

5/21/97

1 JOSEPH P. MAZUREK
Attorney General
2 HARLEY R. HARRIS
Assistant Attorney General
3 State of Montana
215 North Sanders
4 P.O. Box 201401
Helena, MT 59620-1401
5 (406) 444-2026

6 COUNSEL FOR THE STATE OF MONTANA

7
8
9

IN THE WATER COURTS OF THE STATE OF MONTANA
UPPER AND LOWER MISSOURI RIVER DIVISIONS
FORT PECK COMPACT SUBBASIN

10
11
12
13
14
15

In the Matter of the)
Adjudication of Existing) Cause No. WC-92-1
and Reserved Rights to the)
Use of Water, Both Surface)
and Underground, of the) **CONSOLIDATED REPLY BRIEF**
Assiniboine and Sioux Tribes)
of the Fort Peck Indian)
Reservation Within the)
State of Montana.)

16
17
18
19
20
21
22
23
24
25

The State of Montana submits the following as its partial
reply to the response briefs of G. Connie Flygt and Jeff
Weimer¹, (collectively, "the objectors"). In this brief the
State will limit its arguments to the questions posed in the
Court's Order of May 7, 1997. If, after the June 3, 1997
hearing, the Court directs that there will be further
proceedings relative to the Fort Peck-Montana Compact ["the
Compact"], the State requests the opportunity to introduce
additional evidence and argument to support its assertion that

26
27

¹ The State does not additionally reply to any matter
stated in Mr. Tihista's correspondence with the Court of March
11, 1997, and stands on the argument contained in its March 7,
1997 Memorandum relative to Mr. Tihista's lack of standing to
object to the Compact. See id. at 3-4.

1 the Compact meets the "reasonableness" criteria set forth in
2 the Court's Memorandum Opinion of August 3, 1995 at 6-7 (In re
3 Northern Cheyenne-Montana Compact, Cause No. WC-93-1), and
4 accordingly should be approved under Montana Code Annotated.
5 § 85-2-702(3).

7 INTRODUCTION

8 The issue to be addressed at the June 3, 1997 hearing is
9 whether any of the objectors have met their burden to state a
10 legally cognizable objection under Montana Code Annotated
11 §§ 85-2-233(1)(b) and (3). The former defines the "good cause"
12 which must be shown as a precondition to requesting a hearing
13 on a preliminary decree as requiring "a written statement
14 showing that a person has an ownership interest in water or its
15 use **that has been affected by the decree.**" The latter further
16 requires that "[t]he request [for a hearing] must state **the**
17 **specific grounds and evidence** upon which the objections are
18 based." (Emphasis added.)

19 Because these specific pleading requirements supersede
20 the more general ones contained in Mont. R. Civ. P. 8, the more
21 liberal approach that courts otherwise take toward pro se
22 pleadings (see e.g., Hughes v. Rowe, 449 U.S. 5, 9 (1980))
23 must also be applied more rigorously. As a general matter,
24 under Rule 8, a court should provide a pro se litigant notice
25 of the deficiency in his or her pleading and an opportunity to
26 amend to cure the deficiency. Noll v. Carlson, 809 F.2d 1446,
27 1449 (9th Cir. 1987). However, liberal construction of a

1 pro se pleading does not allow the Court to supply essential
2 elements of claims that have not been pled. Ivey v. Board of
3 Regents, 673 F.2d 266 (9th Cir. 1982). A claim must be
4 dismissed if there is the lack of a cognizable legal theory or
5 an absence of facts to support a cognizable legal theory.
6 Robertson v. Dean Whitter Reynolds, Inc., 749 F.2d 530, 533-34
7 (9th Cir. 1984).

8
9 A. Connie Flygt Has Failed To Demonstrate How Her
10 Ownership Interests In Water Have Been or Will Be
11 Affected by The Compact.

12 Mrs. Flygt's main points relating to the alleged "impact"
13 the Compact will have on her are: (1) that the purposes of the
14 tribal water right ("TWR") and the off-reservation marketing
15 right recognized in the Compact constitute a "sizeable
16 expansion of legal concepts" relative to reserved water rights;
17 and (2) that the 1888 priority date in the Compact "is not
18 logically mandated by the Winters case." Even assuming
19 arguendo that these alleged defects are true they are, without
20 more, insufficient to state a legally cognizable objection
21 since Mrs. Flygt does not also allege or explain how those
22 particular defects have affected her water rights.

23 For example, it is clear that under Winters v. United
24 States, 207 U.S. 564 (1908), the reserved water rights
25 possessed by the Tribes would, at a minimum, encompass
26 agricultural purposes. See also Arizona v. California, 373 U.S.
27 546 (1963); State ex rel. Greely v. Confederated Salish &
Kootenai Tribes, 712 P.2d 754 (1985); In re Big Horn River, 753

1 P.2d 76, 101-11 (Wyo. 1988). Accordingly, the Tribes would be
2 entitled to divert and utilize the entire amount of their
3 reserved water right to irrigate land on the Reservation.
4 Given that, Mrs. Flygt fails to explain why the Tribes' use of
5 their water right for purposes other than irrigation affects
6 her water rights. Does the Tribes' use of water for industrial
7 rather than agricultural purposes alter the timing or amount of
8 water diverted from or returned to the Missouri River or Fort
9 Peck Reservoir, or increase the amount they consumptively use
10 in a way that affects her rights on a tributary to the
11 Musselshell River above Fred Robinson Bridge? Does the fact
12 that the Tribes have dedicated a portion of their water rights
13 to instream flows in the Missouri below Fort Peck Dam impact
14 Mrs. Flygt's water rights in some way? If so, how?

15 Similarly, all of the diversion points that are presently
16 available to the Tribes without legislative approval are below
17 the diversion points for Mrs. Flygt's water rights. See
18 Compact, Art. III, J. 3.(c). Mrs. Flygt again does not explain
19 how her water rights are affected if the Tribes take water from
20 Fort Peck Reservoir instead of the Missouri River below Fort
21 Peck Dam. Absent such an explanation she again fails to state
22 a legally cognizable objection. Finally, while the Tribes
23 point out that the 1888 priority date for the TWR is legally
24 justified (see Resp. Br. Of Assiniboine & Sioux Tribes at 2-3),
25 even if we assume arguendo it is not, Mrs. Flygt fails to
26 indicate what other priority date is more appropriate and how
27 she is impacted by the difference between the 1888 date and any

1 she may believe is more appropriate. Her failure to do so is
2 significant since, unless she can plausibly allege that some
3 date *junior* to hers is more justified, she is again unaffected
4 by this alleged error. Cf. State ex rel. Martinez v. Lewis,
5 861 P.2d 235, 238 (N.M. Ct. App. 1993) (court declined to rule
6 on tribe's claim that its water rights had a "time immemorial"
7 priority since the treaty-based priority date to which it was
8 otherwise entitled was already senior to all other water users
9 on the stream).

10 In the end, Mrs. Flygt's academic disagreement with
11 certain provisions of the Compact does not, without more,
12 suffice to state a legally cognizable objection.²

13
14 B. Jeff Weimer Has Failed To Demonstrate How His
15 Ownership Interests In Water Have Been or Will Be
Affected by The Compact.

16 Mr. Weimer raises three equally immaterial concerns:
17 (1) that the Compact improperly allows the TWR to be used for
18 purposes other than agriculture; (2) that since the Tribes are
19 not required to maintain a minimum flow in the Missouri and its
20

21 ² Mrs. Flygt's other two concerns are immaterial. Her
22 complaint that she wasn't provided with the information she
23 requested from the State and Tribes can be remedied by a
24 motion to compel under Mont. R. Civ. P. 26. And, apart from
25 being incorrect and directly rebutted by the United States'
26 position in this case, her concern that the technical basis
27 for the Compact "has [not] been confirmed by the U.S. Army
Corps of Engineers or [any] other relevant body" goes to the
merits and will be addressed at that stage of this proceeding
should it prove necessary.

1 tributaries, their use of the TWR may affect fisheries; and
2 (3) that the Tribes off-reservation water marketing rights
3 recognized in the Compact are ill-advised. In each case
4 Mr. Weimer also fails to explain how these alleged defects
5 impact his water rights.

6 The most glaring of the inadequacies in Mr. Weimer's
7 pleadings lie in his speculation that the Tribes might use
8 their water rights to injure fisheries in the Missouri River.
9 Mr. Weimer then explains that he would be impacted in that
10 hypothetical situation "because I fish." Whether or not he
11 would be injured in that manner is irrelevant because that type
12 of injury is simply not cognizable in this proceeding. The
13 instant action extends no further than to the "adjudication of
14 all existing water rights," (see Mont. Code Ann. § 85-2-
15 214(1)); see also Mont. Code Ann. § 3-7-224 (Water Court's
16 jurisdiction extends only to "the determination of existing
17 water rights.") Simply put, to the extent Mr. Weimer seeks to
18 vindicate his rights to fish, he is in the wrong court and in
19 the wrong legal action.

20 Similarly insufficient are Mr. Weimer's concerns that the
21 Tribes may use their water rights for purposes other than
22 agriculture and market those rights off the Reservation. As
23 with the similar concerns raised by Mrs. Flygt, he does not
24 explain how his water rights are affected by those elements of
25 the Compact.

1 C. The Hypothetical "Call" That the Tribes Might Have
2 Within the Missouri Basin Does Not, Without More,
3 Constitute The Requisite "Impact" To State A Legally
4 Cognizable Objection.

5 Mrs. Flygt and Mr. Weimer both seize on the State's
6 anticipatory argument regarding the Tribes' theoretical right
7 to make a "call" on water upstream in the Missouri River Basin
8 and suggest that this hypothetical possibility suffices to
9 demonstrate the requisite "impact." However, as with many of
10 the other defects they allege with respect to the Compact, this
11 speculative concern is unaccompanied by any evidence or
12 indication that the likelihood of such a call is real, actual,
13 or imminent. In fact, as the State will prove if this case
14 moves beyond this initial stage to the actual merits of the
15 "reasonableness" hearing, the likelihood of such a call against
16 Mr. Weimer or Mrs. Flygt's rights is so low so as to be
17 considered, for all practical purposes, nonexistent. But
18 whether the State can or will ultimately prove that fact is
19 immaterial, since the burden rests in the first instance on an
20 objector to come forward with some actual evidence to support
21 their objection. There is nothing in the pleadings submitted by
22 Mrs. Flygt or Mr. Weimer which indicate what that evidence is.

23 Indeed, if the mere theoretical possibility of a call was
24 all that was necessary to state a legally cognizable objection
25 under Montana Code Annotated §§ 85-2-233(1)(a) and (3), it
26 would appear that any person holding a water right in the
27 entire Missouri River Basin, even above Clark Canyon Dam, could
object to the Compact. It is specifically this type of

1 situation that the special pleading requirements of Montana
2 Code Annotated §§ 85-2-233(1) and (3) are intended to prevent.
3 If all the 200,000 plus claimants in the adjudication were
4 allowed to file and proceed on the basis of the same type of
5 vague and conclusory pleadings filed by Mrs. Flygt and
6 Mr. Weimer, and all the parties whose rights were subjected to
7 such objections were left to discovery or pretrial process to
8 flesh out even the barest elements of those objections, this
9 case would bog down in a morass of procedural detail from which
10 it would never emerge. In setting up the adjudication process
11 the legislature realized this fact and determined that it was
12 reasonable and efficient to require objectors to specify, up
13 front, at least two key elements of their objection: (1) what
14 their own rights were; and (2) how the rights they were
15 objecting to affected those rights. While they may have
16 satisfied the former, neither Mr. Weimer nor Mrs. Flygt have
17 satisfied the latter.

18 **CONCLUSION**

19 The objections to the Compact filed by Messrs. Weimer and
20 Tihista and Mrs. Flygt should be dismissed for their failure to
21 meet the requirements of Montana Code Annotated §§ 85-2-
22 233(1)(a) and (3).

23 Respectfully submitted this 21st day of May, 1997.

24 JOSEPH P. MAZUREK
25 Attorney General
26 State of Montana
27 Justice Building
215 North Sanders
Helena MT 59628-1401

By: 
HARLEY R. HARRIS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed a true and accurate copy of the foregoing Consolidated Reply Brief, postage prepaid, by U.S. mail, to the following:

Mrs. Gladys Connie Flygt
1626 Capital Avenue
Madison, WI 53705

Mr. Paul B. Tihista
240 Third Ave. North
Glasgow, MT 59230

Mr. Reid Peyton Chambers
Sonosky, Chambers, Sachse & Endreson
Suite 1000
1250 Eye Street Northwest
Washington, DC 20005

Mr. F. Patrick Barry
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section
10th and Pennsylvania Avenue Northwest
Washington, DC 20530

Mr. Richard Aldrich
Field Solicitor
United States Department of the Interior
P.O. Box 31394
Billings, MT 59107-1394

Ms. Holly Franz
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, MT 59624-1715

DATED: 5/21/97

