

TESTIMONY OF JAY WEINER
REPRESENTING THE STATE OF MONTANA
ON S. 3290
BEFORE THE SENATE COMMITTEE ON
INDIAN AFFAIRS
UNITED STATES SENATE

July 22, 2010

Chairman Dorgan and distinguished members of the Senate Committee on Indian Affairs, I thank you for the opportunity to provide written testimony on this important matter. My name is Jay Weiner, and I am a Montana Assistant Attorney General and staff attorney for the Montana Reserved Water Rights Compact Commission. I am here to testify on behalf of Chris Tweeten, the Chairman of the Montana Reserved Water Rights Compact Commission, the State of Montana and Governor Brian Schweitzer, in support of Senate Bill 3290, the Blackfeet Water Rights Settlement Act of 2010, and to urge your approval of this bill.

The Montana Reserved Water Rights Compact Commission was created by the Montana legislature in 1979 to negotiate, on behalf of the Governor, settlements with Indian Tribes and federal agencies claiming federal reserved water rights in the state of Montana. The Compact Commission was established as an alternative to litigation as part of the statewide water adjudication and is charged with concluding compacts “for the equitable division and apportionment of waters between the state and its people and the several Indian tribes” and the federal government. (Mont. Code Ann. § 85-2-702 (2009).)

Montana has been remarkably successful in resolving both Indian and federal reserved water rights claims through settlement negotiations. To date, we have concluded and implemented water rights Compacts with the tribes of the Fort Peck, Northern Cheyenne and Rocky Boy’s Reservations, as well as with the United States Forest Service, National Park Service, Agricultural Research Service, Bureau of Land Management, and several units of the Fish and Wildlife Service. The Congress has previously ratified the Northern Cheyenne and the Rocky Boy’s Compacts, and both tribes have seen substantial economic and social benefits from the completed settlements. In addition, we have reached Compact agreements with the tribes of the Blackfeet, Crow and Fort Belknap Reservations that are in the process of approval. Earlier this year, this Committee recommended to the full Senate a “do pass” on Senate Bill 375, as amended, ratifying the Crow Water Rights Settlement. The Blackfeet Tribe–Montana Compact has already been approved by the Montana legislature (Mont. Code Ann. § 85-20-1501 (2009)), and is now before Congress for ratification pursuant to S. 3290.

Concurrent with the initiation of the Montana general stream adjudication and the establishment of the Compact Commission in 1979, the United States filed suit in federal court to quantify the rights of tribes within the State, including the Blackfeet Tribe. Those federal cases have been stayed pending the adjudication of tribal water rights in state court. Should the negotiated settlement of the Blackfeet Tribe’s water right claims fail to be approved, then the claims of the Blackfeet Tribe will be litigated before the Montana Water Court. The Blackfeet Tribe has

always had the senior water rights in the basins that are the subject of the settlement embodied in S. 3290—this Compact does not create those rights, it simply quantifies them.

The Blackfeet Indian Reservation is located in north-central Montana, bounded by Glacier National Park and the Lewis and Clark National Forest to the west, Canada to the north and prairies to the east and south. The Reservation encompasses 1.5 million acres (roughly one and a half times the size of Rhode Island), making the Reservation one of the largest in the United States. The Reservation is home to approximately half of the 16,000 enrolled Tribal members. Unemployment on the Reservation is estimated at being up to 70%. The region is arid, with approximately 13 inches of average annual precipitation. Ranching and farming comprise the major uses of land on the Reservation, with the principal crops being wheat, barley and hay.

The provisions in S. 3290 will recognize and quantify water rights as well as off-Reservation storage allocations that will allow the Blackfeet Tribe to provide for its growing population and to develop its natural resources. The State of Montana and the Blackfeet Tribal Business Council agree that this is a fair and equitable settlement that will enhance the ability of the Tribe to develop a productive and sustainable homeland for the Blackfeet People. We appreciate the efforts of the Tribe and the Federal Government to work with the State to forge this agreement, and, in doing so, to listen to and address the concerns of non-Indian water users both on and off the Reservation. This settlement is the product of over two decades of negotiations among the parties, which included an intensive process of public involvement.

The primary sources of water on the Blackfeet Indian Reservation are the St. Mary River, the Milk River, the Two Medicine River, and Badger, Birch and Cut Bank Creeks. (See Attachment A.) Collectively, these watercourses contain approximately 1.5 million acre-feet per year (AFY) of water, with the St. Mary River alone accounting for roughly one-third of that total. The St. Mary River originates in the mountains of Glacier National Park and flows north and east across the Reservation before crossing into Canada. The Two Medicine River and Badger and Birch Creeks originate in the mountains to the west of the Reservation and flow east, ultimately uniting to form the Marias River just east of the Reservation. Birch Creek delineates the Reservation's southern boundary. The Milk River and Cut Bank Creek are prairie streams. The Milk River flows northeast into Canada before re-entering the United States just west of Havre, Montana, while Cut Bank Creek flows south and east until it joins the Marias River. The St. Mary and Milk Rivers are both subject to an apportionment agreed to between the United States and Canada in the 1909 Boundary Waters Treaty (BWT), and implemented by a 1921 Order of the International Joint Commission that was established by the BWT. Indian water rights were not considered during the negotiation or implementation of the BWT. The Bureau of Indian Affairs (BIA) manages the Blackfeet Irrigation Project on the Reservation. The Blackfeet Irrigation Project serves land in the Birch Creek, Badger Creek, Two Medicine River and Cut Bank Creek drainages.

The Blackfeet Tribal Water Right is quantified separately for each drainage basin within the Reservation. The Tribal Water Right for the St. Mary River drainage within the Reservation is 50,000 AFY, not including the flows of Lee and Willow Creeks. This water right is subject to the limitation that its exercise may not adversely impact the water rights held by the Bureau of Reclamation's Milk River Project (MRP), which diverts almost the entire United States' share

under the BWT of the St. Mary River into the Milk River for use by MRP irrigators in northern Montana approximately 200 miles downstream of the Reservation. The balance between tribal rights and MRP needs, and the protection of these off-Reservation water users, was a critical aspect of the negotiations of this settlement.

In 1902, when Congress authorized, and the Bureau of Reclamation began to develop, the MRP, insufficient attention was given to the senior water rights of the Blackfeet Tribe. Historically, the Tribe has received neither benefits from nor compensation for the St. Mary River water used by the MRP, which can account for up to 90% of the MRP's water supply in dry years. At the same time, water users in this federal project have for generations depended on the St. Mary River water delivered to Project facilities for their livelihoods. This settlement addresses these two factors by providing for an interim allocation to the Tribe of 50,000 AFY of St. Mary River Water stored in Sherburne Reservoir, which is located contiguous to the Reservation and just inside Glacier National Park. That water is to be leased by the Tribe back to the Bureau of Reclamation for use by the MRP, at a rate to be negotiated between the Tribe and the United States, while studies are conducted to identify a permanent solution capable of satisfying the Tribe's water rights while keeping the MRP whole. The Tribe is also entitled to groundwater in the St. Mary drainage that is not subject to the BWT's apportionment, as well as the entire United States' share under the BWT of the natural flow of Lee and Willow Creeks (which are located in the St. Mary River drainage), except for the water in those streams that is subject to existing water rights under state law.

The Blackfeet Tribal Water Right in the Milk River is quantified as the entire United States' share under the BWT of the Milk River, as well as all non-BWT groundwater in the Milk River drainage on the Reservation, except for the water that is subject to existing water rights under state law. In addition, the Tribe has agreed to afford protections for those existing water rights under state law, including a no-call provision for uses other than irrigation, and a 10 year phase-in for new development of tribal irrigation. The tribes of the Ft. Belknap Indian Community also claim water rights in the Milk River downstream of the point at which the Milk River re-enters the United States from Canada. Staff for the Compact Commission, which also negotiated a settlement of the water rights of the Ft. Belknap Indian Community that was approved by the State legislature in 2001 (Mont. Code Ann. § 85-20-1001 (2009)), has evaluated the potential of competing demands on the Milk River between the Blackfeet Tribe and the Ft. Belknap Indian Community and has concluded that the possibility of actual conflict is exceedingly remote. Nevertheless, the Blackfeet Tribe and the Ft. Belknap Indian Community have negotiated a memorandum of understanding over Milk River water uses pursuant to their respective settlements, which contemplates that the Secretary of the Interior shall, with the consent of the tribal governments, identify and implement alternatives to resolve any such conflict that might someday arise. This provision is included in S. 3290 as well.

The Blackfeet Tribal Water Right in Cut Bank Creek is quantified as all of the water (both surface and underground) in that drainage within the Reservation, except for the water that is subject to existing water rights under state law. The Tribe has also agreed to afford existing water rights under state law in the Cut Bank Creek drainage the same protections as are provided for in the Milk River drainage. The quantifications of the Tribal Water Right in the Two Medicine River and Badger Creek drainages are done in the same fashion as the Cut Bank Creek

quantification, though the protections accorded by the Tribe to existing water rights under state law in these two drainages extend the no-call protection to all existing water rights under state law, not just non-irrigation water rights. (This more expansive no-call protection also extends to existing water rights in the St. Mary River drainage.)

The quantification of the Tribal Water Right in Birch Creek was a major component of the negotiations. The Tribe's water rights in Birch Creek were judicially recognized as early as the 1908 Ninth Circuit Court of Appeals decision in the Conrad Investment Company case (161 F. 829 (9th Cir.1908)), which was decided very shortly after the United States Supreme Court ruled in the seminal Indian water rights case Winters v. United States (207 U.S. 564 (1908)). The Blackfeet Irrigation Project diverts water from Birch Creek for project water users on the Reservation, but historically the Tribe has taken far less water from Birch Creek than that to which it was legally entitled. There is also extensive water resource development immediately to the south of Birch Creek, where roughly 80,000 irrigated acres, as well as municipalities, are served by the facilities of the Pondera County Canal and Reservoir Company (PCCRC). PCCRC also operates Swift Dam, which abuts the southwest corner of the Reservation. During the irrigation season, PCCRC's use diverts nearly all of the water available in Birch Creek. As the unconstrained development of the Tribe's Birch Creek water right recognized in this settlement has the potential to cause significant impacts to existing users, the balance between tribal and off-Reservation water use from Birch Creek was a major component of the negotiations.

The settlement quantifies a substantial Tribal Water Right in Birch Creek. The quantification consists of a senior irrigation right of 100 cubic feet per second (cfs) of Birch Creek natural flow, as well as a seasonably variable in-stream flow right (25 cfs from October 1 to March 31, and 15 cfs from April 1 to September 30), and all groundwater in the Birch Creek drainage that is not hydrologically connected to Birch Creek. In addition, the Tribe is entitled to the remainder of the water in Birch Creek after full satisfaction of existing uses under state law. As part of the protection of existing water rights under state law for which the State bargained, the Tribe agreed in the Compact to limit the development of its Birch Creek irrigation right to the Upper Birch Creek Drainage. There are also very specific administration provisions in the Compact concerning the manner in which the Tribe may change the use of its Birch Creek irrigation right to other beneficial purposes. In addition, a Birch Creek Management Plan (Attachment B) has been appended to the Compact, which commits the Tribe, the BIA and the operators at PCCRC to meet prior to each irrigation season to develop management plans to maximize the beneficial use of Birch Creek for all water users, and to adapt those plans as conditions warrant during the course of each irrigation season.

When the Compact Commission initially presented this proposed settlement framework at public meetings south of the Reservation, the response was overwhelmingly negative, as stakeholders believed that the risks posed to their livelihoods by full tribal development of its Birch Creek water rights were insufficiently mitigated. Consequently, the parties returned to the negotiating table and entered into an Agreement Regarding Birch Creek Water Use (the Birch Creek Agreement) on January 31, 2008. The Birch Creek Agreement (Attachment C) is a critical component of the overall settlement. Under the Birch Creek Agreement, the State agreed to put \$14.5 million into an escrow fund payable to the Tribe after final approval of the Compact by the Montana Water Court. (In anticipation of settlement, the 2007 session of the Montana legislature

fully funded this amount.) In the interim, the Tribe is entitled to receive the interest from that fund, up to \$650,000 per year. In exchange for these payments, the Tribe agreed to defer any development of its Birch Creek water rights beyond their current use for a period of 15 years from the effective date of the Birch Creek Agreement. In addition, the Tribe agreed to prioritize in this settlement authorization and funding for the Four Horns Project.

The Four Horns Project involves the repair and improvement of the Four Horns Dam and Reservoir and associated infrastructure, features of the Blackfeet Irrigation Project located on the Reservation in the Badger Creek drainage. Preliminary engineering studies, funded by a \$500,000 appropriation from the State, indicate that the storage capacity of the reservoir can be substantially increased in a cost effective fashion, and that a delivery system can be constructed economically to move excess water from the reservoir across to Birch Creek for the benefit of all Birch Creek water users. The studies suggest that this can be accomplished without reducing the access of Badger Creek water users, including those within the Blackfeet Irrigation Project, to the quantity of water currently stored in Four Horns that they use. The State has committed to spend \$20 million toward the construction of this Four Horns Project, \$4 million of which has already been appropriated.

One of the essential mitigation benefits secured by the State in exchange for the financial and other commitments made in the Birch Creek Agreement is the Tribe's agreement to deliver 15,000 AFY of water from Four Horns to Birch Creek, for the benefit of Birch Creek water users, from the time construction is completed on the facilities necessary to make such deliveries possible until a date 25 years from the effective date of the Birch Creek Agreement. This provision of supplemental water is expected to offset the impacts of the Tribe's development of its Birch Creek water rights after the expiration of the 15 year deferral period. In addition, the existence of infrastructure capable of bringing Four Horns water across to Birch Creek provides the Tribe with a potential market for surplus water from Four Horns into the future. With the Birch Creek Agreement in place, PCCRC and other off-Reservation stakeholders supported ratification of the Compact by the Montana legislature in 2009.

The settlement also includes provisions allowing the Tribe to lease to water users off the Reservation those portions of its water rights that it has stored or directly used. The Tribe must offer water users on Birch Creek, Cut Bank Creek, the Milk River and the St. Mary River, respectively, a right of first refusal on water leased from those drainages to users downstream. Water from Birch Creek, Cut Bank Creek and the Milk River, all of which are within the Missouri River Basin, may only be leased for use at other locations within the Missouri River Basin.

In addition, under S. 3290, the United States will allocate to the Tribe a portion of the water in the Bureau of Reclamation's storage facility on Lake Elwell, located along the Marias River in central Montana. The bill provides for the Tribe's allocation to be all water not yet allocated from that storage facility, less the quantity of water agreed to by the Tribe and the Ft. Belknap Indian Community that may be allocated to Ft. Belknap in the future pursuant to its own water rights settlement. The bill further provides that nothing in this allocation to the Blackfeet Tribe requires the United States to provide any facility for the transportation of the Tribe's allocation from Lake Elwell to any point. The Tribe may lease water from this Lake Elwell allocation so

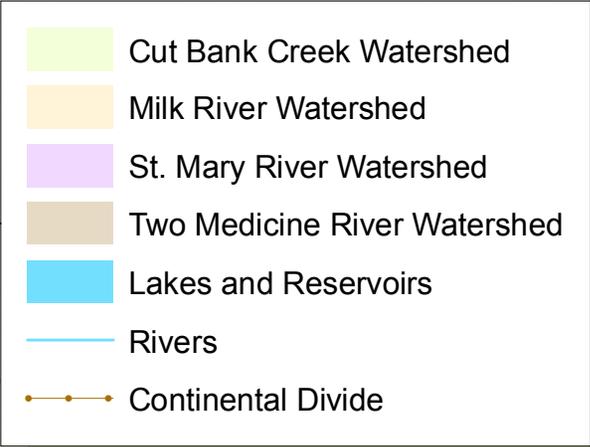
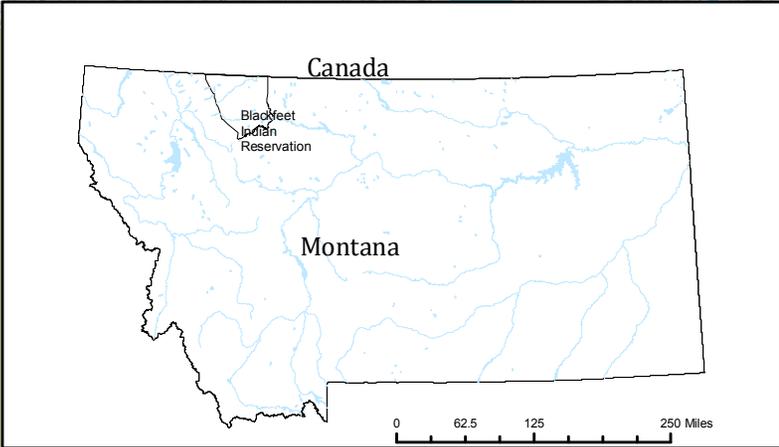
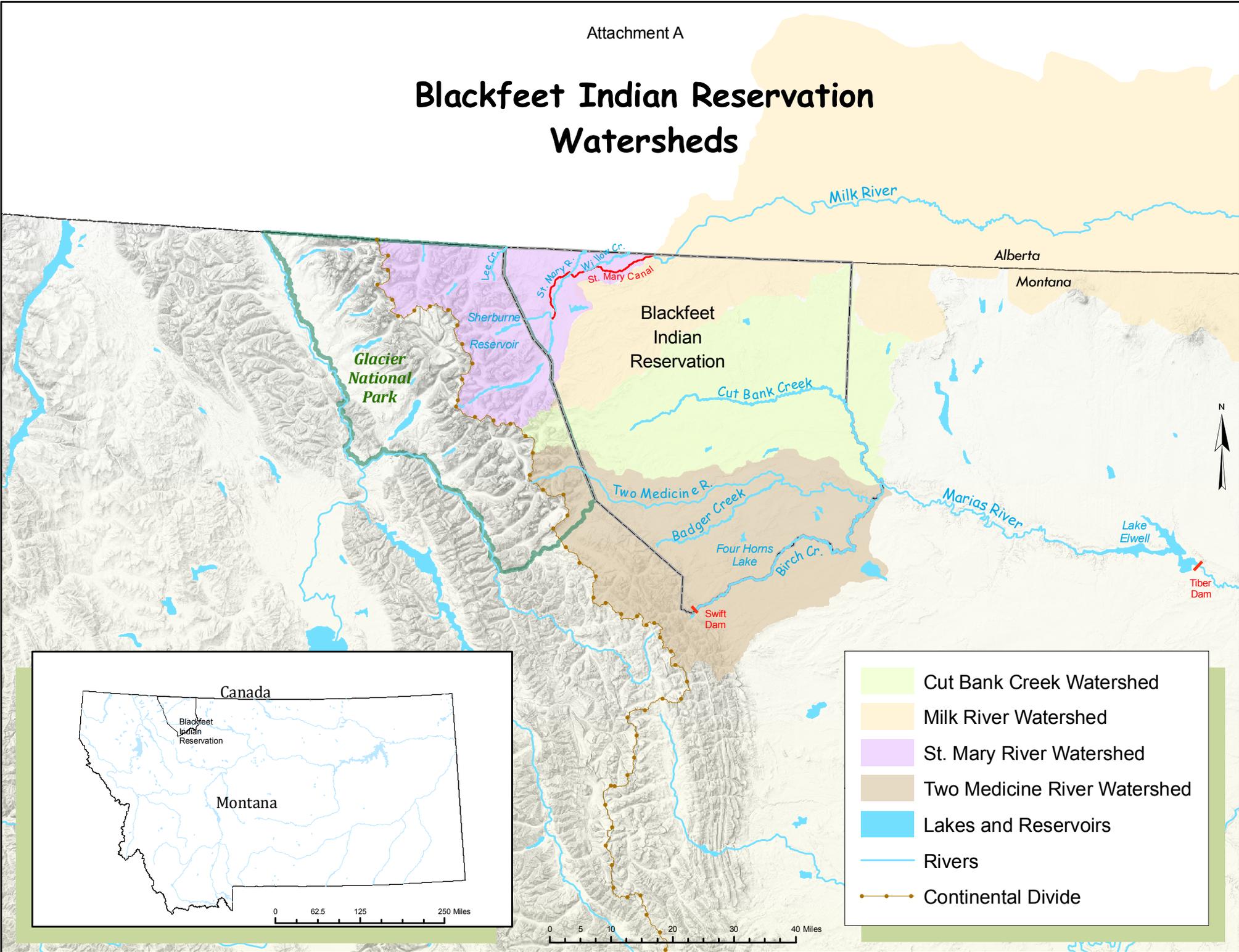
long as it is for use within the Missouri River Basin.

The settlement also closes all of the on-Reservation basins to new appropriation under Montana law. In all cases, both under Tribal Code and State law, the development of new small domestic and stock uses are not precluded by the basin closures. For all on-Reservation basins, water rights under state law will become part of the Tribal Water Right if the Tribe reacquires the land and the appurtenant water right. This structure will allow the Tribe to reconsolidate both land and water resources within the Reservation.

The Tribe will administer the Tribal Water Right. The State will administer water rights recognized under state law. The Blackfeet Irrigation Project will use part of the Tribal Water Right and will continue to be administered by the BIA under applicable federal law. The Blackfeet Tribe will enact a Tribal Water Code to provide for administration of the Tribal Water Right in conformance with the Compact, this Act, and applicable federal law. In the event a dispute arises, the Compact provides for an initial effort between the water resources departments of the State and the Tribe to resolve the dispute. Should the informal process fail to reach resolution, the Compact establishes a Compact Board to hear disputes. Decisions of the Compact Board may be appealed to a court of competent jurisdiction.

The Compact will recognize and protect the Blackfeet Tribe's water rights and provides for the improvement of agricultural water systems and tribal economic development. The Compact promotes development for the benefit of the Blackfeet People while protecting other water uses. The Compact is the full and final settlement of all of the Tribe's water rights claims within the Blackfeet Reservation and the Tribe waives any claims to water rights not contained or reserved in the Compact. We urge your support in ratifying the Compact by passage of this Act.

Blackfeet Indian Reservation Watersheds



BIRCH CREEK MANAGEMENT PLAN

This Birch Creek Management Plan is entered into by and among the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana (Tribe), the State of Montana (State), the United States Bureau of Indian Affairs (BIA) and the Pondera County Canal and Reservoir Company, or any successor entity (PCCRC) (collectively the “Parties”). This Plan shall not be effective until the Water Rights Compact (“Compact”) among the Tribe, the State and the United States has been approved by the Montana Legislature, the Congress, and the Tribe, and the Montana Water Court has entered an Order approving the Compact and entered as a Final Judgment a Decree that confirms the Tribal Water Right as recognized in the Compact.

1. Purpose. The purpose of this Birch Creek Management Plan is to maximize the use of Birch Creek water for the benefit of all water users.

2. Tribal Annual Water Management Plan. The Tribe, in consultation with the BIA, shall develop an annual water management plan for the use of its Birch Creek water right as defined in Article III.C.1.a and b. of the Compact taking into account reasonable efficiencies based on the conditions of facilities of the Blackfeet Irrigation Project. The annual water management plan shall consider water supply and demand conditions, and shall be provided to the other Parties two weeks prior to the Annual Water Allocation Plan Meeting provided for in paragraph 4.

3. PCCRC Annual Water Management Plan. PCCRC shall develop an annual water management plan for its Birch Creek water diversions taking into account reasonable efficiencies based on the conditions of facilities of the PCCRC. The annual water management plan shall consider water supply and irrigation demand conditions, and shall be provided to the other Parties two weeks prior to the Annual Water Management Plan Meeting provided for in paragraph 4.

4. Annual Water Management Plan Meeting. PCCRC, the Tribe, and the BIA will meet no later than March 31st each year to share data on current water supply conditions and to agree collectively upon a master water management plan for the coming irrigation season. Upon promulgation, copies of the master water management plan will be provided to all Parties.

5. Changes to Annual Water Management Plans. Changes to any water management plan promulgated pursuant to paragraphs 2-4 may be made at any time with two days notice to the other Parties, provided by mail, email or telephone. If notice is provided by telephone, it shall also be provided by mail. Provided, however, that no changes to that portion of any water management plan involving the exercise of the portion of the Tribal Water Right set forth in Article III.C.1.b.i of the Compact may be made between April 1 and September 30 of each year.

6. Calculation of Natural Flow. The PCCRC shall calculate weekly the natural flow of Birch Creek at PCCRC's Canal B diversion dam (Canal B). The natural flow shall be calculated as the sum of: a) the measured release from Swift dam; b) the change in storage in Swift reservoir; c) calculated evaporation losses from Swift reservoir; and d) inflows downstream from Swift dam and above Canal B. PCCRC shall implement and maintain a comprehensive gauging measurement program to calculate the natural flow, shall maintain permanent records of all such gauging data and shall make these records available to the Parties upon request and without cost

7. Management of PCCRC Reservoir and Diversion Dams. PCCRC shall manage Swift Reservoir and any diversion dams owned and/or operated by it, and shall manage all diversions at such diversion dams.

8. Gauging of In-stream Flow. The Tribe shall establish and maintain two stream flow gauges to verify in-stream flows. The gauges shall be located on Birch Creek near U.S. Highway 89 and U.S. Highway 358. The Tribe shall maintain permanent records of all gauging data and shall make these records available to the Parties, upon request and without cost.

9. Measurement of Diversions. The Tribe and the State respectively shall implement procedures to measure all diversions from Birch Creek made under their authority. The Tribe and the State shall each maintain permanent records of the uses authorized under their authority and shall make these records available to the Parties, upon request and without cost.

10. Release and Bypass. PCCRC shall release at Swift Dam and bypass at Canal B water necessary to satisfy the Tribe's senior in-stream flow right and any additional natural flow as needed to maintain the in-stream flow right at the Birch Creek stream flow gauges maintained by the Tribe under paragraph 8. PCCRC shall also bypass at Canal B the Tribal call for its senior direct flow right of up to 100 cfs, less the amount of any authorized Tribal diversion(s) taken out above Canal B. The Tribe shall bypass at its diversion or diversions on Birch Creek water necessary to satisfy the Tribe's senior in-stream flow right, any additional natural flow released by PCCRC as needed to maintain the in-stream flow at the Birch Creek stream flow gauges maintained by the Tribe under paragraph 8, and such Natural Flow as may be released by PCCRC to satisfy downstream Water Rights Arising Under State Law.

11. Channel Maintenance Flows. If the natural flows of Birch Creek are insufficient to provide an adequate volume of water for regular channel maintenance, PCCRC, in a manner agreed upon, after consultation with appropriate fish and wildlife agencies, by the Tribe, the BIA, and PCCRC in consultation with other affected water users, shall provide up to 10,000 acre-feet of stored water to ensure that a channel maintenance flow is obtained no fewer than three times every 12 years, and as often as practicable, under hydrologic conditions as shall be agreed upon by the Tribe, the BIA and the PCCRC.

The Tribe, the BIA and PCCRC may also agree to modify the channel maintenance schedule as hydrologic conditions warrant.

12. Amendments to Management Plan. This Birch Creek Management Plan may be amended at any time by the mutual written agreement of the Parties.

13. Dispute Resolution. Any disputes over the interpretation or implementation of this Birch Creek Management Plan, including but not limited to disputes over the promulgation of and changes to the annual management plans contemplated by paragraphs 2-5 and the channel maintenance flow regime contemplated by paragraph 11 of this Birch Creek Management Plan, shall be resolved by the Compact Board pursuant to Article IV.J of the Compact.

Blackfeet Tribe

By _____
Dated _____

Pondera County Canal and Reservoir Company

By _____
Dated _____

The State of Montana

By _____
Dated _____

Bureau of Indian Affairs

By _____
Dated _____

**AGREEMENT BETWEEN
THE BLACKFEET TRIBE OF THE
BLACKFEET INDIAN RESERVATION
AND
THE STATE OF MONTANA
REGARDING BIRCH CREEK WATER USE**

THIS AGREEMENT is made and entered into this 31st day of January, 2008, by and between the BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, MONTANA ("Blackfeet Tribe" or "Tribe"), acting through the Blackfeet Tribal Business Council, and the STATE OF MONTANA ("State"), acting through the Montana Reserved Water Rights Compact Commission ("Compact Commission"). The Tribe and the State are also referred to herein as the "Parties."

AUTHORITY

The Blackfeet Tribe has authority to enter into this Agreement pursuant to the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation, Article VI, Section 1(a).

The State has authority to enter into this Agreement pursuant to Montana Code Ann. §§ 85-2-702 and 703 and 85-20-1504, MCA.

WITNESSETH:

WHEREAS, the Parties are currently negotiating a Compact to resolve the water rights of the Tribe, and expect to complete the Compact in the near future; and

WHEREAS, the Compact will not be final until approved by the Montana Legislature, the Congress and the Tribe, and entered as a decree by the Montana Water Court; and

WHEREAS, the Parties expect the Compact to resolve, among other things, the water

rights of the Tribe in Birch Creek in the amount of: a) 100 cubic feet per second (cfs) for irrigation use in the Upper Birch Creek Drainage from Swift Dam to the confluence of Blacktail Creek; b) 15 cfs from October 1 to March 31 and 25 cfs from April 1 to September 30 of each year for instream flow; c) the remainder of the natural flow in Birch Creek measured at the State Highway Bridge 358 crossing Birch Creek and any gaining flows available from the same bridge crossing to Birch Creek's confluence with the Two Medicine River after satisfaction of Water Rights Arising Under State Law; and d) all groundwater in the Birch Creek drainage that is not hydrologically connected to Birch Creek; and

WHEREAS, the Parties agree that full use of the Tribe's Birch Creek water right under the Compact should be implemented over a period of years in order to provide sufficient time to develop other water supplies that may be used to mitigate impacts to holders of Water Rights Arising Under State Law in Birch Creek; and

WHEREAS, the Parties desire to set out the terms and conditions under which full implementation of the Tribe's Birch Creek water right under the Compact will occur;

NOW THEREFORE, the Parties agree as follows:

1. With the exception of the terms "Parties" and "Effective Date", which are specifically defined herein, the definitions contained in Article II of the Compact are hereby incorporated by reference to the extent they are used herein.

2. For the fifteen (15) year period beginning from the Effective Date of this Agreement, the Tribe shall defer any use, including authorization of any use by others, of Birch Creek water over and above the amount currently used by the Tribe pursuant to the decree in *Conrad*

Investment Co. v. United States, 156 F. 123 (D. Mt. 1907), *affirmed* 161 F. 829 (9th Cir. 1908).

The amount of water currently used by the Tribe under the *Conrad Investment* decree is: a) up to 36 Cfs and 8810 acre-feet annually for irrigation purposes during the irrigation season; and b) 6 Cfs for instream flow during the irrigation season. In addition to use of 6 Cfs for instream flow, the Tribe may continue its current practice of using up to 8810 acre-feet of its *Conrad Investment* irrigation right to irrigate acres within the Birch Creek Unit of the Bureau of Indian Affairs' Blackfeet Irrigation Project or may irrigate additional or different lands within the Upper Birch Creek Drainage so long as the Tribe's total diversions from Birch Creek do not exceed 36 Cfs or 8810 acre-feet and so long as any change in the place of use causes no adverse effect to any holder of Water Rights Arising Under State Law.

3. In any federal legislation approving the Compact, the Tribe and the State will jointly seek authorization and all necessary funding from Congress for the rehabilitation, betterment, enlargement, improvement and/or construction of certain facilities of the Badger-Fisher Irrigation Unit of the Bureau of Indian Affairs' Blackfeet Irrigation Project and other related facilities (collectively the "Four Horns Project" or "Project"). The Parties agree to seek authorization and funding from Congress for the Four Horns Project including : a) rehabilitation and betterment of the Four Horns Feeder Canal system up to at least 300 cfs in capacity; b) enlargement of the existing off-stream Four Horns Dam and Reservoir to its maximum practical capacity; c) construction of facilities to deliver a minimum of 15,000 acre-feet of water per year from the enlarged Four Horns Dam to a point on Birch Creek to be designated by the Parties; d) rehabilitation and betterment of the outlet canal delivery system from Four Horns Dam to

Blacktail Creek; e) rehabilitation and betterment of the Badger-Fisher Main Canal; and f) measures to enhance on-farm efficiency in the Badger-Fisher Irrigation Unit of the Blackfeet Irrigation Project.

4. As part of the planning and feasibility studies relating to the facilities described in paragraph 3, the Tribe, the State and the entity authorized by Congress shall identify those structures or portions of structures that will be constructed, rehabilitated or bettered primarily for the purpose of delivering water to holders of Water Rights Arising Under State Law in Birch Cr  ek under this Agreement, and shall agree on the ownership, operation, maintenance and replacement obligations relating to those facilities, provided that the Tribe and the State will jointly seek provisions in any federal legislation approving the Compact ensuring that the Blackfeet Irrigation Project water users and the holders of Water Rights Arising Under State Law in Birch Creek shall have no obligation for operation, maintenance or replacement costs of structures or portions of structures identified under this paragraph as being constructed, rehabilitated or bettered primarily for the purpose of delivery water to holders of Water Rights Arising Under State Law in Birch Creek under this Agreement.

5. The Tribe and the State will cooperate and coordinate with the Bureau of Indian Affairs in the formulation and development of studies, designs, plans and specifications for the construction and/or rehabilitation of any Blackfeet Irrigation Project facilities.

6. As part of the state contribution to the Blackfeet water rights settlement, the State will contribute a portion of the funding for the Project in an amount to be agreed upon by the Parties or as may be established by Congress if the Parties are unable to agree. Such funding shall be

made available to the entity or entities authorized by Congress, on a schedule to be agreed upon by the Parties or established by Congress, but no later than the schedule on which any federal funding is provided, subject to appropriation of such funds by the Montana legislature. The Parties agree that a cooperative agreement or such other agreement required by Congress shall be entered into to provide for the transfer and accounting of the funding under this Paragraph.

7. The Tribe expects to seek authorization for funding from Congress for other projects and for other purposes as part of a comprehensive water rights settlement. The Tribe will give highest priority to the construction and completion of the Four Horns Project among the projects that may be funded by Congress in any federal legislation approving the Compact, so long as other Reservation projects funded in the same legislation may be constructed during the same period of time as the Four Horns Project.

8. At such time as the entity provided by Congress certifies that the Four Horns Project becomes capable of making such deliveries, the Tribe, as provided by Congress, will provide 15,000 acre-feet of water annually, as measured at Four Horns Dam, to a point on Birch Creek agreed to by the Parties for allocation pursuant to water rights under State law. The Tribe, as provided by Congress, will continue to provide 15,000 acre feet to the agreed upon point on Birch Creek annually thereafter through the conclusion of the 25th year after the Effective Date of this Agreement. The Tribe, in coordination with the BIA, and the State shall agree on a reasonable delivery schedule no later than March 1 of each year in which there is a delivery obligation under this Paragraph. If the Project first becomes capable of making such deliveries during the irrigation season (April 1 to September 30 of each year), the Tribe shall provide a

proportionate amount of water consistent with the remaining irrigation season for that year as mutually agreed with the State. Compensation to the Tribe for providing water under this paragraph is included within the compensation provided for in Paragraph 10.

9. In the event that, after the conclusion of the 15 year period set forth in Paragraph 3, water conditions develop during an irrigation season such that the full 15,000 acre-feet set forth in Paragraph 8 is unavailable to be provided to the agreed upon point in Birch Creek as contemplated by Paragraph 8, the Tribe will reduce the exercise of the instream flow right set forth in Article III.C.1.b of the Compact by an amount not to exceed 13 cfs during the portion of the irrigation season in which the shortage is expected to occur. The Tribe and the State, in consultation with the Bureau of Indian Affairs, shall agree on such additional criteria as may be necessary to implement this provision, taking into account the water use by the Blackfeet Irrigation Project, which shall have priority, and the expected amount and duration of any shortage.

10. In consideration for the obligations undertaken by the Tribe in Paragraphs 2-9, and separate and apart from the State's obligation to contribute to the construction of the Four Horns Project as set forth in Paragraph 6 and any other State contribution to a Blackfeet water rights settlement, the State shall pay to the Tribe \$14.5 million (\$14,500,000.00). Payment to the Tribe shall be made as follows:

a) provided that the total amount of interest disbursed shall not exceed \$650,000 annually, as required by §85-20-1504(3)(b), MCA, or such additional interest amount that may be established by the Montana legislature, interest on the \$14.5 million described in

this Paragraph shall be made available to the Tribe upon the date this Agreement is executed by the Tribe and the State (the Execution Date) and shall be paid to the Tribe quarterly through a payment arrangement to be established by the Tribe and the State separately from this Agreement; and

b) the principal of \$14.5 million shall be paid to the Tribe through a payment arrangement to be established by the Tribe and the State separately from this Agreement within the later of:

(1) 75 days after the entry of a final decree by the Montana Water Court approving the Blackfeet water rights compact if no appeal therefrom is filed; or

(2) 30 days after the entry of judgment of a judicial decision finally resolving any and all appeals taken from such decree.

11. The payments set forth in Paragraph 10 are in full satisfaction of the obligations undertaken by the Tribe in this Agreement. The amount paid to the Tribe under this Agreement is not, and shall not be considered as, a precedent for or a basis to set the market value or price of water for any water marketed by the Tribe.

12. Pursuant to any federal legislation approving the Compact, the Tribe may market any available water stored in Four Horns Reservoir over and above the 15,000 acre feet that the Tribe is obligated to deliver annually under this Agreement, and any available water stored in Four Horns Reservoir after the termination of this Agreement, under such terms and conditions as may be set in the Compact or as may be directed by Congress.

13. The Parties expect the Project to be completed and constructed prior to the end of the

period of deferral in Paragraph 2. However, if completion is delayed due to cataclysmic or catastrophic events caused by events beyond the control of the Parties, such as acts of war or terrorism, or earthquake, flood or fire, or if, despite best efforts, construction is rendered impossible or impracticable due to the unavailability of materials, transportation or manpower, or if Congress otherwise is unable timely to appropriate the necessary funding to complete the Project within 15 years of the Effective Date of this Agreement due to such cataclysmic or catastrophic events, then the period of the deferral set forth in Paragraph 2 shall be extended until completion of the Project under such schedule as may be necessary given the nature of the delay.

The Parties understand that the events causing delay contemplated by this Paragraph are only events of extraordinary magnitude and seriousness.

14. Any disputes concerning the meaning of this Agreement or actions to enforce the provisions of this Agreement shall be brought in a court of competent jurisdiction, provided that any disputes over the annual delivery of the 15,000 acre-feet of water required by Paragraph 8 shall be presented first to the Compact Board created by the Compact. The Tribe and the State waive their respective immunities from suit in a court of competent jurisdiction for the sole purpose of obtaining a declaration of the meaning of this Agreement or to enforce its terms, but not for money damages or attorney fees, provided that the Tribe may be awarded interest on any payments under this Agreement that are determined by a court of competent jurisdiction to have been improperly withheld or delayed.

15. Any notice, demand or request required by this Agreement shall be provided to the State to:

Director
Department of Natural Resources and Conservation
1625 11th Avenue
Helena, MT 59620

and to the Tribe to:

Chairman
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417

16. This Agreement shall be voidable at the discretion of either Party if either Party exercises its right, as set forth in Article VII.A of the Compact, to withdraw from the Compact, or if the Compact is not entered as a final decree by the Montana Water Court within the time period set forth in Article VII.B of the Compact, except that any interest paid to the Tribe under Paragraph 10 may be retained by the Tribe and shall not be refunded to the State. The Parties commit to use their best efforts to ensure that the Compact is finalized and the necessary approvals are obtained, including federal legislative approval, as soon as possible.

17. The Effective Date of this Agreement shall be the later of the date of execution of this Agreement by the Parties or the date of the issuance of any required approval by the Secretary of the Interior or his authorized representative, or by Congress, if the Secretary determines that congressional approval of this Agreement is necessary.

18. No amendments or modifications of this Agreement, or any provisions contained herein, shall be binding and enforceable unless the same shall be in writing and executed in the same manner as this original Agreement and shall after execution become a part of this Agreement. No amendment or modification of this Agreement shall constitute an amendment or

modification of the Compact.

19. Any waiver or failure to enforce the terms of this Agreement by either Party shall not constitute a waiver by that Party of the right to enforce or compel performance with respect to any continuing or subsequent default hereunder.

20. Neither this Agreement nor any of the rights, duties or obligations hereunder shall be assigned or transferred except with the express written consent of the Parties, provided that upon the sunset of the Compact Commission, any duties of the Compact Commission under this Agreement may be carried out by any designated successor of the Compact Commission.

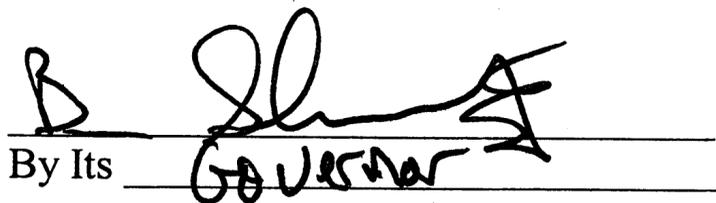
21. The term of this Agreement shall be for a period commencing on the Execution Date and ending at the conclusion of the 25th year from the Effective Date.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

**BLACKFEET TRIBE OF THE BLACKFEET
INDIAN RESERVATION, MONTANA**


By Its Chairman

STATE OF MONTANA


By Its GOVERNOR