

SD Tribe Urges Fed. Circ. To Revive Water Rights Suit

By **Adam Lidgett**

Law360, New York (October 11, 2017, 1:06 PM EDT) -- The Crow Creek Sioux Tribe on Tuesday urged the Federal Circuit to revive its suit accusing the federal government of mismanaging the tribe's water rights, saying the lower court erred when it agreed to dismiss the case.

The South Dakota-based Crow Creek tribe, whose reservation sits along the Missouri River, filed its opening brief in its appeal of a June U.S. Court of Federal Claims decision that tossed its suit and found the tribe hadn't specified any injury it suffered from the government's use of the waters of the river.

The tribe argued that the Court of Federal Claims erred when it held the tribe to a higher standard than required to establish subject matter jurisdiction and tossed the case at the pleading stage by finding the tribe couldn't prove damages.

"Because the tribe alleged a money-mandating statute and a money-mandating constitutional provision, the Court of Federal Claims had subject matter jurisdiction," the tribe wrote in its brief. "Furthermore, since proof of damages at the pleading stage is not required to establish standing or ripeness — both of which are established in pleading that same money-mandating statute and constitutional provision — the Court of Federal Claims erred in granting dismissal.

The tribe hit the government with a June 2016 complaint **seeking at least** \$200 million in damages and claiming the federal government had "completely abdicated" fiduciary trust responsibilities under the U.S. Supreme Court's landmark 1908 decision in *Winters v. United States* regarding tribal water rights.

But this **past June**, Senior Judge Robert H. Hodges Jr. ruled that the *Winters* doctrine guarantees tribes enough water to serve their reservations, but found that the Crow Creek tribe hadn't contended that the government's withdrawals or diversions of Missouri River water had lowered the amount of water available to the tribe.

In its complaint at the lower court, the tribe had alleged that in addition to failing to meet its fiduciary trust duties — including refraining from self-dealing or benefiting, providing regular accountings, and consulting with the tribe about management of water resources on its reservation — the government had taken the tribe's waters without compensation in violation of the Fifth Amendment.

On top of its damages bid, the tribe had sought at the lower court a declaration that the government breached its duties and injunctive relief, including an accounting of its water rights and enforcement of U.S. Department of the Interior and Bureau of Indian Affairs consultation policies.

"The established law of the Federal Circuit is that if a tribe invokes either a money-mandating

statute, or a money-mandating constitutional provision, the trial court has subject matter jurisdiction to hear the case," Austin Tighe, the tribe's attorney, said in a statement. "We invoked both."

The federal government did not immediately respond to a request for comment on Wednesday.

The tribe is represented by Austin Tighe and Michael Angelovich of Nix Patterson & Roach LLP.

The federal government is represented by Amber Beth Blaha and Matthew Littleton of the U.S. Department of Justice.

The case is Crow Creek Sioux Tribe v. U.S., case number 17-2340, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Andrew Westney and Christine Powell. Editing by Emily Kokoll.