

September 2005

## RESERVED WATER RIGHTS STUDY - BACKGROUND MEMORANDUM

Senate Bill No. 2115 (attached as Appendix A) directs the Legislative Council to study the process to negotiate and quantify reserved water rights. Senate Bill No. 2115, as introduced (attached as Appendix B), would have authorized the State Engineer to negotiate reserved water rights of the United States and federally recognized Indian tribes.

Proponents of Senate Bill No. 2115 noted that current state law does not contain a procedure allowing the state to negotiate with tribes or the federal government to quantify reserved water rights and Senate Bill No. 2115 would have established such a procedure. In addition to the State Engineer, the Turtle Mountain Band of Chippewa supported the bill. The bill was opposed by the Mandan, Hidatsa and Arikara Nation (Three Affiliated Tribes) and the Standing Rock Sioux Tribe. The chairman of the Mandan, Hidatsa and Arikara Nation testified that in addition to the State Engineer, other individuals and parties should be involved in the negotiation process and that it may be better for the tribes to negotiate with a body or perhaps a commission that would be a fair representative of the state rather than with just one individual. The chairman testified that any agreement negotiated by the State Engineer should be subject to ratification by the Legislative Assembly and signed by the Governor. Finally, the chairman testified that the Mandan, Hidatsa and Arikara Nation objected to the provisions of Senate Bill No. 2115 providing that exceptions to an agreement would be resolved through an administrative process. The chairman of the Standing Rock Sioux Tribe testified that the tribe was in fundamental opposition to Senate Bill No. 2115. The chairman testified that the bill posed grave risks for all North Dakota tribes and did not believe it was necessary at this time to quantify the tribes' reserved water rights under the "Winters doctrine" relating to reserved water rights for Indian tribes.

### NORTH DAKOTA WATER LAW

#### Surface Water Appropriation

There are generally two systems that govern the appropriation of water in the United States. The humid eastern states where water resources are more plentiful follow the common-law doctrine of riparian rights. The arid western states where water resources are more scarce have rejected the doctrine of riparian rights and have adopted instead the doctrine of prior appropriation.

A riparian right is a right to use a portion of the flow of a watercourse that arises by virtue of ownership of land bordering a stream. The basic principle of the

prior appropriation doctrine is that a person may acquire an exclusive right to use a specific quantity of water by applying it to a beneficial use without reference of the focus of the use. An appropriate right is also defined by the time period of use as well as by the quantity claimed. Thus, the prior appropriation doctrine is often known as the first in time first in right water appropriation system.

North Dakota is a prior appropriation doctrine state. North Dakota Century Code (NDCC) Section 61-04-06.3 provides, in part:

Priority in time shall give the superior water right. Priority of a water right acquired under this chapter dates from the filing of an application with the state engineer, except for water applied to domestic, livestock, or fish, wildlife, and other recreational uses in which case the priority date shall relate back to the date when the quantity of water in question was first appropriated, unless otherwise provided by law.

#### Ground Water Appropriation

Generally, there are four water allocation doctrines applicable to ground water--absolute ownership, reasonable use, correlative rights, and prior appropriation. The first three are based upon ownership of the land overlying the water resource, and the fourth doctrine has been applied to ground water by a number of states that use the prior appropriation doctrine to allocate surface water resources.

The absolute ownership doctrine was imported to the eastern United States from England. Under its provisions, a landowner owns, and has an unlimited right to withdraw, any water found beneath the landowner's land. This doctrine is followed in Connecticut, Georgia, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Rhode Island, Texas, and the District of Columbia.

Under the reasonable use doctrine, ground water may be used without waste on overlying land and landowners are only liable for injuries arising from their ground water withdrawals if their use is unreasonable. A use is unreasonable if it is wasteful or if the water is used on nonoverlying lands. This doctrine is followed in Arizona, Nebraska, and Oklahoma. However, Nebraska has enacted legislation authorizing industrial and municipal nonoverlying ground water uses if a permit has been obtained.

The correlative rights doctrine was designed to accommodate all overlying owners when water supply is insufficient to meet the reasonable needs of all overlying landowners. Under this doctrine, owners of

land are each limited to a reasonable share of the total supply of ground water. The share is usually based on the amount of acreage owned by each landowner. California is the only state that follows this doctrine.

The prior appropriation doctrine, when applied to ground water, has been modified in most jurisdictions to allow more widespread ground water use than strict application of the doctrine would allow. Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, and Wyoming, as well as North Dakota, apply this doctrine.

### Priority

Although North Dakota is a prior appropriation state, this common-law doctrine has been statutorily modified by the requirement that the first in time first in right be measured by the acquisition of a water permit from the State Engineer. North Dakota Century Code Section 61-04-02 requires that an appropriator secure a permit for the beneficial use of water. If there are competing applications for water from the same source and the source is insufficient to satisfy all applicants, then the State Engineer must follow the priority established by NDCC Section 61-04-06.1 in granting water permits. The priority established by Section 61-04-06.1 is (1) domestic use; (2) municipal use; (3) livestock use; (4) irrigation use; (5) industrial use; and (6) fish, wildlife, and other outdoor recreational uses.

The water appropriated must still be put to a beneficial use in order to secure a valid water right under the prior appropriation doctrine. Also, NDCC Section 61-04-06.3 provides, in part:

Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of streamflow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire the prior appropriator's water under the changed conditions.

### RESERVED WATER RIGHTS DOCTRINE

In *Cappaert v. United States*, 426 U.S. 128 (1976), the United States Supreme Court stated:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation

and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Article I, Section 8, which permits federal regulation of navigable streams, and the Property Clause, Article IV, Section 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

The United States Supreme Court first recognized Indian reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters* the United States Supreme Court held that the 1888 agreement and statutes, which created the Fort Belknap Reservation in north central Montana, implicitly reserved to the tribe water from the Milk River for irrigation purposes. In finding that the policy of the United States to promote the transformation of tribal members to a "pastoral and civilized people" would be defeated and the land would become "practically valueless" unless the tribe's supply of irrigation water was protected from non-Indians claiming water under state law, the court stated that "[t]he lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession." It should also be noted that courts have held that the priority of Indian reserved water rights dates from the creation of the Indian reservation and Indian reserved water rights are not subject to forfeiture or abandonment for nonuse.

### QUANTITY OF RESERVED WATER RIGHTS - THE PRACTICABLY IRRIGABLE ACREAGE (PIA) STANDARD

In *Arizona v. California*, 373 U.S. 546 (1963), the United States Supreme Court adopted the practicably irrigable acreage standard as the presumptive quantification standard for Indian reserved water rights. In *Arizona* the Court agreed with the special master's conclusion that the quantity of water intended to be reserved was intended to satisfy the future as well as the present needs of the Indian reservations and ruled that enough water was reserved to irrigate all of the practicably irrigable acreage on the reservations.

Arizona contended that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which the Court rejected. The Court concluded, as did the special master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

scarce water, most western states have commenced general adjudication of varying scope in order to quantify reserved water rights and incorporate them into comprehensive state water management systems."

## ADJUDICATION AND QUANTIFICATION OF RESERVED WATER RIGHTS

In *Indian Reserved Water Rights* by John Shurts, the author outlines the rationale for the adjudication and quantification of Indian reserved water rights. He states that the "prospect of expensive litigation and uncertain outcomes has led Indian groups, the federal government, state and local governments, private water users, and others to focus heavily on negotiating agreements to confirm and quantify reserved rights; agreements that Congress is asked or will be asked to ratify. In the usual situation, a particular Indian nation is asked by the other parties to relinquish its indefinite and potentially expandable reserved rights in return for a clearly described right to a definite, quantified amount of water, plus an amount of money or an agreement for assistance in bringing water to reservation lands, or both." However, until passage of the McCarran Amendment in 1952, the ability of states to quantify reserved water rights and to incorporate them into decrees and administrative systems was thwarted by the sovereign immunity of the United States and tribes. The McCarran Amendment waives the sovereign immunity of the United States and allows the United States to be named as a defendant in state general adjudication and administration proceedings. The McCarran Amendment provides:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such a suit shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual in like circumstances.

*The American Indian Law Deskbook* notes that "[i]n part due to the passage of the McCarran Amendment and in part due to the increasing competition for

As discussed above and affirmed by the United States Supreme Court in *Colorado River Water Conservation District v. United States*, 427 U.S. 800 (1976), the McCarran Amendment allows Indian reserved water rights to be adjudicated in state courts by suing the United States in its role as trustee for the tribes. *The American Indian Law Deskbook* notes that tribes themselves cannot be named as defendants in state adjudication proceedings, since the McCarran Amendment did not waive the sovereign immunity enjoyed by Indian tribes.

State adjudication proceedings generally take one of three forms. One form is the traditional civil judicial action wherein a court determines the water rights of the interested parties. The second form is to authorize an administrative agency to conduct the adjudication process, and the third form is to create a commission to negotiate the adjudication of reserved water rights with Indian tribes.

An example of a state that provides for civil judicial adjudication of reserved water rights is South Dakota. South Dakota Codified Laws Section 46-10-01 provides that "[i]t shall be the duty of the attorney general to bring an action for the general adjudication of the nature, extent, content, scope, and relative priority of the water rights and the rights to use water of all persons, or entities, public or private, on any river system and on all other sources, when in his judgment, or in the judgment of the Water Management Board, the public interest requires such action." Section 46-10-1.1 provides that the procedure in any case of general adjudication is as in other civil cases, insofar as that procedure is not inconsistent with South Dakota law. A copy of South Dakota Codified Laws Chapter 46-10 is attached as Appendix C. Some commentators have criticized this method of adjudicating reserved water rights because the judicial proceedings are adversarial in nature and thus the final adjudication is sometimes viewed as one in which there are winners and losers.

The second method of adjudicating reserved water rights is delegation of negotiation authority to an administrative agency which then conducts negotiations with the tribes or the federal government. An example of a state that has adopted this procedure is Oregon. A copy of the Oregon statute is attached as Appendix D. It appears that Senate Bill No. 2115 is based on the Oregon statute.

An example of a state that has adopted the commission form of adjudicating reserved water rights is Montana. Montana Code Annotated Section 85-2-701 provides that "because the water and water rights in each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. It is the intent of the legislature that the unified proceedings include all

claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666 (the McCarran Act). However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state. To the maximum extent possible, the reserve water rights compact commission should make the negotiation of water rights claimed by the federal government or Indian tribes in or affecting the basins identified by law its highest priority. In negotiations, the commission is acting on behalf of the Governor." The relevant Montana statutory provisions are attached as Appendix E.

Montana has approved, ratified, and codified the Yellowstone River Compact, the Fort Peck-Montana Compact between Montana and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the North Cheyenne-Montana Compact between Montana and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, the United States Park Service-Montana Compact between Montana and the United States National Park Service, the United States Bureau of Land Management-Montana Compact between Montana and the United States Bureau of Land Management, the Chippewa Cree Tribe-Montana Compact between Montana and the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, the United States Fish and Wildlife Service, Black Coulee and Benton Lake-Montana Compact between Montana and the Fish and Wildlife Service, the Red Rock Lakes-Montana Compact between Montana and the Fish and Wildlife Service, the Crow Tribe-Montana Compact between Montana and the Crow Tribe, and the Fort Belknap-Montana Compact between Montana and the Fort Belknap Indian community of the Fort Belknap Reservation. The compacts involving Indian tribes are also included in Appendix E.

### **POSSIBLE STUDY APPROACH**

In conducting its study of the process to negotiate and quantify reserved water rights, the committee could solicit testimony from a number of sources. These include the State Engineer and representatives of the state's Indian tribes.

ATTACH:5

**Fifty-ninth Legislative Assembly of North Dakota  
In Regular Session Commencing Tuesday, January 4, 2005**

SENATE BILL NO. 2115  
(Natural Resources Committee)  
(At the request of the State Water Commission and State Engineer)

AN ACT to provide for a legislative council study of the process to negotiate and quantify reserved water rights.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. LEGISLATIVE COUNCIL STUDY - RESERVED WATER RIGHTS.** The legislative council shall consider studying, during the 2005-06 interim, the process to negotiate and quantify reserved water rights. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly.

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Fifty-ninth  
Legislative Assembly  
of North Dakota

**SENATE BILL NO. 2115**

Introduced by

Natural Resources Committee

(At the request of the State Water Commission and State Engineer)

1 A BILL for an Act to create and enact five new sections to chapter 61-03 of the North Dakota  
2 Century Code, relating to authorizing the state engineer to negotiate reserved water rights of  
3 the United States and federally recognized Indian tribes.

**4 BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new section to chapter 61-03 of the North Dakota Century Code is  
6 created and enacted as follows:

**7 Negotiation for reserved water rights.**

- 8 1. The state engineer may negotiate with any federally recognized Indian tribe  
9 claiming a reserved water right in North Dakota and representatives of the federal  
10 government as trustee for the federally recognized Indian tribe to define the scope  
11 and attributes of rights to water claimed by the Indian tribe. The state engineer  
12 may also negotiate with the federal government to define the scope and attributes  
13 of non-Indian reserved water rights claimed by the federal government.
- 14 2. During negotiations conducted under subsection 1, the state engineer shall, in the  
15 manner the state engineer determines appropriate:
- 16 a. Provide public notice of the negotiations; and  
17 b. Allow for public input.

18 **SECTION 2.** A new section to chapter 61-03 of the North Dakota Century Code is  
19 created and enacted as follows:

**20 Agreement.**

- 21 1. When the state engineer and representatives of any federally recognized Indian  
22 tribe claiming a federal reserved water right in North Dakota and the federal  
23 government as trustee for the federally recognized Indian tribe have completed an  
24 agreement, the agreement, upon approval of the governor, must be signed by the

1 state engineer on behalf of the state of North Dakota and by authorized  
2 representatives of the Indian tribe and the federal government as trustee for the  
3 Indian tribe.

4 2. When the state engineer and the federal government with regard to non-Indian  
5 reserved water rights have completed an agreement, the agreement, upon  
6 approval of the governor, must be signed by the state engineer on behalf of the  
7 state of North Dakota and by authorized representatives of the federal government.

8 **SECTION 3.** A new section to chapter 61-03 of the North Dakota Century Code is  
9 created and enacted as follows:

10 **Notice to persons affected by agreement.** After signing the agreement, the state  
11 engineer shall give written notice to the owners of water right permits, including the holders of  
12 conditional permits, who may be affected by the agreement, that the agreement has been  
13 signed, the time and manner for filing an exception to the agreement, and the telephone  
14 number or address at which a copy of the agreement may be requested. The notice must be  
15 served in the manner allowed for service under the North Dakota Rules of Civil Procedure or by  
16 depositing the notice in the United States mail or with a third-party commercial carrier, postage  
17 or shipping prepaid, and directed to the owner's or holder's last reasonably ascertainable  
18 address.

19 **SECTION 4.** A new section to chapter 61-03 of the North Dakota Century Code is  
20 created and enacted as follows:

21 **Effective date of agreement - Remand.**

22 1. An agreement negotiated under section 1 of this Act is not effective until  
23 incorporated in a final order of the state engineer after the state engineer has  
24 provided an opportunity for the owners of water rights, including the holders of  
25 conditional permits that may be affected by the agreement, to file an exception to  
26 the agreement.  
27 2. Once an exception is filed with the state engineer, the proceeding is deemed to be  
28 an adjudicative proceeding under chapter 28-32 and the provisions of chapter  
29 28-32 apply to proceedings to sustain or reject exceptions. The state engineer  
30 shall appoint an administrative law judge or request the office of administrative  
31 hearings to designate an administrative law judge to preside over the proceedings.

Fifty-ninth  
Legislative Assembly

- 1           3. If the administrative law judge does not sustain an exception, the state engineer  
2           shall issue a final order incorporating the agreement as submitted without  
3           alteration.
- 4           4. If the administrative law judge sustains an exception to the agreement, the  
5           administrative law judge shall remand the agreement to the state engineer for  
6           further negotiation according to the provisions of sections 1 through 5 of this Act, if  
7           desired by the parties to the agreement.

8           **SECTION 5.** A new section to chapter 61-03 of the North Dakota Century Code is  
9           created and enacted as follows:

10          **Procedures after remand of agreement.** Within one hundred eighty days after the  
11          administrative law judge remands the agreement under section 4 of this Act, the state engineer  
12          shall file with the administrative law judge:

- 13           1. An amended agreement complying with section 2 of this Act, which is subject to  
14           the procedures specified by sections 3 and 4 of this Act;
- 15           2. A motion to dismiss the proceedings without prejudice; or
- 16           3. A motion for a continuance.

## CHAPTER 46-10

## ADJUDICATION OF WATER RIGHTS

- 46-10-1 Action for general adjudication of water or water use rights--When attorney general to bring.
- 46-10-1.1 Procedure in actions for general adjudication.
- 46-10-1.2 Orders in actions involving one hundred or more defendants.
- 46-10-2 Jurisdiction and venue of action for general adjudication.
- 46-10-2.1 Documents and orders--Cancellations of documents and orders--Deposit with court.
- 46-10-2.2 Documents and orders as prima facie evidence--Certified copies admissible.
- 46-10-2.3 Powers and duties of court conducting general adjudication.
- 46-10-3 Parties to action for general adjudication.
- 46-10-3.1 Adding additional defendants as parties.
- 46-10-3.2 Commencement of action for general adjudication--Service.
- 46-10-3.3 Defendants numbering one hundred or more--Commencement of action-- Service.
- 46-10-3.4 Captioning complaint for general adjudication.
- 46-10-4 Repealed.
- 46-10-4.1 Action to determine conflicting water or water use rights--Court's powers and duties--Caption of action.
- 46-10-5 Action for general adjudication or to determine conflicting water rights--Copies of complaints mailed to Water Management Board.
- 46-10-6 Action for general adjudication or to determine conflicting rights--Proof of notice of suit to water management board.
- 46-10-7 Intervention by attorney general.
- 46-10-8 Judgment in action for general adjudication or to determine conflicting rights-- Certified copy filed with board.
- 46-10-8.1 Appointment of water master to administer interim or final decree.
- 46-10-9 to 46-10-12. Repealed.
- 46-10-13 Appeal to board from acts or decisions of water master--Appeal to circuit court.
- 46-10-14 to 46-10-26. Repealed.
- 46-10-27 Transferred.
- 46-10-28 Repealed.

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46-10-1. Action for general adjudication of water or water use rights--When attorney general to bring. It shall be the duty of the attorney general to bring an action for the general adjudication of the nature, extent, content, scope, and relative priority of the water rights and the rights to use water of all persons, or entities, public or private, on any river system and on all other sources, when in his judgment, or in the judgment of the Water Management Board, the public interests require such action.

**Source:** SDC 1939, § 55.1811; SL 1980, ch 305, § 1.

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46-10-1.1. Procedure in actions for general adjudication. The procedure in any case of general adjudication shall be as in other civil cases, insofar as that procedure is not inconsistent with this chapter.

**Source:** SL 1980, ch 305, § 15.

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46-10-1.2. Orders in actions involving one hundred or more defendants. In the conduct of actions to which § 46-10-3.3 applies, the court may make appropriate orders

(1) Providing for the limitation of service and filing, or substitutes therefor, of pleadings, briefs, orders, motions, demands, appearances, claim forms, discovery materials, and similar documents;

- (2) Requiring, for the fair conduct of the action, that notice be given all parties in a reasonable manner of any document served or filed in this action;
- (3) Providing for simplified discovery from any party, upon such terms and conditions as the court determines are advisable;
- (4) Adopting permissive or mandatory forms for the submission of claims to water rights or rights to use water; provided, however, that a party shall not be precluded from filing an answer or other pleading in addition to said forms;
- (5) Determining the course of proceedings and prescribing measures to prevent undue repetition or complication in the presentation of evidence and arguments;
- (6) Dealing with similar procedural matters.

The orders may be combined with an order under § 15-6-16 and may be altered or amended from time to time as the court deems advisable.

**Source:** Supreme Court Rule 82-19.

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46-10-2. Jurisdiction and venue of action for general adjudication. The court in which any action involving the general adjudication of water rights or rights to use water may be properly brought, shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights and the rights to use water within the river system and all other sources involved; and the attorney general may bring suit as provided by law in any court having jurisdiction over any part of the river system and all other sources, which shall likewise have exclusive jurisdiction for such purposes.

**Source:** SDC 1939, § 61.0119; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0154; SL 1980, ch 305, § 2.

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46-10-2.1. Documents and orders--Cancellations of documents and orders--Deposit with court. The court conducting a general adjudication may, in its discretion, direct the chief engineer of the Water Management Board to deposit with the court certified copies of every water permit, water license, certificate of construction, or other document or order and every cancellation of each document or order in the river system and all other sources involved, within such time as is set by the court. This section shall not be construed to in any manner limit the powers of the court.

**Source:** SL 1980, ch 305, § 3.

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46-10-2.2. Documents and orders as prima facie evidence--Certified copies admissible. The court conducting a general adjudication shall regard any water permit, water license, certificate of construction, or other document or order issued by or under the authority of the Water Management Board or its predecessors, including the state engineer, and not subsequently cancelled by it or under its authority or its predecessors, including the state engineer, to be prima facie evidence of the right purported to be conferred. A certified copy of any such document or order shall be admissible in evidence.

**Source:** SL 1980, ch 305, § 4.

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46-10-2.3. Powers and duties of court conducting general adjudication. The court conducting a general adjudication shall, in addition to exercising any other power or duty conferred by law:

- (1) Confirm those rights evidenced by previous court decrees when those rights have not been forfeited, abandoned, or otherwise lost;
- (2) Adjudicate the validity of all cancelled and uncanceled permits, certificates of construction, or licenses or other documents or orders purported to be granted by or under the authority of the Water Management Board or its predecessors, including the state engineer, and not heretofore adjudicated;

(3) Determine the extent and priority of and adjudicate any interest in any water right or right to the use of water of the river system or on all other sources not otherwise represented by the aforesaid permits, licenses, certificates, documents, orders, or decrees;

(4) Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of water rights or rights to use water which tabulations or lists may include a notation of the water right or right to use water adjudged to each party, the priority, the amount or rate, the purpose, the periods or place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant together with other conditions as may be necessary to define a right and its priority.

**Source:** SL 1980, ch 305, § 5.

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46-10-3. Parties to action for general adjudication. In any action for the general adjudication of the rights to use water and water rights on any river system and all other sources all those whose claims to the use of such waters or claims of water rights are of record, and all other claimants so far as they can be ascertained with reasonable diligence, shall be made parties.

**Source:** SDC 1939, § 61.0119; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0154; SL 1980, ch 305, § 6.

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46-10-3.1. Adding additional defendants as parties. Defendants in addition to those named in the original complaint may be added within a reasonable time and defendants may be added throughout the duration of the suit, as appropriate.

**Source:** SL 1980, ch 305, § 9.

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46-10-3.2. Commencement of action for general adjudication--Service. Except as provided in § 46-10-3.3 for actions in which the named defendants number one hundred or more, an action for general adjudication shall be commenced and service shall be made as in other civil cases.

**Source:** SL 1980, ch 305, § 8.

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46-10-3.3. Defendants numbering one hundred or more--Commencement of action--Service. An action for general adjudication is commenced by the filing of a complaint in circuit court in any case in which the named defendants number one hundred or more. In such a case personal service of a summons and complaint shall not be required but may be made. If personal service is not made, the court shall order service to be made by the plaintiff on named defendants by mailing a court approved notice of the action by registered or certified mail, return receipt requested, and the court shall order the plaintiff to obtain service on all unnamed defendants by publication of said notice for four consecutive weeks in a newspaper published in each of the counties within which interest in rights to use of the water and water rights may be affected by the adjudication. If there is no newspaper in one or more of said counties, then publication for such counties shall be in one or more newspapers published in the state, and of general circulation within such counties. If publication is in a daily newspaper, one insertion a week shall be sufficient.

**Source:** SL 1980, ch 305, § 8; SL 1987, ch 29, § 31.

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46-10-3.4. Captioning complaint for general adjudication. The complaint for such general adjudication shall be captioned: In re the general adjudication of all rights to use water and water rights in the (to be specified) river system and all other sources, State of South Dakota.

**Source:** SL 1980, ch 305, § 10.

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46-10-4. Repealed by SL 1980, ch 305, § 7

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46-10-4.1. Action to determine conflicting water or water use rights--Court's powers and duties--Caption of action. The attorney general in lieu of bringing an action for a general adjudication may or any person may bring an action for the purpose of determining conflicting water rights or rights to use water. The court before which any such action may be properly brought may exercise the powers and duties set out by this chapter, as appropriate. An action for the determination of conflicting water rights shall be captioned as set forth in Title 15 of the South Dakota Codified Laws.

**Source:** SL 1980, ch 305, § 11.

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46-10-5. Action for general adjudication or to determine conflicting water rights--Copies of complaints mailed to Water Management Board. Whenever suit is brought for general adjudication or to determine conflicting water rights in any of the courts of this state, a copy of the complaint shall be by the complainant mailed by registered or certified letter to the Water Management Board at its office at the state capital, at the time of the first service of summons in the action, and likewise a copy of any amended complaint or cross-complaint shall be mailed in like manner to the board immediately after service thereof upon the opposing party.

**Source:** SDC 1939, § 55.1811; SL 1980, ch 305, § 12.

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46-10-6. Action for general adjudication or to determine conflicting rights--Proof of notice of suit to water management board. No final decree may be issued in any action for general adjudication or in an action for determination of conflicting water rights unless it appears that the water management board has had reasonable notice of the suit.

**Source:** SDC 1939, § 55.1811; SL 1980, ch 305, § 13.

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46-10-7. Intervention by attorney general. If, in the judgment of the Water Management Board, the public interests require action adverse to any party thereto, it may call upon the attorney general to intervene in the action. The attorney general shall then appear on behalf of the state and take whatever steps are necessary to protect the interests of the public, of the state or of any of its institutions.

**Source:** SDC 1939, § 55.1811; SL 1983, ch 314, § 157.

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46-10-8. Judgment in action for general adjudication or to determine conflicting rights-- Certified copy filed with board. The court before which any action for general adjudication or any action for the determination of conflicting rights is conducted shall file a certified copy of any final judgment in such case with the Water Management Board.

**Source:** SDC 1939, § 61.0120; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0155; SL 1980, ch 305, § 14.

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46-10-8.1. Appointment of water master to administer interim or final decree. The authority of a court to appoint a water master to administer any interim or final decree relating to water, including any interim or final

decree issued under the provisions of §§ 46-10-1 to 46-10-8, inclusive, is hereby granted.

**Source:** SL 1983, ch 314, § 178.

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46-10-9 to 46-10-12. Repealed by SL 1983, ch 314, §§ 158 to 161

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46-10-13. Appeal to board from acts or decisions of water master--Appeal to circuit court. Any interested person may appeal from acts or decisions of the water master to the Water Management Board and the board shall promptly and at a stated time and place fixed by it, after due notice to the parties, hear and determine the matter in dispute. Its decision shall be final, unless an appeal is taken to the circuit court having jurisdiction, in conformity with the law governing appeals.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0141; SL 1983, ch 314, § 162.

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46-10-14 to 46-10-26. Repealed by SL 1983, ch 314, §§ 163 to 175

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46-10-27. Transferred to § 46-10A-16

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46-10-28. Repealed by SL 1983, ch 314, § 177

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ther proceeding to adjudicate the water rights represented by the indorsed registration statement.

(7) Upon entry of the indorsed statement in the department's records, the registrant is entitled to continue to appropriate the surface water and apply it to beneficial use to the extent and in the manner disclosed in the recorded registration statement. However, the registrant shall not be entitled to the benefits of an existing water right of record under ORS 540.045.

(8) No registration statement recorded under this section shall be construed as a final determination of any matter stated therein, nor shall the act of indorsement by the director constitute a determination of the validity of the matters contained in the registration statement. The right of the registrant to appropriate surface water under a recorded registration statement is subject to determination under ORS 539.010 to 539.240, and is not final or conclusive until so determined. A right to appropriate surface water under a recorded registration statement has a tentative priority from the date claimed in the indorsed registration statement.

(9) Any indorsed registration statement may be assigned, subject to the conditions in the registration statement, but no such assignment will be binding, except upon the parties to the assignment, unless filed with the department.

(10) Notwithstanding the filing deadline prescribed under subsection (1) of this section, and the late filing period allowed under subsection (4) of this section, if any person submitted, before December 31, 1994, a registration statement or other similar documentation claiming a right to appropriate surface water under ORS 539.010, the director shall examine the material submitted to determine if the documents filed would substantially comply with the requirements of subsection (2) of this section. If the director determines that the documents substantially comply with the surface water registration filing requirements of subsection (2) of this section, the director may accept the registration. If the director determines that the documents filed under this subsection are incomplete or if additional information is required to comply with subsection (2) of this section, or fees required under ORS 539.081 have not been submitted, the director shall notify the claimant of the deficiency, setting a date certain for submittal of the information or fees. The time for submittal of additional information or fees shall be not less than 30 days nor more than 180 days after the director notifies the claimant of the deficiency. If the additional information or fees are not submitted on or before the date certain, the

registration statement shall be considered void and shall be returned to the claimant.

(11) The director shall adopt by rule a process and standards for recognizing changes in the place of use, type of use or point of diversion of water uses registered pursuant to this section. [1987 c.541 §5; 1989 c.691 §14; 1993 c.157 §4; 1995 c.365 §7; 1999 c.860 §1]

### WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES

**539.300 Legislative findings.** The Legislative Assembly of the State of Oregon finds it is desirable to provide a procedure for conducting negotiations to determine the water rights of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon. [1987 c.81 §2; 1993 c.67 §1]

#### 539.310 Negotiation for water rights.

(1) The Water Resources Director may negotiate with representatives of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon and representatives of the federal government as trustee for the federally recognized Indian tribe to define the scope and attributes of rights to water claimed by the federally recognized Indian tribe to satisfy tribal rights under treaty between the United States and the tribes of Oregon. All negotiations in which the director participates under this section shall be open to the public.

(2) During negotiations conducted under subsection (1) of this section, the director shall:

(a) Provide public notice of the negotiations;

(b) Allow for public input through the director; and

(c) Provide regular reports on the progress of the negotiations to interested members of the public. [1987 c.81 §3; 1993 c.67 §2]

**539.320 Agreement; submission to court.** When the Water Resources Director and the representatives of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon and the federal government have completed an agreement, the Water Resources Director shall submit an original copy of the agreement to the appropriate court. The copy shall be signed by the Water Resources Director on behalf of the State of Oregon and by authorized representatives of the Indian tribe and the federal government as trustee for the Indian tribe. [1987 c.81 §4; 1993 c.67 §3]

**539.330 Notice to persons affected by agreement.** (1) Upon filing of the agreement with the appropriate court under ORS 539.320, the Water Resources Director shall

notify owners of water right certificates or permits that may be affected by the agreement:

(a) That the agreement has been filed with the court; and

(b) Of the time and manner specified by the court for filing an exception to the agreement.

(2) Unless notice by registered mail is required by the court, the notice required under subsection (1) of this section may be given by:

(a) Publication; or

(b) Any other method the director considers necessary. [1987 c.81 §5]

**539.340 Court decree; effective date of agreement; remand.** (1) An agreement negotiated under ORS 539.310 to 539.330 shall not be effective unless and until incorporated in a final court decree, after the court has provided an opportunity for an owner of a water right certificate or permit that may be affected by the agreement or for a claimant in an adjudication that may be affected by the agreement to submit an exception to the agreement.

(2) If the court does not sustain an exception, the court shall issue a final decree incorporating the agreement as submitted without alteration.

(3) If the court sustains an exception to the agreement, the court shall remand the agreement to the Water Resources Director for further negotiation according to the provisions of ORS 539.300 to 539.350, if desired by the parties to the agreement. [1987 c.81 §6; 1997 c.708 §1]

**539.350 Procedures after remand of agreement.** Within 180 days after the court remands the agreement under ORS 539.340, the Water Resources Director shall file with the court:

(1) An amended agreement complying with ORS 539.320, which shall be subject to the procedure specified by ORS 539.330;

(2) A motion to dismiss the proceedings, which shall be granted by the court; or

(3) A stipulated motion for a continuance for a period not to exceed 180 days, within which period the parties shall submit to the court an amended agreement, a motion to dismiss or a motion for further continuance. [1987 c.81 §7]

**Part 7**  
**Indian and Federal Water Rights —**  
**Water Rights Within Indian Reservations**

**Part Cross-References**

Indian lands recognized to be under federal jurisdiction, Art. I, Mont. Const.  
 Reserved Water Rights Compact Commission, 2-15-212.  
 Fort Peck-Montana Compact, Title 85, ch. 20, part 2.  
 Northern Cheyenne-Montana Compact, Title 85, ch. 20, part 3.

**85-2-701. Legislative intent.** (1) Because the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. It is the intent of the legislature that the unified proceedings include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.

(2) To the maximum extent possible, the reserved water rights compact commission established under 2-15-212 should make the negotiation of water rights claimed by the federal government or Indian tribes in or affecting the basins identified by 85-2-218 its highest priority. In negotiations, the commission is acting on behalf of the governor.

**History:** En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 9, Ch. 651, L. 1987; amd. Sec. 466, Ch. 418, L. 1995; amd. Sec. 298, Ch. 42, L. 1997.

**Cross-References**

Reserved Water Rights Compact Commission, 2-15-212.  
 Policy considerations, 85-1-101.  
 Negotiations with other states by Department, 85-1-223.  
 Declaration of policy and purpose, 85-2-101.  
 Statement of claim for federal reserved water rights, 85-2-224.  
 Final decree, 85-2-234.

**85-2-702. Negotiation with Indian tribes.** (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings must be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Compact negotiations commence upon receipt of the written designation from the governing body of a tribe.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana and any affected tribal governing body, and approval by the appropriate federal authority.

(3) Upon its ratification by the Montana legislature and the tribe, the terms of a compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration. However, if approval of the state legislature and the tribe has not been accomplished by July 1, 2009, all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 6 months. These new filings must be used in the formulation of the preliminary decree and must be given treatment similar to that given to all other filings.

**History:** En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 8, Ch. 268, L. 1981; amd. Sec. 6, Ch. 667, L. 1985; amd. Sec. 2, Ch. 358, L. 1987; amd. Sec. 3, Ch. 784, L. 1991; amd. Sec. 2, Ch. 44, L. 1997; amd. Sec. 2, Ch. 103, L. 2003.

**Cross-References**

Jurisdiction on Indian lands, Title 2, ch. 1, part 3.

**85-2-703. Negotiation with federal government.** The compact commission may also enter into separate negotiations with the federal government for the conclusion of compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state. The terms and conditions of such negotiations shall be the same as provided in this section for negotiations with Indian tribes.

**History:** En. Sec. 27, Ch. 697, L. 1979.

**Cross-References**

Negotiations with other states by Department, 85-1-223.

**85-2-704. Termination of negotiations.** (1) The commission or any negotiating tribe or federal agency may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to subsection (1), they may be reopened only by mutual agreement of the parties.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 9, Ch. 268, L. 1981; amd. Sec. 7, Ch. 667, L. 1985.

**85-2-705. Status reports to chief water judge.** (1) The Montana reserved water rights compact commission must submit to the chief water judge, appointed pursuant to 3-7-221, a report on the status of its negotiations on July 1, 1985, and every 6 months thereafter.

(2) Each report must state which Indian tribes and federal agencies are engaged in negotiations, whether any negotiations with Indian tribes or federal agencies have been terminated, and the progress of negotiations on a tribe-by-tribe and agency-by-agency basis. The report must be made available to the public.

History: En. Sec. 8, Ch. 667, L. 1985.

**85-2-706. Renumbered 85-20-401.** Code Commissioner, 1994.

**85-2-707. Renumbered 85-20-402.** Code Commissioner, 1994.

**85-2-708. Water administration interim agreements within Indian reservations.** (1) Because it appears to be to the common advantage of the state and Indian tribes to cooperate in matters involving the permitting and use of water within the exterior boundaries of an Indian reservation prior to the final adjudication of Indian reserved water rights and because the state does not intend by enactment of this section to limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries of an Indian reservation, pursuant to the requirements of Title 18, chapter 11, the department may negotiate and conclude an interim agreement with the tribal government of any Indian tribe in Montana prior to final adjudication of Indian reserved water rights for the purpose of implementing a water administration plan and a permitting process for the issuance of water rights and changes in water right uses within the exterior boundaries of an Indian reservation.

(2) Subject to subsection (4), an agreement entered into pursuant to subsection (1) must:

(a) provide for the retention of exclusive authority by the state to issue permits to applicants who are not members of the tribe and to issue change of use authorizations;

(b) provide that any permits must be issued in accordance with the criteria established by state law; and

(c) provide that permits may be only for new uses with a date of priority in compliance with state law.

(3) Prior to concluding any agreement under this section, the department shall hold public meetings, after proper public notice of the meetings has been given and the proposed agreement has been made available for public review, to afford the public an opportunity to comment on the contents of the agreement.

(4) The provisions of subsection (2) do not apply if a court of competent jurisdiction has held that the department lacks exclusive authority to issue new water use permits within the exterior boundaries of an Indian reservation pending final adjudication of Indian reserved water rights. In that case, the department, with the approval of the governor, may enter into an interim agreement that provides for joint tribal and state administration of new water uses on the reservation pending final adjudication of Indian reserved water rights. Any interim agreement entered into pursuant to this subsection (4):

(a) must address how and whether new ground water uses for domestic and municipal purposes will be granted. Except for the criterion in 85-2-311(1)(a)(ii), an interim agreement that grants new ground water uses must establish criteria for new water uses that incorporate the criteria listed in 85-2-311.

(b) must address how and whether changes in existing appropriation rights within the exterior boundaries of the reservation will be granted. An interim agreement that grants changes must establish criteria for changes in existing appropriation rights that incorporate the criteria listed in 85-2-402.

(c) must address how and whether water use will be authorized under the interim agreement and how the use will be secure and valid in the event of the termination of the interim agreement, quantification of reserved water rights, or termination of negotiations of reserved water rights under 85-2-704;

- (d) must maintain the jurisdictional claims of each party to the interim agreement;
- (e) must protect each party against a waiver of the right to challenge the claims of each party at any time;
- (f) may not prejudice the regulatory or adjudicatory jurisdiction of either party;
- (g) must provide that none of the activities of each party in the negotiation or implementation of an interim agreement may be used to affect the equitable or legal position of either party in any future litigation; and
- (h) must provide that nothing in the negotiation or implementation of an interim agreement may be considered as enlarging or diminishing the jurisdiction or authority of either party within the reservation.

**History: En. Sec. 19, Ch. 497, L. 1997; amd. Sec. 1, Ch. 483, L. 2003.**

## Part 2 Fort Peck-Montana Compact

### Part Cross-References

Reserved Water Rights Compact Commission, 2-15-212.  
Indian and federal water rights, Title 85, ch. 2, part 7.

85-20-201. Fort Peck-Montana compact ratified. The compact entered into by the state of Montana and the Assiniboine and Sioux tribes of the Fort Peck Indian reservation and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on May 15, 1985, is ratified. The compact is as follows:

### FORT PECK-MONTANA COMPACT

This Compact is entered into by and between THE STATE OF MONTANA and THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION (herein called the "Parties") and shall become effective as set forth hereinafter.

The Parties agree as follows:

#### ARTICLE I GENERAL PURPOSES

The basic purposes of this Compact are to determine finally and forever all rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in the State of Montana to water on, under, adjacent to, or otherwise appurtenant to the Reservation, to settle existing disputes and remove causes of future controversy between the Tribes and the State and between Indians of the Fort Peck Reservation and other persons concerning waters of the Missouri River, its tributaries, and ground water, and to settle all claims by the Tribes and by the United States on behalf of the Tribes in United States v. Aageson, Civ. No. 79-21-GF (D. Mont.), United States v. Aasheim, Civ. No. 79-40-BLG (D. Mont.) and the pending adjudication in the state water court initiated pursuant to the provisions of Chapter 697, Laws of Montana 1979.

#### ARTICLE II DEFINITIONS

For purposes of this Compact, and for no other purposes, the following definitions apply:

- (1) "Acre-foot" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet.
- (2) "Annual" or "per year" means the calendar year commencing January 1 and ending December 31.
- (3) "Board" means the Fort Peck-Montana Compact Board established by Article VI.
- (4) "Conservation (carry-over) storage" is storage provided in a reservoir to capture and hold water that would otherwise go downstream. Such storage holds the water for beneficial use later in the season or is carried over to a subsequent season or seasons. Evaporation from the surface of such reservoir is considered to be a consumptive use to the extent that it exceeds the evaporative and transpirational losses which occurred in the reservoir area prior to its construction.
- (5) "Consumptive use" means the amount of irrigation water that is transpired by vegetation, converted in the processes of photosynthesis and plant tissue growth, and evaporated from adjacent soils, water surfaces and foliage. For uses other than irrigation, consumptive use means the quantity of water diverted less the quantity of reusable return flow within the State.
- (6) "Court of competent jurisdiction" means a state or federal district court which otherwise has jurisdiction of the subject matter and the parties, or a tribal court which otherwise has such jurisdiction provided that all parties to the case consent to tribal court jurisdiction.
- (7) "Diversion" means the removal of water from its natural course or location by means of a ditch, canal, flume, bypass, pipeline, conduit, well, pump, or other structure or device, or the impoundment of water in a reservoir. Where a reservoir is constructed or operated on a stream, the annual diversion shall be the greater of:
  - (a) the inflow into the reservoir minus the outflow for releases or spills downstream from the reservoir, or
  - (b) withdrawals of water from the reservoir for actual use.
- (8) "Domestic use" means the diversion of water by one or more individuals, family units or households for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

(9) "Fort Peck Irrigation Project" means those irrigation systems and works constructed pursuant to the Act of May 30, 1908, 35 Stat. 558, and all lands receiving water from such systems and works.

(10) "Fort Peck Reservoir" means that body of surface water impounded by Fort Peck Dam, at the current spillway elevation.

(11) "Full service irrigation" means any form of irrigation that distributes water on a regularly scheduled basis in order to satisfy the full seasonal crop and soil water requirements.

(12) "Ground water" means any water located under the surface of the land or the bed of any stream, lake, reservoir, or other body of surface water. All other water shall be considered surface water.

(13) "Indian" means any person who:

(a) is an enrolled member of the Tribes; or

(b) is a member of a tribe that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(c) holds or is recognized by the Secretary of the Interior as eligible to hold trust or restricted property on the Reservation.

(14) "Industrial" means the use of water for any uses that benefit an industrial enterprise including, but not limited to, industrial cooling, energy production, and evaporation associated with any industrial operation. Among the purposes excluded from the industrial use category are irrigation, stockwater, and domestic uses.

(15) "Instream flow" means that quantity of water scheduled to remain in a stream to maintain fish and wildlife resources.

(16) "Missouri River" means the river formed by the confluence of the Gallatin, Jefferson and Madison Rivers in southwestern Montana, and flowing easterly beyond the eastern boundary of Montana.

(17) "Partial service irrigation" means the diversion of flood runoff from natural channels or water courses and spreading such water for the purpose of applying as much water as practicable to the land during periods of high stream flow to increase crop production.

(18) "Parties" means the Tribes and the State.

(19) "Person" means an individual or any other entity, public or private, including the State, the Tribes, and the government of the United States and all officers, agents, and departments thereof.

(20) "Regulatory Storage" is storage provided as a part of a water distribution system for operational purposes. Evaporation loss from the distribution system itself is accounted for and is a part of the unit consumptive use rate established in this Compact and is therefore not considered to be a separate item of consumptive use.

(21) "Reservation" means the Fort Peck Indian Reservation as established in the agreement of December 28 and December 31, 1886, and confirmed by the Act of May 1, 1888, 25 Stat. 113.

(22) "Reusable" means capable of further beneficial use.

(23) "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 State Department of Natural Resources and Conservation or its successor agency.

(24) "Transfer" means any authorization for the delivery or use of water by a joint venture, service contract, lease, sale, exchange or other similar agreement.

(25) "Tribal Water Right" means the right to divert and use water as confirmed by Article III of this Compact.

(26) "Tribes" means the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and all officers, agents and departments thereof. Unless otherwise indicated, for purposes of notification or consent, "Tribes" means the Tribal Chairman or the Chief Executive Official of the Tribes at the time.

(27) "Tributary" or "tributaries of the Missouri River that flow through or adjacent to the Reservation" means those tributaries of the Missouri River that traverse the Reservation, generally in a north to south direction, including:

(a) streams that form the east and west boundaries of the Reservation (Big Muddy Creek, Porcupine Creek and the Milk River);

(b) streams that originate outside the Reservation but empty into the Missouri River within the boundaries of the Reservation (the Poplar River and its tributaries);

(c) streams that are wholly contained within the boundaries of the Reservation (Chelsea Creek, Tule Creek, Wolf Creek, Oswego Creek, and Little Porcupine Creek); and

(d) all other watercourses that traverse the Reservation.

(28) "Wasteful" means the unreasonable loss of water through the design or negligent operation of a diversion or of a water distribution facility.

### ARTICLE III TRIBAL WATER RIGHT

A. General Statement of the Tribal Water Right. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have the right to divert annually from the Missouri River, certain of its tributaries, and ground water beneath the Reservation the lesser of (i) 1,050,472 acre-feet of water, or (ii) the quantity of water necessary to supply a consumptive use of 525,236 acre-feet per year for the uses and purposes set forth in this Compact with a priority date of May 1, 1888, provided that no more than 950,000 acre-feet of water, or the quantity of water necessary to supply a consumptive use of 475,000 acre-feet may be diverted annually from surface water sources. This right is held in trust by the United States for the benefit of the Tribes and is further defined and limited as set forth in this Compact.

B. Persons Who May Use the Tribal Water Right. All uses of water authorized under any applicable law by the following persons shall be considered and calculated as uses of the Tribal Water Right:

1. the Tribes within or outside the Reservation;
2. all individual Indians using water within the Reservation including, but not limited to, Indians exercising uses established pursuant to state law prior to the effective date of this Compact;
3. all non-Indian successors-in-interest to any allottee actually using water within the Reservation by virtue of a water right arising under the laws of the United States, which water right was acquired directly or indirectly from an Indian predecessor-in-interest;
4. all other persons receiving water from the Fort Peck Irrigation Project including, but not limited to, persons exercising uses established pursuant to state law prior to the effective date of this Compact;
5. all other persons authorized to use water by the Tribes pursuant to this Compact, within or outside the Reservation;
6. the United States as trustee for the Tribes or any Indian including, but not limited to, persons exercising uses established pursuant to state law prior to the effective date of this Compact.

C. Measure of Consumptive Use for Irrigation. Irrigation usage of the Tribal Water Right shall be conclusively deemed to cause a consumptive use of 1.8 acre-feet per acre per year for full service irrigation and 0.48 acre-feet per acre per year for partial service irrigation. Any loss of water due to evaporation from reservoirs constructed in the future for conservation (carry-over) storage rather than for regulatory storage by the United States for the benefit of the Tribes or any Indian, or constructed for such conservation storage by the Tribes or by any Indian, shall be counted as a consumptive use.

D. Purposes for Which the Tribal Water Right May be Used. Within the Reservation, use of water in the exercise of the Tribal Water Right for any purpose may be authorized by the Tribes without regard to whether such use is beneficial as defined by valid state law. No use of the Tribal Water Right may be wasteful or inconsistent with the terms of this Compact. Outside the Reservation, any use of water in the exercise of the Tribal Water Right shall be beneficial as defined by valid state law on the date the Tribes give notice to the State of a proposed use outside the Reservation.

E. Facilities Diverting or Using the Tribal Water Right Outside the Reservation. All persons diverting or using the Tribal Water Right outside the Reservation, including the Tribes as sovereign, shall apply for all permits, certificates, variances and other authorizations

required by valid state laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water located outside the Reservation, and shall comply with all applicable provisions of this Compact. A diversion or use of water in the exercise of the Tribal Water Right may be made only after all permits, certificates, variances or other authorizations applied for pursuant to this paragraph have been obtained, and the diversion or use has not been found unlawful by a court of competent jurisdiction.

F. Amounts To Be Diverted from the Missouri River.

1. Diversions of water for use within or outside the Reservation may be made in the exercise of the Tribal Water Right from Fort Peck Reservoir and the mainstem of the Missouri River—but without utilization of the conservation (carry-over) storage of Fort Peck Reservoir—in the following amounts:

- (a) during the months of November, December, January, February and March, not to exceed 40,000 acre-feet per month;
- (b) during the months of April and October, not to exceed 50,000 acre-feet per month;
- (c) during the months of May and September, not to exceed 105,000 acre-feet per month;
- (d) during the month of June, not to exceed 145,000 acre-feet;
- (e) during the month of July, not to exceed 215,000 acre-feet;
- (f) during the month of August, not to exceed 180,000 acre-feet.

Provided that the aggregate of monthly diversions in the exercise of the Tribal Water Right from surface water shall not exceed 950,000 acre-feet per year, and the total annual consumptive use shall not exceed 475,000 acre-feet.

2. The Tribes shall report the amount of all actual diversions from Fort Peck Reservoir and the mainstem of the Missouri River to the United States Army Corps of Engineers by April 1st of the calendar year following the year in which such diversions are made in accordance with paragraph 5 of section J of this Article.

3. All diversions authorized by paragraph 1 of this section may be made without payment to the United States, but the Tribes and any user of the Tribal Water Right shall otherwise comply with all generally applicable laws and regulations of the United States.

G. Export of the Tribal Water Right Outside the State. Use of the Tribal Water Right outside the State shall be in compliance with all valid provisions of state law in effect at the time of the proposed transfer that prohibit, regulate, condition, or permit the transportation of water outside the State.

H. Non-use of the Tribal Water Right not a Forfeiture. Non-use of any part of the Tribal Water Right shall not constitute a relinquishment, forfeiture or abandonment of the right to such use.

I. Sources of Diversions of the Tribal Water Right. In the exercise of the Tribal Water Right water may be diverted:

1. Within the Reservation for use within the Reservation from:
  - (a) the mainstem of the Missouri River within or adjacent to the Reservation;
  - (b) any tributary of the Missouri River that flows through or adjacent to the Reservation, except the mainstem of the Milk River; and
  - (c) any ground water source.
2. Outside the Reservation for use within the Reservation from:
  - (a) Fort Peck Reservoir;
  - (b) any tributary of the Missouri River that flows through or adjacent to the Reservation, except the mainstem of the Milk River; and
  - (c) the mainstem of the Missouri River below Fort Peck Dam.

Diversions authorized by subparagraphs (a) and (c) shall comply with paragraph 1 of section J of this Article.

3. Within or outside the Reservation for use outside the Reservation from:
  - (a) Fort Peck Reservoir;
  - (b) any tributary of the Missouri River that flows through or adjacent to the Reservation, except the mainstem of the Milk River, provided that water from these sources shall not be transported outside the respective watershed of each stream;

- (c) the mainstem of the Missouri River below Fort Peck Dam; and
- (d) the mainstem of the Missouri River above Fort Peck Reservoir.

Diversions authorized by subparagraphs (a) and (c) shall comply with paragraph 1 of section J of this Article. Diversions authorized by subparagraph (b) shall comply with paragraph 4 of section K of this Article. Diversions authorized by subparagraph (d) shall comply with paragraph 3 of section J of this Article.

J. Notice of and Conditions upon Diversions and Uses of the Tribal Water Right.

1. The Tribes shall give the State not less than 180 days advance written notice of any proposed diversion or use of the Tribal Water Right authorized by subparagraphs 2(a) and 2(c) and subparagraphs 3(a) and 3(c) of section I of this Article and shall, in the case of any transfer of the Tribal Water Right, except agreements on the tributaries pursuant to paragraph 4 of section K of this Article, offer the State an opportunity to participate as provided in paragraph 2 of section K of this Article. Such notice shall include sufficient documentation to demonstrate that:

- (a) the proposed use of water complies with section D of this Article;
- (b) for diversions outside the Reservation, the proposed means of diversion and the construction and operation of the diversion works are adequate;
- (c) the proposed use and diversion will not adversely affect, except with the consent of the owner of such right, any of the following rights to the use of water existing at that time:
  - (i) any water right arising under the laws of the United States;
  - (ii) any appropriative right to the use of water established pursuant to the laws of the State that has not been abandoned, but excluding any reservation of water made pursuant to the laws of the State which has not been put to actual beneficial use by the date notice is given;
  - (d) the proposed use does not cause any unreasonable significant adverse environmental impact; and
  - (e) proposed diversions in excess of 4,000 acre-feet per year and 5.5 cubic feet per second of water will not:
    - (i) substantially impair the quality of water for existing uses in the source of water from which the diversion is made;
    - (ii) be made where low quality water which can economically be used is legally and physically available to the Tribes for the proposed use;
    - (iii) create or substantially contribute to saline seep; or
    - (iv) substantially injure fish or wildlife populations in the source of water from which the diversion is made.

The requirements of subparagraph (c) of this paragraph may be satisfied by a showing that the owner of such right has consented to the adverse effect. Subparagraph (c) shall not be construed to alter or avoid in any way the consequences resulting from such consent under state law.

2. A proposed diversion or use of the Tribal Water Right outside the Reservation authorized by subparagraphs 2(a) and 2(c) and subparagraphs 3(a) and 3(c) of section I of this Article may be challenged only:

- (a) within 30 days after the expiration of the notice period provided in paragraph 1 of this section;
- (b) in a court of competent jurisdiction; and
- (c) by the State or by a person whose rights are adversely affected by the proposed diversion or use.

In any such case, the Tribes shall have the burden of going forward and the burden of proving by a preponderance of the evidence that they have satisfied the requirements of paragraph 1 of this section.

3. Diversions of water in the exercise of the Tribal Water Right outside the Reservation from the mainstem of the Missouri River above Fort Peck Reservoir, as authorized in subparagraph 3(d) of section I of this Article, may be made so long as the Tribes or any user of the Tribal Water Right:

- (a) comply with all the laws of the State in effect at the time the diversion is proposed, including but not limited to state water use statutes;

(b) give not less than 180 days advance written notice of any proposed diversion in the manner required in paragraph 5 of this section:

(i) if the diversion is to be made from a reservoir, to the operator of the reservoir; or  
(ii) if the diversion is not to be made from a reservoir, to the operator of the first dam, upstream and downstream, if any, from the point of diversion;

(c) obtain approval of the diversion from the State legislature.

4. For purposes of demonstrating compliance with subparagraph 1(c) and subparagraph 3(a) of this section and paragraph 6 of Section K of this Article, the portion of the Tribal Water Right to be diverted will be deemed an appropriative right which has:

(a) been acquired on May 1, 1888;

(b) a point of diversion and use where the water is actually being diverted and used or, if not actually being diverted, where the water would first flow on or adjacent to the Reservation;

(c) the existing use or, if not actually in use, an irrigation use provided, however, that the use can be transferred to a purpose other than irrigation without restriction as to period of use so long as the requirements of Section F of this Article are observed;

(d) the actual consumptive use or, if not actually in use or if being used for irrigation purposes, a consumptive use of 1.8 acre-feet per acre per year; and

(e) not been abandoned or forfeited.

5. Any notice of a diversion required by paragraph 3 of this section and any report of a diversion required by paragraph 2 of section F of this Article shall specify:

(a) the person authorized to make the diversion;

(b) the amount of water proposed or authorized to be diverted annually;

(c) the amount proposed or authorized for annual consumptive use;

(d) the point of diversion;

(e) the period of use;

(f) the place of use; and

(g) the purposes for which the water may be used.

**K. Transfers of the Tribal Water Right.**

1. As an incident to and in the exercise of the Tribal Water Right, the Tribes may transfer within or outside the Reservation, as authorized by federal law and this Compact, the right to use water but may not permanently alienate such right or any part thereof. Any such transfer of water by the Tribes shall be subject to all provisions of this Compact:

2. Prior to making any transfer which authorizes use of water outside the Reservation to be diverted from the mainstem of the Missouri River, including Fort Peck Reservoir, the Tribes shall give not less than 180 days advance written notice to the State of the proposed terms and conditions of the transfer, and shall offer the State the opportunity to participate in the transfer as a substantially equal partner with the Tribes, assuming obligations and receiving benefits of the transfer under terms and conditions agreed to by the Parties. If the State does not accept the opportunity within the 180-day notice period, or if the State unreasonably delays the institution or completion of approval processes required by state law or unreasonably delays resolution of any litigation arising from its decision to accept the opportunity, the Tribes may proceed with the proposed transfer without State participation, provided that the proposed transfer shall be subject to all other provisions of this Compact. If the State does not accept the opportunity, or if State participation in the joint transfer is not approved, the State shall not later pursue the opportunity, except in accordance with all the terms of this Compact, including paragraph 3 of this section.

3. Prior to making any transfer allowing use or diversion of water from Fort Peck Reservoir or from the mainstem of the Missouri River below Fort Peck Dam, the State shall give not less than 180 days advance written notice to the Tribes of the proposed terms and conditions of the transfer and shall offer the Tribes the same opportunity to participate in the transfer as a substantially equal partner with the State, assuming obligations and receiving benefits of the transfer on terms and conditions agreed to by the Parties. If the Tribes do not accept the opportunity within the 180 day notice period, the State may proceed with the proposed transfer without the Tribes' participation, and the Tribes shall not later pursue the opportunity except in accordance with all the terms of this Compact, including paragraph 2 of this section.

4. If otherwise authorized by federal law, the Tribes may enter into an agreement with any person who is exercising or proposing to exercise a right under the laws of the State to use surface water outside the Reservation on any tributary of the Missouri River that flows through or adjacent to the Reservation, except the mainstem of the Milk River, which agreement allows such person's diversion and use and protects it from any other exercise of the Tribal Water Right provided, however, that:

(a) before use of such water, the person shall have complied with all applicable state laws concerning the acquisition of a water right;

(b) subsequent to acquisition of the state water right, regulation of its use shall be subject to state law;

(c) the amount of water subject to the agreement shall be considered a consumptive use of the Tribal Water Right;

(d) the agreement shall not permanently alienate the Tribal Water Right or any part thereof.

5. The Tribes may transfer annually only the following amounts of water for consumptive use outside the Reservation:

(a) 50,000 acre-feet;

(b) plus 35 percent of any amount over 200,000 acre-feet but less than 300,000 acre-feet authorized by state law to be transferred annually by the State from waters within the State;

(c) plus 50 percent of any amount over 300,000 acre-feet authorized by state law to be transferred annually by the State from waters within the State.

Transfers of the Tribal Water Right shall not be considered as part of any amounts authorized by state law to be transferred annually by the State.

6. In no event shall the Tribes be authorized to transfer less than 50,000 acre-feet of water per year outside the Reservation. The limits established in paragraph 5 of this section shall apply so long as the State is authorized to transfer annually at least 50,000 acre-feet of water pursuant to state law. If statutory authorization for the State to transfer water is not enacted, is repealed, or is held invalid, or if the amount of water authorized by state law to be transferred by the State is less than 50,000 acre-feet per year, then for any period in which the authorization or the limitation is not in force the Tribes may transfer water in accordance with all terms and conditions of this Compact other than paragraph 5 of this section. However, such transfers will be subject to any volume limitations provided by federal law or, in the absence of any federal volume limitations, the Tribes may transfer water in accordance with all terms and conditions in this Compact other than paragraph 5 of this section and with any volume limitations imposed by state law which would apply to a holder of a right to the use of water established pursuant to state law. For the purposes of complying with volume limitations imposed by state law, the Tribal Water Right will be deemed to have the characteristics set forth in paragraph 4 of section J of this Article.

7. Unless authorized by federal law, the State shall not in any manner whatsoever tax any proceeds received by the Tribes as consideration for any transfer of the Tribal Water Right.

#### L. Instream Flows.

1. At any time within five years after the effective date of this Compact, the Tribes may establish a schedule of instream flows to maintain any fish or wildlife resource in those portions of streams, excluding the mainstem of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation. These instream flows shall be a part of the Tribal Water Right with a priority date of May 1, 1888. Water remaining in a stream to maintain instream flows pursuant to such a schedule shall be counted by the Tribes as a consumptive use of surface water.

2. Instream flows may be established by the Tribes only in accordance with this section. The Tribes may change the use of water for maintenance of instream flows to another purpose only with the consent of the State.

M. No Other Diversion or Use of the Tribal Water Right. No other diversion or use of the Tribal Water Right shall be made other than those authorized or recognized by this Article.

ARTICLE IV  
PROTECTION OF USES UNDER STATE LAW

**A. Uses Protected.**

1. The following existing and proposed uses of water by Indians within the Reservation are protected and shall not be subordinated to any other uses by subsequent provisions of this Article:

- (a) a maximum of 113 acres of irrigated land within the Wolf Creek watershed;
- (b) a maximum of 11 acres of irrigated land within the Poplar River watershed;
- (c) a maximum of 523 acres of irrigated land within the Big Muddy Creek watershed; and
- (d) a maximum of 300 acres of land irrigated with ground water near the confluence of Porcupine Creek and the Milk River.

2. Uses of water by Indians within the Reservation for stockwatering purposes not in excess of 20 acre-feet per year for each impoundment and for all domestic uses are protected and shall not be subordinated to any other uses by subsequent provisions of this Article.

3. With the exception of the uses protected in paragraphs 1 and 2 of this section, diversion and use of water in the exercise of the Tribal Water Right except from the mainstem of the Missouri River, including water allocated to instream flow purposes, shall be subordinate to the following uses of water in the Porcupine Creek, Poplar River, Big Muddy Creek, Little Porcupine Creek, Wolf Creek, Tule Creek, and Chelsea Creek watersheds, including all tributary streams within those watersheds, and all underlying ground water whether or not hydrologically connected with the surface water:

(a) the beneficial uses of water with a priority date of December 31, 1984 or earlier established under the laws of the State and identified in Appendix A to this Compact;

(b) such rights of the United States Fish and Wildlife Service to the waters of Big Muddy Creek for the Medicine Lake National Wildlife Refuge as may be finally determined by the state water court;

(c) beneficial uses of water for domestic purposes;

(d) beneficial uses of water for stock watering purposes in existence prior to December 31, 1984, and beneficial uses of water for stock watering subsequent to that date not in excess of 20 acre-feet per year for each impoundment.

4. Except as to the rights protected in paragraph 3 of this section, the Tribal Water Right shall be prior to all rights to the use of surface and ground water established under the laws of the State with a priority date later than May 1, 1888.

**B. Changes of Protected Uses.**

1. The rights to the use of water protected by paragraph 3 of section A of this Article may be changed in accordance with state law as to point of diversion, period of use, place of use, purpose of use, or ownership of the right provided that:

(a) the proposed change will not adversely affect any use of the Tribal Water Right existing at the time of the proposed change;

(b) the amount of surface water flowing onto the Reservation within the Poplar River, the Big Muddy Creek, or the Porcupine Creek watersheds, will not be changed; and

(c) the source of the water will not be changed from surface to ground water, or from ground to surface water, or from one watershed to another.

2. Upon receiving an application for a proposed change authorized by paragraph 1 of this section, the State shall give the Tribes such advance written notice as is required by state law.

3. If an irrigation use is changed in any manner, or if a reservoir is constructed or operated which results in the consumptive use of water by evaporation, the following limitations apply:

(a) no more than 1.8 acre-feet of consumptive use per year may be authorized for each acre of land retired from full service irrigation; and

(b) no more than 0.48 acre-feet of consumptive use per year may be authorized for each acre of land retired from partial service irrigation;

(c) evaporation from any reservoir shall be charged as a consumptive use in accordance with definition 4 in Article II.

4. If an irrigation use is changed to an industrial use, all diversions and return flows shall be measured by a device acceptable to and subject to periodic inspection and testing by the State

and the Tribes at the expense of the owner. The owner shall also have the quality of the return flows sampled and tested by a laboratory acceptable to the State and the Tribes as often as reasonably required by the State and the Tribes and at the expense of the owner.

## ARTICLE V ADMINISTRATION OF WATER RIGHTS

A. United States Administration. All rights to the use of water received from the Fort Peck Irrigation Project shall be administered by the United States, and the United States has the final and exclusive jurisdiction to resolve all disputes concerning uses of water received from the Fort Peck Irrigation Project subject to any judicial review provided by applicable law.

B. Tribal Administration.

1. The Tribal Water Right shall be administered by the Tribes, and the Tribes have the final and exclusive jurisdiction to resolve all disputes between users of the Tribal Water Right, except for disputes concerning uses of water received from the Fort Peck Irrigation Project and disputes involving users of the Tribal Water Right pursuant to agreements authorized in Article III, section K, paragraph 4.

2. Administration and enforcement of the Tribal Water Right shall be pursuant to a water code, which shall be adopted by the Tribes and submitted for approval to the Secretary of the Interior within one year after ratification of this Compact by the Parties. Such code shall take effect 18 months after ratification of this Compact unless sooner disapproved by the Secretary of the Interior. Pending the adoption and approval of the tribal water code, administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior as trustee for the Tribes. The Tribes shall not administer the Tribal Water Right in a manner which denies any person a water right owned by that person which arises under the laws of the United States.

3. Within six months after the tribal water code takes effect or within six months after disapproval of the code by the Secretary, the Tribes or the Secretary of the Interior shall provide the State with notice of each existing use of the Tribal Water Right which shall show:

- (a) the person authorized to make the diversion;
- (b) the amount of water authorized to be diverted annually;
- (c) the amount of water authorized for annual consumptive use;
- (d) the point of diversion;
- (e) the period of use;
- (f) the place of use;
- (g) the uses for which the water may be diverted; and
- (h) the relative priority of the use as against other uses of the Tribal Water Right.

4. The Tribes shall thereafter notify the State within sixty days after the end of each quarter year of all new uses of surface and ground water authorized by the Tribes during the preceding quarter year and of all new uses of the Tribal Water Right actually commenced during that quarter year.

C. State Administration.

1. The State shall administer all rights to the use of surface water and ground water within or outside the Reservation which are not a part of the Tribal Water Right to the fullest extent allowed by law. The State shall have the final and exclusive jurisdiction to resolve all disputes between users of rights established under state law.

2. Within two years after ratification of this Compact, the State shall notify the Tribes of all existing uses authorized by the State on the mainstem of the Missouri River below Fort Peck Dam and on all tributaries of the Missouri River that flow through or adjacent to the Reservation, except the mainstem of the Milk River. The State shall notify the Tribes within sixty days after the end of each quarter year of all new uses of surface and ground water permitted by the State on each of these sources during the preceding quarter year and of all new uses of water actually commenced pursuant to the laws of the State during that quarter year on each of these sources. Notices required by this paragraph shall include the information required by paragraph 3 of section B of this Article.

3. No agency of the State shall administer any part of the Tribal Water Right. From and after the effective date of this Compact, unless the Tribal Water Right confirmed in Article III is fully utilized at the time application is made for a permit or other authorization, the State shall

issue no permit or other authorization to divert or use water within the Reservation to the following persons:

- (a) the Tribes;
- (b) any Indian;
- (c) any non-Indian successor-in-interest to any allottee on the Reservation by virtue of that person's assertion of a right arising under the laws of the United States; or
- (d) the United States for the benefit of the Tribes or any Indian or any non-Indian successor-in-interest to any allottee.

**D. Regulation of Ground Water.**

1. With the exception of uses protected in Article IV, neither the State nor the Tribes shall authorize or continue the use of ground water without the consent of the other if such use will:

- (a) result in degradation of instream flows established pursuant to section L of Article III; or
- (b) contribute to the permanent depletion or the significant degradation of the quality of a ground water source which in whole or in part underlies the Reservation.

2. With the exception of uses protected in Article IV, the State shall not, without the Tribes' consent, authorize or continue the use of ground water that unreasonably interferes with a use of ground water authorized by the Tribes. The Tribes shall not, without the consent of the State, authorize or continue the use of ground water that unreasonably interferes with a use of ground water authorized by the State and protected by Article IV of this Compact.

## ARTICLE VI

### FORT PECK-MONTANA COMPACT BOARD

A. **Board established.** There is hereby established the Fort Peck-Montana Compact Board, which shall exercise powers and responsibilities as set forth in this Article.

**B. Membership.**

1. The Board shall consist of three members. One member shall be appointed by the Governor of the State of Montana or, in lieu of such appointment, shall be the Governor. The salary and expenses of that member shall be paid by the State. One member shall be appointed by the Chairman of the Tribes, or in lieu of such appointment, shall be the Tribal Chairman. The salary and expenses of that member shall be paid by the Tribes. The third member shall be selected by agreement of the other two members. The salary and expenses of that member and all other expenses of the Board shall be shared equally by the State and the Tribes subject to the availability of funds. Each member duly appointed or selected shall hold office for a term of six years, and for so long thereafter until a successor shall be appointed or selected. The initial term of each member shall be staggered, with one member serving a six-year term, one a four-year term, and one a two-year term. The initial term of each member shall be chosen by lot, or by any other procedure and agreed upon in writing by the first three members of the Board. If the Governor or the Tribal Chairman serves on the Board, such person shall not serve on the Board beyond his or her term as Governor or Tribal Chairman.

2. Should the two appointed members fail to agree within sixty days of the effective date of this Compact or within thirty days after any vacancy occurs, on the selection of the third member, the following procedure shall be utilized:

(a) within five days each member shall nominate no more than five and no less than three persons to serve as a member of the Board;

(b) within fifteen days thereafter each member shall reject all but one of the persons nominated by the other member;

(c) the chief judge of the United States District Court for the District of Montana shall select the third member of the Board from the remaining two nominees. If the chief judge declines for any reason to select the third member, the chief justice of the Montana Supreme Court shall make the selection from the remaining two nominees.

3. Vacancies on the board shall be filled by appointment of a person to serve the unexpired term of the member whose seat has become vacant. If the member appointed by the Governor becomes unable or unwilling to serve on the Board, the Governor shall make the appointment within fifteen days. If the member appointed by the Tribal Chairman becomes unable or unwilling to serve, the Tribal Chairman shall make the appointment within fifteen days. If the third member of the Board becomes unable or unwilling to serve on the Board, the remaining

members shall fill the vacancy under the procedure set forth in paragraphs 1 and 2 of this section.

C. Quorum and Vote Required. Two members of the Board shall constitute a quorum if reasonable notice has been provided in advance to the absent member. Meetings may be in person or, in appropriate circumstances, by telephone. All Board decisions shall be by a majority of the Board, shall be in writing and, together with any dissenting opinions, shall be delivered to all parties in the proceeding before the Board, and to both Parties to this Compact.

D. Jurisdiction of the Board. The Board shall have exclusive jurisdiction, only as provided in this Compact, to resolve any controversy over the use of ground water to which this Compact pertains, any controversy over the use of surface water within the Reservation or from any tributary of the Missouri River that flows through or adjacent to the Reservation, except the mainstem of the Milk River, and any controversy as to the meaning of this Compact between: (i) on the one hand, the Tribes or any person or persons claiming a right to use the Tribal Water Right; and (ii) on the other hand, the State or any person or persons claiming a right to use water under the laws of the State.

E. Powers and Duties of the Board.

1. The Board shall have power to administer oaths to witnesses, to take evidence under oath, and to issue subpoenas to compel the attendance of witnesses or for the production of books, records, documents and other evidence. The courts of the Tribes and the State shall enforce any subpoena issued by the Board in the same manner as prescribed by the laws of the Tribes and the State for enforcing a subpoena issued in a civil action by courts of the Tribes and the State.

2. The Board shall hold hearings in proceedings before it and shall give advance notice to the Tribes, the State and all parties to any proceeding personally or by registered mail not less than five days before any hearing. Appearance at a hearing waives such notice. The Board may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The Tribes, the State and all parties to the proceeding are entitled to be heard, to present evidence material to the controversy, to cross-examine witnesses appearing at the hearing, and to be represented by counsel at their own expense.

3. The Board may enter an order after hearing granting any party to the dispute before it temporary or preliminary injunctive relief, or any other relief which the Board deems appropriate except money damages. The Board or any party to a proceeding before the Board may invoke the jurisdiction of a court of competent jurisdiction to enforce any temporary or preliminary injunction so issued by the Board by filing a petition for enforcement naming the enjoined person as respondent. Upon filing the petition, the court shall enter any order it deems appropriate for enforcement of the injunction ordered by the Board, including but not limited to injunctive relief on such terms as to bond or otherwise as it deems proper for the security of the rights of the enjoined party. The United States, the State, and the Tribes shall not be required to post any bond. The court may appoint a water commissioner or master to monitor compliance with such relief.

4. The Board shall adopt rules and regulations to govern its procedures and to carry out its responsibilities under this Compact. Such rules and regulations must be consistent with all provisions of this Compact. All records of the Board shall be open to public inspection except for privileged information.

5. The Board may employ or seek assistance of such clerical or other personnel and may establish such offices as it deems necessary for the performance of its functions according to this Compact. Pending the establishment of a principal office, the Board's office shall be located at Fort Peck Agency of the Bureau of Indian Affairs.

6. The annual budget of the Board shall be subject to approval of the Parties to this Compact and to the availability of funds appropriated by the Parties.

F. Review and Enforcement of Board Decisions.

1. Decisions by the Board shall be effective immediately, unless stayed for a period of time prescribed by the Board. On application of a party within a reasonable time, but in any event no more than ninety days after a decision is rendered, the Board may modify or correct any decision:

(a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the decision;

(b) where the decision is imperfect in a matter of form not affecting the merits of the controversy; or

(c) where the decision requires clarification.

2. Any party before the Board may, within ten days of any final decision, apply to the Board to modify or set aside any aspect of the decision. Notice of such application shall be served personally or by registered mail upon all parties to the proceeding. Any other party shall have ten days within which to respond to the application. The Board shall act on such application within ten days after a response is filed or, if no response is filed, within fifteen days after the application is filed. If the Board fails to act within the time limitations set forth in this paragraph, the application shall be deemed denied. The time for appeal provided in paragraph 3 of this section shall not begin to run until the application is determined as provided in this paragraph.

3. Any party before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty days of such decision. The notice of appeal shall be filed with the Board and served personally or by registered mail upon the Tribes, the State and all parties to the proceeding before the Board, and all such persons shall thereafter have the right to participate in the appeal.

4. In any appeal, the Board's decision shall be presumed to be valid, and may be vacated by the court only on one of the following grounds:

(a) the decision is not supported by substantial evidence;

(b) the decision was procured by corruption, fraud or undue means;

(c) there was evident partiality or corruption by the Board or by any member;

(d) the Board was guilty of misconduct in refusing to hear the dispute, or in refusing to hear evidence pertinent and material to the controversy, or any other clear misbehavior by which the rights of any party have been substantially prejudiced;

(e) the Board exceeded its authority under the terms of this Compact; or

(f) the decision is contrary to law.

5. Unless an appeal is timely filed as provided in paragraph 3 of this section, any decision of the Board shall be confirmed or enforced by any court of competent jurisdiction on petition of the Board, the Tribes, the State or any party before the Board in the proceeding in which the decision was made.

6. A court of competent jurisdiction in which a timely appeal is filed pursuant to paragraph 3 of this section, or in which a petition to confirm or enforce is filed pursuant to paragraph 5 of this section, may order such temporary or permanent relief as it considers just and proper.

7. An appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to paragraph 3 of this section, or in which a petition to confirm or enforce is filed pursuant to paragraph 5 of this section, in the manner and to the same extent as from orders or judgments of the court in a civil action.

8. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court the record of the proceedings before the Board.

G. Waiver of Immunity. The Tribes and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, to permit the appeal or judicial enforcement of Board decisions as provided in this Compact, except that such waivers shall not extend to any action for money damages including costs and attorneys' fees as a result of such judicial action.

## ARTICLE VII

### FINALITY AND EFFECTIVENESS OF COMPACT

A. Ratification. This Compact shall become effective as to both parties when ratified by the Legislature of the State of Montana and the Fort Peck Tribal Executive Board and approved by the United States Departments of Justice and the Interior. Ratification by the State and by the Tribes is irrevocable, and this Compact may not be modified in any manner whatsoever except with the joint consent of the legislative body of both Parties.

B. Incorporation into Decrees and Disposition of Federal Suits.

1. The Parties and the United States shall petition for incorporation of this Compact into the preliminary decrees and final decrees in any state water court proceedings to adjudicate any

right to the use of water to which this Compact pertains, and this Compact may not be modified in any manner whatsoever without the consent of both Parties as provided in section A of this Article. The United States shall not be bound by provisions of this Compact until it is incorporated into the final décret, as provided in this section.

2. This Compact shall only be filed as a proposed consent decree in United States v. Aageson, Civ. No. 79-21-GF (D. Mont.), or United States v. Aasheim, Civ. No. 79-40-BLG (D. Mont.) if there is a final determination by the state courts that they lack jurisdiction over, or that the state proceedings are inadequate to adjudicate, some or all of the water rights asserted in either of the above cases. Upon a final determination that the state courts have jurisdiction over, and that the state proceedings are adequate to adjudicate all of the water rights in the above cases, the United States and the Parties will immediately execute a joint motion pursuant to Rule 41(a) of the Federal Rules of Civil Procedure to dismiss with prejudice and on their merits all claims by the Tribes and the United States on behalf of the Tribes in the pending cases.

#### ARTICLE VIII DISCLAIMERS AND RESERVATION OF RIGHTS

- A. Disclaimers. Nothing in this Compact shall be so construed or interpreted:
1. to establish the nature, extent, transferability, or manner of enforcement of water rights of any Indian reservation other than the Fort Peck Indian Reservation;
  2. to preclude the acquisition or exercise of an appropriative right to the use of water under state law by the Tribes or any individual Indian outside the Reservation by purchase of such right or by purchase of land, or by application to the State;
  3. to preclude the acquisition or exercise of an appropriative right to the use of water under state law by the Tribes or any individual Indian within the Reservation:
    - (a) by purchase of such right or by purchase of land, provided that water rights acquired by such purchase after ratification of this Compact shall be deemed to be an exercise of the Tribal Water Right; or
    - (b) by application to the State, provided that the Tribal Water Right confirmed in Article III has been fully utilized at the time an application is made;
  4. to determine the relative rights inter sese of persons using water under the authority of the State or the Tribes;
  5. to limit in any way the rights of the Parties or any other person to litigate any issues or questions not resolved by this Compact;
  6. to authorize the taking of a water right which is vested under state or federal law;
  7. to create or deny substantive rights through headings or captions used in this Compact;
- or
8. to address or prejudge whether, in any interstate apportionment of the waters of the Missouri River Basin, the Tribal Water Right shall be counted as a part of the waters apportioned to the State.
- B. Reservation of Rights. The Parties expressly reserve all rights not granted, recognized or relinquished in this Compact.

#### ARTICLE IX TRIBAL RELINQUISHMENT OF OTHER WATER CLAIMS

The Tribal Water Right confirmed in Article III shall be final and conclusive. With the exception of the Tribal Water Right recognized herein and rights established under state law as authorized by this Compact, the Tribes and the United States as trustee for the Tribes hereby relinquish forever any and all existing and future claims to water from any source and for any purpose. This relinquishment includes, but is not limited to, any claim for water derived from: aboriginal use of land or water; any Indian treaties; any act of Congress; and any executive act of the United States.

#### ARTICLE X BINDING EFFECT

- A. Persons Bound. Upon the effectiveness of this Compact, its terms will be binding:

1. upon the State and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State of Montana, provided that for purposes of consent, ratification, or authorization the validity of consent, ratification, or authorization is to be determined by Montana law; and

2. upon the Tribes and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the Tribal Water Right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribes, or any right arising under tribal law, provided that for purposes of consent, ratification, or authorization the validity of consent, ratification or authorization is to be determined by Tribal law. Notwithstanding any other provision of law, the Tribal Water Right confirmed in Article III of the Fort Peck-Montana Compact includes conclusively and forever the water rights arising under the laws of the United States of all persons on the Fort Peck Reservation by virtue of the ownership or purchase of any Indian allotment, and the courts of the State shall not have jurisdiction to adjudicate or decree any such right claimed by any such person.

B. Effect on Other Laws. The provisions of the Fort Peck-Montana Compact shall supersede any present or future enactment or common law rule inconsistent with such Compact including but not limited to Montana Code Annotated 28-2-708.

#### ARTICLE XI SEVERABILITY

Should any part of this Compact other than Articles III, IV, VII, or IX be held to be invalid, all other parts thereof shall continue to be in full force and effect. Should any part of Articles III, IV, VII, or IX be held invalid, either party may withdraw from the remaining provisions of this Compact by action of its legislative body taken within one year from the determination of such invalidity.

#### ARTICLE XII LEGISLATION

A. Future legislation. The parties agree to seek enactment of further legislation if it becomes necessary to effectuate the provisions and purposes of this Compact, and to protect such provisions and purposes from challenge and attack, provided that no provisions of the Compact shall be modified as to substance except as provided in Article VII.

B. Petition to Congress.

1. The Parties hereby request the Montana legislature to petition Congress to enact the following legislation in substantially the following form:

"Sec. 2. For purposes of this Act, the term:

(a) "Fort Peck-Montana Compact" means that Compact pertaining to the reserved water rights of the Assiniboine and Sioux Tribes of the Fort Peck Reservation ratified by the legislature of the State of Montana on May 15, 1985 and by the Tribes on April 29, 1985.

(b) "Reservation" means the Fort Peck Indian Reservation as defined in the agreement of December 28 and December 31, 1886, and confirmed by the Act of May 1, 1888, 25 Stat. 113.

(c) "Secretary" means the Secretary of the Interior.

(d) "Tribes" means the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation.

"Sec. 3.

"(a) The Tribes, subject to the approval of the Secretary, may enter into any joint venture, service contract, lease, exchange or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as a "Water Agreement") authorizing the delivery, use or transfer of any part of the water right confirmed in the Tribes by the Fort Peck-Montana Compact for a specified term, not to exceed fifty years, inclusive of all renewal periods. A Water Agreement may authorize the diversion or use of water within or outside the Reservation subject to all terms of the Fort Peck-Montana Compact.

"(b) The Secretary shall approve or disapprove any Water Agreement within (1) one hundred and eighty days after submission or (2) sixty days after compliance, if required, with section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) and any other requirement of federal law, whichever is later. Any party to such an agreement may enforce the provisions of this subsection pursuant to 28 U.S.C. 1361. Notwithstanding any other

law, all projections, studies, data or other information possessed by the Department of the Interior regarding the terms and conditions of the Water Agreement or the financial return to the Tribes, shall be held by the Department of the Interior as privileged proprietary information of the Tribes.

2. The provisions of this Compact shall have no force and effect until the resolution set forth in paragraph 1 of this section is approved by the Montana Legislature and submitted to Congress.

IN WITNESS WHEREOF the representatives of the State of Montana and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have signed this Compact in five original counterparts on the 10th day of April, 1985.

For the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation

.....  
Walter Clark

.....  
Norman Hollow

.....  
Caleb Shields

For the State of Montana  
Montana Reserved Water Rights Compact Commission

.....  
W. Gordon McOmber, Chairman

.....  
Jack E. Galt, Vice Chairman

.....  
William M. Day

.....  
Everett C. Elliott

APPROVED:

.....  
For the Secretary of the Interior

.....  
For the Attorney General of the United States

.....  
History: En. Sec. 1, Ch. 735, L. 1985.

.....  
Daniel O. Kemmis

.....  
A.B. Linford

.....  
Joseph P. Mazurek

.....  
Audrey G. Roth

.....  
Chris D. Tweeten

**Part 3**  
**Northern Cheyenne-Montana Compact**

85-20-301. Northern Cheyenne-Montana compact ratified. The compact entered into by the state of Montana and the Northern Cheyenne tribe of the Northern Cheyenne Indian reservation and filed with the secretary of state of the state of Montana under the provisions of 85-2-702 on May 20, 1991, is ratified. The compact is as follows:

**WATER RIGHTS COMPACT**

STATE OF MONTANA

NORTHERN CHEYENNE TRIBE

UNITED STATES OF AMERICA

This Compact is entered into by and among the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, the State of Montana, and the United States of America to settle, for all time, any and all existing claims of or on behalf of the Northern Cheyenne Tribe to water within the State of Montana.

**RECITALS**

WHEREAS, in 1975, the Northern Cheyenne Tribe and the United States, on behalf of the Tribe, brought suits in the United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights;

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Northern Cheyenne water rights;

WHEREAS, the federal district court suits were stayed in 1983 pending the outcome of Montana State court water adjudication proceedings;

WHEREAS, the adjudication of Northern Cheyenne water rights under state law has been suspended while negotiations have proceeded to conclude a compact resolving all reserved water rights claims of the Northern Cheyenne Tribe;

WHEREAS, the Northern Cheyenne Tribe and the United States agree that the Tribal Water Right described in this Compact shall be in satisfaction of the Tribe's reserved water rights claims and any claims to water rights made on behalf of the Tribe by the United States;

WHEREAS, it is in the best interest of all parties that the reserved water rights claims of the Northern Cheyenne Tribe be settled through a Water Rights Compact;

WHEREAS, the parties agree that settlement of the reserved water rights claims of the Northern Cheyenne Tribe is dependent on the repair and enlargement of the Tongue River Reservoir;

NOW THEREFORE, the parties agree as follows:

**Article I**

**Definitions**

The following definitions shall apply for purposes of this Compact:

1. "Acre-foot" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet.
2. "Alluvial groundwater" means water located below the land surface within the Quaternary hydrostratigraphic unit that borders or underlies major perennial and intermittent streams in the Tongue River and Rosebud Creek basins. This unit is composed of unconsolidated alluvial deposits of clay, silt, sand, and gravel. For the purposes of this Compact, all other water below the land surface will be deemed nonalluvial groundwater.
3. "Annual" or "per year" means during one year as defined by this Compact.
4. "Board" means the Northern Cheyenne-Montana Compact Board established by Article IV of this Compact.
5. "Completion date" means the date of completion of a project to repair and enlarge the Tongue River Dam to a degree sufficient to provide the storage component of the Tribal Water Right subject to the conditions provided in this Compact.
6. "Depletion" means, for any diversion of water, the difference between the quantity of water diverted and the quantity of return flows within the basin.
7. "Direct flow of the Tongue River" means the water in the Tongue River and its tributaries that has not been stored in the Tongue River Reservoir.

8. "Domestic use" means the diversion of water by one or more individuals, family units or households for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.
9. "Excess water" means increases in the Tongue River basin water supply resulting from conditions different from those assumed in the Tongue River Water Model.
10. "Exchange water" means water available to the Tribe from the Tongue River direct flow or from the Tongue River Reservoir storage in exchange for Tribal return flows made available to other Tongue River water users.
11. "Indian" means any person who: a) is an enrolled member of the Northern Cheyenne Tribe; or b) is a member of a tribe that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or c) holds, or is recognized by the Secretary of the Interior as eligible to hold, trust and restricted property on the Northern Cheyenne Reservation.
12. "Manifolded well system" means a water distribution or conveyance facility that is supplied by two or more wells.
13. "Miles City Decree water right" means a water right, finally decreed in any general adjudication of the Tongue River, or recognized under state law until such final adjudication, which is based on the decree entered in Miles City Canal & Irrigating Co. v. Lee et al., Montana Seventh Judicial District, No. 2809; May 20, 1914, and which has a priority date of March 24, 1909, or earlier.
14. "Parties" means the Tribe, the State of Montana, and the United States.
15. "Person" means an individual or any other entity, public or private, including the State, the Tribe, and the government of the United States and all officers, agents, and departments thereof.
16. "Ratification date" means the date this Compact has been approved by the Northern Cheyenne Tribal Council and the Legislature of the State of Montana.
17. "Reservation" means the Northern Cheyenne Reservation as established by Executive Orders of November 26, 1884 and March 19, 1900.
18. "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 State Department of Natural Resources and Conservation or its successor agency.
19. "State contract right" means a right to receive stored water from the Tongue River Reservoir, not to exceed a cumulative total of 40,000 acre-feet per year, pursuant to a contract that allocates the storage rights of the Montana Department of Natural Resources and Conservation or its successor agency.
20. "Tongue River Water Model" means the Tongue River Reservoir Operations computer model that is documented in: Tongue River Modeling Study, Final Report, submitted on July 20, 1990, to the Engineering Bureau of the Water Resources Division of the Montana Department of Natural Resources and Conservation, or any revision agreed to by the parties. The Final Report and any agreed revisions are incorporated herein by reference as though set forth in full.
21. "Transfer" means any authorization for the delivery or use of water from the Tribe or any person authorized by the Tribe to any other person by a service contract, lease, sale, exchange or other similar agreement.
22. "Tribal Water Right" means the right to divert or use water as described by Articles II and III of this Compact.
23. "Tribe" means the Northern Cheyenne Tribe of the Northern Cheyenne Reservation and all officers, agents and departments thereof. Unless otherwise indicated, for purposes of notification or consent, "Tribe" means the Tribal President or the Chief Executive Official of the Tribe.
24. "United States" means the federal government and all officers, agencies, departments and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent, "United States" means the Secretary of the Department of the Interior.
25. "Year" means the twelve-month period beginning April 1st and ending March 31st.

## Article II

### Tribal Water Right

#### A. Quantification of Water Right.

The water rights of the Northern Cheyenne Tribe are as follows:

##### 1. Existing Non-Agricultural Uses.

Tribal and individual Indian stockwater, domestic and municipal water uses on the Reservation and in existence as of the ratification date are hereby recognized and protected as part of the Tribal Water Right, and are in addition to the water rights set forth in Sections A.2., A.3., and A.4. of this Article. All such existing uses shall be governed by the terms of this Compact.

##### 2. Tongue River.

Subject to the terms of this Compact, the Tribal Water Right in the Tongue River basin consists of the right to divert or use or to permit the diversion or use of up to 32,500 acre-feet per year, from a combination of direct flow, storage, and exchange water. Tribal and individual Indian irrigation uses in existence on the Reservation in the Tongue River basin as of the ratification date are recognized and protected, and shall be counted as a use of the 32,500 acre-feet per year right described in Section A.2. of this Article.

a. Direct Flow Right. The Tribe has a right to divert or use or permit the diversion or use of up to 12,500 acre-feet of water per year from direct flow of the Tongue River and its tributaries with a priority date of October 1, 1881; provided, that:

i. The Tribe's annual depletion of its direct flow water right in the Tongue River and its tributaries shall not exceed 75 percent of the amount diverted, or 9,375 acre-feet per year; and

ii. The Tribe's direct flow water right in the Tongue River and its tributaries may not be used in a manner that adversely affects:

A. Miles City Decree water rights, or

B. Water rights from off-Reservation tributaries of the Tongue River, which are finally decreed in any general adjudication of the Tongue River, or are recognized under state law until such final adjudication, and which have a priority date of June 30, 1973 or earlier and are based on the use of an irrigation system in place and not abandoned as of June 30, 1973.

b. Storage and Exchange Water. The Tribe has a right to divert or deplete, or permit the diversion or depletion of, up to 20,000 acre-feet per year from a combination of water stored in the Tongue River Reservoir and exchange water. The availability of the 20,000 acre-feet per year depends, as provided in the Tongue River Water Model, upon the annual schedule utilized by the Tribe for diversions of Tongue River direct flows. Except as provided in paragraph A.2.c.ii. of this Article, any reduction in Tongue River Reservoir stored water resulting from Tribal diversions of Tongue River direct flows shall not affect State contract rights, as defined in this Compact, but shall be satisfied exclusively from the right described in this paragraph. Tribal use of stored water from the Tongue River Reservoir shall be measured at the Reservoir.

##### c. Shortages.

i. The Tribal Water Right in the Tongue River basin shall be subject to shortages due to natural low flows that are consistent with the period of record used in the Tongue River Water Model in diversion amounts not to exceed 50% in any one year and 100% cumulative in any ten-year period.

ii. Decreases in the amount of water stored in the Tongue River Reservoir that are caused by: (i) sedimentation; (ii) Reservoir inflows lower than those assumed in the Tongue River Water Model; (iii) normal and expected maintenance of the Tongue River Dam and associated structures; or (iv) normal and expected deterioration of the Tongue River Dam and associated structures shall not be considered a failure of the Tongue River Dam as that term is utilized in paragraph A.2.f. of this Article. All such decreases in water availability shall be shared pro rata among all users of stored water including the Tribe.

d. Excess Water. The Tribe shall, as part of the Tribal Water Right, have the first right to use excess water, as defined in this Compact; provided, that total use of the Tongue River Tribal Water Right shall not exceed 32,500 acre-feet per year diverted from direct flow, storage, and exchange water. Tribal nonuse of excess water in any one year shall not affect the right of the Tribe to use excess water in any subsequent year.

e. Contract Water. Nothing in this Compact shall affect the water, and any rights therein, secured to the Tribe by Water Purchase Contract No. 232 for 7,500 acre-feet per year, dated March 15, 1938, between the Tongue River Water Users Association, the Water Conservation Board of the State of Montana and the United States, through the Secretary of the Interior. Any water entitlement pursuant to the Contract shall be in addition to and not a part of the 32,500 acre-feet per year Tribal Water Right set forth above.

f. Failure of Tongue River Dam. In the event of a failure of the Tongue River Dam which causes a substantial diminution of the Tribe's storage right set forth in paragraph A.2.b. of this Article, and notwithstanding the provisions of Article V.A. of this Compact, any party may within 180 days of said failure request the others to renegotiate this Compact. The parties shall

have three years from the date of the request to reach a new agreement, during which time all of the provisions in this Compact shall remain in full force and effect. If no party requests renegotiation, or if a new agreement is not reached within three years of the request, the provisions of paragraph A.2.a.ii. of this Article concerning the subordination of the Tongue River direct flow Tribal Water Right to other specified water rights, shall become null and void; provided, that all other provisions of this Compact shall remain in full force and effect. The Tribe shall not be entitled to void or terminate this Compact, or to assert that the State is in breach of the Compact, for a failure of the Tongue River Dam; provided, that any and all other rights of the Tribe arising from such event shall not be affected by this paragraph.

3. Rosebud Creek.
- a. Water Right. The Tribe has a right to divert or use or to permit the diversion or use from Rosebud Creek and its tributaries, for agricultural purposes only, of 1,800 acre-feet of water per year, or enough water to irrigate 600 acres of land per year, whichever is less, with a priority date of October 1, 1881. Tribal and individual Indian irrigation uses in existence as of the ratification date on-Reservation in the Rosebud Creek basin are recognized and protected, and shall be considered a use of the 1,800 acre-feet per year right described in this paragraph.
  - b. Implementation. The Tribe agrees that in the period between May 1, 1991 and July 1, 1993, the Tribe, or persons authorized by it, will develop no more than 200 acres of land in addition to irrigation uses in existence as of May 1, 1991, through irrigation methods involving pumping of alluvial groundwater, except that the Tribe, or persons authorized by it, may develop up to the full 600 acres of land, or any portion thereof, by any other method. During this period, the Tribe and the State agree to share any hydrologic data available for use in connection with any test which the State undertakes to evaluate impacts, if any, of development of on-Reservation lands on off-Reservation lands. After July 1, 1993, the Tribe, or persons authorized by it, may develop the full 600 acres of land by any irrigation method.
  - c. Additional Water Right. In addition to the water right described in paragraph A.3.a. of this Article, the Tribe has a right to divert or use or permit the diversion or use from Rosebud Creek and its tributaries, for any purpose, of up to 19,530 acre-feet of water per year, or enough water to irrigate 6,510 acres of land per year, whichever is less, with a priority date of October 1, 1881. The Tribe may not exercise the water right set forth in this paragraph in a manner that adversely affects a water right finally decreed in any general adjudication of the Rosebud Creek basin or, until such final decree is issued, a water right recognized under state law, which 1) has a priority date of June 30, 1973 or earlier, and 2) is based on the use of an irrigation system in place and not abandoned as of June 30, 1973; provided, that the state law water rights protected in this paragraph shall not exceed:
    - i. North of the Reservation, 8,100 acre-feet of water per year or enough water to irrigate 2,700 acres of land per year, whichever is less; and
    - ii. South of the Reservation, 540 acre-feet of water per year or enough water to irrigate 180 acres of land per year, whichever is less.
  - d. Dams and Impoundments. The Tribe shall not construct, within the Rosebud Creek basin, any dams or impoundments to store water naturally arising in Rosebud Creek and its tributaries; provided, that the Tribe may construct stockwater impoundments pursuant to paragraph A.5. of this Article, and, subject to other applicable provisions of this Compact, may construct dams or impoundments within the Rosebud Creek basin to store water from sources outside the basin, including non-alluvial groundwater.
  - e. Moratorium on Permits. The Montana Department of Natural Resources and Conservation shall order a moratorium on the issuance of permits in the Rosebud Creek basin concurrent with the ratification date of this Compact. The moratorium shall not apply to applications for permits by persons who have entered into deferral agreements with the Tribe for Rosebud Creek basin water as provided in Section G. of this Article. The Department may order the moratorium lifted if it determines that water is available over and above the amount necessary to fulfill the Tribal Water Right described in paragraph A.3.a. and Section A.3.c. of this Article. The Tribe may challenge the Department's determination to lift the moratorium under the procedure set forth in Article IV of this Compact.

4. Groundwater.

a. Alluvial Groundwater. The Tribe has a right to withdraw and use, or permit the withdrawal and use of, alluvial groundwater in lieu of surface water diversions of the Tongue River and Rosebud Creek Tribal Water Right, subject to the same terms and conditions of this Compact that apply to such surface water diversions. Alluvial water withdrawn from wells or manifolded well systems with a capacity of 100 gallons per minute or less shall not be deducted from the Tribal Water Right. For wells or manifolded well systems with a capacity of withdrawing greater than 100 gallons per minute of alluvial water, the entire amount withdrawn shall be deducted from the Tribal Water Right.

b. Non-alluvial Groundwater. Except where a Tribal right to non-alluvial groundwater is established pursuant to Article VII.B. of this Compact, Tribal use or authorization of use of non-alluvial groundwater shall, at the election of the Tribe, comply with state law in effect at the time of the use or with the alluvial groundwater provisions of paragraph A.4.a. of this Article.

5. Stockwater Impoundments. The Tribe may construct, or permit the construction of, stockwater impoundments on the Reservation, where the capacity of the impoundment is less than 15 acre-feet and the impoundment is constructed on a source other than a perennial flowing stream. The amount of water so impounded shall not be deducted from the Tribal Water Right.

6. Subirrigation. The Tribe shall be entitled to take advantage of any natural subirrigation occurring on the Reservation. Where otherwise consistent with state law, persons outside the Reservation shall also be entitled to take advantage of natural subirrigation.

7. Big Horn Reservoir (Yellowtail) Storage.

a. Tribal Allocation. As a part of the Tribal Water Right, the Secretary of the Interior shall allocate 30,000 acre-feet per year of stored water in Big Horn Reservoir, Yellowtail Unit, Lower Bighorn Division, Pick-Sloan Missouri Program, Montana, measured at the dam, for use or disposition by the Tribe for any beneficial purpose, either on or off the Reservation, pursuant to the terms of this Compact. This allocation is subject to the prior reserved water rights, if any, of any Indian tribe, or of persons claiming water through that tribe, to that water. Any use or disposition of water from Big Horn Reservoir off the Reservation by the Tribe is subject to the specific provisions relating to such use or disposition in any act of Congress ratifying this Compact.

b. Payment for Tribal Allocation. The Tribe shall not be required to make payments to the United States for any portion of the Tribal Water Right stored in Yellowtail Reservoir unless and until the water is used or sold by the Tribe in which case the Tribe shall make annual payments to the United States as hereinafter provided.

i. Use or Sale for Municipal and Industrial (M&I) Purposes. For each acre-foot of stored water used or sold for M&I purposes, the Tribe shall pay annually to the United States an amount to cover the proportionate share of the annual operation, maintenance and replacement (OM&R) costs, and the proportionate share of the capital costs with appropriate interest for the Yellowtail Unit allocable to the Tribe's stored water. Upon full payment of the capital costs allocable to the Tribe's stored water supply, the annual payments shall include only a proportionate share of the annual OM&R costs. Such annual payments shall be reviewed and adjusted, as appropriate, to reflect the actual capital and OM&R costs for the Yellowtail Unit.

ii. Agricultural, Domestic, Livestock, and Other Uses. For each acre-foot of stored water used or sold for other than M&I purposes, the Tribe shall pay annually to the United States an amount to cover the OM&R cost for the Yellowtail Unit allocable to the Tribe's stored water, which amount shall be reviewed and adjusted, as appropriate, to reflect the actual OM&R costs for the Yellowtail Unit. The Bureau of Indian Affairs shall transfer sufficient funds on a nonreimbursable basis to the Bureau of Reclamation to cover allocable OM&R costs under this paragraph.

c. Rates and Revenues. Except for payments required to be made to the United States as set forth above, the Tribe shall set such rates as it deems proper for its use or sale of stored water and shall retain all revenues from its use or sale of said stored water; provided, that the United States reserves the right to use any and all water stored in Yellowtail Reservoir for hydropower generation.

d. Agreement. Following ratification of this Compact, and upon development of a demand for the water under Section A.7, of this Article, the United States and the Tribe shall enter into an appropriate agreement, if required, setting forth the terms and conditions under which water will be made available to the Tribe, and for the collection and disposition of revenues in connection therewith.

B. Persons Entitled to Use the Tribal Water Right.

The Tribal Water Right may be used by the Tribe, or persons authorized to use water by the Tribe pursuant to Article III; provided, that:

1. Such use is in accordance with the terms of this Compact;
2. That the Tribe shall give preference to Tribal members to use the Tribal Water Right; and
3. Such water right may be transferred from one Tribal member to another Tribal member for agricultural purposes only upon the transfer of land on the Reservation from one Tribal member to another Tribal member.

C. Place of Use of the Tribal Water Right.

Pursuant to a Tribal water code adopted as prescribed in Article III of this Compact, and subject to all other provisions of this Compact, the Tribe shall have the right to use or permit use of the Tribal Water Right with any point of diversion or any place of use on or off the Reservation; provided, that any use of the Tribal Water Right off the Reservation shall not be deemed to convert the Tribal Water Right to a state water right, and subsequent nonuse of the Tribal Water Right off the Reservation shall not constitute a relinquishment, forfeiture, or abandonment of the Right.

D. Purposes of the Tribal Water Right.

Except as provided in paragraph A.3.a. of this Article, the Tribe may authorize use of the Tribal Water Right on the Reservation for any purpose without regard to whether such use is beneficial as defined by state law. Off the Reservation, any use of the Tribal Water Right shall comply with Article III.B.

E. Conditions Upon Uses of the Tribal Water Right.

The Tribe shall adopt appropriate regulations to ensure that use of the Tribal Water Right is not wasteful and does not degrade water quality.

F. Transfer of Tribal Water Right.

The Tribe shall not transfer water naturally arising in Rosebud Creek or its tributaries for use off the Reservation. The Tribe may transfer any other part of the Tribal Water Right for use on or off the Reservation pursuant to the terms of this Compact. This paragraph shall not affect the right of the Tribe to enter into a deferral agreement regarding Rosebud Creek water pursuant to Section G. of this Article.

G. Deferral Agreements.

After the ratification date, the Tribe may enter into an agreement with any person who is exercising or proposing to exercise a right under state law to use surface water off the Reservation, which agreement protects the person's right from any exercise of the Tribal Water Right; provided, that:

1. Before use of such water, the person shall have complied with all applicable state laws concerning the acquisition of a water right;
2. Subsequent to acquisition of the state water right, regulation of its use shall be subject to state law;
3. The amount of water subject to the agreement shall be deducted from the amount of water available for depletion by the Tribe in the basin from which the water is being diverted; and
4. The agreement shall not permanently alienate the Tribal Water Right or any part thereof.

H. Effect of Non-Use of Tribal Water Right.

Non-use of any part of the Tribal Water Right shall not constitute a relinquishment, forfeiture or abandonment of the Right;

I. Tribal Water Right to be Held in Trust.

The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribe.

## Article III

### Administration of Water Rights

#### A. Tribal Administration.

1. Except as otherwise provided in this Compact, the use of the Tribal Water Right shall be administered by the Tribe, and the Tribe has the final and exclusive jurisdiction to resolve all disputes between users of the Tribal Water Right. Administration and enforcement of the Tribal Water Right shall be pursuant to a water code, which shall be developed and adopted by the Tribe and submitted for approval to the Secretary of the Interior within one year after ratification of this Compact. Pending the adoption and approval of the Tribal water code, the administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior.

2. Within six months after the Tribal water code takes effect, the Tribe shall provide the State with notice of each use of the Tribal Water Right, including uses in existence as of the ratification date of this Compact and those established since that time, which shall show:

- a. The person authorized to make the diversion;
- b. The amount of water authorized to be diverted annually;
- c. The amount of water authorized for annual consumption;
- d. The point of diversion;
- e. The period of use;
- f. The place of use;
- g. The uses for which the water may be diverted; and
- h. The relative priority of the use as against other uses of the Tribal Water Right.

3. The Tribe shall thereafter notify the State within sixty days after the end of each quarter year of all new uses of surface and groundwater authorized by the Tribe during the preceding quarter year and of all new uses of the Tribal Water Right actually commenced during that quarter year. The notice shall be in the same format as that prescribed in Section A.2. of this Article.

4. The Tribe shall provide the State with not less than 180-days written notice prior to the start of construction of any project to divert any portion of the Tribal Water Right from the Big Horn River or the Big Horn Reservoir for use on the Reservation, or from the Tongue River or the Tongue River Reservoir for use on the Reservation in the Rosebud Creek basin. The notice shall describe: any diversion, conveyance and storage facilities; the amounts of water to be diverted and consumed; and the purpose, place, and period of the proposed use. Diversion or use of water from such project may be made only after all permits, certificates, variances or other authorizations described in paragraph B.3. of this Article have been obtained. With respect to any such project or diversion, the State or any affected person may seek such remedies as may be available under federal, state, or tribal law, and nothing in this Compact shall be construed to affect the rights of any party under such law.

#### B. Off-Reservation Uses of the Tribal Water Right.

1. Off-Reservation Uses. Any use of the Tribal Water Right involving a point of diversion or place of use located off the Reservation shall be considered an off-Reservation use; provided, that releases or diversions from Big Horn Reservoir or Tongue River Reservoir for use on the Reservation shall not be considered off-Reservation uses.

2. Subsequent Federal or State Law. All off-Reservation uses of the Tribal Water Right shall comply with the requirements set forth in Section B. of this Article until such time as the statutory or common law of the United States or the State of Montana establishes that off-Reservation uses of Indian water rights may occur without regard to state law.

#### 3. Diversion Facilities.

With respect to diversion or transportation facilities located off the Reservation, the Tribe or persons using the Tribal Water Right shall apply for all permits, certificates, variances and other authorizations required by state laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water. A diversion or use of water in the exercise of the Tribal Water Right may be made only after all permits, certificates, variances or other authorizations applied for pursuant to this paragraph have been obtained.

4. Off-Reservation Uses in Tongue and Rosebud Basins.

a. The Tribe shall provide the State with not less than 180-days advance written notice of any off-Reservation use, transfer, or change of use of the Tribal Water Right:

- i. Within the Tongue River basin, or
- ii. Utilizing Tongue River water off-Reservation in the Rosebud Creek basin.

b. The notice shall include sufficient documentation to demonstrate that:

i. The proposed use of water is a beneficial use as defined by Montana law in effect at that time;

ii. The proposed means of diversion, and the construction and operation of the diversion works are adequate;

iii. The proposed use, transfer, or change of use will not adversely affect, except with the consent of the owner of such right:

A. Any water right arising under the laws of the United States, or

B. Any right to the use of water established pursuant to the laws of the State; except that, if the portion of the Tribal Water Right that is the subject of the proposed off-Reservation use, transfer or change of use is the storage and exchange right set forth in Article II.A.2.b. of this Compact, the Tribe need only demonstrate that Miles City Decree rights will not be adversely affected by such use, transfer, or change of use.

iv. The proposed use, transfer, or change of use does not cause any unreasonable significant adverse environmental impact; and

v. Proposed uses, transfers, or changes in use in excess of 4,000 acre-feet per year and 5.5 cubic feet per second of water will not:

A. Substantially impair the quality of water for existing uses in the source of water from which the diversion is made;

B. Be made where low quality water which can economically be used is legally and physically available to the Tribe for the proposed use;

C. Create or substantially contribute to saline seep; or

D. Substantially injure fish or wildlife populations in the source of water from which the diversion is made.

c. A proposed use, transfer or change of use of the Tribal Water Right pursuant to Section B.4. of this Article may be challenged:

i. Within 30 days after the expiration of the notice period provided in Section B.4.a. of this Article;

ii. In a court of competent jurisdiction; and

iii. By the State or by a person whose rights are adversely affected by the proposed use, transfer, or change of use.

In any such case, the Tribe shall have the burden of proving by a preponderance of the evidence that it has satisfied the requirements of Section B.4.b. of this Article. A Tribal notice that conforms to the requirements of Section B.4.b. of this Article shall be prima facie evidence of its contents.

5. Off-Reservation Uses Outside Tongue and Rosebud Basins.

Except as provided in Section B.4. of this Article, no person may initiate an off-Reservation use, transfer, or change of use of the Tribal Water Right without first applying for and receiving authorization for the use, transfer, or change of use pursuant to Montana law in effect at the time of the application.

C. State Administration.

1. The State shall administer all rights to the use of surface water and groundwater within the Reservation which are not a part of the Tribal Water Right. The State shall have the final and exclusive jurisdiction to resolve all disputes between users of rights established under state law.

2. Within one year after ratification of this Compact, the State shall notify the Tribe of all existing uses of surface and groundwater for which a permit has been issued by the State in the Tongue River or Rosebud Creek basins. The notice shall state:

a. The person authorized to make the diversion;

b. The amount of water authorized to be diverted annually;

- c. The amount of water authorized for annual consumption;
  - d. The point of diversion;
  - e. The period of use;
  - f. The place of use;
  - g. The uses for which the water may be diverted; and
  - h. The priority date of the use.
3. The State shall notify the Tribe within sixty days after the end of each quarter year of all new uses of surface and groundwater for which a permit has been issued by the State in the Tongue River or Rosebud Creek basins during the preceding quarter year and of all new uses of water actually commenced pursuant to the laws of the State during that quarter year on each of these sources. The notice shall be in the same format as that prescribed in Section C.2. of this Article.

**D. Operation of Tongue River Reservoir.**

1. To provide for Tongue River Reservoir operation procedures that are consistent with the purposes of this Compact, a reservoir operation plan shall be developed by a five-member advisory committee. The committee shall have representatives from the State of Montana, the Tongue River Water Users Association, the Northern Cheyenne Tribe, the United States, and a fifth member to be selected by the other four. The advisory committee shall annually agree upon a reservoir operation schedule setting forth proposed uses of storage and direct flow for the year. The Department of Natural Resources and Conservation or its successor shall thereupon be responsible, consistent with the terms of this Compact and other applicable law, for the daily operation of the Reservoir and for implementation of the reservoir operation plan.
2. The reservoir operation plan shall provide for the operation of the project for fish and wildlife purposes depending on the availability of water on an annual basis. This provision shall not create an operational preference for fish and wildlife purposes relative to other project purposes.
3. The Secretary of the Interior shall pay annually to the State an amount to cover the proportionate share of the annual operation, maintenance and replacement (OM&R) costs for the Tongue River Dam allocable to the Tribe's stored water in the Reservoir.

**Article IV**

**Northern Cheyenne-Montana Compact Board**

**A. Establishment of Board.**

There is hereby established the Northern Cheyenne-Montana Compact Board. The Board shall consist of three members: one member appointed by the Governor of the State of Montana; one member appointed by the Northern Cheyenne Tribal Council; and one member selected by the other two members. All members shall be appointed within six months of the ratification date of this Compact and within thirty days of the date any vacancy occurs. Each member shall serve a five-year term and shall be eligible for reappointment. The initial term of each member shall be staggered with one member serving a five-year term, one a four-year term, and one a three-year term. The initial term of each member shall be chosen by lot. Expenses of the members appointed by the State and the Tribe shall be borne by the entity appointing the member. The expenses of the third member and all other expenses shall be borne equally by the Tribe and the State, subject to the availability of funds.

**B. Membership.**

Should the two appointed members fail to agree on the selection of a third member within sixty days of the ratification date of this Compact or within thirty days after any vacancy occurs, the following procedure shall be utilized:

1. Within five days each member shall nominate three persons to serve as a member of the Board;
2. Within fifteen days thereafter each member shall reject two of the persons nominated by the other member;
3. The chief judge of the United States District Court for the District of Montana shall select the third member of the Board from the remaining two nominees. If the chief judge declines for

any reason to select the third member, the chief justice of the Montana Supreme Court shall make the selection from the remaining two nominees.

**C. Quorum and Vote Required.**

Two members of the Board shall constitute a quorum if reasonable notice has been provided in advance to the absent member. All Board decisions shall be by a majority of the Board, shall be in writing and, together with any dissenting opinions, shall be served on all parties in the proceeding before the Board, and on the parties to this Compact.

**D. Jurisdiction of the Board.**

The Northern Cheyenne-Montana Compact Board shall have jurisdiction to resolve controversies over the right to the use of water between users of the Tribal Water Right on the one hand and users of state water rights on the other hand. Such controversies shall include, but shall not be limited to, disputes as to the meaning of this Compact, and disputes concerning the operation of the Tongue River Reservoir as it affects the Tribal Water Right.

**E. Powers and Duties.**

The Board shall hold hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence. The Tribe, the State, and the United States shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribe, the State, or the United States for enforcing a subpoena issued by its courts in a civil action. The parties to the controversy may present evidence and cross examine any witnesses. The Board shall determine the controversy based on the evidence, and grant any appropriate relief, except money damages. All decisions of the Board shall be by majority and in writing. The Board shall adopt necessary rules and regulations to carry out its responsibilities within six months after its first meeting. All records of the Board shall be open to public inspection except for privileged information.

**F. Review and Enforcement of Board Decisions.**

1. Decisions by the Board shall be effective immediately, unless stayed for a period of time prescribed by the Board. Any party before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty days of such decision. The notice of appeal shall be filed with the Board and served personally or by registered mail upon the Tribe, the State, the United States and all parties to the proceeding before the Board, and all such persons shall thereafter have the right to participate in the appeal.

2. In any appeal, the Board's decision shall be presumed to be valid, and may be vacated by the court only on one of the following grounds:

- a. The decision is not supported by substantial evidence;
- b. The decision was procured by corruption, fraud or undue means;
- c. There was evident partiality or corruption by the Board or by any member;
- d. The Board was guilty of misconduct in refusing to hear the dispute, or in refusing to hear evidence pertinent and material to the controversy, or any other clear misbehavior by which the rights of any party have been substantially prejudiced;
- e. The Board exceeded its authority under the terms of this Compact; or
- f. The decision is contrary to law.

3. Unless an appeal is timely filed as provided in paragraph F.1. of this Article, any decision of the Board shall be confirmed or enforced by any court of competent jurisdiction on petition of the Board, the Tribe, the State, the United States, or any party before the Board in the proceeding in which the decision was made.

4. A court of competent jurisdiction in which a timely appeal is filed pursuant to paragraph F.1. of this Article, or in which a petition to confirm or enforce is filed pursuant to paragraph F.3. of this Article, may order such temporary or permanent relief as it considers just and proper.

5. Any appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to paragraph F.1. of this Article, or in which a petition to confirm or enforce is filed pursuant to paragraph F.3. of this Article, in the manner and to the same extent as from orders or judgments of the court in a civil action.

6. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court the record of the proceedings before the Board.

G. Waiver of Immunity.

The Tribe, the United States and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under this Compact by the Northern Cheyenne-Montana Compact Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribe, the United States, or the State shall not extend to any action for money damages including costs and attorneys' fees.

Article V

Finality and Effectiveness of Compact

A. Ratification and Effectiveness of Compact.

1. Upon ratification by the Northern Cheyenne Tribal Council and the Legislature of the State of Montana, the terms of this Compact may not be altered, voided, or modified in any respect without the consent of the parties; provided, that except as set forth in Section A.2. of this Article, this Compact shall not become effective until ratification by the United States Congress and the completion date occurs, notwithstanding the provisions of Section 85-2-702(2), MCA. If the completion date does not occur on or before December 31, 1997, or any later date agreed to in writing by the parties, this Compact, including all provisions that become effective on the ratification date, shall become null and void without further action by any party. Notwithstanding the provisions of Section 85-2-702(3), MCA, this Compact shall not be included in any preliminary decree or final decree in any State water court proceeding unless and until this Compact becomes effective as set forth in this Article.

2. As between the State and the Tribe, all of the provisions of this Compact shall become effective upon the ratification date except insofar as they:

- a. Quantify or provide for the administration of the Tongue River Tribal Water Right;
- b. Provide for the management or operation of the Tongue River Reservoir; or
- c. Require Congressional authorization.

All of the provisions that do not become effective upon the ratification date shall become effective on the completion date, unless Congress provides otherwise.

B. Incorporation Into Decrees and Disposition of Federal Suits.

Within sixty days after the completion date, the parties shall petition for incorporation of this Compact into a decree in any appropriate State court proceeding commenced in accordance with 43 U.S.C. 666. Upon the issuance of a final decree by the State water court, or its successor, and the completion of any direct appeals therefrom, or upon the expiration of the time for filing any such appeal, the United States, the Tribe, and the State shall within thirty days execute and file joint motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss the Tribe's claims, and any claims made by the United States as trustee for the Tribe, in Northern Cheyenne Tribe of the Northern Cheyenne Reservation v. Adsit, et al., No. 75-6-BLG (D. Mont.); United States v. Big Horn Low Line Canal Company, et al., No. 75-34-BLG (D. Mont.); and United States v. Tongue River Water Users Association, et al., No. 75-20-BLG (D. Mont.), (hereinafter collectively referred to as "the federal suits"), with prejudice. This Compact shall be filed as a consent decree in the federal suits only if, prior to the dismissal of the federal suits as provided in this Article, it is finally determined in a judgment binding upon the State of Montana that the State courts lack jurisdiction over, or that the State court proceedings are inadequate to adjudicate, some or all of the water rights asserted in the federal suits.

Article VI

General Provisions

A. Nothing in this Compact shall be so construed or interpreted:

1. To establish the nature, extent, or manner of administration of water rights of any Indian reservation or other federal reservation other than the Northern Cheyenne Reservation;
2. To preclude the acquisition or exercise of a right to the use of water by the Tribe or any individual Indian outside the Reservation by purchase of such right or by acquisition of land, or by application to the State;

3. To preclude the acquisition or exercise of an appropriative right to the use of water under state law by the Tribe or any individual Indian within the Reservation:
  - a. By purchase of such right or by purchase of land; provided, that water rights acquired by such purchase after the ratification date of this Compact shall be in addition to and shall become part of the Tribal Water Right and shall be governed by this Compact; or
  - b. By application to the State. Except for applications for non-alluvial groundwater pursuant to Article II.A.4.b., and applications for storage appropriations authorized by paragraph A.8. of this Article, any such application shall not be granted by the State until the Tribal Water Right in the basin where the diversion that is the subject of the application is located has been fully utilized;
4. To determine the relative rights inter sese of persons using water under the authority of the State or the Tribe;
5. To limit in any way the rights of the parties or any other person to litigate any issues or questions not resolved by this Compact;
6. To authorize the taking of a water right which is vested under state or federal law;
7. To create or deny substantive rights through headings or captions used in this Compact;
8. To preclude or to discourage the Tribe from establishing the right to, or contracting for, water from any further enlargements of the Tongue River Dam, or from any future storage facilities that may be built within the Tongue River or Rosebud Creek basins, or in any other water basins;
9. To address or prejudice whether, in any interstate apportionment, the Tribe's water right shall be counted as part of the waters apportioned to the State; or
10. To alter or amend any provisions of the Yellowstone River Compact, Act of October 30, 1951, ch. 629, 65 Stat. 663 (1951).
11. To prohibit the Tribe or the United States from challenging any claims to water in any general adjudication of the Tongue River or Rosebud Creek basins.
  - B. The parties expressly reserve all rights not granted, recognized or relinquished in this Compact.
  - C. The Secretary of the Interior shall comply with all aspects of the National Environmental Policy Act, 42 U.S.C. 4331-4335, and the Endangered Species Act, 16 U.S.C. 1531, et seq., and other applicable environmental acts and regulations in implementing this Compact.

## Article VII

### Tribal Relinquishment of Other Water Claims

- A. With the exception of the Tribe's claim to non-alluvial groundwater in paragraph B. of this Article and any rights to water which may exist with respect to land held by the Tribe or a Tribal member outside the present Reservation, the Tribe and the United States as trustee for the Tribe hereby relinquish forever any and all claims, in existence on the ratification date of this Compact, to water within the State of Montana. The relinquishment includes, but is not limited to, any claim for water derived from aboriginal use of land or water, any Indian treaties, any Act of Congress, and any executive act of the United States.
- B. The parties intend that the water right as confirmed to the Tribe in Article II is in full satisfaction of its federal reserved water right based on Winters v. United States, 207 U.S. 564 (1908). Notwithstanding the provisions of paragraph A. of this Article, the Tribe retains the right to assert a claim that it has a right, not based on the federal reserved water rights doctrine, to the use of any non-alluvial groundwater underlying the Reservation. In any such action, the Tribe shall be estopped to assert that its right to non-alluvial groundwater is a federal reserved water right, that the Tribal Water Right confirmed in Article II is inadequate to satisfy the purposes for which the Reservation was created, or from collaterally attacking this Compact in any manner. Any right to non-alluvial groundwater established by the Tribe under this paragraph is not subject to this Compact. Nothing in this Compact shall be construed to waive any defenses of the State or any water user to a Tribal claim for non-alluvial groundwater.

Article VIII  
Binding Effect

Upon the effectiveness of any provision of this Compact, its terms will be binding:

A. Upon the State and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State of Montana; provided, that for purposes of consent, ratification, or authorization, the validity of consent, ratification, or authorization is to be determined by Montana law;

B. Upon the Tribe and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the Tribe's water right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribe, or any right arising under tribal law; provided, that for purposes of consent, ratification, or authorization, the validity of consent, ratification or authorization is to be determined by tribal law; and

C. Upon the United States and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State of Montana; provided, that for purposes of consent, ratification, or authorization, the validity of consent, ratification or authorization is to be determined by federal law, and further provided that nothing contained in this Compact affects any claim of any Indian tribe, or of persons claiming water through that tribe, or the right of any Indian tribe, or persons claiming water through that tribe, to pursue a claim to any water from any source based on any theory of right or entitlement.

Article IX  
Contributions to Settlement

A. The United States agrees to provide \$31,500,000 to repair the Tongue River Dam and spillway and to raise the Tongue River Dam spillway crest to secure the Tribe's existing contract water under Article II.A.2.e. and to provide additional storage capacity to secure the Tribe's storage and exchange water right under Article II.A.2.b.

B. The State agrees to provide \$16,500,000 to repair the Tongue River Dam and spillway with the understanding that the State's portion will be paid through a combination of cash and federal loans, in proportions to be agreed upon by the parties.

C. The Provisions of this Article are subject to the separate Letter of Agreement dated April 17, 1991, between the State and the United States explaining in detail the allocation of the costs of the project. The State and the United States will enter into a further agreement providing for the expenditure of the contributions and loans of the United States hereunder.

D. The United States agrees to provide \$10,000,000 for a Tribal Development Fund payable in equal amounts of \$2,000,000 each fiscal year for five years. These funds shall not be distributed on a per capita basis to members of the Tribe and shall only be used for land and natural resources administration, planning and development within the Northern Cheyenne Reservation or for land acquisition by the Tribe within the Northern Cheyenne Reservation.

E. Federal financial contributions to paragraph A of this Article will be budgeted for, subject to the availability of funds, by October 1 of the year following the ratification of this Compact by Congress and the authorization by Congress of the Tongue River Dam project. Federal financial contributions to paragraph D of this Article will be budgeted for, subject to the availability of funds, by October 1 of the second year following the ratification of this Compact by Congress and the authorization by Congress of the Tongue River Dam project.

F. The Tribe and the United States agree to pursue through the normal Bureau of Indian Affairs and Department of the Interior budget process such additional sums as are necessary to implement the terms of this Compact, to develop a Tribal water code, and to provide increased agricultural development on the Reservation. The State agrees to support the efforts of the Tribe and the United States in this regard.

Article X

Legislation

The Parties agree to seek enactment of any legislation necessary to effectuate the provisions and purposes of this Compact, and to defend the provisions and purposes of this Compact from all challenges and attacks; provided, that no provision of the Compact shall be modified as to substance except as may be provided herein.

IN WITNESS WHEREOF the representatives of the State of Montana, the Northern Cheyenne Tribe, and the United States have signed this Compact on the 11th day of June, 1991.

FOR THE STATE OF MONTANA

MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

.....  
Jack E. Galt, Chairman

.....  
Gene J. Etchart

.....  
Chris D. Tweeten, Vice Chairman

.....  
Dennis Iverson

.....  
Carl M. Davis

.....  
Senator Joseph P. Mazurek

.....  
Everett C. Elliott

.....  
Gordon McOmber

.....  
Gary L. Spaeth

FOR THE NORTHERN CHEYENNE TRIBE

.....  
FOR THE SECRETARY OF  
THE INTERIOR

.....  
FOR THE UNITED STATES ATTORNEY  
GENERAL

.....  
History: En. Sec. 1, Ch. 812, L. 1991.

85-20-302. Consent to federal act and modification of compact. (1) Pursuant to Article V, section A.1., of the Northern Cheyenne-Montana Compact, section 85-20-301, MCA, the Legislature hereby gives its consent to, ratifies, and adopts the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (Public Law 102-374, 106 Stat. 1186). This consent includes:

(a) any amendment to the act that clarifies that environmental compliance costs for the Tongue River Dam Project are the responsibility of the federal government; or

(b) any amendment to section 4(c) of the act that provides that, except for the authorizations contained in subsections 7(b)(1)(A), 7(b)(1)(B), and 7(e), the authorization of appropriations in the act are not effective until such time as the Montana water court enters and approves a decree as provided in subsection 4(d) of the act.

(2) The provisions of the compact that are inconsistent with the federal act or with the amendments specified in subsections (1)(a) and (1)(b) of this section shall be deemed to be modified to the extent necessary to conform therewith.

History: En. Sec. 1, Ch. 7, Sp. L. November 1993.

**Part 6**  
**Chippewa Cree Tribe-Montana Compact**

85-20-601. Chippewa Cree Tribe-Montana compact ratified. The compact entered into by the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation and filed with the Secretary of State of the State of Montana under the provisions of 85-2-702 on April 15, 1997, is ratified. The compact is as follows:

**WATER RIGHTS COMPACT**

**STATE OF MONTANA**

**CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION**

**UNITED STATES OF AMERICA**

This Compact is entered into by and among the State of Montana, the Chippewa Cree Tribe of the Rocky Boy's Reservation, and the United States of America for the purpose of settling any and all existing water rights claims of the Chippewa Cree Tribe in the State of Montana.

**ARTICLE I - RECITALS**

WHEREAS, in 1979, the United States, on behalf of the Chippewa Cree Tribe of the Rocky Boy's Reservation, brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights claims, *see, United States v. Aageson*, No. CIV-79-21-GF (filed April 5, 1979); and

WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America in trust for the Tribe; *see, "the McCarran Amendment"*, 43 U.S.C. 666 (1952); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Chippewa Cree tribal water rights; and

WHEREAS, the United States has filed claims on behalf of the Chippewa Cree Tribe in the general stream adjudication initiated by the State of Montana; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes or on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the federal district court litigation was stayed in 1983 pending the outcome of Montana State court water adjudication proceedings, *see, 721 F.2d 1189*; and

WHEREAS, the adjudication of Chippewa Cree tribal water rights in the state court proceedings has been suspended while negotiations are proceeding to conclude a compact resolving all water rights claims of the Chippewa Cree Tribe within the State of Montana; and

WHEREAS, the Chippewa Cree Business Committee, or its duly designated representatives, have authority to negotiate this Compact pursuant to 1(a), of Article VI of the Tribal Constitution; and

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. Sections 516-17 (1993); and

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 the Interior pursuant to 43 U.S.C. Section 1457 (1986), *inter alia*; and

WHEREAS, the Chippewa Cree Tribe, the State of Montana, and the United States agree that the Tribal Water Right described in this Compact shall be in satisfaction of the Tribe's water rights claims within the State of Montana; and

WHEREAS, it is in the best interest of all parties that the water rights claims of the Chippewa Cree Tribe be settled through agreement between and among the Tribe, the State of Montana, and the United States;

NOW THEREFORE, the parties agree to enter into this Compact for the purpose of settling the water rights claims of the Chippewa Cree Tribe within the State of Montana.

## ARTICLE II - DEFINITIONS

The following definitions shall apply for purposes of this Compact:

1. "Acre-foot" or "AF" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43560 cubic feet.
2. "Adverse effect" means an interference with the reasonable exercise of a water right.
3. "Acre feet per year" or "AFY" means the quantity of water to which the Tribe has a right each year measured in acre feet over a period of a year.
4. "Ancestral Missouri River Channel Aquifer" means that material deposited by the Missouri River prior to Pleistocene glaciation, and glacial deposits underlying post-glacial alluvial deposits in the River valley that are sufficiently permeable to conduct groundwater and to yield water to wells. This aquifer is located in the valley of Big Sandy Creek at a depth of 150 feet or more beneath the surface of the ground as shown in Appendix 11 and described in USGS Water Supply Paper 1460-B, Swenson, Frank, "Geology and Ground-Water Resources of the Lower Marias Irrigation Project Montana," (1957).
5. "Beaver Creek Drainage" means Beaver Creek and its tributaries from its headwaters to the confluence with the Milk River, as shown in Appendices 5 and 6.
6. "Big Sandy Creek Basin" means the mainstem of Big Sandy Creek and its tributaries (exclusive of Sage Creek and Lonesome Lake) in Water Court Basin 40H from the headwaters to the confluence with the Milk River, as shown in Appendices 5 and 6.
7. "Board" means the Chippewa Cree - Montana Compact Board established by Section D. of Article IV of this Compact.
8. "Bonneau Reservoir" means the water impoundment as shown in Appendix 6, including the existing storage capacity and the proposed expanded storage capacity, and for which a water right is described in Article III of this Compact.
9. "Box Elder Creek Drainage" means the sub-basin of Big Sandy Creek Basin containing the reach of Box Elder Creek from its headwaters to its confluence with Big Sandy Creek, as shown in Appendix 6.
10. "Brown's Reservoir" means the proposed water impoundment as shown in Appendix 6, including the existing storage capacity and the proposed expanded storage capacity, and for which a water right is described in Article III of this Compact.
11. "Bypass" means the designated streamflow around or through a diversion.
12. "Camp Creek Drainage" means the sub-basin of Big Sandy Creek Basin containing the reach of Camp Creek from its headwaters to its confluence with Duck Creek, as shown in Appendix 6.
13. "Change in use" means a change in the point of diversion, the place of use, the purpose of use, or the place or means of storage.
14. "Consumptive use" means use of water other than a "non-consumptive use" as defined in this Article.
15. "Continuously store" or "continuous storage" means the right to fill and then continually refill the active storage capacity of an impoundment from the natural flow of the source on which the impoundment is located.
16. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor agency.
17. "Drainage Stipulation" means an agreement entered into between and among the Tribe, the United States acting in its capacity as trustee for the Tribe, and one or more signatory non-tribal water users for entry as a stipulation in Montana Water Court. Drainage stipulations are set forth in Appendix 2.
18. "Drainage of Origin" means the drainage in which the water initially arises. See Appendix 6 showing drainage area boundaries.
19. "Duck Creek Drainage" means the sub-basin of Big Sandy Creek Basin containing the reach of Duck Creek from its headwaters to its confluence with Big Sandy Creek, as shown in Appendix 6.
20. "East Fork Reservoir" means the proposed water impoundment as shown in Appendix 6, including the existing storage capacity and the proposed expanded storage capacity, and for which a water right is described in Article III of this Compact.
21. "Evaporative Loss" means reduction in the quantity of water due to the process of evaporation and shall be three (3) acre feet per surface acre rounded off as set forth in Article III.
22. "Fish and Wildlife Enhancement" means the use of water to improve existing habitat for fish and wildlife use, protection, conservation or management through physical or operational modifications of impoundments, within the areas designated in Appendix 4.
23. "Gorman Creek Drainage" means the sub-basin of Big Sandy Creek Basin containing the

reach of Gorman Creek from its headwaters to its confluence with Big Sandy Creek, as shown in Appendix 6.

24. "Gravel Coulee Drainage" means the sub-basin of Big Sandy Creek Basin containing the reach of Gravel Coulee from its headwaters to its confluence with Big Sandy Creek, as shown in Appendix 6.

25. "Groundwater" means any water that is beneath the ground surface.

26. "Hydrologically Connected" means the interconnection of groundwater and surface water such that they constitute one water supply and use of either results in an impact to both.

27. "Lake Elwell" means the water impounded on the Marias River by Tiber Dam.

28. "Lonesome Lake Coulee" means the mainstem of Lonesome Lake Coulee and its tributaries in Water Court Basin 40H from its headwaters to its confluence with Big Sandy Creek, as shown in Appendices 5 & 6.

29. "Lower Big Sandy Creek Drainage" means the sub-basin of Big Sandy Creek Basin containing the reach of Big Sandy Creek below its confluence with Box Elder Creek as shown in Appendix 6.

30. "Minimum Pool" means the quantity of water in an impoundment, as measured in acre-feet, or by the water surface elevation in feet above sea level, that is not available for release for designated water uses.

31. "MR&I Water" means water for use for municipal, rural, industrial, domestic, and incidental drought relief purposes on the Reservation.

32. "Municipal/Domestic Uses" means water for domestic, public, commercial and industrial uses.

33. "Net Depletion" means the difference between the quantity of water diverted from a source and the quantity of water returned to the same source at or near the point of diversion.

34. "New reserved water rights" means any reserved water rights created with acquisition of land by the Tribe or the United States to be held in trust by the United States for the Tribe, after the date of ratification of this Compact by the State and the Tribe, whichever is later.

35. "Non-consumptive use" means a use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream or groundwater conditions.

36. "Non-Irrigation Water Uses" means the use of water for purposes other than the production of agricultural commodities, such as, but not limited to domestic, livestock, fish and wildlife, and recreational uses, including development of golf courses.

37. "Parties" means the Tribe, the State of Montana, and the United States.

38. "Person" means an individual or any other entity, public or private, including the State, the Tribe and the government of the United States and all officers, agents, and departments thereof.

39. "Ratification date" means the date on which the Compact is finally approved by the Business Committee of the Chippewa Cree Tribe, by the Montana Legislature, and by the Congress of the United States, whichever date is latest.

40. "Recognized under state law" when referring to a water right means a water right arising under state law, but does not include water rights arising under federal law.

41. "Release" means (verb) to discharge water from storage, or (noun) the discharge of water from storage.

42. "Reservation" means the Rocky Boy's Reservation and includes all lands and interests in lands which are held in trust by the United States for the Chippewa Cree Tribe, including future additions to the Reservation.

43. "Sage Creek" means the main stem of Sage Creek and its tributaries in Water Court Basin 40G from the headwaters to the confluence with Big Sandy Creek, as shown in Appendices 5 and 6.

44. "Secretary" means the Secretary of the United States Department of the Interior, or his or her duly authorized representative.

45. "Shallow Alluvium Aquifer" means the material deposited by flowing water generally during, or after Pleistocene glaciation that is sufficiently permeable to conduct groundwater and to yield water to wells and springs.

46. "State" means the state of Montana and all officers, agents, departments, and political subdivisions thereof.

47. "Stockwatering" means the storage and use of water for the purpose of providing water to domesticated animals and wildlife.

48. "Stoneman Farms" means the tribal agricultural projects shown in Appendix 6.

49. "Stoneman Reservoir" means the water impoundment, as shown in Appendix 6, including the existing storage capacity and the proposed expanded storage capacity, and for which a water right is described in Article III of this Compact.

50. "Subordinate" means to rank the priority in which a water right is fulfilled behind other specified water rights without regard to relative priority dates.
51. "Supplemental Irrigation Water" means water used for irrigation, as a secondary supply, once it becomes apparent that the primary supply will be unable to meet the full annual demand.
52. "Surface Acres" means the horizontal area in acres associated with the water surface in an impoundment when filled to the maximum capacity.
53. "Transfer" means (verb) to authorize a person to use all or any part of the Tribal Water Right through a service contract, lease, or other similar agreement of limited duration; (noun) a service contract, lease, or other similar agreement of limited duration authorizing the use of all or any part of the Tribal Water Right.
54. "Tribal Water Resources Department" or "TWRD" means the Chippewa Cree Tribal Water Resources Department, or any successor agency.
55. "Tribal Water Right" means the right of the Chippewa Cree Tribe of the Rocky Boy's Reservation to divert, use, or store water as described by Article III of this Compact.
56. "Tribe" means the Chippewa Cree Tribe of the Rocky Boy's Reservation and all officers, agents and departments thereof.
57. "United States" means the federal government and all officers, agencies, departments, and political subdivisions thereof.
58. "Upper Big Sandy Creek Drainage" means the sub-basin of Big Sandy Creek Basin containing the reach of Big Sandy Creek from its headwaters to its confluence with Box Elder Creek, as shown in Appendix 6.
59. "Volcanic Bedrock Aquifer" means those Tertiary igneous rock units that are sufficiently permeable to conduct groundwater and to yield water to wells and springs as shown in USGS Miscellaneous Geologic Investigations Map I-234, "Preliminary General Geologic Map of the Laredo Quadrangle, Bearpaw Mountains, Montana," and Map I-235, "Preliminary Geologic Map of the Centennial Mountain Quadrangle, Bearpaw Mountains, Montana," and shown as surface outcrop in Appendix 11.

#### ARTICLE III - TRIBAL WATER RIGHT

- A. Basin 40H: Big Sandy Creek Basin.
1. Gravel Coulee/Lower Big Sandy Creek Drainages - 1690 AFY diversion - 1000 AF continuous storage.
- a. Quantification - Source - Volume.
- (1) Storage. The Tribe shall have the right to continuously store or permit the continuous storage of up to a capacity of 1000 AF of water in Stoneman Dam and Reservoir from the natural flow of Gravel Coulee. Subject to the 1000 AF limit on storage capacity, the Tribe shall have the additional right to divert up to 1480 AFY from the direct flow of Lower Big Sandy Creek and up to 445 AFY from groundwater for storage in Stoneman Dam and Reservoir as set forth in Section A.1.a.(2) of Article III. The quantity impounded by continuous storage shall not decrease the 1480 AFY which the Tribe may divert for the purposes allowed in Section A.1.e. of Article III. In addition to the storage right set forth in this section, the Tribe shall have the right to store water for stockwatering and fish and wildlife purposes, as set forth in Sections A.1.e.(3) and (4) of Article III.
- (2) Diversion. The Tribe shall have the right to divert or use or permit the diversion or use of 1690 AFY of water from the following sources where they occur on the Reservation in any combination up to the limits on each source and the total limit of 1690 AFY:
- (a) Direct Flow. The Tribe shall have the right to divert or use or permit the diversion or use of up to 1690 AFY from the direct flow of Gravel Coulee and Lower Big Sandy Creek and its tributaries. 1480 AFY of the water from direct flow may be diverted to storage prior to application to any purposes allowed in Section A.1.e. of Article III without reducing the amount that can be applied to such purposes until such water is re-diverted from storage and applied to such purposes.
- (b) Storage. Of the 1690 AFY, the Tribe shall have the right to divert 1480 AFY from storage in Stoneman Reservoir for irrigation and non-irrigation purposes as more specifically provided in Sections A.1.e.(1) and (2) of Article III; provided that, the right to divert 1480 AFY from Lower Big Sandy Creek to storage is not reduced by the amount of water diverted for irrigation or non-irrigation purposes from water derived from storage.
- (c) Groundwater. Of the 1690 AFY, the Tribe shall have the right to withdraw and use or permit the withdrawal and use of up to 445 AFY of groundwater in the Gravel Coulee and Lower Big Sandy Creek drainages in compliance with Sections A.6.a. and b. of Article IV. Groundwater may be diverted to storage prior to application to any purposes allowed in Section A.1.e. of Article III without reducing the amount that can be applied to such purposes until such water is re-diverted from storage and applied to such purposes.

(i) Of the 445 AFY, 100 AFY may be appropriated from the shallow alluvium along Gravel Coulee and Lower Big Sandy Creek.

(ii) Of the 445 AFY, 345 AFY may be appropriated from the Ancestral Missouri River Channel Aquifer in the Gravel Coulee and Lower Big Sandy Creek drainages. Groundwater from the Ancestral Missouri River Channel Aquifer is a primary source for non-irrigation uses; provided that, the non-irrigation uses do not result in discharge of untreated water to land or surface water. Groundwater from the Ancestral Missouri River Channel Aquifer is a supplemental source for irrigation uses.

b. Priority Date. The water rights to surface flow, groundwater, and storage as set forth in Section A.1. of Article III, for the Gravel Coulee and Lower Big Sandy drainages shall have a priority date of September 7, 1916, subject to the subordination agreements set forth in Section A.8. of Article IV, and the drainage stipulations set forth in Appendix 2.

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

d. Points and means of diversion. Subject to the terms and conditions set forth in Article IV, the Tribe may divert or permit the diversion of this water right from any place and by any means on Lower Big Sandy Creek and Gravel Coulee drainages on the Reservation.

e. Purposes. The Tribe's right to 1690 AFY from the Gravel Coulee and Lower Big Sandy drainages may be used for the following purposes; provided that, subject to the limitations set forth in Article IV, the Tribe may make a change in use or transfer of the water identified for irrigation and non-irrigation purposes.

(1) Irrigation.

(a) Volume. 1380 AFY of water in Gravel Coulee and Lower Big Sandy Creek drainages may be used for irrigation.

(b) Source. The 1380 AFY for irrigation may come from a combination of direct flow, storage and groundwater in the Gravel Coulee and Lower Big Sandy drainages.

(c) Place of use. The 1380 AFY may be used to irrigate 540 acres at Stoneman Farms on the Reservation.

(2) Non-Irrigation.

(a) Volume. 100 AFY of water in Gravel Coulee and Lower Big Sandy Creek drainages may be used for non-irrigation purposes.

(b) Source. The 100 AFY for non-irrigation purposes may come from a combination of direct flow, storage, and groundwater in the Gravel Coulee and Lower Big Sandy drainages.

(c) Point of diversion. The 100 AFY for non-irrigation purposes may be diverted on the Reservation within the Lower Big Sandy and Gravel Coulee drainages.

(3) Stockwatering - Evaporative Loss. Use of the Tribal Water Right for stockwatering in Gravel Coulee and Lower Big Sandy Creek drainages is a consumptive use. The Tribe may not make a change in use or transfer of the water right for stockwatering; provided that, the Tribe may repair or relocate an impoundment for stockwatering within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 160 AFY of water in Gravel Coulee and Lower Big Sandy Creek drainages may be used for stockwatering as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 40 surface acres of impoundments on Lower Big Sandy drainage and 13 surface acres of impoundments on Gravel Coulee drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source.

i. Of the 160 AFY, 120 AFY for stockwatering may come from the direct flow of Lower Big Sandy Creek.

ii. Of the 160 AFY, 40 AFY for stockwatering may come from the direct flow of Gravel Coulee.

iii. Water for stockwatering may not be diverted from a perennial stream for off-stream storage other than for a lined storage facility with a capacity of less than 0.5 AF.

(c) Place of use. The Tribal Water Right for stockwatering in the Gravel Coulee and Lower Big Sandy Creek drainages may be used in the drainage of origin, on the Reservation. The current stockwater impoundments are shown in Appendix 7.

(4) Fish and Wildlife Enhancement - Evaporative Loss. Use of the Tribal Water Right for fish and wildlife enhancement in Gravel Coulee and Lower Big Sandy Creek drainages is a consumptive use. The Tribe may not make a change in use or transfer of the Tribal Water Right

for fish and wildlife enhancement; provided that, the Tribe may repair or relocate an impoundment for fish and wildlife enhancement within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 50 AFY of water may be used for fish and wildlife enhancement as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 16 surface acres of impoundments in the Gravel Coulee and Lower Big Sandy Creek drainages. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 50 AFY for fish and wildlife enhancement may come from the direct flow of Gravel Coulee and Big Sandy Creek.

(c) Place of use. The Tribal Water Right for fish and wildlife enhancement may be used in the areas shown in Appendix 4 in the Gravel Coulee and Big Sandy Creek drainages, in the respective drainages of origin.

2. Box Elder Creek Drainage - 6940 AFY diversion - 4800 AF continuous storage.

a. Quantification - Source - Volume.

(1) Storage. The Tribe shall have the right to continuously store, or permit the continuous storage in Bonneau Reservoir, Brown's Reservoir, and in any new impoundments, of up to a capacity of 4800 AF from the natural flow of Box Elder Creek, or any natural flow from the source on which the impoundment is located. Subject to the 4800 AF limit on storage capacity, the Tribe shall have the additional right to divert up to 6310 AFY from the direct flow of Box Elder Creek for storage in Brown's Reservoir and in any new impoundments not located on Box Elder Creek and to divert 1950 AFY from groundwater for storage in any new or existing impoundment wherever located, as set forth in Section A.2.a.(2) of Article III. The quantity impounded by continuous storage shall not decrease the 6310 AFY, which the Tribe may divert for the purposes allowed in Section A.2.e. of Article III. In addition to the storage right set forth in this section, the Tribe shall have the right to store water for stockwatering and fish and wildlife enhancement purposes as set forth in Sections A.2.e.(4) and (5) of Article III.

(2) Diversion. The Tribe shall have the right to use or permit the use of 6940 AFY of water from the following sources where they occur on the Reservation in any combination up to the limits on each source and the total limit of 6940 AFY:

(a) Direct Flow. Of the 6940 AFY, the Tribe shall have the right to divert or use or permit the diversion or use of up to 6590 AFY from Box Elder Creek and its tributaries. 6310 AFY of the water from direct flow may be diverted to storage prior to application to any purposes allowed in Section A.2.e. of Article III without reducing the amount that can be applied to such purposes until such water is re-diverted from storage and applied to such purposes:

(b) Storage. Of the 6940 AFY, the Tribe shall have the right to divert a total of 6310 AFY from storage in one or more of the following reservoirs: Bonneau Reservoir, Brown's Reservoir, and any new impoundments for irrigation and non-irrigation purposes. The right to divert 6310 AFY from Box Elder Creek to storage is not reduced by the amount of water diverted for irrigation or non-irrigation purposes from water derived from storage.

(c) Groundwater. Of the 6940 AFY, the Tribe shall have the right to withdraw and use or to permit the withdrawal and use of up to 1950 AFY of groundwater in the Box Elder Creek drainage in compliance with Sections A.6.a. and b. of Article IV. Groundwater may be diverted to storage prior to application to any purposes allowed in Section A.2.e. of Article III without reducing the amount that can be applied to such purposes until such water is re-diverted from storage and applied to such purposes.

(i) Of the 1950 AFY, 180 AFY may be appropriated from the shallow alluvium in the Box Elder Creek drainage.

(ii) Of the 1950 AFY, 230 AFY may be appropriated from the volcanic bedrock in the Box Elder Creek drainage.

(iii) Of the 1950 AFY, 1570 AFY may be appropriated from the Ancestral Missouri River Channel Aquifer; provided that, should water be imported to the Reservation, the entire 1950

AFY may be appropriated from the Ancestral Missouri River Channel Aquifer. Water from the Ancestral Missouri River Channel Aquifer is a primary source for non-irrigation uses; provided that, the non-irrigation uses do not result in discharge of untreated water to land or surface water. Groundwater from the Ancestral Missouri River Channel Aquifer is a supplemental source for irrigation uses.

b. Priority Date. The water rights to surface flow, groundwater, and storage, as set forth in Section A.2. of Article III, for the Box Elder Creek drainage, including water supplied by Box Elder Creek for off-stream storage, shall have a priority date of September 10, 1888, subject to the subordination agreements set forth in Section A.8. of Article IV, and the drainage stipulations set forth in Appendix 2.

c. Period of use. The period of use of this water right shall be from January 1 through December 31 of each year.

d. Points and Means of diversion. Subject to the terms and conditions set forth in Article IV, the Tribe may divert or permit the diversion of this water right from any place and by any means in the Box Elder Creek drainage on the Reservation.

e. Purposes. The Tribe's right to 6940 AFY in the Box Elder Creek drainage may be used for the following purposes; provided that, subject to the limitations set forth in Article IV, the Tribe may make a change in use or transfer of the water identified for irrigation, non-irrigation and municipal/domestic purposes.

(1) Irrigation.

(a) Volume. 6280 AFY of water in the Box Elder Creek drainage may be used for irrigation.

(b) Source. The 6280 AFY for irrigation may come from a combination of direct flow, storage and groundwater. Water from the Ancestral Missouri River Channel Aquifer is a primary source for non-irrigation uses; provided that, the non-irrigation uses do not result in discharge of untreated water to land or surface water. Groundwater from the Ancestral Missouri River Channel Aquifer is a supplemental source for irrigation uses.

(c) Place of use. The 6280 AFY may be used to irrigate 1930 acres at the Stoneman Farms on the Reservation.

(2) Non-Irrigation.

(a) Volume. 30 AFY of water in the Box Elder Creek drainage may be used for non-irrigation purposes.

(b) Source. The 30 AFY for non-irrigation purposes may come from direct flow, storage, or groundwater or a combination thereof in the Box Elder Creek drainage. The 30 AFY for non-irrigation use may be developed from either the shallow alluvium or volcanic bedrock aquifers.

(3) Municipal/Domestic.

(a) Volume. 350 AFY of water in the Box Elder Creek drainage may be used for municipal/domestic purposes.

(b) Source. The 350 AFY for municipal/domestic purposes may come from the following sources:

i. 150 AFY from the shallow alluvium adjacent to Box Elder Creek.

ii. 200 AFY from the volcanic bedrock.

(4) Stockwatering - Evaporative Loss. Use of the Tribal Water Right set forth for stockwatering in the Box Elder Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the water right for stockwatering; provided that, the Tribe may repair or relocate an impoundment for stockwatering within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 130 AFY of water may be used for stockwatering as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 44 surface acres of impoundments in Box Elder Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 130 AFY for stockwatering may come from the direct flow of Box Elder Creek. Water for stockwatering may not be diverted from a perennial stream for off-stream storage other than for a lined storage facility with a capacity of less than 0.5 AF.

(c) Place of use. The Tribal Water Right for stockwatering in the Box Elder Creek drainage may be used in the drainage of origin, on the Reservation. The current stockwater impoundments are shown in Appendix 7.

(5) Fish and Wildlife Enhancement - Evaporative Loss. Use of the Tribal Water Right for fish and wildlife enhancement in the Box Elder Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the Tribal Water Right for fish and wildlife enhancement; provided that, the Tribe may repair or relocate an impoundment for fish and wildlife enhancement within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 150 AFY of water may be used for fish and wildlife enhancement as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 50 surface acres of impoundments in Box Elder Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 150 AFY for fish and wildlife enhancement may come from the direct flow of Box Elder Creek and its tributaries.

(c) Place of use. The Tribal Water Right for fish and wildlife enhancement may be used in the areas shown in Appendix 4 in the Box Elder Creek drainage, in the drainage of origin.

### 3. Camp Creek and Duck Creek Drainages - 280 AFY diversion.

a. Quantification - Source, Volume. The Tribe shall have the right to use or permit the use of 280 AFY of water from the following sources where they occur on the Reservation in any combination up to the limits on each source and the total limit of 280 AFY:

(1) Direct Flow. Of the 280 AFY, the Tribe shall have the right to divert or use or permit the diversion or use of up to 230 AFY from Duck and Camp Creeks and their respective tributaries in the following proportions:

(a) 170 AFY from Duck Creek.

(b) 60 AFY from Camp Creek.

(2) Storage. The Tribe shall have the right to store water for stockwatering and fish and wildlife enhancement purposes as set forth in Sections A.3.e.(2) and (3) of Article III.

(3) Groundwater. Of the 280 AFY, the Tribe shall have the right to withdraw and use or permit the withdrawal and use of up to 50 AFY of groundwater in the Camp and Duck Creek drainages on the Reservation, including groundwater that is hydrologically connected to surface water, in compliance with Sections A.6.a. and b. of Article IV. This right shall be exercised in the following proportions:

(a) 40 AFY from Duck Creek.

(b) 10 AFY from Camp Creek.

b. Priority Date. The water rights to surface flow, groundwater, and storage, as set forth in Section A.3. of Article III, for the Camp and Duck Creek drainages shall have a priority date of September 7, 1916, subject to the subordination agreements set forth in Section A.8. of Article IV, and the drainage stipulations set forth in Appendix 2.

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

d. Points and means of diversion. Subject to the terms and conditions set forth in Article IV, the Tribe may divert or permit the diversion of this water right from any place and by any means in the Camp Creek and Duck Creek drainages on the Reservation.

e. Purposes. The Tribe's right to 280 AFY in the Camp and Duck Creek drainages may be used for the following purposes; provided that, the Tribe may not make a change in use or transfer that results in a change in the place of use, point of diversion or place or means of storage to a place outside the drainage of origin or to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized

under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(1) Non-Irrigation.

(a) Volume. 50 AFY of water in the Camp and Duck Creek drainages may be used for non-irrigation purposes.

(b) Source. The 50 AFY for non-irrigation purposes may come from groundwater including groundwater that is hydrologically connected to surface water in the Camp and Duck Creek drainages.

(c) Place of use. The Tribal Water Right for non-irrigation purposes in Camp and Duck Creek drainages may be used in the drainage of origin on the Reservation.

(2) Stockwatering - Evaporative Loss. Use of the Tribal Water Right for stockwatering in Camp and Duck Creek drainages is a consumptive use. The Tribe may not make a change in use or transfer of the water right for stockwatering; provided that, the Tribe may repair or relocate an impoundment for stockwatering within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 130 AFY of water may be used for stockwatering as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 19 surface acres of impoundments in the Camp Creek drainage and 23 surface acres of impoundments on Duck Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source.

i. Of the 130 AFY, 60 AFY for stockwatering may come from the direct flow of Camp Creek.

ii. Of the 130 AFY, 70 AFY for stockwatering may come from the direct flow of Duck Creek.

iii. Water for stockwatering may not be diverted from a perennial stream for off-stream storage other than for a lined storage facility with a capacity of less than 0.5 AF.

(c) Place of use. The Tribal Water Right for stockwatering in the Camp and Duck Creek drainages may be used in the drainage of origin on the Reservation. The current stockwater impoundments are shown in Appendix 7.

(3) Fish and Wildlife Enhancement - Evaporative Loss. Use of the Tribal Water Right for fish and wildlife enhancement in the Camp and Duck Creek drainages is a consumptive use. The Tribe may not make a change in use or transfer of the Tribal Water Right for fish and wildlife enhancement; provided that, the Tribe may repair or relocate an impoundment for fish and wildlife enhancement within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 100 AFY of water may be used for fish and wildlife enhancement as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 34 surface acres of impoundments in the Camp and Duck Creek drainages. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 100 AFY for fish and wildlife enhancement may come from the direct flow of Camp and Duck Creeks.

(c) Place of use. The Tribal Water Right for fish and wildlife enhancement may be used in the areas shown in Appendix 4 in the Camp and Duck Creek drainages, in the drainage of origin.

4. Gorman Creek Drainage - 60 AFY diversion.

a. Quantification - Source Volume. The Tribe shall have the right to use or permit the use of 60 AFY of water from the following sources where they occur on the Reservation in any combination up to the limits on each source and the total limit of 60 AFY.

(1) Direct Flow. Of the 60 AFY, the Tribe shall have the right to divert or use or permit the diversion or use of up to 60 AFY from Gorman Creek and its tributaries.

(2) Storage. The Tribe shall have the right to store water for stockwatering and fish and wildlife enhancement purposes as set forth in Sections A.4.e.(1) and (2) of Article III.

b. Priority Date. The water rights to surface flow, groundwater, and storage, as set forth in Section A.4. of Article III, for the Gorman Creek drainage shall have a priority date of September 7, 1916, subject to the subordination agreements set forth in Section A.8. of Article IV, and the drainage stipulations set forth in Appendix 2.

c. Period of use. The period of use of this water right shall be from January 1 through December 31 of each year.

d. Points and means of diversion. Subject to the terms and conditions set forth in Article IV, the Tribe may divert or permit the diversion of this water right from any place and by any means in the Gorman Creek drainage on the Reservation.

e. Purposes. The Tribe's right to 60 AFY in the Gorman Creek drainage may be used for the following purposes; provided that, the Tribe may not make a change in use or transfer that results in a change in the place of use, point of diversion or place or means of storage to a place outside the drainage of origin or to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(1) Stockwatering - Evaporative Loss. Use of the Tribal Water Right for stockwatering in Gorman Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the water right for stockwatering; provided that, the Tribe may repair or relocate an impoundment for stockwatering within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 10 AFY of water in the Gorman Creek drainage may be used for stockwatering as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 3 surface acres of impoundments in the Gorman Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 10 AFY for stockwatering may come from the direct flow of Gorman Creek. Water for stockwatering may not be diverted from a perennial stream for off-stream storage other than for a lined storage facility with a capacity of less than 0.5 AF.

(c) Place of use. The Tribal Water Right for stockwatering in the Gorman Creek drainage may be used in the drainage of origin, on the Reservation. The current stockwater impoundments are shown in Appendix 7.

(2) Fish and Wildlife Enhancement - Evaporative Loss. Use of the Tribal Water Right for fish and wildlife enhancement in the Gorman Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the Tribal Water Right for fish and wildlife enhancement; provided that, the Tribe may repair or relocate an impoundment for fish and wildlife enhancement within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 50 AFY of water may be used for fish and wildlife enhancement as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 17 surface acres of impoundments in the Gorman Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 50 AFY for fish and wildlife enhancement may come from the direct flow of Gorman Creek.

(c) Place of use. The Tribal Water Right for fish and wildlife enhancement may be used in the areas shown in Appendix 4 in the Gorman Creek drainage, in the drainage of origin.

5. Upper Big Sandy Creek Drainage - 290 AFY diversion.

a. Quantification - Source, Volume. The Tribe shall have the right to use or permit the use of 290 AFY of water from the following sources where they occur on the Reservation in any combination up to the limits on each source and the total limit of 290 AFY.

(1) Direct Flow. Of the 290 AFY, the Tribe shall have the right to divert or use or permit the diversion or use of up to 240 AFY from the direct flow of Upper Big Sandy Creek and its tributaries;

(2) Storage. The Tribe shall have the right to store water for stockwatering and fish and wildlife enhancement purposes as set forth in Sections A.5.e.(3) and (4) of Article III.

(3) Groundwater. Of the 290 AFY, the Tribe shall have the right to withdraw and use or permit the withdrawal and use of up to 50 AFY of groundwater in the Upper Big Sandy Creek drainage including groundwater that is hydrologically connected to surface water, in compliance with Section A.6.a. and b. of Article IV.

b. Priority Date. The water rights to surface flow, groundwater, and storage, as set forth in Section A.5. of Article III, for the Upper Big Sandy Creek drainage shall have a priority date of September 7, 1916, subject to the subordination agreements set forth in Section A.8. of Article IV, and the drainage stipulations set forth in Appendix 2.

c. Period of use. The period of use of this water right shall be from January 1 through December 31 of each year.

d. Points and means of diversion. The Tribe may divert or permit the diversion of this water right from any place and by any means in the Upper Big Sandy Creek drainage on the Reservation; provided that, the Tribe may not construct or permit the construction of a diversion or diversions with a total capacity in excess of 100 gpm for the irrigation water right with a source on Upper Big Sandy Creek Drainage. This diversion limit also applies to any change(s) of use of this right.

e. Purposes. The Tribe's right to 290 AFY in the Upper Big Sandy Creek drainage may be used for the following purposes; provided that, the Tribe may not make a change in use or transfer that results in a change in the place of use, point of diversion or place or means of storage to a place outside the drainage of origin, or to a place upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(1) Non-Irrigation.

(a) Volume. 50 AFY of water in the Upper Big Sandy Creek drainage may be used for non-irrigation purposes.

(b) Source. The 50 AFY for non-irrigation purposes may come from groundwater, including groundwater that is hydrologically connected to surface water, in the Upper Big Sandy Creek drainage on the Reservation.

(c) Place of use. The 50 AFY for non-irrigation purposes may be used on the Reservation within the drainage of origin.

(2) Irrigation.

(a) Volume. 45 AFY of water in the Upper Big Sandy Creek drainage may be used for irrigation.

(b) Source. The 45 AFY for irrigation may come from direct flow of Upper Big Sandy Creek on the Reservation.

(c) Place of use. The 45 AFY may be used to irrigate 10 acres in the drainage of origin, on the Reservation.

(3) Stockwatering - Evaporative Loss. Use of the Tribal Water Right for stockwatering in Upper Big Sandy Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the water right for stockwatering; provided that, the Tribe may repair or relocate an impoundment for stockwatering within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 45 AFY of water in the Upper Big Sandy Creek drainage may be used for stockwatering as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 15 surface acres of impoundments in the Upper Big Sandy Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 45 AFY for stockwatering may come from the direct flow of Upper Big Sandy Creek. Water for stockwatering may not be diverted from a perennial stream for off-stream storage other than for a lined storage facility with a capacity of less than 0.5 AF.

(c) Place of use. The Tribal Water Right for stockwatering in the Upper Big Sandy Creek drainage may be used in the drainage of origin, on the Reservation. The current stockwater impoundments are shown in Appendix 7.

(4) Fish and Wildlife Enhancement - Evaporative Loss. Use of the Tribal Water Right for fish and wildlife enhancement in Upper Big Sandy Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the Tribal Water Right for fish and wildlife enhancement; provided that, the Tribe may repair or relocate an impoundment for fish and wildlife enhancement within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(a) Volume. 150 AFY of water may be used for fish and wildlife enhancement as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 50 surface acres of impoundments in the Upper Big Sandy drainage. The Tribe shall have the right to continuously store water in these impoundments.

(b) Source. The 150 AFY for fish and wildlife enhancement may come from the direct flow of Upper Big Sandy Creek.

(c) Place of use. The Tribal Water Right for fish and wildlife enhancement may be used in the areas shown in Appendix 4 in the Upper Big Sandy Creek drainage, in the drainage of origin.

B. Basin 40J: Beaver Creek Basin - 740 AFY diversion - 260 AFY net depletion - 665 AF continuous storage.

1. Quantification - Source - Volume.

a. Storage. The Tribe shall have the right to continuously store, or permit the continuous storage in East Fork Reservoir of up to a capacity of 665 AF from the natural flow of the East Fork of Beaver Creek. Subject to the 665 AF limit on storage capacity, the Tribe shall have the additional right to divert up to 390 AFY from the direct flow of the West Fork of Beaver Creek for storage in East Fork Reservoir as set forth in Section B.1.b. of Article III. The quantity impounded by continuous storage of the East Fork of Beaver Creek, shall not decrease the 390 AFY, which the Tribe has a right to divert from storage in East Fork Reservoir for non-irrigation purposes allowed in Section B.5. of Article III; provided that, the limit of 260 AFY on net depletion shall apply. In addition to the storage right set forth in this section, the Tribe shall have the right to store water for stockwatering and fish and wildlife enhancement purposes as set forth in Sections B.5.b. and c. of Article III.

b. Diversion. The Tribe shall have the right to divert 740 AFY of water in the Beaver Creek drainage from a combination of direct flow, storage and groundwater where they occur on the Reservation up to the limits on each source and the total limit of 740 AFY.

(1) Direct Flow. Of the 740 AFY, the Tribe shall have the right to divert or permit the diversion of up to 540 AFY from the direct flow of Beaver Creek and its tributaries on the Reservation. 390 AFY of the water from direct flow may be diverted to storage prior to application to any purposes allowed in Section B.5. of Article III without reducing the amount that can be applied to those purposes until such water is re-diverted from storage and applied to such purposes.

(2) Storage. The Tribe shall have the right to divert 390 AFY for non-irrigation purposes from water stored in East Fork Reservoir. The right to divert 390 AFY from the West Fork of Beaver Creek to storage is not reduced by the amount of water diverted for non-irrigation purposes from water derived from storage.

(3) Groundwater.

(a) Of the 740 AFY, the Tribe shall have the right to withdraw and use or permit the withdrawal and use of up to 120 AFY of groundwater including groundwater that is hydrologically connected to surface water in the Beaver Creek drainage in compliance with Section A.6.a. of Article IV. Groundwater may be diverted to storage prior to application to any purposes allowed in Section B.5. of Article III without reducing the amount that can be applied to these purposes until such water is re-diverted and applied to such purposes.

(b) Of the 740 AFY, the Tribe shall have the right to withdraw and use or permit the withdrawal and use of an additional 200 AFY of groundwater from the volcanic bedrock aquifer and other aquifers that are not hydrologically connected to surface water in the Beaver Creek drainage in compliance with Section A.6.a. of Article IV. The limit of 260 AFY on net depletion set forth in Section B.1.a.(2) of Article III, shall not apply to groundwater use pursuant to this section. Groundwater may be diverted to storage prior to application to any purposes allowed in Section B.5. of Article III without reducing the amount that can be applied to these purposes until such water is re-diverted and applied to such purposes.

c. Net Depletion. Of the 740 AFY diverted, the Tribe shall have a right to a net depletion of 260 AFY in the Beaver Creek drainage. The calculation of net depletion shall not include evaporative loss from fish and wildlife habitat, from stockwatering, or from East Fork Reservoir, and use of groundwater that is not hydrologically connected to surface water.

2. Priority Date. The water rights to surface flow, groundwater, and storage, as set forth in Section B. of Article III, for the Beaver Creek drainage shall have a priority date of September 7, 1916, subject to the subordination agreements set forth in Section A.8. of Article IV, and the drainage stipulations set forth in Appendix 2.

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

4. Points and means of diversion. Subject to the terms and conditions set forth in Article IV, the Tribe may divert or permit the diversion of this water right from any place and by any means in the Beaver Creek drainage on the Reservation.

5. Purposes. The Tribe's right to water in the Beaver Creek drainage may be used for the following purposes; provided that, subject to the limitations set forth in Article IV, the Tribe may make a change in use or transfer of the water identified for non-irrigation purposes.

a. Non-Irrigation

(1) Volume. 590 AFY of water in the Beaver Creek drainage may be used for non-irrigation purposes; provided that, the net depletion may not exceed 260 acre-feet per year in accordance with Section B.1.c. of Article III.

(2) Source. The 590 AFY for non-irrigation in the Beaver Creek drainage may come from a combination of direct flow, storage and groundwater.

(3) Place of use. The 590 AFY for non-irrigation may be used in the Beaver Creek drainage on the Reservation.

b. Stockwatering - Evaporative Loss. Use of the Tribal Water Right for stockwatering in the Beaver Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the water right for stockwatering; provided that, the Tribe may repair or relocate an impoundment for stockwatering within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(1) Volume. 40 AFY of water in the Beaver Creek drainage may be used for stockwatering as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 13 surface acres of impoundments in the Beaver Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(2) Source. The 40 AFY for stockwatering may come from the direct flow of Beaver Creek on the Reservation. Water for stockwatering may not be diverted from a perennial stream for off-stream storage other than for a lined storage facility with a capacity of less than 0.5 AF.

(3) Place of use. The Tribal Water Right for stockwatering in the Beaver Creek drainage may be used in the drainage of origin, on the Reservation. The current stockwater impoundments are shown in Appendix 7.

c. Fish and Wildlife Enhancement - Evaporative Loss. Use of the Tribal Water Right for fish and wildlife enhancement in the Beaver Creek drainage is a consumptive use. The Tribe may not make a change in use or transfer of the Tribal Water Right for fish and wildlife enhancement; provided that, the Tribe may repair or relocate an impoundment for fish and wildlife enhancement within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(1) Volume. 110 AFY of water may be used for fish and wildlife enhancement as a consumptive use measured by evaporative loss; provided that, the total surface acreage of impoundments shall not exceed 35 surface acres of impoundments in the Beaver Creek drainage. The Tribe shall have the right to continuously store water in these impoundments.

(2) Source. The 110 AFY for fish and wildlife enhancement may come from the direct flow of Beaver Creek.

(3) Place of use. The Tribal Water Right for fish and wildlife enhancement may be used in the areas shown in Appendix 4 in the Beaver Creek drainage, in the drainage of origin.

#### C. Additional Development of Water.

In addition to the water rights specifically set forth in Sections A. and B. of Article III, the Tribe may develop water from the following sources:

1. Subject to Sections A.6.a. and b. and Section A.7.d. of Article IV, the Tribe may, as part of the Tribal Water Right, develop or permit the development of groundwater on the Reservation in addition to the amounts specified in Sections A. and B. of Article III, from new sources or from expanded use of existing sources. The priority date of such new appropriation shall be the date of development, and notwithstanding any other provision of this Compact, may only be used in priority with other water rights.

2. The Tribe may impound or permit the impoundment of surface water for stockwatering purposes in addition to the amounts set forth in Sections A. and B. of Article III; provided that the priority date of the new appropriation shall be the date of development and, notwithstanding any other provision of this Compact, may only be used in priority with other water rights; and further provided that, the maximum capacity of the impoundment or pit is less than 15 AF and the appropriation is less than 30 AFY and is from a source other than a perennial flowing stream. The Tribe may not transfer or make a change in use of the stockwater right obtained pursuant to this section.

3. On the acquisition of land after the Compact is ratified by the State and the Tribe, whichever date is later, the Tribe has the right to the use of any water right acquired as an appurtenance to the land. Such right shall become part of the Tribal Water Right in addition to the amount set forth in Article III of this Compact and shall be subject to the terms of this Compact; provided that, the right shall retain the priority date of the acquired right. The Tribe will notify DNRC of any acquisition of water in the Tribe's annual report and will identify the water right acquired.

4. The Tribe shall be entitled to use any new reserved water rights that may be created with acquisition of land after the Compact is ratified by the State and the Tribe, whichever date is later; provided that, in any drainage with a moratorium on new state permits pursuant to Section A.7.a. of Article IV, the Tribe shall defer exercise of new reserved water rights, if any, until the moratorium is lifted at which time the Tribe has the first right to use the excess water in accordance with Section A.7.b. of Article IV. The priority date of the excess water shall be the date of acquisition of the land.

5. After the ratification date of the Compact, the Tribe shall have the right to acquire off-Reservation water rights separate from acquisition of the land to which such water rights are appurtenant; provided that, water from the Tribal Water Right is not available for economic or other reasons; and provided further that, the rights shall retain the priority date held by the

prior owner of the rights. Such rights shall become part of the Tribal Water Right and shall thereby become subject to Sections A.4.b.(1) and (2) of Article IV.

6. As a part of the Tribal Water Right, the Tribe shall be entitled to an allocation of 10,000 AFY of stored water in Lake Elwell, measured at the dam, for use or disposition by the Tribe for any beneficial purpose, either on or off the Reservation, pursuant to the terms of this Compact; provided that, such allocation shall be in accordance with the terms and conditions of any Act of Congress ratifying this Compact. This allocation is subject to the prior reserved water rights, if any, of any other Indian tribe, or of persons holding such reserved water rights through that tribe or through the United States. Any use or disposition of water from Lake Elwell off the Reservation by the Tribe is subject to the specific provisions relating to such use or disposition in any act of Congress ratifying this Compact.

D. Proposed Decree.

For purposes of entry in the Montana Water Court, the proposed decree of the Tribal Water Right set forth in Article III and Section A.8. of Article IV is attached as Appendix 1.

ARTICLE IV - IMPLEMENTATION OF TRIBAL WATER RIGHT

A. General Provisions.

1. Trust Status of Tribal Water Right. The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribe.

2. Tribal Water Right: Administration. Subject to the limitations imposed by this Compact and other federal law, the use of the Tribal Water Right shall be administered by the Tribe through the TWRD both on and off of the Reservation. Disputes, not within the jurisdiction of the Compact Board set forth in D.4. of Article IV, concerning off-Reservation use of the Tribal Water Right which raise issues concerning the application of state or federal law shall be resolved in a court of competent jurisdiction. Those disputes concerning off-Reservation use of the Tribal Water Right which do not raise issues concerning the application of state or federal law will be within the exclusive jurisdiction of the Tribe. Subject to the limitations imposed by this Compact, the Tribe shall have the final and exclusive jurisdiction to resolve all disputes concerning the Tribal Water Right between users of the Tribal Water Right. The TWRD will, among other activities, develop policies and procedures for monitoring water use, diversions, and maintaining records of water use and development consistent with this Compact. The current and future water use and diversions will be identified by location and quantity. Final storage capacities will be based on project as-built plans, and will store no more than the water right set forth in Article III of this Compact. Administration and enforcement of the Tribal Water Right shall be pursuant to a Tribal water code, which shall be developed and adopted by the Tribe within two (2) years following the ratification date of this Compact pursuant to any requirements set forth in the Constitution of the Chippewa Cree Tribe. Pending the adoption of the Tribal water code, the administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior.

3. Use.

a. Persons Entitled to Use the Tribal Water Right. The Tribal Water Right may be used by the Tribe, or persons authorized by the Tribe.

b. Effect of Non-Use of Tribal Water Rights. Except as specifically provided herein, state law doctrines relating to the use of water rights, including but not limited to relinquishment, forfeiture or abandonment, do not apply to the Tribal Water Right. Thus, non-use of all or any of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture or abandonment of such rights.

4. Change in Use or Transfer.

a. On-Reservation Changes in Use or Transfer of the Tribal Water Right. Unless otherwise stated in this Compact, the Tribe may make a change in use or transfer of a water right set forth in Article III of this Compact on the Rocky Boy Reservation, including the use of water salvaged through the application of water-saving methods to expand irrigation, provided that:

(1) for each source quantified in Article III, any change in use or transfer shall not result in uses that exceed the water amount quantified for that source;

(2) any change in use or transfer shall not result in an increase in net depletion in the Beaver Creek drainage in excess of the amount specified for that source;

(3) any change in use or transfer shall not have an adverse effect on a water right recognized under state law with a priority date before the date of the change or transfer provided that for change in use or transfer of groundwater, the burden as to adverse effect shall be as set forth in Section A.6. of Article IV; and

(4) any change in use or transfer shall not change the source of the water involved in any such changes.

(5) The Tribe may not make a change in use or transfer of any water rights set forth in Article III for the purposes of stockwatering or fish and wildlife enhancement; provided that, the Tribe may repair or relocate an impoundment for stockwatering or fish and wildlife enhancement within the drainage of origin; and provided further that, the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(6) The Tribe may not make a change in use or transfer any of the water rights set forth in Article III with a source on the drainages of Upper Big Sandy Creek, Camp Creek, Duck Creek and Gorman Creek that results in a change in the place of use, point of diversion or place or means of storage of the water outside the drainage of origin or to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.

(7) The Tribe may make a change in use or transfer of the irrigation water right with a source in Upper Big Sandy Creek drainage as set forth in Section A.5.e. of Article III so long as it does so within the diversionary limits set forth in Section A.5.d. of Article III; provided that, the net depletion shall not exceed 30 AFY.

b. Off-Reservation Changes in Use or Transfer of the Tribal Water Right. Except as may be otherwise provided in this Compact, the Tribe, pursuant to federal law, may make or permit a change in use or a transfer of the Tribal Water Right for use off the Reservation; provided that, any transfer shall be for a term of not to exceed 100 years, and may include provisions authorizing renewal for an additional term of not to exceed 100 years; and provided further that, no such transfer shall be a permanent alienation of the water transferred; and provided further that, no transfer or change in place of use shall be made to a location outside the watershed that forms the Missouri River drainage; and provided further that, if the Tribe receives a good faith offer from a third person from outside the Milk River drainage to acquire use of specified Tribal water rights and the Tribe is willing to accept the terms of the offer, the Tribe, before accepting the offer, shall allow water users in the Milk River drainage the opportunity to acquire use of such rights at the same price and on the same terms and conditions as those contained in the offer. Any change in use or transfer of any such water right involving a point of diversion or place of use located off the Reservation shall be considered an off-Reservation use; provided that, any off-Reservation use of Tribal water rights described in this Compact shall not be deemed to convert such rights to rights arising under state law, and nonuse of such rights off the Reservation shall not constitute a relinquishment, forfeiture, or abandonment of the rights; and provided further that, releases or diversions from Lake Elwell for use on the Reservation shall not be considered off-Reservation uses. The Tribe may change the point of diversion or purpose or place of use of the Tribal Water Right back to the Reservation without reduction in the amount of water provided in the Compact.

(1) Applicable Law. No person may initiate an off-Reservation use, change in use, or transfer of a Tribal water right set forth in this Compact without first applying for and receiving authorization for the use, change in use, or transfer pursuant to Montana law in effect at the time of the application. Approval of an application for a use, change in use or transfer off the Reservation by the State shall be conditioned on a valid Tribal permit for such use, change in use or transfer by the Tribe. The applicant shall provide DNRC with proof of a valid Tribal permit prior to initiating the use, change in use, or transfer.

(2) Diversion Facilities. With respect to diversion or transportation facilities located off the Reservation which are to be used in connection with the exercise of a water right set forth in this

Compact, the Tribe or persons using such water rights shall apply for all permits, certificates, variances and other authorizations required by state laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water. A diversion or use of water in the exercise of such water rights may be made only after all permits, certificates, variances or other authorizations applied for pursuant to this paragraph have been obtained.

(3) Subsequent Federal or State Law. All off-Reservation uses of Tribal water rights set forth in this Compact shall comply with the requirements set forth in Section A.4.b.(1) and (2) of Article IV until such time as the statutory or common law of the United States or the State of Montana establish that off-Reservation uses of Indian water rights may occur without regard to state law.

c. Placement and Size Survey. Placement and size of stockwater impoundments and fish and wildlife enhancement areas shall be surveyed by the TWRD every five (5) years commencing one (1) year after the ratification date of this Compact. The initial survey method shall be through use of data obtained by aerial photography or an acceptable quantitative substitute with accuracy and verification equal to or greater than photography. The method may be modified by agreement between the TWRD and the DNRC. Such modification is pursuant to and shall not be deemed a modification of this Compact. The TWRD shall provide the DNRC with a completed survey for review within six (6) months of initiation of the survey.

d. Net Depletion Table. Net depletion for Tribal water uses in the Beaver Creek drainage and for irrigation uses in the Upper Big Sandy Creek drainage shall be as set forth in the table attached as Appendix 9 to this Compact. The TWRD and the DNRC may jointly agree to modify this initial table. Such modification is pursuant to, and will not be deemed a modification of, this Compact.

#### 5. Reporting requirements.

a. On an annual basis the DNRC shall provide the Tribe and the United States with a listing of all new uses of surface and groundwater for which a permit has been issued by the DNRC in the Big Sandy and Beaver Creek drainages, and of any change in use or transfer of surface water or groundwater approved by the DNRC in the Big Sandy and Beaver Creek drainages since the last report.

b. On an annual basis the TWRD shall provide the State and the United States with a listing of all new development of the water rights described in this Compact, the net depletion in the Beaver Creek drainage, and the net depletion for irrigation in the Upper Big Sandy Creek drainage, and of all changes in use or transfers of the water rights described in this Compact since the last report. The first report by the TWRD following adoption of a Tribal Water Code shall include a listing of existing uses.

c. The TWRD, the DNRC, and the United States may agree to modify the reporting requirements set forth in subsections a. and b. of this section. Such modification is pursuant to, and will not be deemed a modification of, this Compact.

#### 6. Groundwater.

##### a. New Groundwater Development Without Adverse Effect.

(1) Limits on Additional Development of Groundwater from Sources on the Reservation. After the ratification date of this Compact, the Tribe may develop or permit the development of groundwater; provided that, such development is without an adverse effect on water rights recognized under state law with a priority date before the date of development of the new appropriation.

(2) Prerequisite Administrative Remedy. The following procedure for determining whether new development of groundwater will have an adverse effect on existing groundwater rights recognized under state law shall be followed prior to seeking relief from the Compact Board:

(a) Application for development of a groundwater use on the Reservation shall be made to the TWRD.

(b) The TWRD shall review the application and make a determination of whether the new use will have an adverse effect on existing water rights recognized under state law with a priority date before the application date. Upon request by the TWRD, the DNRC shall provide information on existing state water rights as recorded in the DNRC database to the TWRD.

(c) If the TWRD determines that the new development will have an adverse effect on a water right recognized under state law with a priority date before the application date, the TWRD shall deny the application. If the TWRD determines that the new development will not have an adverse effect on a water right recognized under state law with a priority date before the application date, the TWRD shall forward the application with its determination to the DNRC.

(d) If, based upon the evidence, DNRC agrees with the TWRD's determination, the application will be approved. If, however, based upon the evidence, the DNRC cannot agree with the determination of the TWRD, DNRC shall publish notice, of the application once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any appropriator of water or holder of a permit who, according to the records of the department, has a water right with a priority date before the application date, and may be affected by the proposed development.

(e) DNRC and the TWRD shall attempt to resolve any disagreement on the determination of no adverse effect by the TWRD on a cooperative basis. If the DNRC or a holder of a water right recognized under state law with a priority date before the application date disagree with the determination of no adverse effect, DNRC or the water users may seek relief from the Compact Board.

(f) In any proceeding concerning the effect of new groundwater development on the Reservation either before the TWRD, the DNRC, or before the Compact Board, the following shall apply:

(i) 1 - 150 Feet Wells: For new Tribal groundwater wells completed at a depth beneath the surface of 1 to 150 feet, the Tribe shall bear the burden of showing no adverse effect to groundwater uses recognized under state law with a priority date before the application date.

(ii) 150 Feet or Deeper Wells: For Tribal groundwater wells completed at a depth beneath the surface of 150 feet or deeper, the owner of a water right recognized under state law with a priority date before the application date shall bear the burden of showing any adverse effect to the water right.

b. Groundwater Development Exempt From The Showing Of No Adverse Effect. The following wells are exempt from the requirement of showing no adverse effect:

(1) Existing Tribal wells are exempt from the burden to show no adverse effect. The Tribe may develop existing wells, or replacements therefor, to their full capacity. The primary municipal and domestic wells are listed in Appendix 8. A comprehensive list of existing wells will be kept on file in TWRD offices as per the requirement to list existing uses in Section A.5. of Article IV.

(2) New Tribal groundwater wells producing from the Volcanic Bedrock Aquifer may be developed without a showing of no adverse effect.

c. Ancestral Missouri River Channel Aquifer. Groundwater from the Ancestral Missouri River Channel Aquifer shall be a primary source for non-irrigation uses; provided that, the non-irrigation uses do not result in discharge of untreated water to land or surface water. Groundwater from the Ancestral Missouri River Channel Aquifer is a supplemental source for irrigation uses.

#### 7. Moratorium.

a. New State Permits. With the exceptions listed in subsection (1) of this section, the DNRC shall not process or grant an application for a permit to appropriate water from a source in the Big Sandy Creek Basin (excluding Sage Creek and Lonesome Lake Coulee), and in the Beaver Creek drainage after the date this Compact is ratified by the Montana Legislature and by the Chippewa Cree Business Committee, whichever date is later. This moratorium shall remain in effect for a minimum of 10 years and shall only be lifted pursuant to the procedures set forth in Section A.7.b of Article IV. This moratorium is not intended to apply to applications for change in appropriation under state law.

(1) The moratorium shall not apply to the following appropriations:

(a) an appropriation of groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation;

(b) an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream;

(c) an appropriation of groundwater from any deep aquifer not hydrologically connected to surface water.

(2) Within 120 days following the date the moratorium takes effect, the DNRC shall publish notice of the moratorium once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on all appropriators of water or holders of permits who, according to the records of the department, have a water right with a source in the affected drainages.

(3) The moratorium applies only to new permits issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

b. Lifting of Moratorium. After 10 years, the Tribe or an individual seeking to appropriate water in the affected drainages may petition the DNRC for removal of the moratorium, or the DNRC may initiate proceedings to lift a moratorium on its own initiative. The DNRC shall comply with the following procedure in making a determination as to whether water is available in excess of the Tribal Water Right and rights recognized under state law. The DNRC and TWRD may agree to modify procedures or provide additional procedures. Such modification is pursuant to and shall not be deemed to be a modification of the Compact.

(1) Proceedings initiated by TWRD.

(a) The TWRD shall have sixty (60) days following the filing of the petition requesting that the moratorium be lifted to provide the DNRC with data supporting its petition to lift the moratorium.

(b) Within sixty (60) days following the receipt of the data supporting TWRD's petition, the DNRC shall determine whether to lift the moratorium, and shall notify the TWRD of its determination and the grounds therefor. The TWRD shall be allowed reasonable access to any data relied upon by the DNRC for its determination.

(c) Within thirty (30) days following a determination by the DNRC not to lift the moratorium, the TWRD may challenge the DNRC's determination in a de novo proceeding before the Compact Board. The moratorium shall continue pending Compact Board proceedings and any appeal.

(2) Proceedings initiated by DNRC.

(a) The DNRC may, on request by a water user or on its own initiative, commence proceedings to determine whether to lift a moratorium.

(b) The DNRC shall notify the TWRD of the commencement of proceedings to determine whether to lift the moratorium and shall submit to the TWRD all data in support of the proceedings at the same time or as soon after such data becomes available as practical or shall give the TWRD reasonable access to such data within the same time frame.

(c) The TWRD shall be given sixty (60) days following receipt of the data in support of the proceedings to submit to the DNRC a statement of the Tribe's position concerning the issue along with any supporting data and argument.

(d) The DNRC shall notify the TWRD of its determination and the grounds therefor within sixty (60) days of receipt of the Tribe's statement.

(e) Within thirty (30) days following a determination by the DNRC not to lift the moratorium, the TWRD may challenge the DNRC's determination in a de novo proceeding before the Compact Board. The moratorium shall continue pending Compact Board proceedings and any appeal.

c. Excess Water. If the moratorium is lifted pursuant to the procedure described in A.7.b. of Article IV, the Tribe shall have the first right to use the excess water for the purpose of fulfilling new reserved water rights, if any, on land acquired after the ratification date of this Compact, but before the date the moratorium is lifted. The excess water used by the Tribe shall become part of the Tribal Water Right and the tribe may make a change in use of, or transfer, including storage, of such water pursuant to Section A.4.a. of Article IV.

d. Limit on New Tribal Groundwater Development. In any drainage with a moratorium, new Tribal groundwater development pursuant to Section C.1. of Article III, by a well or developed

spring from an aquifer that is hydrologically connected to surface water shall be limited to a maximum appropriation or combined appropriation from two or more wells or developed springs in a single drainage defined by this Compact to 35 gallons per minute or less, not to exceed 10 acre-feet per year.

8. Mutual Subordination. To reduce the need for daily administration of water use on and off the Reservation, water rights shall not be administered in priority, but shall be satisfied according to the following agreements.

a. Subordination to Non-Tribal Water Rights Upstream of the Reservation. The Tribal Water Right shall be subordinate to water rights recognized under state law upstream from any point on the Reservation with a priority date before the ratification date of this Compact. It is the intent of the parties that this subordination extends only to valid water rights, and not to statements of claim filed pursuant to 85-2-221, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights exempt from the permit process pursuant to 85-2-306, MCA, a list of rights as currently claimed is attached as Appendix 3. Appendix 3 will be modified by any final decree resolving claims on the affected drainages. Appendix 3 may be modified due to clerical error or omission.

b. Effect of Mitigation. Because the impact of development of the Tribal Water Right on downstream water rights recognized under State law has been mitigated by provisions of the Compact and by special measures set forth in drainage stipulations, any person claiming or holding a water right recognized under State law, or an interest in such water right, may not assert priority over, or make a call for, or claim any of the water rights of the Tribe set forth in this Compact, in any court, tribunal, or other forum.

9. Stockwatering Impoundments Limited by Surface Area. Except for new stock ponds developed under Section C.2. of Article III, the surface acreage limitations on stockwatering impoundments set forth in Article III shall be the measure of compliance with the quantification of water rights for the purpose of stockwatering.

10. Impoundments for the Purpose of Enhancing Fish and Wildlife Habitat.

a. Fish and Wildlife Enhancement Impoundments Limited by Surface Area. The surface acreage limitations on impoundments for the purpose of fish and wildlife enhancement set forth in Article III shall be the measure of compliance with the quantification of water rights for the purpose of fish and wildlife enhancement.

b. Limits on Structures. No structure for the purpose of fish and wildlife enhancement may create a potential high water line beyond the existing wet riparian habitat delineated as fish and wildlife enhancement zones on the map attached as Appendix 4.

11. Structures Mimic Natural Processes. No structure for the purpose of fish and wildlife enhancement, or new stockwatering impoundments on a perennial stream built after the ratification date of the Compact, excluding repair or replacement of existing structures, may stop the entire flow of surface water during filling of the impoundment. To accomplish this the Tribe shall build any structure to mimic natural processes by allowing water to flow through the structure, or bypass the structure during filling.

B. Big Sandy Creek Basin.

1. Operation of Bonneau Reservoir.

a. Minimum Pool/240 AFY Stored for Satisfaction of Release. The minimum pool at Bonneau Reservoir shall be established by the Tribe. The Tribe shall store annually the minimum pool plus 240 acre-feet, if water is available. The 240 acre-feet above the minimum pool shall be stored to satisfy the release set forth in this Article and shall not be available to satisfy the Tribal Water Right. Evaporative loss shall be accounted for in setting the minimum pool and shall not be subtracted from the 240 acre-foot pool stored for downstream water users. Any change in use of the water stored in Bonneau Reservoir from irrigation to other purposes shall be without adverse effect on downstream water uses recognized under state law with a priority date before the date of change, and measures to prevent adverse effect may include release of additional water from Bonneau Reservoir.

b. Release for Off-Reservation Irrigation Use. The Tribe shall release no more than 104 AFY from Bonneau Reservoir or from direct flow of Box Elder Creek to satisfy the claims for irrigation water rights currently held by Bert Corcoran, and the Tribe shall deliver this water to a point of

diversion specified in the drainage stipulation between the Tribe and Mr. Corcoran attached as part of Appendix 2; provided that, the Tribe shall have no responsibility to upgrade or to increase the capacity of the existing delivery system; and further provided that, the Tribe shall not be required to release water from Bonneau Reservoir below the minimum pool established by the Tribe plus 240 acre-feet prior to satisfaction of the 240 acre-feet per year release set forth in Section B.1.c. of Article IV, and the minimum pool at all other times. The 104 AFY release shall be in accordance with a delivery schedule agreed to by Mr. Corcoran, or his successors in interest, and the TWRD. Mr. Corcoran's claims for irrigation water rights shall be specified in the drainage stipulation between the Tribe and Mr. Corcoran attached as part of Appendix 2. Nothing in the drainage stipulation or in this Compact shall affect any existing right that Mr. Corcoran may have to the use of on-Reservation conveyance and distribution systems to deliver this water.

c. 240 AFY Release. The Tribe shall annually release the first 240 acre-feet of water, as measured near the confluence of Box Elder Creek and Lower Big Sandy Creek, stored in Bonneau Reservoir above the minimum pool, at the request of the downstream irrigation water users as set forth below, for maintenance of instream flow and for domestic and stock purposes on Lower Big Sandy Creek: The 240 AF of water, once released, shall be designated as an instream flow and shall be senior to all Tribal diversions and all non-domestic and non-stockwater rights recognized under state law from the point of release to the confluence with the Milk River. The Tribe shall not divert from direct flow on Lower Big Sandy Creek between its confluence with Box Elder Creek and the Reservation boundary at Stoneman Farms, as that boundary exists on the effective date of this Compact, during release of the 240 AF of water to downstream water users in the months of July and August. A structure that will bypass the peak scheduled release will be constructed for any diversion of the Tribal Water Right upstream of the confluence of Big Sandy Creek with Gravel Coulee. Under no circumstances shall the Tribe be required to release more than 240 AFY of water to maintain instream flow and for domestic and stock purposes.

d. Schedule for 240 AFY. The method for determining the schedule of releases is as follows: Water users on Lower Big Sandy Creek with drainage stipulations listed in Appendix 2 shall elect a three member Bonneau Release Committee to determine the schedule of release for the 240 AFY. The Committee shall notify the DNRC which shall notify the TWRD by May 1st of each year of the requested schedule. The schedule shall not exceed the operating standards of Bonneau Reservoir or result in unreasonable interference of the Tribe's use of water stored in the Reservoir. If the TWRD does not receive notice by May 1 of any year, the TWRD shall release 2 cfs continuously for July and August in accordance with Section B.1.c. of Article IV. DNRC shall notify water users which, according to the records of the Department, have a water right recognized under state law with a source on Box Elder Creek, or on Big Sandy Creek between the confluence with Box Elder Creek and the confluence with the Milk River, that the release may not be diverted. After May 1, at the request of the Bonneau Release Committee, the DNRC shall request the Tribe to alter the rate of release and the Tribe may agree to comply. At the request of the Tribe, the DNRC shall request the Bonneau Release Committee to agree to forego the release; and if the Committee believes the purposes for the release as set forth in Section B.1.c. of Article IV are being satisfied without the release, the Committee may, in any year, agree to forego the release. When streamflow in lower Big Sandy Creek at the bypass structure referred to in Section B.1.c. of Article IV, exceeds the peak flow specified in the designated release schedule, such excess flow can be diverted by the Tribe, subject to the diversion limits designated in Article III.

e. Effective Date for Bonneau Reservoir Operational Plan. Notwithstanding ratification of this Compact by the parties, the operational plan for Bonneau Reservoir set forth in Sections B.1.a. through c. of Article IV, shall not become effective until completion of the enlargement of Bonneau Dam.

## 2. Water Use on Lower Big Sandy Creek Drainage.

a. 2cfs Bypass at Stoneman Farms. Structures will be constructed at each point of diversion on Lower Big Sandy Creek which allow a minimum of 2 cfs of water flow from direct and return flow, if available, to pass year around from the most downstream diversion on the Reservation on

Lower Big Sandy Creek. The 2 cfs shall be designated as an instream flow and shall be senior in priority to Tribal diversions and all non-domestic and non-stockwatering water rights recognized under state law with a point of diversion between the bypass and the confluence with the Milk River. When streamflow in Lower Big Sandy Creek exceeds 2 cfs outside the scheduled 240 AF release period, such excess flow can be diverted by the Tribe subject to diversion limits designated in Article III.

b. Water Quality Issues.

(1) Monitoring Wells. Within one year following the effective date of this Compact, a monitoring well network adequate to detect saline seep shall be installed to depths no greater than 30 feet near the proposed Enlarged Stoneman Reservoir site shown in Appendix 6. The location of the wells will be established by TWRD and DNRC (or its representative) and groundwater level and quality shall be measured on a quarterly basis to establish baseline conditions.

(2) Water Quality Monitoring Before Construction. Within one year following the effective date of this Compact, a surface water quality network will be established by TWRD and DNRC and quarterly sampling continued for a sufficient period of time to establish the water quality baseline conditions referred to above, adjacent to and below the Stoneman Farms project. The results of the baseline analysis will be used to establish a threshold value for water quality degradation associated with salinity which will trigger the requirement for more extensive study.

(3) Water Quality Monitoring After Construction. After construction of the Stoneman Reservoir enlargement, monitoring of the wells and surface water quality will be resumed to evaluate changes in water quality. If salinity measurements result in a trend of increasing salinity on a sustained basis over a reasonable period of time, the TWRD or DNRC may petition the Compact Board to appoint a technical expert to conduct an analysis to identify the causes of the increasing salinity and recommend appropriate remedies. The analysis and recommendations may include sources of salinity off the Reservation.

(4) Remedies. The results of the analysis shall be submitted to the DNRC and to the TWRD which shall make a joint effort to resolve the degradation issue based on the analyses. If the analysis includes sources of salinity off the Reservation, the DNRC shall assist the TWRD in obtaining reasonable access onto the land off the Reservation for the purpose of observation. If the DNRC and the TWRD, are unable to resolve the issue within 30 days through joint effort, the DNRC, the TWRD, or any affected water user, may petition the Compact Board for relief. The Compact Board shall have jurisdiction over any contributor to the salinity problem and shall fashion its remedy in a manner proportionate to the causes contributing to the problem. The remedy fashioned by the Compact Board for salinity problems shall be limited to issuance of an order to cease and desist the practice or practices leading to the salinity problems. The remedies set forth in this section shall be in addition to any remedies or water quality standards provided for under other applicable law.

C. Beaver Creek Drainage.

1. Moratorium on Tribal Consumptive Uses. For a period of five years following the ratification date of the Compact, there shall be a moratorium on the development of Tribal consumptive uses from surface water in the Beaver Creek drainage. During this moratorium, a monitoring network consisting of three continuous recording stations will be installed and the resulting data analyzed to determine if Beaver Creek gains or loses flow between the confluence of East and West Fork and the Reservation boundary. Location of the three gages shall be:

(1) the West Fork of Beaver Creek at the location the Tribe intends to divert water to the East Fork;

(2) the confluence of the East and West Forks of Beaver Creek; and

(3) the Reservation boundary at the most downstream point on Beaver Creek. A staff gage shall also be installed in East Fork Reservoir following enlargement of the Reservoir.

2. Development of Management Plan. Based on the results of the five years of gage data on Beaver Creek, the Tribe and the Montana Department of Fish, Wildlife and Parks shall work cooperatively to develop a fishery and recreational management plan. The plan may include modifications in minimum instream flows set forth in Section C.3. of Article IV. Such

modification is pursuant to, and will not be deemed a modification of, this Compact. The management plan is not binding on any party and shall not be used to modify minimum instream flows until it is approved by the Tribe and the Montana Department of Fish, Wildlife and Parks.

3. Operation of East Fork Reservoir Following Enlargement and Pending Adoption of a Management Plan. During the moratorium imposed by Section C.1. of Article IV, or pending adoption of the management plan authorized by Section C.2. of Article IV, East Fork Reservoir may be enlarged; provided that,

a. The enlarged Reservoir shall be used only for recreational purposes during the five year moratorium. However, after the five year moratorium period and pending adoption of the management plan, the enlarged Reservoir may be utilized for multiple purposes, but remains subject to the limitations set forth under Sections C.3.b., c., and d. of Article IV.

b. Any surface water diversion from the West Fork of Beaver Creek and its tributaries on the Reservation to the East Fork of Beaver Creek shall include a structure which allows a minimum of 1 cfs of water flow from direct and return flow, if available, to pass year around; provided that, the storing of water in East Fork Reservoir from the East Fork of Beaver Creek shall not be considered a diversion for the purposes of this provision.

c. For the drainage area below the confluence of the East and West Forks of Beaver Creek to the northern Reservation boundary, any surface water diversion from Beaver Creek and its tributaries on the Reservation shall include a structure which allows a minimum of 1 cfs of water flow from direct and return flow, if available, to pass year around; provided that, the storing of water in East Fork Reservoir from the East Fork of Beaver Creek shall not be considered a diversion for the purposes of this provision.

d. The Tribe shall release water from East Fork Reservoir to augment streamflow on Beaver Creek if the flow at the confluence of East and West Fork or below the most downstream diversion on the Reservation, whichever is the most downstream, falls below 1 cfs; provided that, the Tribe shall not be required to release water if the level of the enlarged Reservoir reaches or falls below the minimum pool; and provided further that, the Tribe shall not be required to release water if the flow at the Reservation boundary at the most downstream point on Beaver Creek exceeds 2 cfs.

4. Operation of East Fork Reservoir Prior to Enlargement. Prior to enlargement of East Fork Reservoir and pending adoption of the management plan authorized by Section C.2. of Article IV, the following diversionary constraints are in effect.

a. Any surface water diversion from the West and East Forks of Beaver Creek and its tributaries on the Reservation shall include a structure which allows a minimum of 1 cfs of water flow from direct and return flow, if available, to pass the structure year around.

b. For the drainage area below the confluence of the East and West Forks of Beaver Creek to the northern Reservation boundary, any surface water diversion from Beaver Creek and its tributaries on the Reservation shall include a structure which allows a minimum of 1 cfs of water flow from direct and return flow, if available, to pass year round.

D. Enforcement - Chippewa Cree-Montana Compact Board.

1. Establishment of Board. There is hereby established the Chippewa Cree-Montana Compact Board. The Board shall consist of three members: one member selected by the Governor of the State of Montana from up to six nominees, up to three nominated by the Commissioners of Chouteau County and up to three nominated by the Commissioners of Hill County; one member appointed by the Chippewa Cree Business Committee; and one member selected by the other two members. If the Governor fails to select a board member from the list of nominees, the Commissioners of Chouteau and Hill Counties may select the member. All members shall be appointed within six months of the ratification date of this Compact and within thirty days of the date any vacancy occurs. If an appointment is not timely made by the Governor or County Commissioners, the Director of DNRC or his/her designee shall fill the State's position. If an appointment is not timely made by the Chippewa Cree Business Committee, the Director of the TWRD or his/her designee shall fill the Tribe's position. Each member shall serve a five-year term and shall be eligible for reappointment. The initial term of each member shall be staggered with one member serving a five-year term, one a four-year term,

**7. Review and Enforcement of Board Decisions.**

a. Decisions by the Board shall be effective immediately, unless stayed by the Board. Unless otherwise provided by Congress, only the United States and parties to the proceedings before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty (30) days of such decision. The hearing on appeal shall be a trial *de novo*. The notice of appeal shall be filed with the Board and served personally or by registered mail upon all parties to the proceeding before the Board.

b. Unless an appeal is filed within thirty (30) days of a final decision of the Board, as provided in Section D.7.a. of Article IV, any decision of the Board shall be recognized and enforced by any court of competent jurisdiction on petition of the Board, or any party before the Board in the proceeding in which the decision was made.

c. A court of competent jurisdiction in which a timely appeal is filed pursuant to Section D.7.a. of Article IV, or in which a petition to confirm or enforce is filed pursuant to Section D.7.b. of Article IV, may order such temporary or permanent relief as it considers just and proper.

d. Any appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to Section D.7.a. of Article IV, or in which a petition to confirm or enforce is filed pursuant to Section D.7.b. of Article IV, in the manner and to the same extent as from orders or judgments of the court in a civil action.

e. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court the record of the proceedings before the Board within sixty (60) days of filing of a notice of appeal.

8. Waiver of Immunity. The Tribe and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under this Compact by the Chippewa Cree-Montana Compact Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribe or the State shall not extend to any action for money damages, costs, or attorneys' fees. The parties agree that only Congress can waive the immunity of the United States. The participation of the United States in the proceedings of the Compact Board shall be as provided by Congress.

**ARTICLE V - DISCLAIMERS AND RESERVATIONS**

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

1. The relationship between the water rights of the Chippewa Cree Tribe described herein and any rights to water of any other 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.

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 Indian tribes and tribal members of other Indian tribes.

3. Nothing in this Compact is otherwise intended to conflict with or abrogate a right or claim of an Indian Tribe other than the Chippewa Cree Tribe regarding its boundaries or property interests.

4. 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 other than those of the Chippewa Cree Tribe.

**B. General Disclaimers.**

Nothing in this Compact shall be so 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 the United States and any other state;

2. To preclude the acquisition or exercise of a right to the use of water by any member of the Tribe outside the Reservation by purchase of such right or by acquisition of land, or by application to the State.

3. To determine the relative rights *inter sese* of persons using water under the authority of the State or the Tribe;

4. To limit in any way the rights of the parties or any other person to litigate any issues or questions not resolved by this Compact;
5. To authorize the taking of a water right which is vested under state or federal law;
6. To create or deny substantive rights through headings or captions used in this Compact;
7. To preclude or to discourage the Tribe from acquiring, by contracting or by other means, water rights in addition to the rights acquired under this Compact from any existing or future federal storage facilities off the Reservation;
8. To address or prejudge whether, in any interstate apportionment, the Tribe's water right shall be counted as part of the waters apportioned to the State;
9. To prohibit the Tribe, or the United States on behalf of the Tribe, from objecting in any general stream adjudication in Montana Water Court to any claims to water rights not protected by a drainage stipulation set forth in Appendix 2 of this Compact; provided that, the United States, on behalf of any other Indian tribe, or in its own right, may raise valid objections to any claims listed in Appendix 2 and Appendix 3 of this Compact;
10. To constitute a waiver of sovereign immunity by the Tribe, State, or United States, except as is expressly set forth in this Compact;
11. Unless otherwise provided by Congress, to prevent the United States, as trustee for the Tribe, or the Tribe itself, from filing an action in any court of competent jurisdiction, to prevent any party from interfering with the Tribe in the enjoyment of any water right in this Compact.

**C. Rights Reserved.**

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

**D. Obligations of United States Contingent.**

Notwithstanding any other language in this Compact, except as authorized under other provisions of federal law, the obligations of the United States under this Compact shall be contingent on authorization by Congress.

**E. Expenditures of Money Contingent.**

The expenditure or advance of any money or the performance of any work by the United States or the Tribe pursuant to this Compact which may require appropriation of money by Congress or allotment of funds shall be contingent on such appropriation or allotment being made.

**ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT**

The Tribe and the State of Montana agree to support federal legislation ratifying this Compact that will accomplish the following:

**A. Off-Reservation Water Sources.**

1. Lake Elwell Water Supply. The State and the Tribe agree to support federal legislation that will provide an allocation of 10,000 acre-feet per year from storage water in Lake Elwell, as described in Section C.6. of Article III. The priority date of this water right shall be that established for the source of supply. This water right will be held in trust and will be part of the Tribal Water Right.

2. Right to Participate in Future Projects to Import Water to the Milk River. The Tribe shall have the right to participate in any project to augment the water supply in the Milk River system by transferring water from another drainage, and to have any such augmentation project deliver any entitlement of the Tribe to water to a point on the Reservation designated by the Tribe.

**B. Provision Of A Municipal, Rural, And Industrial Water Supply System, And A Tribal Economic Development Fund.**

The State and Tribe agree to support federal legislation that will authorize and fund a municipal, rural and industrial water system adequate to meet the future MR&I water needs of the Tribe, according to the needs and population projections as set forth in the Municipal, Rural and Industrial (MR&I) Water Supply System Needs Assessment prepared for the Bureau of Reclamation, U.S. Department of the Interior (January, 1996), through either a regional system or a system serving the Reservation only. The State and Tribe further agree to support federal legislation that will establish an economic development fund as agreed to by the Tribe and the Department of the Interior, or by the Tribe and the Montana Congressional Delegation. Support

by the Department of Interior for the proposed MR&I system will depend on a demonstration of feasibility and appropriate allocation of costs.

C. Implementation Contingencies and Cost Share of Administration and Mitigation.

Implementation of this Compact shall be contingent upon the appropriation of necessary funds by the Congress and by the Montana Legislature. The performance of any obligation by any party under this Compact shall be contingent upon appropriation of funds therefor. No liability shall accrue to any party in case necessary funds are not appropriated. The State and the Tribe agree to recommend the following cost share for administration and mitigation necessary to implement the Compact to the Montana State Legislature and the Congress for appropriation on a schedule consistent with implementation as contemplated in this Compact.

1. The State and the Tribe agree to support federal legislation to appropriate \$3,070,000 for the administration of the Tribal Water Right by the Tribal Water Resources Department as set forth in Articles III and IV of the Compact, including but not limited to: stream flow gages; diversion/bypass structures on Big Sandy Creek; aerial survey of impoundments on the Reservation; and development of a Tribal Water Code.

2. The State and the Tribe agree to support state legislation to appropriate \$150,000 for the following purposes as set forth in Articles III and IV of the Compact: water quality discharge monitoring wells and monitoring program; diversion structure on Big Sandy Creek; conveyance structure on Box Elder Creek; and purchase of contract water from Lower Beaver Creek Reservoir.

3. The state agrees to provide services, subject to the availability of funds, valued at \$400,000 for administration required by the Compact and for water quality sampling required by this Compact.

ARTICLE VII - FINALITY, SETTLEMENT OF CLAIMS,  
AND EFFECTIVENESS OF COMPACT

A. Ratification and Effectiveness of Compact.

1. This Compact shall become effective on the date it is ratified by the Tribe, by the State, and by the Congress of the United States, whichever date is latest; provided that, notwithstanding the provisions of Section 85-2-702(2), MCA, those aspects of the Compact specifically designated in Section A.2. of Article VII, shall become effective as stated therein. Upon ratification of this Compact by the Tribe and by the State, whichever is later, the terms of this Compact may not be altered, voided, or modified in any respect without the consent of both the Tribe and the State. Once ratified by Congress, the Tribe, and the State, the Compact may not be modified without the consent of the Tribe, the State, and the United States.

2. As between the State and the Tribe, the moratorium on state permits in the Big Sandy Creek Basin set forth in Section A.7. of Article IV, shall become effective upon the date the Compact is ratified by the Montana Legislature and by the Chippewa Cree Business Committee, whichever date is later. The reservoir operational plan for Bonneau Reservoir set forth in Section B.1 of Article IV shall not become effective until the Reservoir is enlarged.

3. Notwithstanding any other provision in this Compact, the Tribe reserves the right to withdraw as a party to this Compact -

a. if Congress has not ratified this Compact within four (4) years from the date the Compact is ratified by the Tribe and by the State, whichever date is later, or

b. if the municipal, rural, and industrial water supply system which the feasibility study identifies as the preferred alternative to serve the Rocky Boy's Reservation, or an equivalent water supply system as determined by the Tribe, is not authorized within four (4) years of the date the Compact is ratified by the Tribe and by the State, whichever date is later, or

c. if appropriations are not authorized by Congress, including appropriations for planning, design, and other pre-construction work on the municipal, rural, and industrial water supply system authorized by Congress to serve the Rocky Boy's Reservation, within five (5) years of the date the Compact is ratified by the Tribe and by the State, whichever date is later, or

d. if appropriations are not made in the manner contemplated by the federal legislation authorizing the Tribal municipal, rural, and industrial water supply system, or

e. if construction of the Tribal municipal, rural, and industrial water supply system authorized by Congress to serve the Rocky Boy's Reservation, has not commenced within seven

(7) years from the date the Compact is ratified by the Tribe and by the State, whichever date is later, or

f. if construction of the Tribal municipal, rural, and industrial water supply system authorized by Congress to serve the Rocky Boy's Reservation, has not been completed within fourteen (14) years from the date the Compact is ratified by the Tribe and by the State, whichever date is later.

The Tribe may exercise its right to withdraw by sending to the Governor of the State of Montana and to the Secretary of the Interior by certified mail a resolution of the Chippewa Cree Business Committee stating the Tribe's intent to withdraw and specifying a withdrawal date not sooner than 30 days from the date of the resolution. On the date designated in the resolution for Tribal withdrawal, this Compact shall become null and void without further action by any party, and the parties agree to resume negotiation in good faith for quantification of the water rights of the Chippewa Cree Tribe and entry of a decree in a court of competent jurisdiction. If the Tribe fails to take action to withdraw within five (5) years following the fourteen (14) year deadline for completion of the water system, all provisions of the Compact shall remain in effect.

4. Notwithstanding any other provision in this Compact, the Department of the Interior reserves the right to refuse support for federal legislation ratifying this Compact.

**B. Incorporation Into Decrees and Disposition of Federal Suits.**

1. The Tribe and the State agree to defend the provisions and purposes of this Compact including the quantification set forth in Article III, from all challenges and attacks in all proceedings pursuant to this Section B of Article VII.

2. Within 180 days of the date this Compact is ratified by the Chippewa Cree Business Committee, the State of Montana, and Congress, whichever is latest, the Tribe, the State, or the United States shall file, in the general stream adjudication filed by the State of Montana pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of the proposed decree set forth in Appendix 1 as the decree of the water rights held by the United States in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation. If the court does not approve the proposed decree submitted with the motion within three years following the filing of the motion, the Compact shall be voidable by agreement of the parties. If the court approves the proposed decree within three years, but the decree is subsequently set aside by the court or on appeal, the Compact shall be voidable by agreement of the parties. 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.

3. Consistent with section 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of section 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to Article III, Section A.8. of Article IV, and Appendix 1, and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights. The final decree shall consist of Article III and Section A.8. of Article IV as displayed in Appendix 1 and such other information as may be required by 85-2-234, MCA. Nevertheless, pursuant to section 85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.

4. Upon the issuance of a final decree by the Montana Water Court, or its successor, and the completion of any direct appeals therefrom, or upon the expiration of the time for filing any such appeal, the United States, the Tribe, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss the Tribe's claims, and any claims made by the United States as trustee for the Tribe, in United States v. Aageson, No. CIV-79-21-GF (D. Mont. 1979) (hereinafter referred to as "Aageson") and such claims may only be refiled if the Tribe exercises its option to withdraw as a party to the Compact pursuant to Section A.3. of Article VII. This Compact shall be filed as a consent decree in Aageson only if, prior to the dismissal of Aageson as provided in this Article, it is finally determined in a judgment binding upon the State of Montana that the state courts lack jurisdiction over, or that the state court proceedings are inadequate to adjudicate, some or all of the water rights asserted in Aageson.

C. Tribal Settlement of Water Claims.

The parties intend that the water rights and other rights confirmed to the Tribe in this Compact are in full satisfaction of the Tribe's water rights claims, including federal reserved water rights claims based on *Winters v. United States*, 207 U.S. 564 (1908). In consideration of the rights confirmed to the Tribe in this Compact, including rights to the future development of water pursuant to Section C. of Article III, and of performance by the State of Montana and the United States of all actions required by this Compact, including entry of a final order issuing the decree of the reserved water rights of the Tribe held in trust by the United States as quantified in the Compact and displayed in Appendix 1, the Tribe and the United States as trustee for the Tribe hereby relinquish any and all claims to water rights of the Chippewa Cree Tribe within the State of Montana existing on the date this Compact is ratified by the State and the Tribe, whichever date is later.

D. Binding Effect.

Upon the effectiveness of any provision of this Compact, the terms of that provision will be binding:

1. Upon the State and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State of Montana; provided that, the validity of consent, ratification, or authorization by the State is to be determined by Montana law;

2. Upon the Tribe and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the Tribe to the use of the Tribe's water right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribe; provided that, the validity of consent, ratification or authorization by the Tribe is to be determined by tribal law; and

3. Upon the United States and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State of Montana; provided that, the validity of consent, ratification or authorization by the United States is to be determined by federal law; and further provided that, nothing contained in this Compact affects any claim of any Indian tribe other than the Chippewa Cree Tribe, or of persons claiming water through any such other Indian tribe, or the right of any Indian tribe other than the Chippewa Cree Tribe, or persons claiming water through any such other Indian tribe, to pursue a claim to any water from any source based on any theory of right or entitlement.

ARTICLE VIII - LEGISLATION

The State and Tribe agree to seek enactment of any legislation necessary to effectuate the provisions and purposes of this Compact, and to defend the provisions and purposes of this Compact from all challenges and attacks; provided that, no provision of the Compact shall be modified as to substance except as may be provided herein.

IN WITNESS WHEREOF the representatives of the State of Montana, the Chippewa Cree Tribe of the Rocky Boy's Reservation, and the United States have signed this Compact on the 28th day of February, 2000.

History: En. Sec. 1, Ch. 265, L. 1997.

**Part 9**  
**Crow Tribe-Montana Compact**

85-20-901. Crow Tribe-Montana compact ratified. The compact entered into by the State of Montana and the Crow Tribe and filed with the Secretary of State of the State of Montana under the provisions of 85-2-702 on June 22, 1999, is ratified. The compact is as follows:

WATER RIGHTS COMPACT ENTERED INTO BY  
THE STATE OF MONTANA,  
THE CROW TRIBE,  
AND THE UNITED STATES OF AMERICA

This Compact is entered into by and among the State of Montana, the Crow Tribe, and the United States of America for the purpose of settling any and all existing water rights claims of or on behalf of the Crow Tribe of Indians in the State of Montana.

ARTICLE I - RECITALS

WHEREAS, in 1975, the United States, on behalf of the Crow Tribe, brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights, see, U.S. v. Big Horn Low Line Canal Company, et al., No. CIV-75-34-BLG (filed April 17, 1975); and

WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America in trust for the Tribe; see, "the McCarran Amendment", 43 U.S.C. 666(a)(1)(1952); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Crow tribal water rights; and

WHEREAS, the United States has filed claims on behalf of the Crow Tribe in the general stream adjudication initiated by the State of Montana; and

WHEREAS, the lands and waters constituting the Crow Indian Reservation and Tribal Interests in the Ceded Strip were part of the area recognized as the territory of the Crow Indians under the Treaty of Fort Laramie of September 17, 1851 and also were part of the area set apart for the Crow Tribe under the Treaty of Fort Laramie of May 7, 1868; and

WHEREAS, for the purposes of this Compact, the priority date for the Tribal Water recognized is May 7, 1868, which is the senior water right on the water sources covered by this Compact; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes or on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the federal district court litigation was stayed in 1983 pending the outcome of Montana State court water adjudication proceedings, see, Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187, 1189 (9th Cir. 1983); and

WHEREAS, the adjudication of Crow tribal water rights in the state court proceedings has been suspended while negotiations are proceeding to conclude a compact resolving all water rights claims of the Crow Tribe within the State of Montana; and

WHEREAS, the Crow Tribal Council, or its duly designated representatives, have authority to negotiate this Compact pursuant to Resolution No. 99-33; and

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. Sections 516-17 (1993); and

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 the Interior pursuant to 43 U.S.C. Section 1457 (1986, Supp. 1992), inter alia; and

WHEREAS, the Crow Tribe, the State of Montana, and the United States agree that the Tribal Water Right described in this Compact shall be in satisfaction of all the Tribe's water rights claims within the State of Montana; and

WHEREAS, it is in the best interest of all Parties that the water rights claims of the Crow Tribe be settled through agreement between and among the Tribe, the State of Montana, and the United States; and

WHEREAS, in settling the water rights claims of the Crow Tribe the Parties do not intend to alter or amend or to adopt or preclude any interpretation of the Yellowstone River Compact (Act of October 10, 1951, ch. 629, 65 Stat.663 (1951));

NOW THEREFORE, the Parties agree to enter into this Compact for the purpose of settling the water rights claims of the Crow Tribe within the State of Montana.

## ARTICLE II - DEFINITIONS

The following definitions shall apply for purposes of this Compact:

1. "Acre-foot" or "AF" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet.
2. "Acre Feet Per Year" or "AFY" means the quantity of water to which the Tribe has a right each year measured in acre feet over a period of a year.
3. "Adverse Affect" or "Adversely Affect" means interference with or to interfere with the reasonable exercise of a water right.
4. "Bighorn River Basin" means Water Court Basin 43P, the mainstem of the Bighorn River and its tributaries (exclusive of the Little Bighorn River and its tributaries) within Montana to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.
5. "Bighorn Lake" means the body of water impounded on the Bighorn River by Yellowstone Dam, Yellowtail Unit, Lower Bighorn Division, Pick-Sloan Missouri Program, Montana.
6. "Board" means the Crow - Montana Compact Board established by Section F, of Article IV of this Compact.
7. "Ceded Strip" means the area covered by Article III of the Act of April 27, 1904 (33 Stat.352), as depicted on the map attached as Appendix 5.
8. "Change in Use" as applied to the Tribal Water Right, means a change in the point of diversion, the place of use, the purpose of use, or the place or the means of storage.
9. "Clarks Fork Yellowstone River Basin" means Water Court Basin 43D, the mainstem of the Clarks Fork Yellowstone River and its tributaries from the Montana-Wyoming border to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.
10. "Crow Irrigation Project" means the irrigation project authorized by the Act of March 3, 1891 (26 Stat. 989, 1040) managed by the United States, Department of the Interior, Bureau of Indian Affairs, as of the date this Compact has been ratified by the Montana legislature, consisting of the following project units: Agency, Big Horn, Forty Mile, Lodge Grass #1, Lodge Grass #2, Pryor, Reno, Soap Creek, and Upper Little Horn; and including land held in trust by the United States for the Tribe or a Tribal member within the Bozeman Trail and Two Leggins districts which are managed by private irrigation associations as of the date this Compact has been ratified by the Montana legislature.
11. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor agency.
12. "Effective Date" means the date on which the Compact is ratified by the Crow Tribal Council, by the Montana legislature, and by the Congress of the United States, whichever date is latest.
13. "Groundwater" means any water that is beneath the ground surface.
14. "Little Bighorn River Basin" means Water Court Basin 43O, the mainstem of the Little Bighorn River and its tributaries from the Montana-Wyoming border to its confluence with the Bighorn River, as depicted on the map attached as Appendix 2.
15. "Natural Flow" means water that would exist in the Bighorn River and its tributaries in the absence of human intervention.
16. "Parties" means the Tribe, the State, and the United States.
17. "Person" means an individual or any other entity, public or private, including the State, the Tribe, and the United States and all officers, agents, and departments of each of the above.
18. "Pryor Creek Basin" means Water Court Basin 43E, the mainstem of Pryor Creek and its tributaries from its headwaters to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.
19. "Recognized Under State Law" when referring to a water right, means a water right arising under Montana law or a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member.
20. "Release" means to discharge water from storage, or the discharge of water from storage.

21. "Reservation" means the Crow Indian Reservation consisting of the area as presently set apart for the Crow Tribe pursuant to the following Treaty and laws: Article 2 of the Fort Laramie Treaty of May 7, 1868 (15 Stat. 649); the Act of April 11, 1882 (22 Stat. 42); the Act of March 3, 1891 (26 Stat. 989); the Act of April 27, 1904 (33 Stat. 352); the Act of August 31, 1937 (50 Stat. 884); and, the Act of November 2, 1994 (108 Stat. 4636), as depicted on the map attached as Appendix 4.

22. "Rosebud Creek Basin" means Water Court Basin 42A, the mainstem of Rosebud Creek and its tributaries from its headwaters to its confluence with the Yellowstone River, as depicted on the map attached as Appendix 2.

23. "Secretary" means the Secretary of the United States Department of the Interior, or his or her duly authorized representative.

24. "Shoshone River Basin" means Water Court Basin 43N, the mainstem of the Shoshone River and its tributaries within Montana, as depicted on the map attached as Appendix 2.

25. "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof.

26. "Tongue River Basin" means Water Court Basin 42B, the mainstem of the Tongue River and its tributaries from the Montana-Wyoming border to above and including Hanging Woman Creek, as depicted on the map attached as Appendix 2.

27. "Transfer" as applied to the Tribal Water Right, means to authorize a person to use all or any part of the Tribal Water Right through a service contract, lease, or other similar agreement of limited duration.

28. "Tribal Water Resources Department" or "TWRD" means the Crow Tribal Water Resources Department, or any successor agency.

29. "Tribal Interests in the Ceded Strip" means all present and acquired interests in real property, including mineral interests, held in trust by the United States for the Tribe or Tribal members within the Ceded Strip, consisting of: Crow Indian allotments held in trust by the United States for the Tribe or Tribal members; interests restored to the Tribe pursuant to the Act of May 19, 1958 (72 Stat. 121), as modified by the Act of August 14, 1958 (72 Stat. 575); and other interests held in trust by the United States for the Tribe or Tribal members.

30. "Tribal Water Right" means the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described in Article III of this Compact.

31. "Tribe" means the Crow Tribe and all officers, agents, and departments thereof.

32. "United States" means the federal government and all officers, agencies, and departments thereof.

33. "Yellowstone River Basin between Bighorn River and Tongue River" means Water Court Basin 42KJ, the mainstem of the Yellowstone River and its tributaries between Bighorn River and Tongue River, as depicted on the map attached as Appendix 2.

34. "Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River" means Water Court Basin 43Q, the mainstem of the Yellowstone River and its tributaries between Clarks Fork Yellowstone River and Bighorn River, as depicted on the map attached as Appendix 2.

### ARTICLE III - TRIBAL WATER RIGHT

#### A. Basin 43P: Bighorn River.

##### 1. Quantification - Source - Volume.

a. Natural Flow. The Tribe has a quantified water right to the Natural Flow of the Bighorn River for current uses developed as of the date this Compact has been ratified by the Montana legislature and new development within the Reservation of 500,000 AFY. The use of this right is subject to Sections A.6. and A.8.a., of Article III, and the terms and conditions of the streamflow and lake level management plan agreed to in accordance with Section A.7., of Article III.

(1). The Tribe has a right to divert or use or to authorize the diversion or use of water from the Natural Flow of the Bighorn River within the Reservation, subject to the terms and conditions in Section C., of Article IV.

(2). The Tribe may change the source of water from the Natural Flow of the Bighorn River to surface flow or storage of any tributary within the Bighorn River Basin within the Reservation or to Groundwater within the Bighorn River Basin within the Reservation, subject to the terms and conditions in Section C.2.a., of Article IV.

(3). The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water from the Bighorn River as part of that project is a use of the Natural Flow Tribal Water Right set forth in Section A.1.a., of Article III, in the Bighorn River Basin, and the use of this water shall be subject to federal law.

**b. Storage in Bighorn Lake.**

(1). Subject to the approval of, and any terms and conditions specified by, Congress and to the terms and conditions of the streamflow and lake level management plan agreed to in accordance with Section A.7., of Article III, the Tribe shall be entitled to an allocation of 300,000 AFY of water stored in Bighorn Lake. The Tribe and the State agree to seek as a part of that allocation the following:

(a). not more than 150,000 AFY of the allocation provided in Section A.1.b.(1), of Article III may be used or diverted as authorized by the Tribe, subject to the terms and conditions in Section C., of Article IV; provided that, not more than 50,000 AFY may be used outside the Reservation subject to the terms and conditions in Section C.2.c., of Article IV. This storage allocation is in addition to the Natural Flow Tribal Water Right provided in Section A.1.a., of Article III.

(b). not less than 150,000 AFY of the allocation provided in Section A.1.b.(1) of Article III shall only be:

(i) managed so as to be available as a Release during low flow periods pursuant to streamflow and lake level management plan agreed to under Section A.7., of Article III; or

(ii) used for beneficial purposes including diversions for consumptive uses in years of excess Natural Flows and excess storage, if any, when unappropriated or unallocated water is available, and subject to the terms and conditions in Section C., of Article IV.

(2). All other water stored in Bighorn Lake, except for the 6,000 AFY currently allocated by contract to the Montana Power Company, or its successor-in-interest, and the 30,000 AFY allocated by Congress to the Northern Cheyenne Tribe, shall be used only for flood control, production of power, maintenance of instream flows, maintenance of lake levels and carryover storage, consistent with Section A.7., of Article III and federal law.

**2. Priority Date.**

a. Natural Flow. The priority date of the Natural Flow Tribal Water Right set forth in Section A.1.a., of Article III shall be May 7, 1868.

b. Storage. The priority date of the Tribal Water Right to waters stored in Bighorn Lake set forth in Section A.1.b.(1), of Article III shall be the priority date of the water right held by the Bureau of Reclamation as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA.

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

**4. Points and Means of Diversion.** Subject to the terms and conditions in Article IV, and except for the 50,000 AFY that may be used outside the Reservation as provided in Section

A.1.b.(1)(a), of Article III, the Tribe may divert or permit the diversion of this water right from any place and by any means within the Reservation for use within the Reservation, provided that, any diversion structure of the Tribal Water Right upstream of the Two Leggins diversion on the Bighorn River will be constructed to bypass streamflows established or modified pursuant to Section A.7., of Article III.

**5. Purposes.** Subject to the terms and conditions in Article IV, the Tribal Water Right may be used for any purpose within the Reservation allowed by Tribal and federal law.

**6. Protection of Water Rights Recognized Under State Law.**

a: Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature: New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections A.6.a.(1) and (2), of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation No. 1781-r (g)); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV. Measures to prevent Adverse Affect may include Release of water from Bighorn Lake.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Streamflow and Lake Level Management Plan. Pursuant to this Compact, the Tribe, the Secretary, and the State shall develop a streamflow and lake level management plan for the Bighorn River, from the Yellowtail Afterbay Dam to a point immediately upstream of the Two Leggins diversion, and for Bighorn Lake. The streamflow and lake level management plan shall be agreed to within one (1) year after this Compact has been ratified by the Montana legislature. If the streamflow and lake level management plan is not agreed to by the Tribe, the Secretary, or the State the provisions of Section A.4.d., of Article VII apply. The streamflow and lake level management plan is not required to be implemented until the Effective Date of this Compact. The streamflow and lake level management plan may be modified at any time with the consent of the Tribe, the Secretary, and the State. The Montana legislature intends that the streamflow management plan should provide enforceable mechanisms that protect the long-term biological viability of the blue ribbon wild trout fishery on the Bighorn River from the Yellowtail Afterbay Dam to the Two Leggins diversion.

8. Basin Closure within the Bighorn River Basin.

a. In the Bighorn River Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, the DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

B. Basin 430: Little Bighorn River.

1. Quantification - Source - Volume.

a. The Tribe has a water right for all surface flow, Groundwater, and storage within the Little Bighorn River Basin, except as provided for in Sections B.6., and B.7.a., of Article III, and except for water apportioned to Wyoming, if any, as determined by a court of competent jurisdiction or Congress. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

b. The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water in the Little Bighorn River Basin as part of that project is a use of the Tribal Water Right set forth in Section B.1.a., of Article III, and the use of this water shall be subject to federal law. Water stored in Willow Creek Reservoir also is a use of the Tribal Water Right.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section B.1., of Article III shall be May 7, 1868.

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

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Little Bighorn River Basin within the Reservation for use within the Reservation or in connection with Tribal Interests in the Ceded Strip subject to the terms and conditions in Section F., of Article III and Section C.2.b., of Article IV.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Little Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Little Bighorn Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections B.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation No. 1781-r (g)); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Little Bighorn River Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Little Bighorn River Basin.

a. In the Little Bighorn River Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

### C. Basin 43E: Pryor Creek.

#### 1. Quantification - Source - Volume.

a. The Tribe has a water right for all surface flow, Groundwater, and storage within the Pryor Creek Basin within the Reservation, except as provided for in Sections C.6. and C.7.a., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

b. The use of the Tribal Water Right on units of the Crow Irrigation Project that divert water in the Pryor Creek Basin as part of that project is a use of the Tribal Water Right set forth in Section C.1.a., of Article III, and the use of this water shall be subject to federal law.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section C.1., of Article III shall be May 7, 1868.

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

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Pryor Creek Basin within the Reservation for use within the Reservation.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.

#### 6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections C.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Pryor Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Pryor Creek Basin.

a. In the Pryor Creek Basin, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

D. Basin 42A: Rosebud Creek.

1. Quantification - Source - Volume. The Tribe has a water right for all surface flow, Groundwater, and storage within the Rosebud Creek Basin within the Reservation, except as provided for in Sections D.6. and D.7., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., of Article IV.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section D.1., of Article III shall be May 7, 1868.

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

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the Rosebud Creek Basin for use within the Reservation.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used within the Reservation for any purpose allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Within the Reservation. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Rosebud Creek Basin within the Reservation with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1): an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2): new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the Rosebud Creek Basin with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections D.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently

claimed and permits and reservations issued within the Reservation is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basin. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237; 85-2-314; or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. Outside the Reservation. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the Rosebud Creek Basin outside the Reservation are protected from an assertion of senior priority in the exercise of the Crow Tribal Water Right to the same extent provided in the Northern Cheyenne - Montana Compact, Sections A.3.c.i. and ii., of Article II, 85-20-301, MCA. Protection from an assertion of senior priority in the exercise of the Crow Tribal Water Right for the Northern Cheyenne Tribal Water Right shall only be as provided in Section D.7., of Article III.

e. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in the Rosebud Creek Basin within the Reservation with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, or outside the Reservation to the same extent provided in the Northern Cheyenne - Montana Compact, Section A.3.c.i. and ii., of Article II, 85-20-301, MCA.

f. Existing uses of the Tribal Water Right shall not be Adversely Affected by development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect of uses of the Tribal Water Right on Tribally owned land.

#### 7. Protection of Northern Cheyenne Tribal Water Rights within the Northern Cheyenne Reservation.

a. Except as provided in Section G.2., of Article III, the Northern Cheyenne Tribal Water Right, recognized in the Northern Cheyenne - Montana Compact, Section A.3.a., of Article II, 85-20-301, MCA, is protected from an assertion of senior priority in the exercise of the Crow Tribal Water Right.

b. New development, Change in Use, or Transfer of the Crow Tribal Water Right shall not Adversely Affect the exercise of the Northern Cheyenne Tribal Water Right, recognized in the Northern Cheyenne - Montana Compact, Section A.3.a., of Article II, 85-20-301, MCA.

#### 8. Basin Closure within the Rosebud Creek Basin within the Reservation.

a. In the Rosebud Creek Basin upstream from the point that Rosebud Creek or any tributary of Rosebud Creek leaves the Reservation, DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

E. Youngs Creek drainage, Squirrel Creek drainage, Tanner Creek drainage, Dry Creek drainage, and Spring Creek drainage within Tongue River Basin; Sarpy Creek drainage within Yellowstone River Basin between Bighorn River and Tongue River; Cottonwood Creek drainage, Five Mile Creek drainage, and Bluewater Creek drainage within Clarks Fork Yellowstone River Basin; Sage Creek drainage within Shoshone River Basin; and, Fly Creek drainage, Blue Creek drainage, Dry Creek drainage, and Bitter Creek drainage within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River.

1. Quantification - Source - Volume. The Tribe has a water right for all surface flow, Groundwater, and storage within the Reservation within Youngs Creek drainage, Squirrel Creek drainage, Tanner Creek drainage, Dry Creek drainage, and Spring Creek drainage within Tongue River Basin; Sarpy Creek drainage within Yellowstone River Basin between Bighorn River and Tongue River; Cottonwood Creek drainage, Five Mile Creek drainage, and Bluewater Creek drainage within Clarks Fork Yellowstone River Basin; Sage Creek drainage within Shoshone River Basin; and, Fly Creek drainage, Blue Creek drainage, Dry Creek drainage, and Bitter Creek drainage within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River, except as provided in Sections E.6. and E.7.a., of Article III. Development of the Tribal Water Right shall be subject to the terms and conditions in Section C., Article IV.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section E.1., of Article III shall be May 7, 1868.

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

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the drainages listed in Section E.1., of Article III within the Reservation for use within the Reservation.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right may be used for any purpose within the Reservation allowed by Tribal and federal law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law in the drainages listed in Section E.1., of Article III, with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1) an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2) new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law in the drainages listed in Section E.1., of Article III with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections E.6.a.(1) and (2), of Article III extends only to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC; water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights exempt from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basins. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. Administration and distribution between State and Tribal water uses within the Reservation shall be as provided in Section A.4., of Article IV.

d. New development, Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law in each drainage listed in Section E.1., of Article III, with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

e. Existing uses of the Tribal Water Right shall not be Adversely Affected by development, Change in Use; or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect of uses of the Tribal Water Right on Tribally owned land.

7. Basin Closure within the Reservation.

a. In the drainages listed in Section E.1., of Article III, upstream from the point that each stream or its tributaries leaves the Reservation, DNRC shall not process or grant an application

for an appropriation after this Compact has been ratified by the Montana legislature, provided that, in accordance with the terms and conditions in Section D.1., of Article IV, DNRC may issue a certificate of water right or permit for use on fee land for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations as provided in 85-2-113(3), MCA.

b. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, issued under state law and is not a limit on new development of the Tribal Water Right as set forth in this Compact.

c. The basin closure applies only to new appropriations not excepted from the permit process, as provided in Section D.1., of Article IV, and is not a limit on change of use or transfers of water rights Recognized Under State Law, subject to the terms and conditions in Section D.2., of Article IV.

#### F. Tribal Water Right in the Ceded Strip.

##### 1. Quantification - Source - Volume.

a. Tribal Interests in the Ceded Strip. As part of the Tribal Water Right, the Tribe has a right to divert a total of 47,000 AFY from surface flow, Groundwater, or storage within the Ceded Strip from portions of the Sarpy Creek drainage and Yellowstone River within Yellowstone River Basin between Bighorn River and Tongue River; Fly Creek drainage and Yellowstone River within Yellowstone River Basin between Clarks Fork Yellowstone River and Bighorn River; Pryor Creek Basin; and Bighorn River Basin for use in connection with Tribal Interests in the Ceded Strip; and, water imported to the Ceded Strip from the Little Bighorn River Basin for use in connection with Tribal Interests in the Ceded Strip. Diversion and use shall be subject to the terms and conditions in Sections C.1.c. and C.1.d., of Article IV.

(1). This 47,000 AFY is in addition to the Tribal Water Right set forth in Sections A.1., B.1., C.1., and E.1., of Article III, except that any diversion of this right from surface flow, Groundwater, or storage within the Bighorn River Basin shall be deducted from the Tribal Water Right as set forth in Section A.1., of Article III.

(2). No more than 47,000 AFY may be diverted and used in connection with Tribal Interests in the Ceded Strip from all water sources, provided that:

(a). no more than 2,500 AFY from all water sources including the Yellowstone River may be diverted upstream from the confluence of the Bighorn River and the Yellowstone River.

(b). no more than 7,000 AF may be diverted from all sources including the Yellowstone River in any month, provided that, aggregate uses from all sources not exceed 47,000 AFY.

b. Use limited to within the Ceded Strip. The Tribal Water Right of 47,000 AFY for use in connection with Tribal Interests in the Ceded Strip shall be used only within the Ceded Strip and shall not be considered a Change in Use or Transfer outside the Reservation for purposes of Section C.2.c., of Article IV.

c. Any portion of the 50,000 AFY set forth in Section A.1.b.(1).(a)., of Article III which may be used outside the Reservation may also be used in connection with Tribal Interests in the Ceded Strip in addition to the Tribal Water Right of 47,000 AFY set forth in Section F.1.a., of Article III.

2. Priority Date. The priority date of the Tribal Water Right set forth in Section F.1.a., of Article III shall be May 7, 1868.

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

4. Points and Means of Diversion. Subject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means for use in connection with Tribal Interests in the Ceded Strip within the Ceded Strip.

5. Purposes. Subject to the terms and conditions in Article IV, the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip may be used for beneficial purposes allowed by Tribal, federal and state law.

6. Protection of Water Rights Recognized Under State Law.

a. Except as provided in Section G.2., of Article III, water rights Recognized Under State Law affected by the exercise of the Tribal Water Right in the Ceded Strip with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, are protected from:

(1). an assertion of senior priority in the exercise of current uses of the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature.

(2). new development of the Tribal Water Right after the date this Compact has been ratified by the Montana legislature. New development of the Tribal Water Right shall be exercised as junior in priority to water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. The protection of water rights Recognized Under State Law set forth in Sections F.6.a.(1). and (2)., of Article III extends to: valid existing water rights as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permits issued by DNRC; state water reservations issued by the Montana Board of Natural Resources and Conservation or DNRC (except for Water Reservation Nos. 1781-r and 10006-r); water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA; and, water rights excepted from the permit process pursuant to 85-2-306, MCA. With the exception of rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA, and rights excepted from the permit process pursuant to 85-2-306, MCA, a list of existing water rights as currently claimed and permits and reservations issued is attached as Appendix 3. Appendix 3 shall be modified by decrees resolving claims on the affected basins. Prior to issuance of the final decree, water rights protected shall be as recognized under state law, and all remedies available under state law shall be applicable. Appendix 3 may be modified due to clerical error or omission or to make Appendix 3 consistent with modifications in accordance with 85-2-237, 85-2-314, or 85-2-316(10) through (13), MCA.

c. New development; Change in Use, or Transfer of the Tribal Water Right shall not Adversely Affect the exercise of water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

d. Existing uses of the Tribal Water Right shall not be Adversely Affected by new development, Change in Use, or Transfer of the Tribal Water Right, except that the Tribe may allow Adverse Affect on uses of the Tribal Water Right on Tribally owned land.

G. Additional Rights to Water. As part of the water rights specifically set forth in Sections A., B., C., D., E., and F., of Article III, the Tribe has a right to water from the following sources:

1. Appurtenant Water Rights. For land within the Reservation acquired after the Effective Date of this Compact, the Tribe has the right to the use of any water right acquired as an appurtenance to the land. At such time that the acquired land is transferred to trust status, the water right appurtenant to the land acquired shall become part of and not in addition to the Tribal Water Right quantified in this Compact with a May 7, 1868 priority date, provided that, the acquired water right shall retain any protections set forth in this Compact. The Tribe shall notify DNRC of any acquisition of water in the Tribe's annual report and shall identify the water right acquired, as set forth in Section E.1., of Article IV. Any water right acquired shall be added as decreed by the Montana Water Court to the list of current uses of the Tribal Water Right as provided in Section E.2., of Article IV.

2. Exempt Rights.

a. Religious or cultural uses of the Tribal Water Right by Crow Tribal members within the Reservation in de minimis amounts shall be allowed without prior review by DNRC.

b. In accordance with the terms and conditions in Section C.1., of Article IV, TWRD may authorize development of the Tribal Water Right for:

(1). an appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the

appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

(2). an appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

(3). temporary emergency appropriations necessary to protect lives or property.

c. Uses of the Tribal Water Right provided for in Sections G.2.a. and G.2.b., of Article III, are not subject to protection of water rights Recognized Under State Law provided in Sections A.6., B.6., C.6., D.6., D.7., E.6., and F.6., of Article III, or streamflows established or modified pursuant to Section A.7., of Article III.

H. Proposed Decree. For purposes of entry in the Montana Water Court, the proposed decree of the Tribal Water Right set forth in Article III is attached as Appendix 1. If there are differences between Appendix 1 and the Final Decree, the Final Decree shall control.

#### ARTICLE IV - IMPLEMENTATION OF TRIBAL WATER RIGHT

##### A. General Provisions.

1. Trust Status of Tribal Water Right. The Tribal Water Right shall be held in trust by the United States.

##### 2. Tribal Water Right: Administration.

a. Subject to the limitations imposed by this Compact and federal law, the use of the Tribal Water Right shall be administered by the Tribe through TWRD within the Reservation, in the Ceded Strip, and outside the Reservation. Disputes, not within the jurisdiction of the Compact Board set forth in F.4., of Article IV, concerning use of the Tribal Water Right in the Ceded Strip and outside the Reservation which raise issues concerning the application of state or federal law shall be resolved in a court of competent jurisdiction. Those disputes concerning use of the Tribal Water Right in the Ceded Strip and outside the Reservation which do not raise issues concerning the application of state or federal law shall be within the exclusive jurisdiction of the Tribe. Subject to the limitations imposed by this Compact, the Tribe shall have the final and exclusive jurisdiction to resolve all disputes concerning the Tribal Water Right between holders of water rights under the Tribal Water Right. TWRD shall develop policies and procedures for monitoring water use, diversions, and maintaining records of water use and development consistent with this Compact. The current water use and diversions and new development shall be identified by location and quantity.

b. Administration and enforcement of the Tribal Water Right shall be pursuant to a Tribal water code, which shall be developed and adopted by the Tribe within two (2) years following the Effective Date of this Compact pursuant to any requirements set forth in the Constitution of the Crow Tribe. Pending the adoption of the Tribal water code, the administration and enforcement of the Tribal Water Right shall be by the Secretary of the Interior.

c. The Tribe shall not administer any water right Recognized Under State Law.

d. Administration, operation and maintenance, and delivery of the Tribal Water Right on the Crow Irrigation Project shall be conducted by the United States Department of the Interior, Bureau of Indian Affairs, in accordance with applicable federal laws. Portions of the Project within the Bozeman Trail and Two Leggins Districts shall be administered in accordance with applicable law.

##### 3. Water Rights Recognized Under State Law: Administration.

a. The State shall administer and enforce all water rights Recognized Under State Law to the use of surface flows, Groundwater, and storage within or outside the Reservation. The State shall have the final and exclusive jurisdiction to resolve all disputes between holders of water rights Recognized Under State Law.

b. The State shall not administer or enforce any part of the Tribal Water Right.

c. For water rights Recognized Under State Law, if any, utilizing water delivered by the Crow Irrigation Project, administration and distribution of such water shall be conducted by the United States Department of the Interior, Bureau of Indian Affairs, in accordance with applicable federal laws.

4. Distribution of Water Between the Parties. When water availability is insufficient to satisfy all water rights under the Tribal Water Right and all water rights Recognized Under State Law within the Reservation, administration and distribution shall be as follows:

a. distribution between the water administered by the Tribe and the United States for current uses of the Tribal Water Right within the Reservation developed as of the date this Compact has been ratified by the Montana legislature and the water for water rights Recognized Under State Law within the Reservation with a priority date before this Compact has been ratified by the Montana legislature shall be on an equitable basis in proportion to the amount of water required for Tribal water use as listed pursuant to Section E.2., of Article IV, and the amount of water required for water rights Recognized Under State Law, provided that, the Parties recognize that distribution may not be on a precise proportional basis due to the need to take into account the physical constraints of water delivery. Administration and distribution by the Tribe, the United States, and the State within their proportional shares shall be pursuant to Tribal, federal, and state law respectively, and shall be coordinated as necessary. This distribution shall not modify the right of a holder of a water right Recognized Under State Law to seek enforcement of such water right against other water rights Recognized Under State Law in priority without the agreement of the water right holder.

b. future development of the Tribal Water Right after this Compact has been ratified by the Montana legislature shall be enforced as junior in priority to the water rights subject to a proportional distribution as set forth in Section A.4.a., of Article IV.

c. nothing in Section A.4.a., of Article IV shall prevent water users from agreeing to an alternative water distribution plan on the basis of individual water rights pursuant to applicable state, Tribal, or federal law.

5. Subsequent Federal or State Law. Administration under Sections A.2.d., A.3.a. and A.3.c., of Article IV shall be as set forth in this Compact except as may otherwise be determined by a court of competent jurisdiction or established by Congress.

B. Use of the Tribal Water Right.

1. Persons Entitled to Use the Tribal Water Right. The Tribal Water Right may be used by the Tribe, Tribal members, or Persons authorized by the Tribe, provided that, the Tribe may not limit or deprive Indians residing on the Reservation or in the Ceded Strip of any right, pursuant to 25 U.S.C. . 381, to a just and equal portion of the Tribal Water Right set forth in Article III.

2. Effect of Non-Use of the Tribal Water Right. State law doctrines relating to the use of water rights, including but not limited to relinquishment, forfeiture or abandonment, do not apply to the Tribal Water Right. Thus, non-use of all or any of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture or abandonment of such rights.

C. Tribal Water Right: New Development, Change in Use, or Transfer.

1. New Development of Surface Flow, Groundwater, or Storage of the Tribal Water Right.

a. New Development of Surface Flow, Groundwater, or Storage Within the Reservation. After the Effective Date of this Compact, the Tribe may develop or authorize new development of surface flow, Groundwater, or storage of the Tribal Water Right within the Reservation; provided that, such development shall not Adversely Affect a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

b. Prerequisite Administrative Procedure within the Reservation. The following procedure for determining whether new development of surface flow, Groundwater, or storage of the Tribal Water Right within the Reservation will have an Adverse Affect on water rights Recognized Under State Law shall be followed prior to seeking relief from the Compact Board:

(1). Application for new development of a surface flow, Groundwater, or storage use within the Reservation shall be made to TWRD.

(2). TWRD shall review the application and make a determination of whether the new development will have an Adverse Affect on water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV. Upon request by TWRD, DNRC shall provide information on state water rights as recorded in the DNRC database to TWRD.

(3). If TWRD determines that the new development will have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, TWRD shall deny the application. If TWRD determines that the new development will not have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, TWRD shall forward the application with its determination to DNRC.

(4). If, based upon the evidence, DNRC agrees with TWRD's determination, DNRC shall notify TWRD. If, however, based upon the evidence, DNRC cannot agree with TWRD's determination, DNRC shall publish notice of the application once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any holder of a water right Recognized Under State Law who, according to the records of the DNRC, has a water right with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, and may be affected by the proposed development. DNRC shall notify TWRD within ninety (90) days of DNRC's determination.

(5). DNRC and TWRD should attempt to resolve any disagreement on TWRD's determination of no Adverse Affect on a cooperative basis. If DNRC or a holder of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, disagree with the determination of no Adverse Affect, DNRC or the water right holder may seek relief from the Compact Board.

(6). In any proceeding concerning the effect of new Groundwater development of the Tribal Water Right within the Reservation either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a). Wells Less than 100 Feet: For new Groundwater wells to be completed at a depth beneath the surface of less than 100 feet, the applicant shall bear the burden of showing no Adverse Affect to a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

(b). 100 Feet or Deeper Wells: For new Groundwater wells to be completed at a depth beneath the surface of 100 feet or deeper, the owner of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, shall bear the burden of showing Adverse Affect to the water right.

(7). In any proceeding concerning the effect of new storage development of the Tribal Water Right within the Reservation either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a). Storage Over 50 AF: For new storage facilities with a planned constructed capacity of more than 50 AF, the applicant shall bear the burden of showing no Adverse Affect to a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

(b). Storage 50 AF or Less: For new storage facilities with a planned constructed capacity of 50 AF or less, the owner of the water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV, shall bear the burden of showing Adverse Affect to the water right.

c. New Development of Surface Flow, Groundwater, or Storage for Use in Connection with Tribal Interests in the Ceded Strip. After the Effective Date of this Compact, the Tribe may develop or authorize new development, from surface flow, Groundwater, or storage, of the Tribal Water Right as set forth in Section F., of Article III and subject to the terms and conditions in Section F.1., of Article III for use in connection with Tribal Interests in the Ceded Strip; provided that, such development shall not Adversely Affect a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV.

d. Prerequisite Administrative Procedure within the Ceded Strip. The following procedure for determining whether new development of surface flow, Groundwater, or storage of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip will have an Adverse Affect on water rights Recognized Under State Law shall be followed prior to seeking relief from the Compact Board:

(1). Application for new development of surface flow, Groundwater, or storage of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip shall be made to TWRD.

(2). TWRD shall review the application and make a determination of whether the new development will have an Adverse Affect on water rights Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA. Upon request by TWRD, DNRC shall provide information on state water rights as recorded in the DNRC database to TWRD.

(3). If TWRD determines that the new development will have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, TWRD shall deny the application. If TWRD determines that the new development will not have an Adverse Affect on a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, TWRD shall forward the application with its determination to DNRC.

(4). If, based upon the evidence, DNRC agrees with TWRD's determination, DNRC shall notify TWRD. If, however, based upon the evidence, DNRC cannot agree with TWRD's determination, DNRC shall publish notice of the application once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any holder of a water right Recognized Under State Law who, according to the records of the department, has a water right with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA; and may be affected by the proposed development. DNRC shall notify TWRD within ninety (90) days of DNRC's determination.

(5). DNRC and TWRD should attempt to resolve any disagreement on TWRD's determination of no Adverse Affect on a cooperative basis. If DNRC or a holder of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, disagree with the determination of no Adverse Affect, DNRC or the water right holder may seek relief from the Compact Board.

(6). In any proceeding concerning the effect of new Groundwater development of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a). Wells Less than 100 Feet: For new Groundwater wells to be completed at a depth beneath the surface of less than 100 feet, the applicant shall bear the burden of showing no Adverse Affect to a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or exempt rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA.

(b). 100 Feet or Deeper Wells: For new Groundwater wells to be completed at a depth beneath the surface of 100 feet or deeper, the owner of a water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, shall bear the burden of showing Adverse Affect to the water right.

(7). In any proceeding concerning the effect of new storage development of the Tribal Water Right for use in connection with Tribal Interests in the Ceded Strip either before TWRD, DNRC, or before the Compact Board, the following shall apply:

(a). Storage Over 50 AF: For new storage facilities with a planned constructed capacity of more than 50 AF, the applicant shall bear the burden of showing no Adverse Affect to a water

right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA.

(b). Storage 50 AF or Less: For new storage facilities with a planned constructed capacity of 50 AF or less, the owner of the water right Recognized Under State Law with a priority date before this Compact has been ratified by the Montana legislature or excepted rights that are provided in Section D.1., of Article IV or pursuant to 85-2-306, MCA, shall bear the burden of showing Adverse Affect to the water right.

e. Groundwater Development of the Tribal Water Right Exempt from the Showing of No Adverse Affect. The following wells are exempt from the requirement of showing no Adverse Affect:

(1). Wells developed as of the date this Compact has been ratified by the Montana legislature are exempt from the burden to show no Adverse Affect. These wells may be replaced, repaired or rehabilitated to the original constructed capacity. A comprehensive list of wells developed as of the date this Compact has been ratified by the Montana legislature shall be kept on file in TWRD offices as part of the requirement to list current uses of the Tribal Water Right in Section E.2., of Article IV.

(2). An authorized use of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

f. Storage Development of the Tribal Water Right Exempt from the Showing of No Adverse Affect. The following storage facilities are exempt from the requirement of showing no Adverse Affect:

(1). Facilities storing the Tribal Water Right developed as of the date this Compact has been ratified by the Montana legislature are exempt from the burden to show no Adverse Affect. These storage facilities may be replaced, repaired or rehabilitated to the original constructed capacity. A comprehensive list of storage facilities developed as of the date this Compact has been ratified by the Montana legislature shall be kept on file in TWRD offices as part of the requirement to list current uses of the Tribal Water Right in Section E.2., of Article IV.

(2). An authorized use of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

## 2. Change in Use or Transfer of the Tribal Water Right.

a. Change in Use or Transfer of the Tribal Water Right Within the Reservation. Unless otherwise stated in this Compact, the Tribe may make or authorize a Change in Use or Transfer of a water right set forth in Article III of this Compact within the Reservation; provided that, such Change in Use or Transfer shall not Adversely Affect a water right Recognized Under State Law with a priority date before the date of the Change in Use or Transfer. Determination of Adverse Affect shall be made following the same procedure used for review of new surface flow, Groundwater, or storage development of the Tribal Water Right set forth in Sections C.1.a. and C.1.b., of Article IV.

b. Change in Use or Transfer of the Tribal Water Right Within the Ceded Strip. Unless otherwise stated in this Compact, the Tribe may make or authorize a Change in Use or Transfer of the Tribal Water Right set forth in Section F.1.a., of Article III within the Ceded Strip; provided that, such Change in Use or Transfer shall not Adversely Affect a water right Recognized Under State Law with a priority date before the date of the Change in Use or Transfer. Determination of Adverse Affect shall be made following the same procedure used for review of new surface flow, Groundwater, or storage development of the Tribal Water Right within the Ceded Strip set forth in Sections C.1.c. and C.1.d., of Article IV.

c. Change in Use or Transfer of the Tribal Water Right Outside the Reservation. Except as otherwise provided in this Compact, the Tribe, pursuant to federal law, may make or authorize a Change in Use or a Transfer of the Tribal Water Right for up to 50,000 acre-feet of water as provided in Section A.1.b.(1).(a), of Article III, for use outside the Reservation; provided that, any Transfer shall be for a term not to exceed 100 years, and may include provisions authorizing

renewal for an additional term not to exceed 100 years; and provided that, no such Transfer shall be a permanent alienation of the water Transferred. Any Change in Use or Transfer of any such water right involving a point of diversion or place of use located outside the Reservation shall be considered a use outside the Reservation, except as provided in Section F., of Article III and Section C.2.b., of Article IV; and, further provided that, any use of Tribal water rights described in this Compact outside the Reservation shall not be deemed to convert such rights to rights arising under state law, and non-use of such rights outside the Reservation shall not constitute a relinquishment, forfeiture, or abandonment of the rights. The Tribe may change the point of diversion or purpose or place of use of the Tribal Water Right back to the Reservation without reduction in the amount of water provided in the Compact.

(1). Applicable Law. No person may initiate a use, Change in Use, or Transfer of a Tribal water right set forth in this Compact outside the Reservation without first complying with applicable state law. Approval of an application for a use, Change in Use, or Transfer outside the Reservation by the State shall be conditioned on a valid Tribal authorization for such use, Change in Use, or Transfer by the Tribe. The applicant shall provide DNRC with proof of a valid Tribal authorization prior to initiating the use, Change in Use, or Transfer.

(2). Diversion Facilities. With respect to diversion or transportation facilities located outside the Reservation which are to be used in connection with the exercise of a water right set forth in this Compact, the Tribe or Persons using such water right shall apply for all permits, certificates, variances and other authorizations required by state laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water. A diversion or use of water in the exercise of such water right may be made only after all permits, certificates, variances or other authorizations applied for pursuant to this paragraph have been obtained.

D. Water Rights Recognized Under State Law: New Development, Change in Use, or Transfer.

1. Limit on New Development. DNRC shall not process or grant an application for an appropriation after this Compact has been ratified by the Montana legislature within the Reservation, and outside the Reservation in Bighorn River Basin and in Pryor Creek Basin, provided that, the Department may issue certificates of water right or permits for use on fee land for:

a. An appropriation of Groundwater by means of a well or developed spring with a maximum appropriation of 35 gallons per minute or less, not to exceed 10 acre-feet per year, unless the appropriation is a combined appropriation from the same source from two or more wells or developed springs exceeding the limitation.

b. An appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream.

c. Temporary emergency appropriations as provided in 85-2-113(3), MCA.

2. Change in Use or Transfer of Water Rights Recognized Under State Law within the Reservation. The State may authorize a change in use or transfer of a water right Recognized Under State Law within the Reservation in accordance with state law, provided that, such change or transfer shall not Adversely Affect a use of the Tribal Water Right existing at the time of the application for change in use or transfer.

a. Prerequisite Administrative Procedure. The following procedure for determining whether a change in use or transfer of a water right Recognized Under State Law within the Reservation will have an Adverse Affect on an existing water right developed or authorized prior to the date of application for change of use or transfer under the Tribal Water Right shall be followed prior to seeking relief from the Compact Board:

(1). Application for a change in use or transfer of a water right Recognized Under State Law within the Reservation shall be made to DNRC.

(2). DNRC shall review the application and make a determination of whether the change in use or transfer of a water right Recognized Under State Law within the Reservation will have an Adverse Affect on a water right developed or authorized under the Tribal Water Right. Upon

request by DNRC, TWRD shall provide information on developed and authorized Tribal Water Rights as recorded by TWRD to DNRC.

(3). If DNRC determines that the change in use or transfer of a water right Recognized Under State Law within the Reservation will have an Adverse Affect on a water right developed or authorized under the Tribal Water Right, DNRC shall deny the application. If DNRC determines that the change in use or transfer of a water right Recognized Under State Law within the Reservation will not have an Adverse Affect on a water right developed or authorized under the Tribal Water Right, DNRC shall forward the application with its determination to TWRD.

(4). If, based upon the evidence, TWRD agrees with DNRC's determination, TWRD shall notify DNRC. If, however, based upon the evidence, TWRD cannot agree with DNRC's determination, TWRD shall publish notice of the application once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any Tribal Water Right holder who, according to the records of TWRD, has a water right developed or authorized before the application date and may be affected by the proposed change in use or transfer of a water right Recognized Under State Law within the Reservation. TWRD shall notify DNRC within ninety (90) days of TWRD's determination.

(5). TWRD and DNRC should attempt to resolve any disagreement on DNRC's determination of no Adverse Affect on a cooperative basis. If TWRD or a holder of a water right developed or authorized under the Tribal Water Right disagree with the determination of no Adverse Affect, TWRD or the Tribal Water Right holder may seek relief from the Compact Board.

#### E. Reporting Requirements.

1. On an annual basis DNRC shall provide the Tribe and the United States with a listing of all uses of surface flow, Groundwater, or storage for which a certificate of water right or permit has been issued or a change in use or transfer has been approved by DNRC within the Reservation, in the Ceded Strip, and in drainages affected by this Compact.

2. Within one (1) year after this Compact has been ratified by the Montana legislature, the TWRD and the United States shall provide the DNRC with a report listing all current uses of the Tribal Water Right, including uses by Tribal members, existing as of the date this Compact has been ratified by the Montana legislature. DNRC may request additional information from TWRD or the United States to assist in reviewing the report. DNRC must approve or disapprove of the listing of all current uses of the Tribal Water Right within six (6) months after receipt of the report.

3. On an annual basis TWRD shall provide the DNRC and the United States with a listing of all new development of the Tribal Water Right described in this Compact within the Reservation, in the Ceded Strip, and outside the Reservation, and of all Changes in Use or Transfers of water rights within and outside the reservation since the last report.

4. TWRD, DNRC, and the United States may agree to modify the reporting requirements set forth in Sections D.1. and D.3., of Article IV. Such modification is pursuant to, and shall not be deemed a modification of, this Compact.

5. All reporting to the United States under this subsection shall be made to the Billings Area Office of the Bureau of Indian Affairs.

#### F. Enforcement: Crow-Montana Compact Board.

1. Establishment of Board. There is hereby established the Crow-Montana Compact Board. The Board shall consist of three members: one member selected by the Governor of the State of Montana; one member appointed by the Crow Tribal Chairman; and one member selected by the other two members. All members shall be appointed within six (6) months of the Effective Date of this Compact and within thirty (30) days of the date any vacancy occurs. If an appointment is not timely made by the Governor, the Director of DNRC or his/her designee shall fill the State's position. If an appointment is not timely made by the Crow Tribal Chairman, the Director of TWRD or his/her designee shall fill the Tribe's position. Each member shall serve a five-year term and shall be eligible for reappointment. The initial term of each member shall be staggered with one member serving a five-year term, one a four-year term, and one a three-year term. The initial term of each member shall be chosen by lot. Expenses of the members appointed by the State and the Tribe shall be borne by the entity appointing the member. The expenses of the

third member and all other expenses shall be borne equally by the Tribe and the State, subject to the availability of funds.

2. Membership. Should the two appointed members fail to agree on the selection of a third member within sixty (60) days of the date of appointment of the second member, or within thirty (30) days after any vacancy occurs, the following procedure shall be utilized:

a. Within five (5) days thereafter each member shall nominate three persons to serve as a member of the Board;

b. Within fifteen (15) days thereafter each member shall reject two of the persons nominated by the other member;

c. Within five (5) days thereafter, the remaining two nominees shall be submitted to the Dean of the University of Montana School of Law who shall select the third member from the two nominees.

3. Quorum and Vote Required. Two members of the Board shall constitute a quorum if reasonable notice of the time, place, and purpose of the meeting, hearing, or other proceeding has been provided in advance to the absent member. All Board decisions shall be by a majority of the Board, shall be in writing and, together with any dissenting opinions, shall be served on all parties in the proceeding before the Board, and on the Parties to this Compact.

4. Jurisdiction of the Board. The Crow-Montana Compact Board shall have jurisdiction to resolve controversies over the right to the use of water as between the Parties or holders of water rights developed or authorized under the Tribal Water Right and holders of water rights Recognized Under State Law. Such controversies shall include, but shall not be limited to, disputes as to the meaning of this Compact.

5. Prerequisite Administrative Procedures.

a. Any holder of a water right Recognized Under State Law concerned that a new development, Change in Use, or Transfer of the Tribal Water Right is inconsistent with the Compact shall first contact the Billings Regional Office of DNRC. If DNRC and TWRD are unable to resolve the issue in a manner acceptable to the water right holder within a reasonable time through discussion, DNRC or the water right holder may seek relief through the Compact Board. The Tribe agrees to allow DNRC reasonable access onto Tribal land or to assist DNRC in obtaining reasonable access onto the land of the Tribal Water Right holder to observe the challenged new development, Change in Use, or Transfer.

b. Any Tribal Water Right holder concerned that a new development, change in use, or transfer of water by a holder of a water right Recognized Under State Law is inconsistent with the Compact shall first contact TWRD. If TWRD and DNRC are unable to resolve the issue in a manner acceptable to the Tribal Water Right holder within a reasonable time through discussion, TWRD or the Tribal Water Right holder may seek relief through the Compact Board. DNRC agrees to assist TWRD in obtaining reasonable access onto the land of the holder of the water right Recognized Under State Law to observe the challenged development, change in use, or transfer.

c. TWRD and DNRC may jointly develop supplemental procedures as necessary or appropriate. Such supplemental procedures are pursuant to, and shall not be deemed a modification of, this Compact.

6. Powers and Duties. The Board shall hold hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence, and to appoint technical experts. The Tribe and the State shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribe and the State for enforcing a subpoena issued by the courts of each respective sovereign in a civil action. The parties to the controversy may present evidence and cross examine any witnesses. The Board shall determine the controversy and grant any appropriate relief, including a temporary order; provided that, the Board shall have no power to award money damages, costs, or attorneys' fees. All decisions of the Board shall be by majority vote and in writing. The Board shall adopt necessary rules and regulations to carry out its responsibilities within six (6) months after its first meeting. All records of the Board shall be open to public inspection, except as otherwise ordered by the Board.

### 7. Review and Enforcement of Board Decisions.

a. Decisions by the Board shall be effective immediately, unless stayed by the Board. Unless otherwise provided by Congress, only the United States and parties to the proceedings before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty (30) days of such decision. The hearing on appeal shall be a trial de novo. The notice of appeal shall be filed with the Board and served personally or by registered mail upon all parties to the proceeding before the Board.

b. Unless an appeal is filed within thirty (30) days of a final decision of the Board, as provided in Section F.7.a., of Article IV, any decision of the Board shall be recognized and enforced by any court of competent jurisdiction on petition of the Board, or any party before the Board in the proceeding in which the decision was made.

c. A court of competent jurisdiction in which a timely appeal is filed pursuant to Section F.7.a., of Article IV, or in which a petition to confirm or enforce is filed pursuant to Section F.7.b., of Article IV, may order such temporary or permanent relief as it considers just and proper.

d. An appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to Section f.7.a., of Article IV, or in which a petition to confirm or enforce is filed pursuant to Section F.7.b., of Article IV, in the manner and to the same extent as from orders or judgments of the court in a civil action.

e. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court the record of the proceedings before the Board within sixty (60) days of filing of a notice of appeal.

8. Waiver of Immunity. The Tribe and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under this Compact by the Crow-Montana Compact Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribe or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties agree that only Congress can waive the immunity of the United States. The participation of the United States in the proceedings of the Compact Board shall be as provided by Congress.

## ARTICLE V - DISCLAIMERS AND RESERVATIONS

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

1. Except as provided in Sections A.1.b.(2). and D.7., of Article III, the relationship between the Tribal Water Right described herein and any rights to water of any other Indian Tribe or its members, or of the United States on behalf of such Tribe or its members shall be determined by the rule of priority.

2. Nothing in this Compact may be construed or interpreted as a precedent to establish the nature, extent, or manner of administration of the rights to water of any other Indian tribes or their members outside of the Crow Reservation.

3. Nothing in this Compact is otherwise intended to affect or abrogate a right or claim of an Indian Tribe other than the Crow Tribe.

4. Except as otherwise provided herein and authorized by Congress, nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the reserved rights to water of any other federal agency or of any other federal lands. Such reserved rights will be subject to the rule of priority in their use.

### B. General Disclaimer. Nothing in this Compact shall be so 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 the United States and any other state;

2. To preclude the acquisition or exercise of a right Recognized Under State Law to the use of water by any member of the Tribe outside the Reservation by purchase of such right or by acquisition of land, or by application to the State;

3. To determine the relative rights inter sese of Persons using water under the authority of the State or the Tribe;

4. To limit in any way the rights of the Parties or any other person to litigate any issues or questions not resolved by this Compact;

5. To authorize the taking of a water right which is vested under state or federal law;
6. To create or deny substantive rights through headings or captions used in this Compact;
7. To address or prejudice whether or how, in any interstate apportionment, the Tribe's water right shall be counted as part of the waters apportioned to the State;
8. To prohibit the Tribe, or the United States on behalf of the Tribe, from objecting in any general stream adjudication in Montana Water Court to any claims to water rights;
9. To constitute a waiver of sovereign immunity by the Tribe, State, or United States, except as is expressly set forth in this Compact;
10. Unless otherwise provided by Congress, to prevent the United States, as trustee for the Tribe or Tribal members, or the Tribe itself, from filing an action in any court of competent jurisdiction, to prevent any party from interfering with the enjoyment of the Tribal Water Right;
11. To impair, amend, or alter rights under existing state or federal law;
12. To affect or determine the applicability of any state or federal law, including, without limitation, environmental and public safety laws, on activities of the Tribe or Tribal members within the Reservation or in connection with Tribal Interests in the Ceded Strip;
13. To alter or amend any provision or to adopt or preclude any interpretation of the Yellowstone River Compact, Act of October 10, 1951, ch. 629, 65 Stat. 663 (1951);
14. To alter or abridge any right reserved to the Crow Tribe of Indians under Article 4 of the May 7, 1868 Treaty of Fort Laramie; or
15. To prejudice any right that Tribal members may have to secure a portion of the Tribal Water Right from the Tribe.

C. Rights Reserved. The Parties expressly reserve all rights not granted, recognized or relinquished in this Compact.

D. Obligations of United States Contingent.

1. Notwithstanding any other language in this Compact, except as authorized under other provisions of federal law, the obligations of the United States under this Compact shall be contingent on authorization by Congress.
2. The State and the Tribe recognize that this Compact has not been reviewed and approved by the United States or any agency thereof and ratification by the Montana legislature or ratification by the Tribal Council in no manner binds or restricts the discretion of the United States in the negotiation of all related matters, including but not limited to, coal severance tax, Section 2 of the Crow Allotment Act (41 Stat. 751), water rights, and State and Federal contribution or cost share.

E. Expenditures of Money Contingent. The expenditure or advance of any money or the performance of any work by the United States or the Tribe pursuant to this Compact which may require appropriation of money by Congress or allotment of funds shall be contingent on such appropriation or allotment being made.

## ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT

A. State Contribution to Settlement.

1. The State agrees to contribute the sum of \$15 million, in equal annual installments for a period of no more than fifteen years beginning July 1, 1999, to a fund for the use and benefit of the Tribe.
2. Payment of the State's contributions for the benefit of the Tribe is contingent on the final approval of this Compact by the Tribe and Congress, the final inclusion of the rights set forth in the Compact in decrees by the Montana Water Court and the expiration of the time for appeal from all orders effecting such inclusion or the affirmance of the decrees or orders on appeal, the provision of releases of claims as provided in Section A.4., of Article VI, and the fulfillment of any other conditions to the effectiveness of the Compact.
3. Until all conditions for payment are fulfilled, the State and the Tribe agree that any payments due shall be paid into an interest-bearing escrow account, to be held without distribution of principal or interest until all conditions for payment to the Tribe are satisfied.
4. The Tribe agrees that the State's contribution will be dedicated to economic development and water and sewer infrastructure within the Crow Reservation. The Tribe further agrees that the State's contributions as set forth in Section A.1., of Article VI and any other agreements that may be set forth in a separate coal severance tax settlement agreement between the State and

Tribe should be considered as fully satisfying any cost-share obligation on the part of the State for this Compact. The Tribe further agrees that the State's contributions and agreements herein are full and adequate consideration for the Tribe's agreements as set forth in this Compact, and that the State's contributions, together with any other agreements that may be set forth in a separate coal severance tax settlement agreement between the State and the Tribe, are full and adequate consideration for the release of all claims by the Tribe and the United States in the civil action captioned Crow Tribe of Indians v. State of Montana, Cause No. CV-78-110-BLG-JDS (D. Mont.). The Tribe further agrees that in consideration of the State's contributions and other agreements set forth in a separate coal severance tax settlement agreement, the Tribe will provide releases of all claims, including any pleadings or proposed orders necessary to implement or otherwise give effect to the releases, in that action in a form acceptable to the Attorney General of the State.

B. Federal Legislation. The Tribe and the State agree to support federal legislation ratifying this Compact that will accomplish the following:

1. Bighorn Lake Water Supply. The State and the Tribe agree to support federal legislation that will provide an allocation of storage water in Bighorn Lake, as described in Section A.1.b., of Article III and which will reallocate the water in Bighorn Lake as set forth in Section A.1.b.(1)(b)(i), of Article III. The priority date for the allocation shall be the date of the water right held by the Bureau of Reclamation as decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA. This allocation shall be held in trust for the Tribe by the United States and will be part of the Tribal Water Right.

2. Right to Participate in Future Projects to Import Water. The Tribe shall have the right to initiate or participate in any project to augment the water supply in the Basins listed in Sections B., C., D. and E., of Article III, by transferring water from another drainage, and to have any such augmentation project deliver any entitlement of the Tribe to water to a point within the Reservation designated by the Tribe.

3. Federal Court Jurisdiction. That the federal courts shall have jurisdiction to enforce the provisions of this Compact and to hear appeals from and enforce decisions of the Compact Board in accordance with Section F.7., of Article IV.

C. Federal Contributions to Settlement. Federal contributions to settlement shall be as provided by Congress.

## ARTICLE VII - FINALITY, SETTLEMENT OF CLAIMS, EFFECTIVENESS OF COMPACT, AND WAIVER OF CLAIMS

### A. Ratification and Effectiveness of Compact.

1. This Compact shall become Effective on the date it is ratified by the Tribe, by the State, and by the Congress of the United States, whichever date is latest. Upon ratification of this Compact by the Tribe and by the State, whichever is later, the terms of this Compact may not be altered, voided, or modified in any respect without the consent of both the Tribe and the State. Once ratified by Congress, the Tribe, and the State, the Compact may not be modified without the consent of the Tribe, the State, and the United States.

2. Notwithstanding any other provision in this Compact, the Tribe reserves the right to withdraw as a Party to this Compact:

a. If Congress has not ratified this Compact within four (4) years from the date the Compact is ratified by the State;

b. If appropriations are not authorized by Congress within four (4) years of the date the Compact is ratified by the Tribe;

c. If the Tribe and the United States do not reach agreement on the federal contribution to settlement;

d. If appropriations are not made in the manner contemplated by the federal legislation ratifying the Compact; or

e. If the Tribe and the United States do not reach agreement on settlement of issues regarding Section 2 of the Crow Allotment Act (41 Stat.751).

3. The Tribe may exercise its right to withdraw by sending to the Governor of the State of Montana and to the Secretary of the Interior by certified mail a resolution of the Crow Tribal Council stating the Tribe's intent to withdraw and specifying a withdrawal date not sooner than

thirty (30) days from the date of the resolution. On the date designated in the resolution for Tribal withdrawal, this Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Crow Tribe and entry of a decree in a court of competent jurisdiction.

4. Notwithstanding any other provision in this Compact, the State reserves the right to withdraw as a Party to this Compact:

a. If the Tribe and Congress have not ratified this Compact within five (5) years from the date the Compact is ratified by the State;

b. If Congress requires a state contribution to settlement that exceeds the contributions described in Section A., of Article VI;

c. If Congress resolves issues under Section 2 of the Crow Allotment Act (41 Stat. 751) in a manner Adversely Affecting water rights Recognized Under State Law;

d. If a streamflow and lake level management plan pursuant to Section A.7., of Article III is not agreed to within one (1) year after this Compact has been ratified by the Montana legislature or any extended deadline agreed to by the State, or if federal legislation is inconsistent with the streamflow and lake level management plan; or

e. If the Department of Natural Resources and Conservation does not approve the list of current uses of the Tribal Water Right pursuant to Section E.2., of Article IV.

5. The State may exercise its right to withdraw by sending to the Crow Tribal Chairman and to the Secretary of the Interior a letter delivered by certified mail from the Governor of the State of Montana stating the State's intent to withdraw and specifying a withdrawal date not sooner than thirty (30) days from the date of the letter. On the date designated in the letter for State withdrawal, this Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Crow Tribe and entry of a decree in a court of competent jurisdiction.

6. Notwithstanding any other provision in this Compact, the Department of the Interior reserves the right to refuse to support federal legislation ratifying this Compact.

7. The Parties understand and accept that federal financial contributions to the Compact may not be budgeted until October of the year following the year of enactment of the Compact.

B. Incorporation Into Decrees and Disposition of Federal Suit.

1. The Tribe, the State, and the United States agree to defend the provisions and purposes of this Compact including the quantification set forth in Article III, from all challenges and attacks in all proceedings pursuant to this Section B., of Article VII.

2. Within one hundred eighty (180) days of the date this Compact is ratified by the Crow Tribal Council, the State of Montana, and Congress, whichever is latest, the Tribe, the State, or the United States shall file, in the general stream adjudication initiated by the State of Montana, pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of the proposed decree set forth in Appendix 1 as the decree of the water rights held by the United States in trust for the Crow Tribe. If the Montana Water Court does not approve the proposed decree submitted with the motion within three years following the filing of the motion, the Compact shall be voidable by agreement of the State and the Tribe. If the Montana Water Court approves the proposed decree within three years, but the decree is subsequently set aside by the Montana Water Court or on appeal, the Compact shall be voidable by agreement of the State and the Tribe. Any effect of the failure of approval or setting aside of the decree on the approval, ratification, and confirmation by the United States shall be as provided by Congress. 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.

3. Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to Article III, and Appendix 1, and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights. The final decree shall consist of Article III as displayed in Appendix 1, and such other information as may be required by 85-2-234, MCA.

Nevertheless, pursuant to 85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.

4. Upon the issuance of a final decree by the Montana Water Court, or its successor, and the completion of any direct appeals therefrom, or upon the expiration of the time for filing any such appeal, the United States, the Tribe, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed. R. Civ. P., to dismiss the Tribe's claims, and any claims made by the United States as trustee for the Tribe, in U.S. v. Big Horn Low Line Canal Company, et al., No. CIV-75-34-BLG (filed April 17, 1975) (hereinafter referred to as "Low Line Canal") and such claims may only be refiled if the Tribe exercises its option to withdraw as a Party to the Compact pursuant to Section A.3., of Article VII. This Compact shall be filed as a consent decree in Low Line Canal only if, prior to the dismissal of Low Line Canal as provided in Section B., of Article VII, it is finally determined in a judgment binding upon the State of Montana that the state courts lack jurisdiction over, or that the state court proceedings are inadequate to adjudicate, some or all of the water rights asserted in Low Line Canal.

C. Settlement of Water Right Claims. The water rights and other rights confirmed to the Tribe in this Compact are in full and final satisfaction of the water right claims of the Tribe and the United States on behalf of the Tribe and its members, including federal reserved water rights claims based on *Winters v. United States*, 207 U.S. 564 (1908). In consideration of the rights confirmed to the Tribe in this Compact, and of performance by the State of Montana and the United States of all actions required by this Compact, including entry of a final order issuing the decree of the reserved water rights of the Tribe held in trust by the United States as quantified in the Compact and displayed in Appendix 1, the Tribe and the United States as trustee for the Tribe and Tribal members hereby waive, release, and relinquish any and all claims to water rights or to the use of water within the State of Montana existing on the date this Compact is ratified by the State, the Tribe, and Congress and conditional upon a final decree, whichever date is later.

D. Binding Effect. After the Effective Date of this Compact, its terms shall be binding:

1. Upon the State and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State of Montana; provided that, the validity of consent, ratification, or authorization by the State is to be determined by Montana law;

2. Upon the Tribe, Tribal members, and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the Tribe's water right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribe or a Tribal member, or any right arising under tribal law; provided that, the validity of consent, ratification or authorization by the Tribe is to be determined by tribal law; and

3. Upon the United States and any person or entity of any nature whatsoever using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State of Montana; provided that, the validity of consent, ratification or authorization by the United States is to be determined by federal law.

E. Waiver of Claims or Objections.

1. After the Effective Date of this Compact, the Tribe, any individual claiming a right to use water based on or derived from the Tribe, and the United States on behalf of the Tribe or a Tribal member, shall be prohibited from objecting to, or bringing a claim against, the claim or holder of a right to use water based on the laws of the State of Montana, and any carriage, storage, or delivery facilities and rights of way associated therewith, based on the assertion that such right is invalid because 85-2-301(4), MCA, is invalid as applied to such right, or that such right is inconsistent with or otherwise impairs any right reserved by the Tribe under Article 4 of the May 7, 1868 Treaty of Fort Laramie. If and to the extent necessary to effectuate the intent of this paragraph the Tribe, any individual claiming a right to use water based on or derived from the Tribe, and the United States on behalf of the Tribe shall be deemed to have waived and relinquished any claims or objections they may have against a holder of a right to use water based on the laws of the State of Montana, and any carriage, storage, or delivery facilities and rights of way associated therewith, based on the aforementioned law and Treaty.

2. Waiver of claims by the Tribe against the United States shall be as provided by Congress.

## ARTICLE VIII - LEGISLATION

The State and Tribe agree to seek enactment of any legislation necessary to effectuate the provisions and purposes of this Compact, and to defend the provisions and purposes of this Compact from all challenges and attacks; provided that, no provision of the Compact shall be modified as to substance except as may be provided herein.

IN WITNESS WHEREOF the representatives of the State of Montana, the Crow Tribe, and the United States have signed this Compact on the \_\_\_\_ day of \_\_\_\_, 19 \_\_\_\_.

History: En. Sec. 1, Ch. 3, Sp. L. June 1999.

**85-20-902. Findings and purpose.** (1) It is the policy of the state of Montana to seek negotiated settlements of federal and Indian reserved water rights claims in Montana under Title 85, chapter 2, part 7.

(2) Pursuant to this policy, the commission commenced negotiations with the Crow Tribe regarding the Tribe's water rights claims on November 12, 1981.

(3) A water rights compact has been agreed to between the commission and the elected representatives of the government of the Crow Tribe that, among other things, provides an allocation of water to the Crow Tribe and provides protection for certain water rights recognized under state law in Montana.

(4) As consideration for the Crow Tribe's agreement to protect certain water rights recognized under state law in Montana and to release certain legal claims asserted against the state, the state of Montana has undertaken an obligation to make certain payments for the benefit of the Crow Tribe and has agreed that any future production taxes collected by the state on production of coal owned by the United States in trust for the Crow Tribe will be paid to the Crow Tribe.

(5) The commission's agreement to the compact and the state's obligation to make payments to the Crow Tribe thereunder is conditioned, among other things, upon the final approval of the compact as set forth in the compact and as required by state, federal, and tribal law and upon the execution and delivery by the Crow Tribe of sufficient releases for the legal claims that the Crow Tribe has agreed to release.

(6) The purposes of 85-20-902 through 85-20-905 are to provide for the implementation of the compact, to provide a mechanism for settlement of certain claims against the state, and to provide a means to fund the state's financial obligations for the upcoming biennium under its water rights compact with the Crow Tribe.

History: En. Sec. 1, Ch. 1, Sp. L. June 1999.

**85-20-903. Definitions.** As used in 85-20-902 through 85-20-905, the following definitions apply:

(1) "Commission" means the reserved water rights compact commission.

(2) "Compact" means the Crow-Montana water rights compact as approved by the legislature in 85-20-901.

(3) "Department" means the department of natural resources and conservation.

History: En. Sec. 2, Ch. 1, Sp. L. June 1999.

**85-20-904. Payment of settlement funds into escrow — requirements for escrow agreement — notice from attorney general.** (1) The department shall enter into an agreement with the Crow Tribe and, if necessary under federal or tribal law, the United States, selecting an escrow agent to hold any funds paid by the state prior to the time they become payable to the Crow Tribe under this section. When an escrow agent has been selected, the department shall negotiate the terms of an escrow agreement with the Crow Tribe, the escrow agent, and if necessary under federal or tribal law, the United States. The terms of the agreement must govern the holding of the funds paid pursuant to the settlement. The escrow agreement must provide that any costs and fees payable for the management of the escrow fund will be borne by the fund, that the funds placed in the escrow account will be invested and held at interest in trust for the Crow Tribe, and that the contents of the fund will become payable to the order of the Crow Tribe only upon the occurrence of all of the following conditions:

(a) the compact has been approved by the Congress of the United States in a form satisfactory to the commission;

(b) the compact has been approved by the Crow Tribe in the manner provided by federal and tribal law, including approval of any tribal referendum presently or later required by federal or tribal law;

(c) the compact has been approved by the Montana water court for inclusion in the final decrees in all affected basins, and the order of approval has been affirmed on appeal or the time for appeal from the water court's approval has expired; and

(d) the Crow Tribe and the United States have furnished releases, pleadings, and proposed orders, in forms acceptable to the attorney general, with respect to all claims, including but not limited to claims for costs and attorney fees, asserted in the civil action captioned Crow Tribe of Indians v. State of Montana et al., Cause No. CV-78-110-BLG-JDS (D. Mont.), or any appeal pending in that action.

(2) Within 20 days after all conditions set forth in subsections (1)(a) through (1)(d) have been satisfied, the attorney general shall provide written notice of the satisfaction of the conditions to the escrow agent. The escrow agreement must provide that upon receipt of the written notice provided in this section, the escrow agent shall pay the funds in escrow to the order of the Crow Tribe. This section does not preclude the Crow Tribe from entering into an agreement with the escrow agent or any other entity for the holding of the funds in trust for the Crow Tribe for a period in excess of that provided in this section.

(3) The escrow agreement must provide that in the event the conditions set forth in subsection (1) do not occur within any time limits set in the compact, as those limits may be extended pursuant to the compact by agreement of the parties and the approval of the legislature, or if any party to the compact terminates the compact as provided in the compact prior to payment of the funds to the Crow Tribe as provided in subsection (2), the contents of the escrow fund, including funds paid into the escrow fund by the state and any interest earned on the escrow fund, will revert to the state.

**History:** En. Sec. 3, Ch. 1, Sp. L. June 1999.

**85-20-905. Settlement of litigation — disposition of production taxes collected on coal owned in trust for Crow Tribe.** (1) The governor and attorney general may enter into an agreement with the Crow Tribe and the United States for the settlement of the civil action captioned Crow Tribe of Indians v. State of Montana et al., Cause No. CV-78-110-BLG-JDS (D. Mont.), or any appeal pending in that action.

(2) The agreement may:

(a) include a release of all claims asserted by the Crow Tribe and the United States in the action, including but not limited to claims for costs and attorney fees;

(b) provide payments as authorized in the compact and 85-20-902 through 85-20-905; and

(c) include an agreement by which the proceeds of any production taxes levied under Montana law on the severance or production of coal owned by the United States in trust for the Crow Tribe are to be paid to the Crow Tribe.

**History:** En. Sec. 4, Ch. 1, Sp. L. June 1999.

**Part 10**  
**Fort Belknap-Montana Compact**

85-20-1001. Fort Belknap-Montana compact ratified. The Compact entered into by the State of Montana and the Fort Belknap Indian Community of the Fort Belknap Reservation and filed with the Secretary of State of the State of Montana under the provisions of 85-2-702, MCA, on April 16, 2001, is ratified. The Compact is as follows:

WATER RIGHTS COMPACT ENTERED INTO BY  
THE STATE OF MONTANA,  
THE FORT BELKNAP INDIAN COMMUNITY  
OF THE FORT BELKNAP RESERVATION,  
AND THE UNITED STATES OF AMERICA

This Compact is entered into by and among the State of Montana, the Fort Belknap Indian Community of the Fort Belknap Reservation, and the United States of America for the purpose of settling all existing water rights claims of the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation in the State of Montana. The Compact is not effective until approved by the Tribes, the Montana Legislature, and the United States Congress. The participation of the United States in each relevant section of the Compact is not valid until the Compact is ratified by Congress.

ARTICLE I - RECITALS

WHEREAS, pursuant to the Treaty of 1855, 11 Stat. 657 and the Acts of Congress of 1874, 18 Stat. 28, and 1888, 25 Stat. 113, a Reservation was established in Montana for the Gros Ventre and Assiniboine Tribes; and

WHEREAS, pursuant to said Treaty and Acts of Congress, the Gros Ventre and Assiniboine Tribes claim reserved water rights to fulfill the purposes of the Treaty, the Acts of Congress, and *Winters v. United States*, 207 U.S. 564 (1908); and

WHEREAS, in 1979, the United States, on behalf of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation, brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribes' water rights claims, see *United States v. Aageson*, No. CIV-79-21-GF (filed April 5, 1979); and

WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America in trust for the Tribes; see "the McCarran Amendment," 43 U.S.C. §666(a)(1) (1952); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Gros Ventre and Assiniboine tribal water rights; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under §85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes and/or on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the federal district court litigation was stayed in 1983 pending the outcome of Montana state court water adjudication proceedings, see *Northern Cheyenne v. Adsit*, 721 F.2d 1187 (9th Cir., 1983); and

WHEREAS, the adjudication of the Gros Ventre and Assiniboine tribal water rights in the state court proceedings has been suspended pursuant to §85-2-217, MCA, while negotiations are proceeding to conclude a compact resolving all water rights claims of the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation within the State of Montana; and

WHEREAS, the Fort Belknap Community Council, or its duly designated representatives, have authority to negotiate this Compact pursuant to Resolution No. 19-81 of the Fort Belknap Community Council, February 17, 1981, as amended; and

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 (1993); and

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 the Interior pursuant to 43 U.S.C. §1457 (1986), *inter alia*; and

WHEREAS, the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation, the State of Montana, and the United States agree that the Tribal Water Right, water development, and water management described in this Compact are in satisfaction of the water rights claims of the Tribes, Tribal members, and Allottees, and of the United States on behalf of the Tribes and their members and Allottees within the State of Montana; and

WHEREAS, the Parties agree that it is in the best interest of all Parties that the water rights claims of the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation be settled through agreement between and among the Tribes, the State of Montana, and the United States.

NOW THEREFORE, the Parties agree to enter into this Compact for the purpose of settling the water rights claims of the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community, Tribal members, and Allottees of the Fort Belknap Reservation within the State of Montana.

## ARTICLE II - DEFINITIONS

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

1. "Acre-feet per year" or "AFY" means an annual quantity of water measured in acre-feet over a period of a year.
2. "Acre-foot" or "Acre-feet" or "AF" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet of water.
3. "Adverse Effect" or "Adversely Affect" means an actual interference with the reasonable exercise of a water right resulting in a material injury.
4. "Allottee" or "Allottees" means any individual or individuals who own or hold a trust allotment or interest in a trust allotment on the Fort Belknap Reservation under the authority of the General Allotment Act and subject to the terms and conditions of that Act.
5. "Arising Under Federal Law" means, as applied to a water right, a water right created or defined under federal law.
6. "Arising Under State Law" means, as applied to a water right, a water right created under Montana law and does not include water rights Arising Under Federal Law.
7. "Beaver Creek Basin" means Montana Water Court Basin 40M, consisting of the mainstem of Beaver Creek and its tributaries, including Big Warm Creek and Little Warm Creek, to its confluence with the Milk River, as shown in Appendix 2.
8. "Board" means the Fort Belknap - Montana Compact Board established by Section D. of Article IV of this Compact.
9. "Calculated Undepleted Flow of the Milk River" means the flow available for the Tribal Water Right determined pursuant to Section E.2. of Article IV, and represents the calculated United States' Share of the Natural Flow of the Milk River at the diversion point on the Reservation.
10. "Cfs" means cubic feet per second.
11. "Change in Use" means, as applied to the Tribal Water Right, a change in the point of diversion, the place of use, the purpose of use, or the place or means of storage.
12. "Combined Development" means, in reference to small wells and springs, a use or proposed use of water for the same purpose.
13. "Compact" means the water rights settlement entered into by the State of Montana, the Fort Belknap Indian Community of the Fort Belknap Reservation, and the United States of America.
14. "Depletion" means the amount of water consumptively used, or the difference between the amount of water diverted and returned to the source of supply.
15. "Direct Use" means diversion of water from the source to be used for a designated purpose without intermediate storage.
16. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor agency.
17. "Eastern Crossing" means the most downstream location at which the mainstem of the Milk River crosses the 49th parallel to re-enter the United States from Canada.
18. "Effective Date" means the date on which the Compact is finally approved by a referendum vote by the eligible members of the Fort Belknap Indian Community and ratified by the Fort Belknap Indian Community Council, by the Montana Legislature, and by the Congress of the United States, whichever date is latest.
19. "Exempt New Development" means new development of the Tribal Water Right that is exempt from review pursuant to Section A.4. of Article IV.
20. "Fort Belknap Indian Irrigation Project" means the irrigation projects authorized by federal law for development on the Reservation in the Milk River and Peoples Creek Basins.

21. "Groundwater" means any water that is beneath the ground surface.
22. "Hydrologically Connected" means the interconnection of groundwater and surface water such that they constitute one water supply and use of either results in an impact to both.
23. "Milk River Coordinating Committee" or "MRCC" means the basin organization established pursuant to Section C.1. of Article IV.
24. "Milk River Basin" means the mainstem of the Milk River and its tributaries from its headwaters to the confluence with the Missouri River and consists of: Montana Water Court Basins 40F, 40G, 40H, 40I, 40J, 40K, 40L, 40M, 40N, and 40O; and the portion of the Milk River and its tributaries flowing through the Provinces of Alberta and Saskatchewan in Canada.
25. "Milk River Basin 40J" or "Basin 40J" means the portion of the Milk River Basin, including the tributaries of Threemile Creek, White Bear Creek and Fifteenmile Creek, constituting Water Court Basin 40J, as shown in Appendix 2.
26. "Milk River Project" means the Reclamation project on the Milk and St. Mary Rivers in Montana authorized by the Reclamation Act of 1902, 32 Stat. 388; 43 U.S.C. 391.
27. "Missouri River Basin 40EJ" or "Basin 40EJ" means the portion of the Missouri River Basin including the tributaries of Suction, Rattlesnake, Tin Cup, Little Suction, and Cow Creeks constituting Water Court Basin 40EJ, as shown in Appendix 2.
28. "Non-Exempt New Development" means new development of the Tribal Water Right that is subject to review pursuant to Section A.5. of Article IV.
29. "Parties" means the Fort Belknap Indian Community of the Fort Belknap Reservation, the State of Montana, and the United States of America.
30. "Peoples Creek Basin" means Water Court Basin 40I, consisting of the mainstem of Peoples Creek to its confluence with the Milk River, and its tributaries including: Duck Creek; the South Fork of Peoples Creek; Little Peoples Creek; Jim Brown Creek; Lodge Pole Creek; Lone Tree Coulee; and Mud Creek, as shown in Appendix 2.
31. "Perennial Flowing Stream" means a stream that historically flowed and is currently flowing continuously during all seasons of the year including dry as well as wet years.
32. "Person(s)" means an individual or individuals or any other entity, public or private, including the State, the Tribes, and the government of the United States and all officers, agents, and departments thereof.
33. "Reservation" means the Fort Belknap Reservation and includes all lands and interests in lands which are now and in the future held in trust by the United States for the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation within the boundary established by the Treaty ratified by Congress on May 1, 1888, 25 Stat. 113, as modified by: The Grinnell Agreement of October 9, 1895 and ratified by Congress in 1896, 29 Stat. 350; and the Fort Belknap Allotment Act of March 3, 1921, 41 Stat. 1355.
34. "Same Source" means the same aquifer in reference to wells and developed springs of 35 gallons per minute or less that do not exceed a use of 10 Acre-feet per year.
35. "Secretary" means the Secretary of the United States Department of the Interior, or his or her duly authorized representative.
36. "Seniority of the Water Rights Set Forth in Sections B.1.a. and d. of this Article III Shall not be Asserted Over" means the senior water rights specified in Sections B.1.a. and d. of Article III shall be administered as subordinate to the junior water rights specified and referenced in Section B.2.a of Article III.
37. "State" means the State of Montana and all officers, agencies, departments, and political subdivisions thereof.
38. "Transfer" means, as applied to the Tribal Water Right, to authorize a Person or Persons to use all or any part of the Tribal Water Right through a service contract, lease, or other similar agreement of limited duration.
39. "Tribal Water Resources Department" or "TWRD" means the Fort Belknap Tribal Water Resources Department, or any successor agency.
40. "Tribal Water Right" means the right of the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community, Tribal members, and Allottees within the Fort Belknap Reservation, to divert, use, or store water as described by Article III of this Compact.
41. "Tribes" means the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation and all officers, agencies, and departments thereof.
42. "Undepleted Flow" means the stream flow in a watershed without the effects of diminishment by water uses for specific beneficial purposes including, but not limited to;

irrigation, municipal, domestic, mining, commercial, industrial, stockwatering, recreational, and environmental concerns.

43. "United States" means the federal government and all officers, agencies, and departments thereof.

44. "United States' Share of the Natural Flow of the Milk River" means the allocation to the United States of water in the Milk River and its tributaries pursuant to Article VI of the "Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada," January 11, 1909, and ratified by the Senate on May 13, 1910, 36 Stat. 2455, and the Order of the International Joint Commission on October 4, 1921, pertaining to "In the matter of the Measurement and Apportionment of the Waters of the St. Mary and Milk Rivers and their Tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan."

45. "Water Bank" means a water purchasing mechanism whereby willing sellers are paid to forego use of a portion of their supplies in a year of water shortage, and purchased water is either stored or reallocated to meet specified needs.

46. "Western Crossing" means the most upstream location at which the mainstem of the Milk River crosses the 49th parallel to enter Canada from the United States.

### ARTICLE III - TRIBAL WATER RIGHT

The Tribal Water Right set forth in this Article III shall be the water allocation in settlement of the claims including Winters reserved water rights claims of the Tribes, Tribal members, and Allottees, and the United States on behalf of the Tribes, Tribal members, and Allottees within the Fort Belknap Reservation, to water within the State of Montana, as those claims exist on the Effective Date of the Compact, and shall be held in trust by the United States for the benefit of the Tribes, Tribal members, and Allottees within the Fort Belknap Reservation. Non-use of all or any of the Tribal Water Right does not constitute a relinquishment, forfeiture, or abandonment of such rights.

#### A. Basin 40J: Milk River Basin 40J.

##### 1. Quantification.

a. The Tribes have the right to divert up to 645 cubic feet per second "Cfs" of the United States' Share of the Natural Flow of the Milk River and its tributaries upstream from the diversion point on the Reservation as calculated pursuant to Section E.2. of Article IV. The right to divert 645 Cfs is in addition to allocation to the Tribes of storage in Fresno Reservoir pursuant to the Memorandum of Agreement between the Bureau of Reclamation and the Office of Indian Affairs (BIA) Milk River Project Montana, I-1-Ind. 18725, July 8, 1946.

(1) Of the right to divert 645 Cfs, up to 125 Cfs may be diverted for Direct Use to a maximum of 10,425 irrigated acres within the Fort Belknap Indian Irrigation Project. This water right is intended to preserve the historic water use protected in *Winters v. United States*, 207 U.S. 564 (1908). Irrigation of the Fort Belknap Indian Irrigation Project pursuant to this paragraph may be on land within the external boundaries of the Project on the Effective Date of the Compact or as modified pursuant to applicable federal law.

(2) Of the right to divert 645 Cfs and in addition to the 125 Cfs water right quantified in Section A.1.a.(1) of this Article III, up to 520 Cfs may be diverted for Direct Use or to off-stream storage, or both, for subsequent use for both of the following: use on an additional 19,390 present and future irrigated acres (including land irrigated historically within the Milk River Basin 40J); and up to 4000 AFY of use for non-irrigation purposes. The off-stream storage pursuant to this Section A.1.a.(2) of Article III is limited to a maximum combined capacity of 60,000 Acre-feet. Irrigation by diversion to Direct Use pursuant to this paragraph may be accomplished through expansion or modification of the Fort Belknap Indian Irrigation Project pursuant to applicable federal law.

b. In addition to the water rights set forth in Section A.1.a. of this Article III, the Tribes have the right to divert surface flow from tributaries to the Milk River on the Reservation in Basin 40J to irrigate the acreage identified in Section A.1.a.(1) and (2) of this Article III.

c. In addition to the water rights set forth in Sections A.1.a. and b. of this Article III, the Tribes have the right to develop surface water in the Milk River Basin 40J within the Reservation for use by livestock if the maximum capacity of each impoundment or pit is less than

15 Acre-feet and the total amount impounded in each impoundment or pit is less than 30 Acre-feet per year and is from a source other than a Perennial Flowing Stream. The cumulative development of stock impoundments pursuant to this Section A.1.c., of Article III following the Effective Date of this Compact may not exceed a storage capacity of fifteen Acre-feet times the number of square miles in Basin 40J on the Reservation. This capacity limit does not apply to the water right quantified in Sections A.1.a., b., and d. of this Article III.

d. In addition to the water rights set forth in Sections A.1.a., b., and c. of this Article III, the Tribes have the right to use or authorize the use of water for non-irrigation purposes developed prior to the Effective Date of the Compact in the Milk River Basin 40J within the Reservation, provided that, any portion of this water right diverted from the mainstem of the Milk River shall be part of the 4000 AFY non-irrigation water right set forth in Section A.1.a.(2) of this Article III. These water uses are subject to the reporting requirements of Section A.7. of Article IV.

#### **2. Priority Date/Administrative Priority.**

a. For purposes of this Compact only, the priority date of the water rights set forth in Sections A.1.a., b., and d. of this Article III is October 17, 1855. The Parties agree that the senior water right quantified in Section A.1.a. of this Article III, shall be satisfied in the following manner:

(1) In the event that the water available for use by the Tribes at the diversion point on the Reservation is less than the amount to which the Tribes are entitled to pursuant to Section A.1.a. of this Article III and Section E.1.b.(2) of Article IV, the Tribes shall seek delivery of the difference between what they are entitled to and what is available solely from release or bypass of water from or through Fresno Dam by the Milk River Project. The Milk River Project shall, pursuant to Section E. of Article IV and applicable federal law, release or bypass the additional water necessary to fulfill the water right of the Tribes.

(2) The allocation between and relative priority of satisfaction of the water rights set forth in Section A.1.a. of this Article III and the water right of the Blackfeet Tribe in the Milk River Basin shall be resolved among the Fort Belknap Indian Community of the Fort Belknap Reservation, the Blackfeet Tribe, and the United States, or in the event an agreement is not reached, as ultimately decreed by the Montana Water Court or other court of competent jurisdiction, and shall not be prejudiced by this Compact including any agreement on priority date. The amount of the United States' Share of the Natural Flow of the Milk River available to the Tribes as calculated pursuant to Section E.2. of Article IV shall be modified to reflect any adjudication of the water rights of the Blackfeet Tribe or agreement between the Blackfeet Tribe and the Fort Belknap Indian Community of the Fort Belknap Reservation to the extent such agreement or adjudication affects the Calculated Undepleted Flow of the Milk River. The Milk River Project will not be required to provide any exchange water to the Tribes for diversion of the Blackfeet tribal water right.

b. The priority date of the water rights set forth in Section A.1.c. of this Article III for stock impoundments shall be the date of development of the right.

**3. Period of Use.** The period of use of the water rights set forth in Section A.1. of this Article III is:

a. March 1 through October 31 of each year for the 125 Cfs diversion set forth in Section A.1.a.(1) of this Article III.

b. January 1 through December 31 of each year for the 520 Cfs right set forth in Section A.1.a.(2) of this Article III.

c. March 1 through October 31 for water diverted from tributaries set forth in Section A.1.b. of this Article III.

d. January 1 through December 31 of each year for the water rights set forth in Section A.1.c. and d. of this Article III.

#### **4. Points and Means of Diversion.**

a. Subject to the terms and conditions set forth in Article IV, the water right set forth in Section A.1.a. of this Article III may be diverted from the mainstem of the Milk River in the Milk River Basin 40J; or from Groundwater beneath the Reservation that is Hydrologically Connected to the surface water from any place and by any means in the Milk River Basin 40J.

b. Subject to the terms and conditions set forth in Article IV, the water right set forth in Section A.1.b. of this Article III may be diverted for Direct Use from any place and by any means from tributaries to the Milk River in Basin 40J on the Reservation.

c. Subject to the terms and conditions set forth in Article IV, the water right set forth in Section A.1.c. of this Article III may be developed from a surface water source anywhere within the Milk River Basin 40J within the Reservation, provided that, the development may not be on a Perennial Flowing Stream.

d. Subject to the terms and conditions set forth in Article IV, the water rights set forth in Section A.1.d. of this Article III may be diverted from any place and by any means in Basin 40J from surface water or Groundwater that is Hydrologically Connected to surface water, within the Reservation in Basin 40J.

**5. Place of Use.**

a. Subject to the terms and conditions set forth in Article IV, the Tribes may use or authorize the use of the water rights set forth in Sections A.1.a. and b. of this Article III any place within the Reservation.

b. Subject to the terms and conditions of Article IV, the Tribes may transfer water developed (pursuant to Section A.1.a. of this Article III) prior to the date of application for a Change in Use or Transfer or stored (pursuant to Section A.1.a.(2) of this Article III) prior to the date of application for a Change in Use or Transfer for use off the Reservation within the Missouri River Basin.

c. The Tribes may use or authorize the use of the water rights set forth in Sections A.1.c. and d. of this Article III any place within the Reservation.

**6. Purposes.**

a. The water rights set forth in Sections A.1.a. and b. of this Article III may be used within the Reservation for any purpose allowed by Tribal and federal law, including fish and wildlife purposes, provided that, Non-Exempt New Development, Change in Use, or Transfer of any portion of the Tribal Water Right, is subject to the terms and conditions of Section A. of Article IV

b. The water rights set forth in Section A.1.c. of this Article III may be used for the purpose of watering stock and may not be changed to any other use.

c. The water rights set forth in Section A.1.d. of this Article III may be used within the Reservation in Basin 40J for any non-irrigation purposes.

**B. Basin 40I: Peoples Creek Basin.**

**1. Quantification.**

a. The Tribes have the right to the surface water and Groundwater that is Hydrologically Connected to surface water that remains in the Peoples Creek Basin within the Reservation after satisfaction of water rights Arising Under State Law set forth in Appendix 3. The Tribes have the right to store water within the Peoples Creek Basin pursuant to this water right. The reservoir or reservoirs must be entirely within the Reservation unless otherwise agreed to with affected landowners off the Reservation.

b. In addition to the water rights set forth in Section B.1.a. of this Article III, the Tribes' right to use water in the Peoples Creek Basin includes the right to use water conveyed from the Missouri River Basin 40EJ pursuant to Section E.1.b. of this Article III. The Tribes have the right to store water within the Peoples Creek Basin pursuant to this water right. The reservoir or reservoirs must be entirely within the Reservation unless otherwise agreed to with affected landowners off the Reservation.

c. In addition to the water rights set forth in Sections B.1.a. and b. of this Article III, the Tribes have the right to develop surface water in the Peoples Creek Basin within the Reservation for use by livestock if the maximum capacity of each impoundment or pit is less than 15 Acre-feet and the total amount impounded in each impoundment or pit is less than 30 Acre-feet per year and is from a source other than a Perennial Flowing Stream. The cumulative development of stock impoundments pursuant to this Section B.1.c., of this Article III following the Effective Date of this Compact may not exceed a storage capacity of fifteen Acre-feet times the number of square miles in Basin 40I on the Reservation. This capacity limit does not apply to the water right quantified in Sections B.1.a., b., and d. of this Article III.

d. In addition to the water rights set forth in Sections B.1.a., b., and c. of this Article III, the Tribes have the right to use or authorize the use of water for non-irrigation purposes developed prior to the Effective Date of the Compact in the Peoples Creek Basin within the Reservation. These water uses are subject to the reporting requirements of Section A.7. of Article IV.

**2. Priority Date/Administrative Priority.**

a. For purposes of this Compact, the priority date of the water rights set forth in Sections B.1.a. and d. of this Article III is October 17, 1855. For the purposes of providing a more reliable water right and simplification of administration, the Parties agree that this senior water right shall be satisfied in the following manner:

(1) Subject to the terms of Section B.2.a.(2) of this Article III, the Seniority of the Water Rights Set Forth in Sections B.1.a. and d. of this Article III Shall Not be Asserted Over non-irrigation water rights Arising Under State Law upstream from the Reservation in the Peoples Creek Basin with a priority date before the Effective Date of the Compact, and irrigation water rights set forth in Appendix 3, provided that water rights numbers W017296, W166075, and C016704 are not protected by this agreement. The Tribes may assert the senior priority of water rights and storage that have been actually developed over water rights Arising Under State Law that are developed after the Effective Date of this Compact, and over any water rights Arising Under State Law not set forth in Appendix 3.

(2) The agreement set forth in Section B.2.a.(1) of this Article III is not effective until completion of construction of a reservoir or reservoirs of a minimum capacity of 3000 AF on the Reservation in upper Peoples Creek for use by the Tribes. Prior to construction of the reservoir, the Tribes may only assert the senior priority of water rights actually developed.

b. The priority date of the water right set forth in Section B.1.b. of this Article III shall be as set forth in Section E.2.b. of this Article III.

c. The priority date of the water rights set forth in Section B.1.c. of this Article III for stock impoundments shall be the date of development of the right.

3. **Period of Use.** The period of use of the water rights set forth in Section B.1. of this Article III is January 1 through December 31 of each year.

**4. Points and Means of Diversion.**

a. The water right set forth in Sections B.1.a. and d. of this Article III may be diverted for Direct Use or storage from surface water or from Groundwater that is Hydrologically Connected to surface water from any place and by any means within the Peoples Creek Basin within the Reservation.

b. The point and means of diversion of the water right set forth in Section B.1.b. of this Article III shall be as set forth in Section E.4.b. of this Article III.

c. The water right set forth in Section B.1.c. of this Article III may be developed on a surface water source anywhere within the Peoples Creek Basin within the Reservation, provided that the development may not be on a Perennial Flowing Stream.

**5. Place of Use.**

a. The Tribes may use or authorize the use of the water rights set forth in Sections B.1.a. and b. of this Article III for use any place within the Reservation within the Peoples Creek Basin. Subject to the terms and conditions set forth in Article IV, the Tribes may Transfer water stored pursuant to Sections B.1.a. and b. of this Article III for use off the Reservation within the Milk River Basin.

b. The Tribes may use or authorize the use of the water rights set forth in Sections B.1.c., and d. of this Article III for use any place within the Reservation.

**6. Purposes.**

a. The water rights set forth in Sections B.1.a. and b. of this Article III may be used for any purpose allowed by Tribal and federal law, including fish and wildlife purposes, provided that any Transfer of the water rights stored pursuant to Sections B.1.a. and b. of this Article III off the Reservation, after the Effective Date of the Compact is subject to the terms and conditions of Section A. of Article IV.

b. The water rights set forth in Section B.1.c. of this Article III may be used for the purpose of watering stock and may not be changed to any other use.

c. The water rights set forth in Section B.1.d. of this Article III may be used within the Reservation in Basin 40I for any non-irrigation purposes.

**C. Basin 40M: Beaver Creek Basin.**

**1. Quantification.**

a. The Tribes have the right to divert 8,024 AFY for irrigation of 2,241 acres from surface flow, or from Groundwater that is Hydrologically Connected to surface flow, within the Reservation in the Beaver Creek Basin. The Tribes agree to use their best efforts to bypass a minimum flow when naturally available.

b. In addition to the water rights set forth in Section C.1.a. of this Article III, the Tribes have the right to develop surface water in the Beaver Creek Basin within the Reservation for use by livestock if the maximum capacity of each impoundment or pit is less than 15 Acre-feet and the total amount impounded in each impoundment or pit is less than 30 Acre-feet per year and is from a source other than a Perennial Flowing Stream. The cumulative development of stock impoundments pursuant to this Section C.1.b., of this Article III following the Effective Date of this Compact may not exceed a storage capacity of 15 Acre-feet times the number of square miles in Basin 40M on the Reservation. This capacity limit does not apply to the water right quantified in Sections C.1.a. and c. of this Article III.

c. In addition to the water rights set forth in Sections C.1.a. and b. of this Article III, the Tribes have the right to use or authorize the use of water for non-irrigation purposes developed prior to the Effective Date of the Compact in the Beaver Creek Basin within the Reservation. These water uses are subject to the reporting requirements of Section A.7. of Article IV.

**2. Priority Date/Administrative Priority.**

a. For purposes of this Compact, the priority date of the water rights set forth in Sections C.1.a. and c. of this Article III is October 17, 1855.

b. The priority date of the water rights set forth in Section C.1.b. of this Article III for stock impoundments shall be the date of development of the right.

**3. Period of Use.** The period of use of the water rights set forth in Section C.1. of this Article III is:

a. March 1 through October 31 for the 8,024 AFY water right set forth in Section C.1.a. of this Article III.

b. January 1 through December 31 of each year for the water rights set forth in Sections C.1.b. and c. of this Article III.

**4. Points and Means of Diversion.**

a. Subject to the terms and conditions set forth in Article IV, the Tribes may divert or authorize the diversion of the water rights set forth in Sections C.1.a. and c. of this Article III from any place and by any means from surface water or Groundwater that is Hydrologically Connected to surface water in the Beaver Creek Basin within the Reservation. When constructing diversion facilities, the Tribes agree to use their best efforts to allow bypass of a minimum flow, when naturally available.

b. Subject to the terms and conditions set forth in Article IV, the water right set forth in Section C.1.b. of this Article III may be developed on a surface water source anywhere within the Beaver Creek Basin within the Reservation, provided that, the development may not be on a Perennial Flowing Stream.

**5. Place of Use.** Subject to the terms and conditions set forth in Article IV, the Tribes may use or authorize the use of the water rights set forth in Sections C.1.a., b., and c. of this Article III any place within the Reservation within the Beaver Creek Basin.

**6. Purposes.**

a. The Tribes may use or authorize the use of the water rights set forth in Section C.1.a. of this Article III within the Reservation for any purpose allowed by Tribal and federal law, including fish and wildlife purposes, provided that, use of the water rights set forth in Section C.1.a. of this Article III, for any purpose other than irrigation is subject to the terms and conditions of Section A. of Article IV.

b. The water rights set forth in Section C.1.b. of this Article III may be used for the purpose of watering stock and may not be changed to any other use.

c. The water rights set forth in Section C.1.c. of this Article III may be used within the Reservation in the Beaver Creek Basin for any non-irrigation purposes.

**D. Reservation Portion of Missouri River Basin 40EJ.**

**1. Quantification.**

a. The Tribes have the right to use or authorize the use of water for non-irrigation purposes developed prior to the Effective Date of the Compact in Basin 40EJ within the Reservation. These water uses are subject to the reporting requirements of Section A.7. of Article IV.

b. In addition to the water rights set forth in Section D.1.a. of this Article III, the Tribes have the right to develop surface water in Basin 40EJ within the Reservation for use by livestock if the maximum capacity of each impoundment or pit is less than 15 Acre-feet and the total amount impounded in each impoundment or pit is less than 30 Acre-feet per year and is from a source other than a Perennial Flowing Stream.

**2. Priority Date/Administrative Priority.**

a. For purposes of this Compact, the priority date of the water rights set forth in Section D.1.a. of this Article III is October 17, 1855.

b. The priority date of the water rights set forth in Section D.1.b. of this Article III for stock impoundments shall be the date of development of the right.

**3. Period of Use.** The period of use of the water rights set forth in Section D.1. of this Article III is January 1 through December 31 of each year.

**4. Points and Means of Diversion.**

a. Subject to the terms and conditions set forth in Article IV, the Tribes may continue to divert or authorize the diversion of the water rights set forth in Section D.1.a. of this Article III from any place and by any means from surface water or Groundwater that is Hydrologically Connected to surface water, within the Reservation in Basin 40EJ.

b. Subject to the terms and conditions set forth in Article IV, the water right set forth in Section D.1.b. of this Article III may be developed on a surface water source anywhere within Basin 40EJ within the Reservation, provided that, the development may not be on a Perennial Flowing Stream.

**5. Place of Use.** Subject to the terms and conditions set forth in Article IV, the Tribes may use or authorize the use of the water rights set forth in Section D.1. of this Article III on any place within the Reservation within Basin 40EJ.

**6. Purposes.**

a. The Tribes may use or authorize the use of the water rights set forth in Section D.1.a. of this Article III for any non-irrigation purposes.

b. The water rights set forth in Section D.1.b. of this Article III may be used for the purpose of watering stock and may not be changed to any other use.

**E. Off-Reservation Tribal Fee and Trust Lands - Missouri Basin 40EJ and Peoples Creek Basin 40I.** The Tribes have the following water rights on trust and fee land off the Reservation in Missouri Basin 40EJ and Peoples Creek Basin 40I. Unless Congress acts to modify the Reservation boundary to include the Tribal trust and fee land, the rights shall not be considered part of the Tribal Water Right for purposes of administration pursuant to Article IV. The water rights set forth in this Section E. of Article III shall be administered by the State pursuant to Section B.1.b. of Article IV, except that non-use of all or any of the rights shall not constitute a relinquishment, forfeiture, or abandonment of such rights.

**1. Quantification.**

a. The Tribes have the right to divert up to 1135 AFY for irrigation of:

(1) 297 acres of land historically irrigated in Basin 40EJ; and

(2) 18 acres of land in Basin 40EJ developed after the Effective Date of the Compact.

b. In addition to the water rights set forth in Section E.1.a. of this Article III, the Tribes have the right to divert up to 1290 AFY for conveyance to the Peoples Creek Basin.

c. In addition to the water rights set forth in Sections E.1.a. and b. of this Article III, the Tribes have the right to use or authorize the use of water for non-irrigation purposes developed prior to the Effective Date of the Compact on Tribal fee and trust land off the Reservation in Basin 40EJ and Basin 40I. These water uses are subject to the reporting requirements of Section A.7. of Article IV.

d. In addition to the water rights set forth in Sections E.1.a., b., and c. of this Article III, the Tribes have the right to develop surface and Groundwater in Basin 40EJ and Basin 40I on Tribal fee and trust land off the Reservation pursuant to State law.

e. In addition to the water rights set forth in Sections E.1.a., b., c., and d. of this Article III, the Tribes have the right, pursuant to State law, to develop surface water in Basin 40EJ and Basin 40I on Tribal fee and trust land off the Reservation for use by livestock if the maximum capacity of each impoundment or pit is less than 15 Acre-feet and the total amount impounded in each impoundment or pit is less than 30 Acre-feet per year and is from a source other than a Perennial Flowing Stream.

**2. Priority Date/Administrative Priority.**

a. The priority date of the water rights set forth in Section E.1.a. of this Article III is:

- (1) July 24, 1893 for the water right set forth in Section E.1.a.(1) of this Article III.
- (2) The date of development for the 18 acres set forth in Section E.1.a.(2) of this Article III.

b. The priority date of the water right set forth in Section E.1.b. of this Article III is January 1, 1935.

c. The priority dates of the water rights set forth in Section E.1.c. of this Article III are the date on which the water was developed for stock and domestic purposes. The priority date of these rights is subject to the reporting requirements of Section A.7. of Article IV.

d. The priority date of the water rights set forth in Sections E.1.d., and e. of this Article III shall be as provided by State law.

**3. Period of Use.** The period of use of the water rights set forth in Section E.1. of this Article III is:

a. March 1 through October 31 of each year for the irrigation water rights set forth in Section E.1.a. of this Article III.

b. January 1 through December 31 of each year for diversion of the water right set forth in Section E.1.b. of this Article III.

c. January 1 through December 31 of each year for the water rights set forth in Section E.1.c. of this Article III.

d. As provided by State law for the water rights set forth in Sections E.1.d., and e. of this Article III.

**4. Points and Means of Diversion.**

a. The points and means of diversion for the water rights set forth in Section E.1.a. of this Article III are as follows:

(1) The water right set forth in Section E.1.a.(1) of this Article III may be diverted from any point by any means on Tribal trust or fee land within Section 30, T28N, R22E and the SW 1/4 of Section 18, T27N, R22E;

(2) The water right set forth in Section E.1.a.(2) of this Article III may be diverted from any point by any means on Tribal trust or fee land within Section 19, T27N, R22E.

b. The water right set forth in Section E.1.b. of this Article III may be diverted from any point by any means on Tribal trust or fee land in the SWSESW, Section 9, T26N, R22E.

c. The water rights set forth in Section E.1.c. of this Article III may be diverted from the place and by the means in use prior to the Effective Date of the Compact, on Tribal fee or trust land in Basin 40EJ and Basin 40I. Subject to the terms and conditions of Section B. of Article IV, the Tribes may change the point and means of diversion of a water right set forth in Section E.1.c. of this Article III to any place and any means from surface or Groundwater that is Hydrologically Connected to surface water, on Tribal fee or trust land in Basin 40EJ or Basin 40I.

d. The water right set forth in Sections E.1.d. and e. of this Article III may be diverted from any point by any means on Tribal fee or trust land in Basin 40EJ and Basin 40I, pursuant to State law.

**5. Place of Use.**

a. The Tribes may use the water rights set forth in Section E.1.a.(1) of this Article III on Tribal trust or fee land in Sections 29, 30, 31, and 32, T28N, R22E, and on the W1/2 of the SE1/2 and the E1/2 of the W 1/2 of Section 19, T27N, R22E. The Tribes may use the water rights set forth in Section E.1.a.(2) of this Article III on Tribal trust or fee land in Sections 19 and 30, T27N, R22E.

b. The water rights set forth in Section E.1.b. of this Article III may be used any place authorized in Section B.5.a. of this Article III, and shall be administered as part of the Tribal Water Right.

c. Subject to the requirements of State law, the water rights set forth in Section E.1.c. of this Article III may be used any place on Tribal fee or trust land in Basin 40EJ and Basin 40I on which the water has been used prior to the Effective Date of the Compact.

d. The water rights set forth in Sections E.1.d. and e. of this Article III may be used on any Tribal fee and trust land in Basin 40EJ and Basin 40I, pursuant to State law.

#### **6. Purposes.**

a. The water rights set forth in Section E.1.a. of this Article III may be used for irrigation. Subject to the terms and conditions of Section B. of Article IV, the Tribes may change the use of the water rights set forth in Section E.1.a. of this Article III to any other purpose allowed by State law.

b. The water rights set forth in Section E.1.b. of this Article III may be used for any purpose allowed by federal and Tribal law.

c. The water rights set forth in Section E.1.c. of this Article III may continue to be used for stock and domestic purposes according to their purpose on the Effective Date of the Compact. Subject to the terms and conditions of Section B. of Article IV, the Tribes may change the use of the water rights set forth in Section E.1.c. of this Article III to any other purpose allowed by State law.

d. The water rights set forth in Sections E.1.d., and e. of this Article III may be used for any purpose allowed by State law.

**F. Temporary Emergency Appropriations.** The Tribes or the United States on behalf of the Tribes may divert water from sources on the Reservation for use on or off the Reservation for temporary emergency use necessary for public health and safety. Temporary emergency use of water from a source for which a water right is quantified in this Article III of this Compact shall not be considered an exercise of that right.

#### **G. Groundwater.**

**1. Groundwater that is Hydrologically Connected to Surface Water.** The Tribes have the right to develop Groundwater that is Hydrologically Connected to surface water within the quantification limits for surface water provided in Sections A., B., C., D., and E. of this Article III. The attributes of the water right are as set forth in Sections A., B., C., D., and E. of this Article III.

#### **2. Existing Groundwater Development.**

a. **Quantification.** The Tribes have the right to the use of Groundwater developed before the Effective Date of the Compact within the Reservation as provided in Sections A.1.d., B.1.d., C.1.c., and D.1.a. of this Article III. These Groundwater uses are subject to the reporting requirements of Section A.7. of Article IV.

#### **3. New Development of Small Groundwater Wells and Springs.**

a. **Quantification.** In addition to the water rights set forth in Sections A., B., C., and D., of this Article III, the Tribes have the right to develop Groundwater within the Reservation by means of wells or developed springs if the maximum flow of each well or developed spring is 35 gallons per minute or less and does not exceed a use of 10 Acre-feet per year. This size limitation includes a Combined Development from the Same Source from two or more wells or developed springs.

#### **b. Priority Date/Administrative Priority.**

The priority date of the water rights set forth in Section G.3.a. of this Article III shall be the date of development of the right.

c. **Period of Use.** The period of use of the water rights set forth in Section G.3.a. of this Article III is January 1 through December 31 of each year.

d. **Points and Means of Diversion.** Subject to the terms and conditions set forth in Article IV, the water right set forth in Section G.3.a. of this Article III may be diverted from Groundwater from any point by any means within the Reservation.

e. **Place of Use.** Subject to the terms and conditions set forth in Article IV, the Tribes may use or authorize the use of the water rights set forth in Section G.3.a. of this Article III any place within the Reservation.

f. **Purposes.** Subject to the terms and conditions set forth in Article IV, the water rights set forth in Section G.3.a. of this Article III may be used for any purpose authorized by Tribal or federal law.

**4. New Groundwater Development not Hydrologically Connected to Surface Water.**

a. **Quantification.** In addition to the water rights set forth in Sections A., B., C., D., and E. of this Article III, the Tribes have the right to develop or authorize the development of Groundwater within the Reservation that is not Hydrologically Connected to surface water subject to the following conditions:

(1) The development of Groundwater that is not Hydrologically Connected to surface water must comply with the provisions of Sections A.5. and 6. of Article IV for determination of Adverse Effect. Pursuant to Section A.5.a. of Article IV, the Tribal Water Resources Department and the DNRC may jointly agree to exempt certain development of Groundwater from a showing of no Adverse Effect due to location, size, or other agreed upon parameter.

(2) If a conflict arises between use of the water right set forth in this Section G.4. of Article III and a water right Arising Under State Law, DNRC and TWRD shall attempt to resolve the controversy. In attempting to resolve the controversy, DNRC and TWRD may establish controlled Groundwater areas off and on the Reservation and may manage them cooperatively pursuant to Sections A.2.d. and B.2. of Article IV. If DNRC and TWRD are unable to resolve the controversy, the Tribes, State or the Person whose water use is affected may seek relief from the Compact Board. Among the remedies the Compact Board may order is imposition of a controlled Groundwater area that includes Groundwater use both on and off the Reservation pursuant to Sections A.2.d. and B.2. of Article IV. The controlled Groundwater area is to be administered by the TWRD on the Reservation and the DNRC off the Reservation pursuant to Article IV and Tribal and State law.

b. **Priority Date.** The priority date of the water rights set forth in Section G.4.a. of this Article III for new Groundwater development shall be the date of development of the right.

c. **Period of Use.** The period of use of the water rights set forth in Section G.4.a. of this Article III for new Groundwater development is January 1 through December 31 of each year.

d. **Points and Means of Diversion.** Subject to the requirements set forth in Article IV, the water rights set forth in Section G.4.a. of this Article III may be diverted from Groundwater that is not Hydrologically Connected to surface water at any point by any means within the Reservation.

e. **Place of Use.** Subject to the requirements set forth in Article IV, the water rights set forth in Section G.4.a. of this Article III may be used on any place within the Reservation.

f. **Purpose.** Subject to the requirements set forth in Article IV, the Tribes may use or authorize the use of the water rights set forth in Section G.4.a. of this Article III for any purpose allowed by Tribal and federal law.

**H. Additional Water.** As a part of the Tribal Water Right, the Tribes shall be entitled to an allocation of stored water in Lake Elwell as agreed to by the Parties and as provided by Congress, measured at the dam, for use or disposition by the Tribes for any beneficial purpose, either on or off the Reservation, pursuant to the terms of this Compact; provided that, such allocation shall be in accordance with the terms and conditions of any Act of Congress ratifying this Compact. This allocation is subject to the prior reserved water rights, if any, of any other Indian tribe, or persons holding such reserved water rights through that tribe or through the United States. Any use or disposition of water from Lake Elwell off the Reservation by the Tribes is subject to the specific provisions relating to such use or disposition in any Act of Congress ratifying this Compact. The United States shall have no responsibility or obligation to provide any facility for the transport of the water allocated under this Section H. of Article III. to the Fort Belknap Reservation or to any other location.

**I. Basin Closures.**

1. The following closure does not apply to development of the Tribal Water Right as provided for in this Compact. In the Milk River Basin from the Eastern Crossing to the confluence between the Milk River and the Missouri River comprised of Basins 40F, 40G, 40H, 40I, 40J, 40K, 40L, 40M, 40N, and 40O both above the Western Crossing and below the Eastern Crossing, DNRC shall not process or grant an application for an appropriation pursuant to State law after this Compact has been ratified by the Montana legislature, provided that, after compliance by the applicant with all applicable provisions of State and federal law, DNRC may issue a certificate of water right or permit for:

a. An appropriation for municipal use of surface or Groundwater that is Hydrologically Connected to surface water. In addition to compliance with applicable State law, the application shall be treated as a change in use for the purposes of Section B. of Article IV, if the point of diversion is located upstream from any point on the Reservation. For purposes of compliance with State law other than this Compact, the appropriation shall be treated as a new use.

b. An appropriation of Groundwater that is not Hydrologically Connected to surface water. In addition to compliance with applicable State law, the application shall be treated as a change in use for the purposes of Section B. of Article IV, if the point of diversion is within an aquifer that might extend onto the Reservation. For purposes of compliance with State law other than this Compact, the appropriation shall be treated as a new use.

c. An 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 use of 10 Acre-feet per year. This size limitation includes a Combined Development from the Same Source from two or more wells or developed springs. This exemption includes development on fee land on the Reservation.

d. An appropriation of water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 Acre-feet and the appropriation is less than 30 Acre-feet per year and is from a source other than a Perennial Flowing Stream. This exemption includes development on fee land on the Reservation. With the exception of Peoples Creek Basin 40I, the cumulative development of stock impoundments pursuant to this exemption following the Effective Date of this Compact may not exceed a storage capacity of 15 Acre-feet times the number of square miles in the Water Court basin in which the new impoundment is located. In the Peoples Creek Basin 40I, development of stock impoundments pursuant to this exemption following the Effective Date of this Compact must be constructed with the ability to bypass inflow.

e. An appropriation for instream use of water by livestock.

f. Temporary emergency appropriations as provided in § 85-2-113(3), MCA.

g. An appropriation necessary for the purposes of new storage of imported water or modification and replacement of existing storage as set forth in Section I.4. of this Article III.

h. An appropriation necessary for new storage off the Reservation approved by the Milk River Coordinating Committee pursuant to Section C.3.g. of Article IV.

i. An appropriation for a nonconsumptive use as defined under State law.

j. With the exception of applications for appropriations in Basin 40I upstream from the Reservation, an appropriation of water for an impoundment of any size for use for fish and wildlife purposes if the cumulative development under this provision and Section I.1.d. of this Article III, does not exceed 15 Acre-feet times the number of square miles owned by the applicant in the Water Court basin in which the new impoundment is located.

2. The basin closure is not a limit on change of use or transfer of any water right Arising Under State Law, provided that, applicable provisions of State and federal law and this Compact are followed. For purposes of this Compact, any change in a water right for the purpose of moving instream stockwatering to off-stream stockwatering that does not result in an increase in the historic consumptive use of water shall be considered a change in use, and is not a new use subject to the basin closure.

3. Due to the shortage of water in the Milk River Basin, water salvaged through efficiency measures may not be used to expand irrigation from a water right Arising Under State Law with

a point of diversion in the United States' portion of the Milk River Basin under the following circumstances:

a. the efficiency measures are funded in whole or in part by the State, United States, Tribes, or water users as part of the implementation of this Compact; or

b. the salvaged water may be used to alleviate water shortage in the Milk River Basin. Pursuant to Section B.3. of Article IV, DNRC may promulgate rules to implement this provision.

4. The basin closure is not a limit on: the modification or replacement of existing storage when there is no enlargement of that storage; the modification or development of storage pursuant to this Compact and the federal legislation that ratifies this Compact; or the development of storage to impound water imported to the Milk River Basin from another basin.

5. Within 120 days of the date this Compact is ratified by the Montana Legislature, DNRC shall publish notice of the basin closures set forth in Section I. of this Article III once in newspapers of general circulation in the area of the sources.

#### ARTICLE IV - IMPLEMENTATION OF COMPACT

##### A. Tribal Administration.

##### 1. Tribal Authority Over Tribal Water Right.

a. The Tribes have the right, subject to the limits imposed by this Compact (including Sections C., D., and E. of this Article IV, and Section B.3. of Article VII), and federal law (including 25 U.S.C. §381), to administer the use of the Tribal Water Right.

b. Once the Tribal Water Right is diverted to the facilities of the Fort Belknap Indian Irrigation Project on units held by the United States, distribution shall be conducted by the United States Department of the Interior, Bureau of Indian Affairs or its successor in accordance with applicable federal laws. Operation and maintenance of the Fort Belknap Indian Irrigation Project shall be conducted by the United States Department of the Interior, Bureau of Indian Affairs or its successor in accordance with applicable federal laws.

c. Once the Tribal Water Right is diverted to the facilities of the Ereaux Unit, and any other unit previously part of the Fort Belknap Indian Irrigation Project which has been subsequently quit claimed by the United States to specific irrigation companies, distribution shall be conducted by the irrigation companies. Administration of the Tribal Water Right to the points of diversion of the listed irrigation projects shall be conducted by the Tribes on Peoples Creek and other tributaries to the Milk River on the Reservation, and pursuant to Sections C., D., and E., of this Article IV, and Section B.3. of Article VII on the mainstem of the Milk River.

d. Owners of fee land within the Reservation may apply to the Tribes to continue their historic use of water in the manner and to the extent existing on the Effective Date of the Compact on fee land within the Reservation as determined by the TWRD pursuant to the Tribal water code as part of the Tribal Water Right if no claim was filed by the landowner in the state adjudication, or may continue their use pursuant to state law and as decreed by state court if a claim was filed.

2. **Tribal Water Code.** Administration of the Tribal Water Right by the Tribes shall be pursuant to a comprehensive Tribal water code governing the Tribal Water Right set forth in this Compact. Pending the adoption of the Tribal water code, the administration of the Tribal Water Right shall be by the Secretary of the Interior. The Tribal water code shall be developed and adopted by the Tribes with approval by the Secretary within two (2) years following the Effective Date of this Compact and shall include:

a. A process by which any Tribal member or Allottee may request and be provided with an equitable distribution of water for use on his or her trust lands.

b. A process for notice and a right to be heard for the consideration and determination of any request by a Tribal member or Allottee for an equitable distribution of water, including a process for formal review of denied or disputed distributions and for resolution of contested administrative decisions.

c. A process by which an owner of fee land within the boundaries of the Reservation may apply for use of a portion of the Tribal Water Right.

d. A process for establishment of a controlled Groundwater area and for management of such Area in cooperation with establishment of a contiguous controlled Groundwater area off the Reservation established pursuant to Section B.2. of this Article IV and State law.

3. **Persons Authorized to Use the Tribal Water Right.** The Tribal Water Right may be used by the Tribes, or Persons authorized by the Tribes (including Tribal members, Allottees, and holders of fee land within the boundaries of the Fort Belknap Reservation).

4. **Authorization for New Development of the Tribal Water Right.** Subject to Article III and the following conditions, the Tribes may use or authorize the use of the Tribal Water Right within the Reservation for any purpose allowed by this Compact and Tribal and federal law:

a. Impact of new development of the Tribal Water Right within the Reservation for the purposes of irrigation and non-irrigation use as expressly identified under the quantification in Article III, and new development for any purpose within the Reservation within the Peoples Creek Basin, have been accounted for in design of mitigation and administration in the Compact. Thus, new development for the purposes expressly identified in Article III within the Reservation and all new development within the Reservation within the Peoples Creek Basin are exempt from any review by DNRC under the process set forth in Sections A.5. and 6. of this Article IV. All such development will be referred to as "Exempt New Development." Specifically, Exempt New-Development is as follows:

(1) Use of the Tribal Water Right for purposes of irrigation with the place of use on the Reservation and as set forth in Article III.

(2) Use of up to 4000 AFY of water diverted from the Milk River pursuant to Section A.1.a.(2) of Article III for non-irrigation purposes on the Reservation.

(3) Use of the Tribal Water Right quantified for the Peoples Creek Basin within the Reservation for any purpose allowed by Tribal or federal law.

(4) Use of the Tribal Water Right for stockwatering on the Reservation if the maximum capacity of the impoundment or pit is less than 15 Acre-feet and the appropriation is less than 30 Acre-feet per year and is from a source other than a Perennial Flowing Stream.

(5) Use of Groundwater on the Reservation that is Hydrologically Connected to surface water by means of a well or developed spring with an appropriation of 35 gallons per minute or less, and a use that does not exceed 10 Acre-feet per year. This size limitation includes a Combined Development from the Same Source from two or more wells or developed springs.

b. Any Tribal authorization for the development of Groundwater that is not Hydrologically Connected to surface water by means of a well or developed spring with an appropriation of greater than 35 gallons per minute, or in excess of 10 Acre-feet per year, developed after the Effective Date of this Compact, shall not have an Adverse Effect on water rights Arising Under State Law with a priority date before the date of the application for Groundwater development. The development is considered a Non-Exempt New Development and is subject to the procedures set forth in Sections A.5. and 6. of this Article IV.

5. **Non-Exempt New Development, Change in Use, or Transfer of the Tribal Water Right.** Subject to the following conditions, the Tribes may make or authorize a Non-Exempt New Development, Change in Use, or Transfer of the Tribal Water Right.

a. A Non-Exempt New Development, Change in Use, or Transfer of the Tribal Water Right on or off the Reservation may not Adversely Affect a water right Arising Under State Law with a priority date before the date of the application to the TWRD for the Non-Exempt New Development, Change in Use, or Transfer. Determination of Adverse Effect for the purposes of this Section shall be pursuant to the procedures set forth in Section A.6. of this Article IV and Appendix 5. In addition, the TWRD and DNRC may jointly agree to exempt certain Change in Use, Transfer or Non-Exempt New Development from a showing of no Adverse Effect due to location, size, or other agreed upon parameter.

b. Off Reservation Change in Use or Transfer of the Tribal Water Right is limited as follows:

(1) Off Reservation use of the Tribal Water Right on non-Tribal land shall be limited to the following portion of the Tribal Water Right developed or stored prior to the date of application for Change in Use or Transfer:

(a) Water developed by Direct Use prior to the date of the application for Change in Use or Transfer from the Milk River pursuant to Section A.1.a. of Article III; or

(b) Water stored from the Milk River pursuant to Section A.1.a.(2) of Article III.

(c) Water stored from Peoples Creek pursuant to Sections B.1.a., and b. of Article III.

(2) The off-Reservation new development, Change in Use, or Transfer of the transferable portion of the Tribal Water Right set forth in Section A.1.a. of Article III is limited to a place of use within the Missouri River Basin.

(a) If the Tribes receive a good faith offer from a Person for Transfer of a portion of the Tribal Water Right outside the Milk River Basin, the Tribes shall allow water users receiving water from the Milk River Project the first opportunity, and other water users in the Milk River Basin the second opportunity, to acquire use of such rights at a price consistent with the market value of water within the Milk River Basin at the time of the offer:

(b) The Tribes are not required to offer the first or second right to use a portion of the Tribal Water Right to any water user in the Milk River Basin who is currently marketing a portion of their own water right.

(3) The off-Reservation new development, Change in Use, or Transfer of the transferable portion of the Tribal Water Right set forth in Sections B.1.a., and b. of Article III is limited to a place of use within the Milk River Basin.

(4) The off-Reservation new development, Change in Use, or Transfer of the portion of the Tribal Water Right set forth in Section H. of Article III is limited to a place of use in the Missouri River Basin.

(5) Any off-Reservation Change in Use or Transfer of a portion of the Tribal Water Right may not exceed a term of 100 years, but may include provisions authorizing renewal for an additional term not to exceed 100 years.

(6) No off-Reservation Change in Use or Transfer of a portion of the Tribal Water Right may permanently alienate the water right.

(7) The development or use of the Tribal Water Right pursuant to an off-Reservation new development, Change in Use, or Transfer must comply with State law, provided that, approval of an application for a change in water right by DNRC shall be conditioned on a valid Tribal approval for such use, Change in Use or Transfer. Due to this requirement of compliance with State law, the off-Reservation Change in Use or Transfer shall be exempt from the process set forth in Section A.6. of this Article IV. Any diversion of the Tribal Water Right located off the Reservation for use on the Reservation shall not be considered an off-Reservation use for purposes of this provision.

(8) The Tribes or any Person using diversion or transportation facilities located off the Reservation in connection with a use of the Tribal Water Right shall apply for and obtain all permits, certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water, prior to exercising a use of the Tribal Water Right off the Reservation.

**6. Administrative Procedure for Determination of Adverse Effect for Non-Exempt New Development, Change in Use, or Transfer, Within the Reservation.**

a. The procedures set forth in Sections A.6.b. through i. of this Article IV apply to determine whether the following actions will Adversely Affect a water right Arising Under State Law and must be followed before a Person may seek relief from the Compact Board:

- (1) A Change in Use or Transfer of the Tribal Water Right; and
- (2) A Non-Exempt New Development of the Tribal Water Right.

b. The proposal for a Non-Exempt New Development, Change in Use, or Transfer of a portion of the Tribal Water Right after the Effective Date of this Compact shall be made to TWRD.

c. TWRD shall review the proposal and make a determination of whether it will Adversely Affect a water right Arising Under State Law with a priority date before the date of the proposal for the Non-Exempt New Development, Change in Use, or Transfer.

(1) Upon request, DNRC shall provide to TWRD information on water rights Arising Under State Law as recorded in the DNRC database.

(2) For purposes of determining whether a Non-Exempt New Development of surface water Adversely Affects a water right Arising Under State Law, the existing use shall be deemed to be the use for which the water right is quantified explicitly in Article III of this Compact.

(3) If TWRD determines that the Non-Exempt New Development, Change in Use, or Transfer will Adversely Affect a water right Arising Under State Law with a priority date before the date of the proposal for the Non-Exempt New Development, Change in Use, or Transfer, TWRD shall deny the proposal, provided that, the Tribal water code may allow the applicant to modify the proposal to eliminate Adverse Affect.

(4) If TWRD determines that the Non-Exempt New Development, Change in Use, or Transfer will not Adversely Affect a water right Arising Under State Law with a priority date before the date of the proposal for the Non-Exempt New Development, Change in Use, or Transfer, TWRD shall forward the proposal with its determination to DNRC by certified mail with return receipt requested.

d. Upon receipt of notice from the TWRD, DNRC shall publish notice of the proposed Non-Exempt New Development, Change in Use, or Transfer, once in a newspaper of general circulation in the area of the source and shall serve notice by first-class mail on any holder of a water right Arising Under State Law who, according to the records of the DNRC, has a water right with a priority date before the date of the proposal that may be affected by the proposed Non-Exempt New Development, Change in Use, or Transfer. DNRC shall notify TWRD of the date of publication of notice.

e. A holder of a water right Arising Under State Law who objects to the proposed Non-Exempt New Development, Change in Use, or Transfer on the basis that it will Adversely Affect the exercise of their water right may notify DNRC, and must do so within thirty (30) days of the publication of notice.

f. DNRC shall review the proposal and the determination by TWRD of no Adverse Effect and any objections raised pursuant to Section A.6.e. of this Article IV. In its review, DNRC shall apply the same principles used in a determination of adverse effect or adverse affect pursuant to the Water Use Act, Title 85, Chapter 2, MCA, and Appendix 5. Any Non-Exempt New Development, Change in Use, or Transfer of the Tribal Water Right to a place of use and point of diversion within the Reservation that is within the minimum depletions set forth in Appendix 5 shall be presumed by DNRC to have no Adverse Effect. The TWRD may provide information that the Adverse Effect will be less than that predicted by application of Appendix 5 and DNRC may use the new information in its evaluation.

g. DNRC shall notify TWRD of the outcome of its review within thirty (30) days after the end of the time period for objection set forth in Section A.6.e. of this Article IV. If TWRD is not notified by DNRC within sixty (60) days of publication of notice by DNRC, TWRD may authorize the proposal pursuant to Tribal law.

h. DNRC and TWRD shall attempt to resolve objections or disagreement on TWRD's determination of no Adverse Effect on a cooperative basis. Measures to resolve objections may include agreement to release water from storage.

i. If resolution of an objection or disagreement is not achieved, DNRC or an objector may seek relief from the Compact Board established in Section D. of this Article IV.

#### **7. Reporting Requirements.**

a. Upon request by DNRC, on no more than an annual basis, the TWRD shall provide the MRCC, State and the United States with a listing of: all Non-Exempt New Development and Exempt New Development of the Tribal Water Right and any temporary emergency use or diversion of water on the Reservation.

b. The Tribes or the United States on behalf of the Tribes shall inventory the use of water rights for water developed before the Effective Date of the Compact set forth in Sections A.1.d., B.1.d., C.1.c., D.1.a., E.1.c., and G.2.a. of Article III, and shall report the inventory to DNRC within one year of the decree of the Tribal Water Right. Developments of Groundwater by means of a well or developed spring if the maximum flow of each well or developed spring is 35 gallons per minute or less and does not exceed a use of 10 Acre-feet per year are not required to be included in the inventory. This size limitation includes a Combined Development from the Same Source from two or more wells or developed springs.

**B. State Administration.**

**1. State Authority.**

a. Except as provided in Section C., D., and E., of this Article IV and Section B.3. of Article VII, the State shall administer and enforce all water rights Arising Under State Law to the use of surface water and Groundwater.

b. The State shall administer and enforce water rights set forth in Section E. of Article III on Tribal trust and fee land for use in the portion of the Missouri Basin 40EJ and Peoples Creek Basin 40I off the Reservation unless Congress acts to modify the Reservation boundary to include the Tribal trust and fee land. In administering the Tribal water rights on trust and fee land off the Reservation in Basins 40EJ and 40I, the State shall treat the Tribal rights as water rights Arising Under State Law except that non-use of all or any of the Tribal water rights off the Reservation in Basins 40EJ and 40I shall not constitute a relinquishment, forfeiture, or abandonment of such rights.

**2. Cooperative Management of a Controlled Groundwater Area.**

a. DNRC may designate or modify a controlled Groundwater area adjacent to the Reservation under the following circumstances:

- (1) Pursuant to the requirements of §85-2-506, MCA; or
- (2) In cooperation with designation or modification by TWRD of a similar area on contiguous land within the Reservation; or
- (3) Under order of the Compact Board as set forth in Section G.4.a.(2) of Article III.

b. The following procedures apply to designation or modification of a controlled Groundwater area pursuant to Section B.2.a. of this Article IV:

(1) Designation or modification of a controlled Groundwater area pursuant to Section B.2.a.(1) of this Article IV, or in the portion of an area off the Reservation pursuant to Section B.2.a.(2) of this Article IV, shall be governed by procedures set forth in §85-2-506, MCA.

(2) Designation or modification of a portion of a controlled Groundwater area off the Reservation pursuant to Section B.2.a.(3) of this Article IV shall be with substitution of the following procedures for those set forth in §§85-2-506(3) and (4), MCA:

(a) DNRC shall hold a meeting to inform the public of the designation or modification of a controlled Groundwater area as ordered by the Compact Board.

(b) The DNRC shall publish notice of the time and place of the meeting to inform the public of the designation or modification of a controlled Groundwater area. The notice shall include the description by legal subdivision of all lands included in the area, and shall be published at least once in each week for 3 successive weeks not less than 30 days before the date of the meeting in a newspaper of general circulation in the county or counties in which the controlled Groundwater area is located.

c. Management within the portion of a controlled Groundwater area adjacent to the Reservation shall be as follows:

(1) Management within a controlled Groundwater area established pursuant to Section B.2.a.(1) of this Article IV shall be pursuant to §§85-2-501 to 520, MCA.

(2) Management within the portion of a controlled Groundwater area off the Reservation established pursuant to Sections B.2.a.(2) and (3) of this Article IV shall be pursuant to §§85-2-501 to 520, MCA, and in cooperation with the TWRD.

**3. New Development and Change in a Water Right Arising Under State Law.**

a. Any Person making a new development or change in a water right or portion of a water right Arising Under State Law, including a change in water right for the Milk River Project, must comply with State law, provided that, DNRC may not approve a change in water right for expansion of irrigation through use of salvaged water pursuant to §85-2-402(2)(e), MCA, within the Milk River Basin under the following circumstances:

(1) the efficiency measures are funded in whole or in part by the State, United States, Tribes, or water users as part of the implementation of this Compact; or

(2) the salvaged water may be used to alleviate water shortage in the Milk River Basin. DNRC may promulgate rules to implement this provision.

b. Change in a water right Arising Under State Law upstream from any point on the Reservation, new development of water due to new storage approved by the Milk River

Coordinating Committee, new development of water for municipal purposes upstream from any point on the Reservation, and new development of Groundwater that is not Hydrologically Connected to surface water within the Milk River Basin may not Adversely Affect a use of the Tribal Water Right developed before the date of the change. Determination of Adverse Effect for the purposes of this Section shall be pursuant to the procedures set forth in Section B.4. of this Article IV. The TWRD and DNRC may jointly agree to exempt certain changes in water rights from a showing of no Adverse Effect to the Tribal Water Right due to location, size, or other agreed upon parameter.

**4. Administrative Procedure for Preventing Adverse Effect Resulting from New Development or Change in a Water Right Arising Under State Law.** Except for changes exempt by agreement pursuant to Section B.3.b. of this Article IV and new development of stock impoundments or small wells exempt from the basin closure pursuant to Sections I.1.c. and d. of Article III, the following procedure for determining whether a new development or change in a water right Arising Under State Law within the Milk River Basin (including all tributary basins) upstream from the Reservation and below the Eastern Crossing, must be followed in addition to procedures set forth under state law, prior to a Person seeking relief from the Compact Board:

a. Application for a permit for new development or for a change in a water right Arising Under State Law shall be made to DNRC pursuant to State law.

b. DNRC shall review any application for a permit for new development or for a change in a water right and make a determination of whether it will Adversely Affect any use of the Tribal Water Right developed before the date of the application. In its review, DNRC shall apply the same principles used in a determination of adverse effect or adverse affect pursuant to the Water Use Act, Title 85, Chapter 2; MCA.

(1) Upon request, TWRD shall provide to DNRC information on uses of the Tribal Water Right.

(2) If DNRC determines that the new development or change will Adversely Affect a use of the Tribal Water Right developed before the date of the change, DNRC shall deny the application.

(3) If DNRC determines that the new development or change will not Adversely Affect a use of the Tribal Water Right developed before the date of the change, DNRC shall forward the application with its determination to TWRD by certified mail with return receipt requested.

c. Upon receipt of notice from DNRC, TWRD shall follow any requirements set forth in the Tribal Water Code for notification and objection of Persons authorized to use the Tribal Water Right. TWRD shall notify DNRC of the date of any notice to Persons authorized to use the Tribal Water Right.

d. TWRD may allow up to thirty (30) days after notification to Persons authorized to use the Tribal Water Right for objection by Persons authorized to use the Tribal Water Right. Any objection shall be made to TWRD.

e. TWRD shall review the application and the determination by DNRC of no Adverse Effect and any objections raised pursuant to Section B.4.d. of this Article IV.

f. TWRD shall notify DNRC of the outcome of its review within thirty (30) days of the end of the time period for objections set forth in Section B.4.d. of this Article IV. If DNRC is not notified by TWRD within sixty (60) days of notice by TWRD to Persons authorized to use the Tribal Water Right, DNRC may proceed with the application process.

g. DNRC and TWRD shall attempt to resolve objections or disagreement on DNRC's determination of no Adverse Effect on a cooperative basis.

h. If resolution of an objection or disagreement is not achieved, TWRD or an objector may seek relief from the Compact Board established in Section D. of this Article IV.

**5. Reporting Requirements.** Upon request by TWRD on no more than an annual basis, the DNRC shall provide the MRCC, Tribes, and the United States with a listing of all new development of water rights Arising Under State Law and any temporary emergency use or diversion of water, for the off-Reservation portion of the Milk River Basin upstream from any point of diversion or place of use of the Tribal Water Right.

## **6. Peoples Creek Administration**

a. The DNRC shall develop a database covering water use upstream from the Reservation in Peoples Creek Basin 40I. The database shall include, at a minimum: identification of acreage irrigated on an annual basis; and any change in the use of a water right or storage facility.

b. If the Tribes or a Person authorized to use a portion of the Tribal Water Right within the Peoples Creek Basin 40I disputes a use or uses of water upstream from the Reservation in Basin 40I because the use or uses are in excess of a water right Arising Under State Law, or if the Tribes or Person authorized to use a portion of the Tribal Water Right believes that depletions in excess of water rights Arising Under State Law are occurring upstream from the Reservation but cannot identify the illegal use, the Tribes or Person shall contact the TWRD. The TWRD shall contact the DNRC concerning the dispute or excess depletion. If requested, the DNRC shall, within a reasonable time, investigate the disputed water use, or uses, or excess depletion and a representative of the TWRD may accompany DNRC on the investigation. If DNRC finds that the disputed water use or uses or excess depletion is in excess of a water right Arising Under State Law, DNRC may order any owner or operator of the diversion or storage facilities to curtail the use to within the water right. If any owner or operator does not comply with the order by DNRC or repeats the infraction, DNRC may: impose penalties pursuant to §85-2-122, MCA; and may require any owner or operator of the appropriation facility to install and maintain suitable controlling and measuring devices to allow the DNRC to track compliance with the water right. Disputes unresolved by the process set forth in this Section may be brought before the Compact Board established pursuant to Section D. of this Article IV.

**C. Milk River Coordinating Committee.** A basin-wide coordinating committee is necessary to improve the coordination of storage operations and to provide for the coordination of releases of water from storage within or for the diversion to the Milk River Basin. A coordinating committee is also necessary to improve the management of diversions from the Milk River and to establish priorities for a grant and loan program to improve water supply conditions in the basin.

1. **Establishment of Milk River Coordinating Committee.** There is hereby established the Milk River Coordinating Committee ("MRCC").

### **2. Membership.**

a. The MRCC consists of the following nine (9) voting members and four advisory members. Six (6) voting members of the MRCC constitutes a quorum and decisions shall be by a majority of the membership of the MRCC present, except as provided in Sections C.3.a. and C.5.c. of this Article IV. On the addition of members pursuant to Section C.3.a. of this Article IV, the quorum shall increase by one (1) for every two (2) members added to the original nine (9).

(1) Two (2) representatives of the Tribes;

(2) Three (3) representatives of the Joint Board of Control of the Milk River irrigation districts;

(3) One (1) representative of DNRC;

(4) One (1) representative of the Bureau of Reclamation;

(5) One (1) representative of the Bureau of Indian Affairs;

(6) One (1) representative selected at large by the other 8 members;

(7) One (1) advisory, non-voting, member from the United States Geological Survey;

(8) One (1) advisory, non-voting, member from the United States Fish and Wildlife Service;

(9) One (1) advisory, non-voting, member from the United States Bureau of Land Management; and

(10) One (1) advisory, non-voting, member from the Montana Department of Fish, Wildlife, and Parks.

b. All members shall be appointed by their respective agencies within six (6) months of the Effective Date of this Compact and within thirty (30) days of the date any vacancy occurs. Should the eight appointed members fail to agree, by a majority of a quorum as provided in Section C.2. of this Article IV, on the selection of a ninth member within sixty (60) days of the date of appointment of the eighth member, or within thirty (30) days after a vacancy in the ninth position occurs, the following procedure shall be utilized:

(1) Within five (5) days thereafter, each member shall nominate one person to serve as a member of the MRCC;

(2) Within five (5) days thereafter, the eight nominees shall be submitted to the chief judge of the United States District Court for the District of Montana for selection of the ninth member of the MRCC. If the chief judge declines for any reason to select the ninth member, the chief justice of the Montana Supreme Court shall make the selection from the eight nominees.

c. Each member shall serve a five-year term and shall be eligible for reappointment. The initial terms of each voting member shall be staggered with three members serving a five-year term, three members a four-year term, and three members a three-year term. The initial term of each voting member shall be chosen by lot. The initial term of the advisory members shall be five years. A member seeking to resign prior to expiration of a term must provide written notice to the remaining MRCC members thirty (30) days prior to withdrawal.

d. The MRCC shall select a chair from the voting members within six (6) months of the initial selection of the ninth member and shall rotate the chairmanship on a yearly basis among the voting members.

e. The MRCC shall provide published notice of the time, place, and purpose of its meetings, or other proceedings, and shall hold such proceedings in a forum open to the public unless compelled to close certain portions of a proceeding to protect an individual right to privacy.

f. The MRCC shall adopt necessary rules, pursuant to the Montana Administrative Procedure Act §§2-4-101 et. seq. (MCA), to carry out its responsibilities within six (6) months of the initial selection of the ninth member. The MRCC may amend and repeal rules as necessary to carry out the purposes of this Article IV.

g. Costs and compensation for State, federal, and Tribal members of the MRCC shall be covered by their respective entities.

h. Subject to the availability of funds, the MRCC may compensate any MRCC member not compensated by the entity they represent for time and travel devoted to MRCC business. Compensation shall be based on the average hourly compensation of the other MRCC members.

3. **Authority and Duties of the MRCC.** Notwithstanding any other provision of State, Tribal, and, if this Compact is approved by Congress, federal law, the MRCC shall have the following authority and duties:

a. The initial authority of the MRCC is restricted to the mainstem of the Milk River downstream from the Eastern Crossing. The MRCC has the authority to expand the boundaries of its area by a unanimous vote of the MRCC, including the area within which it may levy a tax, to include tributaries to the Milk River or the portion of the Milk River Basin upstream from the Western Crossing. Such expansion shall require the agreement of Persons holding a majority of the water rights by amount on the source added pursuant to the following procedure:

(1) Any Person or Persons owning 10% or more of the water rights by rate or volume on any tributary to the Milk River within the United States or on the mainstem of the Milk River upstream from the Western Crossing may petition the MRCC for addition to the area covered by the MRCC and for representation on the MRCC.

(2) On receipt of a petition, the MRCC shall notify DNRC and provide a copy of the petition.

(3) Within 60 days of receipt of the petition, DNRC shall hold a hearing in or near the area proposed for addition. DNRC shall publish notice of the hearing once in a newspaper of general circulation in the proposed area and serve notice by first-class mail on any holder of a water right Arising Under State Law and any holder of an adjudicated federal or Indian water right who, according to the records of the DNRC, has a water right within the area proposed for addition with a priority date before the date of the petition.

(4) The MRCC shall preside over the hearing. If the MRCC determines, based on the facts presented at the hearing and other relevant facts and information as may be available, and in the interest of improving water supply or allocation, that there is a need for addition of the area, the MRCC will notify the DNRC.

(5) On receipt of notice for the addition of an area to the MRCC, the DNRC shall send a ballot by first-class mail, with a 30-day deadline for its return, providing for a vote on the proposed addition, to any holder of a water right Arising Under State Law and any holder of an adjudicated federal or Indian water right who, according to the records of the DNRC, has a water right with a priority date before the date of the petition.

(6) Following expiration of the 30 day deadline for receipt of ballots, the DNRC shall count the votes and notify the MRCC of the results.

(7) The area proposed for inclusion in the MRCC shall be added to the MRCC with a representative if a majority of those voting are in favor of the addition.

b. Members of the MRCC may seek technical support from their respective agencies to facilitate the activities of the MRCC. To this end, the Parties agree to seek any necessary authorization to provide technical support to the MRCC. In addition, the MRCC shall have the following authority:

(1) The MRCC may employ a secretary and such other officers, agents, and employees, permanent and temporary, as it may require and shall determine their qualifications, duties, and compensation.

(2) The MRCC shall provide for the execution of surety bonds for all employees and officers who are entrusted with funds or property; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations, and orders issued or adopted; and shall provide for an annual audit of the accounts of receipts and disbursements.

(3) The MRCC may call upon the county attorney of any county in which the MRCC has authority or the attorney general of the state for any legal services it may require, or it may employ their own counsel and legal staff.

c. The MRCC shall hold a meeting on an annual basis with, at a minimum, the Bureau of Reclamation, the Bureau of Indian Affairs, the Tribes, the Milk River Joint Board of Control, DNRC, and Hill County to coordinate reservoir storage.

d. The MRCC shall coordinate the establishment and yearly update of a common database and associated maps on actual water use of water diverted from the mainstem of the Milk River downstream from the Eastern Crossing between: DNRC; the Bureau of Reclamation; the Bureau of Indian Affairs; the irrigation districts within the Milk River Project; and the Tribes. At a minimum, each entity will maintain a database and share information on daily diversions, yearly number of acres irrigated, and yearly changes in use. The MRCC role is one of coordination. The BOR, BIA, TWRD and irrigation districts will continue to maintain the portion of the database covering their own water distribution. The DNRC will continue to maintain its database covering water rights and diversions from the water sources.

(1) The MRCC shall make the database and associated maps available to any water commissioner appointed by a court to enforce water rights in the Milk River Basin.

(2) The DNRC and TWRD shall offer assistance as may be appropriate to the MRCC to update, maintain, and provide training for use of the database.

e. The MRCC shall consult with the Bureau of Reclamation in the Bureau's development of operating criteria pursuant to Section C.11. of this Article IV, for coordination of storage and release of water from storage facilities within the portion of the Milk River Basin in the United States and contributing to the water supply of the Milk River Basin, provided that, except as explicitly provided for in this Compact or by Congress, allocations in the federal and future Tribal reservoirs within the Milk River Basin or contributing to the water supply of the Milk River Basin shall remain unchanged and the right of the owner of a storage facility to exercise discretion in the daily operation and use of its facilities shall not be preempted.

f. Notwithstanding the rights to the use of water existing on the date of a determination by the BOR of excess water flow pursuant to Section C.11.f. of this Article IV, the MRCC may permit the owner of storage in the Milk River Basin to store water regardless of priority if capacity exists and the water would otherwise be lost to the Milk River Basin. Water stored pursuant to this provision may be used to satisfy water rights served by the entity storing the excess flow.

g. The MRCC shall review applications for new storage in the Milk River Basin below the Eastern Crossing.

(1) Any Person or Persons, including the Tribes, seeking to develop or enlarge storage in the United States' portion of the Milk River Basin below the Eastern Crossing, other than new or enlarged storage agreed to in the Compact or pursuant to the federal Act ratifying this Compact, must comply with each of the following criteria:

(a) Application describing the project shall be made to the MRCC; and

(b) The applicant must prove by a preponderance of the evidence that the project will result in a net increase in available water supply within the Milk River Basin below the Eastern Crossing.

(2) The MRCC shall issue a report on its findings and determination.

(3) If the MRCC determines that the application for new storage does not meet the criteria in Section C.3.g.(1)(b) of this Article IV, the determination is final, subject to the right of appeal under the following subsection (4).

(4) Appeal of decisions by the MRCC concerning new storage may be sought in a court of competent jurisdiction. Any appeal heard by a court of competent jurisdiction shall be a trial de novo.

(5) Any applicant that the MRCC determines meets the criteria in Section C.3.g.(1)(b) of this Article IV must further comply with all other applicable State, federal, and Tribal law. The determination of the MRCC or any final appeal is binding on the Tribes, the State, and the United States in consideration of any application for development of new storage.

h. The MRCC does not have the authority to coordinate storage or storage releases in a manner that is inconsistent with any applicable provisions of State, Tribal, and federal law, and the decrees of the Water Court. The responsibility for storage and storage releases in the Milk River Project facilities rests solely with the Bureau of Reclamation, its successors or assigns; provided that, if approved by Congress, the BOR shall participate in efforts at coordination as a member of the MRCC.

i. The MRCC shall have the authority to review applications for grants and loans from the Milk River Watershed Improvement Trusts and to determine prioritization for receipt of grants and loans pursuant to this Compact and §85-20-1006, MCA, and C. 6., 7., 8., 9., and 10. of this Article IV. The DNRC shall offer assistance as may be appropriate to the MRCC for review of applications for grants and loans. The Milk River Watershed Improvement Trusts are permanent accounts established by this Compact and §85-20-1005, MCA, to provide interest for grants for purchase of water for a Water Bank in times of significant short term water shortage, and for loans for long term improvements within the Milk River Basin.

#### **4. Legal Status of MRCC - Immunity.**

a. The MRCC may make and execute agreements necessary to perform its responsibilities as provided in this Compact.

b. The MRCC may apply for State and federal grants and loans available to governmental entities or watershed organizations.

c. The MRCC may sue and be sued to enforce agreements entered into pursuant to this Section C.4. of Article IV in the name of the MRCC. The MRCC, an MRCC member, or MRCC employee is immune from suit for any liability that might otherwise be incurred or imposed for an act or omission committed while engaging in MRCC activities pursuant to this Article IV, unless the act or omission constitutes criminal behavior, gross negligence, was committed in bad faith, or was committed with malicious purposes. Nothing in this provision is intended to waive immunity that is applicable to the United States or any federal employee, to the State or any State employee, or to the Tribes or any Tribal employee.

#### **5. MRCC Finance.**

a. The MRCC may request up to 15% per year of the interest on the Milk River Watershed Improvement Trusts to cover administrative costs, including but not limited to: the cost of review of applications for grants and loans; and the cost of compensation for MRCC members pursuant to Section C.2.h. of this Article IV.

b. The MRCC may apply for grants and loans from applicable State, Federal, and Tribal programs.

c. Subject to §15-10-420, MCA, the MRCC may, on unanimous vote of all voting members, levy taxes on water use pursuant to a water right Arising Under State Law from the mainstem of the Milk River, including, water use under contract with the Bureau of Reclamation, to pay any obligation of the MRCC and to fulfill its duties established by this Compact.

(1) The assessment shall be limited to land irrigated by water from the Milk River, and other non-irrigation water use from the Milk River Project.

(2) The assessment in any one year may not exceed: 0.5% of the assessed value of irrigated land; 0.5% of the taxable portion of the assessed value of a household, and 0.5% of the taxable portion of the assessed value of industrial or commercial land where water is used, with such assessments as determined by the Montana Department of Revenue, without the consent of the majority of the water users subject to the assessment.

(3) Subject to §15-10-420, MCA, the board of county commissioners of each county in which the MRCC imposes an assessment may, annually at the time of levying county taxes, levy an assessment on the applicable water use. The levy must be known as the "Milk River Coordinating Committee regular assessment." The assessment must be certified to the Department of Revenue and entered on the property tax record of each county.

(4) Any special assessment levied pursuant to this Section shall constitute a lien against the property upon which such assessment is levied from the date of such levy. This lien can only be extinguished by payment of such assessment with all penalties, costs, and interest.

d. The Parties agree to seek funding to cover a Tribal contribution to the MRCC. Any Tribal participation in contribution shall be equivalent to assessments associated with lands and uses off the Reservation.

e. On an annual basis, the MRCC shall make a report of its expenditures available to the public.

**6. Milk River Watershed Improvement Trusts.**

a. The Milk River Watershed Improvement Trusts established pursuant to this Compact and §85-20-1005, MCA, are permanent trusts for the generation of interest on the Trusts' principal for the allocation of grants and loans to improve conditions of water supply, water quality, and habitat in the Milk River basin.

b. The MRCC shall review and rank in order of priority, pursuant to the criteria in Sections C. 6., 7., 8., 9., and 10. of this Article IV, applications for grants and loans from the Milk River Watershed Improvement Trusts. The MRCC may seek technical assistance from the Department of Natural Resources and Conservation, the TWRD, and the United States Bureau of Reclamation for review of applications for grants and loans.

c. Allocation of funds from the Milk River Watershed Improvement Trusts shall be managed by the Department of Natural Resources and Conservation. Disbursement of grants and loans from interest on the Milk River Watershed Improvement Trusts by DNRC must be pursuant to prioritization provided by the MRCC.

d. The DNRC shall adopt rules:

(1) prescribing the form and content of applications for grants and loans from the Milk River Watershed Improvement Trusts;

(2) providing for the servicing of loans, including arrangements for obtaining security interests and the establishment of reasonable fees or charges;

(3) providing for the confidentiality of financial statements submitted;

(4) prescribing the conditions for making grants and loans;

(5) establishing the interest rate for the loans; and

(6) determining the type and amount of security interest in real estate that will be accepted and any conditions to be made upon the security interest.

e. At the request of the MRCC, the DNRC may allocate up to 15% of the annual interest from the Milk River Watershed Improvement Trusts to cover capital and administrative costs of the MRCC.

**7. Milk River Watershed Improvement Trusts - Applications for Grants and Loans for Watershed Improvements.**

a. An application for a grant or loan from the Milk River Watershed Improvement Trusts established by this Compact and § 85-20-1005, MCA, must be in the form prescribed by the DNRC and contain or be accompanied by any information necessary to adequately describe the proposed project and provide for evaluation under Sections C.8., and 9., and 10. of this Article IV.

b. Application for a grant or loan from the Milk River Watershed Improvement Trusts may be made by Persons, including but not limited to:

(1) individuals holding water rights Arising Under State Law;

(2) tribes;

- (3) persons authorized to use water by a tribe;
- (4) municipalities;
- (5) irrigation districts; and
- (6) conservation districts.

**8. Milk River Watershed Improvement Trusts - Establishment of Water Bank.** The purpose of this Section is to establish a water bank for implementation in years of significant short term water shortage. The bank is not intended to alleviate normal water shortage within the Milk River Basin.

a. By March 1 of each year and on a monthly basis through October 31, the BOR shall notify the MRCC, DNRC, the Tribes, the U.S. and the Milk River irrigation districts, if it expects, based on current information, water deliveries to be restricted during the current irrigation season due to a critical water shortage. Water shortage may be caused by factors which include, but are not limited to:

- (1) low precipitation;
- (2) requirements for fish and wildlife species of special concern; or
- (3) temporary delivery system outage caused by an unexpected failure or a natural disaster.

b. Following notice by the BOR of expected restrictions in water delivery, the MRCC shall publish notice in newspapers of general circulation within the Milk River Basin of the availability of grants to purchase water for the purpose of alleviating shortage.

c. The MRCC may offer the grants at a fixed price per Acre-foot or may seek bids. For any applicant banking water received from the Milk River Project, the grant must be sufficient to cover payments to the Project, including any assessments or fees paid to an irrigation district.

d. The MRCC may allocate banked water to storage, or may market or allocate banked water to alleviate shortage. Any fees obtained by the MRCC through marketing of banked water must be returned to the Trust as part of the expendable interest. Banked water may be marketed or allocated: on a pro rata basis; to alleviate critical shortages; to meet critical environmental or water quality needs; for irrigation needs; or may be allocated to storage.

e. Grants obtained for the temporary retirement of Milk River Project water must first be used by the applicant to cover payments to the Milk River Project, including any assessments or fees paid to an irrigation district.

f. Nothing within this Section C.8. of Article IV is intended to preclude a more comprehensive water marketing system within the Milk River Basin.

**9. Milk River Watershed Improvement Trusts - Eligibility for Grants for Water Banking or Water Transfers.**

a. The Milk River Coordinating Committee shall apply the following criteria in ranking applications for grants:

- (1) the need for temporary retirement of irrigation or conversion to low water-use crops for the purpose of banking water to alleviate a critical shortage of water in a particular year;
- (2) the extent to which the proposed water banking will alleviate significant short term water shortage in the Milk River Basin as set forth in Section C.8. of this Article IV;
- (3) the proposed retirement of irrigation involves lands irrigated the year prior to the declaration of a critical water shortage in the Milk River Basin and involves a valid water right;
- (4) the feasibility and practicality of the proposed irrigation retirement or conversion;
- (5) the number of related resources that will benefit, including but not limited to: water quality, fisheries habitat, wildlife habitat, and recreation;
- (6) preference for an applicant in an area identified by the MRCC as beneficial for temporary irrigation retirement, or if no specific area has been identified for preference, the MRCC shall attempt to rank applicants in a manner that distributes temporary irrigation retirement equally among the counties in the Milk River Basin; and
- (7) any additional factor that, in the judgment of the MRCC, is important to the evaluation of land retirement in light of the purposes of the Milk River Watershed Improvement Trusts.

b. The MRCC shall not recommend grants for acreage in excess of that necessary to save sufficient water to alleviate the temporary water shortage. The MRCC shall not recommend grants in excess of the interest available from the Milk River Watershed Improvement Trusts.

c. The DNRC may award a grant to an applicant ranked by the MRCC for the purpose of water banking only if the DNRC finds, based on the application, the investigation and evaluation of the proposal by members of the MRCC, and the technical review by DNRC, TWRD, and BOR, that the primary purpose of the application is:

(1) the temporary retirement of the right to irrigate land irrigated in the year prior to the declaration of a critical water shortage in the Milk River Basin; or

(2) the irrigation proposed for temporary retirement or crop conversion is subject to a valid water right pursuant to State, federal, or Tribal law, and the applicant has the legal right to transfer the water.

(3) the criteria set forth in Sections C.9.a. and b. of this Article IV have been met.

**10. Milk River Watershed Improvement Trusts - Eligibility for a Loan.**

a. The Milk River Coordinating Committee shall apply the following criteria in ranking applications for loans:

(1) the extent to which the project will alleviate water shortage in the Milk River Basin;

(2) the engineering feasibility and practicality of the project;

(3) the number of related benefits, including but not limited to improvements in: water quality; fish habitat; wildlife habitat; conservation; recreation; water use efficiency; water management; and water right measurement;

(4) any additional factor that, in the judgment of the MRCC, is relevant to the purposes of the Milk River Watershed Improvement Trusts, including reducing the ranking due to the fact that the application is for a project in a portion of the Milk River Basin that is not a part of the Milk River Coordinating Committee regular assessment.

b. The DNRC may award a loan to an applicant ranked by the MRCC, if the DNRC finds, based on the application, the investigation and evaluation of the proposal by members of the MRCC, and the technical review by DNRC, TWRD, and BOR, that:

(1) the criteria in Section C.10.a. of this Article IV have been met;

(2) the proposal will be economically feasible;

(3) the proposal will comply with statutory and regulatory standards protecting the quality of resources such as air, water, land, fish, wildlife, and recreational opportunities;

(4) the applicant has adequate financial resources to construct, operate, develop, and maintain the project; and

(5) the applicant is credit-worthy and is able and willing to enter into a contract with the DNRC for loan repayment and for construction, operation, development, and maintenance of the proposed project.

**11. Coordination of Storage and Release Within the Portion of the Milk River Basin in the United States and New Storage.** Subject to the applicable provisions of State, Tribal, and federal law, the MRCC shall, within five (5) years of the Effective Date of the Compact, consult with the Bureau of Reclamation on development of operating criteria for coordination of storage and release of water from storage facilities within the portion of the Milk River Basin in the United States. Except as explicitly provided for in this Compact or by Congress, allocations in the federal and future Tribal reservoirs within the Milk River Basin or contributing to the water supply of the Milk River Basin, shall be unchanged. The operating criteria may be modified as necessary and such modification shall not be considered a modification of the Compact.

a. At a minimum, the operating criteria shall include coordination of storage among: Sherburne, Fresno, and Nelson Reservoirs and Hill County Reservoir near Havre, any new storage on the Reservation filled by diversion from the Milk River or Peoples Creek, and any new storage developed pursuant to Section C.3.g. of Article IV.

b. The Bureau of Reclamation shall take comment on development of the operating criteria from, at a minimum, any entity or individual owning, benefiting from, or operating storage within the Milk River Project, or operating storage within the Milk River Basin below the Eastern Crossing. The process for such comment may be pursuant to existing federal and State law.

c. In developing the operating criteria, the Bureau of Reclamation shall make all reasonable efforts to maximize the amount of water stored through coordination of storage and

release within the Milk River Basin as a whole without regard to the priority date of water rights associated with a particular storage facility. The purpose of coordination shall be to provide the maximum use of storage possible for the Milk River Basin, including providing flexibility on a temporary basis.

d. The coordination of storage and release to maximize the amount of water stored shall not modify the storage right of any Person in any storage facility or alter the obligations of any Person to pay construction, operation, maintenance and replacement costs for a facility, or alter the right and discretion of the owner of a storage facility to use or release water to satisfy water rights under its jurisdiction.

e. The operating criteria shall include, at a minimum: a method for accounting for water stored in various storage facilities in the Milk River Basin; a method for coordination of fill and release from storage facilities in the Milk River Basin on a yearly basis; and a method for notification of Persons with the right to divert water from the mainstem of the Milk River below the Eastern Crossing of the predictions for water availability on a yearly basis.

f. As part of the process to develop operating criteria, the BOR will establish criteria for determining the existence of a critical shortage or excess water flows.

g. The Bureau of Reclamation in consultation with the MRCC shall modify the operating criteria as necessary to address changes in the Milk River Basin including the addition, modification, or reduction of storage. The operating criteria is required by, but is not in substance, a part of or enforceable under the Compact. Its modification is not a modification of the Compact.

#### **D. Compact Enforcement: Fort Belknap - Montana Compact Board**

1. **Establishment of Board.** There is hereby established the Fort Belknap - Montana Compact Board.

##### **2. Membership.**

a. The Board consists of three members: a member selected by the Governor of the State of Montana from up to four nominees, one nominated by the Commissioners of each of the following counties: Hill, Blaine, Phillips, and Valley; a Tribal member selected by the Fort Belknap Community Council Tribal Chair; and one member selected by the other two members.

b. All members shall be appointed within six (6) months of the Effective Date of this Compact and within thirty (30) days of the date any vacancy occurs. If an appointment is not timely made by the Governor, the Director of DNRC or his/her designee shall fill the State's position. If an appointment is not timely made by the Tribes, the Director of the TWRD or his/her designee shall fill the Tribes' position.

c. Should the two appointed members fail to agree on the selection of a third member within sixty (60) days of the date of appointment of the second member, or within thirty (30) days after a vacancy in the third position occurs, the following procedure shall be utilized:

(1) Within five (5) days thereafter, each member shall nominate two persons to serve as a member of the Board;

(2) Within fifteen (15) days thereafter, each member shall reject one of the persons nominated by the other member;

(3) Within five (5) days thereafter, the remaining two nominees shall be submitted to the chief judge of the United States District Court for the District of Montana for selection of the third member of the Board. If the chief judge declines for any reason to select the third member, the chief justice of the Montana Supreme Court shall make the selection from the remaining two nominees.

d. Each member shall serve a five-year term and shall be eligible for reappointment. The initial term of each member shall be staggered with one member serving a five-year term, one a four-year term, and one a three-year term. The initial term of each member shall be chosen by lot. A member seeking to resign prior to expiration of a term must provide written notice to the remaining Board members thirty (30) days prior to withdrawal.

e. The Board shall provide reasonable notice of the time, place, and purpose of any meeting, hearing, or other proceeding to each of its members. Two members of the Board shall constitute a quorum.

f. The Board shall adopt necessary rules and regulations to carry out its responsibilities within six (6) months after its first meeting.

3. **Jurisdiction of the Board.** The Fort Belknap-Montana Compact Board shall have the jurisdiction to resolve controversies over the right to the use of water between Persons authorized to use any portion of the Tribal Water Right and Persons holding any water rights Arising Under State Law. Controversies under the jurisdiction of the Compact Board may include disputes concerning the meaning of this Compact. The jurisdiction of the Compact Board does not extend to controversies within the scope of the order appointing a water commissioner or commissioners to distribute water from the mainstem of the Milk River pursuant to Section B.3. of Article VII. Such controversies shall be resolved by the court appointing the water commissioner or commissioners.

4. **Administrative Remedy Prior to Board Action.**

a. **Change in Use, Transfer, or Non-Exempt New Development of the Tribal Water Right:** Any Person with a water right Arising Under State Law objecting to a Change in Use, Transfer, or Non-Exempt New Development of the Tribal Water Right, shall comply with the administrative procedures set forth in Section A.6. of this Article IV for review of applications for Change in Use, Transfer, or Non-Exempt New Development prior to seeking relief from the Compact Board.

b. **Change in water rights Arising Under State Law:** The Tribes or any Person authorized to use a portion of the Tribal Water Right objecting to a change in water right, or new development of a water right Arising Under State Law, shall comply with the administrative procedures set forth in Section B.3. of this Article IV for review of applications for change in appropriate right, prior to seeking relief from the Compact Board.

5. **Funding of the Board.** Expenses of the members of the Board appointed by the State and the Tribe shall be the responsibility of the entity appointing the member, subject to the availability of funds. The expenses of the third member and all other expenses, including the cost of notice, shall be shared equally by the Tribe and the State, subject to the availability of funds.

6. **Hearings Before the Board.**

a. In proceedings before it, the Board shall issue notice and hold hearings. The Board may seek the assistance of DNRC and TWRD in issuing notice.

b. In proceedings before it, the Board shall have the power to administer oaths, take evidence, and issue subpoenas to compel attendance of witnesses or production of documents or other evidence. The Board may apply to a state or federal district court, or Tribal court to compel compliance with subpoenas or the giving of testimony. The Tribes and the State shall enforce the subpoenas in the same manner as prescribed by the laws of the Tribes and the State for enforcing a subpoena issued by the courts of each respective sovereign in a civil action.

c. The Board may appoint technical experts.

d. The parties to the controversy may present evidence and cross examine any witnesses.

e. The Board shall determine the controversy and order any appropriate relief, including the installation of measuring devices and temporary relief, provided that, the Board shall have no power to award money damages or attorneys fees. The Board may assess costs, provided that, the Board may not assess costs against the Tribes or the State, or against the United States.

f. All Board decisions shall be by a majority of the Board, shall be in writing, and, together with any dissenting opinions, shall be served on all parties in the proceeding before the Board and on the Parties to this Compact.

g. All records of the Board shall be open to public inspection, except as otherwise ordered by the Board to protect matters of individual privacy.

h. **Waiver of Immunity.** The Tribes and the State waive their respective immunities from suit, including for the appeal or judicial enforcement of Board decisions, to permit the resolution of disputes by the Fort Belknap - Montana Compact Board. Such waiver of immunity by the Tribes or the State shall not extend to any action for money damages, costs, or attorneys' fees.

i. **Review and Enforcement of Board Decisions.**

(1) Decisions by the Board are effective immediately, unless stayed by the Board. Unless otherwise provided by Congress, only parties to the proceedings before the Board or the United States may appeal any final decision by the Board to a court of competent jurisdiction within

thirty (30) days of service of such decision. The hearing on appeal by any party except the United States (unless otherwise provided by Congress) shall be on the record. The United States may seek a trial de novo on appeal. The notice of appeal shall be filed with the Board and served personally or by registered mail on all parties to the proceeding before the Board.

(2) Unless appeal is filed within thirty (30) days of a final decision of the Board, the decision shall be recognized and enforced by any court of competent jurisdiction on petition of: the Board; any party before the Board in the proceeding in which the decision was made; the State; the Tribes, or the United States.

(3) A court of competent jurisdiction in which a timely appeal is filed or in which a petition to confirm or enforce a decision by the Board is filed, may order such temporary or permanent relief as it determines to be appropriate.

(4) Any appeal may be taken from a decision of the court in which an appeal from a Board decision is filed or in which a petition to confirm or enforce a decision of the Board is filed, in the manner and to the same extent as from orders of judgments of the court in a civil action.

(5) In any appeal from a Board decision or petition to confirm or enforce a Board decision, the Board shall file with the court the record of the proceedings before the Board within sixty (60) days of the filing of the appeal or petition.

**E. Administration of the Milk River to Satisfy the Tribal Water Right.**

**1. Operation of the Milk River to Satisfy the Tribal Water Right.**

a. Delivery of water on the mainstem of the Milk River shall include measures necessary to assure satisfaction of the Tribal Water Right.

b. To satisfy the Tribal Water Right, including to replace water depleted on tributaries to the Milk River excluding Peoples Creek, and water depleted on the mainstem of the Milk River upstream from the Western Crossing through exercise of water rights Arising Under State Law, the Milk River Project storage facilities shall be operated to release or bypass the water necessary to assure satisfaction of the water right set forth in Section A.1.a. of Article III, subject to the following conditions:

(1) The Tribes shall notify the Bureau of Reclamation or its successor as operator of the Milk River Project and any water commissioner appointed following petition by the Parties pursuant to Section B.3. of Article VII, or any other person or entity, when the Tribes seek release or bypass of water to satisfy the water right set forth in Section A.1.a. of Article III. The obligation of the Bureau of Reclamation ends with the release or bypass. Enforcement necessary to deliver the water to the Reservation shall be pursuant to this Compact.

(2) The amount of water released or bypassed to satisfy the water right set forth in Section A.1.a. of Article III shall not exceed the lesser of:

i. 645 Cfs; or

ii. the Calculated Undepleted Flow of the Milk River calculated pursuant to Section E.2. of this Article IV, modified to reflect any agreement or adjudication between the Blackfeet Tribe and the Fort Belknap Indian Community of the Fort Belknap Reservation on allocation of water from the Milk River to the Blackfeet Tribe, to the extent such agreement or adjudication affects the Calculated Undepleted Flow of the Milk River; or

iii. the amount and flow rate of water the Tribes can actually divert for use, storage, or diversion under an agreement for Transfer at the time of their notice to the Bureau of Reclamation and any water commissioner.

(3) In assuring satisfaction of the Tribal Water Right, the operators of the Milk River Project storage facilities shall use their best efforts to operate those facilities consistent with the criteria developed pursuant to Section C.11. of this Article IV. Provided, however, that any effort to maximize the amount of storage within the Milk River Basin or to comply with the operating criteria developed pursuant to Section C.11. of this Article IV shall not diminish or alter the obligations contained in Sections E.1.a. and b. of this Article IV to assure satisfaction of the Tribal Water Right.

**2. Calculated Undepleted Flow of the Milk River.**

a. The determination of the Calculated Undepleted Flow of the Milk River at the point where the Milk River intersects the diversion point on the Reservation shall be done by the

United States Bureau of Reclamation, in consultation with DNRC and TWRD, with review by the U.S.G.S. pursuant to the formula set forth in Appendix 4.

b. The amount of the United States' Share of the Natural Flow of the Milk River available for the Tribes shall be modified as necessary to reflect any agreement between the Blackfeet Tribe and the Fort Belknap Indian Community of the Fort Belknap Reservation on allocation of water from the Milk River, or adjudication of the Blackfeet Tribe's reserved water rights.

c. The Calculated Undepleted Flow of the Milk River may be modified pursuant to Appendix 4. and such modification shall not be considered a modification of the Compact.

#### ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS

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

1. Except as provided in Sections A.2.a. of Article III, the relationship between the Tribal Water Rights of the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community, Tribal members, and Allottees on the Fort Belknap Reservation described in this Compact and any rights to water of any other Indian tribe, tribal member, or Indian owner of trust lands claiming water under federal or tribal law, or of the United States on behalf of such tribe, tribal member, or Indian owner of trust lands, shall be determined by the rule of priority unless otherwise agreed to by such tribe, tribal member, or Indian owner of trust lands, or the United States on behalf of such tribe, tribal member, or Indian owner of trust lands.

2. Nothing in this Compact may be construed or interpreted as a precedent to establish the nature, extent, or manner of administration of the rights to water of any other Indian tribes, tribal members, or Indian owner of trust land of other Indian tribes outside of the Fort Belknap Reservation.

3. Except as provided in Sections C., D., and E. of Article IV and Section B.3. of Article VII pertaining to administration in the Milk River Basin, nothing in this Compact is otherwise intended to affect a right or claim of an Indian Tribe other than the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation.

4. Except as provided in Sections C., D. and E. of Article IV and Section B.3. of Article VII pertaining to administration in the Milk River Basin, 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 the United States on federal lands outside the Fort Belknap Reservation.

##### B. General Disclaimers. Nothing in this Compact may be construed or interpreted:

1. As a precedent for the litigation of reserved water rights;

2. As a precedent for the interpretation or administration of future compacts between the United States and the State, or the United States and any other state;

3. Except as provided in Section I. of Article III closing certain basins to new appropriations under State law, to preclude the acquisition or exercise of a right Arising Under State Law to the use of water by any Allottee or member of the Tribes outside the Reservation by purchase of such right or by application to the State in accordance with state law;

4. To determine the relative rights inter sese of Persons using water under the authority of the State or the Tribes;

5. To limit in any way the rights of the Parties or any other Person to litigate any issues or questions not resolved by this Compact;

6. To authorize the taking of a water right which is vested under State or federal law;

7. To create or deny substantive rights through headings or captions used in this Compact;

8. To prejudice how, in any interstate apportionment, the Tribal Water Right shall be counted;

9. To constitute a waiver of sovereign immunity by the Tribes or State except as is expressly set forth in this Compact;

10. To constitute a waiver of sovereign immunity by the United States except as expressly set forth in 43 U.S.C. §666 (1952);

11. To prohibit the Tribes, Tribal members, or Allottees, or the United States on behalf of the Tribes, Tribal members, or Allottees except as agreed to in Appendix 3, or the United States in any other capacity from objecting in any general stream adjudication in Montana Water Court to any claims to water rights;

12. Except as provided by Congress, to prevent the Tribes, or the United States on behalf of the Tribes, from filing an action in a court of competent jurisdiction to prevent any Person or Party from interfering with the Tribes in the enjoyment of the Tribal Water Right;

13. To affect or determine the applicability of any state or federal law, including, without limitation, environmental and public safety laws, on activities of the Tribe, Tribal members, or Allottees, or the State or state water right holders, or the United States or the United States Bureau of Reclamation;

14. To modify any portion of Article VI of the "Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada," January 11 1909, and ratified by the Senate on May 13, 1910, 36 Stat. 2455, and the Order of the International Joint Commission on October 4, 1921 pertaining to "In the matter of the Measurement and Apportionment of the Waters of the St. Mary and Milk Rivers and their Tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan;"

15. To prevent the Tribes from participating in any project to import water to, or improve storage in the Milk River Basin; or

16. To modify or prevent modification of the Memorandum of Agreement between the Bureau of Reclamation and the Office of Indian Affairs Milk River Project Montana, I-1-Ind: 18725, July 8, 1946.

17. To prevent the water court from adjudicating claims to water rights Arising Under State Law on fee land within the Reservation.

18. Except as expressly provided herein, to modify the obligation of any agency of the United States pursuant to federal law.

19. To limit the ability of the State, the Tribes, or the United States to enforce any state, tribal, or federal laws or any common law rights relating to the protection of the environment.

20. To limit any existing, present, or future claims of the Tribes or the United States on behalf of the Tribes concerning water quality.

#### C. Obligations of the United States Contingent.

1. Notwithstanding any other language in this Compact, except as authorized under other provisions of federal law, the obligations of the United States under this Compact shall be contingent on ratification and necessary authorization by Congress.

2. The expenditure or advance of any money or the performance of any work by the United States or the Tribes pursuant to this Compact which may require appropriation of money by Congress or allotment of funds is contingent on such appropriation or allotment being made.

3. The State and the Tribes recognize that this Compact has not been approved by the United States or any agency thereof and ratification by the Montana legislature or ratification by the Tribal Council in no manner binds or restricts the discretion of the United States in the negotiation of all related matters.

D. Obligations of the State Contingent. The expenditure or advance of any money or the performance of any work by the State pursuant to this Compact which may require appropriation of money by the Montana Legislature or allotment of funds shall be contingent on such appropriation or allotment being made.

### ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT

A. St. Mary Diversion Facilities. The Parties agree that the delivery of water through the facilities of the Milk River Project at least at its existing or design capacities, and especially the St. Mary Diversion Facilities for diversion of water to the Milk River and use downstream from the Eastern Crossing, is essential to the permanent success of the Compact and the finality of the reserved water rights settlement and to the continued irrigation of lands in the Milk River Project. The Parties further understand and agree that the facilities of the Milk River Project, especially the St. Mary Diversion Facilities, are old and are in need of repair, rehabilitation, and to the extent feasible, restoration to their original design capacities. In recognition of the essential nature of the Milk River Project facilities, especially the St. Mary Diversion Facilities, the Parties agree to work with the United States, the Blackfoot Tribe, and the Milk River Project water users to obtain the necessary authorization and funding for the repair, rehabilitation, and restoration of the St. Mary Diversion facilities. The Parties agree that this Compact and its federal legislation may or may not be the appropriate means to fund this project. The Parties

further agree that any discussion of the repair, rehabilitation, and restoration of the St. Mary Diversion facilities as part of the negotiation of the federal legislation ratifying this Compact shall be preceded by an invitation to the Blackfeet Tribe to participate as a party in such discussions.

**B. Mitigation of Impacts on the Milk River Project.**

1. The Parties agree that, as a result of development and use of the Tribal Water Right and protection of water use on tributaries, the Milk River Project and its water users will, at times, be adversely affected if no change is made to the Milk River System. The Parties agree that hydrologic and engineering analyses have identified the impacts and have demonstrated that such impacts can be mitigated through a number of alternatives. The Parties agree that such alternatives, together with such other alternatives as may be identified by the Parties or any other person or entity and by the Bureau of Reclamation, are currently included or will be included in the Bureau of Reclamation's Milk River Basin Regional Feasibility Study, authorized by Congress in Public Law 106-163, and will receive appropriate environmental analyses in that Study. The Parties further agree that funding for water efficiency improvements (Watershed Improvements) and water banking will be included in the total funding for the Compact. In addition to funding for voluntary efficiency improvements and for water banking, mitigation measures authorized and funded as a part of the Compact must mitigate at least to the level of 35,000 Acre-feet Per Year, or a larger amount on agreement by the Parties if information or improved modeling available at the time of completion of the Milk River Basin Regional Feasibility Study indicates that more is necessary for mitigation based on full development of the Tribal Water Right on the Milk River and tributary protection as contemplated in Section A.1. of Article III. The Parties agree to seek establishment of a fund and a schedule for incremental development of mitigation measures to assure that such measures are in place when needed to prevent impact from development of the Tribal Water Right. Mitigation measures identified by the Parties to be studied in the Feasibility Study include the following:

- a. Pumped storage from the Milk River to Nelson Reservoir;
- b. Enlargement of the storage capacity of Nelson Reservoir through the construction of a secondary dam or dike dividing the Reservoir into two separate controllable storage facilities;
- c. Rehabilitation and restoration of the St. Mary Diversion Facilities;
- d. Enlargement of Fresno Dam and Reservoir to restore storage capacity lost by siltation and obtain additional storage capacity;
- e. Construction of a dam and reservoir on lower Peoples Creek on the Reservation and on other tributaries to the Milk River, including Thirtymile Creek;
- f. Construction of new facilities to import water to the Milk River Basin, including but not limited to: the Virgelle diversion, direct importation from Lake Elwell; and importation from the Missouri River or Fort Peck Reservoir to Vandalia via Duck Creek;
- g. Construction of facilities to improve the water quality of the Fish and Wildlife Service's Bowdoin National Wildlife Refuge and to allow the use of Bowdoin as a storage facility for mitigation of impacts of the Compact;
- h. Such other mitigation alternatives which the Parties may identify to be included in the Bureau of Reclamation's Milk River Basin Regional Feasibility Study, or additional studies agreed to by the Parties.

2. On completion of the Milk River Basin Regional Feasibility Study, the Bureau of Reclamation, in consultation with the irrigation districts and the Parties, shall select the appropriate mitigation measures.

**C. Upper Peoples Creek Dam and Reservoir.** The Parties agree that, as a result of the protections provided to the Upper Peoples Creek water users in the Compact and the variable natural water supply in the Peoples Creek Basin, the water supply available for development of the Tribal Water Right in Peoples Creek may be limited. The Parties agree that such impacts can and shall be mitigated, in whole or in part, through the construction of a dam and reservoir for the benefit of the Tribes in the upper Peoples Creek Basin, if a dam and reservoir is determined to be feasible from an engineering, geologic, and environmental analysis. Accordingly, the

Parties agree to seek authorization of appropriations, appropriations, and a schedule for development of a dam and reservoir on Peoples Creek for the benefit of the Tribes.

**D. State Contribution to Settlement.** The Parties agree that the State contribution to settlement shall be negotiated by the State, the Tribes, and the United States as part of the negotiations on the Federal legislation. The agreement to, expenditure, or advance of any State contribution which may require authorization and appropriation of money by the Montana Legislature or allotment of funds is contingent on such appropriation or allotment being made. Any local contribution to cost share shall be allocated to all Persons that benefit from the protections provided by the Compact.

**E. Federal Contribution to Settlement.** The Parties agree that the federal contribution to settlement shall be negotiated by the State, the Tribes, and the United States as part of the negotiations on the Federal legislation.

**F. State Lands on the Reservation.** The Parties agree to work together in the future to obtain the authorization necessary to exchange State lands on the Reservation for federal lands off the Reservation, and that any State lands acquired by the United States in an exchange shall be held in trust for the Tribes.

**G. Project Lands.** The Parties agree to work together to facilitate land classification and reclassification in the Milk River Project.

#### ARTICLE VII - FINALITY

##### **A. Ratification and Effectiveness of Compact.**

1. This Compact becomes Effective on the latest of the dates it is ratified by the Tribes, the State and by Congress. Following the first ratification by any party, the terms of this Compact may not be modified without the consent of the Parties. In the event of permanent or long term loss of the continued operation of the St. Mary Diversion facilities for diversion of water to the Milk River and use downstream from the Eastern Crossing, either due to loss, or to reallocation of water on agreement by the Parties, the Parties agree to enter negotiations on alternative remedies to supply water to portions of the Reservation served from the Milk River and to water rights Arising Under State Law within the Milk River Project. Minor loss or reallocation of water from the St. Mary Diversion facilities shall not be considered a permanent or long term loss. Until satisfactory completion of the above referenced negotiation or litigation and construction of water supply facilities to remedy the long term loss of the continued operation of the St. Mary Diversion facilities, the Tribes' diversion right from the Milk River shall be the amount developed for diversion at the time of the failure. All other provisions of the Compact shall remain in place. Should the Parties fail to reach agreement on alternative remedies within five (5) years of the permanent or long term loss of the continued operation of the St. Mary Diversion facilities, the Parties may seek a remedy in court for opening of the decree and adjudication of the portion of the Tribal Water Right in the Milk River Basin 40J. In opening the decree, there shall be no question of the validity of the Tribes' right to water currently developed.

2. Notwithstanding any other provision in this Compact, the Tribes reserve the right to withdraw as a party if:

a. Congress has not ratified this Compact and authorized appropriations within five (5) years from the date the Compact is ratified by the State;

b. The Tribes and United States do not reach agreement on the federal contribution to settlement; or

c. Appropriations are not made in the manner contemplated by the federal legislation ratifying this Compact.

d. The Parties do not reach agreement on the State contribution to settlement.

e. The State has not authorized appropriations within three (3) years from the date the Compact is ratified by the United States.

f. Appropriations are not made by the State in the manner contemplated by any agreement for contributions to settlement made pursuant to Section D. of Article VI of this Compact.

3. The Tribes may exercise their right to withdraw from the Compact under Section A.2. of Article VII of the Compact by sending to the Governor of Montana and to the Secretary of the Interior by certified mail a resolution of the Fort Belknap Community Council stating the Tribes' intent to withdraw and specifying a withdrawal date not sooner than thirty (30) days from the

date of the resolution. On the date designated in the resolution for Tribal withdrawal, this Compact shall become null and void without further action by any party.

4. Improvements to the Milk River Project to mitigate the impact of potential development of the Tribal Water Right and of tributary protection is essential to the agreement of the State to this Compact. Thus, notwithstanding any other provision in this Compact, the State reserves the right to withdraw as a party if:

a. The Tribes and Congress have not ratified this Compact within five (5) years from the date the Compact is ratified by the State;

b. Congress requires a State contribution to settlement that exceeds the contribution authorized by the Montana Legislature or the contribution agreed to by the Parties if Congressional authorization precedes authorization by the Montana Legislature without the agreement of the State; or

c. Congress does not authorize and appropriate the federal share of funding for the modifications to the Milk River Project or other alternatives necessary to mitigate the impact of development of the Tribal Water Right as outlined generally in Section B. of Article VI, as enacted in the federal legislation ratifying this Compact and such modifications or other alternatives are not constructed

5. The State may exercise its right to withdraw from the Compact under Section A.4. of this Article VII of the Compact by sending to the Fort Belknap Tribal Chair and to the Secretary of the Interior by certified mail a letter from the Governor of Montana stating the intent of the State to withdraw and specifying a withdrawal date not sooner than thirty (30) days from the date of the letter. In considering exercise of the right to withdraw, the Governor shall consult with Persons affected by this Compact including the Milk River Joint Board of Control. On the date designated in the letter for State withdrawal, this Compact shall become null and void without further action by any party.

**B. Incorporation into Decrees.**

1. Within one hundred eighty (180) days of the date this Compact is ratified by the Tribes, the State, and Congress, whichever is latest, the Tribes, and/or the State, and/or the United States shall file, in the general stream adjudication initiated by the State pursuant to the provisions of § 85-2-702(3), MCA, a motion for entry of the proposed decree set forth in Appendix 1 as the decree of the water rights held by the United States in trust for the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community and Tribal members of the Fort Belknap Reservation. 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 provisions of federal law.

2. Consistent with §3-7-224, MCA, and for the purposes of § 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to Article III, and Appendix 1, and may extend to other Sections of the Compact only to the extent that they relate to the determination of existing water rights. The final decree shall consist of Article III as displayed in Appendix 1, and such other information as may be required by §85-2-234, MCA. Nevertheless, pursuant to §85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.

3. Concurrent with filing of the motion for entry of the proposed decree, the Parties shall seek appointment of a water commissioner or commissioners pursuant to Title 85, Chapter 2, Parts 1-3 of the Montana Code Annotated in the appropriate state district court pursuant to §85-2-406, MCA, and as set forth in Appendix 1, to enforce water use pursuant to decrees of the Water Court, permits issued by DNRC, contracts issued by the BOR, and use pursuant to Tribal law, from the mainstem of the Milk River downstream from the Eastern Crossing pursuant to this Compact, federal, Tribal, and State law, and the final decrees. The Parties shall ask the district court to stay the appointment pending issuance of preliminary decrees on the Milk River Basin downstream from the Eastern Crossing. The request for appointment of a water commissioner by the Parties shall be sufficient to meet the requirements of §85-5-101, MCA pertaining to the persons who may request appointment of a water commissioner.

Notwithstanding the requirement of yearly appointment of a water commissioner under state law, the Parties shall seek, and the district court may appoint, a permanent water commissioner or commissioners. The petition by the Parties does not preclude the right of any Person to seek appointment of a water commissioner or enforcement of water rights pursuant to applicable law.

4. The Parties agree to seek a mechanism for funding the Tribal share of the cost of the water commissioner or commissioners in the federal legislation ratifying the Compact.

5. Water users with rights to divert water from the mainstem of the Milk River downstream from the Eastern Crossing under authority of State, federal or Tribal law, shall notify the water commissioner within a reasonable period in advance of a need to divert water.

6. Any Person authorized to use water from the mainstem of the Milk River Basin downstream from the Eastern Crossing objecting to the distribution of water by the water commissioner, or to a use of water by another Person, may use the remedies provided by § 85-5-301, MCA.

7. In the distribution of water, the water commissioner or commissioners shall be bound by the decrees of the water court, however, the commissioner or commissioners may use the databases developed pursuant to Section C.3.d. of Article IV to facilitate understanding of the distribution of water within a particular water right.

8. Nothing in this Compact shall prevent the holders of water rights Arising Under State Law or Tribal Water Rights with a source on the mainstem of the Milk River below the Eastern Crossing from agreeing to an alternative water distribution plan that allows sharing of shortages, distribution of shortage, operation of storage, or exchange of storage in a manner other than priority. Such agreement shall be enforced by the court appointing the water commissioner.

#### C. Disposition of Federal Suit.

1. On issuance of a final decree by the Montana Water Court or its successor, and the completion of any direct appeals therefrom, or on expiration of the time for filing any such appeal, the United States, the Tribes, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed.R.Civ.P., to dismiss without prejudice the claims of the Tribes, Tribal members, and Allottees and any claims made by the United States for benefit of the Tribes, Tribal members, and Allottees in United States v. Aageson, No. CIV-79-21-GF (filed April 5, 1979). The case may only be resumed if the State or Tribes exercise their rights under Section A of this Article VII.

2. The Decree shall be filed by the Parties as a consent decree in Aageson, or in federal court as a new proceeding after the dismissal of Aageson conditional on agreement by the Parties to seek the necessary State, Tribal, and federal legislation to implement the remaining provisions of the Compact, if it is finally determined in a judgment binding on the State of Montana that the state courts lack jurisdiction over, or that the state court proceedings are inadequate to adjudicate some or all of the water rights asserted in Aageson.

#### D. Settlement of Tribal Water Right Claims.

1. The water rights and other benefits confirmed to the Tribes in this Compact are in full and final satisfaction of and are intended to be in replacement of and substitution for all claims to water or to the use of water by the Tribes, Tribal members, and Allottees and the United States on behalf of the Tribes, Tribal members, and Allottees existing on the Effective Date of this Compact, including federal reserved water rights claims based on or recognized in Winters v. United States, 207 U.S. 564 (1908), within the State of Montana.

2. In consideration of the rights confirmed to the Tribes, Tribal members, and Allottees in this Compact, and of performance by the State and the United States of all actions required by this Compact, and on entry of a final order issuing the decree of the Tribal Water Right held in trust by the United States as quantified in this Compact and displayed in Appendix 1, and except for water rights, benefits and uses confirmed in this Compact, the Tribes and the United States as trustee for the Tribes, Tribal members, and Allottees hereby waive, release, and relinquish any and all claims to water rights or to the use of water within the State existing on the Effective Date of this Compact.

3. Any claim to water by the Tribes, Tribal members, or Allottees within the Reservation shall be satisfied out of the Tribal Water Right confirmed by this Compact.

E. **Settlement of Tribal Claims Against the United States.** Waiver of claims against the United States, by the Tribes and Tribal members shall be as provided by Congress.

F. **Binding Effect.** After the Effective Date of this Compact and entry of a final decree, its terms shall be binding on:

1. The State and any Person or entity using, claiming or in any manner asserting any right under the authority of the State to the use of water in Montana; provided that, the validity of consent, ratification, or authorization by the State is to be determined by Montana law;

2. The Tribes and any Person or entity using, claiming or in any manner asserting any right to the use of the Tribal Water Right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribes or Tribal members, or any rights arising under tribal law; provided that, the validity of consent, ratification or authorization by the Tribes is to be determined by Tribal law; and

3. The United States and any Person or entity using, claiming or in any manner asserting any right under the authority of the United States to the use of water in Montana; provided that, the validity of consent, ratification or authorization by the United States is to be determined by federal law;

#### ARTICLE VIII - LEGISLATION/DEFENSE OF COMPACT

A. **State Legislation.** The State and Tribes agree to seek ratification of the Compact by the Montana Legislature and any additional state legislation necessary to effectuate the Compact.

B. **Federal Legislation.** The State and Tribes agree to seek ratification of the Compact by Congress and any additional federal legislation necessary to effectuate the Compact.

C. **Tribal Legislation.** The State and Tribes agree to seek ratification of the Compact by the Fort Belknap Community Council and any Tribal legislation necessary to effectuate the Compact.

D. **Defense of the Compact.** The Parties agree to defend the Compact from all challenges and attacks and in all proceedings pursuant to Sections B. and C. of Article VII, and agree that no provision of the Compact shall be modified as to substance except as may be provided in the Compact, or by agreement among the Parties.

IN WITNESS WHEREOF the representatives of the State of Montana, the Fort Belknap Indian Community of the Fort Belknap Reservation, and the United States, have signed this Compact on the \_\_\_ day of \_\_\_\_\_, 20\_\_.

History: En. Sec. 1, Ch. 256, L. 2001.

85-20-1002. **Findings and purpose.** (1) It is the policy of the state to seek negotiated settlements of federal and Indian reserved water rights claims in Montana under Title 85, chapter 2, part 7.

(2) Pursuant to this policy, the reserved water rights compact commission commenced negotiations with the Gros Ventre and Assiniboine Tribes which compose the Fort Belknap Indian Community of the Fort Belknap Reservation and the United States.

(3) A compact, 85-20-1001, has been agreed to between the state of Montana and the Fort Belknap Indian Community of the Fort Belknap Reservation that, among other things, provides an allocation of water to the tribes in settlement of their water right claims and provides protection for certain water rights arising under state law. Approval of the compact by the United States requires ratification by congress.

(4) (a) For purposes of implementing the compact, 85-20-1002 through 85-20-1008:

(i) establish accounts necessary to meet certain obligations agreed to in the compact;

(ii) provide a structure for the issuance of grants and loans; and

(iii) provide for the facilitation of the development of an economic development plan.

(b) Funding for the accounts established under 85-20-1004, 85-20-1005, and 85-20-1007 is subject to state and federal cost-share negotiations, approval of state cost-share by the legislature, and approval of federal cost-share by the United States congress.

(5) The state's obligation to provide funding to implement the compact and to satisfy the state's cost-share, once approved by the legislature, must be conditioned on:

(a) final court approval of a decree of the water rights of the tribes as set forth in Article VII, sections B. through D., of the compact; and

(b) validity of the compact under Article VII, section A., of the compact.

(6) Funds appropriated to accounts established under 85-20-1004, 85-20-1005, and 85-20-1007 and interest on appropriated funds are not available for expenditure unless the conditions, provided in subsection (5), are met.

(7) If a court does not approve a final decree, if the compact becomes null and void, or if one of the parties withdraws from the compact, the funds appropriated by the state to accounts established in 85-20-1004, 85-20-1005, and 85-20-1007 must revert to the general fund and any federal funds must be returned to the United States treasury. If a portion of the funding or interest on funding provided in 85-20-1004, 85-20-1005, and 85-20-1007 has been expended prior to the return of funds to the general fund, any claim against the state by the tribes or by the United States on behalf of the tribes for adjudication of the water rights of the tribes must be offset by the amount of the expenditures of state funds or interest on state funds.

History: En. Sec. 2, Ch. 256, L. 2001.

**85-20-1003. Definitions.** The definitions provided for in 85-20-1001 apply to 85-20-1002 through 85-20-1008: The absence of capitalization of defined terms in 85-20-1002 through 85-20-1008 does not affect the meaning or application of a defined term.

History: En. Sec. 3, Ch. 256, L. 2001.

**85-20-1004. Mitigation account.** (1) A private purpose trust account, called the mitigation account, is established, as provided for in 17-2-102, for deposit of funds and interest on funds appropriated by the state for mitigation measures required by Article VI of the compact.

(2) On approval of a final decree pursuant to Article VII of the compact, the funds and interest on funds in the mitigation account must be made available to the United States bureau of reclamation to cover the state's cost-share for construction of mitigation measures chosen on completion of a feasibility study and appropriate state and federal environmental review by the bureau of reclamation and on consideration of the economic development plan authorized by 85-20-1008.

History: En. Sec. 4, Ch. 256, L. 2001; amd. Sec. 128, Ch. 114, L. 2003.

**85-20-1005. Watershed improvement trusts.** (1) A permanent fund account, called the state Milk River watershed improvement trust, is established, as provided for in 17-2-102, for deposit of funds appropriated pursuant to the compact for a permanent trust. Interest income may be used by the Milk River coordinating committee established pursuant to the compact for the purpose of allocating grants and loans.

(2) A permanent fund account, called the federal Milk River watershed improvement trust, is established, as provided for in 17-2-102, for receipt of federal funds appropriated for a permanent trust. Interest income may be used by the Milk River coordinating committee established pursuant to the compact for the purpose of allocating grants and loans.

(3) The state and federal Milk River watershed improvement trusts must be collectively referred to as the Milk River watershed improvement trusts.

History: En. Sec. 5, Ch. 256, L. 2001; amd. Sec. 129, Ch. 114, L. 2003.

**85-20-1006. Terms and conditions of loan.** A Milk River watershed improvement trusts loan is subject to the following terms and conditions:

(1) Except for loan agreements with an Indian tribe, the DNRC shall obtain a security interest in real estate that would be obtained by a reasonable, careful, and prudent lender.

(2) A current appraisal of real estate offered as security and a commitment for title insurance on that land must be secured by the borrower at the borrower's expense. All costs incident to the loan and loan closing must be paid by the borrower.

(3) For a loan agreement with an Indian tribe, security must be pursuant to the appropriate federal authority to secure a loan on trust land, and with an allottee, security must be pursuant to 25 U.S.C. 483A.

(4) The term of the loan may not be greater than the life of the project and may not exceed 30 years.

History: En. Sec. 6, Ch. 256, L. 2001.

**85-20-1007. Peoples Creek minimum flow account.** (1) A private purpose trust account, called the Peoples Creek minimum flow account, is established, as provided for in

17-2-102, for deposit of funds and interest on funds appropriated by the state for efficiency improvements and bypass structures for irrigation upstream from the Fort Belknap Reservation in the Peoples Creek Basin 40I and for a reservoir on the Reservation for the purpose of improving minimum stream flow.

(2) On approval of a final decree pursuant to Article VII of the compact, the funds and interest on funds in the Peoples Creek minimum flow account must be made available to the water users and the tribes to cover the cost of construction of improvements as agreed to in the state and federal cost-share negotiations.

**History:** En. Sec. 7, Ch. 256, L. 2001; amd. Sec. 130, Ch. 114, L. 2003.

**85-20-1008. Economic development plan.** (1) The DNRC is directed to facilitate development of an economic development plan focused on future use of water and currently irrigated land, including but not limited to use of water and irrigated land for irrigation, industrial, recreational, fisheries, and habitat purposes in the Milk River basin.

(2) The Milk River regional feasibility study examines alternative measures for mitigation of impacts of development of the tribal water right for the purpose of determining feasibility and environmental impact. The purpose of the economic development plan is to supplement the federal studies and provide information to assist in choosing mitigation measures by examining the long-term economic potential of water use in the Milk River basin.

(3) At a minimum, the DNRC shall include irrigation districts, individual irrigators, conservation districts, county governments, and municipalities in the development of the economic development plan.

**History:** En. Sec. 8, Ch. 256, L. 2001.