

WRC NO.

Motion to Strike Excess
portions of State Briefs

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
WASHAKIE COUNTY, STATE OF WYOMING

IN RE: THE GENERAL ADJUDICATION)
OF ALL RIGHTS TO USE WATER IN THE)
BIG HORN RIVER SYSTEM AND ALL)
OTHER SOURCES, STATE OF WYOMING)

No. 77-4993/86-0012

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| WASHAKIE COUNTY DISTRICT COURT | |
| Issued | _____ |
| Filed | 9/9/98 |
| <i>[Signature]</i> | |
| Deputy | |

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| WRCs INVOLVED: | All Claims (Global Claims) |
| HUCs INVOLVED: | All HUCs |
| DESCRIPTIVE SUMMARY: | State of Wyoming's Response to Tribes' Motion to Strike Portions of State's Briefs |
| NUMBER OF PAGES: | 6, including certificate of service |
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STATE OF WYOMING'S RESPONSE TO TRIBES'
MOTION TO STRIKE PORTIONS OF STATE'S BRIEFS

COMES NOW, the State of Wyoming, by and through its undersigned attorneys, Thomas J. Davidson and Brian C. Shuck of the Wyoming Attorney General's Office, and Keith S. Burron, Special Assistant Attorney General, and, in response to the Tribes' motion, hereby states as follows:

The Tribes have requested the Special Master to strike part of the State's response briefs because they contend that the State allegedly exceeded the Special Master's page limit. The Court should deny the Tribes' motion for several reasons. First, the Special Master's orders and the parties' stipulations clearly contemplate that each party would file a response to each brief to which the party had an interest. In fact, nothing in the parties' stipulations or the Special Master's orders precludes filing a response to every legal brief, although the State chose only to respond to those with which it took issue. *Special Master Kropf's Order Setting Deadline for Filing Proposed*

Findings of Fact and Conclusions of Law, dated June 22, 1998, p. 2 (stating "Response and reply briefs are limited to 20 pages in length") (emphasis added); *Joint Motion and Stipulation for Modification of Walton Global Prehearing, Hearing, and Briefing Schedules, dated May 12, 1998*, p. 2 (stating "All parties will then file response briefs to opposing parties' opening briefs.") (emphasis added). Note that the Special Master and the parties consistently refer to multiple response briefs throughout the orders and stipulations.

Second, the Tribes would like to convince the Special Master that Rule 12 (f) of the Wyoming Rules of Civil Procedure applies in this instance and that the rule is mandatory rather than discretionary. However, the rule is inapplicable – the rule only applies to striking "impertinent matter" or content of a pleading, the rule does not apply to alleged misconduct of the parties. Even if the rule did apply to the conduct of a party, the State has not been impertinent. "Impertinent" is defined as:

That which does not belong in a pleading, interrogatory, or other proceeding; out of place; superfluous; irrelevant. A term applied to matter not necessarily to constitute the cause of action or ground of defense. Such matter may be ordered stricken from the pleading. Fed. R. Civil P. 12 (f). * * *

Black's Law Dictionary, p. 754 (6th ed. 1990). Clearly, the State's responses to the Tribes' and United States' opening briefs are not impertinent. Instead, the State has merely acted in conformity with the clear language of the Special Master's order. The fact that the Tribes chose not to file separate response briefs to each of the briefs served upon them does not amount to impertinence on the part of the State. Furthermore, the rule clearly states that the Court "may" strike any impertinent matter; thus, the Special Master may exercise her discretion and strike any impertinent matter if the circumstances warrant it, but she is not obligated to do so.

Although the Special Master's orders, the parties' stipulations, and the Rules of Civil Procedure clearly support the ability to file one response to each brief filed, the State is further

revisit the previous holdings in this case. Tribes' Opening Brief, pp. 5-6, 13-15, and 20-23; see also State's Opening Brief, pp. 1-4. The Special Master explicitly ordered: "The parties are limited in their legal briefing to those issues reserved in the previous prehearing memoranda, as more thoroughly described in the parties' [October 17, 1997; November 20, 1997; and May 12, 1998 stipulations]." *Special Master Kropf's Final Prehearing Order, dated June 1, 1998, p. 4; see also, Letter from Special Master Kropf to All Attorneys and Parties of Record, dated May 15, 1998, p. 1* (limiting the briefing schedule to the issues identified). Thus, it the Tribes and the United States that have violated the Court's order by going beyond the issue to be briefed and creating more for the State to respond to.

Third, the Tribes and United States advance a numerous arguments which are either not fully developed or lack citations to legal authority or the record. Responding to such unsupported rhetoric requires more space than the original argument took up because it requires citation to the record.

The Tribes fail to demonstrate how they have been prejudiced by the State responding to the briefs it received in two separate documents. The Tribes clearly could have filed separate responses to the State's brief and the briefs of the various Walton claimants, as well as that of the United States since it conflicts with the Tribes' positions. However, they failed to avail themselves of that opportunity. The State would have no objection, if some sort of prejudice can be shown, to allowing the Tribes more time to file a reply to the State's response. However, any such solution should be narrowly tailored to cure the specific ill complained of.

WHEREFORE, the State respectfully requests the Special Master to deny the Tribes' motion. In the alternative, if the Special Master strikes any portion of the State's responses, she should strike 50 pages from the United States' or Tribes' opening briefs, and grant such other and further relief as the Special Master deems just and equitable in the premises.

justified in filing a response to each parties' opening brief in light of the Tribes' and United States' conduct. First, the Tribes and United States are aligned as trustee and ward in these proceedings. Yet they filed two opening briefs, both attacking the State's position from distinctly different directions. For example, while the Tribes requested the hearing on administration and presented numerous proposals for administration of Walton rights, the United States argues that the administration issue is not properly before the Court. Similarly, the Tribes and United States took different positions on most issues. For this reason, it not only would have been impossible to respond to both in one brief, as suggested by the Tribes, it would have been schizophrenic. If, as the Tribes suggest, random portions of the State's response briefs should be stricken, it would also be appropriate for the Special Master to strike either the Tribes' or the United States' opening briefs in their entirety, or some portion of each of those briefs, since the total of those briefs far exceeds the 50-page limitation.

Second, the United States and Tribes have attempted to expand the scope of these proceedings by briefing issues which are not among the limited issues stipulated to by the parties and approved by the Special Master, and arguing that the Special Master should venture beyond the Walton issues presently before the Court and award the Tribes administration of either all 1868 water rights or all water rights on the reservation. The Tribes complain that they were unfairly surprised by the State's response to the Tribes' and United States' briefs. In reality, it is the State who can claim to be unfairly surprised by the conduct of the Tribes and United States. For example, at trial, the United States failed to present any case whatsoever. However, in its brief, the United States presents several arguments which go beyond mere procedural matters and arguably go to the substance of the issues. United States' Opening Brief, pp. 10-12. Furthermore, the Tribes attorneys have agreed throughout these proceedings that the issues currently before the Court are limited to Walton rights, yet in their brief they try to expand these proceedings beyond Walton rights and

DATED this 8 day of September, 1998.



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I, Brian C. Shuck, hereby certify that the foregoing was served by sending a true and correct copy of the same by Federal Express this 8th day of September, 1998, addressed as follows:

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
WASHAKIE COUNTY, WYOMING

IN RE THE GENERAL ADJUDICATION)
OF ALL RIGHTS TO USE WATER IN THE)
BIG HORN RIVER SYSTEM AND ALL)
OTHER SOURCES, STATE OF WYOMING)

WASHAKIE COUNTY DISTRICT COURT
Issued 9/8/98
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No. 76-4093/86-0012
Shirley D. Mead Deputy

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| WALTON RIGHT CLAIMS: | All |
| DESCRIPTIVE SUMMARY: | Motion of Eastern Shoshone and Northern Arapaho Tribes to Strike Excess Portions of State Briefs |
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The State of Wyoming filed two 20-page opposition briefs regarding global *Walton* issues, rather than the one permitted to them under the Master's June 22, 1998, scheduling order. They did so without requesting the Master's leave or discussing it with other parties. The Eastern Shoshone and Northern Arapaho Tribes move to strike those portions of the State's briefs which exceed their overall limit of 20 pages.

The State filed 40 rather than 20 pages of briefing without any allegation of a need to do so, or any explanation at all. The State's action comes as a surprise because at the State's request, the Tribes agreed to a scheduling modification which gave the parties four additional days to file their response briefs. In these discussions, the Tribes suggested a similar extension of the deadline for reply briefs. The State resisted this, citing the informal telephone conference scheduled for September 10. As a result, the period for preparing replies has been reduced from twelve to eight days, and the burden of replying to state arguments has doubled. At no time in these discussions between state and tribal attorneys did state attorneys suggest they were planning to file two briefs, or ask for an increased page limit.

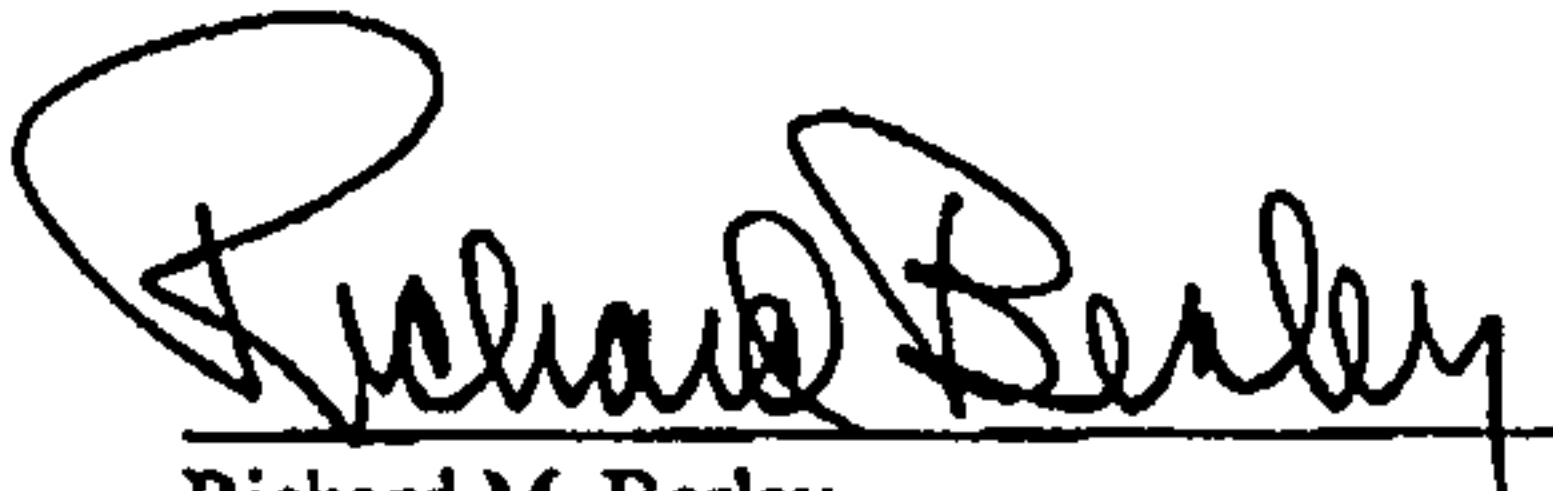
TRIBES' MOTION TO STRIKE — 1

The State's briefs are separately denominated as responses to the opening briefs of the United States and the Tribes. But the Tribes cannot ignore the brief purportedly responding to the United States, extensive portions of which are explicitly included by reference in the brief styled as a response to the Tribes.

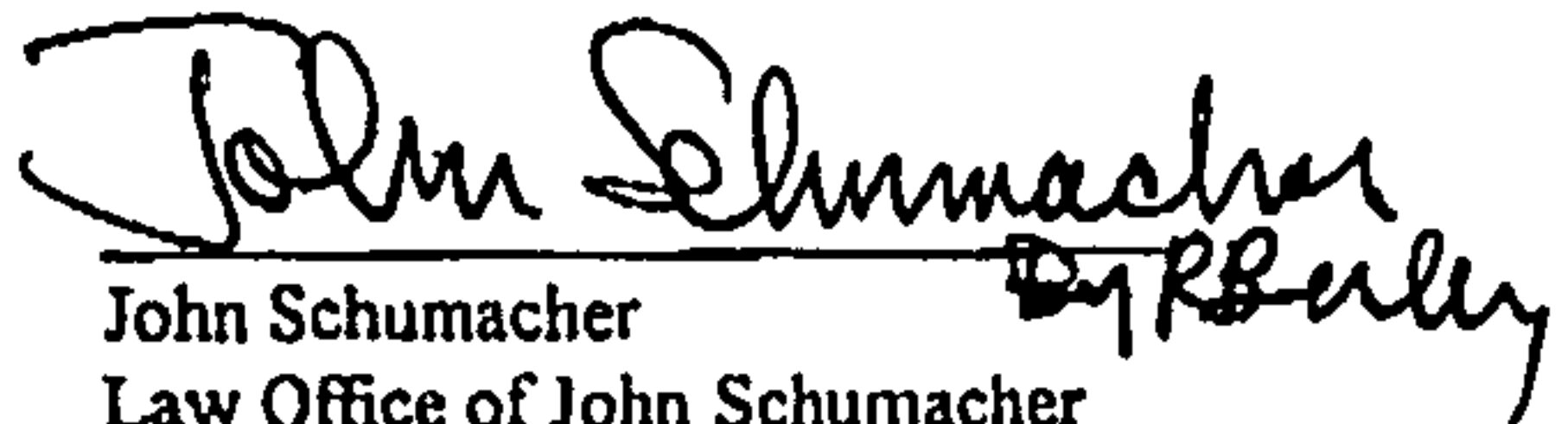
The State's refusal to follow the Master's order and abide by the Master's explicit limits is "impertinence" under Wyo. R. Civ. P. 12 (f), governing motions to strike. Another purpose of the rule is to encourage litigants to be concise. Wright & Miller, Fed. Prac. & Proc., CV Sec. 1380. Had the Shoshone and Arapaho Tribes each separately filed 20-page briefs in response to each significant opposition opening brief, the Tribes could have filed more than 80 pages of response brief, exceeding even the opening brief limitation, a result obviously not intended under the Master's order. In this instance, the State provided no rationale for believing it could file two briefs, nor alleged a need to do so, nor provided, as a courtesy, any advance notice to the Tribes of such an action. Such notice would have been particularly appropriate in light of the State's request to the Tribes to consent to a schedule which would expand the briefing period for responses, but shorten that for replies.

The Tribes suggest that the Master enforce the scheduling order by striking all but the first ten pages of each of the State's two response briefs.

DATED: September 4, 1998.



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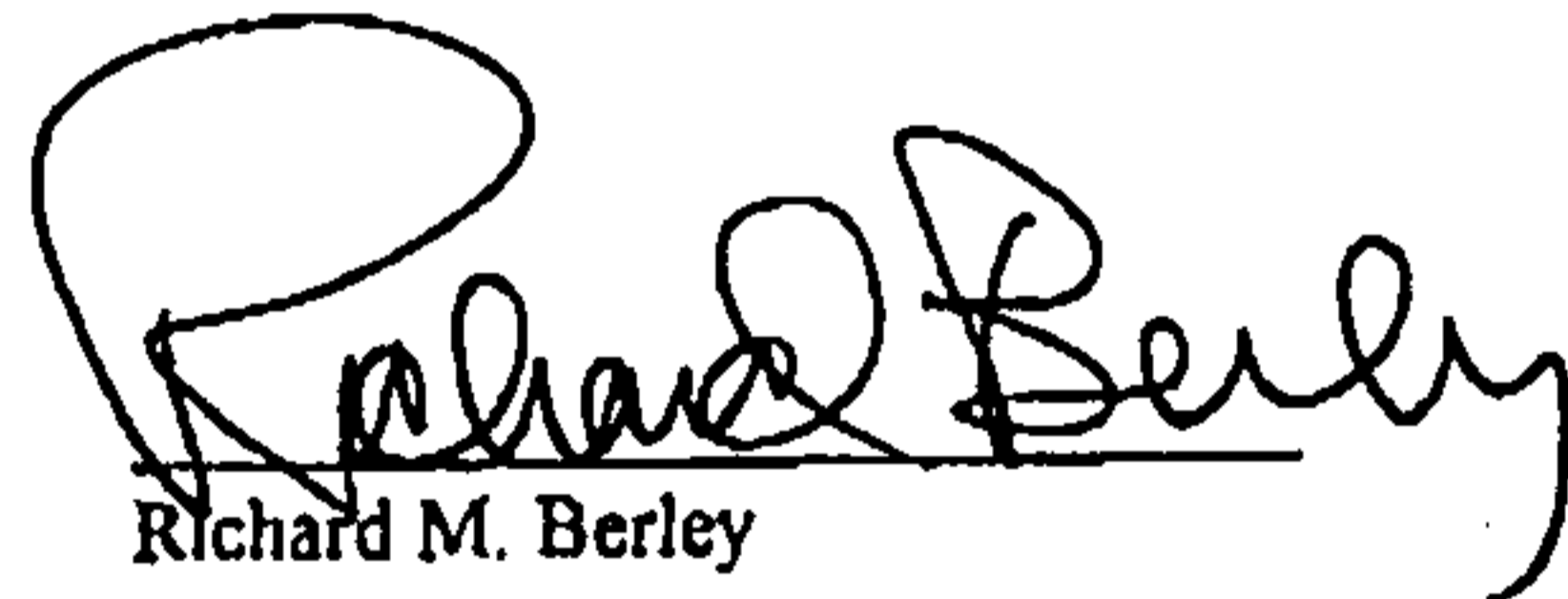
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