Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE RIVER DIVISION
SPECIAL NORTHERN CHEYENNE COMPACT SUBBASIN
* *

IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION WITHIN THE STATE OF MONTANA IN BASINS 42A, 42B, 42C, 42KJ, & 43P	CAUSE NO. WC-93-1

MEMORANDUM OPINION

THIS MATTER came before the Court upon the motions of the State of Montana [State], the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation [Tribe] and the United States of America [United States] to commence proceedings to review and approve the Northern Cheyenne-Montana Compact. The Court, based upon the submissions and stipulations of the parties, and being otherwise fully advised in the premises, hereby FINDS, CONCLUDES, and ORDERS as follows:

PROCEDURAL HISTORY

The State of Montana and the Northern Cheyenne Tribe of the Northern Cheyenne Reservation have reached a water rights compact in accordance with Mont. Code Ann. § 85-2-702. The Northern Cheyenne-Montana Compact was ratified by the Montana Legislature, see 1991 Mont. Laws, ch. 812, § 1, (codified at Mont. Code Ann. § 85-20-301) and with some modifications was "approved, ratified, and confirmed" by the Congress of the United States as a part of the "Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992," Pub. L. 102-374, 106 Stat. 1186, § 4(a)

[the Federal Act]. By a resolution of the Northern Cheyenne Tribal Council and a referendum held in accordance with § 13 of the Federal Act, the Northern Cheyenne Tribe provided its consent to the Compact as modified by the Federal Act. In accordance with Article V, section A.1. of the Northern Cheyenne-Montana Compact the Montana Legislature consented to the modifications contained in the Federal Act, see 1993 Mont. Laws (Nov. 1993 Sp. Sess.) ch. 7, § 1, [HB 74]. Hereinafter, the Northern Cheyenne-Montana Compact, as modified, will be referred to as "the Compact."

On January 19, 1994 the Court entered its Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Northern Cheyenne-Montana Compact.

On January 19, 1994 the Court entered its Order directing the Department of Natural Resources and Conservation to serve the Notice of Entry of Northern Cheyenne Compact Preliminary Decree and Notice of Availability [Notice of Availability], together with a basin specific general description of the Tribal Water Right, on approximately 3500 entities. On February 24, 1994 the DNRC filed its Certificate of Mailing indicating compliance with that Order.

The Notice of Availability was published in accordance with Mont. Code Ann. § 85-2-232 at least once each week for three consecutive weeks in at least three newspapers of general circulation covering the water division in which the Tribal Water Right is located. In fact, the Notice of Availability was properly published in the following newspapers: the *Billings Gazette*, the *Big Horn County News*, the *Hysham Echo*, the *Miles City Star*, *The Terry Tribune* and the *Sidney Herald-Leader*.

Ten objections to the Compact were filed with the Court. All ten objections were eventually withdrawn by the objectors and no objection to the Compact remains outstanding. No objection to the Compact filed in the Water Court has been sustained.

Following the withdrawals of objections, the parties filed submissions including the following affidavits: (1) Robert Delk, Chief of Water Resources Branch, Billings Area Office, Bureau of Indian Affairs, United States Department of Interior; (2) Chris D. Tweeten, Chairman of the Montana Reserved Water Rights Compact Commission; and (3) Susan Cottingham, currently the Program Manager for the Montana Reserved Water Rights Compact Commission and formerly the Northern Cheyenne Technical Team leader during the negotiations between the Compact Commission and the Northern Cheyenne Tribe.

On July 24, 1995 this Court issued its Order confirming and approving the Tribal Water Right contained in the Compact. The Order indicated that the Court would set out its reasons in a later filed memorandum. This is that memorandum.

DISCUSSION

After years of negotiation, the State of Montana, the Northern Cheyenne Tribe and the United States of America concluded a water right compact defining the Tribal Water Right of the Northern Cheyenne Tribe. This compact was approved and ratified by the Montana Legislature, the Northern Cheyenne Tribal Council, the Northern Cheyenne tribal members through referendum, the United States Congress and the President of the United States of America. It is now before the Montana Water Court by virtue of state law and the Federal Act.

All objections to the Compact have been withdrawn and no objection has been sustained. The Court has carefully read the Compact, the Federal Act and all submissions of the parties. The Court has two options here. It may approve the Compact or declare it void. Mont. Code Ann. § 85-2-233. Nothing has been presented in this proceeding to convince the Court that the Compact should be declared void. The Court is satisfied that the Compact is fundamentally fair, adequate, reasonable and conforms to applicable law.

The State raised three issues in its March 13, 1995 Memorandum in Support of Motion for Approval of Northern Cheyenne/Montana Compact. The issues raised by the State, each of first impression, are as follows: (1) what is the scope of the Court's power to review the Compact, particularly given that there are no remaining objections; (2) what is the standard that the Court should employ in such a review; and (3) does the Northern Cheyenne - Montana Compact meet that standard and thus warrant approval.

Without opposition and arguments to the contrary being presented on these issues, the Court's first thought was that such an exercise might be of doubtful assistance.[1] However, under the rationale of *Scribimus Indocti Doctique*, the Court will briefly address these issues.

The State suggests that the Court's authority to review the Compact is limited to those provisions which determine or interpret the Tribal Water Right -- as opposed to those

[1] See the language of the Honorable Simeon E. Baldwin cited in Mettler v. Ames Realty Co., 61 Mont. 152, 166, 201 Pac. 702 (1921).

provisions which, for example, delineate the powers of the Tribe or the State with respect to the administration or management of the Tribal Water Right. The State supports its position with reference to Mont. Code Ann. §§ 3-7-224 and 85-2-216 that the Court's jurisdiction is limited to " . . . all matters relating to the determination of existing water rights within the boundaries of the State of Montana."

Although the Court appreciates and understands the theory of this argument, the Court is not willing to embrace this concept in a proceeding in which no objections remain outstanding.[2] The problem of limiting the Court's review of a compact to the water right component is that it ignores the fact that a compact is a negotiated settlement in which some or all components are contingent upon each other. A contingent non water component could relate to the determination of the existing rights. Conceivably, one non water right component could be so grievous in application that the water right component could be rendered meaningless.

The terms of the statute cited by the State, "all matters relating to the determination of existing rights," arguably are quite broad. Judicial analysis on a case by case may be necessary in the future to define the Court's limitations. It is not necessary to do so in this proceeding.

The State next contends that absent objections, the Court is still obligated to review the Compact and not just automatically approve it. The Court agrees with the State on this issue. State law contemplates a Court review of compacts and it is quite clear

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[2] The Court recognizes limitations do exist on its permitted review of a Compact. See, for example, the Court's Memorandum and Order in this case filed December 10, 1993 at page 2.

that Congress intended the Montana Water Court to review the Compact. Indeed, section 4(c) and 4(d) of the Federal Act refers specifically to the Montana Water Court and withholds Congressional authorization to expend several million dollars until this Court enters and approves an appropriate decree.

What then is the scope of the Court's review in the absence of an objection to the Compact? Citing language found in Mont. Code Ann. § 85-2-701, the State recommends that the Court's standard of review should be to determine whether the Compact provides for an "equitable division and apportionment of waters" between the state and its people and the Northern Cheyenne Tribe. The State further suggests that the Compact is closely analogous to a consent decree and that the principles articulated in several decisions of the 9th Circuit Court of Appeals should apply.

In United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) Cert. denied *sub nom.* Makah Indian Tribe v. United States, ___ U.S. ___, 111 S.Ct. 2889, 115 L.Ed. 2d 1054 (1991), the Court noted that before approving a consent decree, ". . . the court must be satisfied that it is at least fundamentally fair, adequate and reasonable [and] . . . because it is a form of judgment, a consent decree [must] conform to applicable laws." In Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), the Court held that "[t]he relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case."

This Court will utilize the foregoing principles as its

standard of review for this Compact. In reviewing the Compact, however, it is obvious that it is not a typical settlement agreement between competing water right litigants. In addition to the parties, this Compact has been reviewed and ratified by the Montana Legislature, the United States Congress and the President of the United States. Without any objections remaining, it carries a strong presumption of reasonableness, fairness, and legal sufficiency.

It's possible that different people might have differing opinions on the individual components of the Compact. Some might say "It's too much" and others might say "It's too little." But taken as a whole, the Compact represents a fair settlement of a difficult problem. The affidavits of Chris D. Tweeten and Susan Cottingham outline the "give and take" nature of this negotiated settlement. The affidavit of Robert Delk represents that the Tribal Water Right is founded on reliable data. The Court has relied heavily on those affidavits in reaching its conclusion.

Prior to the Compact, the factual and legal basis for the elements of the Tribe's reserved water right were in dispute. It is clear that a careful balancing of various factors went into the formulation of the Compact. For example, the State agreed to the Tribe's priority date of 1881 rather than asserting an 1884 or 1900 priority date in large part because the actual use of the Tribal Water Right was to be subordinated to most non-Indian water uses in the affected basins. [Tweeten Aff., para. 4(a)].[3] The State

[3] Continuation of this subordination depends upon the reconstruction of the Tongue River Dam and its continuance as a viable reservoir. To accomplish the reconstruction goal more than half of the estimated $52 million Tongue River Dam Project cost is to be provided from a Federal contribution. See § 7 of the Federal

asserts that it agreed to the 1881 priority date only after being satisfied that the subordination provisions provided non-Indian water users with an equivalent, if not better, level of protection than if the Tribal priority date were set at 1900. [Tweeten Aff., supra].

In summary, this Compact resolves issues that began over one hundred years ago and appears to resolve a dam problem that has hindered Tongue River water users for several years. It is a remarkable achievement for a settlement process created in 1979 as an untried, first of its kind concept. This Compact, coupled with the passage of the Federal Act, achieves an end result that could never be reached were the Reserved Tribal water right litigated before this Court. This Compact validates the confidence reposed by the 1979 Legislature in the Reserved Water Rights Compact Commission and the Northern Cheyenne Tribe that good faith negotiations can achieve solutions to difficult problems.

This Court finds no reason that overcomes the strong presumption of reasonableness, fairness, and legal sufficiency that this Compact carries with it. It provides for an "equitable division and apportionment of waters" between the parties and does so in conformity with applicable laws.

ORDER

It is for the reasons set forth above and further detailed in the submissions of the parties that the Court entered its July 24, 1995 Order to CONFIRM and APPROVE the Northern

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Act. The long term viability of the project will be enhanced by a continuing Federal proportionate share of the annual operation, maintenance and replacement costs for the dam allocated on the basis of the Tribe's stored water in the reservoir. See § 10 of the Federal Act.

Cheyenne Tribal Water Right contained in the Northern Cheyenne - Montana Compact.

DATED this 3RD day of August, 1995.

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