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FILED

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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER AND LOWER MISSOURI RIVER DIVISIONS

IN THE MATTER OF THE ADJUDICATION)
OF EXISTING AND RESERVED RIGHTS TO) **CASE NOS. WC-2000-03,**
THE USE OF WATER, BOTH SURFACE AND) **2002-04**
UNDERGROUND, OF THE BENTON LAKE)
AND BLACK COULEE NATIONAL WILDLIFE)
REFUGES IN THE STATE OF MONTANA)
_____)

**FINDINGS OF FACT AND CONCLUSIONS OF LAW APPROVING
UNITED STATES FISH AND WILDLIFE SERVICE,
BLACK COULEE AND BENTON LAKE – 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, Black Coulee and Benton Lake – Montana Compact. Section 85-20-701, MCA. 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

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 through 703 and 2-15-212, MCA

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, including the Black Coulee and Benton Lake Refuges, but those negotiations were discontinued due to other priorities. Exhibit 5, Staff Technical Report for Benton Lake National Wildlife Refuge, at 9 (Benton Lake Tech. Rep.); Exhibit 6, Staff Technical Report for Black Coulee National Wildlife Refuge, at 9 (Black Coulee Tech. Rep.); Affidavit of Chris D. Tweeten, filed February 15, 2005, at 2. The Settling Parties resumed negotiation efforts to quantify the reserved water rights associated with the Black Coulee and Benton Lake National Wildlife Refuges in 1995. *Id.*

Black Coulee Refuge and Negotiation

4. Black Coulee National Wildlife Refuge includes those lands and interests in land (640 acres and 840 acres of flowage easements) located in Subbasin 40JE in Blaine County in north central Montana that were acquired pursuant to, or withdrawn and reserved by, Executive Order 7801 of January 28, 1938. Compact at Art. I.3; Black Coulee Tech. Rep. at 8-9 and Appendices A and B; and Tweeten Affidavit at 5. The stated purpose of the Refuge is:

. . . for the use of the Department of Agriculture as a refuge and breeding ground for migratory birds and other wildlife, subject to valid existing rights

Black Coulee Tech. Rep. at 8 and Appendix A. A fixed elevation spillway dam project (Black Coulee Reservoir, with a capacity of 576 af) was constructed on the land pursuant to a federal easement in 1937, the previous year. Black Coulee Tech. Rep. at 9 and Appendix B. The Refuge drains into Black Coulee, a tributary of Cottonwood Creek, which in turn is a tributary of the Milk River. The entire Black Coulee drainage area is 13.88 square miles. *Id.* at 9 and 10.

5. The USFWS filed a water right claim for Black Coulee National Wildlife Refuge in the state-wide comprehensive adjudication for 991 af (576 af of storage in Black Coulee Reservoir

and seasonal evapo-transpiration of 415 af) from unnamed tributaries and the west branch of Black Coulee Creek, with a priority date of June 12, 1937. *Id.* at 10.

6. Members of the Commission Negotiating Team for the Black Coulee Refuge were Bob Thoft and Senator Chuck Swysgood; Rep. Sam Rose and Rep. Emily Swanson; Chris D. Tweeten, Commission Chairman; Susan Cottingham, Commission Program Manager; Joan Specking, Historical Researcher and Technical Team Leader; Barbara Cosens, Legal Counsel; Ann Yates, Legal Counsel; and Dave Amman, Hydrologist. Black Coulee Tech. Rep. at 10; Affidavit of Susan Cottingham at 2, filed February 15, 2005.

Members of the FWS Negotiating Team were Cheryl Williss, Chief of the Water Resources Division, FWS Mountain-Prairie Region; Richard Aldrich, Field Solicitor, United States Department of the Interior; Dave Gehlert, United States Department of Justice, Denver; and Dave Schmidt, Hydrologist. *Id.*

7. Initially, the United States requested recognition of a federal reserved water right for the natural flow of up to 963 afy on the unnamed tributaries and west branch of Black Coulee (576 afy to fill Black Coulee Reservoir, 387 afy to fill evaporative losses), and that the Black Coulee drainage upstream from the Refuge be closed to new appropriations. *Id.* at 11.

During the negotiation, the Settling Parties agreed that:

- the estimated average annual yield (supply) in this small watershed is 277 af;
- the DNRC database indicates 14 other water right claims upstream from the Refuge, three of which are senior to the Refuge claim, that claim a total of 1,868 afy;
- total water demand in the basin is approximately 2831.11 af; and
- therefore, the demand in the basin is in excess of the average available supply.

Id. at 10-11.

8. To help mitigate the effects of the federal reserved water right on existing water users, the USFWS agreed to subordinate its federal reserved water right to existing uses, and to exempt from the requested basin closure all small domestic wells and stock impoundments. Black Coulee Tech. Rep. at 12-13.

9. All negotiating sessions were open to the public and noticed in accordance with a mailing list compiled by the Commission and the USFWS. A telephone poll of water users in the Black Coulee area determined that telephone/mail contact with the water users was sufficient to keep the few water users informed about the negotiation, and that no further public meetings would be necessary. The proposed settlement and requests for comments were sent to those on the water user mailing list three separate times in 1996, when the Settling Parties were attempting to finalize the Compact. Black Coulee Tech. Rep. at 12.

10. Through negotiation, the Settling Parties ultimately agreed that the USFWS has a year-around federal reserved water right, with a priority date of January 28, 1938, for the remaining natural flows in the Black Coulee drainage, where the drainage enters the Refuge, after satisfaction of:

- all valid state-law based water rights with a priority date prior to July 17, 1997;
- new post-Compact wells or springs with a maximum appropriation of 35 gpm or less that do not exceed 10 afy; and
- new post-Compact stock impoundments with a capacity of 15 af or less, that appropriate a maximum of 30 afy.

Benton Lake Refuge and Negotiation

11. Benton Lake National Wildlife Refuge includes those lands (about 12,383 acres) located in Basin 41Q in Cascade County in central Montana that were withdrawn and reserved by Executive Order 5228 of November 21, 1929. Compact at Art. I.2; Benton Lake Tech. Rep. at 7 and Appendices 1 and 2; and Tweeten Affidavit at 2 and 5. The stated purpose of the Refuge is:

. . . for the use of the Department of Agriculture as a refuge and breeding ground for migratory birds, subject to existing valid rights.

Benton Lake Tech. Rep. at 3 and Appendix 1; and Tweeten Affidavit at 3. The Refuge lies entirely within the Lake Creek drainage in Water Court Basin 41Q, and the entire Benton Lake drainage area is 133.65 square miles. As the lake is a natural sump area, no water has ever been discharged from the Refuge. Black Lake Tech. Rep. at 7-8.¹

¹ The USFWS filed a separate claim for 49.8 cfs (up to 14,600 afy) of water from Muddy Creek, consisting primarily of irrigation seepage water and return flows from the Sun River Project, for improving water quality. That claim is not part of the Benton Lake Compact. Benton Lake Tech. Rep. at 7-8.

12. The USFWS filed water right claims in the Montana state-wide comprehensive adjudication. In October 1987, it modified its claims to a reserved water right for 31,257 afy from all tributary sources in Basin 41Q, representing impoundment capacities and seasonal use to offset evapo-transpiration losses. Benton Lake Tech. Rep. at 8. In November 1987, it further modified its claim to 35,555 afy. *Id.*

13. Members of the Commission Negotiating Team for the Benton Lake Refuge included Senator Chuck Swysgood; Representative Emily Swanson; Chris D. Tweeten, Commission Chairman; Susan Cottingham, Commission Program Manager; Joan Specking, Historical Researcher and Technical Team Leader; Barbara Cosens and Anne Yates, Legal Counsel; and David Amman, Hydrologist. Benton Lake Tech. Rep. at 9; Cottingham Affidavit at 2.

Members of the United States Fish and Wildlife Service Negotiating Team included Cheryl Williss, Chief of Water Resources for Mountain-Prairie Region; Richard Aldrich, Field Solicitor, United States Department of the Interior; and Dave Gehlert, United States Department of Justice, Denver. *Id.*

14. During the negotiation process, the Settling Parties agreed that:

- the combined mean stream flow of Lake Creek and median runoff of the unnamed tributaries in Lake Creek drainage (supply) is 12,976 afy;
- the combined full demand of the Refuge and all other appropriators in Lake Creek drainage is 24,866 afy (Refuge/24,196 AF, Refuge well/2 af, upstream users/668.8 af);
- there is, therefore, an insufficient supply of water to meet the full demand of the drainage;
- there are 17 water right claimants in Lake Creek drainage, claiming 134 separate water rights, totaling 16,812.86 af, including 15,065 af of USFWS state-based water rights with a priority date of 1929 and 1,747.86 af of private state-based water rights; 37 of the private claims are senior to the USFWS priority date, and 89 of the private claims are junior to the USFWS priority date; and
- soils and farming in the area contribute to high saline and selenium levels, which need to be controlled.

Benton Lake Tech. Rep. at 11-13; Tweeten Affidavit at 3.

15. To mitigate the effects of the federal reserved water right on existing water rights, the USFWS agreed to subordinate its federal reserved water right to existing uses, and to exempt from the requested basin closure all permits for small domestic wells and stock impoundments. Benton Lake Tech. Rep. at 12-14.

16. Negotiating sessions for the Benton Lake Refuge were held on July 26, 1995, September 26, 1995, March 28, 1996, and July 30, 1996. All sessions were open to the public and noticed in accordance with a mailing list compiled by the Commission and the USFWS. In addition, a public meeting was held in Power, Montana on May 29, 1996. The proposed settlement and requests for comments were sent to the addressees on the mailing list three separate times during 1996, when the Settling Parties were attempting to finalize the Compact. Benton Lake Tech. Rep. at 9 and Appendix 3; Tweeten Affidavit at 2.

17. Through negotiation, the Settling Parties ultimately agreed that the USFWS has a year-around federal reserved water right, with a priority date of November 21, 1929, for:

- (1) the remaining natural flow of the Lake Creek watershed, including the unnamed tributaries to Benton Lake where the drainage enters the Refuge, after satisfaction of:
 - all valid state-based water rights with a priority date prior to July 17, 1997;
 - new post-Compact wells or springs with a maximum appropriation of 35 gpm or less that do not exceed 10 afy; and
 - new post-Compact stock impoundments with a capacity of 15 afy or less that appropriate a maximum of 30 afy.
- (2) a consumptive use right of 2 afy of groundwater for the Refuge headquarters well.

Ratification of the Compact

18. A final draft of the negotiated federal reserved water rights for the Black Coulee and Benton Lake Refuges were incorporated into a single United States Fish and Wildlife Service, Black Coulee and Benton Lake – Montana Compact and signed by the Commission on December 18, 1996. The Compact became effective following initial approval of the Compact by the Governor of the State of Montana, ratification by the Montana Legislature (1997 Mont. Laws, ch 137, codified at § 85-20-701, MCA), and final written approval by the Governor of the State of Montana and authorized representatives of the USFWS and the United States Department of Justice, on July 17, 1997. Compact at Art. V. A; and § 85-2-702 and 703, MCA.

19. The federal reserved water rights for the Black Coulee and Benton Lake National Wildlife Refuges are described and quantified in Article II of the Compact.

Benton Lake Compact – Preliminary Decree

20. On April 21, 2000, the Settling Parties filed with the Water Court a Motion for Incorporation of the Benton Lake National Wildlife Refuge Compact into Preliminary and Final Decrees and for a Hearing on any Objections to Such Compact, pursuant to § 85-2-231(2)(a), MCA, and Art. V.B. of the Compact. In the Memorandum accompanying the Motion, the Settling Parties asked the Water Court to issue a preliminary decree in Basin 41Q pursuant to § 85-2-231, MCA; to provide notice pursuant to § 85-2-232, MCA; to hold timely hearings pursuant to § 85-2-233(1)(a), MCA, with respect to any objections filed; and to determine whether the Benton Lake Compact should be approved in accordance with applicable law.

21. On September 15, 2000, pursuant to § 85-2-234, MCA, and Art. IV.C. of the Compact, the Settling Parties provided the Water Court with a letter transmitting the contents of Appendix 1, consisting of two documents identified as “Abstract of United States Fish and Wildlife Service Water Rights.” The abstracts identify two water rights for the Benton Lake National Wildlife Refuge described and quantified in the Compact.

22. On April 5, 2001, after finding that the Settling Parties had established special circumstances as to why the Court should consider the Benton Lake Compact as a separate preliminary decree in Basin 41Q, the Water Court granted the Settling Parties’ motion, ordered incorporation of the Benton Lake Compact into a preliminary decree in Basin 41Q, issued a preliminary decree containing the contents of the Benton Lake Compact and Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Benton Lake National Wildlife Refuge Compact, and set forth the initial procedures necessary to commence special proceedings and provide notice of the Benton Lake Compact.

The Water Court ordered that all objections to the Benton Lake Compact must be received by the Montana Water Court on or before October 2, 2001.

Notice of Benton Lake Compact Preliminary Decree

23. On April 5, 2001, the Water Court directed the Clerk of the Water Court and the DNRC to serve a Notice of Entry of Benton Lake Compact Preliminary Decree and Notice of Availability, and a Summary Description of the Benton Lake Compact water rights on specified entities, in compliance with the requirements of § 85-2-232, MCA.

On April 26, 2001, Rita Nason, DNRC Water Rights Bureau, filed a Certificate of Mailing certifying that a copy of the Notice and the Summary Description had been placed in the United States Mail, postage prepaid, on October 31, 2002, addressed to each party required by the Order to be served.

In addition, the Water Court published Notice of Entry of Benton Lake Compact Preliminary Decree and Notice of Availability once a week for three consecutive weeks in the following newspapers of general circulation in the Upper Missouri River Division: the Great Falls Tribune, the Fairfield Sun Times, and The River Press in Fort Benton.

Finally, the Water Court made copies of the proposed Compact available to the public at the Montana Water Court in Bozeman, Montana; DNRC Water Resources Regional Office in Lewistown, Montana; DNRC Water Resources Office in Helena, Montana; the Montana Code Annotated in many public offices and public libraries; and on the Internet. A public meeting to explain Water Court procedures to the public was held by the chief water judge, in Great Falls, Montana on May 24, 2001.

Objections to Benton Lake Compact

24. On April 25, 2001, Donald A. Rosenberg filed an incomplete objection to the Benton Lake Compact. No other objections to the Compact were filed. On November 8, 2001, objector Rosenberg filed a Withdrawal of Objection, stating that “he voluntarily withdraws his objection to the above-referenced Compact and its incorporation into the Water Court decree,” and that he “makes the withdrawal knowingly, voluntarily, and without coercion or undue influence from any party hereto.” The Water Court granted the Withdrawal on November 9, 2001, and issued an order dismissing the objection.

Black Coulee Compact – Preliminary Decree

25. On June 20, 2002, the Settling Parties filed with the Water Court a Motion for Incorporation of the Black Coulee National Wildlife Refuge Compact into Preliminary and Final Decrees of SubBasin 40JE and for a Consolidated Hearing on any Objections to Such Compact, pursuant to § 85-2-231(2)(a), MCA, and Art.V.B. of the Black Coulee Compact. In that motion and the accompanying Memorandum, the Settling Parties asked the Water Court to issue a preliminary decree in Subbasin 40JE; to provide notice thereof pursuant to § 85-2-232, MCA; to hold timely hearings with respect to any objections filed pursuant to § 85-2-233(1)(a), MCA; to hold such other

hearings as may be necessary to approve the Compact; and to determine whether the Black Coulee Compact should be approved in accordance with applicable law.

26. Attached to the motion was Appendix 1, entitled "Abstract of Water Right," which identified the one United States' federal reserved water right for the Black Coulee National Wildlife Refuge that is described and quantified in the Compact. The Settling parties prepared the Abstract to comply with the requirements for a final decree as set forth in § 85-2-234, MCA, and Art. IV.C. of the Compact.

27. On October 15, 2002, after finding that the Settling Parties had established special circumstances as to why the Court should consider the Black Coulee Compact as a separate preliminary decree in Basin 40JE, the Water Court granted the Settling Parties' motion, ordered incorporation of the Black Coulee Compact into a preliminary decree in Basin 40JE, issued a preliminary decree containing the contents of the Black Coulee Compact and Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Black Coulee National Wildlife Refuge Compact, and set forth the initial procedures necessary to commence the special proceedings and provide notice of the Black Coulee Compact.

The Water Court ordered that all objections to the Black Coulee Compact were to be received by the Montana Water Court on or before April 28, 2003.

Notice of Black Coulee Compact Preliminary Decree

28. On October 15, 2002, the Water Court directed the DNRC to serve a Notice of Entry of Black Coulee National Wildlife Refuge Compact Preliminary Decree and Notice of Availability, and a Summary Description of the Black Coulee National Wildlife Refuge Compact water rights on specified entities, in compliance with the requirements of § 85-2-232, MCA.

On November 27, 2002, Rita Nason, DNRC Water Rights Bureau, filed a Certificate of Mailing certifying that a copy of the Notice and the Summary Description had been placed in the United States Mail, postage prepaid, on October 31, 2002, addressed to each party required by the Order to be served. The Clerk of the Water Court filed a Certificate of Mailing October 30, 2002, certifying that a copy of the Notice, Summary Description, and Abstract of Water Right were duly served upon the persons set forth in the Order. In addition, the Water Court published Notice of Entry of Benton Lake Compact Preliminary Decree and Notice of Availability once a week for three

consecutive weeks in the following newspapers of general circulation in the Lower Missouri River Division: the Blaine County Journal News – Opinion in Chinook; the Havre Daily news; and the Great Falls Tribune.

Finally, copies of the proposed Compact were made available to the public at the Montana Water Court in Bozeman, Montana; DNRC Water Resources Regional Office in Havre, Montana; DNRC Water Resources Office in Helena, Montana; the Montana Code Annotated in many public offices and public libraries; and on the Internet.

Objections to Black Coulee Compact

29. Two objections to the Black Coulee Compact were filed.² No other objections to the Compact were filed. On June 9, 2004, Objector Welsh filed a Withdrawal of Objection, stating that “he voluntarily withdraws his objection to the above-referenced Compact and its incorporation into the Water Court decree,” and that he “makes the withdrawal knowingly, voluntarily, and without coercion or undue influence from any party hereto.” Objector Liese verbally withdrew his objection during a June 14, 2004 Show Cause hearing. Following the June 14, 2004 hearing, the Water Court issued an Order dismissing both objections.

Judicial Review and Approval of United States Fish and Wildlife Service, Black Coulee and Benton Lake – Montana Compact

30. On February 15, 2005, pursuant to § 85-2-234, MCA, and Article V. of the Compact, the Settling Parties filed a Motion for Approval of Benton Lake and Black Coulee National Wildlife Refuges Compact, Certification of Judgment and Entry of Decree. Supporting the Motion were the Affidavits of Chris D. Tweeten and Susan Cottingham; Resumes for Barbara Cosens, David T. Amman, and Joan L. Specking; the Benton Lake Tech. Rep. and attached appendices; the Black Coulee Tech. Rep. and attached appendices; Memorandum in Support of Motion for Approval of Benton Lake and Black Coulee National Wildlife Refuges Compact and Entry of Interlocutory Decree, filed February 15, 2005.

31. On October 3, 2005, pursuant to an earlier Order, the Settling Parties filed copies of Appendices 2 (Benton Lake Refuge) and 3 (Black Coulee Refuge), referenced in Article V.B.1 of the Compact. Copies of Appendices 2 and 3 are attached hereto. They include 11 statements of

² Objection of H. Fred Liese, filed February 21, 2003; Objection of Kurtis B. Welsh, filed April 23, 2003.

claim that are to be dismissed upon approval of the Compact. Each existing water right in Appendices 2 and 3 shall be dismissed with prejudice 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, BLACK COULEE AND BENTON LAKE – 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, Black Coulee and Benton Lake – 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 through 234, and 85-2-701 through 703, MCA.; and Article V.A.3 of the Compact, Section 85-20-701, 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 § 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*, 501 U.S. 1250 (1991), citing *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).³

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.

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, Black Coulee and Benton Lake – 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, filed April 11, 2005, at pp. 16-17 (USPS – Montana Compact Findings and Conclusions) for a more detailed statement of this law.

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 Black Coulee and Benton Lake National Wildlife Refuges were withdrawn and reserved by the federal government by Executive Orders “for the use of the Department of Agriculture as a refuge and breeding ground for migratory birds [and wildlife],” and are 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.

16 U.S.C. Sec. 715i(a) (February 18, 1929); Black Coulee Tech. Rep. at 8; Benton Lake Tech. Rep. at 7. Although some of the Black Coulee National Wildlife Refuge lands were acquired after the original withdrawal and reservation in 1938, 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 for the Black Coulee Compact. Compact at Art. I.3; Black Coulee Tech. Rep. at 9. Art. V, Sec. 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 85-20-701, 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 Black Coulee and Benton Lake National Wildlife Refuges 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 pp. 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 § 85-2-702 and -703, MCA. While negotiations were being conducted, all proceedings to adjudicate federal reserved water rights for the Refuges were suspended, in accordance with § 85-2-217, MCA. The concluded Compact was signed by the Commission, ratified by the Montana Legislature, and approved and signed by the Governor and authorized representatives of the United States Secretary of Interior and the United States Department of Justice, in accordance with § 85-2-702, MCA. Upon ratification, the terms of the combined Compact were included in a special Black Coulee National Wildlife Refuge Compact Preliminary Decree, and a special Benton Lake National Wildlife Refuge Compact Preliminary Decree, which were made available to other water users for review and objection, in accordance with § 85-2-231(2) and 85-2-702(3), MCA. All the objections to the Compact were resolved, voluntarily withdrawn, and dismissed by the Water Court.

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 state court decrees recognizing and protecting its right to reserve at least a portion of the waters in Basins 40JE and 41Q 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. Findings of Fact 8 and 15. As pointed out by the Commission in both Technical Reports:

For states in 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 created by the legal differences 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 with[in] 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.

Black Coulee Tech. Rep. at 6-7; Benton Lake Tech. Rep. at 5-6.

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, and GIS and mapping. Findings of Fact 6 and 13. There was extensive public involvement throughout the process, with numerous public informational meetings and private meetings with individual water users. Findings of Fact 9 and 16; Tweeten Affidavit at 5; Cottingham Affidavit at 2.

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 pp. 23-24.

There is no evidence of fraud, coercion, or overreaching by the parties in the negotiations and settlements of these federal reserved water rights. Accordingly, this Court presumes that the final 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 process 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 was considered, and attempts to mitigate them were made by the Settling Parties. Findings of Fact 8 and 15.

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 § 85-2-232, MCA. Findings of Fact 20-23 and 25-28. The three objections to the Compact were ultimately “knowingly, voluntarily and without undue influence from any party hereto” withdrawn. No unresolved objections to the Compact remain. Findings of Fact 24 and 29.

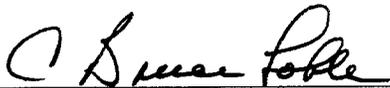
As there are no unsettled objections to the Compact as set forth in the Preliminary Decrees for the Black Coulee and Benton Lake – Montana Compact, the Court is satisfied that the Compact is fundamentally fair, adequate and reasonable to all concerned.

VII

APPROVAL AND CONFIRMATION

The Settling Parties’ Motion for Approval of the United States Fish and Wildlife Service, Black Coulee and Benton Lake – 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 the Compact on Appendix 2 and Appendix 3 are entered into the same database. The Court will contact the Settling Parties if it needs assistance to complete these two projects.

DATED this 4 day of October, 2005 .



C. Bruce Loble
Chief Water Judge

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Appendix 2

BENTON LAKE NATIONAL WILDLIFE REFUGE
Water Rights Claims

<u>Claim No.</u>	<u>Source</u>	<u>Rate</u>	<u>Volume</u>
41Q-W-188172	UT/Benton Lake		135 AF
41Q-W-188173	Lake Creek	500 cfs	14,000 AF
41Q-W-188175	UT/Benton Lake		392 AF
41Q-W-189863	UT/Benton Lake		178 AF
41Q-W-189864	UT/Benton Lake		75 AF
41Q-W-189865	UT/Benton Lake		58 AF
41Q-W-189866	UT/Benton Lake		43 AF
41Q-W-189867	UT/Benton Lake		23 AF
41Q-W-189868	UT/Benton Lake		125 AF
41Q-W-189870	Groundwater	45 gpm	2 AF

Appendix 3

BLACK COULEE NATIONAL WILDLIFE REFUGE
Water Rights Claim

<u>Claim No.</u>	<u>Source</u>	<u>Rate</u>	<u>Volume</u>
40J-W-183199	Black Coulee, West Branch		991 AF