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**FILED**

DEC 19 2016

Montana Water Court

**IN THE WATER COURT OF THE STATE OF MONTANA**

PETITION OF SCOTT RANCH, LLC FOR  
ADJUDICATION OF WATER RIGHTS IN  
BASIN 43P

CASE NO. WC-2016-04

**ORDER DENYING MOTION UNDER RULES 59(E) AND 60(B), M. R. CIV. P.**

**I. PROCEDURAL HISTORY**

Scott Ranch, LLC (hereafter “Scott” or “Scott Ranch”) has filed a motion pursuant to Rules 59(e) and 60(b), M. R. Civ. P. asking this Court to amend or set aside a prior order dated November 1, 2016. The November 1, 2016 Order Denying Petition was issued in response to a request by Scott Ranch to separately adjudicate water rights previously appurtenant to allotment lands.

Scott acquired the allotment lands in 2006, after the Crow Compact was ratified by the Montana Legislature, and after the deadlines for filing water right claims in Montana’s statewide adjudication.

This Court denied Scott’s request for a separate adjudication of its water rights. The basis of that ruling was that Scott’s rights originated with an allottee, and that the allottee’s rights were part of the Tribal Water Right. This Court wrote:

Both the Compact and the Settlement Act address the rights of allottees. The Compact defines the Tribal Water Right as “the right of the Crow Tribe, *including any Tribal member*, to divert use or store water” described in the Compact. Compact, art. II, § 30 (emphasis added). The Compact further states that the water rights “confirmed to the Tribe in this Compact are in full and final satisfaction of the water right claims of the Tribe and the United States on behalf of the Tribe and its members, including federal reserved water rights claims based on *Winters v. United States...*” Compact, art. VII, § C.

The Settlement Act states that “any entitlement to water of an allottee under Federal law shall be satisfied from the tribal water rights.” Act, § 407(2).

Order Denying Petition for Adjudication, 4-5, November 1, 2016.

Scott’s request for reconsideration of this Court’s November 1, 2016 Order raises two issues. First, Scott asserts that the November 1, 2016 order reverses prior orders of this Court stating that *Walton* rights are not part of the Tribal Water Right. Second, Scott contends the effect of the November 1, 2016 Order is to place its rights under the jurisdiction of the Tribe. Scott asserts that this shift in jurisdiction conflicts with the Compact, which disallows the Crow Tribe’s authority to control water rights appurtenant to fee lands owned by non-Tribal members.

## II. ISSUES

1. Does this Court’s November 1, 2016 order amount to a reversal of prior orders in other cases?

2. Does this Court’s November 1, 2016 order improperly grant the Tribe jurisdiction over Scott’s rights?

## III. PRINCIPLES OF LAW

The Crow Compact defines the Tribal Water Right as “the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described...in this Compact.” Compact, art. II.30. The Tribal Water Right “shall be held in trust by the United States for the use and benefit of the Tribe and the allottees... .” Water Rights Settlement Act of 2010 (Claims Resettlement Act of 2010), Pub. L. No. 111-291, 124 Stat. 3064, § 407(c)(1).

A group known as the Crow Allottees objected to the Crow Compact when it was issued as a Preliminary Decree by the Water Court. The Crow Allottees asserted that they had reserved water rights appurtenant to their allotments and claimed those rights should be adjudicated separately from the *Winters* rights held by the Tribe.

The Montana Supreme Court rejected this argument, noting that the United States, acting as trustee, waived whatever claims the Crow Allottees had in exchange for the

Allottees' right to use a just and equal share of the Tribal Water Right identified in the Compact. *In re Crow Water Compact*, 2015 MT 217, ¶ 15, 380 Mont. 168, 354 P.3d 1217 (hereafter *Crow Allottees* case).

#### IV. ANALYSIS

1. Does this Court's November 1, 2016 Order amount to a reversal of prior orders in other cases?

Scott asserts that this Court's November 1, 2016 Order effectively reverses two prior orders in cases 43O-8 and 43N-4.

Like the present case, 43O-8 involved *Walton* rights. Unlike the present case, the *Walton* rights in case 43O-8 were transferred from Tribal member allottees to non-Indian ownership many years prior to the April 30, 1982 filing deadline applicable to water rights in Montana's statewide adjudication.<sup>1</sup> As a consequence, the claimants in that case filed claims under state law for their *Walton* rights years *before* the Crow Compact was approved.

Like all *Walton* rights, the claims in case 43O-8 were originally *Winters* rights owned by the Tribe. Those rights became *Walton* rights upon transfer from their allottee owners to non-Indians. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). Unlike the claims in the present case, the claims in case 43O-8 were not owned by the Tribe or a Tribal member at the time the Compact was ratified by the Legislature on June 22, 1999. The owners of the water rights in case 43O-8 were not part of the Compact negotiations, and the rights they held were not waived in exchange for the Tribal Water Right identified in the Compact. The same analysis applies to the water right in case 43N-4.<sup>2</sup>

Scott has asserted its rights "were water uses tied to Indian Trust Land until 2006, when the lands were converted to fee status." Motion for Ruling on Petition for Adjudication, 2, August 1, 2016. According to Scott, any water rights appurtenant

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<sup>1</sup> Five of the claims in case 43O-8 were transferred from Buffalo That Grunts to James C. Foster on February 25, 1921. One claim was transferred from Flower Whiteshirt to Melvin C. Neal on December 3, 1954, and the last claim was transferred out of trust status and into the ownership of Claren Neal on May 1, 1973.

<sup>2</sup> The claim in case 43N-4 was transferred from trust to fee ownership on January 5, 1955.

thereto were held in trust at the time the Compact was ratified by the Legislature. If that is correct, those rights were waived and exchanged for a just and equal share of the Tribal Water Right. “The Crow Tribe on behalf of itself and its members, and the United States as trustee for the Allottees, waived and released all other claims to water in exchange for those recognized in the Compact.” *Crow Allottees*, ¶ 6.

Scott is therefore in a different position than the owners of *Walton* rights who acquired land from allottees *before* the Compact was ratified. Unlike the claimants in cases 43O-8 and 43N-4, Scott’s rights were not acquired until *after* the Compact was ratified. Under the holding in the *Crow Allottees* case, the language of the Compact, and the Settlement Act, the only water right remaining *after* the Compact was ratified was the Tribal Water Right. The *Crow Allottees* case states that individual allottees could not claim water rights separate from the Tribal Water Right.

It is a fundamental principle of property law that a grantee receives the rights of a grantor. This rule applies to grants of land from allottees to non-Indians. When “title passed from an Indian to a non-Indian for an allotted [sic] parcel, the appurtenant right to share in tribal reserved waters passed with it.” *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) (citing *Walton*, 647 F.2d at 50). The rationale behind recognition of *Walton* rights was that “for an Indian allottee to enjoy the full benefit of his allotment, he must be able to sell his land together with the right to share in the reserved waters.” *Anderson*, 736 F.2d at 1362 (citing *Walton*, 647 F.2d at 49-50).

After the Compact was ratified by the Legislature, allottees had a right to a just and equal share of the Tribal Water Right, but no independent claim to a separate water right that could have been conveyed to Scott. Scott could only receive what the allottee had the ability to convey. At most, an allottee could convey an entitlement to a just and equal share of the Tribal Water Right, but not a separate water right.

Because *Walton* rights acquired before the ratification of the Compact are not part of the Tribal Water Right, nothing in this Court's November 1, 2016 Order invalidates the rulings in 43O-8 or 43N-4.<sup>3</sup>

Scott may argue that its rights still require separate adjudication because they were acquired before the Effective Date of the Compact. The Effective Date of the Compact is the "the date on which the Compact is ratified by the Crow Tribal Council, by the Montana legislature, and by the Congress of the United States, whichever date is latest." Crow Compact, art. II.12. The Crow Tribal Council voted to seek legislative approval of the Compact in 1999, and the Montana Legislature approved the Compact in June of that year. The United States Congress did not approve the Compact until 2010.

Despite the Compact's reference to an Effective Date, the Compact, and the water rights of the Tribe and allottees, were ratified by the Montana Legislature on June 22, 1999, and have not changed since. Ratification by the Legislature established which water rights were included in the Tribal Water Right and served as an important benchmark for several other purposes. Ratification is referenced 70 times throughout the Compact, and provides a baseline for quantifying the Tribe's current uses, protecting rights Recognized Under State Law (state based rights), and determining when a basin is to be considered closed to new appropriation. Most importantly for the purposes of this case, the calculation of what rights were included in the Tribal Water Right was based on lands held in trust on behalf of the Tribe and allottees as of June 22, 1999.

For these reasons, the date of ratification by the Montana Legislature should be used in this case to establish the demarcation between pre-Compact water rights and the post-Compact Tribal Water Right. This demarcation is appropriate because the rights described in the Compact did not change during the eleven-year gap between ratification of the Compact by the Montana Legislature and the Compact's eventual adoption by the United States Congress. Once the Compact became part of state law, the water rights it

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<sup>3</sup> *Walton* rights that predate the Compact are not included in the Compact and are not deducted from the amount of water allocated to the Tribe by the Compact. In contrast, a *Walton* right created by a conveyance from an allottee after the Compact is part of the Tribal Water Right as that term is defined in the Compact and must be deducted from the water allocated to the Tribe.

recognized became fixed. Under the *Crow Allottee* case, the rights of Scott's allottee predecessor were part of the Tribal Water Right recognized in the Compact. The existence of an Effective Date did not change the allottee's rights to a just and equal share of the Tribal Water Right.

Adjudication of the water rights in the Compact effectively occurred when the Water Court approved the Compact. The petitioner now requests that the rights it acquired be carved out of the Tribal Water Right and adjudicated separately. The same request was rejected in the *Crow Allottees* case, which held that the rights of allottees could not be segregated from the Tribal Water Right.

2. Does this Court's November 1, 2016 Order improperly grant the Tribe jurisdiction over Scott's rights?

Scott asserts that if the rights it acquired were part of the Tribal Water Right, then "this Court has ordered that water rights owned by non-tribal members on fee land are under the control of the Crow Tribe." Scott Motion to Alter or Amend Judgment, 4, November 23, 2016. Scott further asserts that "the result would be that Petitioner's water rights would then be held in trust by the United States." *Id.* Scott contends that if this Court's prior order stands, "all water abstracts issued in the 43P decree with *Walton* right designations would no longer be under the administration of the State of Montana..." Scott Motion to Alter or Amend Judgment, 5, November 23, 2016.

Scott asserts these problems exist because its rights fit the Compact's definition of a right Recognized Under State Law. A right Recognized Under State Law includes "a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member." Compact, art. II.19. Such rights are administered and enforced by the State of Montana. Compact, art. IV.A.3.a. The Tribe may not administer any water right Recognized Under State Law, and the State of Montana may not administer any Tribal Water Right. Compact, art. IV.A.2.c. and art. IV.A.3.b.

No other party is asserting that Scott's rights are under the control of the Crow Tribe, that they are held in trust by the United States, or that they can no longer be

administered by the State of Montana. Accordingly, there is no case in controversy, and no issue for this Court to resolve.

The Montana Supreme Court has consistently held that it will not render advisory opinions. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567. “The judicial power of Montana’s courts is limited to justiciable controversies,” *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 19, 366 Mont. 450, 288 P.3d 193. To fall within a court’s adjudicatory power, a controversy must be “real and substantial..., admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.” *Plan Helena*, ¶ 9 (quoting *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)).

While the concerns raised by Scott may arise in the future, they are not presently before the Court, and a ruling on those issues would amount to an advisory opinion.

#### V. CONCLUSIONS OF LAW

1. This Court’s November 1, 2016 Order does not reverse prior orders in other cases.

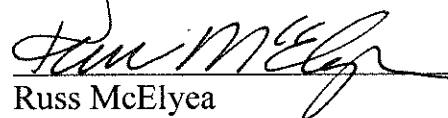
2. This Court’s November 1, 2016 Order does not address the issue of Tribal jurisdiction over Scott’s rights. That issue has not been properly raised by adverse parties and this Court declines to issue an advisory opinion on that question.

Scott has not made the showing required under either Rule 59(e) or 60(b) of the Montana Rules of Civil Procedure.

#### VI. ORDER

Scott’s request pursuant to Rules 59(e) and 60(b), M. R. Civ. P. is DENIED.

DATED this 19 day of December, 2016.

  
Russ McElyea  
Chief Water Judge

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