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FILED
AUG 14 2014
Montana Water Court

**UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL RESEARCH SERVICE, U.S. SHEEP EXPERIMENT STATION–MONTANA COMPACT**

**CASE WC2014-06**

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# PRELIMINARY DECREE AND ORDER FOR COMMENCEMENT OF SPECIAL PROCEEDINGS FOR CONSIDERATION OF THE U.S. SHEEP EXPERIMENT STATION-MONTANA COMPACT

THIS MATTER came before the Court on the Joint Motion of the United States of America and the State of Montana (collectively the "Settling Parties") to commence the proceedings required under applicable law to review and approve the Compact settling the water right claims of the United States Department of Agriculture, Agricultural Research Service ("ARS") for the U.S. Sheep Experiment Station-Montana Compact ("Compact"). The Court, based on the submissions of the Settling Parties, and being otherwise advised in these matters,

FINDS, CONCLUDES, and ORDERS:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In accordance with the provisions of Mont. Code Ann. §§ 85-2-701 to 705 (2013), the Montana Reserved Water Rights Compact Commission has reached a water rights compact with the United States relative to the U.S. Sheep Experiment Station. The Compact was ratified by the 2007 Montana Legislature (See 2007 Mont. L., ch. 80, § 1), Mont. Code Ann. § 85-20-1201, and was approved by the United States Department of Agriculture and the United States Department of Justice effective February 18, 2013.

2. The Settling Parties have filed with this Court a Joint Motion for Incorporation of the Compact into Preliminary and Final Decrees in Water Court Basin 41A for the reserved water rights recognized in the Compact.

3. Special circumstances justify the Court considering the Compact as a Preliminary Decree in Basin 41A rather than through the normal adjudication of that Basin.

a. The requested procedure is consistent with procedures adopted for other Compacts, including the Northern Cheyenne (No. WC-93-1); Fort Peck (No. WC-92-1); National Park Service (No. WC-94-1); Chippewa Cree (No. WC-2000-01); Red Rocks Lake (No. WC-2002-02); Black Coulee (No. WC-2002-04); Forest Service (No. WC-2007-03); Bureau of Land Management (No. WC-2008-10); National Bison Range (No. WC-2011-01); Crow (No. WC-2012-06); and Bowdoin (No. WC-2013-04) Compact proceedings.

b. The Montana Legislature's policy of promoting the settlement of reserved water right claims supports the commencement of proceedings for the confirmation of settlements when the settling parties so request. See Mont. Code Ann. § 85-2-702, (2013).

c. The United States, through the ARS, is willing to pay the costs of mailing personal notice to all water rights holders in Basin 41A, and for the publication of notice for a period of no less than once a week for three consecutive weeks in the *Dillon Tribune*, the *Bozeman Daily Chronicle* and the *Butte Standard* to have these rights confirmed on a timely basis.

4. This Court has the authority to order the commencement of Special Proceedings under the authority of Mont. Code Ann. §§ 3-7-224(2) and 85-2-231 (2013).

**ORDER**

5. The Court grants the Settling Parties' Motion to Commence Special Proceedings to consider the Compact. The Court sets forth in this Order the initial set of procedures necessary to commence these Special Proceedings and to provide notice of the Compact in accordance with Mont. Code Ann. § 85-2-233.

6. The Court issues this Preliminary Decree under Mont. Code Ann. § 85-2-231. This Preliminary Decree contains the following information: (a) contents of the U.S. Sheep Experiment Station–Montana Compact; (b) these Findings of Fact, Conclusions of Law and Order; and (c) abstracts for water right claims.

7. For purposes of these proceedings and in accordance with Mont. Code Ann. § 85-2-231(3), the Court hereby designates all of the water rights claims which are recognized in the Compact as a single class of claims. Copies of abstracts for these rights are attached as Attachments 1 and 2.[1]

8. The language of the U.S. Sheep Experiment Station– Montana Compact is set forth below:

RECITALS

WHEREAS, the State, in 1979, pursuant to Title 85, chapter 2, of the Montana Code Annotated, commenced a general adjudication of the rights to the use of water within the State, including all federal reserved and appropriative water rights;

WHEREAS, 85-2-703, MCA, provides that the State may negotiate compacts concerning the equitable division and apportionment of water between the State and its people and the federal government with claims to non-Indian reserved water rights within the State;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of the reservation of lands for the U.S. Sheep Experiment Station in the State;

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. 516 and 517;

WHEREAS, the Secretary of Agriculture, or a duly designated official of the United States Department of Agriculture, has authority to execute this Compact on behalf of the United States Department of Agriculture pursuant to 7 U.S.C. 2201 note, Section 1(a).

NOW, THEREFORE, the State and the United States agree as follows:

ARTICLE I DEFINITIONS

For purposes of this Compact only, the following definitions apply:

[1] Attachments 1 and 2 are identified in the Compact as Appendices 2, and 3 and 4, respectively.

(1) "Abstracts" means the copy of the document entitled "Abstracts of U.S. Sheep Experiment Station Water Rights" referenced in this Compact as Appendix 3.

(2) "Consumptive" means a use of water that removes water from the source of supply such that the quality or quantity is reduced or the timing of return delayed, making it unusable or unavailable for use by others, and includes evaporative loss from impoundments or natural lakes.

(3) "Department" means the Montana Department of Natural Resources and Conservation or its successor.

(4) "Effective Date of this Compact" means the date of the ratification of the Compact by the Montana legislature, written approval by the United States Department of Agriculture, or written approval by the United States Department of Justice, whichever is latest.

(5) "Groundwater" means water that is beneath the ground surface.

(6) "Parties" means the State and the United States.

(7) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, or any other entity, but does not include the United States.

(8) "State" means the State of Montana and all officers, agents, departments, and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent, "State" means the Director of the Department or the Director's designee.

(9) "United States" means the federal government and all officers, agencies, departments, and political subdivisions thereof. Unless otherwise indicated, for purposes of notification or consent other than service in litigation, "United States" means the Secretary of the Department of Agriculture or the Secretary's designee.

(10) "U.S. Sheep Experiment Station" means those lands within Montana that were withdrawn and reserved by Executive Order No. 3767, dated December 19, 1922, as depicted on the map attached as Appendix 1 to this Compact. For purposes of this Compact, it does not include portions of the U.S. Sheep Experiment Station located in the State of Idaho that the United States owns and the U.S. Department of Agriculture, Agricultural Research Service, administers.

## ARTICLE II WATER RIGHT

The Parties agree that the following water rights are in settlement of all of the United States' federal reserved water rights for the U.S. Sheep Experiment Station.

A. Purpose of Reservation for the U.S. Sheep Experiment Station.

The U.S. Sheep Experiment Station was created for agricultural experiment purposes, and the land in Montana was set aside for experimental sheep grazing by Executive Order No. 3767, dated December 19, 1922.

B. Quantification.

Subject to the terms of Article III, the United States has federal reserved water rights from sources located on the U.S. Sheep Experiment Station as described below.

1. Current Stockwater Use.

The United States has federal reserved rights on U.S. Sheep Experiment Station lands for Consumptive use for stockwatering purposes at the 53 locations identified in the table attached as Appendix 2 for the volume of water identified. Abstracts for each of these federal reserved water rights are attached as Appendix 3 to this Compact. In the event of a discrepancy between the summary of U.S. Sheep Experiment Station water rights in Appendix 2 and the Abstracts contained in Appendix 3, the Abstracts in Appendix 3 control. The period of use of the United States' water rights for Consumptive use set forth in Article II, section B.1., shall be from May 1 to October 31 of each year.

2. Future Uses.

In addition to the current stockwater uses identified in Article II, section B.1., the United States has a federal reserved water right to develop uses of surface water or Groundwater consistent with Article II, section B.5., to fulfill the purposes of the U.S. Sheep Experiment Station up to a total additional volume of 15 acre feet per year for uses within the U.S. Sheep Experiment Station.

3. Emergency Fire Suppression.

The use of water for emergency fire suppression benefits the public and is necessary for the purposes of the U.S. Sheep Experiment Station. The United States has a federal reserved water right to divert or withdraw water for fire suppression on U.S. Sheep Experiment Station lands as needed and without a definition of the specific elements of a recordable water right. Use of water for fire suppression shall not be considered an exercise of the United States' water rights for current or future uses described in Article II, section B.1. and 2.

4. Priority Date.

The priority date for all federal reserved water rights for the U.S. Sheep Experiment Station is December 19, 1922.

5. Purposes.

The United States' reserved water rights for the U.S. Sheep Experiment Station shall be used for purposes as described in Article II, section A. The types of use may include but are not limited to: stockwater, domestic, irrigation, storage, dust abatement, reclamation, and research.

## ARTICLE III IMPLEMENTATION

A. Abstracts.

Abstracts for all the United States' federal reserved water rights for current stockwater uses are set forth in Appendix 3. The Parties prepared the Abstracts to comply with the requirements for a final decree as set forth in 85-2-234, MCA, and in an effort to assist the state courts in the process of entering decrees accurately and comprehensively reflecting the rights described in this Compact. The rights specified in the Abstracts are subject to the terms of this Compact.

B. Enforcement and Administration of Water Right.

1. The United States, the State, or a holder of a water right recognized under state law may petition a state or federal court of competent jurisdiction for relief when a

controversy arises between the United States' reserved water rights described by this Compact and a holder of a water right recognized under state law. Resolution of the controversy shall be governed by the terms of this Compact where applicable or, to the extent not applicable, by appropriate state or federal law.

2. For purposes of the administration of federal reserved water rights provided for in Article II, the United States agrees that a water commissioner, or other official appointed by a court of competent jurisdiction, may enter the U.S. Sheep Experiment Station to collect data, inspect structures for the diversion and measurement of water, and distribute the federal reserved water rights in Article II. The terms of entry or distribution may be limited, as appropriate, by an order of a court of competent jurisdiction. Nothing herein waives the right of the United States, with respect to a specific action or anticipated action by a water commissioner or other official under this subsection, to seek terms of entry or distribution consistent with purposes of the U.S. Sheep Experiment Station, including but not limited to terms of entry that respect the integrity of ongoing or proposed research, or to seek terms of entry or distribution consistent with federal law if in conflict with state law.

3. The Department may enter the U.S. Sheep Experiment Station lands upon which a federal reserved water right is described in Article II for the purposes of data collection on U.S. Sheep Experiment Station water diversions or water uses. The Department shall notify the United States by certified mail or in person at least 72 hours prior to entry.

C. Use of Reserved Water Rights.

The reserved rights of the United States described in this agreement are federal water rights. Nonuse of all or a part of the federal water rights described in this Compact shall not constitute abandonment or forfeiture of those rights. The federal water rights described in this Compact need not be applied to a use deemed beneficial under state law, but shall be restricted to uses necessary to fulfill the purposes of the U.S. Sheep Experiment Station.

D. Change in Use.

1. The United States may make a change in the use of its reserved water rights described in Article II, sections B.1. and 2., provided that:

(a) the use must fulfill the purposes of the U.S. Sheep Experiment Station described in Article II, section A;

(b) the total use shall not exceed the amount described in this Compact; and

(c) the change shall not adversely affect a senior water right recognized under state law.

2. The United States' federal reserved water right to divert or withdraw water for emergency fire suppression as described in Article II, section B.3., shall not be changed to any other use.

E. Reporting Requirements.

The United States shall provide a report to the Department on an annual basis, or on a periodic basis agreed to by the Parties, containing specific information on:

1. the development of new uses as described in Article II, section B.2.;

2. changes in use as described in Article III, section D; and

3. the source of supply, the dates of use, and the estimated amount of water used for emergency fire suppression as described in Article II, section B.3.

## ARTICLE IV GENERAL PROVISIONS

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

1. The relationship between the water rights of the United States described herein and any rights to water of an 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 in any manner to establish the nature, extent, or manner of administration of the rights to water of any other federal agency or federal lands in Montana other than those of the U.S. Sheep Experiment Station.

3. 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 any Indian Tribes and tribal members.

4. Nothing in this Compact is otherwise intended to conflict with or abrogate a right or claim of any Indian Tribe regarding boundaries or property interests.

B. General Disclaimers.

Nothing in this Compact may be construed or interpreted:

1. as a precedent for the litigation of reserved water rights or the interpretation or administration of future compacts between the United States and the State or of the United States and any other state;

2. as a waiver by the United States on behalf of the Agricultural Research Service of its right under state law to raise objections in state court to individual water rights claimed pursuant to the state Water Use Act, Title 85, of the Montana Code Annotated, in the basins affected by this Compact or any right to raise objections in an appropriate forum to individual water rights subject to a provisional permit under the state Water Use Act, Title 85, of the Montana Code Annotated, in the basins affected by this Compact;

3. as a waiver by the United States of its right to seek relief from a conflicting water use;

4. to establish a precedent for other agreements between the State and the United States or an Indian tribe;

5. to determine the relative rights, inter sese, of Persons using water under the authority of state law or to limit the rights of the Parties or a Person to litigate an issue not resolved by this Compact;

6. to create or deny substantive rights through headings or captions used in this Compact;

7. to expand or restrict any waiver of sovereign immunity existing pursuant to federal law as of the Effective Date of this Compact;

8. to limit the authority of the United States to manage its lands in accordance with the Constitution, statutes, and regulations of the United States;

9. to affect in any manner the entitlement to or quantification of other federal water rights;

10. to be binding on the United States with regard to the water rights of the United States for any area other than the U.S. Sheep Experiment Station;

11. to affect the water rights of any other federal agency that is not a successor in interest to the water rights subject to this Compact;

12. to prevent the United States from seeking a permit to appropriate water under state law for use within or outside the U.S. Sheep Experiment Station boundaries.

C. Reservation of Rights.

The Parties expressly reserve all rights not granted, described, or relinquished in this Compact.

D. Severability.

The provisions of this Compact are not severable.

E. Multiple Originals.

This Compact is executed in quintuplicate. Each of the five (5) Compacts bearing original signatures shall be deemed an original.

F. Notice.

Unless otherwise specifically provided for in this Compact, service of notice required hereunder, except service in litigation, shall be:

1. State: Upon the Director of the Department and such other officials as the Director may designate in writing.

2. United States: Upon the Secretary of Agriculture, the U.S. Sheep Experiment Station Director, and such other officials as the Secretary may designate in writing.

## ARTICLE V FINALITY OF COMPACT

A. Binding Effect.

1. The Effective Date of this Compact is the date of the ratification of this Compact by the Montana legislature, written approval by the United States Department of Agriculture, or written approval by the United States Department of Justice, whichever occurs later. Once effective, all of the provisions of this Compact shall be binding on the Parties.

2. Following the Effective Date of this Compact, this Compact shall not be modified without the consent of both Parties. Either party may seek enforcement of this Compact in a court of competent jurisdiction.

3. On approval of this Compact by a state or federal court of competent jurisdiction and entry of a decree by such court confirming the rights described herein, this Compact and such rights are binding on all Persons bound by the final order of the court.

4. If an objection to this Compact is sustained pursuant to 85-2-702(3) and 85-2-703, MCA, this Compact shall be voidable by action of and without prejudice to either party.

B. Filing Compact with State Court.

Subject to the following stipulations and within one hundred eighty (180) days of the Effective Date of this Compact, the Parties shall submit this Compact to an appropriate state court or courts having jurisdiction over this matter in an action commenced pursuant to 43 U.S.C. 666 for approval in accordance with state law and for the incorporation of the water rights described in this Compact into a decree or decrees entered therein. 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 85-2-702(3), MCA, 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.

C. Dismissal of Filed Claims.

At the time the state courts approve the water rights described in this Compact and enter a decree or decrees confirming the rights described herein, such courts shall dismiss, with prejudice, all water right claims specified in Appendix 4 of this Compact for the U.S. Sheep Experiment Station. If this Compact is not approved or a water right described herein is not confirmed, these claims shall not be dismissed.

D. Settlement of Claims.

The Parties intend that the water rights described in this Compact are in full and final settlement of the federal reserved water right claims for the U.S. Sheep Experiment Station land in Montana described in this Compact and administered by the Agricultural Research Service on the Effective Date of this Compact. On the Effective Date of this Compact, the United States hereby and in full settlement of any and all claims to federal reserved water rights by the United States, including all claims that the Agricultural Research Service filed or could have filed as part of the ongoing statewide adjudication process, relinquishes forever all claims to federal reserved water rights within the State for the U.S. Sheep Experiment Station. The State agrees to recognize the water rights described and quantified herein and shall, except as expressly provided for herein, treat them in the same manner as a water right under Montana state law. Nothing in this Compact precludes the Agricultural Research Service from filing for future water use permits under Montana state law.

E. Defense of Compact.

The Parties agree to defend the provisions and purposes of this Compact from all challenges and attacks.

9. The Court, by separate Order, will instruct the Department of Natural Resources and Conservation to serve a Notice of Entry of United States Department of Agriculture, Agricultural Research Service, U.S. Sheep Experiment Station–Montana

Compact Preliminary Decree and Notice of Availability in Basin 41A. The Court will publish notice in the manner set forth in the separate Order.

10. In addition to the requirements set forth in Mont. Code Ann. § 85-2-233, any objection filed to the Compact shall be on forms provided by the Court and shall include:

a. the name and address of the objector;

b. the name and address of the objector's attorney, if any; and

c. a statement of the specific grounds and evidence on which the objection is based.

11. Any proceedings following the issuance of the Preliminary Decree and service of the Notice in accordance with this Order shall be pursuant to further order of the Court.

DATED this 14th day of August, 2014.

Russ McElyea
Chief Water Judge

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