

**IN THE WATER COURT OF THE STATE OF MONTANA  
BLACKFEET TRIBE'S OFF-RESERVATION INSTREAM RESERVED WATER  
RIGHTS**

**CASE NO. WC-1991-01**

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**PRELIMINARY DECREE AND ORDER FOR THE COMMENCEMENT OF  
PROCEEDINGS FOR CONSIDERATION OF THE BLACKFEET TRIBE'S  
OFF-RESERVATION INSTREAM RESERVED WATER RIGHTS**

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THIS MATTER came before the Court on motion of the Blackfeet Tribe and the United States to commence the proceedings required under applicable law to review and approve the water rights of the Blackfeet Tribe quantified in the *Stipulation to Address Claims by and for the Benefit of the Blackfeet Indian Tribe to Water Rights Within the Lewis and Clark National Forest and Glacier National Park* (Stipulation). The Court, based on the submissions of the Tribe and the United States, and being otherwise advised in these matters, FINDS, CONCLUDES, and ORDERS as follows:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. In the *Agreement with the Indians of the Blackfeet Indian Reservation in Montana* (1895 Agreement) dated September 26, 1895, ratified by Congress in the Act of June 10, 1896, 29 Stat. 321, 353-58, the Blackfeet Tribe relinquished to the United States the lands along its western boundary that not long thereafter became part of Glacier National Park (Park) and the Lewis and Clark National Forest (Forest). As part of the Agreement, the Tribe specifically reserved and retained:

the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States, and to cut and remove therefrom wood and timber ... [; and] the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States ... .

Agreement, Art. I, 29 Stat. at 354. For the better part of a century, the Tribe's right to the abundant waters flowing out of the mountains now encompassed by the Park and Forest and onto the Blackfeet Reservation remained unaddressed.

2. In 2016, the Tribe, the United States Bureau of Indian Affairs, acting in its capacity as trustee for the Tribe, the United States National Park Service, and the United States Forest Service resolved the longstanding issue of the Tribe's water rights in the Forest and the Park in the Stipulation. In the Stipulation, the National Park Service and Forest Service recognized that, under the 1895 Agreement, the Tribe (and the United States as the Tribe's trustee) has federal reserved instream flow water rights in the Park and Forest. The Stipulation became effective when the Tribe's membership ratified the Blackfeet Tribe-Montana-United States Compact (codified at § 85-20-1501, MCA) and the Blackfeet Water Rights Settlement Act (Pub L. No. 114-322, Title III, Subtitle G) in a vote held on April 20, 2017, and that vote was certified, on May 30, 2017, by the Bureau of Indian Affairs.

3. On March 7, 2018, the Tribe and the United States initiated the Water Court process required under Montana law to quantify the water rights of the Blackfeet Tribe in the Park and the Forest by filing in the Water Court a Joint Motion for Incorporation of the Blackfeet Tribe's Off-Reservation Instream Reserved Water Rights Preliminary and Final Decrees and for a Hearing on any Objections to the Preliminary Decree. The Tribe and the United States asked the Water Court to adopt a procedure allowing consolidation of the four basins encompassed by the Stipulation water rights into a single judicial unit, in accordance with § 85-2-215, MCA, and

the issuance of a preliminary decree of the water rights defined in the Stipulation within this judicial unit pursuant to § 85-2-231, MCA.

4. The Tribe and the United States asked in their Joint Motion that the Court include the water rights quantified in the Stipulation in the final decrees for the following four basins:

- a. Basin 40F, the Milk River, including its tributaries, above Fresno Reservoir;
- b. Basin 40T, the St. Mary River, including its tributaries;
- c. Basin 41L, the Cut Bank Creek drainage; and
- d. Basin 41M, the Two Medicine River Drainage.

5. The Court finds that the Tribe and the United States have established special circumstances as to why the Court should adopt procedures for consideration of the Stipulation water rights as a single preliminary decree, rather than piecemeal in four separate preliminary decrees in the normal adjudication of the basins affected. While the Court is unable to accord priority status to all claims in the adjudication, significant reasons exist to prioritize the water rights quantified in the Stipulation in a separate proceeding.

First, differences between the geographic and hydrologic divisions associated with the adjudication and the settlement process authorized by the Legislature warrant proceedings in this Court to allow integration of settlements into decrees. Although the Stipulation is not a water rights compact to which the State of Montana is a party, and thus is not subject to the same standard of review as the Blackfoot Tribe-State of Montana-United States Compact, the Stipulation was negotiated by the Blackfoot Tribe and the United States on a government-to-government basis. Such an approach, as is the case here, can lead to agreements that track political boundaries rather than the basin boundaries utilized in the adjudication. The Stipulation includes water rights in four Water Court basins. The Stipulation also includes general provisions

that apply to water rights in each basin. Four separate considerations of the same provisions could lead to conflicting interpretation and to duplication of effort.

Second, the four basins affected by the Stipulation are in various stages of the adjudication process. All four basins have Preliminary Decrees already issued and are in various stages of having objections resolved. Consideration of the Stipulation on a basin-by-basin approach would occur over an extended period of time. Background information necessary to evaluate the water rights settled in the Compact could become stale.

Third, the United States, through the Department of Justice, is willing to pay the costs of mailing personal notice to all water rights holders in Basins 40F, 40T, 41L, and 41M, and for the publication of notice for a period of no less than once each week for three consecutive weeks in the *Great Falls Tribune*, *Glacier Reporter*, *Cut Bank Pioneer Press*, *The Valerian*, and the *Havre Daily News* to have these water rights confirmed on a timely basis.

6. Issuance of a preliminary decree containing the water rights set forth in the Stipulation, as authorized by § 85-2-231, MCA is a reasonable and appropriate measure to commence a process for the adjudication of the water rights set forth in the Stipulation as part of Montana's general water right adjudication.

7. The Tribe and the United States have demonstrated good cause for entry of a preliminary decree in this matter pursuant to § 85-2-218(1)(b), MCA.

8. This Court has the authority to order the commencement of this proceeding under the authority of §§ 3-7-224(2) and 85-2-231, MCA.

WHEREFORE, for good cause shown, the Court hereby enters the following:

### **ORDER**

9. The Court grants the Blackfeet Tribe's and United States' motion to commence these proceedings to consider the water rights quantified in the Stipulation. The Court sets forth

in this Order the initial set of procedures necessary to commence the proceedings and to provide notice of the water rights set forth in the Stipulation in accordance with § 85-2-232, MCA.

10. The water rights quantified in the Stipulation shall be incorporated into a preliminary decree in those basins in which a source for a water right set forth in the Stipulation is located. Those basins are: Basin 40F, the Milk River above Fresno Reservoir; Basin 40T, the St. Mary River; Basin 41L, the Cut Bank Creek drainage; and Basin 41M, the Two Medicine River Drainage. These basins are hereinafter collectively referred to as the “Stipulation Basins.”

11. For the purposes of these proceedings, the Court consolidates the Stipulation Basins into a single judicial unit in accordance with § 85-2-215, MCA. In accordance with § 85-2-218(1) and (3), MCA, the Court hereby designates the Stipulation Basins as a priority basin for the purposes of these proceedings.

12. For the purposes of these proceedings and in accordance with § 85-2-231(3), MCA, the Court hereby designates all of the water rights quantified in the Stipulation as a single class of claims within the Stipulation Basins.

13. The Court hereby issues this preliminary decree under § 85-2-231, MCA within the Stipulation Basins. This preliminary decree contains the following information: (a) the contents of the Stipulation; (b) portions of the Federal Act ratifying the Blackfeet Tribe-State of Montana-United States Compact (Pub. L. No. 114-322, Title III, Subtitle G) that confirm the water rights recognized in the Stipulation; and (c) these Findings of Fact, Conclusions of Law, and Order.

14. Stipulation to Address Claims by and for the Benefit of the Blackfeet Indian Tribe to Water Rights within the Lewis and Clark National Forest and Glacier National Park:

The United States of America (“United States”), on behalf of the Forest Service, an agency of the United States Department of Agriculture, and the National Park Service, an agency of the United States Department of Interior, the Blackfeet Tribe of the Blackfeet Indian Reservation

(“Tribe”), and the United States Bureau of Indian Affairs as trustee on behalf of the Tribe (collectively “Parties”) stipulate as follows regarding the water rights of the Tribe and the United States as trustee on behalf of the Tribe within Lewis and Clark National Forest (“Forest”) and Glacier National Park (“Park”).

**A. Tribal Instream Flow Reserved Rights**

The Parties agree that the Tribe has Federal reserved instream flow water rights in the Forest and in the Park for rights reserved by the Tribe in the Agreement between the Tribe and the United States, ratified by the Act of June 10, 1896, 29 Stat. 321, 353 (collectively “Tribal Instream Flow Water Rights”) in the amount of the entire natural flow of the streams identified in Appendix A, subject to the Forest and Park consumptive use water rights described in paragraphs B and C below, and certain other consumptive use water rights described in paragraph D below. The Tribal Instream Flow Water Rights shall be held in trust by the United States for the benefit of the Tribe and its members, and shall have a priority date of October 17, 1855.

**B. The Lewis and Clark National Forest**

The Tribal Instream Flow Water Rights within the boundaries of the Forest are subject to the consumptive use water rights owned by the United States on behalf of the Forest Service (“Forest Service Water Rights”) described in Appendix B and identified in Mont. Code Ann. §85-20-1401 (Water Rights Compact between the State of Montana and the United States Forest Service) (“FS Compact”), and such other rights described in Appendix B.

**C. Glacier National Park**

The Tribal Instream Flow Water Rights within the boundaries of the Park are subject to the consumptive use water rights owned by the United States on behalf of the National Park Service (“NPS Water Rights”) described in Appendix C and identified in Mont. Code Ann. §85-20-401 (Water Rights Compact between the State of Montana, United States, National Park Service) (“NPS Compact”).

**D. Water Rights Arising Under State Law**

The Tribal Instream Flow Water Rights within the boundaries of the Forest and Park are subject to the consumptive use Water Rights Arising Under State Law as that term is defined in Article II.52 of the Water Rights Compact between the Tribe, the State of Montana, and the United States (Mont. Code Ann. §85-20-1501) and enumerated in Appendix D.

**E. Incorporation into Blackfoot Tribe Water Rights Settlement and Decree**

The parties agree that this Stipulation shall be submitted to the Montana Water Court for approval, and that if approved, the Tribal Instream Flow Water Rights shall be decreed in accordance with applicable law.

**F. General Provisions**

1. The Tribal Instream Flow Water Rights are for instream flow purposes only meaning that the instream flow shall remain in the stream, that there is no diversion, impoundment, or withdrawal associated with the right, that the instream flow right does not cause a net loss of water in the source of supply within the Forest or Park, and that the right may not be changed to any other location or any other or additional use.
2. This Stipulation resolves all claims to water rights within the Forest and Park that have been or could have been asserted by or on behalf of the Tribe, including but not limited to all claims identified in the More Definite Statement of Claim (Nov. 16, 1997), filed in this proceeding by the United States.

3. Nothing in this Stipulation affects the ability of the United States to use water for emergency fire suppression for the benefit of the Forest and the Park as provided in the FS and NPS Compacts, or for the benefit of the Blackfeet Reservation.
4. The recognition of Tribal Instream Flow Water Rights does not confer on the Tribe any authority over the management of Forest or Park lands.
5. The provisions of the Park Compact, Mont. Code Ann. §85-20-401, and the Forest Compact, Mont. Code Ann. §85-20-1401, continue to apply.
6. This Stipulation shall become effective on the date the members of the Tribe have voted to approve the Blackfeet Water Rights Settlement Act of 2016 and the Blackfeet Montana Water Compact, as certified by the Secretary of the Department of the Interior and the Tribe.

**Appendix A**  
**Tribal Instream Flow Rights**  
**Lewis and Clark National Forest**

Badger Creek	North Badger Creek
Benson Creek	North Fork Birch Creek
Birch Creek	North Fork Little Badger Creek
Blind Creek	North Fork Sheep Creek
Box Creek	North Fork Whitetail Creek
Coon Creek	Phillips Creek
Crucifixion Creek	Pike Creek
Deep Creek	Pool Creek
Dry Creek	Red Poacher Creek
East Fork Woods Creek	Rowe Creek
Elbow Creek	Sawmill Creek
Hall Creek	Sidney Creek
Haywood Creek	Slippery Hoof Creek
Hungry Man Creek	Small Creek
Hyde Creek	South Badger Creek
Killem Horse Creek	South Fork Birch Creek
Killem Quick Creek	South Fork Little Badger Creek
Kip Creek	South Fork Two Medicine River
Lee Creek	South Fork Whitetail Creek
Limestone Creek	Steep Creek
Lonesome Creek	Summit Creek
Lookout Creek	Townsend Creek
Lost Shirt Creek	Whiterock Creek
Muskrat Creek	Woods Creek

**Appendix A**  
**Tribal Instream Flow Rights**  
**Glacier National Park**

Allen Creek	Lunch Creek
Apikuni Creek	Medicine Owl Creek

Appekunny Creek  
 Appistoki Creek  
 Aster Creek  
 Atlantic Creek  
 Baring Creek  
 Boulder Creek  
 Canyon Creek  
 Cataract Creek  
 Coonsa Creek  
 Divide Creek  
 Dry Fork Fortymile Creek  
 Fortyone Mile Creek  
 Grinnell Creek  
 Hudson Bay Creek  
 Hudson Creek  
 Iceberg Creek  
 Jule Creek  
 Kennedy Creek  
 Lake Creek  
 Lee Creek

Midvale Creek  
 North Fork Cut Bank Creek  
 Otatso Creek  
 Paradise Creek  
 Ptarmigan Creek  
 Railroad Creek  
 Red Eagle Creek  
 Reynolds Creek  
 Rose Creek  
 Saint Mary River  
 Siyeh Creek  
 South Fork Cut Bank Creek  
 South Fork Milk River  
 Swiftcurrent Creek  
 Two Dog Creek  
 Two Medicine Creek  
 Virginia Creek  
 Two Medicine Creek  
 Wilber Creek  
 Wild Creek  
 Windy Creek

**Appendix B**  
**Lewis and Clark National Forest**

The Tribal Instream Flow Water Rights within the boundaries of the Forest are subject to the following:

1. The reserved water rights the United States holds on behalf of the Forest Service for Discrete and Dispersed Administrative Uses pursuant to Mont. Code Ann. § 85-20-1401, Article II. A. and B., and shown in the table below.

Basin 41M	Current	Future	Total
Discrete Administrative Uses	3.01	3.01	6.02
Dispersed Administrative Uses			43.50
<b>Total</b>			<b>49.52</b>

2. The reserved water right the United States holds on behalf of the Forest Service pursuant to Mont. Code Ann. § 85-20-1401, Article II.C., for use of water for emergency fire suppression.
3. Incidental backcountry uses of water in the Badger-Two Medicine area including, but not limited to, stock and personal water use by: outfitters and guides and their clientele; recreational users; researchers; and federal employees, volunteers, and partners working



on trails, weeds, or other resource protection activities. Such use shall be considered part of the Forest Service Dispersed Administrative Uses quantity in the Table in paragraph 1 above.

4. Up to 40.50 acre feet per year of Post-1973 consumptive water use the United States may appropriate on behalf of the Forest Service under state law in the Badger-Two Medicine area ("Post-1973 Forest Service State Law Water Use Permits"). The Forest Service hereby agrees to reduce the quantity of water that it exercises as a Dispersed Administrative Use pursuant to Mont. Code Ann. § 85-20-1401, Article II. B., and shown in the above table, by the quantity of any active Post-1973 Forest Service Water Use Permit. The Forest Service further agrees that if the State of Montana deems an application for a Post-1973 Forest Service Water Use Permit correct and complete, the Forest Service shall notify the Tribe of the application in addition to any notice the Tribe may receive pursuant to Mont. Code Ann. § 85-2-307(d)(2015)(or subsequent statutory notice requirement).

### **Appendix C Glacier National Park**

Tribal Instream Flow Water Rights within the boundaries of Glacier National Park are subject to the water rights owned by the United States on behalf of the National Park Service described below.

<b>Place of Use:</b>	<b>Volume AF/YR</b>	<b>Maximum Flow Rate</b>
<b>Saint Mary River Basin 40T</b>		
Northern Border areas	2.20	20
Many Glacier areas	166.40	600
Saint Mary areas	128.40	915
Backcountry Use	2.20	
Backcountry Patrol Cabins	1.50	40
<b>Place of Use:</b>		
<b>Badger Two Medicine Basin 41M</b>		
Two Medicine areas	6.40	70
Backcountry Use	0.38	
Backcountry Patrol Cabins	0.19	5
<b>Place of Use:</b>		
<b>Cut Bank Creek Basin 41L</b>		
Backcountry Use	0.18	
Backcountry Patrol Cabins	0.19	
<b>Place of Use:</b>		
<b>Milk River Basin 40F</b>		

Backcountry Use	0.02	
<b>Glacier National Park Total</b>	307.88	

**Appendix D  
Lewis and Clark National Forest**

The Tribal Instream Flow Water Rights are subject to the following water rights arising under state law, as that term is defined in Article II(52) of Mont. Code Ann. § 85-20-1501, that the United States owns on behalf of the Forest Service:

41M 56930 00	41M 56946 00
41M 56932 00	41M 56947 00
41M 56933 00	41M 56948 00
41M 56934 00	41M 56949 00
41M 56935 00	41M 56950 00
41M 56936 00	41M 56951 00
41M 56937 00	41M 56952 00
41M 56938 00	41M 56953 00
41M 56939 00	41M 56954 00
41M 56940 00	41M 56955 00
41M 56941 00	41M 56956 00
41M 56942 00	
41M 56943 00	
41M 56944 00	
41M 56945 00	

**Appendix D**

The Tribal Instream Flow Water Rights are subject to the following Water Rights Arising Under State Law, as that term is defined in Article II(52) of Mont. Code Ann. § 85-20-1501.

<b>WRNUMBER</b>	<b>PURPOSES</b>	<b>SRCNAME</b>	<b>PRIORITY DATE</b>
41M 102123 00	Irrigation	Badger Creek	5/7/1910 0:00
41M 113543 00	Irrigation	Coonsa Creek	11/19/1920 0:00
41M 113545 00	Commercial	Two Medicine River, South	3/4/19210:00
41M 113544 00	Irrigation	Two Medicine River, South	3/4/19210:00
41M 153733 00	Stock	Railroad Creek	7/16/19210:00
41M 12464100	Domestic	Unnamed Tributary Of TW	6/4/1923 0:00
41M 124643 00	Stock	Railroad Creek	7/31/1928 0:00
41M 89580 00	Stock	Two Medicine River, South	6/12/1930 0:00
41M 89587 00	Stock	Summit Creek	6/12/1930 0:00

41M 118412 00	Irrigation	Deep Creek	1/6/1936 0:00
41M 175867 00	Domestic	Groundwater	6/30/1936 0:00
41M 175868 00	Domestic	Spring, Unnamed Tributary	6/30/1936 0:00
41M 175862 00	Stock	Spring, Unnamed Tributary	6/30/1936 0:00
41M 175863 00	Stock	Groundwater	6/30/1936 0:00
41M 175864 00	Stock	Spring, Unnamed Tributary	6/30/1936 0:00
41M 175865 00	Stock	Unnamed Tributary Of TW	6/30/1936 0:00
41M 175866 00	Domestic	Spring, Unnamed Tributary	6/30/1939 0:00
41M 159327 00	Stock	Unnamed Tributary Of TW	12/31/1941 0:00
41M 159337 00	Stock	Deep Creek	12/31/1942 0:00
41M 159341 00	Stock	Spring, Unnamed Tributary	12/31/1942 0:00
41M 156893 00	Stock	Unnamed Tributary Of SU	12/31/1947 0:00
41M 155364 00	Domestic	Unnamed Tributary Of SU	12/31/1957 0:00
41M 159328 00	Domestic	Groundwater	8/31/1958 0:00
41M 44025 00	Stock; Industrial	Unnamed Tributary Of UN	6/29/1970 0:00
41M 131191 00	Domestic	Summit Creek	6/30/1973 0:00
41M 131192 00	Domestic	Two Medicine River, South	6/30/1973 0:00
41M 24230 00	Domestic	Groundwater	8/15/1979 0:00
41M 24927 00	Commercial	Groundwater	10/25/1979 0:00
41M 33471 00	Commercial; Domestic	Groundwater	6/2/1981 0:00
41M 42075 00	Domestic	Groundwater	7/1/1981 0:00
41M 38023 00	Domestic	Groundwater	11/23/1981 0:00
41M 47974 00	Domestic; Lawn and Garden	Groundwater	11/24/1981 0:00
41M 46032 00	Commercial; Domestic	Groundwater	3/11/1982 0:00
41M 46033 00	Commercial; Domestic	Groundwater	3/11/1982 0:00
41M 43542 00	Domestic; Lawn and Garden	Groundwater	4/8/1982 0:00
41M 51321 00	Domestic; Lawn and Garden	Groundwater	8/25/1983 0:00
40T 51371 00	Commercial; Domestic	Groundwater	11/2/1983 0:00
41M 54637 00	Lawn and Garden; Domestic	Groundwater	12/1/1983 0:00
41M 75861 00	Domestic	Groundwater	12/7/1990 0:00
41M 108325 00	Domestic	Groundwater	10/27/1999 0:00

15. The following provision of the Blackfeet Water Rights Settlement Act confirms the water rights recognized in the Stipulation:

**SEC. 3719. WATER RIGHTS IN LEWIS AND CLARK NATIONAL FOREST AND GLACIER NATIONAL PARK**

The instream flow water rights of the Tribe on land within the Lewis and Clark National Forest and Glacier National Park—

- (1) are confirmed; and
- (2) shall be as described in the document entitled “Stipulation to Address Claims by and for the Benefit of the Blackfeet Indian Tribe to Water Rights in the Lewis & Clark National Forest and Glacier National Park” and as finally decreed by the Montana Water

Court, or, if the Montana Water Court is found to lack jurisdiction, by the United States district court with jurisdiction.

16. The Court, in a forthcoming, separate order, shall outline the necessary process to provide notice to the potentially affected water users in the Stipulation Basins and certain other parts of the State.

17. All proceedings following the issuance of this Order shall be pursuant to the further order of the Court.

18. Nothing herein constitutes approval of the Stipulation, the preliminary decree of the Stipulation, or any objections thereto.

DATED this 26th day of March, 2019.

/s/ Stephen R. Brown  
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