# WATER RIGHTS COMPACT
# ENTERED INTO BY
# THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION,
# THE STATE OF MONTANA, AND
# UNITED STATES OF AMERICA

This Compact is entered into by and among the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, the State of Montana, and the United States of America to settle all existing claims to water of or on behalf of the Blackfeet Tribe within the exterior boundaries of the Blackfeet Indian Reservation or further as may be specified by Congress. This Compact is not effective until approved by the Blackfeet Tribe, the Montana legislature and the United States Congress. The participation of the United States in each relevant section is not valid until the Compact is ratified by Congress.

## ARTICLE I – RECITALS

WHEREAS, pursuant to the Treaty of 1855, 11 Stat. 657, a Reservation was established in Montana for the Blackfeet Tribe; and

WHEREAS, pursuant to said Treaty, the Blackfeet Tribe claims reserved water rights to fulfill the purposes of the Treaty and the Reservation; and

WHEREAS, in 1979, the United States, on its own behalf and on behalf of the Blackfeet Tribe, its members and Allottees brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribe's water rights claims, see United States v. Aageson, No. CIV-79-21-GF (filed April 5, 1979); and

WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America in trust for Indian tribes; see "the McCarran Amendment," 43 U.S.C. 666(a)(1) (1952); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes Blackfeet tribal water rights; and

WHEREAS, the United States has filed claims on its own behalf and on behalf of the Blackfeet Tribe, its members and Allottees in the general stream adjudication initiated by the State of Montana, see In the Matter of the Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Blackfeet Tribe of the Blackfeet Reservation within the State of Montana, Civil No. WC-91-1; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes and/or on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the federal district court litigation was stayed in 1983 pending the outcome of Montana State court water adjudication proceedings, see Northern Cheyenne v. Adsit, 721 F.2d 1187 (9th Cir.,1983); and

WHEREAS, the adjudication of Blackfeet tribal water rights in the State court proceeding has been stayed while negotiations are proceeding to conclude a compact resolving all water rights claims of the Blackfeet Tribe within the Reservation; and

WHEREAS, the Blackfeet Tribal Business Council, or its duly designated representatives, have authority to negotiate this Compact pursuant to Article VI, Section 1(a) of the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana, as amended; and

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute this Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. sections 516-17; and

WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department of the Interior, has authority to execute this Compact on behalf of the United States Department of the Interior pursuant to 43 U.S.C. 1457, inter alia; and

WHEREAS, the Blackfeet Tribe of the Blackfeet Indian Reservation, the State of Montana, and the United States agree that the Tribal Water Right described in this Compact is in satisfaction of the water rights claims of the Tribe, its members and Allottees, and of the United States on behalf of the Tribe and its members and Allottees within the Blackfeet Indian Reservation or further as may be specified by Congress; and

WHEREAS, the Parties agree that it is in the best interest of all Parties that the water rights claims of the Blackfeet Tribe be settled through agreement between and among the Tribe, the State of Montana, and the United States.

NOW THEREFORE, the Parties agree to enter into this Compact for the purpose of settling the federally reserved water rights claims of the Blackfeet Tribe, its members, and Allottees of the Blackfeet Indian Reservation and of the United States on behalf of the Tribe, its

members and Allottees within the Blackfeet Indian Reservation or further as may be specified by Congress.

## ARTICLE II- DEFINITIONS

The following definitions shall apply for purposes of this Compact:

1. "Acre-foot" or "Acre-feet" or "AF" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet of water.

2. "Acre-Feet per Year" or "AFY" means an annual quantity of water measured in acre-feet over a period of a calendar year.

3. "Allottee" or "Allottees" means any individual or individuals who own or hold a trust allotment or interest in a trust allotment on the Reservation under the authority of the General Allotment Act (24 Stat. 388) and the Blackfeet Allotment Acts (34 Stat. 1035 and 41 Stat. 3), and subject to the terms and conditions of those Acts.

4. "Annual" means during one calendar year.

5. "Available St. Mary River Water" means: a) water from the St. Mary River allocated to the United States under the Boundary Waters Treaty minus that quantity of water required for the Milk River Project Water Right; and/or b) water otherwise part of the Milk River Project Water Right but made available to the Tribe by the United States without any net reduction to the legal entitlements to water of water users within entities with contracts for water from the Milk River Project Water Right, as those legal entitlements may be determined initially by the Secretary or subsequently by a court of competent jurisdiction.

6. "Badger Creek Drainage" means Badger Creek and its tributaries within the Reservation within Basin 41M, as shown in Appendix __.

7. "Basin 40F" means the hydrologic Basin 40F, including the Milk River and its tributaries, as shown in Appendix __.

8. "Basin 41L" means the hydrologic Basin 41L, including Cut Bank Creek and its tributaries, as shown in Appendix __.

9. "Basin 41M" means the hydrologic Basin 41M, including Birch Creek, Badger Creek, Two Medicine River and their respective tributaries, as shown in Appendix __.

10. "Basin 40T" means the hydrologic Basin 40T, including the St. Mary River and its tributaries, as shown in Appendix __.

11. "Birch Creek" means the mainstem of the southern boundary stream of the Reservation from the southwestern Reservation boundary to the confluence of the Two Medicine River, as shown in Appendix __.

12. "Birch Creek Drainage" means Birch Creek and its tributaries within the Reservation within Basin 41M, as shown in Appendix __.

13. "Birch Creek Management Plan" means the management plan entered into by the Tribe, the State, the Bureau of Indian Affairs and the Pondera County Canal and Reservoir Company, attached hereto as Appendix __, and any amendments thereto. Such amendments are pursuant to, and shall not be deemed a modification or amendment of, this Compact.

14. "Blackfeet Irrigation Project" means the irrigation project authorized by federal law for development on the Reservation in Basins 41L and 41M, and currently administered by the United States Department of the Interior, Bureau of Indian Affairs.

15. "Blackfeet Water Resources Department" or "BWRD" means the Blackfeet Water Resources Department, or any successor agency.

16. "Board" means the Blackfeet-Montana Compact Board established by Section J.1 of Article IV of this Compact.

17. "Boundary Waters Treaty" means the "Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada," entered into on January 11, 1909, and ratified by the Senate on May 13, 1910 (36 Stat. 2448).

18. "Call" means the right of the holder of a water right with a senior priority and an immediate need for a recognized use to require a holder of a water right with a junior priority to refrain from diverting water otherwise physically available.

19. "Cfs" means cubic feet per second.

20. "Change in Use" means a change in the point of diversion, the place of use, the purpose of use, the period of use or the place or means of storage, including for Lease.

21. "Compact" means this water rights settlement entered into by the Blackfeet Tribe, the State and the United States.

22. "Cut Bank Creek Drainage" means Cut Bank Creek and its tributaries within the Reservation within Basin 41L, as shown in Appendix __.

23. "Direct Use" means diversion of water from the Natural Flow of a source to be used for a designated purpose without intermediate storage.

24. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor agency.

25. "Effective Date" means the date on which the Compact is finally approved by the Tribe, by the Montana legislature and by the Congress of the United States, whichever date is latest.

26. "Excepted Rights" means any right excepted from the permitting requirements of State law to appropriate Stock Water for impoundments or pits with a priority date after the Effective Date of this Compact, any right exempt from the permitting requirements of State law to appropriate Ground Water with a priority date after the Effective Date of this Compact, temporary emergency appropriations made after the Effective Date of this Compact and as provided in 85-2-113, MCA, and those small Stock Water and Ground Water rights that are developed free from pre-development review, and those temporary emergency uses to protect lives or property, under tribal law, as each may be applicable.

27. "Existing Uses" means, as applied to the Tribal Water Right, uses both existing and that historically existed, from both Natural Flow and Ground Water, including irrigation use on all assessable and temporarily non-assessable lands within the Blackfeet Irrigation Project, as of the date the ratification of the Compact by the Montana legislature becomes effective. The following shall be considered Existing Uses and not New Developments:

a. water made available by the replacement, repair or rehabilitation of storage facilities existing as of the Effective Date of the Compact to their originally designed capacity;
b. water made available by the rehabilitation, betterment, enlargement, improvement and/or construction of facilities of the Badger-Fisher Irrigation Unit of the Bureau of Indian Affairs' Blackfeet Irrigation Project and other related facilities, specifically:
    i. rehabilitation and betterment of the Four Horns Feeder Canal system up to at least 300 cfs in capacity;
    ii. enlargement of the existing off-stream Four Horns Dam and Reservoir to its maximum practical capacity;
    iii. 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;
    iv. rehabilitation and betterment of the outlet canal delivery system from Four Horns Dam to Blacktail Creek;
    v. rehabilitation and betterment of the Badger-Fisher Main Canal; and

vi. measures to enhance on-farm efficiency in the Badger-Fisher Irrigation Unit of the Blackfeet Irrigation Project;

c. water made available by the rehabilitation and betterment of Lower Two Medicine Lake and Mission Lake;

d. water used by the development of the Two Medicine Water Treatment Plant and Municipal Water Project and associated delivery works, including delivery of water to East Glacier, Browning, Seville and Cut Bank; and

e. water used by the development of the Babb municipal water supply system.

28. "Ground Water" means any water that is beneath the ground surface.

29. "Harm" means an impact on a water right resulting in a material injury.

30. "Lake Elwell" means the water impounded on the Marias River in Montana by Tiber Dam, a feature of the Lower Marias Unit, Pick-Sloan Missouri Basin Program built pursuant to the Act of December 22, 1944 (56 Stat. 887), as set forth in House Document 475 and Senate Document 191, as revised and coordinated by Senate Document 247, 78th Congress, Second Session.

31. "Milk River Drainage" means the Milk River and its tributaries within the Reservation within Basin 40F, as shown in Appendix __.

32. "Milk River Project" means the Bureau of Reclamation project conditionally approved by the Secretary of the Interior on March 14, 1903, under the Act of June 17, 1902 (32 Stat. 388, chapter 1093), commencing at Lake Sherburne Reservoir and providing water to a point approximately 6 miles east of Nashua, Montana. The St. Mary Storage Unit was authorized on March 25, 1905 by the Secretary of the Interior. Fresno Dam, constructed under the National Industrial Recovery Act, was approved by the President in August 1935, pursuant to the acts of June 25, 1910, and December 5, 1924. The Dodson Pumping Unit was approved by the President on March 17, 1944, under the Water Conservation and Utilization Act of August 11, 1939.

33. "Milk River Project Water Right" is included herein as a Water Right Arising Under State Law and means those water rights held by the United States Bureau of Reclamation on behalf of the Milk River Project as finally adjudicated by the Montana Water Court.

34. "Missouri River Basin" means the hydrologic basin of the Missouri River and its tributaries.

35. "Natural Flow" means the water that would exist in a watercourse absent human intervention.

36. "New Development" means the development of a use of the Tribal Water Right set forth in this Compact, from any source, commencing after the date the ratification of the Compact by the Montana legislature becomes effective, and encompasses all uses of the Tribal Water Right not defined as Existing Uses.

37. Non-irrigation Use" means the use of a water right for purposes other than irrigation.

38. "Parties" means the Tribe, the State, and the United States.

39. "Person" means an individual or any other entity, public or private, including the Tribe, the State, and the United States, and all officers, agents and departments of each of the above.

40. "Recognized Under State Law" means, as applied to a water right, a water right arising under Montana law and does not include water rights arising under federal law.

41. "Reservation" means the Blackfeet Indian Reservation of Montana as established by the Treaty of October 17, 1855, 11 Stat. 657, and as the Reservation was modified by Executive Order of July 5, 1873, I Kappler 855; the Act of April 15, 1874, 18 Stat. 28; Executive Order of August 19, 1874, I Kappler 856; Executive Order of April 13, 1875, I Kappler 856; Executive Order of July 13, 1880, I Kappler 856; Agreements with the Blackfeet, ratified by the Act of May 1, 1888, 25 Stat. 113; and Agreement with the Blackfeet, ratified by the Act of June 10, 1896, 29 Stat. 321, 353.

42. "St. Mary River Drainage" means the St. Mary River and its tributaries within the Reservation within Basin 40T, as shown in Appendix __.

43. "Secretary" means the Secretary of the United States Department of the Interior, or the Secretary's duly authorized representative.

44. "State" means the State of Montana and all officers, agencies, departments and political subdivisions thereof.

45. "Stock Water" means water used for livestock.

46. "Lease" means, as applied to the Tribal Water Right, to authorize a Person or Persons to use all or any part of the Tribal Water Right through a service contract, temporary assignment, or other similar agreement of limited duration.

47. "Tribal Water Right" means the right of the Blackfeet Tribe, including any Tribal member or Allottee, to divert, use or store water as described in Article III of this Compact.

48. "Tribe" means the Blackfeet Tribe of the Blackfeet Indian Reservation and all officers, agencies, and departments thereof.

49. "Two Medicine River Drainage" means the Two Medicine River and its tributaries within the Reservation within Basin 41M, as shown in Appendix __.

50. "Upper Birch Creek Drainage" means that portion of the Birch Creek Drainage within the Reservation from Swift Dam to the confluence of Blacktail Creek, as shown in Appendix __.

51. "United States" means the federal government and all officers, agencies and departments thereof.

52. "Water Rights Arising Under State Law" means those valid water rights Recognized Under State Law existing as of the date the ratification of the Compact by the Montana legislature becomes effective, and not subsequently relinquished or abandoned, as: decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by DNRC; issued, as State water reservations, by the Montana Board of Natural Resources and Conservation or DNRC; exempted from filing in the State adjudication pursuant to 85-2-222, MCA; excepted from the permitting process pursuant to 85-2-306, MCA. The following State water reservations, though Recognized Under State Law, do not constitute Water Rights Arising Under State Law as that term is used in this Compact: Water Reservation Nos. 41L 71688 and 41M 72585 other than the portion authorized for use as PO-171-071-01; and Water Reservation Nos. 41M 30017392, 41M 30017536 other than the portion arising off the Reservation, and 41L 30017445, as shown in Appendix __.

## ARTICLE III – TRIBAL WATER RIGHT

**A. Religious or Cultural Uses.** The Tribal Water Right described in this Article III includes all traditional religious or cultural uses of water by Blackfeet Tribal members within the Reservation.

**B. Right of Use.** All Existing Uses by the Tribe, its members and Allottees are included in the Tribal Water Right recognized in this Compact. Such uses include but are not limited to irrigation, Stock Water, domestic, municipal, storage and those uses identified in Article III.A.

**C. Basin 41M - Birch Creek Drainage.**

**1. Quantification.**

a. **Irrigation right.** The Tribe has a Direct Use water right of 100 Cfs of the Natural Flow of Birch Creek for irrigation use in the Upper Birch Creek

drainage. This right may be changed to another place of use or purpose of use only in accordance with Article IV.D.3.

b. **In-stream Flow Right.**

i. The Tribe also has an in-stream Natural Flow right in Birch Creek of 15 Cfs from October 1 to March 31, and 25 Cfs from April 1 to September 30 of each year. The Tribe may establish, in its discretion and after conferral with appropriate fish and wildlife agencies, a lesser in-stream Natural Flow level of not less than 10 Cfs. Subject to Appendix 1, the Tribe may use all or part of the difference between the in-stream Natural Flow right set forth herein and any lesser in-stream Natural Flow level of not less than 10 Cfs at any place of use and for any purpose of use.

ii. Other than as set forth in Article III.C.1.b.i, the in-stream flow right set forth herein shall not be subject to change to any other use, provided that the emergency use of water pursuant to Article III.H.5 shall not be considered a change or alteration in use, or a violation of a water right for in-stream flow.

c. **Additional Flow Right.** After satisfaction of all Water Rights Arising Under State Law in Basin 41M, the Tribe may divert or authorize the use of the Natural Flow in Birch Creek as measured at the State Highway 358 bridge crossing Birch Creek and any gaining flows available from the same bridge crossing to Birch Creek's confluence with the Two Medicine River.

d. **Ground Water Right.** The Tribe also has a right to all Ground Water in the Birch Creek Drainage that is not hydrologically connected to Birch Creek, and to develop or permit the development of Excepted Rights in the Birch Creek Drainage.

2. **Priority Date.** The priority date of the Tribal Water Right set forth in Article III.C.1 shall be October 17, 1855.

3. **Period of Use.**

a. Except as provided in Article IV.D.3, the period of use of the water right set forth in Article III.C.1.a shall be April 1 to October 1 of each year.

b. The period of use of the water right set forth in Article III.C.1.b, c and d shall be January 1 to December 31 of each year.

4. **Points and Means of Diversion.** Subject to the terms and conditions of Article IV of this Compact, and in addition to what is specifically authorized in Article III.C.1.b.i, the Tribe may divert or permit the diversion of the water right set forth in Article III.C.1.a and c from any point on Birch Creek for use within the Reservation and by any means authorized by the Tribal Water Code, or permit the diversion of the water right set forth in Article III.C.1.c from a point off the Reservation pursuant to a Lease under Article IV.D.2.

5. **Purposes.** The water right set forth in Article III.C.1 may be used for any purpose consistent with the terms of this Compact and allowed by Tribal or federal law, and pursuant to the terms of the Birch Creek Management Plan.

6. **Call Protection.** All Water Rights Arising Under State Law using water from sources other than Birch Creek within Basin 41M shall be protected from any Call for the in-stream flows set forth in Article III.C.1.b.

7. **Commencement of Development.** In addition to the foregoing, the exercise of the water rights set forth in Article III.C.1.a. and b. is subject to the Agreement Regarding Birch Creek Water Use entered into by the Tribe and the State on ___, 2007.

**D. Basin 41M - Badger Creek Drainage and Two Medicine River Drainage.**

1. **Quantification.**

a. The Tribe has a water right to all Natural Flow and Ground Water within the Badger Creek and Two Medicine Drainages, with the exception of those waters subject to the Water Rights Arising Under State Law in those drainages.

b. Of the Tribal Water Right set forth in Article III.D.1.a, 20 Cfs shall be dedicated to maintain an in-stream flow in the mainstem of Badger Creek within the Badger Creek Drainage, and 20 Cfs shall be dedicated to maintain an in-stream flow in the mainstem of the Two Medicine River within the Two Medicine River Drainage. The in-stream flow right set forth in this Article III.D.1.b shall not be subject to change to any other use, provided that the emergency use of water pursuant to Article III.H.5 shall not be considered a change or alteration in use, or a violation of a water right for in-stream flow.

c. The Tribe is entitled to develop such storage as is necessary to effectuate the right set forth in Article III.D.1.a.

2. **Priority Date.** The priority date of the Tribal Water Right set forth in Article III.D.1 shall be October 17, 1855.

3. **Period of Use.** The period of use of the water right set forth in Article III.D.1 shall be January 1 to December 31 of each year.

4. **Points and Means of Diversion.** Subject to the terms and conditions of Article IV of this Compact, the Tribe may divert or permit the diversion of the water right set forth in Article III.D.1 from any point within the Reservation for use within the Reservation and by any means authorized by the Tribal Water Code, or permit the diversion of the water right set forth in Article III.D.1 from a point off the Reservation pursuant to a Lease under Article IV.D.2.

5. **Purposes.** The water right set forth in Article III.D.1 may be used for any purpose consistent with the terms of this Compact and allowed by Tribal or federal law.

6. **Call Protection.** All Water Rights Arising Under State Law within Basin 41M shall be protected from any Call from any user of the Tribal Water Right, with the exceptions of Calls for the in-stream flows set forth in Article III.D.1.b, Calls for stored water, and Calls for water diverted from another hydrologic basin.

**E. Basin 41L - Cut Bank Creek Drainage.**

**1. Quantification.**

a. The Tribe has a water right to all Natural Flow and Ground Water within the Cut Bank Creek Drainage, with the exception of those waters subject to the Water Rights Arising Under State Law in that drainage.

b. Of the water right set forth in Article III.E.1.a, 2 Cfs shall be dedicated to maintain an in-stream flow in the mainstem of Cut Bank Creek as shown on Appendix__. The in-stream flow right set forth in this Article III.E.1.b shall not be subject to change to any other use, provided that the emergency use of water pursuant to Article III.H.5 shall not be considered a change or alteration in use, or a violation of a water right for in-stream flow.

c. The Tribe is entitled to develop such storage as is necessary to effectuate the right set forth in Article III.E.1.a.

d. The Tribe shall defer New Development of the Tribal Water Right set forth in Article III.E.1.a for irrigation uses not relying exclusively on stored water or water diverted from another hydrologic basin for a period of ten years after the Effective Date of this Compact.

2. **Priority Date.** The priority date of the Tribal Water Right set forth in Article III.E.1 shall be October 17, 1855.

3. **Period of Use.** The period of use of the water right set forth in Article III.E.1 shall be January 1 to December 31 of each year.

4. **Points and Means of Diversion.** Subject to the terms and conditions of Article IV of this Compact, the Tribe may divert or permit the diversion of the water right set forth in Article III.E.1 from any point within the Reservation for use within the Reservation and by any means authorized by the Tribal Water Code, or permit the diversion of the water right set forth in Article III.E.1 from a point off the Reservation pursuant to a Lease under Article IV.D.2.

5. **Purposes.** The water right set forth in Article III.E.1 may be used for any purpose consistent with the terms of this Compact and allowed by Tribal or federal law.

6. **Call Protection.** All Water Rights Arising Under State Law for Non-Irrigation Uses within Basin 41L shall be protected from any Call from any user of the Tribal Water Right, with the exceptions of Calls for the in-stream flows set forth in Article III.E.1.b, Calls for stored water, and Calls for water diverted from another hydrologic basin.

**F. Basin 40F - Milk River Drainage.**

1. **Quantification.**

a. The Tribe has a water right to all Natural Flow and Ground Water available to the United States under the Boundary Waters Treaty and all Ground Water not subject to the Boundary Waters Treaty in Basin 40F within the Reservation, with the exception of those waters subject to the Water Rights Arising Under State Law in Basin 40F on the Reservation.

b. Of the water right set forth in Article III.F.1.a, 2 Cfs shall be dedicated to maintain an in-stream flow in the Milk River, as shown on Appendix ___. The in-stream flow right set forth in this Article III.F.1.b shall not be subject to change to any other use, provided that the emergency use of water pursuant to Article III.H.5 shall not be considered a change or alteration in use, or a violation of a water right for in-stream flow.

c. The Tribe is entitled to develop such storage as is necessary to effectuate the right set forth in Article III.F.1.a.

d. The Tribe shall defer New Development of the Tribal Water Right set forth in Article III.F.1.a for irrigation uses not relying exclusively on stored water or water diverted from another hydrologic basin for a period of ten years after the Effective Date of this Compact.

2. **Priority Date.** The priority date of the Tribal Water Right set forth in Article III.F.1 shall be October 17, 1855.

3. **Period of Use.** The period of use of the water right set forth in Article III.F.1 shall be January 1 to December 31 of each year.

4. **Points and Means of Diversion.** Subject to the terms and conditions of Article IV of this Compact, the Tribe may divert or permit the diversion of the water right set forth in Article III.F.1 from any point within Basin 40F within the Reservation for use within the Reservation and by any means authorized by the Tribal Water Code, or permit the diversion of the water right set forth in Article III.F.1 from a point off the Reservation pursuant to a Lease under Article IV.D.2.

5. **Purposes.** The water right set forth in Article III.F.1 may be used for any purpose consistent with the terms of this Compact and allowed by Tribal or federal law.

6. **Call Protection.** All Water Rights Arising Under State Law for Non-Irrigation Uses within Basin 40F on the Reservation shall be protected from any Call from any user of the Tribal Water Right, with the exceptions of Calls for the in-stream flows set forth in Article III.F.1.b, Calls for stored water, and Calls for water diverted from another hydrologic basin.

**G. Basin 40T - St. Mary River Drainage.**

1. **Quantification.**

**a. St. Mary River.** The Tribe has a water right to:

i. 50,000 Acre Feet per Year of water from the St. Mary River Drainage, other than Lee Creek and Willow Creek, subject to the Boundary Waters Treaty and the terms of Article IV.D.4; and

ii. all Ground Water in the St. Mary River Drainage not subject to the Boundary Waters Treaty.

**b. Lee Creek.** The Tribe also has the right to all Natural Flow available to the United States under the Boundary Waters Treaty and all Ground Water in Lee

Creek within the Reservation, with the exception of those waters subject to Water Rights Arising Under State Law in Lee Creek.

**c. Willow Creek.** The Tribe also has the right to all Natural Flow available to the United States under the Boundary Waters Treaty and all Ground Water in Willow Creek (also known as Rolf Creek) within the Reservation, with the exception of those waters subject to Water Rights Arising Under State Law in Willow Creek.

**d. Additional Waters.** After satisfaction of all Water Rights Arising Under State Law and full development, pursuant to Article IV.D.4, of the Tribal Water Right set forth in Article III.G.1.a.i, the Tribe also has the right to the remaining portion of the United States' share of the St. Mary River under the Boundary Waters Treaty for any tribally authorized use and need.

**e. Storage.** The Tribe is entitled to develop such storage within the Reservation as is necessary to effectuate the right set forth in Article III.G.1.a-d.

2. **Priority Date.** The priority date of the Tribal Water Right set forth in Article III.G.1 shall be October 17, 1855.

3. **Period of Use.** The period of use of the water right set forth in Article III.G.1 shall be from January 1 through December 31 of each year.

4. **Points and Means of Diversion.** Subject to the terms and conditions of Article IV of this Compact, the Tribe may divert or permit the diversion of the water right set forth in Article III.G.1 from any point within the Reservation for use within the Reservation and by any means authorized by the Tribal Water Code and, if necessary, federal law, or permit the diversion of the water right set forth in Article III.G.1 from a point off the Reservation pursuant to a Lease under Article IV.D.2.

5. **Purposes.** The water right set forth in Article III.G.1 may be used for any purpose consistent with the terms of this Compact and allowed by Tribal or federal law.

6. **Call Protection.** All Water Rights Arising Under State Law within Basin 40T shall be protected from any Call from any user of the Tribal Water Right, except for Calls for stored water or water diverted from another hydrologic basin.

**H. Additional Rights to Water.** In addition to the water rights specifically set forth in Article III.A-G of this Compact, the Tribe has the following rights to water:

1. **Lake Elwell.** As part of the Tribal Water Right, the Tribe shall be entitled to an allocation of stored water in Lake Elwell as agreed to by the Parties and as provided by Congress, measured at the dam, for use or disposition by the Tribe for any beneficial purpose, pursuant to the terms of this Compact; provided that such allocation shall be in accordance with the terms and conditions of any Act of Congress ratifying this Compact. Except as directed by Congress, the United States shall have no responsibility or obligation to provide any facility for the transport of water allocated under Article III.H.1 to the Reservation or to any other location.

2. **Appurtenant Water Rights.** For land within the Reservation acquired after the Effective Date of this Compact, the Tribe has the right to any Water Right Arising Under State Law acquired as an appurtenance to the land. At such time as the acquired land is transferred to trust status, the water right appurtenant to the land acquired shall be added to the Tribal Water Right quantified in this Compact with an October 17, 1855 priority date, provided that the Tribe shall continue to use the acquired right as historically used or may change the use of the right pursuant to the provisions set forth in Article IV.D. The Tribe shall notify DNRC of any acquisition of water upon acquisition or no later than in the Tribe's annual report and shall identify the water right acquired, as set forth in Article IV.I.5. Any water right acquired shall be added as decreed by the Montana Water Court to the list of Existing Uses of the Tribal Water Right as provided in Article IV.I.3 of this Compact.

3. **Water Rights Arising Under State Law - Relinquishment or Abandonment.** Any portion of a Water Right Arising Under State Law within the Reservation that is voluntarily relinquished or is determined under State law to be abandoned, relinquished, or having otherwise ceased to exist, shall be stricken from the relevant basin decree as a Water Right Arising Under State Law and be entitled to no further protection as such a right pursuant to this Compact.

4. **Lakes, Ponds and Wetlands.** As part of the Tribal Water Right, the Tribe, its members and Allottees have the right to all water naturally occurring in all lakes, ponds, wetlands and other such water bodies located within the Reservation on trust lands and fee lands owned by the Tribe, its members or Allottees as of the Effective Date of this Compact.

5. **Emergency Use.** The Tribe has the right to use or authorize the use of water from any source on the Reservation for temporary emergency appropriations necessary to protect lives or property.

I. **Use of the Tribal Water Right on the Blackfeet Irrigation Project.** The use of the water rights set forth in Article III.C through E on units of the Blackfeet Irrigation Project as

part of that Blackfeet Irrigation Project is a use of the Tribal Water Right, and the use of this water shall be subject to federal law.

**J. Basin Closures.**

1. In those portions of Basins 40F, 40T, 41L and 41M within the Reservation, and from the mainstems of the Reservation boundary streams (Birch Creek, Cut Bank Creek, and the Two Medicine River), DNRC shall not process or grant any application for an appropriation received after the ratification of this Compact by the Montana legislature becomes effective. Provided that, in accordance with the terms and conditions of Article IV.G.1, DNRC may issue a certificate of water right or permit for use on fee land for Excepted Rights from the sources otherwise closed by this subsection. Provided further that, after such time as the Tribe promulgates an amended water code pursuant to the provisions of Article IV.C, DNRC shall not issue a certificate of water right or permit for use on fee land within the Reservation for Excepted Rights from the sources otherwise closed by this subsection.

2. The basin closures set forth in Article III.J.1 are not a limit on use of the Tribal Water Right as set forth in this Compact.

3. The basin closures set forth in Article III.J.1 are not a limit on Change in Use or transfers of Water Rights Arising Under State Law, subject to the terms and conditions in Article IV.G.2.

**K. Proposed Decree.** For purposes of entry in the Montana Water Court, the proposed decree of the Tribal Water Right set forth in Article III of this Compact is attached as Appendix __. If there are differences between Appendix __ and the Final Decree, the Final Decree shall control.

## ARTICLE IV – IMPLEMENTATION OF COMPACT

**A. Trust Status of Tribal Water Right.** The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribe, its members and Allottees.

**B. Use of Tribal Water Right.**

1. **Persons Entitled to Use Tribal Water Right.** The Tribal Water Right may be used by the Tribe, and/or Persons authorized by the Tribe.

2. **Effect of Non-Use of the Tribal Water Right.** Non-use of all or any portion of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture, or abandonment of such rights.

**C. Tribal Water Right: Administration.**

1. Except as otherwise provided in this Compact, the use of the Tribal Water Right shall be administered by the Tribe, and the Tribe has the final and exclusive jurisdiction to resolve all disputes between or among users of the Tribal Water Right. The Tribal Water Right shall be administered and enforced pursuant to an amended tribal water code. The amended code shall be developed and adopted by the Tribe, following public comment, within one year of the Effective Date of this Compact. The code and any subsequent amendments thereto will not take effect until the Secretary has timely approved the code or any subsequent amendment thereto. The amended tribal water code shall include:

   a. a process by which any Allottee may request and be provided with an equitable distribution of water for irrigation use on the Allottee's trust allotment;

   b. a process for notice and a right to be heard for the consideration and determination of any request by an Allottee for an equitable distribution of water for irrigation use on the Allottee's trust allotment, including a process for formal review of denied or disputed distributions and for resolution of contested administrative decisions;

   c. a process by which any Person within the Reservation may apply for use of a portion of the Tribal Water Right, including for their historic use of water;

   d. a process by which any Person shall receive authorization for an Excepted Right, without pre-development review, including a Ground Water use, a Stock Water impoundment or pit, or an emergency use to protect lives or property, consistent with standards no more restrictive than those under State law for uses excepted from permitting requirements.

   e. a process by which determination of Harm shall be made, which shall include notice to potentially affected water users and the DNRC, due process, a written determination and the basis therefor, and full access to all information on which the determination is based.

   f. a process for protecting Ground Water from New Developments in areas where Ground Water may be inadequate due to either quantity or quality.

2. Administration and delivery of the Tribal Water Right within the Blackfeet Irrigation Project shall be conducted by the United States Department of the Interior, Bureau of Indian Affairs (BIA), in accordance with applicable federal laws. In the event the

Tribe assumes ownership of the Blackfeet Irrigation Project or the Tribe contracts the administration, operation and maintenance, and/or other functions of the Blackfeet Irrigation Project under the Indian Self-Determination and Education Assistance Act, P.L. 93-638, or the Tribe establishes a separate entity that assumes ownership of the Blackfeet Irrigation Project or contracts the administration, operation and maintenance, and/or other functions of the Blackfeet Irrigation Project under P.L. 93-638, administration and delivery of the Tribal Water Right within the Blackfeet Irrigation Project shall be conducted by the Tribe in accordance with applicable federal laws.

3. After approval by the Secretary of the Tribe's amended water code, the Tribe shall have sole and exclusive jurisdiction to issue authorizations for Excepted Rights, provided that any filing for use of a portion of the Tribal Water Right for an Excepted Right made with the DNRC shall be made on a form provided by the Tribe and, including any fee submitted in conjunction with the filing, shall be promptly forwarded to the BWRD for processing pursuant to the Tribal water code.

**D. Tribal Water Right: New Development or Change in Use.**

1. **Authorization.** Except as specifically set forth in Article IV.D.3, and subject to the conditions set forth immediately below, the Tribe may make or authorize a New Development or Change in Use of the Tribal Water Right. Except as set forth in the tribal water code pursuant to Article IV.C.1.e, any New Development or Change in Use shall not Harm any Water Right Arising Under State Law for Non-irrigation Uses.

2. **Lease.**

a. The Tribe may make a Lease for use off the Reservation of the following portion of the Tribal Water Right that has been put to use and/or stored prior to the provision of notice to the DNRC, pursuant to Article IV.D.2.b, or the date of the application for Change in Use, as applicable:

i. Water developed by Direct Use from Birch Creek pursuant to Article III.C.1.c, the Badger Creek Drainage and/or Two Medicine River Drainage pursuant to Article III.D.1, and/or the St. Mary River Drainage pursuant to Article III.G.1;

ii. Water stored from the Badger Creek Drainage and/or Two Medicine River Drainage pursuant to Article III.D.1; from the Cut Bank Creek Drainage pursuant to Article III.E.1; from the Milk River Drainage pursuant to Article III.F.1; from the St. Mary River Drainage pursuant to Article III.G.1; and/or in

Tiber Reservoir as allocated to the Tribe pursuant to Article III.H.1 or otherwise and federal law; and

iii. That portion of the Tribal Water Right quantified in Article III.C.1.b.i that the Tribe may use for purposes other than in-stream flow pursuant to the terms of that subsection.

b. The Tribe may make a Lease for use off the Reservation from the storage sources listed in Article IV.D.2.a ii and from the source identified in Article IV.D.2.a.iii so long as it provides notice in advance to the DNRC of the terms of the Lease and any modifications thereto or termination thereof. For Leases from the sources identified in Article IV.D.2.a.ii lasting one irrigation season or less, notice to the DNRC shall be provided as far in advance as practicable. For Leases from the sources identified in Article IV.D.2.a.ii lasting longer then one year, notice shall be provided to the DNRC no later than [ ] days prior to the date on which the Lease is to take effect. Provision of notice regarding Leases from the source identified in Article IV.D.2.iii shall be governed by the provisions of the Birch Creek Management Plan (Appendix 1). [Any such Lease shall provide that the State shall be responsible for calculating and enforcing reasonable transmission and carriage losses of water from the point the water leaves the Reservation to the place of delivery.]

c. The Tribe may make a Lease for use off the Reservation from the sources listed in Article IV.D.2.a.i provided that either the Tribe or its assignee, on behalf of the Tribe, first complies with the following provisions of State law as those provisions read on October 31, 2007:

i. Subsections (1)-(3), (5)(a) (with the exception of that portion of subsection (5)(a) that requires the application of §85-2-402(4), which shall not apply) and (8)-(17) of § 85-2-402, M.C.A.;

ii. Subsections (1)-(8) of §85-2-407, M.C.A., provided, however, that the term of any such Lease may be for up to 99 years, and the DNRC may approve the renewal of such a Lease for a period of up to 99 years; and

iii. §85-2-408, M.C.A.

If the assignee is the party submitting the change application (pursuant to §§ 85-2-402 and 407, M.C.A.) on behalf of the Tribe, the assignee must first have obtained approval of the Lease from the Tribe pursuant to the Tribal Water Code.

d. In the event that, after the Effective Date of this Compact, the Montana

legislature substantively amends or repeals any of the sections identified in Article IV.D.2.c, the Tribe and the DNRC shall meet no later than 60 days after the effective date of the State legislative action amending or repealing to determine whether the provisions set forth in Article IV.D.2.c or the new provisions of State law shall govern the process for off-Reservation Leases under this Compact. In the event that Tribe and the DNRC are unable to agree, the provisions of Article IV.D.2.c shall remain in effect. Any modification to the provisions of Article IV.D.2.c agreed to by the Tribe and the DNRC in response to future State legislative action shall be pursuant to and not a modification or amendment to this Compact.

e. If the Tribe receives a good faith offer from a Person for Lease of a portion of the Tribal Water Right in Birch Creek pursuant to Article III.C.1.c to an off-Reservation point of diversion or place of use, or in the Badger Creek Drainage set forth in Article III.D.1 to an off-Reservation point of diversion or place of use, and if delivery facilities exist to otherwise allow the diversion of Badger Creek water into Birch Creek, the Tribe shall allow holders of Water Rights Arising Under State Law using water out of Birch Creek the first opportunity to acquire use of such rights on the same terms and conditions as the good faith offer.

f. If the Tribe receives a good faith offer from a Person for Lease of a portion of the Tribal Water Right in the Cut Bank Creek Drainage set forth in Article III.E.1 to an off-Reservation point of diversion or place of use, the Tribe shall allow holders of Water Rights Arising Under State Law using water from the Cut Bank Creek Drainage the first opportunity to acquire use of such rights on the same terms and conditions as the good faith offer.

g. If the Tribe receives a good faith offer from a Person for Lease of a portion of the Tribal Water Right in the Milk River Drainage set forth in Article III.D.1 to an off-Reservation point of diversion or place of use, the Tribe shall allow holders of Water Rights Arising Under State Law using water from the Milk River Drainage the first opportunity to acquire use of such rights on the same terms and conditions as the good faith offer.

h. If the Tribe receives a good faith offer from a Person for Lease of a portion of the Tribal Water Right in the St. Mary River set forth in Article III.G to an off-Reservation point of diversion or place of use, the Tribe shall allow water users receiving water from the Milk River Project the first opportunity, and other Milk River water users the second opportunity, to acquire use of such rights on the same terms and conditions as the good faith offer.

i. Except as may be provided by Congress, the off-Reservation use of any portion of the Tribal Water Right set forth in Article III.C.1.b, III.D.1, III.E.1 or III.F.1 is limited to a place of use within the Missouri River Basin.

j. No Lease of any portion of the Tribal Water Right may permanently alienate the water right.

k. The Tribe or any Person using diversion or transportation facilities located off the Reservation in connection with a use of the Tribal Water Right shall apply for and obtain all permits, certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water, prior to exercising a use of the Tribal Water Right off the Reservation.

**3. Special Rules for Changes in Use of the Birch Creek Water Right Set Forth in Article III.C.1.a.**

a. Change in Place of Use. The Tribe may change or authorize a change in the place of use of the water right set forth in Article III.C.1.a only if:

i. the proposed change in place of use is to the Badger-Fisher Unit of the Blackfeet Irrigation Project, or to other areas of the Birch Creek Drainage served by water out of the Badger Creek Drainage; and

ii. there is a need for irrigation water beyond available supplies in those areas due to constraints imposed on the Badger-Fisher Unit by the physical availability of water other than as a result of Leases, a failure of delivery capabilities, or significant adverse environmental impacts of continued delivery of Badger Creek water due to degraded delivery systems or otherwise; and

iii. total annual diversions to the Badger-Fisher Unit pursuant to the water right set forth in Article III.C.1.a do not exceed the volume of water needed to supply 75% of the net irrigation requirement for a crop mix of 75% alfalfa and 25% small grains delivered at 50% efficiency for 6000 acres, and the flow rate of the right set forth in Article III.C.1.a for use in the Upper Birch Creek Drainage is reduced by the flow rate of water being diverted for use in the Badger-Fisher Unit.

b. Change in Purpose of Use. The Tribe may change or authorize a change in the purpose of use of the water right set forth in Article III.C.1.a up to a maximum

of 6250 AFY. The relationship between the quantity and flow rate of water proposed for change and the quantity of water available for irrigation pursuant to the water right set forth in Article III.C.1 shall be determined by the following formula:

The volume of water proposed to be changed will be divided by 50% to determine the diverted volume of the Tribal change. This diverted volume of the Tribal change is subtracted from the modeled average diversion volume (12,500 acre-feet) to determine the changed average diversion volume. The new irrigation diversion flow rate is established by dividing the changed average diversion volume by the modeled diversion volume and multiplying this quotient by the flow rate set forth in Article III.C.1.a (100 Cfs). Several example scenarios are shown in Appendix __.

**4. Development of the Tribe's St. Mary River Right Set Forth in Article III.G.1.a.i.** As directed by Congress, and after appropriate investigation and study, the Parties shall identify and the United States shall provide the Tribe, from Available St. Mary River Water, and/or from any other source mutually agreed to by the Parties, sufficient water to fulfill the Tribe's water right set forth in Article III.G.1.a.i. The fulfillment of the Tribe's water right set forth in Article III.G.1.a.i, pursuant to this subsection, from any water subject to the Milk River Project Water Right may occur only in a manner that causes no injury to the Milk River Project Water Right and shall not require current or future Milk River Project water users or their contracting entity or entities to subsidize or pay for any costs required to develop or fulfill the water right set forth in Article III.G.1.a.i. The use of the Tribe's water right set forth in Article III.G.1.a.i, or of any portion of that right, shall commence only after the Parties have mutually agreed in writing that water has been identified and is available to fulfill that right or any portion of it consistent with the terms of this Compact.

**E. Subsequent Federal or State Law.** Administration under Article IV.C.2 and Article IV.F.1 shall be as set forth in this Compact except as may otherwise be determined by a court of competent jurisdiction or established by Congress.

**F. Water Rights Arising Under State Law: Administration.**

1. The State shall administer and enforce all Water Rights Arising Under State Law to the use of Natural Flows and Ground Water within and outside the Reservation. The State shall have the final and exclusive jurisdiction to resolve all disputes between holders of Water Rights Arising Under State Law.

2. The State shall not administer or enforce any part of the Tribal Water Right within the Reservation.

**G. Water Rights Arising Under State Law: New Uses or Change in Use.**

**1. Limit on New Uses.** DNRC shall not process or grant an application for an appropriation within those portions of the Basins closed pursuant to Article III.J received after the ratification of this Compact by the Montana legislature becomes effective, provided that, DNRC may process applications and issue certificates of water right or permits for use on fee land of those uses excepted from the closures as set forth in Article III.J until such time as the Secretary approves an amended tribal water code promulgated pursuant to the provisions of Article IV.C. After approval of the amended water code by the Secretary, filings for Excepted Rights shall be processed pursuant to the provisions of Article IV.C.3.

**2. Change in Use of Water Rights Arising Under State Law within the Reservation.** The State may authorize a Change in Use of a Water Right Arising Under State Law within the Reservation in accordance with State law. DNRC shall provide timely notice to the Tribe of every application for change.

**H. Cooperative Ground Water Management.** BWRD may designate or modify a controlled Ground Water area within the Reservation pursuant to Article IV.C.1.f and applicable tribal law. DNRC may designate or modify a controlled Ground Water area adjacent to the Reservation pursuant to applicable State law. DNRC may manage a permanent or temporary controlled Ground Water area adjacent to the Reservation in cooperation with BWRD.

**I. Information Sharing.**

1. Within one year after a hydrologic basin subject to this Compact is finally decreed by the Montana Water Court, the DNRC shall provide the BWRD and the United States with a report listing all decreed Water Rights Arising Under State Law within that hydrologic basin.

2. Within one year after the date the ratification of this Compact by the Montana legislature becomes effective, the DNRC shall provide the BWRD and the United States with a report listing all uses pursuant to permits and water reservations, and those uses excepted from the permitting requirements of State law to the extent that the DNRC has such information.

3. Within one year after the ratification of this Compact by the Montana legislature becomes effective, the BWRD and the United States shall provide the DNRC with a report listing all Existing Uses of the Tribal Water Right, provided that, due to the small and varied nature of the traditional religious and cultural uses identified in Article III.A,

such uses need not be included on the report required by this subsection. The Parties shall concur in the listing of all Existing Uses of the Tribal Water Right within six months after receipt of the report.

4. On an annual basis DNRC shall provide the Tribe and the United States with a listing of all Excepted Rights for which a certificate of water right or permit has been issued or a Change in Use has been approved by DNRC within the Reservation and in drainages affected by this Compact, and an ownership update for each water right within the Reservation and in drainages affected by this Compact whose owner of record has been changed in DNRC's database.

5. On an annual basis BWRD shall provide the DNRC and the United States with an update since the last report listing all New Development of the Tribal Water Right described in this Compact within and outside the Reservation, of all Changes in Use of water rights within and outside the Reservation, and of all appurtenant water rights acquired pursuant to Article III.H.2.

6. The BWRD, the DNRC, and the United States may agree to modify the reporting requirements set forth in Article IV.I. Such modification is pursuant to, and shall not be deemed a modification of, this Compact.

7. Any Party may request additional information from any other Party to assist in reviewing any report made by one Party to another.

**J. Enforcement: Blackfeet-Montana Compact Board.**

**1. Establishment of Board.** There is hereby established the Blackfeet-Montana Compact Board. The Board shall consist of three members: one member selected by the Governor of the State of Montana, after consultation with affected water users; one member appointed by the Chairman of the Blackfeet Tribal Business Council; and one member selected by the other two members. All members shall be appointed within six months of the Effective Date of this Compact and within thirty days of the date any vacancy occurs. If an appointment is not timely made by the Governor, the Director of DNRC or the Director's designee shall fill the State's position. If an appointment is not timely made by the Chairman of the Blackfeet Tribal Business Council, the Director of BWRD or the Director's designee shall fill the Tribe's position. Each member shall serve a five-year term and shall be eligible for reappointment. The initial term of each member shall be staggered with one member serving a five-year term, one a four-year term, and one a three-year term. The initial term of each member shall be chosen by lot. Expenses of the members appointed by the State and the Tribe shall be borne by the entity appointing the member. The expenses of the third member and all other expenses shall be borne equally by the Tribe and the State, subject to the availability of funds.

**2. Membership.** Should the two appointed members fail to agree on the selection of a third member within sixty days of the date of appointment of the second member, or within thirty days after any vacancy occurs, the following procedure shall be utilized:

a. Within five days thereafter each member shall nominate three persons to serve as a member of the Board;

b. Within fifteen days thereafter each member shall reject two of the persons nominated by the other member;

c. Within five days thereafter, the remaining two nominees shall be submitted to the chief judge of the United States District Court for the District of Montana for selection of the third member of the Board.

**3. Quorum and Vote Required**. Two members of the Board shall constitute a quorum if reasonable notice of the time, place, and purpose of the meeting, hearing, or other proceeding has been provided in advance to the absent member. All Board decisions shall be by a majority of the Board.

**4. Jurisdiction of the Board.**

a. The Blackfeet-Montana Compact Board shall have jurisdiction to resolve controversies over the right to the use of water as between the Parties or holders of water rights developed or authorized under the Tribal Water Right and holders of Water Rights Arising Under State Law. Such controversies shall include, but shall not be limited to, disputes as to the meaning of this Compact, disputes over the application and interpretation of the provisions of Article IV.D.3, disputes over the application and interpretation of the provisions of the Birch Creek Management Plan, and disputes between holders of Excepted Rights issued pursuant to Article IV.C.3 who are not enrolled members of the Tribe and other water right holders under either State or tribal law.

b. The jurisdiction of the Board shall not extend to the administration or distribution of water on lands served by the Milk River Project, nor to the diversion of water made outside the Reservation for Milk River Project use, nor to the administration or distribution of water on lands served by the Blackfeet Irrigation Project, nor to the administration or distribution of water on lands served by the Pondera County Canal and Reservoir Company.

**5. Prerequisite Administrative Procedures.**

a. Any Tribal Water Right holder concerned that a use of water by a holder of a Water Right Arising Under State Law is inconsistent with the Compact shall first contact the BWRD. If the BWRD and the DNRC are unable to resolve the issue in a manner acceptable to the Tribal Water Right holder within a reasonable time through discussion, the BWRD or the Tribal Water Right holder may seek relief through the Compact Board. The DNRC agrees to assist the BWRD in obtaining reasonable access onto the land of the holder of the Water Right Arising Under State Law to acquire information regarding the challenged use.

b. Any holder of a Water Right Arising Under State Law concerned that an exercise of the Tribal Water Right is inconsistent with the Compact shall first contact the DNRC. If the DNRC and the BWRD are unable to resolve the issue in a manner acceptable to the water right holder within a reasonable time through discussion, the DNRC or the water right holder may seek relief through the Compact Board. The Tribe agrees to allow the DNRC reasonable access onto Tribal land or to assist the DNRC in obtaining reasonable access onto the land of the Tribal Water Right holder to acquire information regarding the challenged exercise.

c. The BWRD and the DNRC may jointly develop supplemental procedures as necessary or appropriate after consultation with affected water right holders. Such supplemental procedures are pursuant to, and shall not be deemed a modification of, this Compact.

d. Any authorized user of a portion of the Tribal Water Right appealing a decision of the DNRC to the Compact Board may seek technical assistance from the BWRD in preparing and presenting the appeal.

e. Any holder of a Water Right Under State Law appealing a decision of the BWRD to the Compact Board may seek technical assistance from the DNRC in preparing and presenting the appeal.

**6. Powers and Duties.**

a. Hearings. The Board shall hold hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence, and to appoint technical experts. The Tribe and the State shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribe and the State for enforcing a subpoena issued by the courts of each respective sovereign in a civil action. The Persons involved in the controversy may present evidence and

cross examine any witnesses. The Board shall determine the controversy and grant any appropriate relief, including a temporary order; provided that, the Board shall have no power to award money damages, costs, or attorneys' fees. All decisions of the Board shall be in writing, and, together with a written justification for the decision and any dissenting opinions, shall be served personally or by certified mail on all Persons involved in the proceeding before the Board, the Tribe, the State and the United States. The Board shall adopt necessary rules and regulations to carry out its responsibilities within six months after its first meeting. All records of the Board shall be open to public inspection, except as otherwise ordered by the Board consistent with applicable federal, State and tribal law.

b. Appointment of Water Commissioner.

i. The Board shall have the authority to appoint one or more commissioners to provide day to day administration of water subject to this Compact, including the opening and closing of headgates. The Tribe and the State shall agree on a recommendation for each commissioner to be appointed by the Board. If the Tribe and the State fail to agree, each may nominate one individual for consideration for each commissioner position, and the Board shall select from between the nominees.

ii. Under the jurisdiction of the Board, the commissioners shall have the authority to administer and distribute water on the Reservation and from the off-reservation portions of the Reservation boundary streams (the mainstems of Birch Creek, Cut Bank Creek and the Two Medicine River), to water right holders under the Tribal Water Right and the holders of Water Rights Arising Under State Law according to the rights fixed by all applicable decrees and this Compact. The authority of any commissioners appointed pursuant to this Article IV.J.6.b, as it pertains to facilities owned by the United States, shall extend only to the provision of written orders to the federal representative with the authority to adjust diversions or releases, which the federal representative, or his or her designee, shall then promptly carry out, so long as the federal representative determines that execution of the order does not threaten the safety, security or physical integrity of the facility, and does not extend to the actual opening or closing of headgates. The authority of any commissioners appointed pursuant to this Article IV.J.6.b, as it pertains the use of the Milk River Project Water Right, shall extend only to the delivery of water to the diversion facilities of the Milk River Project on the Reservation and shall not extend to the administration, diversion or distribution of water to or from any facilities or lands served by the Milk River Project off the Reservation. The authority of any commissioners appointed pursuant to this Article IV.J.6.b, as it pertains to portions of the Tribal Water Right used within the Blackfeet

Irrigation Project, extends only to the delivery of water to Blackfeet Irrigation Project diversion facilities and shall not extend to the administration of that water on lands served by the Blackfeet Irrigation Project, which shall remain subject to Article IV.C.2. The authority of any commissioners appointed pursuant to this Article IV.J.6.b, as it pertains to the use of the Water Rights Arising Under State Law of the Pondera County Canal and Reservoir Company (PCCRC), extends only to the delivery of water to PCCRC diversion facilities from Birch Creek and shall not extend to the administration of that water on lands served by PCCRC.

iii. The State and the Tribe shall share the costs of any water commissioners appointed by the Board.

**7. Review and Enforcement of Board Decisions.**

a. Decisions by the Board shall be effective immediately, unless stayed by the Board. Persons involved in the proceedings before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty days of such decision. The hearing on appeal shall be a trial de novo. The notice of appeal shall be filed with the Board and served personally or by certified mail upon all Persons involved in the proceeding before the Board, the Tribe, the State and the United States.

b. Unless an appeal is filed within thirty days of a final decision of the Board, as provided in Article IV.J.7.a, any decision of the Board shall be recognized and enforced by any court of competent jurisdiction on petition of the Board, or any Person before the Board in the proceeding in which the decision was made.

c. A court of competent jurisdiction in which a timely appeal is filed pursuant to Article IV. J.7.a, or in which a petition to confirm or enforce is filed pursuant to Article IV. J.7.b, may order such temporary or permanent relief as it considers just and proper.

d. An appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to Article IV.J.7.a, or in which a petition to confirm or enforce is filed pursuant to Article IV.J.7.b, in the manner and to the same extent as from orders or judgments of the court in a civil action.

e. In any appeal or petition to confirm or enforce the Board's decision, the Board shall file with the court the record of the proceedings before the Board within sixty days of filing of a notice of appeal.

**8. Waiver of Immunity.** The Tribe and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under this Compact by the Blackfeet-Montana Compact Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribe or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties agree that only Congress can waive the immunity of the United States. The participation of the United States in the proceedings of the Compact Board shall be as provided by Congress.

**K. Notice and Reporting.** All notices and reports required by this Compact to be delivered to or served on a Party shall be sent to:

1. The Chairman of the Blackfeet Tribal Business Council, Browning, Montana;

2. The Director of DNRC, Helena, Montana; and

3. The Director of the Rocky Mountain Regional Office of the Bureau of Indian Affairs, Billings, Montana.

## ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS

A. **No Effect on Other Tribal Rights or Federal Reserved Water Rights.**

1. Except as otherwise provided herein, the relationship between the Tribal Water Right described herein and any rights to water of any other Indian Tribe, or of any federally derived water right of an individual, or of the United States on behalf of such Tribe or individual shall be determined by the rule of priority.

2. Nothing in this Compact may be construed or interpreted as a precedent to establish the nature, extent, or manner of administration of the rights to water of any other Indian tribes, tribal members, or Indian owner of trust land of other Indian tribes outside of the Blackfeet Reservation.

3. Nothing in this Compact is otherwise intended to affect or abrogate a right or claim of an Indian Tribe other than the Blackfeet Tribe.

4. Except as provided herein and authorized by Congress, nothing in this Compact may be construed or interpreted in any manner to establish the nature, extent, or manner of administration of the rights to water of the United States on federal lands outside the Reservation.

**B. General Disclaimers.** Nothing in this Compact shall be so construed or interpreted:

1. As a precedent for the litigation of reserved water rights;

2. As a precedent for the interpretation or administration of future compacts between the United States and the State, or the United States and any other state;

3. Except as provided in Article III.J pertaining to basin closures, to preclude the acquisition or exercise of a Water Right Arising Under State Law to the use of water by any Allottee or member of the Tribe outside the Reservation by purchase of such right or by application to the State in accordance with State law;

4. To determine the relative rights inter sese of Persons using water under the authority of the State or the Tribe;

5. To limit in any way the rights of the Parties or any other Person to litigate any issues or questions not resolved by this Compact;

6. To authorize the taking of a water right that is vested under State or federal law;

7. To create or deny substantive rights through headings or captions used in this Compact;

8. To address or prejudge how, in any interstate or international apportionment, the Tribal Water Right shall be counted;

9. To constitute a waiver of sovereign immunity by the Tribe or State, except as is expressly set forth in this Compact;

10. To constitute a waiver of sovereign immunity by the United States except as expressly set forth in 43 U.S.C. 666 (1952) or as otherwise provided by Congress;

11. To prohibit the Tribe, its members, or Allottees, or the United States on behalf of the Tribe, its members, or Allottees, or the United States in any other capacity from objecting in any general stream adjudication in Montana Water Court to any claims to water rights;

12. To prevent the Tribe, its members or Allottees, or the United States on behalf of the Tribe, its members or Allottees, from filing an action in a court of competent jurisdiction to prevent any Person or Party from interfering with the Tribe in the enjoyment of the Tribal Water Right;

13. To affect or determine the applicability of any State or federal law, including, without limitation, environmental and public safety laws, on activities of the Tribe, its members, or Allottees, the State or holders of Water Rights Arising Under State law, or the United States;

14. To limit any existing, present or future claims of the Tribe, its members or Allottees, or the United States on behalf of the Tribe, its members or Allottees, concerning water quality;

15. To prevent the Montana Water Court from adjudicating any properly filed claims to the use of water within the Reservation;

16. Except as expressly provided herein and as required by Congress, to modify the obligation of any agency of the United States pursuant to federal law;

17. To limit the ability of the Tribe, the State, or the United States to enforce any tribal, State, or federal laws or any common law rights relating to the protection of the environment;

18. To prejudice any right that Tribal members may have to secure a portion of the Tribal Water Right from the Tribe;

19. To affect the right, if any, of the Tribe to establish, through a final court judgment or congressional act, that its aboriginal or treaty title to lands outside the Reservation, including but not limited to lands within Glacier National Park and the Lewis and Clark National Forest, has not been extinguished; and

20. To determine the rights, if any, of the Tribe on lands within Glacier National Park and the Lewis and Clark National Forest.

21. Nothing in this Compact shall be construed or interpreted to create any right, title or interest in federal lands off the Reservation.

**C. Rights Reserved.** The Parties expressly reserve all rights not granted, recognized or relinquished in this Compact.

**D. Obligations of the United States Contingent.**

1. Notwithstanding any other language in this Compact, except as authorized under other provisions of federal law, the obligations of the United States under this Compact shall be contingent on ratification and necessary authorization by Congress.

2. The expenditure or advance of any money or the performance of any work by the United States or the Tribe pursuant to this Compact which may require appropriation of money by Congress or allotment of funds is contingent on such appropriation or allotment being made.

3. The State and the Tribe recognize that this Compact has not been approved by the United States or any agency thereof and ratification by the Montana legislature or ratification by the Tribe in no manner binds or restricts the discretion of the United States in the negotiation of all related matters.

**E. Obligations of the State Contingent.** The expenditure or advance of any money or the performance of any work by the State pursuant to this Compact which may require appropriation of money by the Montana legislature or allotment of funds shall be contingent on such appropriation or allotment being made.

## ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT

**A. State Contribution to Settlement.** The Parties agree that the State contribution to settlement shall be negotiated by the State, the Tribe, and the United States as part of the negotiations on the federal legislation contemplated by Article VI.C. The agreement to, expenditure, or advance of any State contribution which may require authorization and appropriation of money by the Montana legislature or allotment of funds is contingent on such appropriation or allotment being made.

**B. Federal Contribution to Settlement.** The Parties agree that the federal contribution to settlement shall be negotiated by the Tribe, the State, and the United States as part of the negotiations on the Federal legislation.

**C. Federal Legislation.** The Tribe and the State agree to seek ratification of the Compact by Congress and any additional federal legislation necessary to effectuate the Compact.

## ARTICLE VII – FINALITY

**A. Ratification and Effectiveness of Compact.**

1. Following the first ratification by any Party, the terms of this Compact may not be modified without the consent of the Parties.

2. Notwithstanding any other provision in this Compact, the Tribe reserves the right to withdraw as a Party if:

a. Congress has not ratified this Compact and authorized appropriations within four years from the date the ratification of the Compact by the Montana legislature becomes effective;

b. Appropriations are not made in the manner contemplated by the federal legislation ratifying this Compact;

c. The Parties do not reach agreement on the State contribution to settlement;

d. The State has not authorized appropriations within five years from the date the Compact is ratified by the United States; or

e. Appropriations are not made by the State in the manner contemplated by any agreement for contributions to settlement made pursuant to Article VI.A.

3. The Tribe may exercise its right to withdraw from the Compact under Article VII.A.2 by sending to the Governor of Montana and to the Secretary of the Interior by certified mail a resolution of the Blackfeet Tribal Business Council stating the Tribe's intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the resolution. On the date designated in the resolution for Tribal withdrawal, this Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Blackfeet Tribe and entry of a decree in a court of competent jurisdiction.

4. Notwithstanding any other provision in this Compact, the State reserves the right to withdraw as a Party to this Compact if:

a. the Tribe and Congress have not ratified this Compact within [four] years from the date the ratification of the Compact by the Montana legislature becomes effective;

b. Congress requires a State contribution to settlement that exceeds the contributions described in Article VI.A;

c. Congress does not authorize and appropriate the federal share of funding agreed to pursuant to Article VI.B; or

d. the DNRC does not concur in the list of Existing Uses of the Tribal Water Right pursuant to Article IV.I.2.

5. The State may exercise its right to withdraw by sending to the Chairman of the Blackfeet Tribal Business Council and to the Secretary of the Interior a letter delivered by certified mail from the Governor of the State of Montana stating the State's intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the letter. On the date designated in the letter for State withdrawal, this Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Blackfeet Tribe and entry of a decree in a court of competent jurisdiction.

6. Notwithstanding any other provision in this Compact, the Department of the Interior reserves the right to refuse to support federal legislation ratifying this Compact.

**B. Incorporation into Decrees.**

1. Within one hundred eighty days of the date this Compact is ratified by the Tribe, the State, and Congress, whichever is latest, the Tribe, the State, or the United States shall file, in the case In the Matter of the Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Blackfeet Tribe of the Blackfeet Reservation within the State of Montana, Civ. No. WC-91-1, pursuant to the provisions of State law, a motion for entry of the proposed decree set forth in Appendix __ as the decree of the water rights held by the United States in trust for the Blackfeet Tribe. If the Montana Water Court does not approve the proposed decree submitted with the motion within three years following the filing of the motion, the Compact shall be voidable by agreement of the State and the Tribe. If the Montana Water Court approves the proposed decree within three years, but the decree is subsequently set aside by the Montana Water Court or on appeal, the Compact shall be voidable by agreement of the State and the Tribe. Any effect of the failure of approval or setting aside of the decree on the approval, ratification, and confirmation by the United States shall be as provided by Congress. The Parties understand and agree that the submission of this Compact to a State court or courts, as provided for in this Compact, is solely to comply with the provisions of State law, and does not expand the jurisdiction of the State court or expand in any manner the waiver of sovereign immunity of the United States in the McCarran Amendment, 43 U.S.C. 666, or other provision of federal law.

2. Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to Article III, and Appendix __ [*proposed decree*], and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights. The final decree shall consist of Article III as displayed in Appendix __, and such other information as may be required by 85-2-234, MCA. Nevertheless, pursuant to

85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.

**C. Disposition of Federal Suit.**

1. On issuance of a final decree by the Montana Water Court or its successor, and the completion of any direct appeals therefrom, or on expiration of the time for filing any such appeal, the United States, the Tribe, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed.R.Civ.P., to dismiss without prejudice the claims of the Tribe, Tribal members, and Allottees and any claims made by the United States for benefit of the Tribe, Tribal members, and Allottees in United States v. Aageson, No. CIV-79-21-GF (filed April 5, 1979). The case may only be resumed if the State or Tribe exercises their rights under Article VII.A.

2. The Decree shall be filed by the Parties as a consent decree in Aageson, or in federal court as a new proceeding after the dismissal of Aageson conditional on agreement by the Parties to seek the necessary State, Tribal, and federal legislation to implement the remaining provisions of the Compact, if it is finally determined in a judgment binding on the State of Montana that the State courts lack jurisdiction over, or that the State court proceedings are inadequate to adjudicate some or all of the water rights asserted in Aageson.

**D. Settlement of Tribal Water Right Claims.**

1. The water rights and other benefits confirmed to the Tribe in this Compact are in full and final satisfaction of and are intended to be in replacement of and substitution for all claims to water or to the use of water by the Tribe, Tribal members, and Allottees and the United States on behalf of the Tribe, Tribal members, and Allottees existing on the Effective Date of this Compact, including water rights claims based on or recognized in Conrad Inv. Co. v. United States, 161 F. 829 (9th Cir. 1908), within the Reservation or further as may be specified by Congress.

2. In consideration of the rights confirmed to the Tribe, Tribal members, and Allottees in this Compact, and of performance by the State and the United States of all actions required by this Compact, and on entry of a final order issuing the decree of the Tribal Water Right held in trust by the United States as quantified in this Compact and displayed in Appendix __, and except for water rights, benefits and uses confirmed in this Compact, the Tribe and the United States as trustee for the Tribe, Tribal members, and Allottees hereby waive, release, and relinquish any and all claims to water rights or to the use of water within the Reservation or further as may be specified by Congress existing on the Effective Date of this Compact.

3. Any claim to water by the Tribe, its members or Allottees within the Reservation or further as may be specified by Congress shall be satisfied out of the Tribal Water Right confirmed by this Compact, except for any Water Rights Arising Under State Law held by the Tribe, its members or Allottees as of the Effective Date of this Compact, which shall be satisfied pursuant to their own terms.

**E. Settlement of Tribal Claims Against the United States.** Waiver of claims against the United States, by the Tribe, its members and Allottees shall be as provided by Congress.

**F. Binding Effect.** After the Effective Date of this Compact and entry of a final decree, its terms shall be binding on:

1. The State and any Person using, claiming or in any manner asserting any right under the authority of the State to the use of water in Montana; provided that, the validity of consent, ratification, or authorization by the State is to be determined by Montana law;

2. The Tribe and any Person using, claiming or in any manner asserting any right to the use of the Tribal Water Right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribe or Tribal members, or any rights arising under tribal law; provided that, the validity of consent, ratification or authorization by the Tribe is to be determined by Tribal law; and

3. The United States and any Person using, claiming or in any manner asserting any right under the authority of the United States to the use of water in Montana; provided that, the validity of consent, ratification or authorization by the United States is to be determined by federal law.

## ARTICLE VIII – LEGISLATION/DEFENSE OF COMPACT

**A. State Legislation.** The State and Tribe agree to seek ratification of the Compact by the Montana legislature and any additional State legislation necessary to effectuate the Compact.

**B. Federal Legislation.** The State and Tribe agree to seek ratification of the Compact by Congress and any additional federal legislation necessary to effectuate the Compact.

**C. Tribal Legislation.** The State and Tribe agree to seek ratification of the Compact by the Blackfeet Tribe and any Tribal legislation necessary to effectuate the Compact.

**D. Defense of the Compact.** The Parties agree to defend the Compact after its Effective Date from all challenges and attacks and in all proceedings pursuant to Article VII.B and C, and agree that no provision of the Compact shall be modified as to substance except as may

be provided in the Compact, or by agreement among the Parties.

IN WITNESS WHEREOF the representatives of the Blackfeet Tribe, the State of Montana, and the United States, have signed this Compact on the ____ day of ____, 2007.