

No. 137, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

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

**AMICUS BRIEF OF THE NORTHERN CHEYENNE TRIBE
IN OPPOSITION TO
WYOMING'S MOTION FOR SUMMARY JUDGMENT**

JEANNE S. WHITEING
Attorney at Law
1628 5th Street
Boulder, Colorado 80302
(303) 444-2549

*Counsel of Record
Northern Cheyenne Tribe*

August 2, 2013

The Northern Cheyenne Tribe (Tribe) files this Amicus Brief in Opposition to the State of Wyoming’s Motion for Summary Judgment dated July 3, 2013, insofar as Wyoming argues that a February 20, 1992 Agreement between Montana and Wyoming represents a binding agreement between the States to treat Wyoming pre-1980 water uses as if they are pre-1950 uses for purposes of the Yellowstone Compact. This brief is filed in accordance with Paragraph IV.B of the December 20, 2011 Case Management Plan No. 1. For purposes of this Amicus Brief, the Tribe adopts the Statement of Material Facts of the State of Montana.

INTRODUCTION AND BACKGROUND

The Northern Cheyenne Tribe occupies a 444,000 acre Reservation along the Tongue River in southeastern Montana. The Northern Cheyenne Reservation was established by Executive Order of November 26, 1884. *5 Indian Affairs: Laws and Treaties* 860 (Charles J. Kappler, ed., Government Printing Office, 1904). The eastern boundary was extended to the “middle of the channel of the Tongue River” by Executive Order of March 19, 1900. *5 Indian Affairs: Laws and Treaties* 860-61 (Charles J. Kappler, ed., Government Printing Office, 1904).

As the result of the withdrawal of lands in 1881, and the subsequent establishment of the Tribe’s Reservation in 1884 and 1910, water was reserved by and for the Northern Cheyenne Tribe under the Winters Doctrine. *Winters v. United States*, 207 U.S. 564 (1908). Under the Winters Doctrine, the Tribe has the right to sufficient water to fulfill the purposes of the Reservation with a priority date of the establishment of the Reservation. The rights are reserved for both present and future uses, *Arizona v. California*, 373 U.S. 546, 600 (1963), and apply to both treaty reservations and Executive Order reservations. *Id.* at 598.

The Northern Cheyenne Compact

In 1991, the Northern Cheyenne Tribe, the State of Montana and the United States entered into a compact to resolve the Indian reserved water rights of the Northern Cheyenne Tribe. The Northern Cheyenne-Montana Compact (Compact) was approved by the Montana Legislature in 1991, 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), and entered as a decree by the Montana Water Court in 1995. *In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Indian Reservation within the State of Montana in Basins 42A, 42B, 42C, 42KU and 43P*, decree entered September 26, 1995, amended October 18, 1995. A copy of the State codified version of the Compact is attached as Exhibit A.

The Compact and settlement were the culmination of over two decades of litigation¹ and negotiation. The compact resolved the Tribe's water right claims within the Tongue River and Rosebud Creek Basins. Under the Compact and decree, the Northern Cheyenne Tribe's water rights in the Tongue River are: 1) 12,500 acre feet of direct flow water with a priority date of October 1, 1881(Art. II.A.2.a); and 2) 20,000 acre-feet of storage water in the Tongue River Reservoir, with a priority date equal to the senior-most right for stored water in the Tongue River Reservoir (1937) (Art. II.A.2.b). The Tribe has a separate contract right for 7,500 acre-feet of

¹ See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Northern Cheyenne v. Adsit*, 721 F.2d 1187 (9th Cir. 1983); *Northern Cheyenne v. Adsit*, 713 F.2d 502 (9th Cir. 1983); *Northern Cheyenne v. Adsit*, 668 F.2d 1080 (9th Cir. 1982); *Northern Cheyenne v. Tongue River Water Users*, 484 F. Supp. 31 (D. Mt. 1979). See also *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985).

storage water from Tongue River Reservoir, which is in addition to the Tribe's compact right. Art. II.A.2.e.²

The Tribe's storage right of 20,000 acre-feet is satisfied from a "combination of water stored in the Tongue River Reservoir and exchange water," and is subject to the schedule utilized by the Tribe for its direct flow right. Art. II.A.2.b. "Exchange water" is defined as "water available to the Tribe from the Tongue River direct flow or from the Tongue River Reservoir storage in exchange for Tribal return flows made available to other Tongue River water users." Art. I.9. The Tribe also has "the first right" to use "excess water" to firm up its Tongue River water right, Art. II.A.2.d. Excess water is defined in the Compact as "increases in the Tongue River basin water supply resulting from conditions different from those assumed in the Tongue River Model." Art. I.9.

The Tongue River Water Model

In the negotiations leading up to the Compact, the parties utilized the Tongue River Water Model for analyzing various settlement scenarios. The water model, which was developed by the Montana Department of Natural Resources, provided a means by which the parties were able to analyze water availability and the potential impacts of different settlement scenarios in order to come to a final settlement. The model is defined in Article I.20 as:

"Tongue River Water Model" means the Tongue River Reservoir Operations computer model that is documented in Tongue River Modeling Study, Final Report, submitted on July 20, 1990, to the Engineering Bureau of the Water Resources Division of the Montana Department of Natural Resources and Conservation, or any revision agreed to by the parties. The Final Report and any agreed revisions are incorporated herein by reference as though set forth in full.

² The Tribe also has water rights in Rosebud Creek, a Montana tributary to the Yellowstone River (Art. II.A.3), and 30,000 acre-feet of storage in Big Horn Reservoir, (Art. II.A.7), located on the Big Horn River, one of the four interstate tributaries addressed in the Yellowstone Compact, but not at issue in the present matter.

(Underlining in original.) A copy of the July 20, 1990 *Tongue River Modeling Study, Final Report* (TRWM), is attached as Exhibit B to the Second Affidavit of Gordon W. Fassett in Support of Wyoming's Motion for Summary Judgment.

In addition to serving as an aid to reaching an agreement on the quantity of water under the Northern Cheyenne Compact, the final Compact also references and incorporates the TRWM with respect to three aspects of the Tribe's Tongue River water right. First, the TRWM is referenced in Art. II.A.2.b in connection with the Tribe's 20,000 acre-feet Tongue River Reservoir storage right: "The availability of the 20,000 acre-feet per year depends, as provided in the *Tongue River Water Model*, upon the annual schedule utilized by the Tribe for diversion of Tongue River direct flows." (Emphasis added.) In this provision, the Tribe's use of its direct flow water right is linked to its storage right – reductions in storage water caused by use of the Tribe's direct flow cannot affect state contract rights and must be made up with the Tribe's storage water. *Id.*

Second, the TRWM is referenced with respect to the shortage criteria applicable to the Tribe's Tongue River water right: "The Tribal Water Right in the Tongue River basin shall be subject to shortages due to natural low flows that are consistent with the period of record used in the *Tongue River Water Model* in diversion amounts not to exceed 50% in any one year and 100% in any ten year period." Art. II.A.2.c.i (emphasis added). However, if decreases in the amount of Tongue River storage water are caused by, among other things, "Reservoir inflows lower than those assumed in the *Tongue River Water Model*," then such shortages are shared pro rata among all users of stored water. Art. II.A.2.c.ii (emphasis added).

Third, under Art. II.A.2.d, the Tribe has the first right to excess water to firm up its Tongue River water right. Excess water is defined in the Compact as "increases in the Tongue

River basin water supply resulting from conditions different than those assumed in the *Tongue River Water Model*.” Art. I.9 (emphasis added).

The Tongue River Water Model consists of two water models – an allocation model and an operations model. The allocation model was intended “to determine the water available to be stored by a new Tongue River Dam project, after the water allocated between Montana and Wyoming according to the Yellowstone Compact.” TRWM at 6. The purposes of the Operations Model are “to determine water supply capabilities of a new reservoir on the Tongue River and to identify which users encounter shortages.” TRWM at 15.

As is the case with any water model, the inputs to the model include “assumptions and synthesized data.” See TRWM at 8. The assumptions used for the allocation model are set out in the TRWM at 8-13. In particular, in order to conservatively estimate water availability for purposes of the Tongue River Water Allocation Model, and “[t]o simplify interpretation of the compact for purposes of analysis,”

Representatives of Wyoming and Montana suggested considering any increase in water use since 1950 to have a pre-1950 priority date under the definition of supplemental water. Therefore the model assumed the pre-1980 level of development for existing users to be non-allocable water. These level-of-development adjustments are only 500 acre-feet/year for Wyoming but the average for Montana is 9,400 acre-feet/year for the period of record. The historical level of development was determined by the Bureau of Reclamation from U.S. Department of Agriculture census data which include crop and irrigated acreages by county for each year. These amounts have been apportioned into basins and, in Montana, normalized to the water use survey of 1975 (DNRC 1975).

For purposes of the model, the Northern Cheyenne Tribe’s water right is also treated as a pre-1950 water right that is not subject to allocation, and the Tribe’s priority date is assumed to be 1900. TRWM at 12. This assumption was made for purposes of the model, notwithstanding that the Yellowstone Compact provides in Article VI that “Nothing contained in this 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.”³

1992 Agreement

After completion of the Compact, legislation was introduced in Congress to ratify the Compact and to provide funding to enlarge the Tongue River Reservoir, which was the lynchpin of the settlement. At that point, Wyoming expressed concerns about the potential of the Compact to impact Wyoming water uses. Discussions between the Montana and Wyoming were had to resolve Wyoming’s concerns and culminated in the 1992 Agreement, Exhibit D to the Second Affidavit of Gordon W. Fassett in Support of Wyoming’s Motion for Summary Judgment.

The Tribe was not a participant in the negotiations leading to the 1992 Agreement. However, the Tribe expressed its position in a July 12, 1991, letter to Karen Barclay, the then Director of the Montana Department of Natural Resources and Conservation.

The premise for the language and the Agreement is incorrect. The Northern Cheyenne Tribe never agreed or intended to protect Wyoming water users. We did agree to accept the Tongue River Modeling Study, which takes those users into account for the purpose of calculating water available to satisfy the Tribe’s rights under the Compact. Our acceptance of the Tongue River Modeling Study does not mean that we accepted the legitimacy of all of Wyoming’s rights as a factual or legal matter, or that we have agreed that the Tribe’s rights will not ever affect Wyoming’s rights.

Under these circumstances, the proposed legislative language is unacceptable. The proposed Agreement is also too broad. In general, we do not object to an Agreement which provides for consultation with Wyoming prior to any changes to the Water Model, but Wyoming’s proposal goes far beyond that.

³ No court decision has construed this provision of the Yellowstone Compact, and its meaning is not an issue in this proceeding.

A copy of the letter is attached hereto as Exhibit B.

The 1992 Agreement did not meet all of the Tribe's concerns. It required consultation with and *consent* of Wyoming for changes in the Tongue River Modeling Study, as well as the Compact itself. However, the Agreement did acknowledge in paragraph 3 that "the Tongue River Water Model analysis indicated future allocation of water in the Tongue River Basin provided to Wyoming under the provisions of the Yellowstone River Compact may be reduced as a result of the use of the water under the Northern Cheyenne Compact." The Agreement also clearly indicated that use of the Tongue River Model as incorporated in the Northern Cheyenne Compact "shall not be deemed an admission by either Party as to the correct interpretation of the Yellowstone River Compact."

ARGUMENT

Wyoming's arguments that the 1992 Agreement binds Montana to the water allocation and reservoir operations in the Tongue River Modeling Study for purposes of the claims in this case, and specifically binds Montana to the assumption in the model as to the manner in which Wyoming's water uses should be treated under the Yellowstone Compact, fail on several grounds.

1. The TRWM was a tool to estimate available water for and potential impacts of the water rights settlement among Montana, the Northern Cheyenne Tribe and the United States for purposes of facilitating a final water rights settlement. The TRWM took a conservative approach to water availability by treating all Wyoming pre-1980 water uses as if they were pre-1950 uses under the Yellowstone Compact. Such treatment of Wyoming water uses was solely for the purpose of ensuring that the estimate of water availability fell well within any requirements under the Yellowstone Compact and to forestall any concerns of Wyoming. The parties' use of

the TRWM and the assumption contained within it was simply to facilitate settlement, and was not an agreement on the manner in which Wyoming's water uses would be treated for any other purpose.

Once the parties reached agreement on the specific quantity of water for the Tribe's water right, the TRWM was referenced and incorporated in the Northern Cheyenne Compact for three limited purposes: 1) to clarify that the availability of the Tribe's Tongue River Reservoir storage right was dependent on the schedule utilized for the Tribe's direct flow right; 2) to define shortage criteria in terms of the period of record in the TRWM, and to address the treatment of shortages caused by lower flows than those used in the TRWM; and 3) to define water that would be available to the Tribe to firm up its water right (excess water).

Use of the TRWM as a negotiation tool and for the specific references in the Compact represents nothing more than use of a set of assumptions and data -- which may or may not be correct -- to make necessary assessments and analyses to aid in reaching a final water rights settlement between the Tribe and the Montana. There is nothing in the Compact or the TRWM that indicates it was intended to be used for any purpose other than the Northern Cheyenne Compact, or specifically that it was intended to be an agreement on how Wyoming's water uses were treated under the Yellowstone Compact or for any other purpose. Indeed, the Compact provides that:

Nothing in the Compact shall be construed or interpreted:

* * *

10. To alter or amend any provision of the Yellowstone River Compact, Act of October 30, 1951, ch. 629, 65 Stat. 663 (1951). ...

Art. VI.A.10.⁴

⁴ The Compact also provides that nothing in the compact shall be construed or interpreted "to address or prejudice whether, in any interstate apportionment, the Tribe's water right shall be counted as part of the waters apportioned to the State." Art. VI.A.9.

2. The agreement on the use of the TRWM in the Compact is limited, however, by the fact that only the Tongue River *Operations Model* is referenced in and agreed to the Northern Cheyenne Compact. As set out in the definitions, “Tongue River Water Model’ means “the *Tongue River Reservoir Operations computer model....*” Art. I.20 (Emphasis added.) The Operations Model does not contain the assumptions concerning the treatment of Wyoming’s water uses. The assumptions about such uses are in the Tongue River Allocation Model. *See* TRWM at 6, 11. Thus the only part of the TRWM incorporated in and referenced in the Compact is the Operations Model, and it is only the Operations Model that requires an agreement among the parties to change. While the results of the Allocation Model are utilized as an input to the Operations Model, the assumptions as to the treatment of Wyoming water uses are not specifically set out in Operations Model. Thus the inclusion of the Operations Model, which is silent on the assumptions relating to Wyoming’s uses, cannot be interpreted as an agreement on the treatment of Wyoming water uses for any purpose.

3. The 1992 Agreement was negotiated in response to Wyoming’s concerns at the time the Northern Cheyenne Compact was introduced in Congress. Notwithstanding that, like the Compact itself, the act of Congress approving the Compact provided:

Nothing in this Act shall be construed to alter or amend any provision of the Yellowstone River Compact, as consented to in the Act entitled, “An Act granting the consent of Congress to a Compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River”, approved October 30, 1951 (65 St. 663).

Northern Cheyenne Indian Reserved Water Rights Settlement Act, Pub. L. 102-374 (Sept. 30, 1992), Sec. 11(b), Wyoming pressed its concerns that Montana was trying to solve its reserved water rights issues with Wyoming water. Wyoming Motion at 11.⁵

⁵ Wyoming’s concerns in this regard suggest that the Northern Cheyenne Tribe’s water rights are strictly a Montana issue that cannot affect Wyoming’s water rights. The Tribe would disagree. The Yellowstone Compact does not

In response to those concerns, in the 1992 Agreement, Montana agreed it would not change the TRWM or the Northern Cheyenne Compact without consulting with and obtaining the consent of Wyoming. Neither the Tribe nor the United States are parties to the 1992 Agreement and are not bound by the agreement. However, like the agreement to include the TRWM in the Compact, there is nothing on the face of the 1992 Agreement that indicates or suggests any agreement to utilize the TRWM for any purpose other than the Northern Cheyenne Compact. The Agreement not to change the TRWM or the Compact does not change the fact that the model only has application to the Northern Cheyenne Compact.⁶

4. Wyoming's argument that the 1992 Agreement entitles Wyoming to satisfy its pre-1980 water rights before making water available to Montana would result in less water available to satisfy the Northern Cheyenne Tribe's water rights and the rights of other Montana water users. Not only is this result inconsistent with the Yellowstone Compact, but it would open both states to claims by the Tribe and other water users when they begin to receive less water as a result of a voluntary agreement between the two states outside the Yellowstone Compact.

5. Wyoming also argues that the 1992 Agreement binds Montana to operate the Tongue River Reservoir as set out in the TRWM. This argument is directly contrary to the Northern Cheyenne Compact. Article III.D.1 of the Compact addresses how the Tongue River Reservoir will be operated.

To provide for Tongue River Reservoir operation procedures that are consistent with the purposes of this Compact, a reservoir operation plan shall be developed by a five-member advisory committee. The committee shall have representatives from the State of Montana, the Tongue River Water Users Association, the Northern Cheyenne Tribe, the

address how Tribal water rights are to be treated, and there is nothing in the Compact that suggests how such rights should be treated in any manner other than the usual administration of priorities.

⁶ The 1992 Agreement appears to assume that both the Allocation Model, which contains the assumptions about Wyoming's water uses, and the Operations Model were included in the Compact. As set forth in #2 above, that is not the case. Only the Operations Model is agreed to in the Compact.

United States, and a fifth member to be selected by the other four. The advisory committee shall annually agree upon a reservoir operation schedule setting forth proposed uses of storage and direct flow for the year. The Department of Natural Resources and Conservation or its successor shall thereupon be responsible, consistent with the terms of this Compact and other applicable law, for the daily operation of the Reservoir and for implementation of the reservoir operation plan.

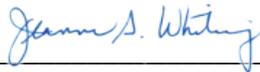
Article III.D.2 of the Compact further provides that “[t]he reservoir operation plan shall provide for the operation of the project for fish and wildlife purposes depending on the availability of water on an annual basis. This provision shall not create an operational preference for fish and wildlife purposes relative to other project purposes.”

Wyoming’s argument that the 1992 Agreement requires the Tongue River Reservoir to be operated in accordance with the Tongue River Model is inconsistent with and directly contrary to the Northern Cheyenne Compact. The 1992 Agreement cannot change the terms of the Compact or the terms of the state and federal laws that approved and ratified the Compact.

CONCLUSION

For the above reasons, Wyoming’s Motion for Summary Judgment should be denied as to its arguments concerning the 1992 Agreement.

NORTHERN CHEYENNE TRIBE



Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, Colorado 80302
(303) 444-2549

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically and by U.S. mail

on August 2, 2013, on the following:

Peter K. Michael
Interim Attorney General
Jay Jerde
Christopher M. Brown
Matthias Sayer
Andrew Kuhlmann
James C. Kaste
The State of Wyoming
123 Capitol Building
Cheyenne, WY 82002
peter.michael@wyo.gov
jjerde@wyo.gov
chris.brown@wyo.gov
matthias.sayer.wyo.gov
andrew.kuhlmann@wyo.gov
james.kaste@wyo.gov

John D. Draper
Jeffrey Wechsler
Montgomery & Andres
325 Paseo de Peralta
Santa Fe, NM 87501
jdraper@montand.com
jwechsler@montand.com

Cory J. Swanson
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401
coswanson@mt.gov

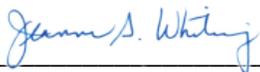
Jennifer L. Verleger
Assistant Attorney General
North Dakota Attorney General's Office
500 North 9th Street
Bismarck, ND 58501-4509
jverleger@nd.gov

James J. Dubois
United State Department of Justice
Environmental and Natural Resources
Natural Resources Section
999 18th Street, #370, South Terrace
Denver, CO 80202
james.dubois@usdoj.gov

Solicitor General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, Room 5614
Washington, DC 20530-0001
SupremeCtBriefs@usdoj.gov

Michael Wigmore
Bingham McCutchen, LLP
2020 K Street NW
Washington, DC 20006-1806
michael.wigmore@bingham.com

Barton H. Thompson, Jr.
Susan Carter, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205
susan.carter@stanford.edu



Jeanne S. Whiteing