Process and Implications of Adjudication through Litigation of CSKT Reserved Water Right Claims vs. Legislative Approval of a Compact

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On December 10, 2014, the Confederated Salish and Kootenai Tribes (CSKT), the Montana Reserved Water Rights Compact Commission (RWRCC), and the United States reached agreement on a revised compact for CSKT reserved water rights. With approval by the RWRCC, the revised compact will be introduced at the 2015 Montana Legislature. This is the second time that the Montana Legislature will be considering a CSKT compact, having rejected the previous version during the 2013 session. This compact process has attracted national attention, including a New York Times article with this description of the 2013 version:

> The proposed compact is 1,400 pages long, a decade in the making and bewilderingly complex. Essentially, it helps to lay out the water rights of the tribe[s] and water users like farmers and ranchers. It provides $55 million in state money to upgrade the reservation's water systems. And it settles questions about water claims that go back to 1855, when the government guaranteed the tribes' wide-reaching fishing rights across much of western Montana. Healy, Water Rights Tear at Indian Reservation, New York Times, April 22, 2013.

At least four lawsuits in different state and federal jurisdictions have already been filed over claims to water related to the CSKT reservation. Opinions differ on how best to quantify the CSKT reserved water rights. Some who oppose the revised Compact have indicated support for adjudication through litigation of the CSKT

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water rights. This article summarizes the adjudication process as it generally applies to CSKT and state-based water rights.

The United States began litigating Indian water rights for Montana tribes when it filed two lawsuits in 1975 on behalf of the Northern Cheyenne and Crow Tribes and and two lawsuits in 1979 on behalf of the Fort Peck tribes in federal court. See Folk-Williams, The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights, 28 Nat. Res. J. 63, 82 (1988). In 1979, Congressional hearings recorded widespread concern by non-Indians about the consequences of this litigation. Id, citing Senate Select Committee on Indian Affairs, Indian Water Rights in Montana (1979). In 1979, largely because of the federal lawsuits, the Montana Legislature enacted the statewide water rights adjudication effort.

In Montana's adjudication process, statements of claim for all state-based water rights (rights other than federal and Indian reserved water rights) were required to be filed by April 30, 1982. Late claims were allowed until 1996. Late claims are subordinate to reserved water rights and sometimes to timely filed claims. Section 85-2-221, MCA. Indian reserved water rights did not need to be filed in 1982 if the tribes agreed to negotiate the rights with the Montana Reserved Water Rights Compact Commission. Compacts reached through the Compact Commission are required to be approved by the Montana Water Court. Section 85-2-217, MCA.

When the Montana Water Court approved the legislative approved Compacts of the Fort Peck and Rocky Boy Reservations in 2001 and 2002, Judge Loble concluded:

> All negotiations and adjudications quantifying Indian reserved water rights involve extensive and complex disputed issues of fact and law. They inherently involve competing interests in a scarce resource, the allocation of which must be determined by ambiguous, perhaps anachronistic law, evolving governmental policies, and increasingly sophisticated science—all amidst rapidly changing circumstances, within the confines of a complex adjudication process. That is precisely the incentive for negotiation and settlement of complex water right adjudications. Memorandum Opinion, Case WC 92-1 (2001).

If the CSKT Compact is not approved by the Legislature, then all CSKT Indian reserved water right claims must be filed with the Montana Department of Natural Resources and Conservation (DNRC) by July 1, 2015. These new filings must be given treatment similar to that given all other filings. Section 85-2-702(3), MCA.

Differences between state-based and federal rights for adjudication, and some rules that would apply in adjudication

Indian reserved water rights were first recognized by the United States Supreme Court in a case regarding the Fort Belknap Indian Reservation in northern Montana, Winters v. United States, 207 U.S. 564 (1908). Recognizing that the "lands were arid, and, without irrigation, were practically valueless," the Court concluded that Congress, by creating the Indian reservation, impliedly reserved not only land, but all of the waters of the Milk River necessary for the purposes for which the reservation was created. 207 U.S. 564, 567 (1908).

In Cappaert v. United States, the United States Supreme Court summarized the federal reserved water rights doctrine as follows:

> When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Cappaert v. United States, 426 U.S. 128 (1976).

In 1985, the Montana Supreme Court directed the Water Court to adjudicate reserved water rights in accordance with State ex rel. Greely v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, 214 Mont. 143,691 P.2d 833 (1985). In that opinion, the Montana Supreme Court described the holdings of several federal court decisions and provided the following summary:

- State appropriative water rights and Indian reserved water rights differ in origin and definition.
- Appropriative rights are based on actual use. Appropriation for beneficial use is governed by state law.
- Reserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water. The basis for an Indian reserved water right is the treaty, federal statute or executive order setting aside the reservation. Treaty interpretation and statutory construction are governed by federal Indian law.

- The date of priority of an Indian reserved water right depends upon the nature and purpose of the right.
- Reserved water rights are difficult to quantify. Because the purposes of each reservation differ, federal courts have devised several general quantification standards. These standards differ depending upon the purpose for which the water was reserved.
- For agricultural purposes, the reserved right is a right to sufficient water to "irrigate all the practicably irrigable acreage on the reservation."
- The right to water reserved to preserve tribal hunting and fishing rights is unusual in that it is non-consumptive. A reserved right for hunting and fishing purposes "consists of the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies." Greely, 214 Mont. 143,691 P.2d 833.

Many aspects of these rules and decisions are ambiguous and thus it is difficult to predict the outcome of their application to CSKT water rights in litigation. For example, the Winters Court held that reserved water on the Fort Belknap Reservation could be beneficially used for "acts of civilization" as well as for agricultural purposes. Winters v. United States, 207 U.S. 564 (1908). "Acts of civilization" could be found to include a variety of uses, including consumptive uses for industrial purposes. Also, reserved rights may reflect future need as well as present use. Most reservations have used only a fraction of their reserved water, but the "practically irrigable acreage" standard applies to future irrigation of reservation land, not present irrigation practices and current consumptive uses. Winters rights are not subject to abandonment. See Arizona v. California, 373 U.S. 573, 577 (1963).

The Montana Water Court has recognized that "[w]hether by adjudication or by negotiation, determining the scope and extent of Indian reserved water rights has proved difficult at best." Memorandum Opinion, Case WC 92-1 (2001). This case discusses several of the Supreme Court decisions, stating that:

> As articulated by the United States Supreme Court, the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts. *After nearly one hundred years of legislation, litigation, and policy making, there are still*

> *no bright lines clearly and consistently delineating the Doctrine. Most of the legal issues inherent in the Doctrine remain unsettled and hotly debated and are now complicated by decades of distrust and competing policie*s.

Memorandum Opinion, Case WC 92-1 (2001) (Italics mine).

All statements of claim are prima facie proof of their content in Montana. This legal standard did not apply to Indian reserved water rights litigation in Wyoming.

Claims for all existing (pre-July 1, 1973) water rights were required to be filed by April 30, 1982, and late claims were accepted for filing until 1996. Section 85-2-221, MCA. These deadlines were suspended only for federal and Indian reserved water rights during the compact negotiation process. Section 85-2-217, MCA. Some rights, such as instream stock and domestic rights, were exempt from the claim filing process. Section 85-2-222, MCA. Claims for existing rights can no longer be filed, because the deadlines have passed for all claims other than any remaining federal and Indian reserved rights that are not resolved through compacts, and processes for exempt rights pursuant to Section 85-2-222, MCA.

All statements of claim, for state-based claims and federal and Indian reserved rights, are prima facie proof of their content. Section 85-2-227(1), MCA. Objectors have the burden of producing evidence that contradicts and overcomes elements of the prima facie claim. Memorandum Opinion, Water Court Case 40G-2, p. 13 (March 11, 1997). This is the burden of proof for every assertion that a claim is incorrect, including for claimants objecting to their own claims. Rule 19, Water Right Adjudication Rules (W.R.Adj.R.)

This prima facie standard for water rights is not a feature of law in all Western states and was not the legal standard in Montana prior to 1979. Prior to 1979, any party asserting a water right in Montana had the burden of proving every element of their water right claim. See Case 40G-2. Recognizing the evidentiary difficulty in proving up elements of historical water rights when all witnesses to the original appropriations have long since died, and the need to speed up the process, the 1979 Legislature enacted the prima facie proof statute. Section 85-2-227, MCA.

In Montana, this prima facie standard would apply to CSKT claims just like any other claims in the adjudication process, so any objectors would have the burden to attempt to contradict or overcome elements of CSKT claims. This makes comparisons or predictions based on Indian reserved water rights litigation in other states very difficult. For example, in Wyoming, the Wind River Reservation Tribes and the United States were required to substantiate their claims to reserved water

rights, and the State of Wyoming served as an opposing party in the litigation. See Wyoming v. United States, 492 U.S. 406 (1989), reh'g denied, 492 U.S. 938 (1989) [Big Horn I].

This structure is very different in Montana. In Montana, unless DNRC places issue remarks on claims (see below discussion on issue remarks), the Court reviews claims pursuant to Rule 8, W.R.Adj.R, or objectors actively oppose claims through the objection process, the prima facie standard can result in claims proceeding through adjudication unchallenged. The final decree can then reflect the claims as they originally appeared on the statements of claim. Objectors must actively participate in adjudication proceedings in order to maintain an objection. If an objector fails to appear at a scheduled conference or hearing, or fails to comply with an order issued by the Water Court, the Water Court may issue orders of sanction including dismissal of the objection. Rule 22, W.R.Adj.R.

Adjudication Process

The adjudication process for any basin decree begins with DNRC examination of all claims filed in the basin, using a detailed claims examination manual and a set of claims examination rules adopted by the Montana Supreme Court. This examination reviews claims for factual discrepancies and issues, such as whether acreage claimed appears to be irrigated in historical aerial photos, whether claimed acreage can be reached by claimed ditches or diversions, questionable flow rates and volumes, legal description errors, duplicate claims, questionable priority dates, and a wide variety of other discrepancies. DNRC contacts claimants to attempt to resolve issues that it identifies, and issues that remain unresolved are written on the claim abstracts as issue remarks. Many of the objections filed in recently issued basins are based on the DNRC issue remarks. The Water Court resolves issue remarks pursuant to Section 85-2-248, MCA, so claims examination is a significant component of the current adjudication process.

The claims examination rules do not provide procedures to examine federal and Indian reserved water right claims, and it is not clear whether these claims would be examined by DNRC. CSKT could object to examination of its claims, so litigation on this issue is likely. If examination is ordered, the Montana Supreme Court would most likely be asked to issue new claims examination rules to govern that examination process. If the claims are not examined, objectors will not be able to rely upon DNRC issue remarks to assist in identifying factual discrepancies. If claims examination is ordered, it is not possible to estimate how long any DNRC examination of CSKT claims would take because all claims are not yet filed, and

any litigation over this issue would delay examination. The claims examination process can generally take a year or longer in a basin, but with litigation and possible new rules for examination, it could take DNRC several years to complete an examination process for CSKT water right claims.

After examination, the Water Court issues the basin decree. Unlike traditional District Court cases where a decree is issued at the end of litigation, a Water Court decree is issued at the beginning of the litigation process. The Water Court decree is basically a compilation of water right abstracts for claims filed in a basin. Parties receive notice of the decree, have an opportunity to object to claims in the decree, and the decree is then modified after hearings, objections, and settlements. The Water Court provides notice that a decree has been issued and that it is available for review, and the time period for filing objections begins. The objection period lasts at least 6 months and is commonly extended. Deadlines for counter objections and notice of intent to appear are set, and once all deadlines have passed the Court will begin to consolidate cases. This is generally about 2 years after issuance of the decree.

The Water Judges refer many of the cases to Water Masters, who manage the cases through resolution by settlement or hearing. Masters set orders for conferences, manage settlement and prehearing deadlines, order field investigations, manage discovery processes, accept or reject settlement agreements, and issue decisions on motions. If parties are not able to reach settlement, Water Masters conduct hearings and issue decisions in the form of Master's Reports with findings of fact, conclusions of law and recommendations. Parties can object to Master's Reports, and Master's Reports can be accepted, rejected, or modified by the Water Judges. Rule 23, W.R.Adj.R. Water Judges will often hold additional proceedings, including hearings, at the request of a party in review of an objection to a Master's Report.

Currently, the average basin takes at least 5 years to be 90% complete. The remaining 10% are generally the most contentious cases in the basin, which could take several more years to complete. See Montana Water Court website, http://courts.mt.gov/water/water_court_statistics.mcpx.

The CSKT claims, if they are required to be filed, will present substantially different procedural and legal issues than any the Water Court has previously addressed due to the application of federal reserved water rights doctrine.

Adjudication of the CSKT reserved water rights through the claims filing, objection, and litigation process will involve not only the basins where the reservation is

located, but a likely reopening of other basins to address claims for aboriginal rights which CSKT has indicated it will file in several off-reservation basins. CSKT has asserted that its aboriginal range may include most of Montana west of Billings and Lewistown. If CSKT claims are filed in off-reservation basins, then it might also result in litigation and reopening of litigation for state-based rights in those same off-reservation basins.

Consequently, the basins where CSKT claims are filed, including Basin 76L (Flathead River below Flathead Lake) and Basin 76LJ (Flathead River to and including Flathead Lake) will take longer to complete than the average for basins. The basins where aboriginal claims are filed, off the reservation, are also quite likely to take longer than average. No one can estimate the length of time it will take to adjudicate these claims, and appeals to state and federal courts are far more likely than with any other litigation the Water Court has addressed, including the potential for appeals to the United States Supreme Court. The United States Supreme Court has reserved the right to review state court adjudications of Indian reserved water rights, which the Montana Supreme Court has directly acknowledged. State ex rel. Greely v. Confed. Salish & Kootenai Tribes, 219 Mont. 76, 95 (1985). In the San Carlos Apache case, the U.S. Supreme Court emphasized:

> "[O]ur decision in no way changes the substantive law by which Indians rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a *particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment*." 463 U.S. at 571, 103 S.Ct. at 3216. (Emphasis mine).

If the CSKT Compact is approved by the Legislature, it will be subject to Congressional, Tribal, and Water Court approval. Preliminary decrees will be issued incorporating the Compact and state based claims. The Compact could be included in a Preliminary Decree with all the state law based claims filed in the Flathead Valley basins. Alternatively, the state based water right claims of the Flathead Valley basins could be issued in a separate Preliminary Decree while the CSKT Compact is reviewed by Congress. If Congress and the President approve the Compact, the Compact would then be filed with the Water Court for approval or rejection. The Water Court reviews Compacts to determine if they are "fundamentally fair, adequate and reasonable", and to determine whether they

conform to applicable law. Case WC 2007-03. The Water Court cannot modify a compact. It can only approve or reject compacts.

Because predicting a final outcome of the claim filing, objection, and litigation process is so difficult, there are significant benefits to negotiating water right settlements. Settlements can address issues such as water administration and funding, but a Water Court decision, issued after the claims are filed and all objections are litigated to finality, would set forth only the findings of fact, conclusions of law, and elements of water rights as dictated by Section 85-2-234, MCA. The Water Court has recognized that a water right decision litigated through the objection process is less flexible than a negotiated compact settlement:

> The parties to this Compact, and the negotiators to compacts generally enjoy considerable freedom in reaching the compacted results, and may achieve results through the compact process that are more favorable to their interests than would be achieved through litigation. If other parties claiming reserved water rights proceed to litigation on the merits before the Montana Water Court, the Court will have to draw hard lines and resolve ambiguous legal precedent on many of the issues which are given broad brush in this Compact review. Case WC 92-1.

Conclusion

The Montana Water Court and the adjudication staff at DNRC have outstanding expertise and procedures in place to adjudicate state based rights, and also federal and Indian reserved water rights if compact efforts fail. If CSKT water rights are litigated in Montana's general statewide stream adjudication, the Montana Water Court will be faced with the most complex, most contentious litigation it has encountered to date. The water rights adjudication process in Montana has currently been proceeding for over thirty years, and has cost nearly ninety million dollars in state funding so far, not counting expenses by litigants including federal agencies, local governments, and individual water users. Many commenters before the Montana Water Policy Interim Committee express an interest in seeing an expedited completion of the adjudication process, and benchmarks and funding have been incorporated into the process to speed its conclusion. A recent legislative audit predicted that the adjudication may be completed by 2028, but that prediction assumed Montana would successfully negotiate compacts for federal and Indian reserved water rights. June 2010 Performance Audit Report to the Montana Legislature. If the CSKT water right claims are required to be adjudicated through the objection and litigation process, the only certainty will be that Montana water

rights will remain unsettled for much longer than any previous estimates could predict.