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Montana Reserved Water Rights Compact Commission  
P.O. Box 201601  
Helena, MT 59620-1601

Kathleen A. McAllister  
Deputy Regional Forester  
U.S. Forest Service – Region I  
Federal Negotiating Team Chairperson  
P.O. Box 7669  
Missoula, MT 59807

Re: TU comments on draft Forest Service Reserved Water Rights Compact

Dear Commission Members and Ms. McAllister:

Trout Unlimited continues to see tremendous potential for the State of Montana and the Forest Service to work collaboratively on behalf of all Montanans in finalizing the Forest Service Reserved Water Rights Compact. As we have stated previously, there is much more common ground between the State of Montana and the Forest Service than there are differences. Both the Forest Service and the State have long-term interests in keeping native trout and other rare aquatic species off the Endangered Species list. Maintaining healthy stream flows on public lands helps achieve this. Both parties also have obligations to ensure Montana rivers, streams and lakes meet state water quality standards. Water quality is affected by water quantity. Further, the Forest Service has a legal obligation to protect important aquatic habitats, while the State has trust responsibilities to ensure fish and wildlife populations are protected by preserving habitat. Finally, if the Forest Service is able to protect water in stream to forest boundaries, it helps the State fulfill its obligation to protect its own instream flow water rights on “Murphy Rights” streams and on waters for which the State holds instream flow reservations. Importantly, this also helps the State protect economic interests and Montana taxpayers by ensuring water continues to be reliably delivered to downstream irrigators and towns that hold senior water rights.

TU believes the Compact negotiations have importance far into the future because the accord determines who will have priority in perpetuity for water flowing in streams on Montana's national forests. Besides being valuable in their own right, these streams are also critical for replenishing the Madison, Missouri, Big Hole, Beaverhead, Bitterroot, Clark Fork, Gallatin and Smith Rivers, as well as other famous trout streams. Besides supporting nationally acclaimed fisheries, these rivers are the lifeblood of local agricultural economies, as well as magnets for business people who want to invest in our state because of its high quality of life. This is why since 1998 we have closely followed, and attempted to participate in, the Compact negotiations.

### **Failure to Capitalize on Common Ground**

Chief among our disappointments are: 1.) The Compact only provides a reserved water right on 77 streams, out of the approximately 750 streams originally identified; 2.) the 77 streams for which a reserved water right is proposed were not selected primarily because they are biologically important, or because the water they yield is important for some other Forest Service purpose, but instead they were chosen because wetted-perimeter data is available for them; 3.) after more than a decade of negotiations and process, the Compact largely proposes more negotiation and process; and, 4.) the Compact focuses on only the wetted-perimeter measurement method, thereby failing to acknowledge the evolving science of instream flow methodologies.

### **TU's Preferred Approach**

Though we appreciate discussions we have had with commission members and Forest Service staff over the years, we are disappointed the draft Compact wasn't crafted to capitalize on common ground between the two parties. TU strongly prefers a Compact that brings certainty to Forest Service water rights. We believe a cleaner approach would have better maintained the status quo regarding flows on national forests, while also allowing for future conditions that might warrant off-stream development. TU's suggested four-point alternative would better ensure that rivers and streams issuing from Forest Service lands continue delivering water to downstream users, and that fisheries and recreation on national forests continue to be supported by adequate flows. TU's alternative would essentially create a Forest Service water right to the status quo. In addition, our alternative would also accommodate compelling water development in the future by allowing the agency to transfer water, but only in state, to another use as long as these conditions are met:

1. Applicants for a new use calculate the amount of water flowing annually and seasonally in the Forest Service water body they want a right to;
2. The applicants convincingly demonstrate that the amount and the time they want the water for is essential for the proposed new use;
3. The applicants demonstrate that the proposed new use will not harm downstream senior water right holders; and
4. The applicants demonstrate that the proposed new use will not have a significant adverse impact on recreational, fishery and wildlife values on national forest land.

This approach allows for new water development, but not at the expense of critical existing purposes of national forests and senior water right holders. This approach also doesn't require, as does the proposed Compact, several more decades of uncertainty and process for determining Forest Service water rights. Further, this approach would require fewer public funds than the proposed Compact for dealing with future water right issues on national forests. TU's approach is a common-sense solution that acknowledges that most of the public is happy with the status quo, including many downstream users of water who depend on reliable flows from public lands. It also helps protect national forest values from future water development that has yet to be conceived, yet it accommodates compelling development that could arise.

### **Lost Opportunities in the Compact**

TU believes that an opportunity was also lost to capitalize on common ground when four basic objectives that could have guided the negotiations over the Forest Service's water rights were largely ignored. Many of these we previously raised with Compact negotiators, some in a letter we sent March 1, 2006. They include:

1. Help fulfill the State of Montana's instream flow rights in "Murphy Rights" streams;
2. Protect fisheries in the State's "Blue Ribbon" and "Red Ribbon" trout streams
3. Avoid additional depletions in currently dewatered streams where there are already more water rights than water; and
4. Meet the needs of fish and wildlife species of special concern, such as those listed or candidates for listing as endangered or threatened under the Endangered Species Act.

The Montana Legislature created Murphy Rights for 12 popular angling streams in the early 1970s. Main stems of three Murphy Rights streams flow partially on national forest land – Rock Creek and the Smith and Gallatin Rivers. Headwater streams that feed these and other Murphy Rights stream, including the Blackfoot, Big Hole and three forks of the Flathead Rivers, issue from national forests. The proposed Compact includes reservations for only a few headwater streams in a few of these basins. Today the Murphy Rights in most of the 12 streams remain unfulfilled during low flow periods. The Compact falls short by not enabling the State to better protect its Murphy Rights by providing the Forest Service with an instream flow right to important headwaters of all these streams.

Montana FWP lists 30 streams or sections of streams as either "Blue Ribbon" or "Red Ribbon" trout streams. The compact does not include Forest Service instream flow rights for these streams, a move that would have been in the State's interest. Blue Ribbon streams with tributaries needing instream flow protection that the Forest Service won't have rights to in the Compact include the Big Hole, Beaverhead, Boulder (Yellowstone drainage), Stillwater, North Fork of the Flathead, Ruby and Jefferson Rivers. In addition to classifying Blue and Red Ribbon streams, FWP classifies 963 streams as "outstanding"

and 412 as “high-value” fisheries. The proposed Compact includes only 36 of the outstanding streams and seven of the high-value streams.

The Compact could also have focused on streams whose flows are already significantly impaired. Only 12 of the 77 streams in the proposed Compact have been listed by the State as “chronically dewatered.” Another four are considered periodically dewatered. By adding more streams from the chronically dewatered list to the Compact, the State and Forest Service could have partnered to ensure flows in these streams get no worse. Similarly, if many of the national forest reaches of Murphy Right streams, Blue and Red Ribbon streams and chronically dewatered streams were included in the Compact, it would benefit downstream water users with senior water rights who already struggle to fully exercise their rights.

The Compact falls short because it failed to fully prioritize waters with species of special concern, including bull trout, westslope and Yellowstone cutthroat trout, arctic grayling, tailed frogs and Coeur d’Alene salamanders. Only 53 streams west of the Divide in the Compact hold cutthroat trout. The draft Compact helps protect only about five populations of westslope cutthroat east of the Divide. Only two streams with Yellowstone cutthroat trout are among the 77 streams in the draft Compact.

### **Failure to Embrace Evolving Science Related to Instream Flows**

Article VI of the compact limits the Forest Service to future instream reservations through the draft Compact’s expedited process only for those applications made using the wetted perimeter methodology. Though this 1970s method is useful for some kinds of flow assessments, it is a field-intensive, stream-by-stream approach that uses reference cross-sections to determine what discharge size is necessary to keep riffles wet in representative reaches. New methodologies, however, have been developed in recent years that can better correlate the relationship between particular flows at particular times of years to benefit channel and floodplain function while benefiting specific life cycles and life histories of aquatic species. Some of these methods require less field work, while taking advantage of existing information. This leads to more rapid assessments, enabling a quicker way to develop data for instream flow reservation requests.

The draft Compact’s exclusive focus on the wetted perimeter methodology ignores precedent from other negotiations in which flows exceeding base flows were protected as Forest Service reserved water rights. For example, Colorado negotiated a Forest Service reserved right for the San Luis Valley that is more protective than simply applying the upper inflection point from the wetted perimeter methodology. This negotiation covered 303 stream segments in the Rio Grande and Gunnison National Forests, and was filed in Water Division No. 3 of Colorado’s district courts in March 2000 as Case No. 81CW183 (thereby earning its common nickname as the “Div 3” settlement).

During runoff (April 1 to July 31 of each year), the Forest Service is entitled to 60 percent of the mean daily peak of natural flow. At other times of the year, the agency is

entitled to a high of 80 percent of mean monthly natural flow, or a low of 60 percent of mean monthly natural flow. In exchange, the Forest Service gave up its right to impose an additional by-pass flow requirement through its special use permit authority under the National Forest Management Act. Though these flows are certainly not perfect for aquatic life, they can exceed the upper inflection point at times and they do roughly mimic the shape of the hydrograph.

We believe if a Compact is approved that relies on future applications by the Forest Service for additional reservations, that the accord include language ensuring that additional peer-reviewed methodologies for determining appropriate flows be granted expedited review much like the wetted perimeter technique is in the existing agreement. The most direct way to accomplish that is to simply allow the Forest Service to apply for flows that it asserts are necessary, and to explain the purpose of those flows (base flows for fish, channel maintenance for habitat preservation, etc.) , and to identify the methodology it is applying to determine the appropriate discharge. If an objector challenges the methodology, then the Forest Service has the burden to present evidence that the methodology is scientifically valid and has been applied correctly.

## **Conclusion**

TU cannot support the Compact as currently written. However, because there is little time between now and the 2007 Montana Legislature, we understand there is little opportunity for the negotiators to add streams to the Compact, or to modify the application process for future reservations in a wholesale fashion. Thus we recommend Compact negotiators give serious consideration to modifying the accord so that it is more flexible regarding the use of alternative instream flow methodologies in the future, as we outline above. We also recommend that the parties agree to develop a side agreement that outlines how and when the Forest Service, with the State's help, will apply for additional reservations in the future. We see this side agreement as a sign of good faith that both sides will work diligently to address additional reservations in the future. This approach is not too dissimilar from the Crow Tribe Compact, when at TU's urging the Legislature amended the compact to require the State and Tribe to develop a water management plan addressing instream flows in the Bighorn River. We would be happy to help develop this agreement.

Thanks for the opportunity to comment on the draft Compact.

Sincerely,

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Bruce Farling, executive director  
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