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 Creek 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.

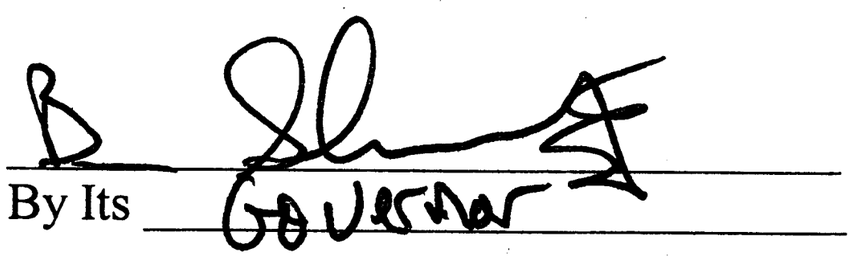
21. The term of this Agreement shall be for a period commencing on the Execution Date and ending at the conclusion of the 25th year from the Effective Date.

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