

Public Land and Resources Law Review

Volume 0 Case Summaries 2015-2016

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Recommended Citation

Overstreet-Adkins, Ariel E. (2013) "In re Crow Water Compact," *Public Land and Resources Law Review*: Vol. 0, Article 34.
Available at: <http://scholarship.law.umt.edu/plrlr/vol0/iss6/34>

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***In re Crow Water Compact*, 364 P.3d 584 (Mont. 2015)**

Ariel Overstreet-Adkins

In re Crow Water Compact is the second appeal from the Crow Water Compact, agreed upon by the Settling Parties to distribute and manage water rights amongst themselves. The decision upholds the negotiated Compact for the second time, affirming the Montana Water Court’s decision granting summary judgment to the Settling Parties over objections by the Objectors and approving the Compact by a final order. This decision represents the last step in a process, started in 1979, to define and quantify the reserved water rights for current and future uses of the Crow Nation in Montana.

I. INTRODUCTION

At issue in *In re Crow Water Compact* was whether the Montana Water Court applied the proper legal standard of review in approving the Crow Water Compact (“Compact”) in the final order and whether non-tribal water users (“Objectors”) met their burden of proof under that standard of review.¹ Further, the Objectors asserted that their due process rights were violated during the Compact negotiation process.² The Montana Supreme Court held that the Water Court applied the proper standard for determining the reasonableness of the Compact, and that the Objectors failed to establish that the Compact was unreasonable and would adversely affect their interests.³ The Court also held that the Compact negotiation process did not violate the Objectors’ due process.⁴

II. FACTUAL BACKGROUND

The United States, the Crow Tribe, and the State of Montana (“Settling Parties”) negotiated the Compact to determine the Crow Tribe’s water rights in relation to the rights of both the United States and the State of Montana.⁵ The Settling Parties quantified the Tribe’s rights using the Practicably Irrigable Acreage (“PIA”) standard established in *Greeley v.*

1. *In re Crow Water Compact*, 382 P.3d 584, 585 (Mont. 2015) [hereinafter *Crow II*].

2. *Id.*

3. *Id.* at 587-88.

4. *Id.* at 591.

5. *Id.* at 586 (citing *In re Crow Water Compact*, 354 P.3d 1217, ¶¶ 17-18 (Mont. 2015) [hereinafter *Crow I*]).

Confederated Salish & Kootenai Tribes.⁶ During negotiations, the Settling Parties settled on the Tribe's PIA and water entitlement under *Winters v. United States*.⁷ The Settling Parties agreed on the volume of water the Tribe would receive and listed the water rights by basin in Article III of the Compact.⁸ First, from the Big Horn River Basin, the Tribe has a 500,000 acre-feet per year ("AFY") natural flow right.⁹ The United States also conditionally granted the Tribe 300,000 AFY from its water right in Bighorn Lake.¹⁰ Second, the Settling Parties agreed that the Tribe has "all surface flow, groundwater and storage" rights in the other Compact-covered basins.¹¹ Third, the Tribe agreed to reserve 250,000 AFY between the Yellowtail Afterbay Dam and the diversion facility at Two Leggins for fish and recreational purposes.¹²

III. PROCEDURAL BACKGROUND

In 1999, the Crow Tribe, the United States Department of the Interior, and the Montana Reserved Water Rights Compact Commission agreed to the Compact terms.¹³ The Montana Legislature ratified the Compact that same year, codifying it as Montana Code Annotated § 85–20–901.¹⁴ In 2011, the members of the Crow Tribe voted to ratify the Compact.¹⁵ The Water Court entered a preliminary decree reflecting the terms of the Compact in 2012, as required by Montana Code Annotated § 85–2–231.¹⁶ Over 16,000 people and entities received notice from the court and 100 objections were filed, 15 of which were maintained throughout the process.¹⁷ On May 27, 2015, the Water Court dismissed the remaining objections and approved the Compact in a final decree without alteration per the requirements of Montana Code Annotated § 85–2–233.¹⁸ The appeal arose from concerns by the Objectors who claimed the

6. *Id.* (citing State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d.754, 764 (Mont. 1985); *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 35 P.3d 68, 77–78 (Ariz. 2001)).

7. *Id.* (citing *Winters v. United States*, 207 U.S. 564, 577–78 (1908)).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 585-86.

14. *Id.* at 586.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

Compact would adversely affect their interests as neighboring land and water rights owners.¹⁹

IV. ANALYSIS

The Court addressed three main issues raised by the Objectors on appeal.²⁰ First, the Objectors claimed that the Water Court improperly applied a legal standard by requiring the Objectors to prove injury from the application of the Compact.²¹ Second, the Objectors raised a number of issues relating to the extent of their injury from the Compact's operation.²² Third, the Objectors claimed that the Compact negotiation process violated their due process rights.²³

A. Water Court's Standard of Review

The first issue addressed by the Court was whether the Water Court applied the proper legal standard of review in approving the Compact in the final order.²⁴ The Water Court required the Objectors to show "material injury" in order to find the Compact unreasonable.²⁵ On appeal, the Objectors argued that the correct standard was "good cause" and that they need only show the Compact was not "fundamentally fair, adequate and reasonable and conform[ing] to the law."²⁶

The Court stated that the Objectors had confused the standard required for filing the initial objection with the standard for deciding the ultimate reasonability of the Compact.²⁷ The "good cause" standard, under Montana Code Annotated § 85-2-233(1), is sufficient to compel the Water Court to hold a hearing on the Compact objections.²⁸ The Court, in *Crow I*, noted the correct standard, stating:

[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 587.

25. *Id.*

26. *Id.* (quoting *Officers for Justice v. Civil Serv. Comm'n of City and Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982)).

27. *Id.*

28. *Id.*

reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.²⁹

The Court noted that the Water Court has adopted “complementary standards” in reviewing compacts, specifically noting the Chippewa Cree Compact and the Fort Peck Compact.³⁰ When dealing with objections from parties who did not participate in the compact negotiation process, the Water Court first examines if “the decree was the product of good faith, arms-length negotiations,” and if so, the “negotiated decree is presumptively valid and the objecting party has a heavy burden of demonstrating that the decree is unreasonable.”³¹ If the Water Court finds that “the decree was the product of good faith, arms-length negotiations,” the burden of proof on the objector shifts to require a showing that the decree is unreasonable.³² In the Chippewa Cree and Fort Peck Compact cases, the Water Court required the objectors to show that their interests were “materially injured by operation of the Compact.”³³ Because the Water Court applied this analysis and standard in this case, the Court found “no error in law.”³⁴

B. Unreasonableness of the Compact and Material Injury

The second issue addressed by the Court was whether the Objectors met their burden of proof under the “unreasonable” and “material injury” standard correctly applied by the Water Court.³⁵ The

29. *Id.* (quoting *Officers for Justice*, 688 F.2d at 625; discussing *Crow I*, 354 P.3d at ¶ 16) (bracket in original).

30. *Id.*

31. *Id.* (quoting *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (internal citations and quotations omitted).

32. *Id.* (quoting *Oregon*, 913 F.2d at 581 (9th Cir. 1990) (internal citations and quotations omitted).

33. *Id.* (citing *In the Matter of the Adjudication of the Existing and Reserved Rights to the use of Water both Surface and Underground, of the Chippewa Cree Tribe of the Rocky Boy’s Reservation within the State of Mont.*, No. WC-2000-01, 2002 WL 34947007, *6 (Mont. Water Ct. June 12, 2002) (mem. op.); *In the Matter of the Adjudication of the Existing and Reserved Rights to the use of Water both Surface and Underground, of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation within the State of Mont. in Basins 40E, 40EJ, 40Q, 40R & 40S*, No. WC-1992-01, 2001 WL 36525512, *7 (Mont. Water Ct. Aug. 10, 2001) (mem. op.).

34. *Id.*

35. *Id.*

Court presumed the Compact valid because the Objectors did not challenge that it was negotiated at arm's length and in good faith.³⁶ The Objectors' burden, then, was to show that the Compact was unreasonable and that their interests were materially injured.³⁷ The Objectors raised three specific issues in their effort to meet this burden.³⁸ First, the Objectors argued that the Compact did not follow precedent established by *Winters*.³⁹ Second, Objectors argued that because the Compact "give[s] all the water in the smaller drainages to the Tribe and authoriz[es] the Tribe to enter any land for diversion purposes," it violated their property rights.⁴⁰ Third, Objectors argued the Compact was unreasonable because it closes basins that injure the Objectors, over-appropriated water or failed to quantify water appropriated to the Tribe or both, and Montana negotiated the Compact contrary to public interest.⁴¹ The Court found that the Objectors failed to meet their burden to show the unreasonableness of the Compact and material injury to their interests.⁴²

First, the Court held that the Objectors failed to show how the specific grant of 300,000 AFY storage right in Big Horn Lake was beyond the legal authority of the federal government to make under *Winters* because their arguments were based on speculation.⁴³ The Court stated that "substantial evidence exists to demonstrate that return flow from Tribal diversions does not reduce the amount of water available downstream."⁴⁴ Further, the Court emphasized, "Objectors have sufficient water for their own diversions."⁴⁵ The Court also rejected the Objectors' challenge to the 47,000 AFY allocated to the Tribe for coal mining purposes on the Ceded Strip, because this allocation was within the *Winters* rights as well as a result of the result of arms-length negotiations by the Settling Parties.⁴⁶

Second, in response to Objectors' property rights argument, the Court stated plainly: "[t]he Compact does not compromise state-based water rights."⁴⁷ The Court noted that state water rights with priority dates prior to 1999—the priority date of the Tribal Water Rights based on the date the Compact was ratified by the Montana Legislature—were

36. *Id.*
37. *Id.* at 587-88.
38. *Id.* at 588.
39. *Id.*; see *Winters*, 207 U.S. 564.
40. *Crow II*, 382 P.3d at 588.
41. *Id.*
42. *Id.* at 591.
43. *Id.* at 588.
44. *Id.*
45. *Id.*
46. *Id.* at 589.
47. *Id.*

protected from assertions of senior priority by the Tribe.⁴⁸ The Court stated, “[t]he amount of water available to pre-1999 state law rights is protected and certainly not materially injured by the Compact.”⁴⁹ Further, the Court noted that the Compact did not authorize the Tribe to take water from the Objectors and in times of shortage and the Objectors could enforce their rights with the state agencies and state courts under state law.⁵⁰ Also, the Court stated that “[t]he Compact does not permit the unconditional entry of the Tribe onto private land.”⁵¹ Under Article IV of the Compact, the Tribe must have the owner’s permission or some other legal authority to enter private fee land.⁵²

Third, the Court rejected the Objectors’ claims about the Compact’s unreasonableness.⁵³ The Court found that the closure of basins “does not compromise Objectors’ rights,” rebuffing Objectors’ argument that the Compact would “freeze these basins in time, effectively disallowing ‘progress based on technology, improved practices, changes in irrigation and livestock methods and methodology.’”⁵⁴ The Court reiterated the Water Court’s finding that the Objectors did not have a property interest in “future appropriations or changes in use,” and further stated that the Compact allows changes in use and transfer of state water rights so long as the change “does not adversely affect an existing use of a Tribal water right.”⁵⁵ Regarding the Objectors’ over-appropriation argument—specifically the 250,000 AFY for maintenance of the fishery—and claim that the Compact negotiation was contrary to the public interest, the Court found that “allocation of water for public recreation and maintenance of aquatic life is not inconsistent with the public interest.”⁵⁶

C. Due Process

The third issue addressed by the Court was if the negotiation process of Compact violated the Objectors’ right to due process.⁵⁷ The Objectors claimed they did not have a “meaningful opportunity to be

48. *Id.*

49. *Id.*

50. *Id.* at 590.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (citing *Seven Up Pete Venture v. Montana*, 114 P.3d 1009, 1017 (Mont. 2005); MONT CODE ANN. § 85-20-901 (1999)).

56. *Id.* at 590-591.

57. *Id.* at 591.

heard.”⁵⁸ The Court stated that the record showed that the Compact negotiation sessions were open to the public, drafts were noticed and made public for review, and the Montana Legislature held public meetings and solicited comments from the public.⁵⁹ The Court held that because Objectors had opportunities to be heard, the Compact did not violate their due process rights.⁶⁰

V. CONCLUSION

The Court affirmed the Montana Water Court’s final order.⁶¹ In so doing, the Court approved the standard of review applied by the water court in this and previous compacts. This decision should provide certainty to tribes such as the Confederated Salish and Kootenai Tribe, which will be going through a similar process for final approval of its water compact, about what it can expect in proceedings in front of the Montana Water Court.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*