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MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (BASIN 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

ORDER ON MOTION TO EXTEND STAY

On December 13, 2022, the United States of America (“United States”) and the Confederated Salish and Kootenai Tribes (“Tribes”) filed a Joint Petition of the Confederated Salish & Kootenai Tribes and the United States of America for Extension of Stay of Adjudication of All Claims in Basins 76L and 76LJ (“Joint Petition”). The State of Montana (“Montana”) filed a brief in support of the Joint Petition on December 22, 2022.

The Court held a hearing on the motion on January 6, 2023 by Zoom. The Court discussed the motion with the parties, continued the hearing, and extended the stay to February 6, 2023. The Court resumed the hearing on January 24, 2023 by Zoom. David Harder appeared for the United States. Melissa Schlichting appeared for the Tribes. Chad Vanisko and Molly Kelly appeared for Montana. At the hearing, the Court issued an oral order extending the stay to September 29, 2023. This Order sets forth the basis for the extension and the terms of the extended stay.

BACKGROUND

The Joint Petition asks the Water Court to extend a stay on issuance of preliminary decrees in Basins 76L and 76LJ. Basins 76L and 76LJ are the only two

hydrologic basins in Montana where the Water Court has not yet issued either a temporary preliminary decree or a preliminary decree. Basin 76L covers the Flathead River and its tributaries, including all groundwater, below Flathead Lake. Much of Basin 76L lies within the exterior boundaries of the Flathead Indian Reservation. Basin 76LJ is immediately north of Basin 76L and covers Flathead Lake and the mainstem of the Flathead and North Fork of the Flathead River and their tributaries, including groundwater. The southern portion of Basin 76LJ also lies within the Flathead Indian Reservation.

A stay on decree issuance for these two basins has been in place for a number of years, including several extensions. The background to the stays is lengthy and complex due to the interrelationship between the adjudication of water right claims in these basins and the Compact between the Tribes, Montana, and United States (the “Compact”).

On July 1, 2015, both the United States and the Tribes filed motions to stay proceedings to adjudicate aboriginal and tribal reserved water right claims the United States had filed on behalf of the Tribes in the United States’ capacity as Trustee.¹ The “claims” referred to in the 2015 motions consist of 7,312 water right claims the United States filed on behalf of the Tribes in June 2015, and 2,814 claims the Tribes also filed in 2015.² For purposes of this order, those claims are referred to collectively as the “Reserved Right Claims.” The Reserved Right Claims include claims both within the Flathead Reservation and off the Flathead Reservation in Basins 76L and 76LJ and various other basins. Following a hearing, the Court granted the motions for the stay in an order issued on July 27, 2015. By its terms, the July 27, 2015 Order stayed until July 31, 2017 the adjudication of “all water rights in Basins 76L and 76LJ.” This included both

¹ United States “Motion to Stay Proceedings to Adjudicate Aboriginal and Reserved Water Right Claims” (July 1, 2015); Tribes’ “Motion to Stay Proceedings to Adjudicate the Aboriginal and Reserved Water Rights Claims of the Confederated Salish and Kootenai Tribes and Memorandum in Support of Motion” (July 1, 2015).

² These figures are taken from the motions and briefs the parties filed in 2015. The Court references them for purposes of providing a scale of the number of claims. According to Montana’s brief supporting the Joint Petition, there are 10,109 claims in this category, impacting 51 different adjudication basins. (Doc. 14.00, at 3). The precise number of claims is immaterial for purposes of this Order.

the Reserved Right Claims, and claims based on state law (“State-Based Claims”) filed pursuant to the general claim filing statute.

As of the date of the 2015 stay, the Montana Legislature had ratified the Compact, but it had not yet been ratified by the United States Congress or the Tribes, nor had they ratified it by July 31, 2017, the expiration date for the stay. Consequently, in response to requests by the United States and the Tribes, the Water Court extended the stay several times in orders dated September 26, 2016 (extending stay to June 1, 2018); June 5, 2018 (extending stay to January 10, 2020); and December 13, 2019 (extending stay to January 10, 2023).

As of the date of each of these extension orders, neither the United States Congress nor the Tribes had ratified the Compact. Congress ultimately ratified the Compact on December 27, 2020 (P.L. 116-260, Title V, Division DD), and the Tribes ratified it on December 29, 2020. (Council Resolution 21-023). The Secretary of the United States Department of the Interior approved the Compact on September 17, 2021. In response to a joint motion filed by the United States, the Tribes, and Montana, the Water Court issued a preliminary decree for the Compact (“Compact Preliminary Decree”) on June 9, 2022. (Doc. 19.00, Case WC-0001-C-2021). The current deadline for filing objections to the Compact Preliminary Decree is February 6, 2023.

The parties filed the Joint Motion after the Compact had been ratified by the various governments and after the Water Court issued the Compact Preliminary Decree. The prior stay and extensions were based on concerns about how additional decrees might affect Compact ratification. As the Compact now is ratified, those concerns no longer exist.

The pending Joint Petition now requests an extended stay based upon a somewhat different rationale. The United States and the Tribes generally contend the time and resources necessary to simultaneously address objections to the Compact Preliminary Decree and review the Basin 76L and 76LJ decrees will impose hardship on the Tribes,

the United States, and potentially other parties. (Doc. 12.00³, at 5). Montana focuses its argument on the potential hardship of examining the 10,000-plus Reserved Rights Claims.

DISCUSSION

The Court has used three criteria to evaluate prior stay extensions, which include (1) the balancing of competing interests with a recognition the Court has inherent authority to control its docket; (2) that the party seeking the stay make out a clear case of hardship or inequity in proceeding, even if there is a fair possibility the stay will damage someone else; and (3) consideration of the promotion of public welfare or convenience, especially in cases of “extraordinary public moment.” Order Extending Stay (June 5, 2018), *citing State v. Mont. First Judicial Dist. Court*, 361 Mont. 536, 264 P.3d 518 (2011) and *Henry v. Dist. Court*, 198 Mont. 8, 645 P.2d 1350 (1982).

In considering whether to extend the stay further, it is necessary to recognize more specifically the two categories of claims that have been subject to prior stays. Although they do not clearly differentiate the two, the Joint Petition includes both categories.

The first category includes the State-Based Claims in Basins 76L and 76LJ that were subject to the claim filing requirements set forth in §§ 85-2-221 and -222, MCA. Montana’s response indicates the Department of Natural Resources and Conservation (“DNRC”) is on track to issue a summary report documenting its examination of these claims by February 28, 2023. Once the Water Court approves the summary report, it can be in a position to include the State-Based Claims in preliminary decrees for these two basins. Issuance of preliminary decrees will commence the same objection and claim resolution process that the Water Court has followed in other basins.

The second category includes the 10,000-plus Reserved Right Claims. As Montana explains in its briefing and supporting documents, these claims are spread

³ Docket number (abbreviated as “Doc.”) refer to the docket in the basin file for Basin 76L, which for electronic filing docketing purposes is designated as “BASIN-0001-76L-1985.” The filings also are docketed in the electronic basin file for Basin 76LJ, which is designated as “BASIN-0002-76LJ-1985.”

across 51 different basins. The DNRC has not conducted an examination of these claims. Montana notes the financial and other hardship of examining these claims.

The water rights addressed in the Compact Preliminary Decree are separate from these two categories of claims. The Compact Preliminary Decree also still is in its objection period. The Court will consolidate proceedings to resolve the suite of objections after the objection period closes, but at this point the scope and timeframe for those proceedings remains uncertain. However, the Tribe and the United States state they anticipate the need to dedicate significant resources to the Compact Preliminary Decree objection process.

In balancing the interests involved in these various categories, the Court also is mindful of its ongoing obligation to continue to move the overall water rights adjudication toward final decrees for all basins in Montana. To that end, even if the Court delays issuance of preliminary decrees for the State-Based Rights in Basins 76L and 76LJ, DNRC confirmed during the hearing of the Joint Motion that its examination resources can be used effectively to complete the summary report and other work necessary to allow the preliminary decrees for the two basins to be issued when the time is right. DNRC's work should continue because it now is underway and will need to be completed regardless of the outcome of objections to the Compact Preliminary Decree.

In contrast, it would be an inefficient use of examination and adjudication resources for DNRC to examine the 10,000-plus Reserved Right Claims. Whether those claims ever will be decreed depends on the outcome of the Compact Preliminary Decree proceedings. If it turns out those claims must be decreed, the Court has the authority to consolidate and include them in separate decrees from decrees involving the Basins 76L and 76LJ claims. Sections 85-2-215 and -231, MCA. Thus delaying examination of those claims will not delay the issuance of the Basins 76L and 76LJ preliminary decrees.

In balancing these factors, the Court concludes a limited stay is appropriate. A limited stay will allow the Compact Preliminary Decree objection process to come to completion, and give the parties and the Court a better sense of the time and resources that may be necessary to address the objections. A limited stay also provides DNRC the

time necessary to ready the Basins 76L and 76LJ preliminary decrees for issuance with the State-Based Claims. A limited stay also defers examination work on the Reserved Right Claims, which is not necessary at this time.

ORDER

Therefore, it is ORDERED that the stay for Basins 76L and 76LJ is extended to **September 29, 2023** with the following modifications and clarifications:

1. Montana, through DNRC, shall continue work to complete summary reports to the Water Court for all State-Based Claims within Basins 76L and 76LJ and provide those reports to the Water Court according to the current procedures.

2. Montana, through DNRC, shall defer any examination work on the Reserved Right Claims and shall not include any of the Reserved Right Claims in the summary reports for the two basins.

3. Nothing in this Order shall apply to ongoing or future proceedings arising out of the Compact Preliminary Decree.

4. The United States, the Tribes, and Montana shall attend a status conference at 10:00 a.m. on **September 7, 2023**. The conference shall take place via Zoom. Instructions for the Zoom conference will be provided in a separate order. The parties are requested to be prepared to discuss factors, if any, for whether the stay should be extended in full or in part. The requirement to file quarterly status reports is suspended, but any party may file reports or motions as they deem appropriate prior to the conference.

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