Office of the Attorney General

Governor
Matthew H. Mead

Attorney General
Peter K. Michael

Water and Natural Resources Division
123 State Capitol
Cheyenne, Wyoming 82002
307-777-6946 Telephone
307-777-3542 Fax

Chief Deputy Attorney General
John G. Knepper

Division Deputy
James Kaste

May 30, 2017

Barton H. Thompson, Jr., c/o
Kimberly Dorst, Faculty Support
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

Re: MT v. WY: Supreme Court of the United States No. 137
WY Comments on the Discussion Draft Decree

Special Master Thompson,

Many of Montana's suggested revisions to the draft decree are acceptable, but Wyoming objects to two specific suggestions. First, Wyoming objects to Montana's attempt to change the outcome of this case by revising Section B.2.(b). This section of the draft decree accurately memorializes the content of the Second Interim Report. Montana had an opportunity to take exception to that report on this point, and it failed to do so. Accordingly, Section B.2.(b) of the draft decree reflects the settled law of this case.

More importantly, Montana incorrectly claims that there is no basis for mandating that reservoir operators fill when it will maximize use of the resource for the public benefit. In fact, both states authorize regulators to deviate from strict priority of appropriation to avoid waste and to obtain the maximum benefit from the resource. *See* Wyo. Stat. Ann. § 41-3-603 (authorizing the water commissioner to require the filling of any reservoir whenever practical and whenever water is available); Mont. Code Ann. § 85-2-406(3) (authorizing the district court to alter existing rights and priorities to avoid waste). Regulators in both states are entrusted with this flexibility to "conserve the waters of the state" to avoid "interference with direct flow appropriators" and "thereby prevent a waste

of water." Wyoming State Board of Control Regulations Chapter I, Section 7 b. Here the requirement that Montana base a call for reservoir storage on the available forecasting data prevents water from being lost from Wyoming's mountain reservoirs, and ultimately, the system because of an improvident call. Thus, the requirement is consistent with the laws of both states and inures to their mutual benefit.

Moreover, while trial was the appropriate time to elicit testimony from witnesses and Montana's untimely and improper affidavits should be ignored, a word about their content is in order. Montana's affiants state that they have never seen calls that were subjected to a requirement that the reservoir water right owner reasonably believed, based on significant evidence, that the reservoir might not fill. It is unlikely that any of these affiants has ever personally made or received a call, but as they did not testify on this subject at trial and are not now subject to cross-examination, their qualifications are left to speculation. Nevertheless, it is probably true that such a requirement rarely needs to be articulated, because no reasonable reservoir owner would make a call absent significant evidence that his reservoir might not fill, and no reasonable regulator would allow such a call if made. Here, however, the requirement does need to be articulated to help guide the parties' future interactions and avoid disputes.

Wyoming also objects to Montana's suggested revision of the second sentence of Section B.7. requiring Wyoming to deliver water to Montana as soon as physically possible. This requirement would eliminate the states' flexibility to remedy a violation at a time and in a manner that is most advantageous. Montana may not want water immediately, and it may come to pass that releasing the water early in the spring as soon as Wyoming is physically able would result in waste. Moreover, requiring Wyoming to deliver water as soon as it is physically able, does not account for situations like the states faced when the last two calls were made. In both instances, Montana and Wyoming agreed that although Montana placed a call, Wyoming would not release any of the then accruing post-1950 storage to avoid waste in the event that the Tongue River Reservoir ultimately filled. Had Wyoming been "required to deliver" water at the initiation of the call, or as soon as physically possible, the result would have been wasteful because the Tongue River Reservoir ultimately filled. Specifying only Wyoming's liability and allowing the parties to fashion the appropriate remedy under the then prevailing conditions was appropriate, and no change to the second sentence of Section B.7. should be made.[1]

[1] Moreover, as proposed by Montana, Section B.7. perpetuates the incorrect notion that all post-1950 groundwater withdrawals after a call automatically violate the Compact.

While Wyoming does not believe that the substitution of the words "intends to take and has taken" adds any meaning or clarity to "is taking" in the third sentence of Section B.7., and the word "including" always denotes a non-exhaustive list such that the words "but not limited to" in Section E.3. would be redundant, Wyoming does not object to the remainder of Montana's suggested revisions.

Respectfully,

James Kaste
Deputy Attorney General

c: All Counsel