

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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**MONTANA'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO WYOMING'S  
MOTION IN LIMINE TO EXCLUDE EVIDENCE THAT THE 1999 TONGUE RIVER  
RESERVOIR ENLARGEMENT IS PROTECTED BY ARTICLE V(A) OF THE  
YELLOWSTONE RIVER COMPACT**

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The State of Montana submits this Supplemental Response in Opposition to Wyoming's Motion in Limine to Exclude Evidence or Argument that the 1999 Tongue River Reservoir Enlargement Is Protected By Article V(A) of the Yellowstone River Compact ("Motion") in order to clarify that Montana in no way concedes that the enlarged capacity of the Tongue River Reservoir ("Reservoir") is not protected by Article V(A) of the Yellowstone River Compact ("YRC"). This Supplemental Response is submitted because upon review of the original response, the expedient practical arguments on denial of the motion may have left an incorrect impression that other factual and legal arguments were foregone. Such is not the case. While Montana maintains that the Special Master need not decide the priority of the Reservoir's enlarged capacity in this case as a practical matter, that doing so in ruling on a motion in limine would be procedurally flawed, and that any attempt to do so would be impossible without the participation of the United States and the Northern Cheyenne Tribe as parties, Montana submits the following arguments as to why Wyoming's Motion is substantively misguided.

## **ARGUMENT**

### **I. Article VI of the YRC Protects the Northern Cheyenne Tribe's Reserved Water Right**

The Reservoir was rehabilitated in 1999 as part of the implementation of the Northern Cheyenne Tribe Compact ("NCT Compact") and the Congressional Act ratifying the NCT Compact. Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (Public Law 102-374, 106 Stat. 1186) ("Settlement Act"). At that time, the capacity of the Reservoir was increased to 79,071 acre-feet. The additional storage was constructed as part of the implementation NCT Compact, which included the recognition of a 20,000 acre-foot storage

right in the Tongue River Reservoir for the Northern Cheyenne Tribe (“Tribe”) under Article II.A.2.b of the NCT Compact, as ratified by the Settlement Act.<sup>1</sup>

Article VI of the YRC provides that “[n]othing contained in [the Yellowstone River Compact] shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.” This language was included in the YRC specifically to account for and to ensure the protection of the rights of Indian tribes to waters in the Yellowstone River System.

## **II. Both the Tribe’s and DNRC’s Rights in the Reservoir have a 1937 Priority**

The NCT Compact provides, in satisfaction of the Tribe’s federal reserved water right based on *Winters v. United States*, 207 U.S. 564 (1908), that, *inter alia*, the Tribe is accorded a storage right of up to 20,000 acre-feet in Tongue River Reservoir. NCT Compact, art. II.A.2.B. Under the NCT Compact and decree, the Tribe’s water right in the Tongue River, has two components. The first is a direct flow right in the amount of 12,500 acre-feet with a priority date of October 1, 1881. Mont. Code Ann. §85-20-301 (Art. II.A.2.a). The second is a storage right in the Tongue River Reservoir in the amount of 20,000 acre-feet, Mont. Code Ann. § 85-20-301 (Art. II.A.2.b), that carries a priority date “equal to the senior-most right for stored water in the Tongue River Reservoir[.]” *In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Within the State of Montana in Basins 42A, 42B, 42C, 43KJ, & 43P*, Cause No. WC-93-1, Montana Water Court, Order Entering Decree (September 26, 1995), as amended October 17, 1995.

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<sup>1</sup> This is not to say that the additional storage capacity is solely the Tribe’s. Rather, as discussed below, the Tribe’s and the DNRC’s rights in the entire reservoir are commingled.

The senior-most right for water stored in the Tongue River Reservoir when the Tribal decree was entered was the right belonging to the DNRC, denominated as water right claim number 42B 119280-00, which has a priority date of April 21, 1937. The Tribe and the Federal Government have agreed that the separate NCT Compact right to storage is commingled with and as such reflected in the DNRC storage right in the Reservoir with the 1937 priority date. See Amended Stipulation, ¶ 6, Expert Report of Kevin Smith (Jan. 4, 2013) (“Smith Report”) at Attachment 2. Thus, as provided in the NCT Compact, and protected by Article VI of the YRC, the Tribe’s water right in the Reservoir has an April 21, 1937 priority.

Although a final decree for the DNRC’s Tongue River Reservoir water right (Water Right No. 42B 1119280-00) has not issued, the right is included in the Montana Water Court’s preliminary decree for the Tongue River Basin Above and Including Hanging Woman Creek (Basin 42B), and the parties who objected to that right have entered and filed an Amended Stipulation agreeing on attributes of the water right, including its commingling with the water right already finally decreed by the Water Court in Cause No. WC-93-1. Among the parties that agreed to the attributes of the water right in the Amended Stipulation were the United States and the Tribe. Under the Amended Stipulation, the priority date of the DNRC’s right to store water with a reservoir capacity of 79,071 acre-feet is April 21, 1937. See Smith Report at Attachment 2. Wyoming did not object to the DNRC’s right. Thus, as determined by the Montana Water Court, with the participation of the Tribe and the United States, the commingled rights of the Tribe and the DNRC in the Reservoir have a 1937 priority date.

### **III. The Tribe’s and Montana’s Water Right in the Reservoir Are Commingled**

The storage water rights of the State of Montana and the Tribe are commingled and administered conjunctively pursuant to the NCT Compact. Both storage rights are dependent on

the State of Montana's ability to fill and refill the reservoir subject to physical and legal water availability and capacity in the reservoir. Smith Report at Attachment 2, ¶ 6.

Thus, every subpart of the water stored in Tongue River Reservoir is commingled, including water stored in the enlarged capacity. There is no horizontal fill of the Reservoir according to different priority dates. In other words, in light of the rights recognized in the NCT Compact and Settlement Act (rights protected under Article VI of the Yellowstone River Compact), Montana needs to store water to the 79,071 acre-foot level to enjoy its pre-1950 storage right in Tongue River Reservoir. If it is not able to store to that level it will not have available to it the water it had available prior to the Yellowstone River Compact. Accordingly, Wyoming's claim that water stored in the enlarged capacity in the Reservoir is not protected by Article V(A) of the YRC is wrong as a substantive matter and should be rejected if the Special Master should reach the merits.

### **CONCLUSION**

The Special Master may confidently, and should, deny Wyoming's Motion on the various practical and procedural grounds previously argued. However, if the Special Master determines it is necessary to address Wyoming's Motion on the merits, the NCT Compact, the Settlement Act, the relevant Montana Water Court decrees and the Stipulation of the Tribe, the United States, and the State of Montana regarding the DNRC's Tongue River Reservoir water right all support the conclusion that the entire Reservoir is entitled to a pre-1950 priority date. Therefore, the Motion should be denied for substantive reasons, as well.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of Montana's Supplemental Response in Opposition to Wyoming's Motion in Limine to Exclude Evidence or Argument that the Tongue River Reservoir Enlargement Is Protected by Article V(A) of the Yellowstone River Compact was served electronically, and by U.S. Mail on October 9, 2013, to the following:

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I further certify that all parties required to be served have been served.

  
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