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FILED

AUG 23 2005

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI RIVER DIVISION

IN THE MATTER OF THE ADJUDICATION) **CASE NO. WC-2000-02**
OF EXISTING AND RESERVED RIGHTS TO)
THE USE OF WATER, BOTH SURFACE AND)
UNDERGROUND, OF THE RED ROCKS)
LAKE NATIONAL WILDLIFE REFUGE OF)
THE STATE OF MONTANA)
_____)

**FINDINGS OF FACT AND CONCLUSIONS OF LAW APPROVING
UNITED STATES FISH AND WILDLIFE SERVICE,
RED ROCK LAKES-MONTANA COMPACT**

THIS MATTER came before the Court on a joint motion of the State of Montana and the United States of America for approval of the United States Fish and Wildlife Service, Red Rock Lakes – Montana Compact, Montana Code Ann. Section 85-20-801 (2004). Based on the submissions of the State and the United States, the Compact and the record in this case, the Court now issues the following:

FINDINGS OF FACT

General Adjudication of Water Rights

1. In 1979, the State of Montana commenced a comprehensive, general, state-wide adjudication of the rights to the use of water within the State of Montana, including all federal reserved and appropriative water rights, pursuant to Title 85, Chapter 2 of the Montana Code Annotated.

Reserved Water Rights Compact Commission Negotiation

2. In 1979, the Montana Legislature stated its intent that the State of Montana attempt to conclude compacts for the equitable division and apportionment of waters between the state and its people and the federal government claiming reserved waters within the state. It established the Reserved Water Rights Compact Commission (Commission) to act on behalf of the governor and the people of Montana as a whole in those negotiations. Sections 85-2-701, -702, and -703 and 2-15-212; M.C.A

3. In the mid-1980s, the State of Montana, through the Commission, commenced general negotiations with the United States of America, on behalf of the U.S. Fish and Wildlife Service (FWS), (the State and the United States are collectively referred to as the "Settling Parties") for five FWS refuges in Montana that include lands reserved from the public domain, but those negotiations were discontinued due to other priorities. *Technical Report Presented to the Montana Reserved Water Rights Compact Commission*, dated October 2002, at 10. (Technical Report) In 1996, the Settling Parties resumed negotiation efforts to quantify the reserved water rights associated with the Red Rock Lakes National Wildlife Refuge and Wilderness Area. *Id.*

4. Red Rock Lakes National Wildlife Refuge includes all lands located in the Centennial Valley in Beaverhead County in the southwestern corner of Montana that were withdrawn and reserved by Executive Orders No. 7023 of April 22, 1935, and 7172 of September 4, 1935, and all additional lands acquired over the years by the United States Fish and Wildlife Service within the boundaries established by those orders. Technical Report at 8-9; Appendix 1. The purpose of the Refuge is:

. . . to effectuate further the purposes of the Migratory Bird Conservation Act . . . [and to serve] as a refuge and breeding ground for wild birds and animals.

Protection of the breeding grounds of trumpeter swans, as well as the protection of habitat for Arctic Grayling, Westslope Cutthroat Trout, and other endangered, threatened and sensitive species has been the main focus of the Refuge. Technical Report at 9-10.

Over the years, the United States has acquired approximately 35,782 acres for the Refuge, which has increased the size of the original Refuge from 9,218 to approximately 45,000 acres. Much

of this acquired land carried water rights that were senior to the reservation date of the Refuge.¹ The Refuge also includes about 15,000 acres of private inholdings within its boundaries, and Refuge managers administer a certain number of grazing and haying permits each year. Technical Report at 9-10.

Red Rock Lakes Wilderness Area includes approximately 32,350 acres of land within Red Rock Lakes National Wildlife Refuge designated as wilderness by Public Law 94-557 of October 19, 1976, 16 USC 1132. Public Law 94-557 states that the lands set apart within the Refuge and designated as wilderness are components of the National Wilderness Preservation System and shall be for the purposes of and “administered in accordance with the applicable provisions of the Wilderness Act [78 Stat. 892].” Technical Report at 9; Appendix 2. (Henceforth, the Red Rock Lakes National Wildlife Refuge and Red Rock Lakes Wilderness Area are referred to as the “Refuge”).

5. Members of the Commission Negotiating Team were Senator Chuck Swysgood, Senator Bea McCarthy, Bob Thoft, Chris Tweeten, Rep. Sam Rose, and Rep. Emily Swanson. They were supported by a Commission staff that included Barbara Cosens, legal counsel; Dave Amman and Stan Jones, hydrologists; Craig Bacino, geographer and GIS specialist; Bill Greiman, agricultural engineer; Susan Cottingham, staff director, and Joan Specking, historian and technical team leader. Technical Report at 10.

Members of the FWS Negotiating Team were Cheryl Williss, Chief of the Water Resources Division, FWS Mountain-Prairie Region; Dave Schmidt and Jana Varner, FWS hydrologists; John Chaffin, legal counsel, U.S. Department of the Interior Solicitor’s Office in Montana; Dave Gehlert, legal counsel, U.S. Department of Justice, Washington D.C. and Jim DuBois, legal counsel, U.S. Department of Justice, Denver. *Id.*

6. In September of 1996, the FWS presented a proposal to the Commission in which it offered to subordinate most of its water rights to the existing water rights of other users as finally decreed by the Water Court in exchange for (1) protection of all its existing diversions to maintain

¹ The Water rights acquired by FWS went back to 1888 and were senior to all other upstream irrigation claims. FWS claims on Odell Creek were senior to all other upstream irrigation claims. FWS claims on Odell Creek were senior to the only irrigation user on that stream. FWS had four water right claims on Tom Creek, one with a date of 1898, which was senior to the only private irrigation user on that stream. Technical Report at 11 and Appendix 4.

its Refuge wetlands, including minimum flows of 15 cfs in Red Rock Creek, 11 cfs in Odell Creek, and 1.4 cfs in Tom Creek; (2) right to change the use of existing state based water rights appurtenant to any lands it acquires in the future; (3) permanent basin closure of Red Rock Creek and all its tributaries above the Refuge; and (4) maintenance of existing lake levels on the Refuge. Technical Report at 11 and Appendix 3, citing Letter to Commission negotiating Chair Rep. Emily Swanson from Cheryl Willis, FWS, September 16, 1996, and Summary of Minutes of July 15, 1997 Negotiating Session, Helena, MT.

The Commission's primary concern during negotiations was the protection of existing water users in the basin. Existing water users expressed concern about (1) the legal basis for the FWS change of use from irrigation to instream flows and habitat maintenance; (2) the impact on shallow aquifers and sediment rates downstream, particularly on Odell Creek, if FWS discontinues using water rights for irrigation; (3) the impact minimum stream flows would have on availability of stock water and hay production during dry years; (4) how FWS would maintain and enforce minimum flows during dry years; and (5) maintaining their ability to make changes in existing ground water uses and to develop large groundwater wells in the future.² Technical Report at 11, 16, 25, and 26.

7. It was determined during the negotiation and public notice period that, generally, water users downstream from the Refuge would not be adversely affected by the proposed Compact, because the Refuge was seeking to preserve or enhance stream flow, which would preserve or enhance flows for downstream users. To mitigate some downstream users' concern with the impact discontinued irrigation could have on shallow aquifers and the sedimentation rate of Odell Creek, the FWS agreed to continue to set aside 3,000 acre-feet at 25 cfs for irrigation in that area. Compact at Art. II.A.1; Technical Report at 17.

To mitigate the impact on stock permittees on the Refuge, the FWS agreed to subordinate its minimum flow water rights to all upstream domestic and instream stock uses, including stock tanks installed to replace instream stock watering, and assisted some ranchers in finding grants for improvements to their stock watering systems. Compact at Art. II.B.2.b.; Technical Report at 26-27.

² Due to the nature of the topography and geology in the basin, it was agreed that most groundwater likely resides in underlying gravels and is connected to the surface water, and therefore any large groundwater development would probably have a direct impact on stream flow. Technical Report at 25.

To mitigate the impact of minimum stream flows on upstream junior water uses, among other things, the FWS agreed to negotiate voluntary cooperative agreements with claimants on Red Rock, Odell, and Tom Creeks, that would allow FWS minimum flow needs to be met during dry years, in return for subordination of their water rights as set forth in the Compact, and its agreement not to object in the Water Court to claims voluntarily reduced through the use of such cooperative agreements. Compact at Art. II.B.2.b.; Compact at Art. III.C.1; Technical Report at 18, 20. To mitigate the impact of the groundwater well restrictions on water users in the basin, the FWS agreed to permit wells over 35 gpm, or a total appropriation of more than 10 afy, if the Department of Natural Resources and Conservation (DNRC) determines that the groundwater is not hydrologically connected to surface water upstream from the Refuge. Compact at Art. III.A.1.b.; Technical Report at 26, citing Summary of Minutes from December 4, 1998 Public Meeting, Red Rock Lakes National Wildlife Refuge, Dillon, MT.

8. The negotiating sessions were open to the public and public comment was received during meetings and open houses held in Dillon, Lima, and Helena. Numerous informational mailings to water users were sent during 1998 when the Settling Parties were working to finalize the Compact. Technical Report at 13 and Appendix 5.

9. On December 9, 1998, after approximately three years of work by legal and technical professionals, and intensive good-faith negotiations between well-represented parties, the Settling Parties signed a Compact “to settle for all time any and all claims existing on the effective date of the Compact to water for [the Refuge.]” Affidavit of Chris D. Tweeten, dated April 17, 2003, filed April 29, 2003, at 4; Affidavit of Susan Cottingham, dated April 22, 2003, filed April 29, 2003, at p. 2. The Compact was filed with the Secretary of the State of Montana on April 20, 1999. Section 85-20-801, MCA.

Ratification of the Compact

10. Pursuant to Sections 85-2-702 and -703, the Compact was ratified by the Montana Legislature (1999 Mont. Laws, ch 347, codified at § 85-20-801, MCA), and became effective upon approval by the Secretary of Interior, the Attorney General of the United States, and the Governor of the State of Montana on February 1, 2000. § 85-20-801, MCA; Technical Report at 4 and Appendix 6. The Compact was subsequently amended by the Montana Legislature (2001 Mont. Laws, ch 187, § 1, codified at § 85-20-801, MCA) to make technical corrections.

The United States Fish and Wildlife Service, Red Rock Lakes – Montana Compact

11. The United States Fish and Wildlife Service, Red Rock Lakes – Montana Compact was entered into for the purpose of “settling for all time any and all claims existing on the effective date of the Compact to water for Red Rock Lakes National Wildlife Refuge and Wilderness Area administered by the U.S. Fish and Wildlife Service within the State of Montana.” § 85-20-801, MCA.

12. The federal reserved water rights for the Refuge water rights are quantified in Article II and III of the Compact and include consumptive, natural flow, and minimum flow water rights. The Settling Parties state in the Compact that they prepared an Abstract specifically listing all of the water rights described and quantified in the Compact, and that they attached the Abstract as Exhibit 1 of the Compact. Article IV. C. The Settling Parties also state that upon approval and confirmation of the water rights in the Compact, the water rights described in Appendix 2 of the Compact shall be dismissed with prejudice. Article V. B. 1. Appendix 1 and 2 were not attached to the Compact originally filed with the Water Court or codified in § 85-20-801, MCA.

Preliminary Decree for Red Rock Lakes Fish and Wildlife Compact Subbasin

13. On April 21, 2000, the Settling Parties filed with the Water Court a Motion for Incorporation of the Red Rock Lakes Compact into Preliminary and Final Decrees and a Consolidated Hearing on any Objections to Such Compact, pursuant to §§ 85-2-231(2)(a) and -233(1), MCA. The Settling Parties asked the Water Court to issue a preliminary decree in Basin 41A for the water rights recognized in the Red Rock Lakes Compact. On April 24, 2000, the Settling Parties agreed that the process of incorporation should be suspended, until the Montana Legislature could amend certain tables included in the Compact. Court Minutes, filed May 22, 2000.

14. On May 9, 2002, the Court issued Findings of Fact and Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Red Rock Lakes National Wildlife Refuge Compact.

Public Notice and the Objection Process

15. On May 9, 2002, the Court ordered the DNRC to serve a Notice of Entry of the Red Rock Lakes Compact Preliminary Decree and Notice of Availability, and summary descriptions of the Red Rock Lakes National Wildlife Refuge water rights to specified entities, in compliance with the requirements of Section 85-2-232, MCA. The DNRC mailed the notices and summaries to all

water users, claimants, and water permittees of record in Subbasin 41A and all interested parties, including all federal land management agencies in this division, all neighboring States of the Upper Missouri Division, all Indian Tribes in the Upper Missouri Water Division, Beaverhead County Officials, and other interested parties set forth in the Certificate of Service. In addition, copies of the proposed Compact were made available to the public within Montana at locations in Dillon, Lima, and the Red Rock Lakes National Wildlife Refuge. Notice of Entry of Red Rock Lakes Compact Preliminary Decree and Notice of Availability was published once a week for three consecutive weeks in the following newspapers of general circulation in the Upper Missouri River division: the Dillon Tribune, and the Montana Standard, and the Anaconda Leader. Order of May 9, 2002; Certificate of Service, May 10, 2002; Technical Report at 12 and Appendix 5; and Tweeten Affidavit at 4. All objections to the Compact were to be filed with the Montana Water Court by November 6, 2002.

16. No Objections to the Compact were filed, and no allegations of fraud, overreaching, or collusion between the Settling Parties have been raised.

Judicial Review and Approval

17. On April 29, 2003, pursuant to Section 85-2-233(5)(b), MCA, and Article V.A.3 of the Compact, the Settling Parties filed a Motion for Approval of Red Rock Lakes National Wildlife Refuge Compact and Entry of Decree. Supporting the Motion were the affidavits of Susan Cottingham, Chris D. Tweeten, and Stan Jones; a Memorandum in Support of Motion for Approval of Red Rock Lakes National Wildlife Refuge Compact and Entry of Decree; and a Memorandum from Stan Jones with proposed abstracts for the Red Rock Lakes Compact attached thereto, together with a computer disk containing much of the same information in electronic form.

18. By letter dated May 5, 2003, the Court forwarded a copy of the proposed abstracts to Rita Nason, Adjudication Program Manager for the DNRC, with the request that the abstracts be reviewed for their prospective inclusion into the DNRC water rights database of the State Centralized Record System. On May 12, 2003, Rita Nason responded by letter to the Court's request and provided the DNRC's recommendations and comments. On May 14, 2003, the Court set a June 16, 2003 deadline to respond to DNRC's May 12 letter and notified the Settling Parties in its Order that unless objections were filed, the Court would probably follow the DNRC's recommendations. No comments or objections to the DNRC recommendations were filed.

19. On December 27, 2004, pursuant to an earlier Order, the Settling Parties filed a copy of Appendix 2, referenced in Article V.B.1 of the Compact. In their December 27 filing, the Settling Parties also confirmed that the proposed abstracts filed with the Court on April 29, 2003, in electronic and paper form, represented the Abstract referenced in the Compact as Appendix 1. A copy of Appendix 2 is attached hereto. It includes 125 statements of claim, provisional permits, or certificates that are to be dismissed upon approval of the Compact. Each existing water right in Appendix 2 shall be dismissed and shall bear the following or similar remark:

THIS CLAIM WAS DISMISSED PURSUANT TO ARTICLE V(B)(1) OF THE UNITED STATES FISH AND WILDLIFE SERVICE, RED ROCK LAKES – MONTANA COMPACT.

From these Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

I

JURISDICTION

The Montana Water Court has jurisdiction to review the United States Fish and Wildlife Service, Red Rock Lakes – Montana Compact and decree the federal reserved water rights defined therein under the authority granted by 43 U.S.C. §666 (the McCarran Amendment); Sections 85-2-231, -233, -234, and 85-2-701 through -703, MCA. (2003); and Article V.A.3 of the Compact, Section 85-20-801, MCA. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983); and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 808 (1976). In *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* (1985) (*Greely II*), the Montana Supreme Court held that the Montana Water Use Act, as amended by Senate Bill 76, is adequate on its face to allow the Water Court to adjudicate federal reserved water rights. 219 Mont. 76, 97-99, 712 P.2d 754.

II

STANDARD OF REVIEW

A compact concluded and incorporated into a final decree pursuant to Section 85-2-231 is similar to a consent decree, in that the decree is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise, subject to continued judicial policing. *See e.g., United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. Ore.

1990), *cert. denied sub nom. Makah Indian Tribe v. United States* (1991), 501 U.S. 1250, citing *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).³

Accordingly, this Court reviews compacts incorporated into preliminary and final decrees in this general adjudication under a standard of limited review similar to that applied by the Ninth Circuit Court of Appeals to review consent decrees. Simply stated, that standard provides that:

[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 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.

Officers for Justice v. Civil Service Comm'n., 688 F.2d 615, 624-625 (9th Cir. Cal. 1982), *cert. denied*, *Byrd v. Civil Service Commission*, 459 U.S. 1217 (1983) (emphasis added). Primarily, the Court must be satisfied that the compact is “fundamentally fair, adequate and reasonable” to the public interests involved, and to those third parties not present during the negotiation whose private interests are affected. *Oregon*, 913 F.2d at 580-581. In addition, because a finally decreed compact is a form of judgment, it must conform to all applicable law, though it need not impose all of the obligations authorized by law. *Id.* at 581.

III

COMPACT IS CONSISTENT WITH APPLICABLE LAW

Federal Procedural Law

The submission of the United States Fish and Wildlife Service, Red Rock Lakes–Montana Compact for the review and decree of the Montana Water Court is consistent with federal procedural law. *See* Findings of Fact and Conclusions of Law Approving and Confirming United States Park Service – Montana Compact, Water Court Case WC-94-1, filed April 11, 2005, at pp. 16-17 (USPS – Montana Compact Findings and Conclusions) for a more detailed statement of this law.

³ *See e.g.* Memorandum Opinion, Water Court Case WC-2000-01 (Chippewa Cree Tribe-Montana Compact), filed June 12, 2002; Order Approving and Confirming Fort Peck-Montana Compact, Water Court Case WC-92-1 (Fort Peck-Montana Compact), filed August 10, 2001; and Memorandum Opinion in Water Court Case WC-93-1 (Northern Cheyenne–Montana Compact), filed August 3, 1995.

Federal Substantive Law

The federal reserved water rights recognized, defined, and quantified in the Compact and proposed decree are consistent with federal substantive law. *See* USPS – Montana Compact Findings and Conclusions at pp. 17-19 for a more detailed statement of this law.

The Red Rock Lakes National Wildlife Refuge was withdrawn and reserved by the federal government for specific federal purposes, and is subject to the mandates of the Migratory Bird Conservation Act, which directs the Secretary of the Interior that:

. . . areas of lands, waters, or interests therein acquired or reserved pursuant to this subchapter shall, unless otherwise provided by law, be administered by the Secretary of the Interior under rules and regulations prescribed by him to conserve and protect migratory birds in accordance with treaty obligations with Mexico, Canada. . . and other species of wildlife found thereon, including species that are listed pursuant to section 1533 of this title as endangered species or threatened species, and to restore or develop adequate wildlife habitat.

Technical Report at 17, citing and quoting 16 U.S.C. Sec. 715i(a). Although much of the Refuge lands were acquired after the original withdrawal and reservation in 1935, together with appurtenant water rights, the Settling Parties agreed early in the negotiation process to treat the reserved land and acquired lands the same for purposes of settling all claims in the Compact, Technical Report at 12. Art. V.B.1. of the Compact provides that upon final approval of the Compact, all FWS state-based water right claims, as specified in Appendix 2 of the Compact, shall be dismissed with prejudice. Section 85-20-801, MCA.

Although the Red Rock Lakes Wilderness Area is located within the Red Rock Lakes National Wildlife Refuge and is administered in accordance with the applicable provisions of the Wilderness Act (Finding of Fact 4), the Settling Parties agreed in Art. V.C. of the Compact that the water rights described in the Compact are “in full and final settlement” of all the water right claims of the United States for both Red Rock Lakes National Wildlife Refuge and Wilderness Area. Section 85-20-801, MCA.

Because the federal reserved water right doctrine is built on implication and is an exception to Congress' explicit deference to state water law in most other areas, federal courts have construed the doctrine narrowly as a “minimal need” standard and applied it with sensitivity to its impact upon

those who have obtained water rights under state law. See e.g., *Cappaert*, 426 U.S. at 138; *Greely II* at 93, 97. In *Cappaert*, for example, the United State Supreme Court held that “[t]he . . . doctrine . . . reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.”

Id. In *United States v. New Mexico*, the United States Supreme Court explained that:

While many of the contours of . . . [the doctrine] remain unspecified, the Court has repeatedly emphasized that Congress reserved “only that amount of water necessary to fulfill the purpose of the reservation, no more.” * * * Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary purpose, however, there arises the contrary inference that Congress intended consistent with its other views, that the United States could acquire water in the same manner as any other public or private appropriator.

438 U.S. at 700-702.

Quantifying the scope and extent of this open-ended standard has proved difficult at best, and after nearly one hundred years of legislation, litigation and policy-making, there are still few bright lines clearly or consistently defining the doctrine. *Greely II*, 219 Mont. at 92. Quantifying the federal reserved water rights for the Red Rock Lakes National Wildlife Refuge and Wilderness Area through litigation, therefore, would likely have been time-consuming, costly, and divisive, with many private, state-based water rights unfairly displaced in favor of unnoticed and heretofore unrecognized federal reserved water rights.

State Procedural Law

Though the United States could have litigated its federal reserved water rights in the Montana Water Court under the federal reserved water right doctrine articulated by the United States Supreme Court, it chose instead to negotiate its rights through Montana's more flexible, less costly, compacting procedure. In negotiating the federal reserved water rights under this procedure, the Settling Parties complied with all Montana procedural law. See USPS – Montana Compact Findings and Conclusions at 19-20 for a more detailed statement of this law.

Negotiations between the United States and the Commission were commenced by the Commission, as required in Sections 85-2-702 and -703, MCA. While negotiations were being conducted, all proceedings to adjudicate federal reserved water rights for the Refuge and Wilderness Area were suspended, in accordance with Section 85-2-217, MCA. The concluded Compact was

signed by the Commission, ratified by the Montana Legislature, signed by the Governor, and approved by the United States Secretary of Interior and the United States Attorney General, in accordance with Section 85-2-702, MCA. Upon ratification, the terms of the combined Compact were included in a special Red Rock Lakes National Wildlife Refuge Compact Preliminary Decree, which was made available to other water users for review and objection, in accordance with Sections 85-2-231(2) and 85-2-702(3), MCA. No objections to the Compact were filed.

Accordingly, the Compact was authorized, negotiated, concluded, decreed, and reviewed consistent with all applicable federal and Montana law.

IV

COMPACT IS PRODUCT OF GOOD-FAITH NEGOTIATION

The Compact and record in this case also establish that the Compact is the result of good-faith, arms-length negotiation, and is not the product of fraud or overreaching by, or collusion between, the negotiating parties.

The Settling Parties each represented distinct and competing public interests and policies with respect to the waters being adjudicated. The United States sought a state court decree recognizing and protecting its right to reserve at least a portion of the waters in Basin 41A from appropriation by state water users. The State of Montana sought to mitigate the impact of those federal reserved water rights on existing state water right claimants. Technical Report at 11-13. As pointed out by the Commission in its Technical Report:

For arid regions, the greatest source of conflict between appropriative and reserved water rights is created by new exercise of a reserved water right with a priority date that relates back to the date of the reservation. (Citation omitted) Fueling this conflict is the fact that the United States did not begin to actively assert reserved water rights until the 1960s (citation omitted), thus substantial development of junior water rights has occurred in some basins without consideration of water availability in light of the magnitude of reserved water rights.

Conflicts between reserved and appropriative rights are further aggravated by the complexities of land ownership. Montana is a headwater state for the Columbia, Missouri, and Hudson rivers. The State contains 28% federal or Tribal land, 69% of which is reserved. (Citation omitted) Currently, of the 85 subbasins in the state, 70 contain claims for reserved water rights. Adjudication of water rights in these basins is complicated by factors that include: checkerboard Tribal and non-Tribal ownership of fee land within Indian reservations; private water diversions within national forests; preexisting dams within wilderness areas; rivers that form the

boundaries to national parks and Indian reservations and . . . to private land; and streams that begin in areas of private land before flowing onto a reservation with reserved instream flow rights.

Technical Report at 6-7.

During the negotiation, both of the parties were represented by governmental agencies established to protect their respective public interests. Those agencies in turn were supported and advised by competent legal and technical experts in the field of water resource analysis and law, including experienced legal counsel, historical researchers, resource managers and superintendents from the FWS, hydrologists, fish and wildlife biologists, and experts in the fields of riparian vegetation, geothermal sciences, geomorphology, and GIS and mapping. Finding of Fact 5. There was extensive public involvement throughout the process, with numerous public informational meetings and private meetings with individual water users. Finding of Fact 8.

In the absence of clear state or federal law prohibiting either the Compact or its provisions, and having found no evidence of fraud, coercion, or overreaching by the negotiating parties, the Court's role is reduced to determining whether the Compact is "fair, adequate and reasonable to all affected by it."

V

COMPACT PRESUMED FAIR, REASONABLE, AND ADEQUATE

In deference to Montana's policy of encouraging the negotiation and settlement of federal reserved water rights through the statutory compacting process, and in the absence of any evidence of fraud, coercion, or overreaching by the parties, the Montana Water Court presumes that compacts concluded through that process are "fundamentally fair, adequate and reasonable." *See e.g.*, Section 85-2-702, MCA; *Oregon*, 913 F.2d at 581, citing *Vukovich*, 720 F.2d at 921. *See also* USPS – Montana Compact Findings and Conclusions at 23-24.

There is no evidence of fraud, coercion, or overreaching by the parties in the negotiation and settlement of these federal reserved water rights. Accordingly, this Court presumes that the Compact is fundamentally fair, adequate and reasonable.

VI

NO DEMONSTRATED INJURY TO QUALIFIED OBJECTORS

One of the primary concerns of the Commission during the negotiation phase of this process was the protection of existing water uses in the basin. Although the Compact was technically only between the Settling parties, there was extensive public involvement throughout the process, with numerous public informational meetings and private meetings with individual water users. The potential impact of the Compact on the rights of other affected upstream and downstream water users were considered, and attempts to mitigate them were made by the Settling Parties. Findings of Fact 6-7.

To test the validity and fairness of the Compact with respect to the rights of unrepresented parties, the concluded Compact was incorporated into a preliminary decree, in accordance with Montana law, and notice of the preliminary decree was served on and made available for review to those parties identified in Section 85-2-232, MCA. Finding of Fact 15. No objections were filed to the Compact. Finding of Fact 16.

As there are no unsettled objections to the Compact as set forth in the Preliminary Decree for the Red Rock Lakes National Wildlife Refuge and Wilderness Compact Subdivision, the Court is satisfied that the Compact is fundamentally fair, adequate and reasonable to all concerned.

VII

APPROVAL AND CONFIRMATION

The Settling Parties' Motion for Approval of the United States Fish and Wildlife Service, Red Rock Lakes – Montana Compact is **GRANTED**. The Compact is **APPROVED** and **CONFIRMED**. Entry of Final Judgment and issuance of a Rule 54(b) Certification will occur at a later date: (1) after the information referenced in Appendix 1 of the Compact is entered into the DNRC water rights database of the State Centralized Record System; and (2) after the dismissal of the water right claims referenced in Appendix 2 are entered into the same database. The Court will contact the Settling Parties if it needs assistance to complete these two projects.

DATED this 23 day of August, 2005 .



C. Bruce Loble
Chief Water Judge

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RED ROCK LAKES NWR
Existing State law-based water rights in Basin 41A

<u>Claim Number</u>	<u>Rate</u>	<u>Volume</u>	<u>Source</u>
✓ W-103710	4.00 cfs		Battle Creek
✓ W-103718	stock/NA		Battle Creek
✓ W-189779	4.00 cfs		Collins Creek
✓ W-189781	0.50 cfs		Collins Creek
✓ Z-189778	4.50 cfs	725.0 AF	Collins Creek
✓ W-187314	7.50 cfs		Duff Creek
✓ W-187315	7.50 cfs		Duff Creek
✓ Z-187313	15.00 cfs	800.0 AF	Duff Creek
✓ W-190520	1.25 cfs		Elk Creek
✓ W-190521	2.75 cfs		Elk Creek
✓ W-190522	16.00 cfs		Elk Creek
✓ Z-190519	20.00 cfs	900.0 AF	Elk Creek
✓ W-187316	3.75 cfs		UT, Elk Creek
✓ W-187318	2.50 cfs		UT, Elk Creek
✓ W-190514	12.00 cfs		Hackett (Picnic,Culver)Creek
✓ W-190515	5.00 cfs		Hackett (Picnic,Culver)Creek
✓ W-190516	1.00 cfs		Hackett (Picnic,Culver)Creek
✓ W-190517	1.00 cfs		Hackett (Picnic,Culver)Creek
✓ W-190518	1.00 cfs		Hackett (Picnic,Culver)Creek
✓ Z-190513	20.00 cfs	2200.0 AF	Hackett (Picnic,Culver)Creek
✓ W-095009	stock/NA		Hellroaring Creek
✓ W-095010	2.76 cfs		Hellroaring Creek
✓ W-190556	5.00 cfs		Humphry Creek
✓ W-190557	1.00 cfs		Humphry Creek
✓ W-190558	1.00 cfs		Humphry Creek
✓ W-190559	1.00 cfs		Humphry Creek
✓ W-190560	1.00 cfs		Humphry Creek
✓ W-190561	1.00 cfs		Humphry Creek
✓ Z-190555	10.00 cfs	1775.0 AF	Humphry Creek

W-190552	8.00 cfs		Lone Willow Creek
W-190553	4.00 cfs		Lone Willow Creek
W-190554	1.00 cfs		Lone Willow Creek
Z-190551	13.00cfs	875.0 AF	Lone Willow Creek
W-190511	4.00 cfs		Matsingale Creek
W-190532	3.75 cfs		Nye Creek
W-190538	7.50 cfs		Nye Creek
W-190542	4.00 cfs		Nye Creek
W-190546	2.50 cfs		Nye Creek
W-190549	5.00 cfs		Nye Creek
W-190547	6.25 cfs		UT, Nye Creek
W-190533	3.75 cfs		UT, Nye Creek East Fork
W-190540	7.50 cfs		UT, Nye Creek East Fork
W-190544	3.50 cfs		UT, Nye Creek East Fork
W-190548	4.00 cfs		UT, Nye Creek East Fork
G-106726	stock/NA		Odell Creek
W-106726	stock/NA		Odell Creek
W-106727	stock/NA		Odell Creek
W-106728	stock/NA		Odell Creek
W-106729	stock/NA		Odell Creek
W-106730	stock/NA		Odell Creek
W-106731	stock/NA		Odell Creek
W-106732	stock/NA		Odell Creek
W-106733	5.00 cfs		Odell Creek
W-106734	25.00 cfs		Odell Creek
W-106735	25.00 cfs		Odell Creek
W-106736	8.00 cfs		Odell Creek
W-106737	37.50 cfs		Odell Creek
W-106738	5.00 cfs		Odell Creek
W-106739	5.00 cfs		Odell Creek
W-190529	7.50 cfs		Odell Creek
W-190530	5.00 cfs		Odell Creek
W-190531	25.00 cfs		Odell Creek
W-190536	8.00 cfs		Odell Creek
W-190537	4.00 cfs		Odell Creek
W-190539	4.00 cfs		Odell Creek
W-190541	12.50 cfs		Odell Creek
W-190545	17.50 cfs		Odell Creek
Z-190528	150.00 cfs	9412.5 AF	Odell Creek
W-187320		32,952.0 AF	Red Rock River
W-187322		25,979.0 AF	Red Rock River

✓W-187323	36.00 cfs	26,064.0 AF	Red Rock River
✓G-190495	9.47 cfs	613.0 AF	Red Rock Creek
✓W-190496	20.00 cfs		Red Rock Creek
✓W-190497	1.00 cfs		Red Rock Creek
✓W-190498	4.00 cfs		Red Rock Creek
✓W-190499	4.00 cfs		Red Rock Creek
✓W-190500	0.50 cfs		Red Rock Creek
✓W-190501	1.00 cfs		Red Rock Creek
✓W-190502	12.00 cfs		Red Rock Creek
✓W-190503	1.00 cfs		Red Rock Creek
✓W-190504	0.50 cfs		Red Rock Creek
✓W-190505	1.00 cfs		Red Rock Creek
✓W-190506	0.50 cfs		Red Rock Creek
✓W-190507	0.50 cfs		Red Rock Creek
✓W-190508	0.50 cfs		Red Rock Creek
✓W-190509	0.50 cfs		Red Rock Creek
✓Z-190495	47.00 cfs	9268.0 AF	Red Rock Creek
✓W-106725	stock/NA		UT, Red Rock Creek
✓W-187321	5.00 gpm	8.0 AF	UT, Red Rock Creek
✓W-190562	4.00 cfs		UT, Red Rock Creek
✓W-106724	stock/NA		Shambow Creek
✓W-106740	5.00 cfs		Shambow Creek
✓W-106741	100.00 gpm		Shambow Creek
✓W-187317	7.50 cfs		Shambow Creek
✓W-190512	1.00 cfs		Shambow Creek
✓W-187319	1.00 cfs		UT, Shambow Creek
✓W-190534	6.25 cfs		Sparrow Slough
✓W-190535	12.50 cfs		Sparrow Slough
✓W-094588	2.50 cfs		Teepee Creek
✓W-094589	stock/NA		Teepee Creek
→ W-095367	1.00 cfs		Teepee Creek
✓W-190492	8.00 cfs		Teepee Creek
✓W-190493	8.00 cfs		Teepee Creek
✓W-190494	4.00 cfs		Teepee Creek
→ Z-190491	20.00 cfs	1950.0 AF	Teepee Creek
✓W-103708	4.00 cfs		Tom Creek
✓W-103709	6.25 cfs		Tom Creek
✓W-103711	4.77 cfs		Tom Creek
✓W-103712	7.00 cfs		Tom Creek
✓W-103719	stock/NA		Tom Creek

W-103721	stock/NA		Tom Creek
W-103722	stock/NA		Tom Creek
W-103723	stock/NA		Tom Creek
W-190524	7.00 cfs		Tom Creek
W-190525	4.00 cfs		Tom Creek
W-190526	6.25 cfs		Tom Creek
W-190527	1.00 cfs		Tom Creek
Z-190523	18.25 cfs	1975.0 AF	Tom Creek
W-190510	5.00 cfs		UT, Tom Creek
W-190550	30.00 gpm	7.0 AF	Groundwater
W-095368	40.00 gpm		Groundwater
C-016218	20.00 gpm		Groundwater
C-039133	3.00 gpm		Groundwater
C-047726	15.00 gpm		Groundwater
C-047727	15.00 gpm		Groundwater