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IN THE WATER COURT OF THE STATE OF MONTANA

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IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE WITHIN THE STATE OF MONTANA	**CASE WC-2007-03** FILED October 31, 2012

U.S.D.A. FOREST SERVICE – MONTANA COMPACT DECISION

THIS MATTER came on for an evidentiary hearing before the Montana Water Court in Missoula, Montana on January 4, 2012, Chief Water Judge C. Bruce Loble presiding.[1] The United States of America, Department of Agriculture, Forest Service was represented by Department of Justice attorney James J. DuBois and Special Assistant United States Attorney Jody Miller. The State of Montana was represented by Assistant Attorney General Jeremiah D. Weiner. The United States and the State of Montana will sometimes be referred to as the "Settling Parties."

Attorney W. G. Gilbert, III, appeared for the Strodtman Trust, Strodtman Irrevocable Trust, Helena R. Strodtman Trustee, Frances Strodtman-Royer Co-Trustee,

[1] The Water Court recorded all the testimony presented in this hearing on an electronic recording device known as an FTR Reporter. Only one CD was used in this proceeding. Reference in this decision to specific testimony will often be identified by the name of the witness if not obvious, followed by a reference to the electronic place marker identified by the hour, minutes, and, sometimes seconds. The place marker reflects the time of the day when the testimony was recorded. For example, Tweeten: 9:15:25 references the testimony of the first witness, Chris Tweeten, beginning at the electronic place marker of 9:15:25, which also indicates that this portion of the testimony of Mr. Tweeten first began to be recorded at 9:15:25 a.m. on the day of the hearing.

Walter W. Zobell Jr. Co-Trustee, and Lone Tree Ranch (collectively referred to herein as "Strodtmans"); Fred Lovell and Nancy Lovell ("Lovells"); and Glen Lake Irrigation District ("Glen Lake"). Frances Strodtman-Royer and Walter W. Zobell were present in person. Steve Curtiss of Glen Lake was present. Except as noted, no other objectors appeared in person or through an attorney.

General Adjudication of Water Rights

In 1979, the State of Montana commenced a comprehensive, general, statewide adjudication of water rights within the state of Montana, including all federal reserved and appropriated water rights, pursuant to Title 85, Chapter 2, MCA. The Legislature also established the Reserved Water Rights Compact Commission ("Commission") to negotiate on behalf of the governor and the people of Montana. Sections 85-2-701 - 703 MCA; 2-15-212, MCA.

The Commission began negotiations with the United States Department of Agriculture, Forest Service in the 1980s and worked with a mediator in 2006 to reach a tentative agreement. The State of Montana and the United States concluded a Compact settling the reserved water right claims of the United States for the National Forest System lands and the South Fork of the Flathead Wild and Scenic River in accordance with § 85-2-702, MCA. *Agreed Fact 1*.

The 2007 Montana Legislature ratified the Compact. 2007 Mont. L., Ch. 213, § 1; § 85-20-1401, MCA. The United States' Department of Agriculture's Secretary of Agriculture and the Department of Justice's Attorney General approved the Compact, effective April 17, 2007. *Agreed Fact 2*. Accordingly, the "Effective Date of This Compact" is April 17, 2007. Compact Article I(6).

All notices required by §§ 85-2-228 and 232, MCA have been given. *Agreed Fact 3*.

The majority of the National Forest lands within the Montana Adjudication Basins listed in Table 1 of the *Joint Pre-Hearing Order* filed January 4, 2012 were reserved and set aside for National Forest purposes under the Act of Congress of March 3, 1891 (26

Stat. 1103) and the Act of Congress of June 4, 1897 (30 Stat. 34) (the "Organic Administration Act") on the dates set forth in Table 1, although some portions of the Beaverhead National Forest in Basin 41D may have been reserved or acquired on dates different from the initial proclamation on November 5, 1906. *Agreed Fact 4*. *See also* US Exhibit 2.

The purposes of the reservation of the National Forest System lands in Montana include improving and protecting the forests within their boundaries and furnishing a continuous supply of timber for the use and necessities of the citizens of the United States. *Agreed Fact 5*.

Preliminary Decree

On March 20, 2008, the United States of America's Department of Agriculture Forest Service and the State of Montana filed a Joint Motion for Commencement of Special Proceedings for Consideration of the U.S.D.A. Forest Service – Montana Compact. Pursuant to § 85-2-234, MCA, United States of America's Department of Agriculture, Forest Service and the State of Montana requested the Water Court to direct the Montana Department of Natural Resources and Conservation (DNRC) to provide Notice of the Preliminary Decree to a defined set of water users. *See Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the USDA Forest Service Compact*, at 2 (March 19, 2008); Affidavit of John Hoeglund, at 6-7 (April 14, 2008).

On May 19, 2008, the Water Court entered its Findings of Fact and Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the U.S.D.A. Forest Service – Montana Compact. As part of this process, the Water Court issued specific orders to the DNRC to provide notice. Any and all objections to the Compact were to be filed with the Water Court by November 15, 2008.

Public Notice of Compact

On May 19, 2008, the DNRC served by regular mail a copy of the Notice of Entry of U.S.D.A. Forest Service – Montana Compact Preliminary Decree and Notice of

Availability, and Summary Description of Reserved Water Rights in the U.S.D.A. Forest Service – Montana Compact to all the water users it recommended receive notice of the compact proceedings in the Forest Service Basins. The Notice briefly described the Compact, established a November 15, 2008 objection deadline, provided a summary of Water Court procedures, identified locations on where to view the Compact and supporting information, and identified the date, time and location of six public meetings for people to attend and to ask questions of the Settling Parties.

Additionally, the DNRC served a copy of the Notice and Summary Description, the U.S.D.A. Forest Service – Montana Compact, Abstracts and any Index, Findings of Fact, Conclusions of Law and Order of Commencement on the County Clerk of District Court of the following counties: Beaverhead, Broadwater, Carbon, Carter, Cascade, Chouteau, Custer, Deer Lodge, Fergus, Flathead, Gallatin, Glacier, Golden Valley, Granite, Jefferson, Judith Basin, Lake, Lewis and Clark, Lincoln, Madison, Meagher, Mineral, Missoula, Park, Pondera, Powder River, Powell, Ravalli, Rosebud, Sanders, Silver Bow, Stillwater, Sweet Grass, Teton, and Wheatland.

On May 20, 2008, the Clerk of the Water Court mailed the Notice of Entry of U.S.D.A. Forest Service – Montana Compact Preliminary Decree and Notice of Availability, Summary Description of Reserved Water Rights in the U.S.D.A. Forest Service – Montana Compact, and Notice of Objection form to the persons listed in her filed Certificate of Mailing via first class, postage paid, United States mail.

The Water Court published a Notice of Entry of Compact once a week for three consecutive weeks in newspapers of general or partial circulation, including: Billings Gazette, Bozeman Daily Chronicle, Great Falls Tribune, Townsend Star, Carbon County News, The Ekalaka Eagle, Cascade Courier, The River Press (Ft. Benton), Miles City Star, Anaconda Leader, Lewistown News-Argus, The Daily Inter Lake (Kalispell), Belgrade News, Cut Bank Pioneer Press, Philipsburg Mail, Boulder Monitor, Judith Basin Press (Stanford), Lake County Leader (Polson), the Montanian (Libby), The Western News (Lincoln County), The Madisonian (Ennis), Meagher County News, Clark Fork

Chronicle (Superior), Livingston Enterprise, Independent-Observer (Conrad), Silver State Post (Deer Lodge), Ravalli Republic, The Independent Press (Forsyth), Sanders County Ledger (Thompson Falls), Stillwater County News (Columbus), The Big Timber Pioneer, Choteau Acantha, and The Times-Clarion (Harlowton). The total publication cost was $15,209.42. *See* Affidavits of Publication, filed June 20, 2008 through July 3, 2008.

Public meetings to explain the Water Court procedures and the Compact were hosted by the Water Court in Billings on July 14, 2008; Lewistown on July 15, 2008; Dillon on July 16, 2008; Kalispell on July 17, 2008; Missoula on July 18, 2008; and in Bozeman on July 22, 2008. Representatives of the Settling Parties attended all the meetings and answered questions.

Objections to Compact

Several objectors filed a timely Notice of Objection and Request for Hearing. The Objectors included: Fred Lovell and Nancy Lovell; Strodtman Trust, Strodtman Irrevocable Trust, Helena R. Strodtman, Trustee, Frances Strodtman-Royer, Co-Trustee and Walter W. Zobell, Jr., Co-Trustee, Lone Tree Ranch; Kester C. Romans; Joann C. Hosko; Glen Lake Irrigation District; Kristina D. Cloutier; Pat White; Darin E. Hagin; Daniel Smith and Lea Trotman Smith; Merle D. Lloyd; Kathie L. Phillips and Robert C. Phillips; and Gilbert Martin and Anna L. Martin.

Jurisdiction

The Montana Water Court has jurisdiction to review the Compact and decree the federal reserved water rights defined therein under the authority granted by the McCarran Amendment of 1952 (43 U.S.C. § 666), Montana statutes found in §§ 85-2-231 - 234 and 85-2-701 - 703, MCA, and through Article VIII. A.3. of the Compact, § 85-20-1401, MCA. *See also State ex. rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation, (Greely II*), 219 Mont. 76, 99, 712 P.2d 754, 768 (1985). In reviewing the federal reserved water rights, the Court must apply federal law. *Greely II*, 219 Mont. at 89, 95, 712 P.2d at 762, 765 *citing San Carlos Apache v. Arizona*, 463 U.S. 545, 571, 103 S. Ct. 3201, 3216 (1983).

Standard of Review

A compact concluded and incorporated into a decree pursuant to § 85-2-231, MCA, is similar to a consent decree, in that the decree is not a decision on the merits or achievement of the optimal outcome for all parties, but rather 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. 1990)*; Makah Indian Tribe v. United States*, 501 U.S. 1250, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991). The Water Court reviews compacts incorporated into this general adjudication under a standard of limited review similar to that applied by the Ninth Circuit Court of Appeals to review consent decrees. "Before approving a consent decree, a district court must be satisfied that it is at least fundamentally fair, adequate and reasonable." *Oregon*, 913 F.2d at 580, *citing Davis v. City & County of San Francisco,* 890 F.2d 1438, 1445 (9th Cir. 1989).

The purpose of this kind of judicial review is not to ensure that the settlement is fair or reasonable between the negotiating parties, but that it is fair and reasonable to those parties who were not personally involved in the negotiation efforts and whose interests could be materially injured by operation of the compact. Where an objector can establish standing, i.e. "good cause," to object to the compact, the Court has a heightened responsibility to protect those interests. The Court's level of inquiry is commensurate with the potential degree of injury. *Oregon*, 913 F.2d at 580-81. Because a final, decreed compact is a form of judgment, it must conform to all applicable law, though it, "need not impose all the obligations authorized by law." *Oregon*, 913 F.2d at 581.

The Water Court has applied this standard of review on several compacts involving both Indian and federal reserved rights. *See, e.g., Memorandum Opinion Chippewa Cree Tribe-Montana Compact*, Case WC-2001-01, filed June 12, 2002; and *BLM - Montana Compact Decision*, Case WC-2008-10, filed May 20, 2011.

Settlement Effort, Stipulations, and Dismissals

The Court set an initial settlement period of June 12, 2009. *See* Court Minutes and First Scheduling Order, at 2 (March 11, 2009). Upon request of the parties, the settlement

period was extended several times. A few of the objectors entered into Stipulations with the United States, but not all, and the formal settlement effort ended on September 10, 2010.

On September 16, 2010, the Water Court issued its Hearing Track and Fifth Scheduling Order, commenced formal hearing and discovery proceedings and required all parties, other than the natural persons representing themselves, to be represented by an attorney. Eventually, a January 4, 2012 evidentiary hearing in Missoula was scheduled and held.

Beyond filing an initial objection, Objector Pat White did not participate in this proceeding. She never attended any conference, never filed a subsequent document, and did not attend the January 4 evidentiary hearing. Accordingly, the Pat White objection is **DISMISSED**.

On January 3, 2012, Daniel Smith and Lea Trotman Smith fax-filed a letter in the Water Court and advised that they would not be present at the January 4 evidentiary hearing, and "regretfully have to concede our contentions regarding the water compact." Smiths' Letter, at 1. Accordingly, the Smith objections are **DISMISSED**.

Prior to the hearing date, the United States filed Stipulations with objectors Kathie L. Phillips and Robert C. Phillips, Kester C. Romans, Gilbert Martin and Anna Martin, and Joann Hosko. The Stipulation with Kester C. Romans was signed by Mr. Romans and dated for February 10, 2010. The Stipulation was not signed by the United States. On December 27, 2011, Objector Kester C. Romans filed his handwritten Motion to Amend Stipulation and supporting brief, together with a "Stipulation of Entry of Decree Amended." The Amended Stipulation was signed by Mr. Romans, but not by the United States.

In response, on December 28, 2011, the Court mailed its letter to Mr. Romans and advised him as follows:

> If you wish to amend the *Stipulation* you made with the United States, you need to discuss that directly with Mr. DuBois. If you or other objectors to the Compact cannot reach an agreement with the United States before the January 4, 2012 Missoula hearing date on the Forest Service - Montana Compact, the only option

> left is to present and prosecute your objections to the Compact at the January 4 Missoula hearing. The date, location, and other particulars of the hearing are contained in the Court Minutes and Order filed and mailed to you on December 15, 2011.

On December 28, 2011, the United States filed a signed copy of the Stipulation which was previously filed as unsigned. No amendments were made to the Stipulation. On January 3, 2012, Mr. Romans filed his handwritten "Affidavit of Affermation" together with his "Motion to Amend Stipulation" and attachments. Mr. Romans did not appear in person or by attorney at the January 4, 2012 evidentiary hearing.

On January 12, 2012, the United States filed its Response to Motion and Affidavit filed by Kester C. Romans. In its Response, the United States asserts at page 3 that the only modification needed is to amend paragraph 11 of the proposed decree which was attached to the Stipulation dated February 10, 2010 . Mr. Romans did not file a subsequent brief disputing the United States assertion. Accordingly, when the Court enters its decree, it will include the language proposed as paragraph 11 set forth on page 3 of the January 12 Response of the United States.

After the filing of the stipulations, the sole remaining Objectors included Fred and Nancy Lovell; Strodtman Trust, Strodtman Irrevocable Trust, Helena R. Strodtman, Trustee, Frances Strodtman-Royer, Co-Trustee and Walter W. Zobell, Jr., Co-Trustee; and Glen Lake Irrigation District (hereinafter collectively "Objectors").

January 4, 2012 Evidentiary Hearing

The Water Court held its evidentiary hearing on January 4, 2012. The United States and the State of Montana called two witnesses: Chris D. Tweeten and Jed A. Simon. The United States and the State of Montana introduced four exhibits without objection: U.S. Exhibit 1 – Curriculum Vitae of Jed A. Simon; U.S. Exhibit 2 – Index of Proclamations and other Documents Reserving Forest Service Lands in Montana; U.S. Exhibit 3 – Abstracts of Reserved Water Rights, and U.S. Exhibit 4 – Abstracts and Maps of Reserved Water Rights. The Strodtmans called one witness, Frances Strodtman-Royer, and did not introduce any exhibits.

Issues

Prior to the hearing, the parties agreed upon and signed a *Joint Pre-Hearing Order* delineating the contentions of each party. Following the hearing, the Objectors filed their Trial Memorandum and set forth three broad issues:

1. Whether the Objectors have standing to object to the Compact.
2. Whether the Compact violates the Objectors' due process rights.
3. Whether the Compact violates Mont. Const. Art. V § 12.

Standing

The standing to object to a claim in the state-wide adjudication process in Montana is fairly broad based. *Montana Trout Unlimited v. Beaverhead Water Co.* 2011 MT 151, 361 Mont. 77, 255 P.3d 179, ¶¶ 23, 34, and 41. The Strodtmans assert the ownership of water claims in the Big Hole River, Governor Creek, and Warm Springs Creek.[2] Glen Lake Irrigation District appears to have numerous water right claims in the Kootenai River drainage (Basin 76D).[3] The Lovells identify themselves on the objection forms they filed in this case in their personal capacity as Fred and Nancy Lovell. The Lovells do not appear to own any water rights personal to themselves, but in the "re:" line of his November 10, 2008 objection transmittal letter, Mr. Lovell states "Lovell Family Trust Objections." The Lovell Family Trust has two Wise River water right claims and six Swamp Creek claims in the Big Hole River drainage and the Lovells apparently are the Trustees of the Trust.[4] Trustees of an express trust may sue in their own names. Rule 17, M.R.Civ.P. Therefore, the Strodtmans, Glen Lake Irrigation District, and the Lovells have standing in this matter.

Due Process

The Strodtmans assert the Compact violates their Constitutional rights for due

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[2] See also DNRC Water Right Query System located online at http://www.nris.mt.gov/dnrc/waterrights/report.aspx?st=s&owner=Strodtman

[3] See http://www.nris.mt.gov/dnrc/waterrights/report.aspx?st=s&owner=Glen%20Lake%20Irrigation

[4] See http://www.nris.mt.gov/dnrc/waterrights/report.aspx?st=s&owner=lovell

process. They subdivide their argument into two arguments: A and B. In argument A, they argue the Compact violates their "due process rights by granting water rights to the USFS without providing notice to owners of Montana water rights." *Trial Memorandum* at 14 (February 6, 2012). In argument B, they argue the Compact violates their "due process right by granting procedural rights to the USFS which through their exercise deny owners of Montana water rights due process." *Trial Memorandum* at 15 (February 6, 2012).

During the Compact negotiations, the Reserved Water Rights Compact Commission provided extensive notice to Montana water users and other members of the public. Chris D. Tweeten testified (9:15 through 9:48) that he has been a member of Montana's Reserved Water Rights Compact Commission since 1985, its Chairman since 1991, and that he participated in the negotiations of the United States Forest Service and Montana Compact as a member of the negotiating team. The Compact negotiations began in the 1980s. Negotiations stopped in the mid to late 1990s and in 2001. A mediation effort began in January 2006 and took one year.

According to Mr. Tweeten, the mediation process was open to the public and most sessions were held either in Missoula or Helena. Mr. Tweeten testified several times about their concerted effort to get the interested public involved and make sure they understand what the Commission was doing. (9:32:00 through 9:32:35). Notice of the sessions were published in newspapers around the state, information was posted on the DNRC website, and notices were mailed to a list of addresses on a DNRC mailing list. Members of the public attended these sessions and provided comments.

A tentative agreement was reached in September 2006 and notice was again provided to the public through the DNRC website, newspaper advertisements, radio ads, and through notices mailed to the DNRC mailing list. The Compact was sent to the Montana Legislature, which also held public hearings, and was approved in 2007. On April 17, 2007, the Governor and the United States Department of Justice Attorney General signed the Compact during a public signing ceremony. As set forth earlier under

the heading "Public Notice of Compact", the Court provided extensive notice to Montana water users and other members of the public.

The record indicates Montana water users had plenty of opportunity to review and comment on the Compact during the negotiations sessions, during the legislative process, and during the Water Court proceedings. Water users were notified of the opportunity to file objections to the Compact and to participate in the Water Court proceedings. With reference to the Objectors in this case, their objections were filed in November 2008 and an evidentiary hearing was held on January 4, 2012. The Objectors had over three years to prepare for the hearing. The Objectors were not denied their due process rights. The record does not indicate anyone was denied due process.

Special Legislation

The Objectors' contend the Compact violates Article V § 12 of the Montana Constitution which provides: "The legislature shall not pass a special or local act when a general act is, or can be made, applicable."

Statutes are presumptively constitutional. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828, *cited in Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 7 , 354 Mont. 133, 227 P.3d 42 A person challenging a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt. *Eklund v. Wheatland County*, 2009 MT 231, ¶ 14, 351 Mont. 370, 212 P.3d 297, *referenced in Rohlfs*, ¶ 7. The Objectors did not meet the burden.

The rationale behind the Compact process in Montana was to avoid the costly litigation that other western states had experienced with adjudication of federal reserved water rights. The Settling Parties, in their *Joint Response*, explain this rationale in greater detail as follows:

> The fundamental extrinsic fact and circumstance here is that the Forest Service asserted claims to federal reserved water rights for instream flow. If the United States prevailed on such claims, such rights would have priority dates corresponding to the dates of Forest reservations, thus making them senior to many existing water rights, *Cappaert v. United States*, 426 U.S. 128, 138 (1976), and would not provide for the sort of public involvement

> and opportunity for protest that is provided for by the Compact and Montana statutes. In order to protect existing water uses in Montana while obtaining the United States' agreement to forego its claims to federal reserved water rights claims for instream flow, the general law on reservations was not, and could not be made, sufficiently applicable.
> . . . .
> These [instream flow] claims have been intensively, and expensively, litigated in other states in the west. One stated purpose of the Compact provision in question is to obtain federal agreement not to pursue federal instream flow water rights, and for the Forest Service to accept in consideration the United States' agreement to pursue protection of instream flows under a state law process. *See* Article IV.A. The Compact is germane to achieving the purposes and goals of the legislature in setting up the Compact Commission system. § 85-2-701, MCA.

Joint Response of the United States and State of Montana to Objectors' Trial Memorandum at 17-18, (March 1, 2012); *See also* the "Recitals" set forth at the beginning of the Compact; the "Compact Principles" set forth in Art. IV A; the Settlement of Claims language in Art. VIII H.

In *United States v. New Mexico*, the Supreme Court split 5-4 on the issue of whether Congress intended to reserve instream flows in the Gila National Forest. Justice Powell, writing for the minority, stated that "the Court's opinion cannot be read as holding that the United States never reserved instream flows when it set aside national forests under the 1897 Act." 438 U.S. at 724. Justice Powell further stated thus: "if the United States proves in this case or others, that the reservation of instream flows is necessary to fulfill the purposes discerned by the Court, I find nothing in the Court's opinion that bars it from asserting this right." 438 U.S. at 725.

Trying to define the scope and extent of federal reserved water rights under the unspecified contours articulated by the United States Supreme Court over the last one hundred years is not an easy task. The headlines of Supreme Court decisions over the last few years have announced several precedent setting and precedent ending decisions. Trying to guess what a future Supreme Court might decide on instream flow claims in national forests within Montana, based on the knife edge decision in *New Mexico*, is a gamble that prudent spenders of the public purse could logically decline.

Instead of litigating the existence of reserved water rights on every water source within the National Forest System lands in Montana with potentially early and disruptive priority dates, the parties agreed to recognize (1) reserved water rights specified in Table 1 of the Compact (current and future discrete administrative uses; and dispersed administrative uses); (2) a reserved right for almost the entire instream flow of the South Fork of the Flathead "wild and scenic" River ending at the point where the river flows into Hungry Horse Reservoir; (3) seventy-eight "Water Rights Recognized Under State Law" for instream or in situ use as specified in Table 2 of the Compact; and (4) the right of the United States to apply for a state water reservation to maintain a minimum flow, volume, level, or quality of water on National Forest System Lands under § 85-2-316, MCA.

As will be discussed later under the No Material Injuries heading, the record does not indicate these Compact provisions will have any adverse affect on the Objectors or any other Montana water user. Considering the amount of public and private resources that could have been consumed in litigating reserved water rights on every source of water in the National Forest System Lands, the potential for disruption such litigation could cause to state law based water right claims, the requirement under the McCarran Amendment for state to be engaged in a comprehensive stream adjudication before acquiring jurisdiction over federal and Indian reserved water rights, and the foresight of the Montana Legislature to establish the Compact Commission to negotiate the finality of ambiguous reserved water rights, the Court, is not persuaded that the Compact violates Article V, § 12 of the Montana Constitution.

No Material Injuries

With respect to the 263 reserved rights described as current Discrete Administrative uses cumulatively set forth on Table 1 and specifically identified on the abstracts in US Exhibit 3, the vast majority are for stock, lawn and garden, or institutional (basically domestic) uses and reflect a nominal use of water. Of the 263 rights, 87% have volumes less than 2 acre feet. In Basin 41D, the largest federal reserved right is 41D

30026655 (Wise River Administrative Site), has a flow rate of 583.44 gallons per minute (1.3 cfs), a volume of 154 acre feet, and is used to irrigate 35 acres. The Compact provides that any change to a Discrete Administrative Use "shall not adversely affect a Water Right Recognized Under State Law." Compact Art. III D(1)(c).

With respect to the future Discrete Administrative Uses and the Dispersed Administrative uses identified on Table 1 of the Compact, there are no defined places of diversion or places of use for these reserved rights. However, their use is limited to a specific number of acre feet per year in each of the 50 adjudication basins identified in Table 1.

Furthermore, the Compact incorporates other provisions which protect Montana water users from any adverse affect arising out of the use of these reserved rights. For example:

- Any development of a future Discrete Administrative use after April 17, 2007 "shall not adversely affect a senior Water Right Recognized Under State Law." Compact Art. III(C)(2)(c).

- Before diverting or withdrawing any Dispersed Administrative use in excess of 20,000 gallons per day from a single source of supply, the Forest Service is required to post notice at the site of the diversion or withdrawal for the entire period of use. If it intends to divert or withdraw 60,000 gallons per day from a single source of supply, the Forest Service must notify the local DNRC Water Rights Regional Office no more than 45 and no less than 10 days in advance. Compact Art. III(C)(3)(c).

- The "diversion or withdrawal of water for a Dispersed Administrative Use shall not adversely affect a senior Water Right Recognized Under State Law." Compact Art. III(C)(3)(d).

- If "notified that the diversion or withdrawal for a Dispersed Administrative Use adversely affecting a senior Water Right Recognized Under State Law, the Forest Service will immediately cease diversion or withdrawal from that source of supply. To resume the diversion or withdrawal, the Forest Service can move the diversion or withdrawal to another source of supply or satisfy the senior user and the Department Water Resources Regional Office Manager that use will not adversely affect the senior user or users." Compact Art. III(C)(3)(e).

- The "federal reserved water right to divert or withdraw water for Dispersed Administrative Uses as described in Article II, section B., shall not be changed to any other use." Compact Art. III D(2).

- Upon DNRC request, the Forest Service is to provide reports to the DNRC of its development or change of its future Discrete Administrative Uses and to provide copies of any posted notices or other information that is available on its use of the Dispersed Administrative uses. Compact Art. III E.

These Compact provisions provided significant protection to state based water right owners. The routine notice provisions included in Article III C(3) exceed any requirement applied to state law based water rights that are not being actively distributed under the supervision of a water commissioner.

The main thrust of the Objectors' argument and concern is that the current use of the rights recognized under the Compact might be changed or modified in the future and that the modified use will adversely affect one or more of the Objectors. This concern was best articulated during the testimony of Frances Strodtman-Royer, a co-trustee of one of the two objecting trusts. (10:51 through 11:35).

Ms. Strodtman-Royer has a BS degree in finance from Montana State University and was employed as a bank examiner for the First Bank System for three and one-half years. She has read the Compact several times and, as a lay person and rancher, finds it very difficult to understand. (11:19: 45 though 11:20:30).

Ms. Strodtman-Royer and her brother, Walter Zobell, raise hay and cattle on about 1,200 acres of land in the Big Hole River basin. She testified that the Big Hole River valley is a unique ranching community. The elevation is about 6,500 feet and has a very short growing season. Their ranch needs to quickly divert and spread its water rights across their irrigated land, often between May 15 and July 15. She described their irrigation practice as being common in the upper Big Hole area.

She explained that land practices and customary water usage have been changing over the last ten years. Local ranchers are selling to out of state buyers, recreational water users are complaining that irrigators are responsible for low flows, particularly during short water years, and are urging reductions of irrigation diversions. Ms. Strodtman-

Royer testified to the intense pressure she and other irrigators are experiencing from outside interests and forces over the Arctic Grayling habitat in the Big Hole River drainage, including threats of lawsuits and lobbying efforts to list Grayling on the Endangered Species List.

She is worried that the Compact would set a precedent or become another avenue for a federal agency to mandate instream flows. If the waters are left instream for the maintenance of the Grayling, she believes there will be an adverse affect on all ranchers in the area because instream flows "would be structured without any regard for crop production, and if people cannot raise their hay crop, they can't raise their cattle, and eventually if you keep going to the extreme it would do away with ranching in the Big Hole." (11:15:00 though 11:16:20).

With respect to the Forest Service Jackson Administrative Site, Ms. Strodtman-Royer explained that their ranch has a secondary right to runoff from 80 acres of Forest Service irrigation out of Warm Springs Creek near this site. If these acres are irrigated, she stated the Forest Service runoff flows into their canal and are used to irrigate their ranch lands. She said her ranch has a written agreement with the Forest Service about this practice. The agreement was not introduced and its specifics are unknown, leaving the Court in a factual vacuum about the interrelationship between any Compact provisions and the Strodtman agreement with the Forest Service.

Ms. Strodtman-Royer testified that if the Forest Service converts its irrigation use on the 80 acres into an instream use or just stops irrigating the 80 acres, their ranch will lose that runoff water and would have less water to irrigate, particularly during short water years.

Ms. Strodtman-Royer recognizes that all of the Strodtman diversion points are below or downstream from all Forest Service boundary lines and that any Forest Service effort to reserve water under state law would create reservations with priority dates junior to the Strodtman senior rights. (11:25:35 through 11:27:30). Not withstanding this

recognition, she fears an adverse impact because "like everything the government has done in the last 25 years, you don't think it will impact, until it does." (11:27:51 though 11:27:58).

Although Ms. Strodtman-Royer cannot identify any concrete impact on the Strodtman water rights by the Compact, one cannot listen to her heartfelt testimony without empathy for the pressure she describes. The Court is very aware of the tensions that exist within Montana and specifically within the Big Hole River basin regarding instream flows. *See, e.g.*, the Montana Supreme Court's opinions of *In re Adjudication of Existing Rights*, 2002 MT 216, 311 Mont 327, 55 P.3d 396; *Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, 361 Mont. 77, 255 P.3d 179 (reversing the Water Court's Case 41D-1 *Decision Dismissing Montana Trout Unlimited Big Hole River Decree Objections*); and the Water Court's *Decision on Dismissal of Western Watersheds Project and Laurence D. Zuckerman Big Hole River Decree Objections,* filed May 27, 2010 in Water Court Case 41D-2.

However, this Court cannot rely on any fears, concerns, and conjectures expressed by the Objectors about the future application of the Compact provisions or other future Forest Service actions. The expressed uncertainty of feared future events is too speculative upon which the Court can base a decision. The Decision must be based on the record and the application of current legal principles.

Water rights are property rights. Within reason, landowners have the right to use their land as they please. *Newton v. Weiler*, 87 Mont. 164, 179, 286 P. 133, 139 (1930). If the United States, or any other water user, decides not to use their property rights and foregoes the diversion of water into a common canal on any particular day, no authority has been presented which allows outside parties, such as the Strodtmans, to compel water users, such as the Forest Service, to divert water when they do not wish to do so. Even though a subsequent water user, such as the Strodtmans, can appropriate waste, drainage, and return flows from someone else's use of water, such as the Forest Service, no Montana authority has been cited to compel the continuous wasting of water to satisfy a

waste water appropriation and, in fact, Montana authority appears to prohibit such compulsion. *Popham v. Halloran*, 84 Mont. 442, 449-450, 275 P. 1099, 1102-1103 (1929).

Forest Service lands are heavily regulated through Congressional oversight and administrative rules. No federal authority has been cited that the Forest Service must continue to divert its water rights to benefit a private landowner's appropriation of a waste water right.

If a water user desires to change a diverted water right into an instream flow water right, there has been a statutory mechanism to do so for many years. Section 85-2-436, MCA. The existence of the Compact does not change these basic legal principles.

Ms. Strodtman-Royer testified that the Compact allows the Forest Service to apply for new state reservations of instream flow. The record indicates the Forest Service boundaries are upstream from the Strodtman diversions. The United States and the State of Montana emphatically state in their *Joint Response* that: "There can be no question that the Compact provides only for reservation of instream flow within those forest boundaries. Article VIA." *Joint Response* at 12 (Emphasis in original). The priority date of any new state reservation would be the date of the filing of the application. Compact Art. IV A(2). So, any new state reserved water rights issued to the Forest Service would be upstream and subordinate to the Strodtman existing water rights.

Other than the perceived pressure Ms. Strodtman-Royer articulated, no evidence has been presented to convince the Court that instream flows confined to Forest Service lands above the Strodtmans headgates will adversely affect their downstream diversion of water from a shared source.

Finally, Ms. Strodtman-Royer believes that their modest ranch would not be able to finance the cost of attorneys and hydrologists to oppose efforts by the United States to change their rights to instream flows. (11:16:52 through 11:17:47). It is impossible to predict whether the Strodtmans will or will not engage in future litigation to protect their property rights. No authority has been presented which would support dismissing the

Compact based on a vague possibility of future litigation. In fact, the United States Supreme Court has noted that "the expense and annoyance of litigation is 'part of the social burden of living under government." *Petroleum Exploration, Inc. v. Public Service Com.*, 304 U.S. 209, 58 S. Ct. 834, 82 L. Ed. 1294 (1938). The fear of potential litigation costs is not a sufficient reason to dismiss the Compact.

The contentions of Fred Lovell and Nancy Lovell, set forth in the *Joint Pre-Hearing Order* at 13, assert the volumes associated with the Compact are too high, the priority dates need to be documented, and the period of diversion to October 9 is excessively long for the Big Hole. Also at the end of the hearing, their attorney stated that their objections and water right claims were on file and asked the Court to consider the relationship of those to their properties and, in particular, the Wise River Ranger Station. (W.G. Gilbert: 11:35:10 through 11:35:34).

The Lovells did not personally appear at the hearing and did not present any evidence or testimony to support their contentions. With respect to their volume contentions, the proper volume to be applied to irrigation ground is fact dependent. No evidence was presented that the volumes should be less than stated. With respect to the Compact priority dates, no evidence was presented that the priority dates are inaccurate. With respect to period of use ending October 9, no evidence was presented that any period of use within the Compact was excessively long.

Ms. Strodtman-Royer did state that a common period of use in the upper Big Hole was generally May 15 to July 15. (11:04:35 through 11:04:44). However, the abstracts of the Strodtman and Lovell water right claims reflect periods of use ending in October. *See, e.g.*, Strodtman Warm Springs Creek irrigation claim 41D 49471-00, Strodtman Governor Creek irrigation claim 41D 49476-00, and Strodtman Big Hole River irrigation claim 41D 49482-00 (April 15 to October 1); Lovell Wise River irrigation claim 41D-182379-00 (April 1 to October 1), Lovell Wise River irrigation claim 41D 93824-00 (April 15 to October 4), and Lovell Swamp Creek irrigation claim 41D 93099-00 (April 1 to October 4). While a Compact period of use ending on October 9 may be a few days

longer than some of the Objectors' claim to use water in the same drainage, nothing in the record indicates such a use injures the Objectors or requires the Court to dismiss the Compact.

Glen Lake Irrigation did not include any contentions or witnesses on the Joint Pre-Hearing Order and did not introduce any evidence or present any witnesses during the January 4 hearing. Instead, near the conclusion of the hearing, its attorney advised the Court that the District has several water right claims in the adjudication, that the District claims two diversion points within the Forest Service boundaries, and that its claimed places of use "are essentially, although not directly, surrounded by the U.S. Forest Service and therefore subject to the adjacency concerns of the Compact." (W.G. Gilbert: 11:35:37 through 11:36:20).

The "adjacency concerns" were not specified, but in the *Objectors Trial Memorandum* Glen Lake states that any "instream flow changes requiring them to allow water to flow past their headgate causes a loss of water available for irrigation by their members." *Objectors Trial Memorandum* at 9. Therefore, the adjacency concerns appears to arise from Article IV B(2) of the Compact which states:

> the Forest Service may apply for a change of use from an appropriation right to divert or withdraw water on land owned by the United States that is located within or immediately adjacent to the exterior boundaries of the National Forest System Lands on the Effective Date of This Compact to an instream flow water right on National Forest System Lands within or immediately adjacent to the exterior boundaries of National Forest System Lands on the Effective Date of This Compact in accordance with procedures required under state law. The Parties agree that the language of 85-2-320 on the Effective Date of This Compact satisfies the principles in Article IV, section B.2.

Section 85-2-320, MCA, cited in the above quote, requires the United States to "own the appropriation right that it seeks to change," and to file a change application detailing the length and location of the stream reach, provide a "detailed streamflow measuring plan," and "prove by a preponderance of the evidence that: (a) the change . . . will not adversely affect the water rights of other persons; . . . . " Section 85-2-320(6)

further provides that "[a] change in appropriation under this section does not create a right of access across private property or allow any infringement of private property rights." Based on the record, there appears to be adequate protection and opportunity for Glen Lake Irrigation District to challenge any Forest Service application to change one or more of its water rights into an instream flow and to present evidence of any potential adverse affect.

With respect to the reserved right for an intstream flow in the South Fork of the Flathead "wild and scenic" River, the priority date of the reserved right is October 12, 1976. Compact Article II D. The right "shall not be changed to any other use." Compact Art. III D(4). Commission Chairman Tweeten testified that most of the river is in the Bob Marshall Wilderness and he could not recall any water users who were affected by this instream flow reservation. (Tweeten: 9:43:23 through 9:43:45). The record contains no evidence that this wild and scenic instream flow reservation will cause any material injury to the Objectors or any other Montana water user.

With respect to the 78 "Water Rights Recognized Under State Law" for instream or in situ use as specified in Table 2 of the Compact, the priority date of these water rights is April 17, 2007. The United States unsuccessfully contended in the Gila National Forest litigation in New Mexico that it was entitled, under the reserved water rights doctrine, to a minimum instream flow for "aesthetic, environmental, recreational and 'fish' purposes." *United States v. New Mexico*, 438 U.S. 696, 704, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978). Therefore, if it was to acquire any non-reserved water rights, such as instream flows, it was required to do so under state law. *New Mexico*, 438 U.S. 696, 716-717.

Montana law recognizes water rights for instream and inlake fish, wildlife and recreation uses. *In re Adjudication of Existing Rights to the Use of all Water*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 ¶ 40. Montana law also recognizes reservations of water for such instream uses. Section 85-2-316, MCA.

The Montana Legislature has authority to create reservations of water for the United States through the compacting process because it possesses all the powers of lawmaking inherent in any independent sovereignty. It is limited only by the United States and Montana Constitutions. *See, e.g., Hilger v. Moore*, 56 Mont. 146, 163, 182 P. 477, 479 (1919); *State ex rel. Evans v. Stewart*, 53 Mont. 18, 161 P. 309 (1916).

Those powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Art. X, U.S. Constitution.[5] Although the history of the relationship between the Federal Government and the States in the reclamation of arid lands of the Western States is both long and involved, through it runs the consistent thread of purposeful and continued deference to state water law by Congress. *California v. United States*, 438 U.S. 645, 653, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978); *United States v. New Mexico*, 438 U.S. 696, 699, 701, 702-705, 718, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978).

In 1972 the people of Montana ratified a new constitution. The Montana Constitution provides in Article IX(3) as follows:

> **Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> . . . .
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> (4) The legislature shall provided for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Pursuant to Art. IX, § 3(4), Mont. Const. 1972, the legislature enacted the Montana Water Use Act of 1973. Title 85, Chapter 2, MCA. The Water Use Act governs the

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[5] *See also Kansas v. Colorado*, 206 U.S. 46, 79, 27 S. Ct. 655, 51 L. Ed. 956 (1907); *United States v. Rio Grande Irrigation Company*, 174 U.S. 690, 703, 19 S. Ct. 770, 43 L. Ed. 1136 (1899).

administration, control and regulation of water rights within the state of Montana. *Greely II*, 219 Mont. 76, 712 P.2d 754 (1985) and § 85-2-101, MCA.

As long as the State acts within the parameters of the State and federal constitutions, Montana has broad authority over the administration, control and regulation of the water within the State boundaries. Accordingly, if the State negotiates, approves, and ratifies a compact that grants more water to a reserved water right entity than that entity might have obtained under a strict adherence to the "limits" of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to that entity to resolve a dispute. In the absence of material injury to existing water users, the merits of such public policy decisions is for the Legislature to decide, not the Water Court. The Legislature has the Constitutional authority to authorize or recognize 78 water rights with a 2007 priority date for fishery or wildlife purposes.

Finally, in the *New Mexico* decision, the Supreme Court specifically referenced "the Act of Mar. 10, 1934, 48 Stat. 400, 16 *U. S. C § 694 (1976 ed.)*," in which "Congress authorized the establishment within individual national forests of fish and game sanctuaries, *but only with the consent of the state legislatures.*" 438 U.S. at 710 (italics in original). Although the seventy-eight state based reservations of water were apparently not based on this Act, the Congressional concept is consistent with the Compact's state law based reservations enacted with the consent of the Montana Legislature.

Compact is Consistent with Applicable Law

Specific acts of Congress proclaimed the Forest Service lands. These proclamations set aside reserves of forest lands into the national forest system. With these proclamations came reservations of water. *See Cappaert v. United State*s, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069 (1976) and *United States v. New Mexico*, 438 U.S. 696, 702-705, 718, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978).

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. The United States chose to negotiate its federal reserved water rights through Montana's more flexible, less costly, compacting procedure. This choice avoided a more costly route. In negotiating the federal reserved water rights under Montana's compacting procedure, the Claimant and Objectors complied with all Montana procedural law.

Compact is Product of Good-Faith Negotiation

In this case, no evidence exists that the Compact is the product of fraud or over-reaching by or collusion between the negotiating parties. Both the Compact and the record establish that the Compact is the result of good-faith, arms length negotiation. The process of negotiating and achieving a Compact met the goals of resolving the dispute without expensive litigation and protecting the existing water users. During the negotiations, the United States Forest Service and the State of Montana had teams to provide legal advice and scientific expertise. Extensive public involvement occurred throughout the process with many public informational meetings and private meetings with individual water users.

The Compact fully complies, both factually and legally, with State and Federal law relating to federal reserved water rights for National Forest System lands in Montana. Therefore, approval of the Compact is appropriate because the Compact is fair, adequate, and reasonable, and conforms to applicable law. In order to finalize Water Court proceedings, this Court must issue a Rule 54(b) certificate. *In re Adjudication of Sage Creek Drainage*, 234 Mont. 243, 252-53, 763 P.2d 644, 649-50 (1988).

APPROVAL AND CONFIRMATION

The joint motion of the State of Montana and the United States of America for the approval of the United States Department of Agriculture Forest Service – Montana Compact is **GRANTED**. The Compact is **APPROVED AND CONFIRMED**.

The entry of the proposed Decree and the issuance of a Rule 54(b) Certification will occur after the expiration of at least 30 days following the filing of this Decision. Similarly,

the dismissal of the filed claims identified in Appendix 2 of the Compact, as mandated by Article VIII F, shall take place after the expiration of at least 30 days.

DATED this _31__ day of October 2012.

/s/ C. Bruce Loble
C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Jamie Pope, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **U.S.D.A. FOREST SERVICE - MONTANA COMPACT DECISION** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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DATED this day of October, 2012.

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