

Forest Service, state agree on water compact

By PERRY BACKUS of the Missoulian

April 18, 2007

After 15 years of long, sometimes contentious negotiations, the U.S. Forest Service and the state of Montana have signed an agreement to address federal reserved water rights on national forest lands.

Gov. Brian Schweitzer, U.S. Undersecretary of Agriculture Mark Rey and U.S. Assistant Attorney General Ryan Nelson signed the negotiated federal reserved water rights compact Tuesday afternoon on a table parked within earshot of Rattlesnake Creek.

All three agreed the compact marked a win for both Montana and the country.

Federal reserved water rights are created when federal lands are set aside for a specific purpose, such as national forests, national parks, or fish and wildlife refuges.

While it was intended that enough water be reserved to meet the purposes for which the federal lands were designated, those rights still have to be negotiated with the state.

“We can all agree that there's nothing more important in the Rocky Mountains than water,” Schweitzer told the group of about 30 who gathered for the signing ceremony. “It's also difficult to know who actually owns that water.”

This agreement proves that the federal government and states can put together an agreement without litigation, Schweitzer said.

“I was a little worried that we folded like a cheap suit, but in the end, we didn't,” he said. “This resolution will protect our water for future generations while making sure there are in-stream flows for managing fisheries.”

Rey said the agreement basically debunks Mark Twain's notion that whiskey is for drinking and water is for fighting.

“This is an important model that we hope other states will embrace,” Rey said. “People will hold up Montana as a good example of how these disputes should be resolved in the future.”

The Montana Reserved Water Rights Compact Commission and the Forest Service began negotiations in 1992 concerning federal reserved water rights on national forest lands in Montana. When negotiations hit an impasse in 2005, a mediator helped put together the final agreement.

The compact was ratified by the 2007 Legislature. It establishes:

-Federal reserved water rights for Forest Service administrative uses across Montana and in-stream flows for the wild and scenic South Fork Flathead River.

-State-based in-stream flows for 77 additional streams on national forest lands, with a current priority date.

-A new procedure that enables the Forest Service to apply for future state-based in-stream flows.

-A provision that enables the Forest Service to apply for a change of use from an appropriation to divert or withdraw water owned by the United States to an in-stream flow right.

-A provision to avoid conflict between state and federal permitting processes.

-A provision that gives the Forest Service the right to object in the ongoing statewide adjudication.

Chris Tweeten, chairman of the Montana Reserved Water Rights Compact Commission, said the agreement is a plus not only for Montanans and the Forest Service, but also for the different groups concerned about the future of Montana's water.

The compact protects both the interests of Montana's agricultural community - which depends on water for livelihood - as well as those who live in Montana because of the recreational opportunities offered by the state's clean and clear waters, Tweeten said.

The agreement also clears the way for the state to continue on with the water rights adjudication process in as many as 40 different water basins across the state, he said.

Federal reserved water rights have to be negotiated before that process can be completed.

Not everyone is happy with the agreement, however.

Montana Trout Unlimited's Bruce Farling is disappointed that in-stream flows on only 77 streams were protected under the compact.

"We think that all streams on national forest lands should have an in-stream flow right," Farling said. "We think that should be the default."

The compact does provide a process for the agency to apply for future in-stream flow rights on additional streams. Considering the fact it took 15 years of negotiations to get to this point, Farling worries about the amount of time that will pass before additional streams are protected.

"We've spent 15 years of process to set up a process," Farling said. "We'd hoped for more."

Negotiating water rights isn't an easy task, said Deputy Regional Forester Kathleen McAllister, who served on the Forest Service's negotiating team.

“Water law is the most arcane thing that I've dealt with in my 33 years with the agency,” she said. “It's so very complex.”

There's still a lot of work to do, McAllister said. At one point, negotiators counted 750 streams in the state that might need to go through the process.

“We're going to need to work with groups like Trout Unlimited and the (Department of Natural Resources and Conservation) to find the places most in need of protection,” she said. “We're going to need to work on those highest priority areas first.”

Still, McAllister said this compact is a good first step.

“We've been wrapped in litigation over this issue in Idaho,” McAllister said. “The state and Forest Service spent millions and neither ended up with anything.”