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MONTANA WATER COURT - YELLOWSTONE RIVER DIVISION
TONGUE RIVER ABOVE AND INCLUDING HANGING WOMAN CREEK-BASIN 42B
and
TONGUE RIVER BELOW HANGING WOMAN CREEK-BASIN 42C

United State of America (USDI-Bureau of Indian Affairs) -) **CASE NO. 42B-1**
General Objection to Basin 42B and 42C Preliminary Decrees)
_____)

**MOTION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF THE NORTHERN
CHEYENNE TRIBE AND THE BLACKFEET TRIBE IN SUPPORT OF
UNITED STATES' MOTION FOR ORDER REQUIRING DNRC TO EXAMINE FOR
POST-JUNE 30, 1973 NONUSE
AND
MOTION FOR WATER COURT TO ADJUDICATE POST-JUNE 30, 1973
ABANDONMENT IN THE MONTANA ADJUDICATION**

MOTION TO FILE AMICUS BRIEF

The Northern Cheyenne Tribe and the Blackfeet Tribe move for leave to file an amicus brief in this matter. Both Tribes have a direct interest in the issues raised by the United States' motions. Both Tribes are federally recognized Indian tribes who have entered into water rights compacts with the State of Montana to resolve their federal reserved Indian water rights. See *Winters v. United States*, 207 U.S. 564 (1908); *Montana ex rel. Greely v. Confederated Salish and Kootenai Tribes, et al.*, 219 Mont. 76; 712 P.2d 754 (Mont. 1985).

The Northern Cheyenne Compact was approved by the Montana Legislature in 1991. MCA 85-20-201. It was subsequently ratified by Congress, P.L. 102-374, 106 Stat. 1186 (1992), and entered as a decree by the Montana Water Court. See Order of September 26, 1995, as amended October 17, 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 Tribe of the Northern Cheyenne Indian Reservation Within the State of Montana in Basins 42A, 42B, 42C, 42KJ & 43P*, Cause No. WC-93-1.

The Blackfeet Tribe's Compact was approved by the Montana Legislature in 2009. MCA 85-29-1501. A bill ratifying the Compact is currently pending before Congress. See Senate Bill S. 434 (Mar. 4, 2013).

Both Tribes have provisions in their compacts which recognize and protect certain valid state water right as ultimately decreed by the Montana Water Court. Both Tribes have filed objections and/or notices of intent to appear in the adjudication of non-Indian water right in basins affecting them. The validity of the state water right claims has a significant impact on the amount of water available to the Tribes and the extent to which its rights can be exercised, given the provisions in the Tribes' compacts that protect state water rights.

**AMICUS BRIEF OF THE NORTHERN CHEYENNE TRIBE
AND THE BLACKFEET TRIBE**

This Amicus Brief is filed jointly by the Northern Cheyenne Tribe and the Blackfeet Tribe pursuant to the Water Court's Scheduling Order of October 31, 2013 issued in this case. In that Order, the Water Court gave notice to interested parties and stakeholders in the adjudication process and invited them to file amicus briefs or motions to intervene in the United States' Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion for Water Court to Adjudicate Post-June 30, 1973 Abandonment in the Montana Adjudication filed on October 31, 2013.

Introduction

The United States filed General Objections to the Preliminary Decree in Basins 42B and 42C on February 23, 2009.¹ Among other grounds, the United States objected to the preliminary decree on the ground that the Montana Department of Natural Resources and Conservation had failed to examine claims for abandonment after July 1, 1973 and may decree claims to water that have long been abandoned. The United States subsequently moved to require DNRC to examine for post-June 30, 1973 nonuse and moved to require the Water Court to adjudicate post-June 30, 1973 abandonment in the Montana adjudication. In that motion, the United States expanded its general objections to include Basins 40M, 40J, 43E and 43O. The Northern Cheyenne Tribe and the Blackfeet Tribe file this brief in support of the United States motions.

¹ Basins 42B and 42C cover the Tongue River and tributaries. The Tongue River forms the eastern boundary of the Northern Cheyenne Reservation, and the Northern Cheyenne Tribe has water rights in the Tongue River and in the Tongue River Reservoir under its water rights compact. Similar general objections were filed by the United States in Basin 40J involving a portion of the Milk River. The Blackfeet Tribe has water rights in the Milk River under its water rights compact.

Argument

I. The Water Court is Required to Address Post-1973 Abandonment in the Montana Water Rights Adjudication

The Northern Cheyenne Tribe and the Blackfoot Tribe support and adopt the arguments of the United States that the Water Court has the duty and authority to address post-1973 abandonment, *see generally* MCA 3-7-501(4), and that the DNRC should be directed to examine water rights for post-1973 non-use as required by Rule 2(a)(3) of the Water Court Claims Examination Rules. It is critical to the issuance of valid water rights decrees for the Water Court to address post-1973 abandonment. Failure to address post-1973 abandonment will potentially result in the issuance of decrees that include water rights that have been abandoned in the 40-year period since July 1, 1973. Such a result will not only be contrary to law, but will have a significant effect on the water rights of the Northern Cheyenne Tribe and the Blackfoot Tribe.

II. Failure to Address Post-1973 Abandonment Will Have Serious Consequences for the Water Rights of the Northern Cheyenne Tribe and the Blackfoot Tribe

Both the Northern Cheyenne and Blackfoot water rights compacts contain provisions that protect certain valid state water rights that potentially limit the amount of and/or use of water by the Tribes. Given these provisions, it is critical that the decrees issued by the Montana Water Court reflect valid water rights as of the date of the issuance of the decree.

The Northern Cheyenne Compact contains several provisions that protect valid state water rights. First, under Article II.A.2 of the Compact, the Tribe's Tongue River direct flow right may not be used in a manner that adversely affects Miles City Decree rights,² or water rights from off-reservation tributaries "which are finally decreed in any general adjudication of

² Miles City Decree water rights are defined as "any water right, *finally decreed in any general adjudication of the Tongue River* or recognized under state law until such final adjudication, which is based on the decree entered in *Miles City Canal & Irrigating Co. v. Lee, et al.*,.... (emphasis added).

the Tongue River.” Second, the Tribe’s Rosebud Creek additional water right under Article II.A.3.c of the Compact may not be exercised in a manner that adversely affects a “water right finally decreed in any general adjudication of the Rosebud Creek basin....” The Tribe’s ability to use its Tongue River direct flow right and its Rosebud Creek additional right is therefore directly tied to the validity of state water rights that are finally decreed by the Montana Water Court in the adjudication of those streams. If the Tongue River and Rosebud Creek decrees contain state water rights that have been abandoned since 1973, the Tribe will be in the position of having to challenge the validity of those water rights in order to exercise its own rights.

The Blackfeet Compact contains provisions in which the quantity of the Tribe’s water right is directly affected by quantity of valid state water rights, and also contains other provisions that protect certain state water rights. The Tribe’s water rights in the Badger Creek, Two Medicine River, Cut Bank Creek and Milk River Drainages include all available water in those drainages less the amount needed to fulfill water rights arising under state law. See Article III.D, E and F of the Compact. The term “water rights arising under state law” is defined in Article II (52) of the Compact as “those valid water rights Recognized Under State Law existing as of the date of the ratification of the Compact by the Montana legislature becomes effective, and not subsequently relinquished or abandoned,” including those water rights “decreed or to be decreed by the Montana Water Court pursuant to 85-20-234, MCA....”³ Further, the Tribe’s additional water right in the Birch Creek Drainage can be used only “[a]fter satisfaction of all Water Rights Arising Under State Law” in the Basin. Article III.C.1.c. In the St. Mary Basin, the Tribe’s water right in the St. Mary River, Lee Creek and Willow Creek and its ground water right are subject to water rights arising under state law, Article III.G.b and c, and its right to additional St.

³ The term “Recognized Under State Law” is defined as “a water right arising under Montana law and does not include water rights arising under federal laws.” Article II (41).

Mary water can be exercised only after satisfaction of water rights arising under state law.

Article III.G.1.d. and Article IV.D.4. The Compact also contains call protection provisions for domestic, stock uses and certain irrigation uses under state law water rights. Article III.C.6, D.6, E.6, F.6, and G.6 Finally, any portion of a state law water right that is “determined under state law to be abandoned, or having otherwise ceased to exist” is not entitled to any further protection under the Compact. Article III.H.3.

The quantity of the Blackfeet Tribe’s water rights in all basins but the Birch Creek Basin is directly dependent on the quantity of state law water rights as finally decreed by the Montana Water Court, and the Tribe’s ability to use its additional water right in the St. Mary and Birch Creek Basins is dependent on state law water rights being satisfied first. The Tribe further agreed to protect most domestic, stock water rights and some irrigation rights under state law by agreeing not to make a call on them.

Both Tribes made significant compromises in their compacts to recognize and protect state law water rights that are in all cases junior to the Tribe’s water rights. In agreeing to make these compromises, it was both Tribes’ intent that such recognition and protection would be given only to valid state law water rights as finally determined and decreed by the Montana Water Court. The Tribes did not agree to protect state law water rights that have been abandoned. Yet the potential for that to occur is exceedingly high if state water rights are not examined for and the Water Court does not address abandonment for the 40 year period since 1973.

In the basins in which the Tribes have filed objections or notices of intent to appear, the DNRC examination has not included an examination of non-use after 1973. Issues of abandonment are not raised and resolved unless the Tribes or other parties conduct their own

technical review of the claims. Short of objecting to or appearing in every claim, there is therefore no systematic process for addressing post-1973 abandonment.

One of the most significant benefits of the water rights adjudication and entry of decrees is finality of water rights. Yet a decree entered by the Water Court will not achieve finality if the decree includes abandoned water rights. Where the Tribes have protected certain state water rights, the Tribes potentially will be required to engage in further litigation in order to determine the status of a particular right in order to know the full extent of their water rights or to exercise the full extent of their water rights. While complete finality may not be achievable, it clearly will not be achieved if abandonment is not examined and addressed.

CONCLUSION

For the reasons set forth above, the United States' Motion for Order Requiring DNRC to Examine for Post-June 30, 1973 Nonuse and Motion for Water Court to Adjudicate Post-June 30, 1973 Abandonment in the Montana Adjudication should be granted.

Respectfully submitted this 20th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, a copy of the foregoing was served electronically on each of the following:

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