

SENATE BILL NO. 42

INTRODUCED BY B. MCCARTHY

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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

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

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

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

WATER RIGHTS COMPACT

STATE OF MONTANA

UNITED STATES OF AMERICA, FISH AND WILDLIFE SERVICE

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

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, 85-2-703, MCA, provides that the state may negotiate compacts concerning the equitable division and apportionment of water between the state and its people and the federal government with claims to non-Indian reserved water rights 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 Red Rock Lakes National Wildlife Refuge and Wilderness Area, in the State of Montana;

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

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

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

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

ARTICLE I - DEFINITIONS

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

1. "Abstract" means the copy of the document entitled "Abstract of U.S. Fish and Wildlife Service Water Rights" referenced in this Compact as Appendix 1.
2. "Consumptive" when referring to a water right recognized under state law means a use of water which removes water from the source 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 includes evaporative loss from impoundments or natural lakes.
3. "Department" means the Montana Department of Natural Resources and Conservation or its successor.
4. "Developed spring" means any diversion from a spring for beneficial use under state law and does not require augmentation of flow.
5. "Effective date of this Compact" means the date of the ratification of the Compact by the Montana legislature, written approval by the United

States Department of the Interior, or written approval by the United States Department of Justice, whichever is latest.

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

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 Compact, at or below which the United States has the right to seek curtailment of junior water rights upstream from the Refuge.

8. "Natural flow" means the water that the parties agree shall remain in the stream in satisfaction of the United States' water right for the purposes of the federal reservation.

9. "Non-consumptive" see "consumptive"

10. "Parties" means the State of Montana and the United States.

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

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 include state recognition of a federal or tribal reserved water right arising under federal law.

13. "Red Rock Lakes National Wildlife Refuge" means those lands located in Montana that were withdrawn and reserved by Executive 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 the boundaries established by Executive Orders 7023 and 7172.

14. "Red Rock Lakes Wilderness Area" means those lands within Red Rock Lakes National Wildlife Refuge designated as wilderness by Public Law 94-557 of October 19, 1976, 16 USC 1132.

15. "Refuge" means both the Red Rock Lakes National Wildlife Refuge and the Red Rock Lakes Wilderness Area.

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

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

his or her designees.

ARTICLE II - WATER RIGHT

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

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

1. **Consumptive Use:**

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. Twnshp Range							GFS			
McDonald Pond	NW	6	14 S	1 E	6629.63	13	44	NWS	Mallard	10	Culver Springs
Widgeon Pond	NW	6	14 S	1 E	6636.3	88	585	NWS	Hacket Cr	20	Culver Springs
Culver Pond	NW	8	14 S	1 E	6651.7	27	110	NWS			Culver Springs
East Pintail Ditch Pnd	N	1	14 S	1 W		3	3	M	Mallard	10	Elk Creek
Pintail Ditch Pond	SW	34	13 S	1 W		21	24	M	Mallard	10	Elk Creek
Swan Lake ¹	N	9	14 S	1 W		649	1168	N			Elk Creek
Buck Pond ³	NE	4	14 S	1 W		11	16	N	Mallard	10	Groundwater
East Swan lake ¹	SW	3	14 S	1 W		65	78	N			Groundwater
Sora Pond ²	E	33	13 S	1 W		1	2	N			Groundwater

Antelope Pond	N	4	14 S	1 W	10	12	N			Groundwater	
Campground Spring	SWSWSE	21	14 S	1 W		8	M		10 gpm	Groundwater	
Shambow Pond [†]	S	20	14 S	1 W	7	26	N			Groundwater	
Rail Pond ²	NW	3	14 S	1 W	6	9	N	Mallard	10	Groundwater	
Irrigation	SWSW	30	14 S	1 W			3000	M	25	Odell Creek	
Sparrow Slough Dam[†]	N	13	14 S	2 W	6627	63	190	M		Odell Creek	
Sparrow Slough Pond[†]	SW	13	14 S	2 W	6629.3	21	34	NWS	ditch	17.5	Odell Creek
Upper Red Rock Lake	W	8	14 S	1 W		3467		N		Red Rock Creek	
Lower Red Rock Lake	NE	6	14 S	2 W	6607.5	5492	89582	NWS		Red Rock Creek	
Tuck Slough South	SW	7	14 S	1 E		29	63	M	Harlequin	30	Red Rock Creek
Tuck Slough North	N	7	14 S	1 E		103	2003	M	Harlequin	30	Red Rock Creek
Shoveler Pond ²	W	7	14 S	1 E	6	9		N	Harlequin	30	Red Rock Creek
Refuge HQ domestic	SESENW	23	14 S	2 W		8	8	M		Groundwater	
Irr. of Refuge HQ	NESW	23	14 S	2 W				M	ditch	0.5	Shambow Creek
Irr. of Bunkhse grnds	E2W2E2	23	14 S	2 W				M	ditch	1	Shambow Creek

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

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

[†] = Estimated average depth 2 feet ³ = Estimated average depth 3 feet

² = Estimated average depth 2.5 feet ⁴ = 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>Acre-</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>Water</u>		
	<u>Qtr</u>	<u>Sec.</u>	<u>Twncshp</u>	<u>Range</u>				<u>CFS</u>			
<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>
<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>
<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>
<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>
											<u>Groundwater</u>
<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>
											<u>Groundwater</u>
<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>
											<u>Groundwater</u>
<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>
<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>
<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>
<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>
<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>
<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>
<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>
<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>
<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>
<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>
<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>

<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>
<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>
Sparrow Slough Pond	N2	13	14 S	2 W	6627	63	190	M			<u>Odell Creek</u>
Sparrow Pond	SW	13	14 S	2 W	6629.3	21	34	NWS	<u>ditch</u>	<u>17.5</u>	<u>Odell Creek</u>
Upper Red Rock Lake	W2	8	14 S	1 W		3467		N			<u>Red Rock Creek</u>
<u>UPPER RED ROCK LAKE</u>						<u>3467</u>					
Lower Red Rock Lake	NE	6	14 S	2 W	6612.5	5492	89582	NWS			<u>Red Rock Creek</u>
Tuck Slough South	SE	7	14 S	1 W		29	63	M	<u>Harlequin</u>	<u>30</u>	<u>Red Rock Creek</u>
<u>TUCK SLOUGH SOUTH</u>						<u>29</u>	<u>63</u>				
Tuck Slough North	N2	7	14 S	1 W		103	200	M	<u>Harlequin</u>	<u>30</u>	<u>Red Rock Creek</u>
<u>TUCK SLOUGH NORTH</u>						<u>103</u>	<u>200</u>				
<u>Shoveler Pond²</u>	<u>W2</u>	<u>7</u>	<u>14 S</u>	<u>1 W</u>		<u>6</u>	<u>9</u>	N	<u>Harlequin</u>	<u>30</u>	<u>Red Rock Creek</u>
											<u>Groundwater</u>
<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>	M		<u>Groundwater</u>
<u>Well</u>											
<u>Irr. of Refuge HQ grnds</u>	<u>SWNESW</u>	<u>23</u>	<u>14 S</u>	<u>2 W</u>				M	<u>pipeline</u>	<u>0.5</u>	
											<u>Shambow Creek</u>
<u>Irr. of Bunkhse grnds</u>	<u>SWNESW</u>	<u>23</u>	<u>14 S</u>	<u>2 W</u>				M	<u>pipeline</u>	<u>0.2</u>	
											<u>Shambow Creek</u>
<u>Irr. of Bunkhouse</u>	<u>SWSWNE</u>	<u>23</u>	<u>14 S</u>	<u>2 W</u>				M	<u>ditch</u>	<u>1.6</u>	<u>Shambow Creek</u>
<u>Pasture</u>											

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

POD = Point of Diversion

N = Natural lake

NWS = Natural lake with manmade structure

M = Manmade lake

¹ = Estimated average depth 2 feet

³ = Estimated average depth 3 feet

² = Estimated average depth 2.5 feet

⁴ = Estimated average depth 6 feet

2. **Natural Flow:** The United States has a water right to the natural flow in all the tributaries entering the Refuge above the most 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 following water rights:

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

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 and Odell Creeks as follows:

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

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~~ ~~6612.5~~ 6607.5 feet. The United States may store additional water only to the extent consistent with the Memorandum of Understanding of February 4, 1987, between the United States and the Water Users Irrigation Company (Lima Reservoir) and East Bench Irrigation District and state water right permit number 65254-S41A.

5. **Emergency Fire Suppression:** The use of water for emergency fire suppression benefits the public, and is necessary for the purposes 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 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' water rights for consumptive use or a violation of its water rights for natural or minimum flow.

B. Relative Priority:

1. **Priority Date:**

a. **Consumptive Use and Natural Flow:** Subject to the subordination provisions of Article II.B.2.a., the United States has a priority date 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.

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 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 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.

2. Subordination:

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 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 on the Refuge:

- (1) any right recognized under state law with a priority date before the effective date of this Compact; and
- (2) any right exempt from the basin closure set forth in Article III.A. of this Compact.

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 are subordinate to the following rights upstream from the Refuge:

- (1) any right for the purpose of domestic use;
- (2) any right for the purpose of instream stockwatering; and
- (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 increase in the historic consumptive use of water.

C. Period of Use:

1. **Natural Flow/Consumptive Use:** The period of use of the United States' water rights for natural flow and consumptive use set forth in Article II.A.1. and 2. shall be from January 1 through December 31 of each year.

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 1 through November 30 of each year.

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

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

2. **Natural Flow:** The United States' water rights for natural flow apply to the portion of the streams specified in this Compact that flow over or form the boundary of land administered by the Fish and Wildlife Service.

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

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

1. **Consumptive Use:** The United States' water rights for consumptive use shall be used for the purposes of the Refuge including wildlife habitat maintenance and enhancement. Subject to the limitations set forth in Article III.E., the United States may change the use of water identified for consumptive use in Article II.A.1.

2. **Natural and Minimum Flows:** The United States' water rights to natural and minimum flows shall be used on the Refuge for wildlife 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 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 suppression as set forth in Article II.A.5.

ARTICLE III - IMPLEMENTATION

A. **Basin Closure:**

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

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

b. permits for appropriation of groundwater by means of a well or developed spring with an appropriation of greater than 35 gallons per 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 information provided by the applicant or information from any other source available to the Department that the groundwater is not hydrologically connected to surface water

upstream from or on the Refuge;

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

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

e. permits for domestic use;

f. permits for nonconsumptive use; and

g. temporary emergency appropriations.

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

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

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

C. Enforcement of Water Right:

1. Minimum flow:

a. Minimum flow rights set forth in Article II.A.3. may be satisfied through cooperative agreements entered into by the FWS and any 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 may, on agreement with the parties to a cooperative agreement, modify an existing agreement. The FWS may enter into additional cooperative agreements after the effective date

of the Compact. Modification of a cooperative agreement or entry into a new cooperative agreement shall not be considered a modification of the Compact. As between the FWS and signatories to cooperative agreements, the FWS will use its best efforts to seek satisfaction of the minimum flow rights pursuant to the cooperative agreements prior to resorting to remedies set forth in Article III.C.2.

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

- (1) Red Rock Creek and its tributaries upstream from the point of measurement when measured flow is approximately 25 cfs;
- (2) Odell Creek and its tributaries upstream from the point of measurement when measured flow is approximately 20 cfs; and
- (3) Tom Creek and its tributaries upstream from the point of measurement when measured flow is approximately 5 cfs.

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 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 III.C.1.b. requiring curtailment of FWS diversions shall apply.

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 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 curtailment of any water right which, based on the experience and observation of the FWS, does not cause a measured or cumulative reduction 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 is sought to that necessary to maintain the minimum flow.

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 jurisdiction for relief when a controversy arises between the United States' reserved water rights described by this Compact, and a holder of a water right recognized under state law. Resolution of the controversy shall be governed by the terms of this Compact where applicable or, to the extent not applicable, by appropriate state or federal law.

3. The United States agrees that a water commissioner appointed by a state or federal court of competent jurisdiction, or other official authorized by future changes in law, may enter the Refuge for the purpose of data collection, including the collection of information necessary for water distribution on or off the Refuge, and to inspect structures for the diversion and measurement of water described in this Compact for 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 court of competent jurisdiction.

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

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

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

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

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 the federal water rights described in this Compact shall not constitute abandonment or forfeiture of those rights. The federal water rights 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 purposes of the Refuge.

E. Change in Use:

1. **Natural and Minimum Flow:** Water rights specified in this Compact for natural and minimum flow shall not be subject to change to 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 or alteration in use, or violation of a water right for natural or minimum flow.

2. Consumptive Uses:

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

(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 as defined by state law;

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

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

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

ARTICLE IV - GENERAL PROVISIONS

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

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 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. 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 before the effective date of the Compact, including aboriginal rights, if any, in the basins affected.

2. Nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent or manner of administration 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.

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

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

B. **State Water Rights:** Nothing in this Compact limits the exclusive authority of the State, including the authority of a water commissioner authorized by state law, to administer all current and future water rights recognized under state law within and upstream of the Refuge, provided 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 law.

C. **Abstract:** Concurrent with this Compact, the parties have prepared an Abstract, a copy of which is referenced as Appendix 1, which 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 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 to assist the state courts in the process of entering decrees accurately and comprehensively reflecting the rights described in this Compact. The 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 that same right as quantified in accordance with Articles II and III of this Compact, the parties intend that the quantification in accordance with Articles II and III of this Compact shall govern and shall be reflected in a final decree.

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

1. as a precedent for the litigation of reserved water rights or the interpretation or administration of future compacts between the United States and the State; or of the United States and any other state;
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 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 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 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 affected by this Compact;
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 this Compact;
4. to establish a precedent for other agreements between the State and the United States or an Indian tribe;
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 or a person to litigate an issue not resolved by this Compact;
6. to create or deny substantive rights through headings or captions used in this Compact;
7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the effective date of this Compact;
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 such fees or costs, pursuant to a ruling by a state or federal court of competent jurisdiction or Act of Congress;
9. to affect in any manner the entitlement to or quantification of other federal water rights;
10. to be binding on the United States with regard to the water rights of the United States for any area other than the Refuge;

11. to affect the water rights of any other federal agency that is not a successor in interest to the water rights subject to this Compact;
12. to prevent the United States from constructing or modifying an outlet to an impoundment at the Refuge in compliance with all applicable laws;
13. to prevent the United States from seeking a permit to appropriate water under state law from a source not closed to new permits by this

Compact or any other law.

E. **Reservation of Rights:** The parties expressly reserve all rights not granted, described or relinquished in this Compact.

F. **Severability:** The provisions of this Compact are not severable.

G. **Multiple Originals:** This Compact is executed in quintuplicate. Each of the five (5) Compacts bearing original signatures shall be deemed an original.

H. **Notice:** Unless otherwise specifically provided for in this Compact, service of notice required hereunder, except service in litigation, shall be:

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

ARTICLE V - FINALITY OF COMPACT

A. **Binding Effect:**

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

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

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 rights described herein, this Compact and such rights are binding on all persons bound by the final order of the court.

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 prejudice

to either party.

B. Disposition of Actions: Subject to the following stipulations and within one hundred eighty (180) days of the effective date of this Compact, the parties shall submit this Compact to an appropriate state court or courts having jurisdiction over this matter in an action commenced 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 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 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 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 of federal law.

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

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 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 such judgment the United States agrees to commence such additional proceedings in the federal district court for the District of Montana as may be necessary to judicially confirm the water rights described herein.

3. **Continuation of Negotiations:** The parties were unable to finalize agreement on quantification of the water rights for: the National Bison Range; Bowdoin National Wildlife Refuge; and Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend Wilderness Area, prior to 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 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 these areas adjudicated in a state or federal court of competent jurisdiction.

C. Settlement of Claims: The parties intend that the water rights described in this Compact are in full and final settlement of the water right claims for the Refuge land described in this Compact and administered by the Fish and Wildlife Service in Montana on the effective date 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 the United States or which could have

been filed by the United States for Red Rock Lakes National Wildlife Refuge and Wilderness Area, relinquishes forever all said claims to water within the State of Montana for Red Rock Lakes National Wildlife Refuge and Wilderness Area. The state agrees to recognize the water rights described and quantified herein, and shall, except as expressly provided for herein, treat them in the same manner as a water right recognized by the state.

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

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

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

- END -