

Crow Creek tribe sues U.S. government for \$200 million

Seth Tupper Journal staff Nov 13, 2016

About 270 river-miles downstream from the Dakota Access pipeline protest camp, a South Dakota Native American tribe is quietly fighting for \$200 million in compensation over alleged water-rights violations.

The Crow Creek Sioux Tribe, which resides on a reservation on the eastern banks of the Missouri River in central South Dakota north of Chamberlain, is locked in a legal showdown with the federal government in the U.S. Court of Federal Claims.

The tribe contends its reservation of land includes rights to Missouri River water that the government has long allowed others to use illegally. Now, the tribe wants \$200 million as compensation and also wants its water rights measured, or “quantified,” in the language of the tribe’s formal complaint. The government disputes the tribe's claims and has filed a motion to dismiss them.

The tribe filed its case in June, about two months after Native American-led protesters began to gather at the site of the planned route of the Dakota Access pipeline under the Missouri River near Cannon Ball, N.D. The Crow Creek complaint and the pipeline protest are not formally related, but they are both grounded in Native American assertions of water rights.

The Crow Creek complaint is based on the Winters Doctrine, established by a 1908 U.S. Supreme Court decision. In that decision, the court determined that the establishment of a land reservation for a Native American tribe includes an implied reservation of water rights for the tribe.

Some tribes in other parts of the country have since forced the U.S. government to determine the amount

of water they are entitled to use, but apparently no tribe in the Northern Great Plains has done so.

David Ganje, a Rapid City lawyer who handles water-rights cases but is not involved in the Crow Creek case, said tribes have been hesitant to sue for water rights. That is partly because of a 1952 federal law known as the McCarran Amendment, which pushed many water-rights disputes from federal courts down to state courts, where Native Americans often fear they will not receive fair treatment. Why, then, is the Crow Creek tribe suddenly pressing its case in the federal Court of Claims?

When the Journal emailed the question to the tribe's lawyer, Austin Tighe, of the Nix, Patterson & Roach firm in Austin, Texas, he mentioned the firm's success in similar cases.

Tighe said the firm helped win a \$186 million payment from the U.S. government for the Choctaw and Chickasaw tribes in August 2015. The payment settled 100-year-old claims that the government failed to protect tribal timber interests.

In a separate and ongoing case, the firm is representing the Schaghticoke Tribal Nation in its

\$600 million lawsuit against the state of Connecticut over its claims of illegal taking of tribal land.

The Crow Creek complaint is similar to those cases because it claims the U.S. government has a responsibility to hold tribal water in trust — like tribal land — and manage it for the good of the tribe.

The government, in its motion to dismiss, calls the tribe's position “novel and legally unsupportable.” “A Winters doctrine right ‘gives the United States the power to exclude others from subsequently diverting waters that feed the reservation,’” the government’s motion says, quoting a 2015 court ruling. “It does not give Plaintiff ownership of any particular molecules of water, either on the reservation or up or downstream of the reservation.”

Ganje, the local water-rights expert, said he foresees a number of legal issues that could thwart the tribe’s effort in the Court of Claims, and he thinks negotiation would have been a better initial tactic than litigation. But he said tribes should generally do more to assert their water rights.

“Our society has such a great need for water,” Ganje

said, "and good-quality water is becoming a commodity that in the future could be as valuable as oil and gold."