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Crow Tribe of Indians – Montana Compact

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Crow Tribe of Indians – Montana Compact, No. WC-2012-06 (Mont. Water Ct. May 27, 2015) (order approving compact)

Ariel Overstreet-Adkins

This order from the Montana Water Court approved the Crow Water Compact over objections by non-tribal water users in Montana. Although the Objectors have appealed the decision to the Montana Supreme Court, this order represents the next-to-last step in a process, started in 1979, to define and quantify the reserved water rights for current and future uses of the Crow Nation in Montana. The order provides a clear roadmap for other Montana tribes still seeking to achieve approval of a water compact by the Montana Water Court, and for objectors who would attempt to invalidate a compact in future proceedings.

I. INTRODUCTION

At issue in *Crow Tribe of Indians – Montana Compact*, was the resolution of objections to the Crow Water Compact (“Compact”).¹ Several state based water rights holders (“Objectors”) objected to the Montana Water Court’s Preliminary Decree incorporating the Compact, alleging it would cause them injury in the exercise of their water rights.² The Montana Water Court rejected all objections and filed this order approving the Compact after a 36-year-long process.³ The Objectors have appealed the water court’s decision to the Montana Supreme Court.⁴

II. FACTUAL & PROCEDURAL BACKGROUND

The State of Montana, Crow Nation (“Tribe”), and the United States (together “Settling Parties”) began negotiating the Crow Compact in 1979.⁵ In April 1999, the Settling Parties reached a tentative agreement for a proposed Compact.⁶ The members of the Reserved Water Rights Compact Commission and the Tribe voted to seek approval by the Montana Legislature (“Legislature”),

¹ Crow Tribe of Indians – Montana Compact, No. WC-2012-06, at *1 (Mont. Water Ct. May 27, 2015) (order approving compact), *available at* <https://publiclandlawreview.files.wordpress.com/2015/07/here.pdf>; *see* Water Rights Compact Entered Into By the State of Montana, the Crow Tribe, and the United States of America, April 27, 2012, 124 Stat. 3064 [hereinafter Crow Water Compact] *available at* http://crowsettlement.com/yahoo_site_admin/assets/docs/water_compact.139183221.pdf.

² *Id.* at *2.

³ *Id.* at **2, 5-6.

⁴ *See* In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians of the State of Mont., DA 15-0370 (Mont.), *available at* <https://supremecourtdocket.mt.gov/search/case?case=17896>.

⁵ *Crow Tribe of Indians – Montana Compact* at *2.

⁶ *Id.*

which the Legislature granted during a special session.⁷ The Compact was signed by the Governor in June 1999 and codified at Montana Code Annotated § 85-20-901.⁸

Congress and the President approved the Compact in 2010.⁹ Members of the Tribe offered their approval in 2011.¹⁰ In 2012, the Secretary of the Interior, the Crow Tribal Chairman, and the Governor of Montana signed the Compact.¹¹

Operating under authority granted by the McCarran Amendment,¹² the Montana Water Use Act,¹³ and the Compact itself,¹⁴ the water court issued a Preliminary Decree incorporating the Compact on December 21, 2012.¹⁵ The water court mailed notice of the Decree to over 16,000 owners of 28,748 water rights in nine hydrologic basins across Montana.¹⁶ Unresolved objections were tried before the water court without a jury in February 2015.¹⁷

Because the Objectors were not parties to the Compact, the court determined it was only obligated to assess whether the Compact is “fair and reasonable to those parties and the public interest who were not represented in the negotiation, but have interest that could be materially injured by operation of the Compact.”¹⁸ Further, the court cited the rule that “once the court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree is presumptively valid and the objecting party then has a heavy burden of demonstrating that the decree is unreasonable.”¹⁹

The water court granted the Settling Parties’ summary judgment motion that the Compact was valid, finding that the Compact “was negotiated at arm’s length and was not the product of bad faith.”²⁰

III. ANALYSIS

Because compacts may recognize water rights in areas where water is scarce and memorialize those rights many years after they arose under federal

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; see Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064.

¹⁰ *Crow Tribe of Indians – Montana Compact*, at *2.

¹¹ *Id.*

¹² McCarran Amendment, 66 Stat. 560 (codified at 43 U.S.C. § 666 (2012)).

¹³ Mont. Code Ann. §§ 85-2-231, 233, 234, 701, and 702 (2013).

¹⁴ Mont. Code Ann. § 85-20-901, art. VII(B)(3) (2013).

¹⁵ *Crow Tribe of Indians – Montana Compact*, at *2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at *3 (quoting Chippewa Cree Tribe–Montana Compact, No. WC-200-01, at **6-7 (Mont. Water Ct. June 12, 2002) (mem. op.) (citing *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990)), available at http://www.indianlaw.mt.gov/content/chippewa_cree/water/wc_2000_01.pdf).

¹⁹ *Id.* at **3-4 (quoting *Oregon*, 913 F.2d at 581 (internal quotation omitted)) (citing *Fort Peck–Montana Compact*, No. WC-92-1, at *7 (Mont. Water Ct. Aug. 10, 2001) (mem. op.), available at <http://cases.justia.com/Montana/water-court/2001-1992-01.pdf?ts=1406825092>).

²⁰ *Id.* at *4.

law, state based water rights have the potential to be disrupted when a compact is recognized.²¹ At trial, the Objectors’ burden was to establish that the Compact is unreasonable.²² The water court has adopted a two-pronged test to evaluate objections to a compact that is presumed valid.²³ First, the Objectors must show that their interests are “materially injure[d]” by the compact and, second, that those injuries were caused by failure of the compact “to conform to applicable law.”²⁴ The court determined that the issues remaining for trial were: (1) does recognition of tribal water rights in the Bighorn River Basin materially injure the Objectors; (2) does recognition of tribal water rights in the Ceded Strip materially injure the Objectors; (3) does the Compact otherwise cause material injury to the Objectors; and (4) if injuries were proven, were those injuries caused by failure of the Compact to conform to applicable law?²⁵

A. Does Recognition of Tribal Water Rights in the Bighorn River Basin Materially Injure the Objectors?

The court stated that a finding of material injury to the Objectors in the Bighorn River Basin was precluded by two concessions made by the Objectors: first, that there is more than enough water in the basin to satisfy all water users, and second, that the Tribe’s rights are not presently adversely affecting their rights.²⁶

Both the Settling Parties and the Objectors performed complex analyses of practically irrigable acres (“PIA”) of tribal rights in the Bighorn Basin based on the standard set in *Arizona v. California*.²⁷ While the Compact allocates 500,000 acre-feet per year (“AFY”) to tribal rights, the Objectors determined that the Tribe’s PIA for the area to be 477,000 AFY.²⁸ The court determined the amounts “nearly matched.”²⁹ The court further noted a number of assumptions and arithmetic errors on the part of the Objectors, and that the Objectors had ignored language in the Compact requiring that shortages in a basin would be shared *pro rata* between the tribal and state based rights.³⁰ The court concluded that the Objectors had not shown injury from current uses of the Tribe’s Bighorn rights.³¹

The court also determined that there is no possibility of injury arising from future uses because Article III of the Compact subordinates future uses of

²¹ *Id.* at *20.

²² *Id.* at *4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at *6.

²⁶ *Id.* at **4, 20.

²⁷ *Id.* at *7, 21 (discussing *Arizona v. California*, 373 US. 546, 600 (1963)).

²⁸ *Id.* at *21.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at *22.

tribal rights in the Bighorn Basin to state based rights with priority dates before the Compact was ratified by the Legislature in 1999.³²

B. Does Recognition of Tribal Water Rights in the Ceded Strip Materially Injure the Objectors?

The Ceded Strip is an area of over 1.1 million acres that was ceded to the United States in 1904, and the land and mineral rights were granted back to the Tribe in 1958.³³ While the land is not within the Crow Reservation boundaries as defined by the Compact, the Compact allocates 47,000 AFY to the Tribe from water sources within the Ceded Strip, like the Yellowstone River.³⁴ There are currently very few uses of the water in the Ceded Strip by the Tribe, and the court found no evidence that these present uses materially injure the Objectors.³⁵

The court noted that future uses of water on the Ceded Strip, like those in the Bighorn Basin, would be subordinated to existing state based water rights with priority dates before 1999.³⁶ Future uses likely would not include irrigation, but rather mining and coal fired power generation.³⁷ The court found that the Objectors had not established a material injury from current or future uses of tribal rights in the Ceded Strip.

C. Does the Compact Otherwise Cause Material Injury to the Objectors?

Some Objectors alleged injury due to current distribution of water from Pryor Creek, which the court stated did not pertain to the validity of the Compact, but rather the enforcement of rights.³⁸

The Objectors also alleged that efforts by the Tribe to reacquire former trust lands with appurtenant state based water rights would cause injury to the exercise of their state based rights by exposing them to a greater risk of shortage.³⁹ The court found that the Objectors misunderstood the Compact provision that states, if lands are reacquired and transferred back to trust status, “the water right appurtenant to the land acquired shall become part of *and not in addition to* the Tribal Water Right quantified in this Compact with a May 7, 1868 priority date.”⁴⁰ The court emphasized, “[n]o matter how many State Based Rights the Tribe acquires in the future, the Tribal Water Right is capped at the levels defined in the Compact.”⁴¹

³² *Id.* (discussing Mont. Code Ann. § 85-20-901, art. III).

³³ *Id.* at **16-17.

³⁴ *Id.* at *17.

³⁵ *Id.* at *18.

³⁶ *Id.* at *23.

³⁷ *Id.* at *17.

³⁸ *Id.* at *25.

³⁹ *Id.* at *26.

⁴⁰ *Id.* at **26-27 (quoting Mont. Code Ann. § 85-20-901, art. II(G)(1)) (emphasis in original).

⁴¹ *Id.* at *27.

The Objectors asserted generalized claims of injury, which the court said overlooked the shortage sharing provisions of the Compact.⁴² The court stated, “[w]ith the Compact, junior water users are treated as if all their rights predating June 1999 are equal in priority to current uses of the Tribe’s May 7, 1868 rights, and senior to Tribe’s future uses.”⁴³ The court found no material injury to the Objectors in other provisions of the Compact.⁴⁴

D. If Injuries Were Proven, Were Those Injuries Caused by Failure of the Compact to Conform to Applicable Law?

Because the Objectors failed to demonstrate material injury related to the recognition of the Tribe’s water rights in the Bighorn River Basin, the Ceded Strip, or in the Compact’s other provisions, the court determined that there was no need to address the second part of the two-part test to show the Compact was unreasonable.⁴⁵ However, the court did note that had the Objectors wished to prevail on that prong of the test, they would have needed to submit into evidence a copy of the May 7, 1868 treaty establishing the Crow Reservation, and show that the water rights recognized in the Compact were not compatible with the purposes of the treaty.⁴⁶ The Objectors did not do this, nor did they provide any other evidence that would relate to the purposes of the treaty.⁴⁷ Thus, had the court determined any material injury had occurred, the Objectors would have failed to meet the second prong of the court’s test to prove the Compact was unreasonable.⁴⁸

IV. CONCLUSION

To halt approval of the Crow Water Compact, the Objectors had a high bar to overcome in demonstrating material injury to the exercise of their state based water rights and that the Compact violated applicable law. The Montana Water Court determined that the Objectors did not meet this bar failed the first prong of the two-part unreasonability test. The court also stated that the Objectors would have failed the second prong, had they reached the issue. Although this order is on appeal to the Montana Supreme Court, it provides valuable insight to tribes such as the Confederated Salish and Kootenai Tribe, which will be going through a similar process for final approval of their water compact. The water court order offers a preview of what tribes and objectors might expect in proceedings in front of the Montana Water Court, and clear outline of what will be expected of each side.

⁴² *Id.*

⁴³ *Id.* at *28.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* See Treaty with the Crow Tribe, Aug. 4, 1825, 7 Stat. 266, available at http://indianlaw.mt.gov/content/crow/codes/appendix_b.pdf.

⁴⁷ *Id.*

⁴⁸ *Id.*