</u>			<u>Groundwater</u>
4	<u>Well</u>	<u>SESESE</u>	<u>28</u>	<u>13 S</u>	<u>1 W</u>					<u>M</u>		<u>40 gpm</u>	<u>Groundwater</u>
5	<u>Well</u>	<u>SESESE</u>	<u>28</u>	<u>13 S</u>	<u>1 W</u>					<u>M</u>		<u>15 gpm</u>	<u>Groundwater</u>
6	<u>Well</u>	<u>SWSESE</u>	<u>28</u>	<u>13 S</u>	<u>1 W</u>					<u>M</u>		<u>15 gpm</u>	<u>Groundwater</u>
7	<u>Well</u>	<u>NWSWNW</u>	<u>28</u>	<u>13 S</u>	<u>1 W</u>					<u>M</u>		<u>3 gpm</u>	<u>Groundwater</u>
8	<u>Well</u>	<u>NESESE</u>	<u>28</u>	<u>13 S</u>	<u>1 W</u>					<u>M</u>		<u>20 gpm</u>	<u>Groundwater</u>
9	<u>Irrigation</u>	<u>SWSW</u>	<u>30</u>	<u>14 S</u>	<u>1 W</u>				<u>3000</u>	<u>M</u>		<u>25</u>	<u>Odell Creek</u>
10	<u>Sparrow Slough Pond</u>	<u>N2</u>	<u>13</u>	<u>14 S</u>	<u>2 W</u>	<u>6627</u>	<u>63</u>	<u>190</u>		<u>M</u>			<u>Odell Creek</u>
11	<u>Sparrow Pond</u>	<u>SW</u>	<u>13</u>	<u>14 S</u>	<u>2 W</u>	<u>6629.3</u>	<u>21</u>	<u>34</u>		<u>NWS</u>	<u>ditch</u>	<u>17.5</u>	<u>Odell Creek</u>
12	<u>Upper Red Rock Lake</u>	<u>W2</u>	<u>8</u>	<u>14 S</u>	<u>1 W</u>		<u>3467</u>			<u>N</u>			<u>Red Rock Creek</u>
13	<u>UPPER RED ROCK LAKE</u>						<u>3467</u>						
14	<u>Lower Red Rock Lake</u>	<u>NE</u>	<u>6</u>	<u>14 S</u>	<u>2 W</u>	<u>6612.5</u>	<u>5492</u>	<u>89582</u>		<u>NWS</u>			<u>Red Rock Creek</u>
15	<u>Tuck Slough South</u>	<u>SE</u>	<u>7</u>	<u>14 S</u>	<u>1 W</u>		<u>29</u>	<u>63</u>		<u>M</u>	<u>Harlequin</u>	<u>30</u>	<u>Red Rock Creek</u>
16	<u>TUCK SLOUGH SOUTH</u>						<u>29</u>	<u>63</u>					
17	<u>Tuck Slough North</u>	<u>N2</u>	<u>7</u>	<u>14 S</u>	<u>1 W</u>		<u>103</u>	<u>200</u>		<u>M</u>	<u>Harlequin</u>	<u>30</u>	<u>Red Rock Creek</u>
18	<u>TUCK SLOUGH NORTH</u>						<u>103</u>	<u>200</u>					
19	<u>Shoveler Pond²</u>	<u>W2</u>	<u>7</u>	<u>14 S</u>	<u>1 W</u>		<u>6</u>	<u>9</u>		<u>N</u>	<u>Harlequin</u>	<u>30</u>	<u>Red Rock Creek</u>
20													<u>Groundwater</u>
21	<u>Refuge HQ domestic</u>	<u>SESENW</u>	<u>23</u>	<u>14 S</u>	<u>2 W</u>			<u>8</u>	<u>8</u>	<u>M</u>			<u>Groundwater</u>

1 Well

2	<u>Irr. of Refuge HQ grnds</u>	<u>SWNESW</u>	<u>23</u>	<u>14 S</u>	<u>2 W</u>	<u>M</u>	<u>pipeline</u>	<u>0.5</u>	<u>Shambow Creek</u>
3	<u>Irr. of Bunkhse grnds</u>	<u>SWNESW</u>	<u>23</u>	<u>14 S</u>	<u>2 W</u>	<u>M</u>	<u>pipeline</u>	<u>0.2</u>	<u>Shambow Creek</u>
4	<u>Irr. of Bunkhouse</u>	<u>SWSWNE</u>	<u>23</u>	<u>14 S</u>	<u>2 W</u>	<u>M</u>	<u>ditch</u>	<u>1.6</u>	<u>Shambow Creek</u>

5 Pasture

6 **Bold letters denote data taken from the dam safety reports, all other data is derived from topographic maps and Refuge staff estimates.**

7 POD = Point of Diversion N = Natural lake NWS = Natural lake with manmade structure M = Manmade lake

8 ¹ = Estimated average depth 2 feet ³ = Estimated average depth 3 feet

9 ² = Estimated average depth 2.5 feet ⁴ = Estimated average depth 6 feet

10 2. **Natural Flow:** The United States has a water right to the natural flow in all the tributaries entering the Refuge above the most
 11 downstream point on the Refuge at the point the tributary enters the Refuge in the amount of the natural flow remaining after satisfaction of the
 12 following water rights:

- 13 a. all rights recognized under state law upstream from the Refuge with a priority date prior to the effective date of this Compact; and
- 14 b. any rights exempt from the basin closure set forth in Article III.A. of this Compact.

15 3. **Minimum Flow:** Subject to the provisions of Article III.C.1., the United States has a water right for minimum flows on Red Rock, Tom
 16 and Odell Creeks as follows:

- 17 a. Red Rock Creek: 15 cfs, measured at NE SE NW Sec. 17, T14S, R1E;
- 18 b. Tom Creek: 1.4 cfs, measured at the county road in SW NE NE Sec. 25, T14S, R1W;
- 19 c. Odell Creek: 11 cfs, measured at the county road in SW SW SE Sec. 24, T14S, R2W.

20 4. **Lake Level:** The United States has the right to maintain the natural lake level of Lower Red Rocks Lake at an elevation of ~~6607.5~~
 21 ~~6612.5~~ 6607.5 feet. The United States may store additional water only to the extent consistent with the Memorandum of Understanding of

1 February 4, 1987, between the United States and the Water Users Irrigation Company (Lima Reservoir) and East Bench Irrigation District and state
2 water right permit number 65254-S41A.

3 **5. Emergency Fire Suppression:** The use of water for emergency fire suppression benefits the public, and is necessary for the purposes
4 of the Refuge. The United States may, as part of its water right, divert water for fire suppression at the Refuge as needed and without a definition
5 of the specific elements of a recordable water right. Use of water for fire suppression shall not be considered an exercise of the United States'
6 water rights for consumptive use or a violation of its water rights for natural or minimum flow.

7 **B. Relative Priority:**

8 **1. Priority Date:**

9 a. Consumptive Use and Natural Flow: Subject to the subordination provisions of Article II.B.2.a., the United States has a priority date
10 of April 22, 1935, for the water rights for consumptive use and natural flow described in Article II.A.1. and 2. of this Compact.

11 b. Minimum Flow: Subject to the provisions of Article III.C.1. setting forth the means to satisfy the minimum flow rights for the Refuge
12 and the subordination provisions of Article II.B.2.b., the United States has a priority date of October 30, 1888, for the 15 cfs minimum flow on
13 Red Rock Creek; June 15, 1894, for the 1.4 cfs minimum flow on Tom Creek; and June 28, 1889, for the 11 cfs minimum flow on Odell Creek.

14 **2. Subordination:**

15 a. Consumptive Use Natural Flow and Lake Levels: The water rights for consumptive use set forth in Article II.A.1. and natural flow set
16 forth in Article II.A.2. and lake levels set forth in Article II.A.4. are subordinate to the following rights upstream from the most downstream point
17 on the Refuge:

18 (1) any right recognized under state law with a priority date before the effective date of this Compact; and

19 (2) any right exempt from the basin closure set forth in Article III.A. of this Compact.

20 b. Minimum Flow: The water rights for minimum flows on Red Rock, Tom and Odell Creeks set forth in Article II.A.3. of this Compact
21 are subordinate to the following rights upstream from the Refuge:

- 1 (1) any right for the purpose of domestic use;
- 2 (2) any right for the purpose of instream stockwatering; and
- 3 (3) any change in use of a water right for the purpose of instream stockwatering to off-stream stockwatering that does not result in an
- 4 increase in the historic consumptive use of water.

5 C. **Period of Use:**

6 1. **Natural Flow/Consumptive Use:** The period of use of the United States' water rights for natural flow and consumptive use set forth

7 in Article II.A.1. and 2. shall be from January 1 through December 31 of each year.

8 2. **Minimum Flow:** The period of use of the United States' water rights for minimum flows set forth in Article II.A.3. shall be from April

9 1 through November 30 of each year.

10 D. **Points and Means of Diversion/Location of Natural and Minimum Flow Rights:**

11 1. **Consumptive Use:** See Table at Article II.A.1.

12 2. **Natural Flow:** The United States' water rights for natural flow apply to the portion of the streams specified in this Compact that flow

13 over or form the boundary of land administered by the Fish and Wildlife Service.

14 3. **Minimum Flow:** The United States' water rights for minimum flow are measured at the points set forth in Article II.A.3.

15 E. **Purposes:** The United States' rights to water may be used for the following purposes:

16 1. **Consumptive Use:** The United States' water rights for consumptive use shall be used for the purposes of the Refuge including wildlife

17 habitat maintenance and enhancement. Subject to the limitations set forth in Article III.E., the United States may change the use of water

18 identified for consumptive use in Article II.A.1.

19 2. **Natural and Minimum Flows:** The United States' water rights to natural and minimum flows shall be used on the Refuge for wildlife

20 habitat maintenance and enhancement. The United States' water rights to natural flow set forth in Article II.A.2. and to minimum flows set forth

21 in Article II.A.3. shall be used only for the purpose of instream flow and shall not be changed or diverted for any other use, except for fire

1 suppression as set forth in Article II.A.5.

2

ARTICLE III - IMPLEMENTATION

3 **A. Basin Closure:**

4 1. In the drainage basins upstream of the most downstream point on the Refuge, the Department shall not process or grant an application
5 for a permit to appropriate or to reserve water for consumptive use after the effective date of this Compact, provided that, the following
6 appropriations are exempt from this closure:

7 a. certificates of water right for appropriation of groundwater by means of a well or developed spring with a maximum appropriation of
8 35 gallons per minute or less that does not exceed a total appropriation of 10 acre-feet per year;

9 b. permits for appropriation of groundwater by means of a well or developed spring with an appropriation of greater than 35 gallons per
10 minute or a total appropriation in excess of 10 acre-feet per year, if the Department determines by a preponderance of the evidence based on
11 information provided by the applicant or information from any other source available to the Department that the groundwater is not hydrologically
12 connected to surface water upstream from or on the Refuge;

13 c. permits or changes in water right for appropriation of groundwater for irrigation purposes when the number of acres to be irrigated
14 from groundwater under the permit or change in water right will be accompanied by a corresponding decrease in the number of acres irrigated
15 from surface water sources upstream from the Refuge;

16 d. permits for stock watering ponds with a maximum capacity of the impoundment or pit of less than 15 acre-feet and an appropriation
17 of less than 30 acre-feet per year from a source other than a perennial flowing stream;

18 e. permits for domestic use;

19 f. permits for nonconsumptive use; and

20 g. temporary emergency appropriations.

21 2. If a temporary or permanent basin closure is enacted under state law for a drainage basin or subbasin for which future consumptive

1 water use is limited under this Compact, the most restrictive measures applicable to consumptive use of surface or groundwater shall control.

2 3. Within 180 days following the effective date of this Compact, the Department shall mail notice of the basin closure to every person
3 or public agency of record with a claim of water right or permit in the portion of the drainage basins subject to closure.

4 B. **Lake Levels:** The United States agrees to continue efforts to coordinate lake water level management with Water Users Irrigation
5 Company (Lima Reservoir) and East Bench Irrigation District or their successors in interest. It is not intended that this Compact affect in any way
6 the Memorandum of Understanding between the United States and the Irrigation Company and Irrigation District listed above, or the ability of
7 the parties to modify that agreement.

8 C. **Enforcement of Water Right:**

9 1. **Minimum flow:**

10 a. Minimum flow rights set forth in Article II.A.3. may be satisfied through cooperative agreements entered into by the FWS and any
11 person holding a water right with a point of diversion on Red Rock, Tom or Odell Creeks or their tributaries upstream of the Refuge. The FWS
12 may, on agreement with the parties to a cooperative agreement, modify an existing agreement. The FWS may enter into additional cooperative
13 agreements after the effective date of the Compact. Modification of a cooperative agreement or entry into a new cooperative agreement shall
14 not be considered a modification of the Compact. As between the FWS and signatories to cooperative agreements, the FWS will use its best
15 efforts to seek satisfaction of the minimum flow rights pursuant to the cooperative agreements prior to resorting to remedies set forth in Article
16 III.C.2.

17 b. Prior to seeking satisfaction of the minimum flow, the FWS shall cease its own diversions, if any, from:

18 (1) Red Rock Creek and its tributaries upstream from the point of measurement when measured flow is approximately 25 cfs;

19 (2) Odell Creek and its tributaries upstream from the point of measurement when measured flow is approximately 20 cfs; and

20 (3) Tom Creek and its tributaries upstream from the point of measurement when measured flow is approximately 5 cfs.

21 c. On acquisition by or transfer to the FWS of any water right subject to a cooperative agreement, the FWS will continue to exercise the

1 water right in a manner that satisfies the minimum flow at least to the degree set forth in the cooperative agreement, and the provisions of Article
2 III.C.1.b. requiring curtailment of FWS diversions shall apply.

3 d. In the absence of a cooperative agreement, the FWS may seek curtailment of a water use to satisfy the minimum flow by resort to
4 a court of competent jurisdiction pursuant to Article III.C.2. In any proceeding before a court of competent jurisdiction, the FWS will not seek
5 curtailment of any water right which, based on the experience and observation of the FWS, does not cause a measured or cumulative reduction
6 in flow of Red Rock, Tom, or Odell Creeks at the point of measurement set forth in Article II.A.3., and will limit the period for which curtailment
7 is sought to that necessary to maintain the minimum flow.

8 2. The United States, the State, or a holder of a water right recognized under state law, may petition a state or federal court of competent
9 jurisdiction for relief when a controversy arises between the United States' reserved water rights described by this Compact, and a holder of a
10 water right recognized under state law. Resolution of the controversy shall be governed by the terms of this Compact where applicable or, to
11 the extent not applicable, by appropriate state or federal law.

12 3. The United States agrees that a water commissioner appointed by a state or federal court of competent jurisdiction, or other official
13 authorized by future changes in law, may enter the Refuge for the purpose of data collection, including the collection of information necessary
14 for water distribution on or off the Refuge, and to inspect structures for the diversion and measurement of water described in this Compact for
15 consumptive use and for the measurement of natural and minimum flow. The terms of entry shall be as specified in an order of a state or federal
16 court of competent jurisdiction.

17 4. The Department may enter the Refuge, at a reasonable hour of the day, for the purposes of data collection on water diversion and
18 stream flow or inspection of devices maintained by the United States pursuant to this Compact. The Department shall notify the United States
19 by certified mail or in person, at least 24 hours prior to entry.

20 5. The United States may request an investigation by the Department of a diversion located upstream of the portion of a stream for which
21 a water right is described in this Compact. The Department may investigate. If an investigation occurs, the United States may accompany the

1 Department.

2 6. The United States shall maintain structures, including wellhead equipment and casing, for the diversion and measurement of water
3 authorized for consumptive use by this Compact. The United States shall maintain the devices it considers necessary for enforcement of its
4 reserved water right for natural and minimum flow described in this Compact.

5 7. A person who violates or refuses or neglects to comply with the provisions of this Compact or an order of the Department pursuant
6 to this Compact is subject to the penalties provided by state law.

7 D. **Use of Water Right:** The rights of the United States described in this agreement are federal water rights. Non-use of all or a part of
8 the federal water rights described in this Compact shall not constitute abandonment or forfeiture of those rights. The federal water rights
9 described in this Compact need not be applied to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the
10 purposes of the Refuge.

11 E. **Change in Use:**

12 1. **Natural and Minimum Flow:** Water rights specified in this Compact for natural and minimum flow shall not be subject to change to
13 any other use, provided that: the emergency use of water for fire suppression as provided for in Article II.A.5. shall not be considered a change
14 or alteration in use, or violation of a water right for natural or minimum flow.

15 2. **Consumptive Uses:**

16 a. The United States may make a change in the use of its consumptive use water rights, provided that:

17 (1) the action shall be in fulfillment of the purposes of the Refuge described in Article II.E. rather than with reference to a beneficial use
18 as defined by state law;

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

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

21 b. With the exception of the purpose for which the water right is used, the United States, in making the change, shall comply with the

1 provisions of Title 85, Chapter 2, Montana Code Annotated, applicable to change in appropriative right at the time of the change. The United
2 States may appeal any decision by the Department to a state or federal court of competent jurisdiction.

3 ARTICLE IV - GENERAL PROVISIONS

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

5 1. The relationship between the water rights of the United States described herein and any rights to water of an Indian Tribe, or of any
6 federally derived water right of an individual, or of the United States on behalf of such tribe or individual shall be determined by the rule of priority.
7 The parties to this agreement recognize that the water rights described in this Compact are junior to any tribal water rights with a priority date
8 before the effective date of the Compact, including aboriginal rights, if any, in the basins affected.

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

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

13 4. Nothing in this Compact is otherwise intended to conflict with or abrogate a right or claim of any Indian Tribe regarding boundaries
14 or property interests.

15 B. **State Water Rights:** Nothing in this Compact limits the exclusive authority of the State, including the authority of a water commissioner
16 authorized by state law, to administer all current and future water rights recognized under state law within and upstream of the Refuge, provided
17 that in administration of those water rights in which the United States has an interest, such authority is limited to that not in conflict with federal
18 law.

19 C. **Abstract:** Concurrent with this Compact, the parties have prepared an Abstract, a copy of which is referenced as Appendix 1, which
20 is a specific listing of all of the United States' water rights for the Refuge, that are described in this Compact and quantified in accordance with
21 this Compact. The parties prepared the Abstract to comply with the requirements for a final decree as set forth in 85-2-234, MCA, and in an effort

1 to assist the state courts in the process of entering decrees accurately and comprehensively reflecting the rights described in this Compact. The
2 rights specified in the Abstract are subject to the terms of this Compact. In the event of a discrepancy between a right listed in the Abstract and
3 that same right as quantified in accordance with Articles II and III of this Compact, the parties intend that the quantification in accordance with
4 Articles II and III of this Compact shall govern and shall be reflected in a final decree.

5 D. **General Disclaimers:** Nothing in this Compact may be construed or interpreted:

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

8 2. except as agreed to in cooperative agreements authorized by Article III.C.1. of this Compact, as a waiver by the United States on
9 behalf of the FWS of its right under state law to raise objections in state court to individual water rights claimed pursuant to the state Water Use
10 Act, Title 85, of the Montana Code Annotated, in the basins affected by this Compact; or any right to raise objections in an appropriate forum
11 to individual water rights subject to a provisional permit under the state Water Use Act, Title 85, of the Montana Code Annotated, in the basins
12 affected by this Compact;

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

15 4. to establish a precedent for other agreements between the State and the United States or an Indian tribe;

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

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

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

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

1 enforcement of this Compact in a court of competent jurisdiction. Any attempt unilaterally to modify this Compact by either party shall render
2 this Compact voidable at the election of the other party.

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

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

7 **B. Disposition of Actions:** Subject to the following stipulations and within one hundred eighty (180) days of the effective date of this
8 Compact, the parties shall submit this Compact to an appropriate state court or courts having jurisdiction over this matter in an action commenced
9 pursuant to 43 U.S.C. 666, for approval in accordance with state law and for the incorporation of the water rights described in this Compact
10 into a decree or decrees entered therein. The parties understand and agree that the submission of this Compact to a state court or courts, as
11 provided for in this Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and does not expand the jurisdiction of the state court
12 or expand in any manner the waiver of sovereign immunity of the United States in the McCarran Amendment, 43 U.S.C. 666, or other provision
13 of federal law.

14 1. **Dismissal of Filed Claims:** At the time the state courts approve the water rights described in this Compact and enter a decree or
15 decrees confirming the rights described herein, such courts shall dismiss, with prejudice, all of the water right claims specified in Appendix 2 to
16 this Compact. If this Compact is not approved or a water right described herein is not confirmed, the specified claims shall not be dismissed.

17 2. **Federal Court:** This Compact may be filed as a consent decree in federal court only if it is finally determined in a judgment binding on
18 the State of Montana that the state courts lack jurisdiction over some or all of the water rights described in this Compact. Within one year of
19 such judgment the United States agrees to commence such additional proceedings in the federal district court for the District of Montana as may
20 be necessary to judicially confirm the water rights described herein.

21 3. **Continuation of Negotiations:** The parties were unable to finalize agreement on quantification of the water rights for: the National Bison

1 Range; Bowdoin National Wildlife Refuge; and Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend Wilderness Area, prior to
2 the effective date of this Compact. The parties agree to continue to pursue, in good faith, quantification of water rights for these areas. In the
3 event the parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water rights for
4 these areas adjudicated in a state or federal court of competent jurisdiction.

5 C. **Settlement of Claims:** The parties intend that the water rights described in this Compact are in full and final settlement of the water
6 right claims for the Refuge land described in this Compact and administered by the Fish and Wildlife Service in Montana on the effective date
7 of this Compact. On the effective date of this Compact, the United States hereby and in full settlement of any and all claims to water filed by
8 the United States or which could have been filed by the United States for Red Rock Lakes National Wildlife Refuge and Wilderness Area,
9 relinquishes forever all said claims to water within the State of Montana for Red Rock Lakes National Wildlife Refuge and Wilderness Area. The
10 state agrees to recognize the water rights described and quantified herein, and shall, except as expressly provided for herein, treat them in the
11 same manner as a water right recognized by the state.

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

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

15

16 NEW SECTION. **Section 2. Effective date.** [This act] is effective on passage and approval.

17

- END -