

5-15-1985

# Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation Compact

Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, MT

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Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation Compact 85-20-201 MCA

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## Montana Code Annotated - 2007

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**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 decree, 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	Daniel O. Kemmis
.....	.....
Jack E. Galt, Vice Chairman	A.B. Linford
.....	.....
.....	Joseph P. Mazurek
.....	.....
William M. Day	Audrey G. Roth
.....	.....
Everett C. Elliott	Chris D. Tweeten
APPROVED:	
For the Secretary of the Interior	
.....	
For the Attorney General of the United States	
.....	

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

