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July 9, 2024

Montana Water Court

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IN THE WATER COURT OF THE STATE OF MONTANA
CONFEDERATED SALISH AND KOOTENAI TRIBES -
MONTANA - UNITED STATES COMPACT

WC-0001-C-2021

Objection to Certain Omissions of Standard of Review/Including Violations of Procedural Due Process of these Proceedings

Background

In looking at over two years of judicial review of the Flathead Water Compact, there are some unusual standards that have been either broken, omitted or a violation of due process and transparency. The Preliminary Decree was filed on June 9th, 2022, and what lurks behind every day and month that goes by is time, for this case must be decided within three years.

In this Decree the Court said it is *limited in its review to parts of the Compact that determines the Tribe's water rights and their administration*. Now, this statement has at least two premises that are factually in dispute. The Court presumes a collective tribe was to be created in perpetuity (permanent homeland) by the Reservation (which is false) and that there is a Tribal Water Right. That there are reserved water rights is a given, but Tribal Water Rights? All humans have the right to pursue water for life's necessities, you don't have to be tribal to have that right.

Also, on June 9th of 2022 the Water Court filed its "*Findings of Fact, Conclusions of Law and Order for the Commencement of Special Proceedings*" While the Findings of Fact in this Commencement deal with procedures initiating the Water Court's involvement, nothing, of course, is said about the factual data that involved the History of the Tribe, the Hellgate Treaty and subsequent Acts of Congress in clearly delineating what was the purpose of the Reservation. So, these objectors are left wondering what the Court meant in its October 10th Zoom meeting when it said, around the 22-minute mark in the context of the discussion about discovery, the following:

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"*Facts that are already known*." So, it appears the Court believes all the facts are already on the table for everyone to know; therefore, do we really need discovery? However, even a cursory glance at many of the objections filed would reveal many facts are in dispute and have yet to be determined.

The standard of review statement in the Preliminary Decree is remarkable in what is omitted. Nothing is said about a constitutional review of the Compact including its origin and history.

Part of the standard of review stated is that the Compact is "*fair and reasonable to those parties and the public interest who were not represented in the negotiation but have interests that could be injured by the operation of the compact*." Now, Courts normally do not like to look at injuries that could be speculative. Speculative injuries usually have a strong burden to show standing. Yet here we have the phrase "*could be injured*". The objectors appreciate the opening of the door, but this is unusual. While constitutional injuries to the public are clearly shown in this Compact, one would need admissions and interrogatories to cement the potential of material injury.

The Court has allowed objectors to file Motions entitled Fair and Adequate. Strangely, nothing is said about whether the Court, itself, has been Fair, Reasonable and Adequate in the proceedings so far. This Motion, in part, will address this.

Another criterion of review is that the Compact is not "*the product of fraud, overreach, and collusion between the negotiating parties*." A reasonable criterion, which for the most part, was not addressed in previous Water Compacts by objectors. In the Fort Peck Water Compact (which was approved in 2001) objectors did not mention fraud, overreach and collusion. Did they know? Were these objectors adequately represented?

In the Blackfeet Water Compact (approved in December of 2020) the Court made the following statement:

> Over the course of reviewing 4 tribal compacts, the Water Court has developed a standard of review and applied it consistently. . . Under this standard, the Court presumes a compact is fundamentally fair, adequate, and reasonable.

One must assume that the Court also presumes a compact is constitutional!

On page 13 of the Blackfeet Water Compact, the Court stated this:

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> Non-party objectors have to overcome the presumption of compact validity. . . this burden is heavy and has never been met in any prior tribal compact proceedings.

The consistency of the Water Court's standard of review is somewhat in doubt which includes what the standards are. Exactly what are the specific standards of review? They are not listed with any clarity but are hodgepodged in several decisions by courts. The Fort Peck Water Court decision mentions that the Compact is closely analogous to a consent decree (will discuss this later) but the Blackfeet decision does not. The Fort Peck decision mentions fraud, collusion and overreach as a criterion even though objectors did not claim them. The Blackfeet does not mention these. In Fort Peck, the Water Court stated the Montana Legislature is limited only by the U.S. and Montana Constitutions. The Blackfeet does not say this.

Therefore, another criterion is this idea that Compact is to be viewed as "*closely analogous to a consent decree.*" For any consensual agreement, we do have the overall criteria of fraud, overreach and collusion. But there are two more that the Court is strangely silent about: *informed consent* and *coercion*. One might suggest that these two are included in the words fraud and collusion, but these objectors believe these two criteria need to be specified. An informed consent is necessary for a consensual agreement to be valid. Did the Montana Legislature give an informed consent to the Water Compact or were they misled, and given false information and relied on so-called experts? It can be shown that many legislators never actually read the whole Compact but relied on experts to explain it to them. This standard can only be discovered in a hearing with members of the Legislature testifying. Was the Legislature coerced by the false 10,000 water claims and expensive litigation that would take years? That these assertions were made by proponents of the Compact can factually be shown.

{We read at the DNRC website under Water Compacts the following statements (see **mtdnrc.maps.arcgis.com**):

> "The RWRCC is still the only state Commission to negotiate reserved water systematically across an entire state. This negotiation approach has likely saved the people of Montana millions of dollars in litigation fees. Montana's approach, since the inception of the *Reserved Water Rights Compact Commission* (RWRCC), has been to negotiate rather than litigate, to talk rather than fight. It's made a big difference".

A noble cause if tactics used were noble, however, fear tactics asserting thousands of claims and endless litigation if the Water Compact was not approved were not noble tactics. It is far more

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noble to consider the constitutional standard of review in negotiations rather than legal costs and political winds.}

On top of page 14 of the Blackfeet Water Court's Order we read, "*substantive fairness flows from procedural fairness*." There is much truth to this for much of fairness has to do with due process procedures. Has this Water Court in the past two years shown procedural fairness? It must be admitted the Court has tried hard to show fairness. However, there are indications procedurally that this Court is not totally fair. These objectors list the following:

1. To those of us that experienced the Mediation Process, we did not think it was impartial or fair. The Court has tried to shield itself from this by stating it trusts the mediator was professional (without evidence) and that confidentiality shields the Court from further inquiry. The conduct of the Mediation process was designed to eliminate Objectors by making statements soliciting the signing of a consensual agreement in private away from public scrutiny in turn for dropping from further participation as an Objector. In our opinion, the Settlement Phase using a Mediation Process is highly suspect and should not have been made a mandatory process for all Objectors.

2. Why is discovery not allowed through admissions and interrogatories to show objectors "*could be injured*" by the operation of this Compact? Discovery may possibly be allowed in late September of this year AFTER Motions of Fairness and Adequacy. In our opinion, Discovery should have been allowed in the months of May and June so that objectors could show that the implementation of the Compact is not fair.

3. The Court has assigned the burden on objectors to overcome the presumption of validity. Actually, the burden should be heavy on the Compacting Parties to prove that the Compact does not violate both the Montana and U.S. Constitutions since the Parties wrote the Compact. Does the Compact meet constitutional standards and protections for all objectors? The Compacting Parties have a heavy burden to show this.

4. The presumptions of the Water Court that the "purpose of the Reservation" was to retain a collective Tribe with collective land {Did the U.S. Government in the 19th century believe in collectivism when the U.S. Constitution proposes a republican form of government for all its citizens} and that there is a Tribal Water Right rather than 'federal reserved water rights". It is not valid for Water Courts to presume these claims are true based on other courts assertions. Not

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all treaties and their histories are the same. Every Compact is different in geography, damages, objections and Objectors.

Brief

This matter comes before the Court on issues of law and procedural standards of review. As stated in the Blackfeet Water Court decision, the Montana 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." Therefore, the Water Court had developed an amalgamation of several maxims in determining the standard of review for Water Compacts. So, we see the following:

1. A presumption that the Compact is valid.
2. Closely analogous to a consent decree or agreement.
3. Does the Compact consist of Fairness, Adequacy and good faith negotiation?
4. Is there material injury to parties who did not participate in negotiations?
5. Is the Compact the product of fraud, overreach, and collusion?
6. Solemn obligation to follow federal law (court decisions).
7. Was the proposed Compact given public notice and available for public comment?

In the Blackfeet Water Court Decision on page 15, we read a glaring difference between the record of proceedings there and the one here in the Flathead Compact. Blackfeet states:

> There is no indication in the **record** (emphasis by objector) presented by the parties that Pondera or any other potentially affected water user objected to the **ultimate form** (emphasis added by objector) 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.

So, by implication we must add another criterion, due process, for the standards of review for Water Compacts from the above statement.

8. Was the final form of the Flathead Water Compact, including its specific provisions, full of falsehoods, historical revision and did it violate both the U.S. and Montana Constitution?

We objectors believe No. 8. is one of the most significant criterion of the standard of review.

Yet even though we have 8 criteria, what is significant is that the Court in developing this standard of review, has omitted other obvious criteria. It left out the following:

9. Was the Legislature properly informed about the effects of the Compact upon the citizens of Montana both within and outside the Reservation? **Did they give an informed consent**?

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10. Were coercive tactics used in pressuring the Legislature to pass the Water Compact?

11. In its historical setting, sitz im leben, what was the purpose of the Flathead Reservation?

12. In reviewing Water Compacts, the Water Court must follow the Supreme Law of the Land, the U.S. Constitution, and in addressing legislative acts of the Montana Legislature, the Montana Constitution.

13. In reviewing any Water Compacts, a judge must remove any appearance of bias due to previous Compacts or Court Decisions regarding Indian Tribes. He is not to be partial based on race, class or perceived mistreatments of Indian Tribes.

14. In reviewing Treaties, a Water Court must interpret the treaty and its language as it would have been understood at the time. We must resist putting 21st century concepts into 19th century words and meanings. While it is tempting to say today what the Treaty should have said, we cannot do this. This would be interfering with the historical background and intention of the Treaty. Both the Indian perspective, the Government, and the citizens must be treated equally in understanding the perspectives. While some may argue the Indians did not fully understand the implications of the Hellgate treaty in 1859, they cannot argue Indians did not understand the significance of selling their allotted land to non-Indians in the early 1900's. Furthermore, ambiguities in any treaty must be cleared up by historical acts occurring concurrently with said treaty which clearly articulate the purpose of the treaty and the Reservation.

One of the big problems in Water Court proceedings is determining exactly what is the "Reserved Water Rights Doctrine". In the Fort Peck Decision, on page 12, the Court admitted "the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts." Of course, the **Winters** decision did not address off reservation water nor groundwater, but the use of water from the Milk River. What is not often quoted from **Winters** (207 U.S. 576 is the following:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, if it was the desire of the Indians, to change those habits and to become a pastoral and civilized people.

Was it really the desire of the Indians to become a pastoral and civilized people? That the language is condescending is clear but many who pontificate **Winters** will ignore this statement; yet it was a policy clearly stated in those days and we cannot deny it or try to twist it to achieve 21st century revisionist claims. Still, it was a policy which can be shown to be the exact policy of the U.S. Government in the Hellgate Treaty. Unfortunately, Winters has evolved to where we are now arguing about off reservation water rights (Time Immemorial – which is a legal fiction)

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and the right of non-Indians to use groundwater within the Reservation. We have come a long way from Tribal rights to fish and irrigate for their own needs.

Obviously if this Doctrine is vague and open-ended, then the standard of review for such a doctrine will also be confusing.

On page 10 of the Water Court's approval of the Blackfeet Compact, it states, "*it has a solemn obligation to follow federal law.*" Now what does the court mean by federal law? Contextually it appears it is referring to decisions by federal courts. Sometimes semantics are important. It is not the solemn obligation of courts to follow federal law! Federal law is subordinate to the Constitution as are statutes or court decisions. Judges have a solemn obligation, due to their oath of office, to follow the Constitution. Chief Justice John Marshall stated way back in 1803 the following:

> It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned, and not the laws of the United States generally. (See **Marbury vs Madison**)

He further stated that "*an act of the Legislature, repugnant to the constitution is void*." Logically it follows that a decision of a court that is repugnant to the Constitution is also **void**. The Court ultimately must follow the highest standard of review, which is strangely silent in all of these proceedings, that is the Montana and U.S. Constitution. This same obligation applies to the Compacting Parties – to follow both the U.S. and Montana Constitutions. What is not known is if the Tribal officials who helped negotiate this Compact have a similar oath and obligation. This is further enhanced by the fact that members of the Flathead Water Management Board do not take an oath to follow the U.S. and Montana Constitution.

On page 16 of the Fort Peck decision, we read the following: "there is no clear consensus in any federal courts as to how the "purpose" of the reservation is to be determined." A strange statement to make unless you ignore the plain language of most treaties. It is difficult to clearly see the facts due to stare decisis and confusing court decisions. The Hellgate Treaty clearly tells us the purpose of the Flathead Reservation. In any standard of review, one must establish exactly what you are reviewing and what must be ignored. It appears previous Water Court decisions have ignored with precise detail "the purpose" of the Reservation. Will the Court allow in its judicial review of the Flathead Water Compact the actual purpose of the Reservation?

Conclusion

Due Process should always include substantive and fundamental rights and procedural rules. The ultimate purposes of due process are fairness, the search for truth, and justice. This case involves both substantive, fundamental rights and a standard of review. In our opinion, the standards of review in this case are more important for it determines the outcome of this case. Therefore, even the standards of review must be subject to strict scrutiny. Are the standards fair? Do they include all criteria that would resolve this case fairly, reasonably and truthfully? Will the Water Court arbitrarily use standards of review favorable to the Tribes or will the Court us all the standards listed from 1 to 14 as stated above in this brief? Or will the Court reject many of them as not proper standards or standards used in previous court decisions? These are all valid questions. Remember none of the standards listed particularly by the Court are within the statutes of Montana. They were developed by the courts, not by the Legislature.

These Objectors request all 14 criteria be used in determining whether the Compact should be approved or declared void. Further, we object to lack of procedural fairness shown by the Water Court as detailed herein.

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DATED this Fifth day of July, 2024. /s/Stephen D. Dennison and /s/Vicki P. Dennison

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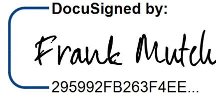

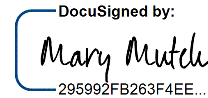

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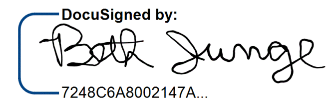

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Dated this Fifth day of July, 2024

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