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.

On Motion To Dismiss
Bill Of Complaint

BRIEF FOR *AMICUS CURIAE* NORTHERN CHEYENNE TRIBE IN SUPPORT OF PLAINTIFF STATE OF MONTANA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS*[1]

The Northern Cheyenne Tribe is a federally recognized Indian tribe,[2] occupying a 444,000 acre Reservation along the Tongue River in southeastern Montana. The Tongue River is one of the Interstate tributaries of the Yellowstone River addressed in the Yellowstone Compact and at issue in this case.

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). The lands described in the 1900 Executive Order were "set apart as a reservation for the permanent use and occupation" of the Northern Cheyenne Tribe. *Id.* The boundaries of the Reservation, and the Tribe's ownership of and title to the lands within the boundaries were ratified and confirmed by section 1 of the Northern Cheyenne

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[1] No person or entity other than *amicus* authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk simultaneously with this *Amicus* Brief.

[2] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18553, 18554 (April 4, 2008).

Allotment Act, Act of June 3, 1926, 44 Stat. 1690. *See Northern Cheyenne Tribe v. Hollowbreast*, 415 U.S. 649, 650 (1976).

As the result of the withdrawal of lands for the Tribe 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. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 595-96 (1963) (the *Winters* Doctrine applies to executive order reservations as well as treaty reservations).

The nature and quantity of the Tribe's Indian reserved water rights or *Winters* rights, including its rights in the Tongue River, were resolved pursuant to a Compact with the State of Montana in 1991. The Northern Cheyenne Compact was ratified and approved by the Montana Legislature in 1991, Mont. Code Ann. 85-20-301, and by Congress on September 30, 1992, Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374, 106 Stat. 1186 (1992). The Compact was subsequently approved and confirmed by the Montana Water Court, and entered as a decree 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 Tribe of the Northern Cheyenne Indian Reservation Within the State of Montana in Basins 42A, 42B, 42KJ, & 43P* (Water Court of the State of Montana, Yellowstone River Division, Special Northern Cheyenne Compact SubBasin), *decree entered* September 26, 1995.

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, located south of the Reservation on the Tongue River, or from exchange water,[3] with a priority date equal to the senior-most right for stored water in the Tongue River Reservoir (Art. II.A.2.b). In addition, the Tribe has a separate contract right for 7,500 acre-feet of storage water from Tongue River Reservoir (Art. II.A.2.e).[4]

The Tribe also has water rights in Rosebud Creek, a Montana tributary to the Yellowstone River, in the amount of 1,800 acre-feet and up to an additional 19,530 acre-feet with a priority date of October 1, 1881 (Art. II.A.3). Finally, the Tribe has 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.

The Northern Cheyenne Tribe has an interest in ensuring that its water rights are fully protected under the Yellowstone Compact, and that the Compact is not

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[3] Exchange water is either direct flow or storage made available to the Tribe in exchange for Tribal return flows made available to other Tongue River water users.

[4] The Tongue River Reservoir was constructed in 1938 and is owned by the State of Montana.

interpreted in a manner that adversely affects the water rights of the Tribe. In addition, to the extent the Tribe's storage rights are affected by the interpretation of the Compact that is made here, the Tribe has an interest in ensuring that any interpretation is protective of the Tribe's rights.

ARGUMENT

I. The Northern Cheyenne Tribe's Right to Use Water Is Protected by the Yellowstone Compact

Notwithstanding the interpretation of the Yellowstone Compact, Pub. L. 82-231, 65 Stat. 663 (1951), as between Montana and Wyoming, the rights to the use of water of Indian tribes in the Yellowstone River and its tributaries, including the Northern Cheyenne Tribe, are protected under the Compact. Article VI of the Compact provides:

> Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

In commenting on this provision, then Secretary of the Interior, Oscar Chapman, explained to the House and Senate Committees that:

> The water rights of the Indians were reserved by the Indians at the time of the creation of

> the respective reservation by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters v. United States* reported in the 207 U.S. 564. This situation explains the inclusion of the language just quoted.

S. Rep. 883, 82d Cong. 1st Sess. (1951), Appendix A to Montana's Brief in Response (hereinafter App. __ at ___) at 25a; H. Rep. 1118, 82d Cong., 1st Sess. (1951), App. B at 11b.[5]

Under Article VI, the rights to use water held by or for the Northern Cheyenne Tribe or for the Tribe, including water rights held by the United States in trust for the Tribe, cannot be adversely affected by the Yellowstone Compact. Therefore, regardless of the manner in which the Yellowstone Compact is interpreted as to the rights of Montana and Wyoming, the rights to use water held by or for the Northern Cheyenne Tribe are protected by Article VI. The Tribe and the United States, on behalf of the Tribe, would have

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[5] The interests of the Tribes were recognized and acknowledged throughout the negotiations leading to the Compact. App. A at 19a: "It should be specially noted that there are great areas of Indian land in the Yellowstone River Basin in both Montana and Wyoming, much of which is irrigated or proposed to be irrigated, and the interest of the Bureau of Indian Affairs in the compact is important. . . . The language submitted by them to cover Indian interests in the compact was adopted verbatim." (R. J. Newell Report to the Congress).

a separate cause of action if the Tribe's water rights are adversely affected by the manner in which water is used or allocated under the Yellowstone Compact. This would include the Tribe's direct flow right, and its storage rights in the Tongue River Reservoir and Big Horn Reservoir, all of which constitute rights to use of water of the Northern Cheyenne Tribe that are protected by the Compact. These rights cannot be infringed or adversely affected by either State exercising its rights under the Compact.

II. Montana Has Stated a Claim Under Article V of the Compact; Accordingly, Wyoming's Motion to Dismiss Should Be Denied

Article V is the heart of the Yellowstone Compact. Under Article V.A, "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." (These rights are hereinafter referred to as "pre-Compact rights".) Article V.B then allocates the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950." These waters are allocated first to supplemental water supplies for the pre-Compact rights (hereinafter "supplemental rights"), then to "storage or direct diversions for beneficial use on new lands and for other purposes" in accordance with the percentages

set forth in Article V.B, paragraphs 1 through 4 (hereinafter "post-Compact rights").[6] Article V.C sets out the formula by which the quantity of water available for post-Compact rights is determined.

Montana has alleged in its Bill of Complaint (hereinafter "Compl.") that Wyoming has depleted the waters of the Tongue River and Powder River by various means to the extent that there is insufficient water to satisfy Montana's pre-Compact rights, that Wyoming refuses to curtail its use of water beyond that amount necessary to fulfill its own pre-Compact rights, and therefore Montana and its water users have been injured in violation of Article V of the Compact. Bill of Complaint paragraphs 8-14. Specifically, Montana alleges that 1) Wyoming has constructed and used new and expanded storage facilities in the Tongue and Powder Rivers, Compl. para. 9;[7] 2) Wyoming has put new acreage under irrigation, Compl. para. 10; 3) Wyoming has constructed and used groundwater wells for irrigation and other uses, including coal bed methane production, Compl. para.

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[6] The Interstate Tributaries are the Clarks Fork, the Bighorn River (except Little Bighorn River), the Tongue River and the Powder River. Article II.F.

[7] In Montana's Brief in Support of Motion for Leave to File Complaint at 14, Montana states that since the completion of the Yellowstone Compact, Wyoming has constructed or enlarged eight reservoirs in the Tongue River Basins, and seven reservoirs in the Powder River Basin, an increase in storage capacity of 216,000 acre-feet in the Powder River and 9,400 acre-feet in the Tongue River.

11; and 4) Wyoming has increased the consumption of water on existing irrigated acreage, Compl. para. 12. Montana alleges that these new and expanded uses are not violations of the Compact themselves, but they violate the Compact when they result in insufficient water to satisfy Montana's pre-Compact rights. Montana therefore seeks to require Wyoming "to deliver the waters of the Tongue and Powder Rivers in accordance with the provisions of the Yellowstone Compact." Compl. para. B.

The crux of the dispute is whether the pre-Compact water rights in each state, i.e. the "appropriative rights to the beneficial uses of the Yellowstone River System existing in each signatory State as of January 1, 1950," are protected under Article V of the Compact, and if so, whether Montana's pre-Compact rights are protected from Wyoming's expanded and new uses. We agree with Montana that under the structure of the Compact, the pre-Compact uses are necessarily allocated and protected in order for the Compact to operate.

1. Wyoming urges that the pre-Compact rights and the supplemental rights are subject only to each state's own laws and are not protected under the Compact. Wyo. Br. at 40-43. Essentially, Wyoming argues that the only enforceable provisions of the Compact are the percentage allocations of "unused and unappropriated water" in Article V.B as determined under the formula in Article V.C., the "modified divertible flow" provisions. Under Wyoming's view, the only claim Montana can assert under the

Compact is that "Wyoming is violating its cumulative percentage allocation as of a given date." Wyo. Br. at 48. Under this interpretation, Wyoming is free to infringe on Montana's pre-Compact rights with impunity, and Montana has no cause of action under the Compact to prevent such infringement. Such an interpretation would make the Compact virtually inoperative.

What Wyoming overlooks is that there can be no "unused and unappropriated water" subject to the percentage allocation in Article V.B, if Montana's pre-Compact uses are not being fulfilled. Article V.A establishes a baseline condition against which it is determined whether there is "unused and unappropriated waters" available for allocation under the Article V.B percentages. If the baseline condition is not being met, i.e. sufficient water is not available to fulfill pre-Compact rights, then there is no water to allocate under Article V.B. In that circumstance, any use of water by Wyoming under Article V.B, by definition, would be a violation of the Compact.

Moreover, the pre-Compact rights are necessarily required to be protected, otherwise the pre-1950 condition cannot be maintained as a baseline. Wyoming never explains how the Compact would work without such a protected baseline. Indeed, the provisions of Article V.A and Article V.B are inextricably linked, and both must be enforced in order for the Compact to operate.

Even assuming that Article V.B is the only enforceable provision as Wyoming argues, there is still a basis under that Article to require curtailment of post-Compact uses if there is no unused and unappropriated water available for such uses. Such would be the case if pre-Compact uses are not being satisfied. Therefore, even under Wyoming's restrictive view of the Compact, Wyoming must curtail its post-Compact uses to ensure sufficient water is made available to satisfy by Montana's pre-Compact rights.

2. It is further clear from the structure of the Compact that the baseline condition under Article V.A is the amount of water actually being used as of January 1, 1950, and not the full amount that may have been permitted or appropriated. If the baseline condition was not tied to actual use as of January 1, 1950, then it would be a moving baseline, making it impossible to determine the unused and unappropriated water as of January 1, 1950, for purposes of Article V.B. As stated in the Senate Report: "Article V-B, it is true, allocates to the States the 'unused and unappropriated waters.' But this follows V-A which recognized all existing beneficial *uses* as of January 1, 1950." App. A at 5a [emphasis added]. Under these terms, the V.B allocation applies to water that has not been appropriated, and water that has not been put to use under an existing permit or appropriation, i.e. "unused water." This generally follows the law of appropriation within Montana and Wyoming. *See, e.g.*, Wyo. Stat. 41-3-101. As noted in M. Squillace, *A*

Critical Look at Wyoming Water Law, 24 Land and Water Law Review 307, 324:

> "Beneficial use [is] the basis, the measure and limit of the right to use water. . . ." The earliest Wyoming decisions established that no appropriation is complete until the water is put to a beneficial use. Further, whatever the amount of an adjudicated water right, the true measure of the right is the amount of water put to beneficial use.

Citing Moyer v. Preston, 6 Wyo. 308, 44 P. 845 (1896) and *Basin Electric Power Cooperative v. State Bd. of Control*, 578 P.2d 557 (1978). In Montana, where a permit system has existed only since 1973, Mont. Code Ann. 85-2-301 et seq., the only way to obtain a water right was by putting water to actual beneficial use. *See, e.g., Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897).

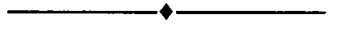
Therefore, the Compact recognized and protected existing beneficial uses as the baseline condition, but it did not "determine or fix comparable values for existing rights." App. A. at 15a (R.J. Newell Report to Congress). In large part, this was because it was assumed that there was enough water, particularly with storage, to satisfy the existing condition as well as future developments. *Id.* The existing uses are nevertheless protected, even if the assumption of an adequate water supply proves to be wrong.

> V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the

> supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing.

App. A at 3a (Senate Report). What *is* contemplated, however, is a demand by one State upon the other for the supply "now obtaining under present conditions of supply and diversion." Such a demand *would* have legal standing under the Compact.

3. Wyoming argues that none of its post-Compact expanded or new uses violate the Compact because they are specifically allowed under the Compact and do not exceed its percentage allocation under Article V.B. We do not understand Montana to allege or argue that the nature of such uses violate the Compact. However, to the extent such uses result in insufficient water to satisfy Montana's pre-Compact rights, they violate the Compact. Whether and to what extent the specified uses result in insufficient water to satisfy Montana's pre-Compact rights raise factual and legal issues that Montana should be allowed to address in a case on the merits. At this point, Montana has clearly stated a claim under Article V.A or Article V.B, or both.



CONCLUSION

For the reasons stated, Wyoming's Motion to Dismiss should be denied.

Respectfully submitted,

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