

IN THE WATER COURT OF THE STATE OF MONTANA
BLACKFEET TRIBE – MONTANA – UNITED STATES COMPACT

CASE NO. WC-0006-C-2018

FINAL ORDER APPROVING BLACKFEET TRIBE – MONTANA – UNITED STATES COMPACT

The Blackfeet Tribe (the “Tribe”), the State of Montana (“State”), and the United States of America (“United States”) (collectively “Compacting Parties”) filed a motion with the Montana Water Court to approve the Blackfeet Tribe–Montana–United States Compact (the “Compact”). The Compacting Parties also ask the Water Court to enter summary judgment dismissing objections to the Compact filed by Pondera County Canal and Reservoir Company (“Pondera”) and Kenneth Pape (“Pape”). Pondera filed a Motion for Additional Findings of Fact and Conclusions of Law Specific to Birch Creek. The Compacting Parties and Pondera each responded and replied to the other parties’ motions. Pape did not respond.

BACKGROUND

A. The Blackfeet Reservation and Its Hydrology.

The Blackfeet Reservation (“Reservation”) was established in 1855 by treaty between the Tribe and the United States. Treaty with the Blackfeet, 11 Stat. 657, Oct. 17, 1855. Since the original treaty, the Reservation has been modified several times by subsequent executive orders, acts of Congress, and ratified agreements. *See* § 3703(14), Blackfeet Water Rights Settlement Act (“Settlement Act”), Pub. L. 114-322, Title III, Subtitle G, §§ 3701-3724, 130 Stat. 1814 (2016) (defining the term “Reservation” and detailing its history).

The Reservation is located along the east side of the Rocky Mountains in north central Montana, adjacent to Glacier National Park. The Reservation is bordered on the north by Canada. Birch Creek forms the Reservation's southern border. Several other significant streams flow out of the mountains and cross the Reservation between Birch Creek and Canada. These streams include Badger Creek, the Two Medicine River, Cut Bank Creek, and the Milk River. The St. Mary River flows out of Glacier Park, then north through the Reservation and into Canada. Birch Creek flows into the Two Medicine River on the east side of the Reservation. Cut Bank Creek joins the Two Medicine River further downstream. The confluence of Cut Bank Creek and the Two Medicine River forms the Marias River.

The stream drainages on the Reservation lie within portions of four of Montana's designated hydrologic basins, including basins 40T (St. Mary River), 40F (Milk River above Fresno Reservoir), 41L (Cut Bank Creek), and 41M (Two Medicine River). Birch Creek and Badger Creek are within Basin 41M. The Water Court is adjudicating state-based water rights in each of these basins. The Reservation also includes portions of the federal Milk River Project. The Milk River Project diverts water from the St. Mary River, conveys it across the Reservation, and discharges it to the North Fork of the Milk River to provide supplemental water for the Milk River Basin.

B. Water Rights Litigation and Compact Negotiations.

Issues related to the Tribe's water rights have been litigated in several previous proceedings. More than 100 years ago, the United States, as trustee for the Tribe, sued the Conrad Investment Company alleging the company was improperly diverting the flow of Birch Creek, preventing water from reaching downstream diversions to the reservation. The Federal District Court of Montana and the Ninth Circuit agreed, ordering the company to leave a sufficient amount of water instream to fulfill the Tribe's senior reserved water right. *United States v. Conrad Invest. Co.*, 156 F. 123 (D. Mont. 1907), *aff'd*, 161 F. 829 (9th Cir. 1908). The federal court discussed an amount of water necessary to meet the Tribe's needs at that time, but specifically recognized it was not

issuing a final quantification of the Tribe's water rights. *Id.* 156 F. at 130-131. The Ninth Circuit upheld this determination. 161 F. at 835.

In 1979, the United States, as trustee for the Blackfeet Tribe, filed suit in federal district court seeking to quantify the Tribe's water rights. *United States v. Aageson*, CV-79-21-GF (D. Mont., Nov. 29, 1979). In April 1982, the United States Bureau of Indian Affairs ("BIA") filed statements of claim on behalf of the Tribe, including claims for reserved water rights. After various federal and Montana Supreme Court cases resolved threshold legal issues, proceedings began before the Water Court to resolve the Tribe's water rights. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S. Ct. 3201 (1983); *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985); *Blackfeet Indian Nation v. Hodel*, 634 F. Supp. 646 (D. Mont.1986).

In 1989, the Tribe and the United States began negotiations with the Montana Reserved Water Rights Compact Commission ("Compact Commission"). The Montana Legislature established the Compact Commission to represent the State in negotiating settlements of reserved water rights claims of the federal government and Indian tribes, as an alternative to litigation. Sections 2-15-212, MCA; 85-2-701(2), MCA; *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 2002 MT 280, ¶ 39, 312 Mont. 420, 59 P.3d 1093 ("[t]wo statutory methods [exist] for comprehensively adjudicating Indian reserved water rights *** – a general *inter sese* adjudication or negotiations with the Montana Reserved Water Rights Compact Commission").

The Compact Commission negotiations initially faltered and the State initiated litigation in the Water Court to adjudicate the Tribe's water rights. The State filed a Motion for More Definite Statement seeking clarification of the Tribes' claims. The Water Court opened case WC 91-1 to address the litigation issues. In November 1997, the United States filed a More Definite Statement of Claim that elaborated on the prior claims the United States had filed on behalf of the Tribe. Among other things, the More Definite Statement of Claim explained the quantification parameters of the Tribe's reserved water rights.

Ultimately negotiations between the Tribe, the United States, and the Compact Commission resumed and proceeded for many years. The Court stayed case WC 91-1 while the parties addressed numerous complex issues. Various technical reports were prepared to quantify the available water, the anticipated water needs of the Tribe, potential impacts to Pondera and other water users, and other related issues. The parties held many negotiating sessions in various locations. The sessions were open to the public and the public was given the opportunity to comment. The parties also made periodic filings with the Water Court that reported on progress and requested continued stays of adjudication proceedings, which the Court granted.¹ Much of this history is summarized in a Staff Report dated May 15, 2019 (“Staff Report”) regarding the Compact drafted by the Montana Department of Natural Resources and Conservation (“DNRC”).²

By 2007 negotiations progressed to the point that a draft of the Compact was made available to the public and several public meetings were held to receive public comment. The 2007 draft was incorporated into a bill introduced in the 2007 Montana Legislature. Although certain funding provisions were passed, the bill did not pass and negotiations resumed.

Several months after the 2007 legislative session ended, a revised draft of the Compact was released for further public comment and public meetings. Following public comment, the Compact Commission voted to approve the Compact and submit it to the 2009 Legislature. The Blackfeet Tribal Business Council also authorized the Compact for approval by the State, the United States Congress, and the Tribe.

The 2009 Montana Legislature ratified the Compact. Governor Schweitzer signed the approval legislation on April 15, 2009. The Compact is codified in the Montana Code at § 85-20-1501, MCA. In 2016, the United States Congress passed the “Blackfeet Water

¹ The stay requests and orders granting stays are contained in the Water Court case file for case no. WC 91-1. The Court subsequently redesignated the case as case WC 1991-01.

² Each party included all or parts of the Staff Report in support of the motions now pending before the Court. No party contends that issues of material fact exist with any component of the Staff Report. The history of the parties’ negotiations leading to the Compact approval is detailed in Section I.C. of the Staff Report (pp. 11-16).

Rights Settlement Act,” (“Settlement Act”). P.L114-322, Title III, Subtitle G, §§ 3701-3724, 130 Stat. 1814 (2016). President Obama signed the Settlement Act ratifying the Compact on December 16, 2016. The Tribe approved the Compact by a referendum vote on April 20, 2017, which the BIA certified on May 30, 2017. The Tribe and the Secretary of Interior on behalf of the United States signed the Compact on June 12, 2018.

C. Compact and Settlement Act Provisions.

1. Compact.

As ratified and codified by the Montana Legislature, and confirmed by Congress and the Tribe, the Compact contains both procedural and substantive terms. Procedurally, the Compact requires the Tribe, the State, or the United States to file a motion with the Water Court to approve and enter the Compact as a final decree. Compact art. VI, § B.1. Among other provisions, the Compact also conditions certain waivers and releases on the Water Court’s entry of the Compact as a final order. *Id.*, art. VII, §. D.2.

Substantively, the Compact defines a “Tribal Water Right.” Compact art. II(47). The Tribal Water Right is a federal reserved right. The specific quantification and other details about the Tribal Water Right are set forth in Article III of the Compact. The Compact specifies that the Water Court’s review of the Compact is limited to Article III. Compact art. VII, § B.2.

Article III contains separate sections for each of the hydrologic basins within the Reservation, including the Birch Creek Drainage³ portion of Basin 41M (Compact art. III, § C.); the Badger Creek Drainage and Two Medicine River Drainage portions of Basin 41M (Compact art. III, § D.); the Cut Bank Creek Drainage in Basin 41L (Compact art. III, § E.); the Milk River Drainage in Basin 40F (Compact art. III, § F.); and the St. Mary River drainage in Basin 40T (Compact art. III, § G.). The Compact’s quantification provisions detailing the Tribal Water Right differ from basin to basin due to each basin’s specific hydrology, water use, legal and other attributes. For example, because the St. Mary River flows into Canada from the Reservation, the Compact provisions for Basin

³ The Birch Creek Drainage and each of the other drainages mentioned in this paragraph are defined terms in the Compact. Compact art. II (definitions). This Order incorporates those definitions.

40T account for the Boundary Waters Treaty. Compact art. III, § G. Likewise, the Compact includes provisions addressing the Milk River Project's diversion of water from the St. Mary River Drainage to the Milk River Drainage. Compact art. IV, § D.4.

The Compact designates October 17, 1855 as the priority date for the Tribal Water Right regardless of basin. The Compact then includes basin-specific provisions that protect certain junior state-based water rights⁴ from some calls⁵ for water by a user of the Tribal Water Right.

2. Birch Creek Drainage Provisions.

Birch Creek is a developed water source that supplies water to Pondera. Pondera owns and operates Swift Dam and Reservoir, a storage facility located in the western portion of the basin near where Birch Creek flows out of the mountains. Article III of the Compact includes two provisions unique to the Birch Creek Drainage. First, the Compact states that irrigation use of the portion of the Tribal Water Right from Birch Creek is “governed by the terms of the Birch Creek Management Plan.” Compact art. III, § C.7. The Birch Creek Management Plan is a defined term under the Compact. The Management Plan is an appendix to the Compact. Compact art. II(13). As summarized by the Compacting Parties in their opening brief, the Management Plan “calls for the development of annual water management plans by the Tribe and Pondera and an annual management meeting, and provides for comprehensive gauging programs, maintenance of records, and other means to facilitate and ensure the viability of all water rights in Birch Creek.” Compacting Parties Opening Br. at 6-7. Pondera does not dispute the elements of the Management Plan.

Second, the Compact states that both the Birch Creek irrigation use and instream flow portions of the Tribal Water Right are “subject to the Agreement Regarding Water Use entered into by the Tribe and the State on January 31, 2008” (“Birch Creek

⁴ The Compact uses the defined term “Water Rights Arising Under State Law” to describe state-based water rights. Compact art. II(52).

⁵ The Compact defines a “call” as “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.” Compact Art. II(18).

Agreement”). Compact art. III, § C.8. According to its recitals, the Birch Creek Agreement reflects the parties’ “desire to set out the terms and conditions under which full implementation of the Tribe’s Birch Creek water right under the Compact will occur.” Birch Creek Agreement at 2. As summarized by the Compacting Parties,

The Birch Creek Agreement provides for a fifteen-year deferral of new uses by the Tribe. It also provides for mitigation water for Pondera water users through the construction of a pipeline to deliver 15,000 acre-feet of water annually from Four Horns Reservoir on the Reservation to an agreed upon point on Birch Creek for approximately a ten-year period from the date the project is capable of making deliveries.

Compacting Parties Opening Br. at 7 (internal citations and parenthetical omitted).

The Tribe and the State entered into an “Amendment to the Agreement Between the Blackfeet Tribe of the Blackfeet Indian Reservation and the State of Montana Regarding Birch Creek Water Use” on February 12, 2009.

3. Settlement Act.

The Settlement Act is the act of Congress signifying federal ratification and approval of the Compact. Settlement Act § 3704(a)(1). The Settlement Act calls for the Compact to be filed with the Water Court for purposes of incorporation into a decree. *Id.* § 3705(e)(4). The Settlement Act ratifies and confirms the Tribal Water Right as a matter of federal law. *Id.* § 3715(a)(1). The Act conditions the use of the Tribal Water Right to the terms and conditions of both the Compact and the Settlement Act. The Settlement Act approves the Birch Creek Agreement. *Id.* § 3722(h). The Act also specifies that the enforceability date of various provisions of the Act is the date of publication in the Federal Register that “the Montana Water Court has approved the Compact, and that decision has become final and nonappealable.” *Id.* § 3720(f).

D. Preliminary Decree Proceedings.

The Compact requires that one of the Compacting Parties move the Water Court for approval of a decree incorporating the terms of the Compact. Art. VII.B.1. The Compacting Parties met that obligation in December 2018 by filing their “Joint Motion for Incorporation of the Blackfeet Tribe’s Compact into Preliminary and Final Decrees

and for a Hearing on any Objections to the Preliminary Decree.” The joint motion asked the Water Court to incorporate the water rights set out in the Compact into preliminary and final decrees for the basins addressed in the Compact.⁶

After receiving the Compacting Parties’ motion, the Water Court consolidated proceedings for the Compact into this case.⁷ On March 26, 2019, the Court issued the Preliminary Decree and Order for Commencement of Special Proceedings for Consideration of the Blackfoot Tribe – Montana – United States Compact (“Preliminary Decree”). The Preliminary Decree made findings of fact, included the full text of the Compact, and summarized pertinent provisions of the Settlement Act.

In conjunction with the issuance of the Preliminary Decree, the Water Court also issued an Order Directing the United States to Mail Notice of Entry of the Blackfoot Tribe – Montana - United States Compact Preliminary Decree and Notice of Availability (“Notice Order”). The Notice Order ordered the United States to send notice of the Preliminary Decree to various water users, government entities, tribes and other interested persons. The order also specified requirements for newspaper notice.

The United States met the terms of the Notice Order by arranging for publication of notice of the Preliminary Decree for three consecutive weeks in several state-wide and regional newspapers, including the Great Falls Tribune, the Glacier Reporter, the Cut Bank Pioneer Press, the Valerian, the Billings Gazette, and the Havre Daily News. The Water Court and the DNRC posted notice of the Preliminary Decree on their websites. With the Water Court’s approval, the United States mailed individual notice of the Preliminary Decree to more than 3,000 persons and entities. The mailing included all water users in Basins 40F, 40T, 41L, 41M, and 41P, water users claiming water rights in the mainstem of the Milk River in Basins 40J, 40M, and 40O, the Assiniboine and Sioux

⁶ The Montana Water Use Act authorizes the Water Court to adopt procedures to consolidate water right claims from different hydrologic basins into a single judicial unit. Section 85-2-215, MCA.

⁷ The Court left open case 91-1 (now called case WC-0001-C-1991) and created several subcases to address water right claims addressed in a stipulation between the Tribe, the Forest Service and the National Park Service. Those cases remain pending, but do not pose impediments to addressing the request to approve the Compact.

Tribes of the Fort Peck Indian Reservation, the Chippewa Cree Indians of the Rocky Boy's Reservation, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Fort Belknap Indian Community of the Fort Belknap Reservation, the State of North Dakota, and the United States Department of the Interior.

In addition to the notices, the Water Court hosted five separate public meetings in Browning, Valier, Great Falls, Glasgow, and Havre, Montana between April 30, 2019 and May 8, 2019. Representatives of the United States, the Tribe, and the State attended each meeting and were available to respond to questions about the Compact and its approval process.

E. Objections.

The Preliminary Decree objection period closed on October 1, 2019.⁸ Four parties filed timely objections. The objectors included Pondera⁹, Pape, Kenneth A. Rice ("Rice"), and Doug Nelson ("Nelson"). Rice withdrew his objection on March 5, 2020. Nelson withdrew his objection on April 16, 2020.

F. Pending Motions.

The Court set a briefing schedule that included a deadline for parties to file any motions. On July 21, 2020, the Compacting Parties timely filed a consolidated Motion for Approval of the Blackfeet Compact and For Summary Judgment Dismissing All Remaining Objections. The same day, Pondera timely filed a Motion for Additional Findings of Fact and Conclusions of Law Specific to Birch Creek. Objector Pape did not file any motions. The motions were fully briefed and the Court heard oral argument on October 8, 2020.

ISSUES

1. Have the Compacting Parties met their burden to prove the Court should approve the Compact?

⁸ The Water Court received a request from Raleigh King to extend the objection period, but the request was not granted.

⁹ In the briefing Pondera County Canal and Reservoir Company uses the shorthand "PCCRC" and the Compacting Parties use "Pondera." For purposes of this Order, the Court uses "Pondera" because that was the terminology used at oral argument.

2. Has Pondera met its burden to prove that specific findings of fact and conclusions of law are necessary to approve the Compact and resolve its objections?
3. Should the Water Court dismiss the objections of Pondera and Pape?

DISCUSSION

A. Jurisdiction.

State courts have jurisdiction to adjudicate Indian water rights in a comprehensive adjudication under the McCarran Amendment's sovereign immunity waiver. 43 U.S.C. § 666; *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236 (1976); *San Carlos Apache Tribe*, 463 U.S. 545, 564, 103 S. Ct. at 3212 (1983). This jurisdiction includes authority to adjudicate the Blackfeet Tribe's water rights. *Blackfeet Indian Nation v. Hodel*. In *Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation v. Adsit*, 721 F.2d 1187, 1188 (9th Cir. 1983), the Ninth Circuit ordered federal district courts to stay all water right adjudications pending in federal courts until state court proceedings conclude. In *State ex rel. Greely*, the Montana Supreme Court held that the adjudication provisions of the Montana Water Use Act are adequate to adjudicate Indian water rights as part of a single unified proceeding, and that the Montana Water Court may exercise jurisdiction.

B. Compact Approval.

1. Indian Reserved Water Rights.

The United States Supreme Court recognized Indian reserved water rights in *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207 (1908). In *Winters*, the Court held that the federal government impliedly reserved sufficient water to provide for a permanent tribal homeland with an agricultural economy when it created the Fort Belknap Indian Reservation in Montana. *Winters* sets out the basic parameters of the reserved rights doctrine.

When adjudicating water rights, including tribal water rights, the Water Court is a state court with a "solemn obligation to follow federal law." *San Carlos Apache Tribe*, 463 U.S. at 571, 103 S. Ct. at 3216 (1983). Thus, as applied to tribal water rights and the approval of compacts, *Winters* and its progeny apply. *State ex rel. Greely*, 219 Mont. at

92, 712 P.2d at 764; *In re Crow Water Compact* (“*Crow Compact I*”), 2015 MT 217, ¶ 17, 380 Mont. 168, 354 P.3d 1217.

2. Standard for Compact Approval.

As part of its objective to establish a single unified system of water rights, the Montana Water Use Act establishes procedural requirements and substantive standards to adjudicate all “existing rights.” Section 85-2-701(1), MCA. “Existing rights” include both “federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.” Section 85-2-102(13), MCA. The Act requires the Court to state in a final decree certain elements for existing rights. The list of required elements differs depending on whether the rights are based on state or federal law. Section 85-2-234(6), (7), MCA. Because tribal water rights are based on federal law, and because the Compacting Parties ask the Court to incorporate the Compact into final decrees for Basins 40F, 40T, 41L and 41M, the Court follows the Water Use Act final decree provisions for “water rights arising under the laws of the United States” set forth in § 85-2-234(7), MCA.

The Water Use Act provides two methods to decree federally-based tribal water rights. First, the Montana Legislature authorized the Compact Commission to resolve federally-based water rights through the compact negotiation process. If negotiations are successful, negotiated compacts are presented to the Water Court for approval. Alternatively, if negotiations are unsuccessful, tribes or federal agencies may file claims, which then are subject to the claim resolution process applicable to state-based water rights. Section 85-2-704, MCA. Thus far, all federally-based water rights addressed in Compact Commission proceedings, both tribal and non-tribal, have been successfully included in compacts.¹⁰ The Water Court has approved all compacts previously filed seeking approval.

When the elements of tribal or federal water rights are resolved by compact, the Water Use Act requires the Court to include the terms of a compact in a final decree

¹⁰ The Water Court decreed the water right claims of the Turtle Mountain Band of Chippewa outside a compact approval proceeding, but those claims were not negotiated by the Compact Commission.

“without alteration” unless the Court sustains an objection to the compact. Section 85-2-702(3), MCA. When the Court incorporates a compact into a final decree, the Water Use Act also prohibits the Court from altering or amending a compact “except with the prior written consent of the parties in accordance with applicable law.” Section 85-2-234(2), MCA.

Other than prohibiting alteration and identifying those elements that must be included in a final decree, the Water Use Act does not set a standard for the Water Court to apply when reviewing a compact that has been filed with the Court for approval. However, over the course of reviewing and approving four tribal¹¹ and eleven federal¹² compacts, the Water Court has developed a standard for review and applied it consistently. Under this standard, the Water Court presumes a compact is valid if (a) the compact is “fundamentally fair, adequate and reasonable” and (b) the compact conforms to applicable laws. *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1, *7. If the Court makes these determinations and no objections are received, the Court’s review ends and it approves the compact. *Special Northern Cheyenne Compact Subbasin*, 1995 Mont. Water LEXIS 8, *8 1995 ML 109 (quotation omitted).

If non-parties to a compact file objections, the Water Court makes a threshold evaluation of whether the compact “was the product of good faith, arms-length negotiations.” *In re Crow Water Compact (“Crow Compact II”)*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.2d 584 (internal quotation omitted). If this threshold is met, the burden of proof shifts to the non-party objectors to overcome the presumption of compact validity by proving (a) the compact is unreasonable and (b) their “interests are materially injured by operation of the Compact.” *Id.*, ¶ 19-20 (internal quotation omitted). This

¹¹ The tribal compacts previously approved by the Water Court under this standard include the Fort Peck Compact, the Northern Cheyenne Compact, the Chippewa-Cree Compact, and the Crow Compact. The compacts with the Fort Belknap Indian Community and the Confederated Salish and Kootenai Tribes of the Flathead Reservation have been ratified by the Montana Legislature, but have not yet been submitted to the Water Court for approval.

¹² The compacts are codified in Title 85, Chapter 20, MCA.

burden is heavy and has never been met in any prior tribal compact proceeding where non-party objections were filed. *See In re Adjudication of Existing and Reserved Rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation*, Case WC-92-1, Mem. Op., Aug. 10, 1991; *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, Case WC-2000-01, 2002 Mont. Water LEXIS 1, Mem. Op., (Jun. 12, 2002); *Crow Compact II*; *see also In re Bowdoin National Wildlife Refuge – Montana Compact*, Case WC-2013-04, Order Granting Summary Judgment and Approving Compact, (Oct. 7, 2015).

The standard for approving compacts and addressing objections recognizes two fundamental aspects of compact approval. First, compacts are the product of government-to-government negotiations of elements of water rights claimed by the United States, either for itself or in its capacity as trustee for various tribes. This means negotiations by the Compact Commission and ratification by the Montana Legislature is deemed to be in the overall public interest. *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1, *14; *Crow Compact II*, ¶ 36. Second, the standard also recognizes that compact approval may affect rights of third party water users who are not parties to compacts, and ensures that those parties have been afforded a meaningful opportunity to participate in the process. *Crow Compact II*, ¶ 39 (explaining extent of procedural due process rights of objectors). The Water Court has consistently applied this general approach to every tribal and federal compact it has addressed thus far.

3. Application of the Threshold Standard for Compact Validity.

The threshold fairness and adequacy of a compact has both procedural and substantive components. A compact meets the procedural fairness standard when the negotiation process was conducted fairly, through arms-length negotiations by the parties. For substantive fairness, the Court is not required to predict how it might have fashioned a judgment had the reserved water rights been litigated. Rather, the Court's substantive analysis is limited to "an amalgam of delicate balancing, gross approximations and rough justice." *In re Chippewa Cree Tribe*, *8, *citing Officers for Justice v. Civil Service*

Comm'n, 688 F.2d 615, 625 (9th Cir. 1983). The Court need only be satisfied that the Compact “represents a reasonable factual and legal determination.” *United States v. Oregon*, 913 F.2d 576, 581 (1990). Ultimately, “substantive fairness flows from procedural fairness.” *United States v. Telluride Co.*, 849 F. Supp. 1400, 1402, (D. Colo., 1994).

The Compact meets both prongs of the fairness threshold. The Montana Legislature created the Compact Commission to negotiate government-to-government agreements with the United States and Tribes for reserved water rights. In negotiations, the Compact Commission acted on behalf of the governor. Section 85-2-701(2), MCA. There is nothing in the Staff Report or the briefing to suggest the negotiations for the Compact deviated in any material way from Compact Commission negotiations that led to the prior federal and tribal compacts.

The procedural fairness of the process leading up to the Compact is underscored by its resolution of what at times was an adversarial process, as illustrated by the initiation of adjudication proceedings before the Water Court. Ultimately the litigation was stayed, but the Compact negotiations took years to complete and significant commitment from all parties. Because the Water Court stayed, but did not dismiss the case, the backdrop of potential renewed litigation remained during this time. The Compact represents the parties’ decision to reach a mutually satisfactory compromise rather than litigating the scope of the Tribe’s water rights.

Additionally, even though the Compact Commission did not directly represent any particular water user, the negotiation proceedings were carefully structured so water users, including Pondera and the public, could participate by observing proceedings and offering comment. The record shows that numerous meetings took place in various locations around Montana over the span of years. The public included not only Pondera, but any other person with an interest in the outcome of negotiations. Pondera states in its briefing that it took full advantage of the process offered to it by attending meetings and submitting comments. Neither Pondera nor any other member of the public asserts they lacked notice of the proceedings or were deprived of a full and fair opportunity to

participate. This opportunity extended to proceedings before both the Montana Legislature and Congress as part of Compact ratification by both bodies. Pondera also participated in the legislative proceedings by offering comment. There is no indication in the record presented by the parties that Pondera or any other potentially-affected water user objected to the ultimate form of the Compact passed by the Legislature and ratified by Congress. This process met the standard necessary to protect the due process rights of Pondera and other members of the public. *See Crow Compact II*, ¶ 39.

Likewise, the substance of the Compact reflects the balance and sense of justice the parties recognized was necessary to reach resolution. The measure of Indian reserved water rights is governed by the amount of water necessary to fulfill the purposes of the reservation. *Winters*, 207 U.S. at 577, 28 S. Ct. at 212. The United States Supreme Court has held this may reserve an amount necessary “to irrigate all the practicably irrigable acreage [“PIA”] on the reservations.” *Arizona v. California*, 373 U.S. 546, 600, 83 S. Ct. 1468, 1498 (1963). The Montana Supreme Court concurs that reserved water rights may be based on PIA. *Greely*, 219 Mont. at 92-94.

The material the parties filed with the Court indicates they spent significant time evaluating what ultimately became the quantification provisions of the Tribal Water Right for each of the basins covered by the Compact. *See Staff Report* at 25-51 (describing Birch Creek Basin analysis). In performing this evaluation, the Compact Commission recognized the backdrop and potential applicability of the PIA standard and its complexities. *See Staff Report* at 27 (“the PIA standard was viewed by the Compact Commission as the most likely standard to be used if this matter went to litigation”). The Court’s role in addressing the Compact is not to second-guess the application of this standard and reach a different outcome. Rather, the Court is limited to determining whether anything in the Compact’s quantification provisions violate or are prohibited by applicable law. Because the quantification provisions of the Compact are based upon legally sufficient standards, quantification of the Tribal Water Right meets the threshold necessary for Court approval.

In addition to quantification, the final decree provisions of the Water Use Act require that the decree state certain other elements for “water rights arising under the laws of the United States.” Section 85-2-234(7), MCA. The statute allows the Water Court to accept a compact as the mechanism to decree these elements. The Compact includes provisions that address the elements set forth in § 85-2-234(7), MCA. The Compact is sufficient for the Water Court to fulfill its function to meet the statutory final decree standards applicable to reserved rights. Therefore, the Compact conforms to existing law and is procedurally and substantively sufficient to meet the standards for presumptive validity.

4. Objections.

Once the Compacting Parties meet their threshold burden and the Compact is presumed valid, the burden shifts to the objectors. Pondera and Pape are the only objectors. They both are non-parties to the Compact. As noted previously, their “heavy burden” is to prove the compact is unreasonable and their “interests are materially injured by operation of the Compact.” *Crow Compact II*, ¶ 19-20. Pape fails to meet this burden because he submitted no response. Therefore, the objection analysis addresses only Pondera’s objection.

a. Material Injury.

Pondera’s objection is limited to the Compact’s quantification provisions for the Birch Creek Drainage. Pondera does not object to the process used to reach consensus in the Compact, does not object to quantification in any drainage other than Birch Creek, and does not object to any substantive term of the Compact other than the Birch Creek Drainage quantification.

Pondera contends that implementation of the Compact’s quantification provisions will reduce the volume of water available to Pondera by up to 15,000 acre feet per year. Pondera states this reduction will result in “material injury to [Pondera’s] water rights and water interests as a result of the Compact.” Pondera Resp. at 4. Citing the Staff Report as authority, Pondera further contends material injury “is demonstrated and appears undisputed.” *Id.*, citing Staff Report at 47-48. Pondera argues that this material

injury will only be eliminated if the Water Court grants its motion and makes findings of fact and conclusions of law formally recognizing mitigation measures contained in the Birch Creek Agreement and the Settlement Act.

Pondera's objection does not meet its burden to prove the Compact will cause it material injury and is unreasonable. Pondera claims no water rights senior to the Tribal Water Right, nor does Pondera object to the October 17, 1855 priority date. Pondera also does not dispute settled principles of reserved water rights jurisprudence applicable to the Tribal Water Right, which include (a) the lack of any requirement that the reserved rights have been exercised historically to be valid, *Stults*, ¶ 28, and (b) that reserved water rights are "immune from abandonment for nonuse." *Greely*, 219 Mont. at 98. Pondera and its predecessors have been on notice since at least 1907 that their rights are subject to curtailment because their rights are junior to the Tribe, and the Tribe's reserved rights had not yet been finally quantified. *Conrad Invest. Co.*, 156 F. at 130-131, *aff'd*, 161 F. at 835. Without the Compact, Pondera's water use is and always has been at risk of curtailment. Quantifying the Tribal Water Right in the Compact does not increase the curtailment risk, especially given the Compact's mitigation measures, including incorporation of the Management Plan and the Birch Creek Agreement. Pondera fails to explain how approving a Compact quantifying an unquestionably senior reserved water right causes it material injury.

Pondera's argument that full exercise of the Tribal Water Right could reduce water available to Pondera by up to 15,000 acre feet improperly conflates information from the Staff Report with terms ultimately negotiated and memorialized in the Compact. The 15,000 acre feet figure Pondera plucked from the Staff Report is a modeled projection the Staff Report indicates was part of the background information used to negotiate the package of terms that make up the Birch Creek Drainage section of the Tribal Water Right. Staff Report at 47-48 (describing assumptions in one of the models used in Compact negotiations). In the posture of a Compact approval proceeding, the Court is not in a position to determine alleged future injury based on unverified volumetric facts that

did not ultimately become Compact terms.¹³ To do so would force the Court to speculate as to how water might be administered in the future, which it cannot do. *Crow Compact II*, ¶ 35 (“Objectors’ main contention here is the future potential problems that might arise with the administration of water rights under the Compact. Not only is it speculative but it is also beyond the scope of our review.”).

Even if the Court accepts the 15,000 acre feet figure from the Staff Report as a potential future consequence to Pondera, Pondera’s contention does not properly account for the mitigation and other protective measures contained in the Compact. In the subsections that immediately follow the Birch Creek flow rate quantification, the Compact qualifies the irrigation portion of the Tribal Water Right by stating its use “is governed by the Birch Creek Management Plan.” Compact, art. III.C.7. The Compact further qualifies both the irrigation portion and the instream flow portions of the right by stating their exercise is “subject to the Agreement Regarding Birch Creek Water Use entered by the Tribe and the State on January 31, 2008.” Compact, art. III.C.8. In contrast to its reference to the Staff Report (which is not part of the Compact), Pondera does not explain how the flow rate and mitigation measures that do appear within the four corners of the Compact cause material injury to Pondera.

Pondera seems to accept that the mitigation measures are proper to eliminate any material injury because Pondera does not ask the Court to declare the Compact void. Instead, Pondera’s response to the Compacting Parties’ motion and its own motion argue that Pondera will be materially injured unless the Court adopts findings and conclusions that both “reflect the extent of impacts to non-Indian water users,” and “assure the terms of the Birch Creek Agreement are accurately incorporated under the Final Decree.” Pondera Motion at 12; Pondera Response to Compacting Parties at 5. Pondera’s motion includes proposed findings and conclusions that it contends are necessary to eliminate material injury and fully characterize the Tribal Water Right.

¹³ In contrast, the Birch Creek Drainage provisions of the Compact defining the Tribal Water Right do quantify a “Direct Use water right of 100 Cfs of the Natural Flow of Birch Creek” for irrigation use and an instream flow right in Birch Creek with a flow rate that varies seasonably. Compact, art. III.C.1.a. and b.

Pondera provides no legal basis for the Water Court to make findings and draw conclusions about the documents referenced in the Compact. Pondera does not contend the Birch Creek documents referenced in the subpart C.7 and C.8 mitigation measures are vague or ambiguous in any way. Pondera also does not contend that the documents were not prepared in good faith as part of arms-length negotiations. Nor does it argue the documents fail to reflect the public interest. Instead, Pondera's argument amounts to a request that the Court annotate the language of the Compact by supplementing the terms the parties actually used with Court-supplied terms that lie outside the terms of the Compact and the documents it incorporates by reference. The Court lacks authority to supplement any terms of the Compact without consent of the parties, which does not exist here. Sections 85-2-702(3); 85-2-234(2), MCA.

Pondera argues the Water Use Act leaves room for the Court to adopt findings and conclusions even if the quantification provisions of the Compact are accepted. As authority, Pondera cites the Water Use Act provision for water rights arising under the laws of the United States. This provision requires the Water Court to include in final decrees "any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702." Section 85-2-234(7)(h), MCA. Pondera points to no instance where the Water Court has found it necessary to include in a decree information outside a compact's four corners to approve the compact. There is no reason to do so here. The Compact specifically references the Birch Creek Agreement, so that agreement is not necessary information outside the four corners of the Compact. As already discussed, there is no reason for the Water Court to parse and paraphrase the Birch Creek Agreement as part of the Compact approval process.

Furthermore, the parties seem to have largely resolved this issue in their briefing and statements made at oral argument. Pondera is concerned the Tribe and the State amended the Birch Creek Agreement after the Compact was ratified. Pondera argues this amendment is critical to mitigating material injury it otherwise will suffer. While the Settlement Act recognizes the amendment, according to Pondera the Compact does not.

However, the Compacting Parties do not dispute the amendment, and further state the Birch Creek Agreement contemplates amendments. The amendment therefore is incorporated into the agreement that the Compact incorporates by the reference. *See* Compact, art. III.C.8.

To summarize, Pondera has not met its burden to prove the Court must make the findings it requests to eliminate material injury. The Management Plan and the Birch Creek Agreement are plainly referenced in art. III.C.7 and C.8 of the Compact. Those sections of the Compact apply to the Tribal Water Right and state conditions to the quantification of the water right. The Montana Supreme Court held in *Crow Compact II* that it is proper for the Water Court to rely on provisions of a Compact that provide measures of protection to existing state-based rights. *Crow Compact II*, ¶ 30. The Supreme Court did not hold or even suggest the Water Court must make further findings to cement the veracity of those measures. Because the measures are an integral part of the quantification of the Tribal Water Right, and because Pondera has failed to demonstrate that the measures, as incorporated, are invalid in any way, Pondera has failed to prove that it will be materially injured if the Court approves the Compact as drafted. Therefore, Pondera's motion for additional findings should be denied.

b. Reasonableness.

In *Crow Compact II*, the Supreme Court held that once the Water Court finds a compact to be presumptively valid, as it has here, the objectors must show that the compact "is unreasonable and that [the objectors] interests are materially injured." *Crow Compact II*, ¶ 20. A compact may be unreasonable if it follows an approach to quantify and allocate water rights that departs from existing law. *Id.*, ¶ 24. Pondera does not identify any law the Compact violates and agrees the Compact is consistent with the *Winters* doctrine. Pondera Reply at 8 (stating it "is not contending that the Tribal Water Right does not comport with the purposes of the Treaty creating the Blackfeet Reservation").

In its reply brief, Pondera argues for the first time that the Compact does not comply with existing law because mitigation measures exist in the Settlement Act

(specifically, recognition of the amendment to the Birch Creek Agreement) that are not memorialized in the Compact. As already discussed, the Compacting Parties do not dispute that the amendments to the Birch Creek Agreement are incorporated by reference in the Compact. Pondera does not disagree. Thus, even if there was some disparity between the Settlement Act and the Compact, the parties' statements moot the issue. Even if that were not the case, Pondera provides no argument, nor can the Court conceive of one, as to how the Compact somehow departs from existing law merely because the Settlement Act adds to the mitigation that already is in the Compact. Pondera provides no other basis to prove the Compact is unreasonable.

5. Compacting Parties' Summary Judgment Motion.

The remaining issue is whether the Court should grant the Compacting Parties' motion for summary judgment. The motion seeks to dismiss the objections of both Pape and Pondera as a matter of law under the undisputed facts. The motion is well taken. Pape provided no filings to establish a basis to overcome the Court's finding that the Compact is presumptively valid. Pape did not file anything to meet the burden of proof that applies following that finding. Therefore, Pape's objection should be dismissed as a matter of law.

Likewise, for the reasons already discussed, Pondera has failed to meet its burden to prove the Water Court's approval of the Compact will cause it material injury and that the Compact is unreasonable. No additional findings or conclusions are necessary to make the mitigation measures in the Compact enforceable and Pondera does not prove why the Court should void the Compact with these mitigation measures. Absent such proof, Pondera's objection should be dismissed as a matter of law, which is the relief the Compacting Parties seek in their summary judgment motion.

ORDER

Based upon the foregoing, it is ORDERED:

1. The motion of the Compacting Parties to approve the Compact is GRANTED.

2. Pondera's motion for additional findings of fact and conclusions of law is DENIED.

3. The motion of the Compacting Parties to dismiss the objections of Pondera and Pape is GRANTED, and the objections are DISMISSED.

4. The Compact is APPROVED and the Compact shall be included in final decrees of the Water Court for Basins 40F, 40T, 41L and 41M without modification.

5. This Order is a final order of the Water Court as to all matters within the Water Court's jurisdiction relating to approval of the Compact, provided that the Court retains whatever jurisdiction is needed to facilitate the administrative process of inserting the provisions of the Compact into the State Centralized Record System, including the computer water right database maintained by the DNRC, in cooperation and coordination with the United States and the State of Montana. The Court will certify this order as a final judgment in a separate order.

Stephen R. Brown
Associate Water Judge

Service via Electronic Mail:

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
(303) 444-2549
jwhiteing@whiteinglaw.com

Samuel D. Gollis, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources
Division
Indian Resources Section
South Terrace, Suite 370
999 18th Street
Denver, CO 80202
(303) 844-1351
samuel.gollis@usdoj.gov
Efile_Denver.enrd@usdoj.gov

John E. Bloomquist
BLOOMQUIST LAW FIRM, P.C.
3355 Colton Drive, Suite A
Helena, MT 59602
(406) 502-1244
blf@helenalaw.com
(*Atty for Obj. PCCRC*)

Jeremiah Langston
Melissa Schlichting
Aislinn Brown
Assistant Attorney General
215 North Sanders
PO Box 21401
Helena, MT 59620-1401
(406) 444-2026
Jeremiah.langston@mt.gov
mschlichting@mt.gov
aislinn.brown@mt.gov
rochell.standish@mt.gov

Barbara Chillcott
Special Assistant Attorney General
Department of Natural Resources and
Conservation
1539 11th Ave
PO Box 201601
Helena, MT 59620-1601
(406) 444-9758
barbara.chillcott@mt.gov
astrong@mt.gov

Derek E. Kline
Blackfeet Legal Department
PO Box 849
Browning, MT 59417
(406) 338-7777
Fax: (406) 338-5363
dkline@blackfeetnation.com
tgilham@blackfeetnation.com

Courtesy Copy
DNRC- Water Resources
Havre Regional Office
PO Box 1828
Havre, MT 59501-1828

Service via USPS Mail:

Kenneth R. Pape
1505 Quarton Ridge Circle
Bloomfield Hills, MI 48301
(248) 644-8135
kenneth.r.pape@gmail.com

Douglas J. Nelson
PO Box 1496
Hamilton, MT 59840
(406) 212-0239
doug@isoart.com
doug@glacieryallery.com

John Chaffin
US Department of Interior
Office of the Solicitor
2021 4th Ave North, Suite 112
Billings, MT 59101
(406) 247-7583
john.chaffin@sol.doi.gov