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FILED
OCT 24 2012
Montana Water Court

REPLACES EMAIL
FILED 10/22/2012

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER – FROM HOLTER DAM TO SUN RIVER – BASIN 41QJ

Claimants: Linda M. Johns; W. Steve Johns; Betty L. Bicknell; Gene E. Bicknell; Diana L. Nelson; Sue A. Weingartner; Russell W. Weingartner; Elizabeth C. Dagnall; Robert G. Dagnall Objector: United States of America (Department of the Interior- Bureau of Indian Affairs	**41QJ-19** 41QJ 5581-00 41QJ 34410-00 41QJ 41568-00 41QJ 41569-00	 41QJ 97570-00 41QJ 97571-00 41QJ 97572-00 41QJ 143007-00

AMICUS BRIEF OF THE BLACKFEET TRIBE
IN SUPPORT OF THE UNITED STATES'
MOTION TO REVISE INTERLOCUTORY ORDER

The Blackfeet Tribe files this Amicus Brief in Support of the United States' Motion to Revise Interlocutory Order, specifically the Water Court's September 24, 2012 Order Addressing P490 Issue Remark (Order), in order to bring to the attention of the Water Court the concerns of the Blackfeet Tribe (Tribe) regarding the Order and its impact on the water rights of the Tribe. The Tribe further requests additional time to supplement this brief which is necessarily cursory given that the Tribe only became aware of the United States' motion on October 19, 2012.

Introduction

The Blackfeet Tribe possesses federally reserved water rights on the Blackfeet Reservation under the Treaty of October 17, 1855, 11 Stat. 657. The Tribe has entered into a Compact with the Montana Reserved Water Rights Compact Commission to resolve its Reservation water rights. The Montana Legislature ratified the compact in 2009. MCA 85-20-1501. Federal legislation ratifying the compact was introduced in the U.S. Congress in 2010, but it is not known at this time when Congress will act to ratify the Compact. After ratification, other actions are also required for the compact to be final, including execution of the Compact by all parties; issuance of a final judgment and decree by the Montana Water Court approving the compact; ratification of the Compact by a majority of eligible Tribal voters; and appropriation of all funds. The Compact will not become final until the Secretary of the Interior publishes findings in the Federal Register that all necessary actions have occurred. Thus the Compact will not become final potentially for several more years.

Since 1998, the litigation of the Blackfeet Tribe's water rights has been stayed by order of the Montana Water Court, while the Tribe, the Montana Reserved Water Rights Compact Commission and the United States negotiated the Compact, and the stay has continued while the parties seek congressional ratification of the Compact. The most recent stay order extends the stay through January 16, 2013. *See* Order Extending Stay dated December 28, 2011.

In its September 24, 2012 Order Addressing P490 Issue Remark, the Water Court makes determinations on issues that are directly raised in the Tribe's water rights claims before the Water Court, that are not before the court, and which may preclude a full and fair hearing of the Tribe's claims if adjudicated. The Court further applies an analysis of the Tribe's claims that is not supported by the law applicable to Indian water rights.

Reasons for Revising the Order

Given the status of the Blackfeet Tribe's water rights as set forth above, and particularly the Water Court's stay of litigation of the Tribe's water rights, the Tribe adopts the reasons of the United States for revising the Court's September 24 2012 order, and further sets forth the following reasons of critical importance to the Tribe.

1. While the Court correctly determined that the 1855 Treaty established a reservation for the Blackfeet Tribe, the Water Court's September 24, 2012 interlocutory order purports to determine the water rights of the Blackfeet Tribe under the 1855 Treaty, including a determination of the "reservation's purpose" and "how much water was reserved for the Blackfeet." Order at 10. These determinations directly impact the water rights of the Blackfeet Tribe in the pending state-wide adjudication before the Montana Water Court, and involve issues that are not before that court that are critical to the adjudication of the Tribe's water rights in the current adjudication and that are presently stayed by order of the Montana Water Court. The Court's determinations in the September 24, 2012 Order are therefore in direct conflict with the Water Court's December 28, 2011 stay order and prior stay orders.

2. The Blackfeet Tribe claims water rights under both the Winters Doctrine, *Winters v. United States*, 207 U.S. 564 (1908), and under the doctrine of *United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of right to the Indians, but a grant of right from them, a reservations of those not granted"), and asserts that it is entitled to sufficient to provide a permanent homeland for the Blackfeet Tribe. *See In re Gila River Sys. & Source*, 35 P.3d 68 (Ariz. 2001). Thus the determination of the purposes of the Blackfeet Reservation are a critical part of the Tribe's water rights claims and are central to a determination of the quantity of the Tribe's rights. However, these issues are not in this case, and can only be litigated, if at all, in

the context of the Tribe's claims after development of a full and complete record, and with the participation of the Blackfeet Tribe, which is a party in the adjudication of its rights. *See* Order Granting Permission for Blackfeet Tribe to Intervene, November 25, 1997.

3. Further, the Courts' determination of the purposes and quantities of water does not comport with the law relating to Indian water rights. First, it applies the narrow purposes doctrine of *United States v. New Mexico*, 438 U.S. 696 (1978), applicable to federal lands, and which the Montana Supreme Court expressly rejected as to Indian lands. *Montana ex rel Greely v. Confederated Salish and Kootenai Tribes, et al.*, 219 Mont. 76, 98; 712 P.2d 754, 768 (Mont. 1985) ("The purposes f Indian reserved rights...are give broader interpretation in order to further the federal goal of Indian self-sufficiency."). Although the Order acknowledged such, it did not apply the "broader interpretation" required by the Supreme Court. Second, under the Winters Doctrine the Tribe is entitled to water for both present and future needs. *Arizona v. California*, 373 U.S. 546, 600 (1963). The Court's analysis takes into account only the needs of the Tribe as of 1855 and ignores the future component of the Tribe's water rights. Third, there is no record or other basis to determine the actual quantity of water reserved to the Tribe, and no basis to determine that the 1855 Treaty "did not reserve all the waters in Basin 41QJ for the exclusive use of the Blackfeet Tribe." Order at 12. This issue is simply incapable of determination in the absence of a record. Fourth, the Court did not take into account applicable canons of construction that require that Indian treaties must be liberally construed in favor of the Indians, and that any ambiguities in a treaty be resolved in favor of the Indians. *Greely*, 712 P.2d at 762-763 (citations omitted).

4. The Court's analysis does not distinguish between federal public lands and Indian reservation lands in its analysis of non-Indian appropriation of water. There is no deference to

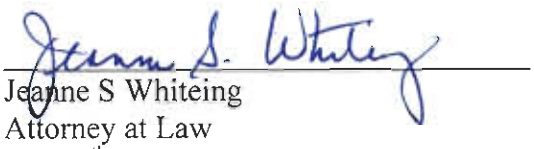
state law where Indian lands are concerned. *See* Order at 16. Neither the 1866 Mining Act nor the Desert Lands Act of 1877 apply to Indian reservation lands and neither governs the acquisition of water rights on Indian lands. Nor does the McCarran Amendment, 43 U.S.C. § 666, make state substantive law applicable to Indian lands. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) (the McCarran Amendment "in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law.") *See Greely*, 712 P. 2d at 765-766.

Whatever the law may be as to state appropriative rights on federal public lands, there is no statue that authorizes the appropriation of water rights by non-Indians on the Blackfeet Reservation without title, and the Court's conclusions concerning Article 7 and Article 8 of the 1855 Treaty are unwarranted and unsupported.

5. Finally, the history of the Blackfeet Reservation and the legal effect of the various executive order and statutes requires a more thorough review. For example, while the Executive Order of July 5, 1873 purported to modify the boundaries of the Reservation, it did not extinguish the Tribe's title to its original 1855 Treaty lands. It is well settled that Indian title can only be extinguished by express and unambiguous act of Congress. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941) Further, the Executive Order of August 19, 1874, did not restore to the public domain all 1855 Treaty lands except for those within the July 5, 1973 Executive Order Reservation. A clear reading of the August 19, 1874 Executive Order shows that it restored to the public domain only the lands between the Marias and Birch Creek to the north and the Sun River to the south.

For these reasons, the Blackfeet Tribe supports the United States' Motion to Revise Interlocutory Order. The Tribe further requests the Court to allow additional time for the Tribe to supplement this brief.

Respectfully submitted this 22nd day of October, 2012.



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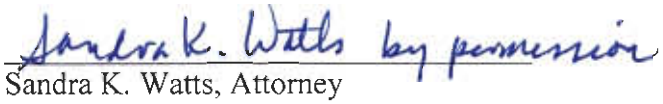

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2012, a true and correct copy of the foregoing was served by first class mail to the following:

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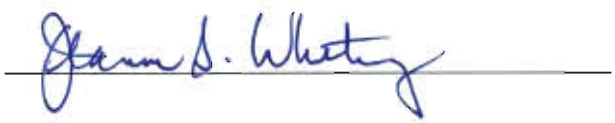
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