No. 137, Original

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IN THE
SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA,

*Plaintiff,*

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

*Defendants.*

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Before the Honorable Barton H. Thompson, Jr.
Special Master

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# AMICUS BRIEF OF THE NORTHERN CHEYENNE TRIBE IN OPPOSITION TO WYOMING'S AND NORTH DAKOTA'S ARTICLE VI ARGUMENT AND MONTNA'S ARGUMENT THAT WATER STORED IN THE ENLARGED CAPACITY OF THE TONGUE RIVER RESRVOIR IS TRIBAL WATER

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The Northern Cheyenne Tribe (Tribe) files this Amicus Brief in opposition to Wyoming's argument at pages 11-13 of its Post-Trial brief and North Dakota's Post-Trial Brief that under Article VI of the Yellowstone Compact (Compact), the water rights of Indian tribes, including the Northern Cheyenne Tribe,[1] would be supplied from the allocation made to each state, and specifically under Article V (B) of the Compact. The Tribe takes exception to this argument and urges the Special Master to decline to address this issue since it is not raised in the case, it is not necessary to any of the issues raised, and Wyoming does not rely on the argument for any purpose.

The Tribe also takes exception to Montana's argument at pages 103-105 of its Post-Trial Brief that the enlarged capacity of the Tongue River Reservoir is Northern Cheyenne water. However, the Tribe does not believe it is necessary to decide this issue and urges the Special Master to decline to address this issue as well.

## WYOMING AND NORTH DAKOTA ARTICLE VI ARGUMENT

1. From the beginning of this case, it has been recognized that the water rights of Indian tribes, including the Northern Cheyenne Tribe, and the federal government are not at issue in this case. *See* Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint, June 9, 2009 (Opinion on Motion to Dismiss):

> Although federal lands (such as Yellowstone National Park) and Indian reservations (such as the Northern Cheyenne Indian Reservation) are in the greater Yellowstone River basin, the Compact expressly states that its provisions should not be construed to impact either Indian water rights (Compact, Art. VI) or water rights of the United States (id., Art. XVI).

[1] The Tribe has previously provided background information concerning the water rights of the Northern Cheyenne Tribe under its Compact with the State of Montana, MCA 85-20-301, ratified by Congress in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374, 106 Stat 1186 (Sept. 30, 1992). *See* Amicus Brief of the Northern Cheyenne Tribe in Opposition to Wyoming's Motion for Summary Judgment, August 2, 2013.

Accordingly, the Master has declined to address issues that would impact the rights of the Northern Cheyenne Tribe. *See* Memorandum Opinion of the Special Master on Wyoming's Motion for Summary Judgment, September 16, 2013. The Master should continue to do so in connection with Wyoming's latest effort to limit the Northern Cheyenne Tribe's water rights.[2]

2. The State of Wyoming has not previously raised or argued the issue of the meaning of Article VI. Indeed, it is the Tribe understands that this case does not involve Northern Cheyenne water rights or Article VI. *See* Opinion on Motion to Dismiss at 2: "The issue in this case is when, if at all, the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (the "Compact"), protects the holders of pre-1950 appropriative rights in Montana on the Powder and Tongue Rivers from diversions, storage, and consumption of water in Wyoming that date from after January 1, 1950." Under this framing of the issue and based on other rulings of the Special Master, not only is Article VI not an issue in this case, but Article V(B) is not at issue in this case. Even though Wyoming raises the issue in its Post-Trial Brief, it is not used for any purpose in the brief, and appears to be a purely gratuitous. The bottom line is that Article VI is not implicated in any of the issues before the court and there is no need to decide it.

2. Moreover, Wyoming's interpretation of Article VI – that the states really intended Article VI to mean that tribal water rights would be satisfied by the States' Article V(B) water -- potentially affects the water rights of four Indian tribes, and the interests of the United States as trustee for the tribes. The Northern Cheyenne and Crow Tribes in Montana, and the Arapaho and Shoshone Tribes on the Wind River Reservation in Wyoming, all have adjudicated or settled

[2] Wyoming apparently sees Montana's claims as "merely an attempt to shift the burden of the Northern Cheyenne Compact onto Wyoming in direct contravention of the explicit understanding of the Yellowstone River Compact negotiators." Wyoming Post-Trial Brief at 1. Although Wyoming has failed to show any such understanding, it is in any case irrelevant to this case.

water rights in streams covered by the Compact. There can be no decision on the critical issue of the meaning of Article VI without the presence of the United States and the Tribes.

3. Wyoming argues that parties to the Yellowstone Compact understood that water for Indian lands would be supplied from the respective allocations of the states under Article V(B), citing Minutes of Meeting Dec. 7-8,1950 of the Yellowstone Compact Commission. Ex. J72. The Minutes cannot be read to support Wyoming's conclusion. At most, what can be concluded from the Minutes is that no change was made to the language of Article VI as a result of any discussions at that meeting, and Article VI continued to read as it appears in the final compact.

The Minutes show that an amendment to Article VI to add the language, "and such rights are excluded from this Compact," was voted down. Exh. J72 at 45. On the other hand, another amendment that Mr. Lloyd from Wyoming intended to propose -- that water for Indian lands should be charged to the states -- was never made and never voted on. Exh. J.72 at 42 ("Mr. Lloyd [from Wyoming] said that he intended to propose with respect to Article VI that water for Indian lands should be charged to the states.") Thus Article VI remained unchanged.

4. Wyoming's argument would revise Article VI by adding language that Indian water rights would not only be charged to the states, but specifically would be charged to the respective States' Article V (B) water. The Special Master has already dealt with a similar issue in the context of the 1992 Agreement. There, the Master pointed to the Supreme Court's observation that:

> in the context of an interstate compact, the "express terms" of an agreement are "the best indication of the intent of the parties." Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120, 2130 (2013).

Memorandum Opinion of the Special Master on Wyoming's Motion for Summary Judgment, September 16, 2013 (Opinion on Summary Judgment) at 8. That observation is especially applicable here.

Wyoming's argument would add language that completely changes and, in fact, is directly contrary to Article VI. Most egregiously, the argument that Indian water rights would be satisfied from the States' Article V (B) water would essentially wipe out the priority dates and quantity of Indian water rights. This would mean that Indian water rights would come after pre-1950 state appropriative and after supplemental water is provided to state appropriative rights, and would be satisfied solely from the "remainder of the unused and unappropriated water allocated to each state." Not only does Wyoming's argument make no sense under the structure of the Yellowstone Compact, it would likely effect an unconstitutional taking.

5. The plain language of Article VI refutes Wyoming's argument in any event. Article VI simply states: "Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of waters of Yellowstone River and its tributaries owned by or for Indian, Indian tribes, and their reservations." There is nothing in this language that even remotely suggests that Indian water rights are to be satisfied from the respective Article V (B) allocations of the States. Because the language is clear, there is no basis to resort to the Commission Minutes or any other extrinsic evidence to determine the meaning of Article VI even if the issue were before the court.

5. If the states had actually agreed on Wyoming's interpretation of Article VI, Wyoming knew how to make such an agreement clear in the Compact. A little over a year before it entered into the Yellowstone Compact, Wyoming entered into the Snake River Compact with Idaho. Article XIV of the Snake River Compact provides:

> Nothing in this compact shall be deemed:
>
> 1. To affect adversely any right to the use of the waters of the Snake River, including its tributaries entering downstream from the Wyoming-Idaho state line, owned by or for Indians, Indian tribes and their reservations. The water required to satisfy these rights shall be charged against the allocation made to the State in which the Indians and their lands are located.

Act of March 21, 1950, 64 Stat. 29, 34. No such language was included in Article VI, and there is no basis to read such language into the provision. [3]

The Special Master should decline to address this issue since it is not an issue in this case and in any event would require the presence of other parties if the Master were to decide the issue.

**MONTANA'S POST-TRIAL BRIEF RE TONGUE RIVER RESERVOIR**

Montana's argument at pages 103-105 of its Post-Trial Brief -- concerning the treatment of water from the enlarged capacity of the Tongue River Reservoir –assumes that the water from the enlarged capacity of the Reservoir is Northern Cheyenne water. However, there is nothing in the Tribe's Compact, the 1992 settlement legislation or the 1995 decree that provides that the Tribe's 20,000 acre-foot allocation or any part of it is intended to be satisfied from the enlarged capacity of the Reservoir. In any event, the enlarged capacity is insufficient to satisfy the Tribe's allocation. The enlargement produced only an additional 6,571 acre-feet, Montana's Post-Trial Brief at 104, far less than the Tribe's 20,000 acre-foot allocation.

Although the Tribe disagrees with Montana's assumption, the Tribe does not believe it is necessary to decide this issue. The issue regarding the status of the enlarged

[3] The Snake River Compact was solely a percentage allocation between Idaho and Wyoming. Article III of the Compact provides that the waters of the Snake River will be allocated 96 per cent to Idaho and 4 per cent to Wyoming. Under this percentage allocation, it may make sense to provide that Indian water rights would come out of the States' respective allocations. It makes no sense under the three-tier structure of the Yellowstone Compact.

capacity of the Tongue River Reservoir under the Yellowstone Compact can be decided without determining whose water, as between the State and its users and the Tribe, is satisfied from the enlargement. The Tribe thus urges the Special Master to decline to address this issue. Otherwise, the presence of the Tribe would be required.

## CONCLUSION

For the above reasons, the Special Master should decline to rule on: 1) Wyoming's and North Dakota's argument concerning Article VI; and 2) the issue of whose water, as between Montana and the Tribe, is intended to be satisfied from the enlargement of the Tongue River Reservoir.

Respectfully submitted this 25th day of April, 2014.

**NORTHERN CHEYENNE TRIBE**

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically and by U.S. mail on April 25, 2014, on the following:

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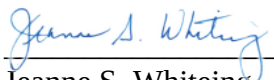

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