

SENATE BILL NO. 426
INTRODUCED BY J. LASLOVICH

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE NATIONAL BISON RANGE WATER COMPACT."

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

NEW SECTION. **Section 1. United States of America, fish and wildlife service, national bison range - Montana compact ratified.** This Compact is entered into by the State of Montana and the United States of America to settle for all time any and all claims to federal reserved water rights for the National Bison Range administered by the U.S. Fish and Wildlife Service within the State of Montana.

ARTICLE I - RECITALS

WHEREAS, in 1979, the United States brought several actions in the United States District Court for the District of Montana to adjudicate, inter alia, its rights to water with respect to the National Bison Range, see United States v. Abell, No. CV 79-33-M (filed April 5, 1979);

WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America; see "the McCarran Amendment," 43 U.S.C. 666(a)(1) (1952);

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

WHEREAS, the Montana Reserved Water Rights Compact Commission, pursuant to 85-2-703, MCA, is authorized to negotiate settlement of water rights claims filed by the United States for areas in which the United States claims reserved waters within the State of Montana;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of the National Bison Range, in the State of Montana;

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. 516-517 and 519 (1968);

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

WHEREAS, it is in the best interest of all Parties that the water rights claims for the National Bison Range be settled through agreement between 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 United States for the National Bison Range.

ARTICLE II - DEFINITIONS

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

(1) "Abstract" means the copy of the documents entitled "Abstract of U.S. Fish and Wildlife Service Water Rights" referenced in this Compact as Appendices 2, 4, 5, 6, 7 and 8.

(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) "Acre-foot per year" or "Acre-feet per year" or "AFY" means an annual quantity of water measured in acre-feet over a period of a year.

(4) "Animal Unit" means a measure of animal numbers, where one male bison equals 1.5 Animal Unit and one female bison equals 0.9 Animal Unit

(5) "Arising Under State Law" means, as applied to a water right, a water right created under Montana law and does not include water rights created under federal law.

(6) "Change in Use" means, as applied to the National Bison Range water right, a change in the point of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Consumptive Use" means a use of water that removes water from the source of supply such that the quality or quantity is reduced or the timing of return delayed, making it unusable or unavailable for use by others, and includes evaporative loss from impoundments and natural lakes.

(8) "Department" means the Montana Department of Natural Resources and Conservation, or any successor agency.

(9) "Effective Date" means the date on which the Compact is given ratification by the Montana Legislature, written approval by the United States Department of the Interior, or written approval by the United States Department of Justice, whichever date is latest.

(10) "FWS" means the United States Fish and Wildlife Service of the United States Department of the Interior, or any successor agency.

(11) "Ground Water" means any water that is beneath the surface of the ground.

(12) "National Bison Range" means those lands located in the State of Montana that were withdrawn from disposition and reserved by the Act of May 23, 1908, 35 Stat. 267; and that were expanded by the

Agricultural Appropriations Bill of 1910 (35 Stat. 1051 - Act of March 4, 1909). The lands that comprise the National Bison Range are depicted on the map attached as Appendix 1 to this Compact.

(13) "Party" or "Parties" means the State of Montana, the United States of America or both.

(14) "Person" or "Persons" means an individual or individuals or any other entity, public or private, including the State, a tribe and the United States and all officers, agents, and departments thereof.

(15) "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof, and unless otherwise indicated, for purposes of notification or consent "State" means the Director of the Department, or the Director's designee.

(16) "Tribal Water Right" means those water rights held by the Confederated Salish and Kootenai Tribes (the "Tribes" or "CSKT") or by the United States in trust for the Tribes, their members and allottees.

(17) "United States" means the federal government and all officers, agencies, and departments thereof, and unless otherwise indicated, for purposes of notification or consent other than service in litigation "United States" means the Secretary of the Department of the Interior, or the Secretary's designee.

ARTICLE III - NATIONAL BISON RANGE WATER RIGHT

The Parties agree that the following water rights are in settlement of the reserved water rights of the United States for the National Bison Range.

A. Purpose of Reservation for the National Bison Range. The National Bison Range was created on May 23, 1908 for the purpose of being a permanent range for the care and maintenance of a herd of bison. 35 Stat. 267. An executive order of December 22, 1921, (No. 3596) added the purpose of a bird refuge to the National Bison Range as well.

B. Quantification. Subject to the terms of Article IV, the United States shall have the right to water for the following purposes from the sources identified on National Bison Range lands.

1. Irrigation Use. The United States has federal reserved water rights to apply water from springs and seeps to approximately 14.3 acres for the production of forage for bison. The specific elements of these rights are set forth in the Abstracts attached as Appendix 2 to this Compact.

2. Wildlife Use.

a. Current Wildlife Use. The United States has federal reserved water rights for consumptive use for wildlife purposes at the locations identified in the table attached as Appendix 3, provided that the total Wildlife Use on National Bison Range lands shall not exceed the historic maximum carrying capacity of the National Bison Range of 755 Animal Units. The specific elements of these rights are set forth in the Abstracts attached as Appendix 4 to this Compact.

b. Bird Habitat Use. The United States also has federal reserved water rights of 243 gallons per minute from springs and seeps for largely non-consumptive uses to maintain forage, riparian habitat, and nesting habitat for birds. The specific elements of these rights are set forth in the Abstracts attached as Appendix 5 to this Compact. The United States also has federal reserved water rights in the amount of 18.48 Acre-feet per year for the Ravalli Ponds and an in-stream flow in the amount of 151 gallons per minute from Mission, Pauline, Trisky and Elk Creeks for the maintenance of loafing and rearing habitat for birds. The specific elements of these rights are set forth in the Abstracts attached as Appendix 6 to this Compact.

3. Administrative Uses.

a. Current Administrative Uses. The United States has federal reserved rights for consumptive use for current administrative uses on National Bison Range lands totaling 35.2 Acre-feet per year. The United States also has a federal reserved water right of up to 536 Acre-feet per year of flood flows from Mission Creek for largely non-consumptive administrative uses, when such flows are naturally available. The specific elements of these rights are set forth in the Abstracts attached as Appendix 7 to this Compact.

b. Future Administrative Uses. The United States has federal reserved water rights from Ground Water for consumptive use for future administrative uses up to a total additional volume of 15 Acre-feet per year to fulfill the purposes of the National Bison Range. The types of use of the United States' federal reserved water rights for administrative uses may include, but are not limited to: domestic, lawn and garden, storage, and dust abatement.

4. Emergency Fire Suppression. The use of water for emergency fire suppression benefits the public, and is necessary for the purposes of the National Bison Range. The United States may, as part of its reserved water right, divert or withdraw water for fire suppression on National Bison Range lands as needed and without a definition of the specific elements of a recordable water right. Use of water for fire suppression shall not be considered an exercise of the United States' water rights for consumptive use.

5. Period of Use.

a. The period of use of the United States' federal reserved water rights for consumptive uses set forth in Article III, section B.1 shall be from March 15 to October 31 of each year.

b. The period of use of the United States' federal reserved water rights for consumptive use set forth in Article III.B.2 and B.3., shall be from January 1 to December 31 of each year.

6. Priority Date. The priority date for the federal reserved water rights set forth in Article III.B.1, B.2.(a) and B.3. is May 23, 1908; and the priority date for the federal reserved water right set forth in Article III.B.2(b) is December 21, 1921.

ARTICLE IV - IMPLEMENTATION OF COMPACT

A. Abstracts. Concurrent with this Compact, the Parties have prepared Abstracts, copies of which are attached as Appendices 2, 4, 5, 6, and 7 to this Compact, which specifically identify all of the United States' current use of water for the National Bison Range described in this Compact and quantified in accordance with this Compact. These abstracts specifically do not include that use of water that is the subject of water right claim number 76L 187042 00, which claim the FWS and the State agree that the FWS shall retain (unless it shall choose voluntarily to withdraw or abandon it in the future) and have adjudicated by the Montana Water Court as a water right Arising Under State Law subject to the terms, conditions and procedures of the Montana Water Use Act, Title 85, Chapter 2, MCA, and the Montana general water rights adjudication. The Parties prepared the Abstracts to comply with the requirements for a final decree as set forth in state law, and in an effort to assist the state courts in the process of entering decrees accurately and comprehensively reflecting the rights described in this Compact. The rights specified in the Abstracts are subject to the terms and conditions of this Compact. In the event of a discrepancy between a right listed in an Abstract and that same right as quantified in accordance with Articles III and IV of this Compact, the Parties intend that the quantification in accordance with Articles III and IV of this Compact shall be reflected in a final decree.

B. Enforcement of Water Right.

1. The United States, the State, a holder of a water right Arising Under State Law or a holder of a right to use any portion of the Tribal Water Right, may petition a state or federal court of competent jurisdiction for relief when a controversy arises between the United States' water right described by this Compact, and a holder of a water right Arising Under State Law or a holder of a right to use any portion of a Tribal Water Right. Resolution of the controversy shall be governed by the terms of this Compact where applicable, or to the extent not applicable, by applicable state, federal and tribal law.

2. The United States agrees that a water commissioner appointed by a state or federal court of competent jurisdiction, or other official authorized by law, may enter the National Bison Range for the purpose of data collection, including the collection of information necessary for water distribution on or off the National Bison Range, and to inspect structures for the diversion and measurement of water described in this Compact for consumptive use. The terms of entry shall be as specified in an order of a court of competent jurisdiction or other entity authorized by law to prescribe such terms of entry.

3. So long as the Department remains the administrative entity responsible for the water rights quantified in this Compact, the Department may enter the National Bison Range at a reasonable hour of the day, for the purposes of data collection on water diversion and stream flow or inspection of devices maintained by the United

States pursuant to this Compact. The Department shall notify the United States by certified mail, telephone, e-mail or in person, at least 24 hours prior to entry. If some other body becomes responsible for the administration of the National Bison Range water rights, representatives of that entity may enter the National Bison Range on the same terms and conditions set forth above in this subsection.

4. So long as the Department remains the administrative entity responsible for the water rights quantified in this Compact, the United States may request an investigation by the Department of a diversion located on a stream for which a water right is described in this Compact. The Department may investigate. If an investigation occurs, the United States may accompany the Department. If some other body becomes responsible for the administration of the National Bison Range water rights, the United States may request an investigation by that entity in the same manner and on the same terms and conditions set forth above in this subsection.

5. The United States shall maintain structures, including wellhead equipment and casing, for the diversion and measurement of water authorized for consumptive use by this Compact and shall measure all exercises of the consumptive use water rights set forth herein. The United States shall maintain any devices it deems necessary for enforcement of its water right for natural flow described in this Compact.

C. Use of Federal Reserved Water Rights.

1. Federal Reserved Water Rights. The reserved rights of the United States described in this agreement are federal water rights. Nonuse of all or a part of the federal reserved water rights described in this Compact shall not constitute abandonment or forfeiture of those rights. The federal reserved water rights described in this Compact need not be applied to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the purposes of the National Bison Range.

2. Development of Future Uses. The United States, without prior approval of the Department, or any other administrative entity with regulatory authority over the water rights of the National Bison Range, may develop a future use after the Effective Date of this Compact as described in Article III.B.3.(b), provided that:

- (a) the purpose of use is for the use authorized under Article III.B. 3.(a);
- (b) the total quantity of water shall not exceed the amount set forth in Article III.B.3.;
- (c) the source of supply shall be restricted as set forth in Article III.
- (d) the use shall not adversely affect a senior water right Arising Under State Law.

D. Change in Use of Federal Reserved Water Rights.

1. Irrigation Use. The United States may change its federal reserved water rights for irrigation use set forth in Article III.B.1, provided that:

- (a) the action shall be in fulfillment of the purposes of the National Bison Range described in Article III.A.;

(b) the use of water is irrigation use;

(c) the total irrigation use shall not exceed the total acreage, and flow rate or volume described in Article III.B.1 and the Abstracts attached as Appendix 2 to this Compact;

(d) the source of supply shall be restricted to the source of supply set forth in Article III; and

(e) the change shall not adversely affect a water right Arising Under State Law or recognized under federal law.

2. Wildlife Use. The United States may change its federal reserved water rights for wildlife use set forth in Article III.B.2.(a) and (b), provided that:

(a) the action shall be in fulfillment of the purposes of the National Bison Range described in Article III.A;

(b) the total wildlife use shall not exceed the amount of water or number of Animal Units described in Article III.B.2.; and

(c) the change shall not adversely affect a water right Arising Under State Law or recognized under federal law.

3. Administrative Use. The United States may change its federal reserved water rights for administrative use set forth in Article III.B.3(a) and (b), provided that:

(a) the action shall be in fulfillment of the purposes of the National Bison Range described in Article III.A;

(b) the total administrative use shall not exceed the amount of water described in Article III.B.3.; and

(c) the change shall not adversely affect a water right Arising Under State Law or recognized under federal law.

4. Emergency Fire Suppression. The United States' federal reserved water right to divert or withdraw water for emergency fire suppression as described in Article III.B.4 shall not be changed to any other use.

E. Reporting Requirements. The United States shall provide a report to the Department and the Tribes on an annual basis, or on a periodic basis agreed to by the Parties and the Tribes, containing specific information on:

1. the development of new uses as described in Article III.B.3.(b);

2. changes in use as described in Article IV.D; and

3. the source of supply, the dates of use, and the estimated amount of water used for emergency fire suppression as described in Article III.B.4.

ARTICLE V - GENERAL PROVISIONS

A. No Effect on Tribal Rights or Other Federal Reserved Water Rights. The relationship between the water rights of the United States described in this Compact and any rights to water of any Indian tribe, or any

federally derived water right of an individual, or of the United States on behalf of such tribe or individual, shall be determined by the rule of priority. The Parties agree that the water rights described in this Compact are junior to any rights to water of any Indian tribe, or any federally derived water right of an individual, or of the United States on behalf of such tribe or individual, currently quantified or as may be quantified after the Effective Date of this Compact and with a priority date before the Effective Date of this Compact, including aboriginal rights, if any, in the basins affected.

2. Nothing in the 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 federal agency or federal lands in Montana other than those of the FWS at the National Bison Range.

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

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

B. State Water Rights. Nothing in this Compact may limit the authority of the State, including the authority of a water commissioner authorized by state law, to administer all current and future water rights Arising Under State Law within and upstream of the National Bison Range, provided that in administration of those water rights in which the United States has an interest, such authority is limited to that granted under federal law, and provided that any scheme of comprehensive administration of all water rights located within the exterior boundaries of the Flathead Indian Reservation (which include the water rights recognized in this Compact) that is negotiated and approved in a water rights settlement among the State, the CSKT and the United States shall supersede any administrative provisions in this Compact the conflict with a State-CSKT water rights settlement.

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

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

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

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

4. to determine the relative rights inter sese of Persons using water under the authority of state or tribal

law, or to limit 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 that is vested under state or federal law;
6. to create or deny substantive rights through headings or captions used in this Compact;
7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the Effective Date of this Compact;
8. to affect or determine the applicability of any state or federal law, including, without limitation, environmental and public safety laws, on activities of the FWS;
9. to affect the right of the State to seek fees or reimbursement for costs or the right of the United States to contest the imposition of such fees or costs, pursuant to a ruling by a State or federal court of competent jurisdiction or Act of Congress;
10. to affect in any manner the entitlement to or quantification of other federal water rights. This Compact is only binding on the United States with regard to the water rights of the United States for the National Bison Range, and does not affect the water rights of any other federal agency that is not a successor in interest to the water rights subject to this Compact;
11. to prevent the United States from constructing or modifying an outlet to an impoundment at the National Bison Range in compliance with all applicable laws;
12. to prevent the United States from seeking a permit to appropriate water under applicable State or other law.

D. Reservation of Rights. The Parties expressly reserve all rights not granted, described or relinquished in this Compact.

E. Severability. The provisions of this Compact are not severable.

F. Multiple Originals. This compact is executed in triplicate. Each of the three Compacts bearing original signatures shall be deemed an original.

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

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

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

CSKT: Upon the Tribal Chairman of the CSKT and such other officials as the Chairman may designate

in writing.

ARTICLE VI - FINALITY

Binding Effect.

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

2. Following the effective date, this Compact shall not be modified without the consent of both Parties. Either party may seek enforcement of this Compact in a court of competent jurisdiction.

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

4. If an objection to this Compact is sustained pursuant to 85-2-703, MCA, and 85-2-702(3), MCA, this Compact shall be voidable by action of and without prejudice to either party.

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

C. Dismissal of Filed Claims. At the time the state courts approve the water rights described in this Compact and enter a decree or decrees confirming the rights described herein, such courts shall dismiss, with prejudice, all water right claims specified in Appendix 8 of this Compact for the National Bison Range. If this Compact is not approved or a federal reserved water right described herein is not confirmed, any corresponding state law-based claim filed by the FWS for use on the National Bison Range shall not be dismissed.

D. Settlement of Claims. The Parties intend that the water rights described in this Compact are in full and final settlement of the federal reserved water right claims for the National Bison Range described in this Compact and administered by the FWS on the Effective Date of This Compact. On the Effective Date of This Compact, the United States hereby and in full settlement of any and all claims to federal reserved water rights

by the United States, including all claims that the FWS filed or could have filed as part of the ongoing statewide adjudication process, relinquishes forever all claims to federal reserved water rights within the State of Montana for the National Bison Range. The State agrees to recognize the water rights described and quantified herein and shall, except as expressly provided for herein, treat them in the same manner as a water right recognized by the State. Nothing in this Compact precludes the FWS from filing for future water use permits under Montana state law.

E. Continuation of Negotiations. The Parties have not finalized agreement on quantification of the water rights for the Charles M. Russell and UL Bend National Wildlife Refuges and UL Bend Wilderness Area, prior to the Effective Date of this Compact. The Parties agree to continue to pursue, in good faith, negotiations toward compacts for the quantification of water rights for these areas. In the event the Parties are unable to agree on quantification, the United States retains its right to have the quantity of any reserved water right for these areas adjudicated in a state or federal court of competent jurisdiction.

F. Defense of Compact. The Parties agree to defend the provisions and purposes of this Compact from all challenges and attacks.

IN WITNESS WHEREOF the representatives of the State of Montana and the United States have signed this Compact on the ____ day of _____, 2009.

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

- END -

