

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

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.
SPECIAL MASTER

**MOTION IN LIMINE TO LIMIT THE PRESENTATION OF EVIDENCE IN
THIS CASE TO THE NINE YEARS THAT SURVIVED WYOMING'S INITIAL
SUMMARY JUDGMENT MOTION**

PETER K. MICHAEL*
Attorney General of Wyoming

JAY JERDE
Deputy Attorney General
JAMES KASTE
Senior Assistant Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
MATTHIAS SAYER
Assistant Attorney General
ANDREW KUHLMANN
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6196

**Counsel of Record*

The State of Wyoming hereby moves in limine for an order limiting the presentation of evidence in this case to the nine years that survived Wyoming's initial Motion for Partial Summary Judgment. In support of this motion, Wyoming states as follows:

On September 12, 2011, Wyoming moved for the entry of partial summary judgment precluding Montana "from claiming damages or other relief based on Section V(A) of the Yellowstone River Compact for the years 1952-2003, and 2005, which were years in which Montana did not notify Wyoming that Montana's pre-1950 appropriators were not receiving adequate water from the Tongue and Powder Rivers." WY Mot. for Part. Sum. Judg. at 1. Wyoming also sought "partial summary judgment precluding Montana from claiming damages or other relief for those days in the years 2004 and 2006 that preceded Montana's notifications in those years." *Id.* This motion was clearly addressed to the issue of liability for the years and other periods raised in the motion. In fact, the first substantive section in Wyoming's memorandum in support of its motion was entitled "[t]he Yellowstone River Compact requires Montana to make a call on Wyoming as a precondition of Wyoming liability under Section V(A)." Mem. in Support of Mot. for Part. Sum. Judg. at 10 (emphasis added).

On December 20, 2011, the Special Master agreed that in order to obtain any relief for any particular year, Montana has the burden of proving that it made a call on Wyoming. Mem. Op. of the Special Master on WY's Mot. for Part. Sum. Judg. (Notice Requirement for Damages). Accordingly, the Special Master ruled that "Montana's failure to provide such notice precludes Montana from seeking damages or other relief."

Id. at 7 (emphasis added). The only possible way to construe this holding is as a determination that liability will not lie in the absence of a call in accord with the specific relief requested by Wyoming in its motion.¹ In other words, Montana cannot demonstrate a breach of the Compact without proving that it made a call in a given year. And in fact, that is how both parties construed the ruling until Montana changed its position after the close of discovery.

On September 28, 2012, after reviewing the evidence related to calls in all the years in issue, the Special Master ruled that "Wyoming is entitled to partial summary judgment precluding Montana from claiming damage *or other relief* for the violation of Article V(A) except for the years 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006." Mem. Op. of the Special Master on WY's Renewed Mot. for Part. Sum. Judg. (Notice Requirement for Damages) at 45 (emphasis added). In accord with this ruling, the parties engaged in discovery specifically related to the nine years in which liability remained possible. For example, Wyoming has attached Montana's Responses to Wyoming's Second Set of Interrogatories which demonstrate that Wyoming limited its discovery to those years in which Montana claimed it made calls on Wyoming. *See, e.g.*, Requests Nos. 1 and 2. Wyoming has also attached Montana's Second Set of Interrogatories and Requests for Production to Wyoming, which demonstrate that Montana also limited its discovery requests to the nine years that survived summary

¹ *See also Worley v. U.S. Borax and Chem. Corp.*, 428 P.2d 651, 654 (N.M. 1967) (a principle authority upon which the Special Master relied in his ruling, which held that the defendants "*cannot be liable* for plaintiff's shortage of water unless plaintiff demanded that water, to the extent of his needs and within his senior appropriation, be allowed to reach his diversion.") (emphasis added).

judgment. It is worth noting that Montana's Second Set of Interrogatories and Requests for Production were served on Wyoming on the very last day for submitting written discovery, and at that late date, Montana was not inquiring about all the years excluded by the grant of summary judgment to Wyoming.

After the close of discovery, however, Montana dramatically changed its position in this case and claimed in its opposition to Wyoming's Motion for Summary Judgment

that Wyoming violated the Compact in all but three years since 1961 by allowing post-1950 uses in Wyoming at a time that Montana was not receiving sufficient water to satisfy its pre-1950 direct flow rights. Because the Special Master has ruled that Montana did not provide sufficient notice in the majority of those years, and because Montana has not quantified the impact from these violations, if Montana is able to prove this claim, Montana will seek only prospective relief based on this claim in the next phase of the litigation.

MT's Br. in Opp. to Wy's Mot. for Sum. Judg. at 30. Similarly, in its Final Pretrial Memorandum, Montana asserts claims for every year but three between 1961 and 2007. Final Pretrial Memo. at 2. And Montana's exhibit list contains literally hundreds of documents that appear to relate solely to years outside the nine that survived summary judgment.

Given Montana's recent change in position, it appears necessary for the Special Master to enter an order providing that the initial summary judgment proceedings were not in vain. Rather, Wyoming obtained a specific and final determination that Montana must make a call on Wyoming as condition precedent to liability. Montana failed to produce evidence that it did so for all but nine years since 1951. Montana's claims related to these years were dismissed by the entry of summary judgment in Wyoming's

favor, and discovery in this case was appropriately limited to the nine years that survived summary judgment. As a result, any evidence related to those years that were dismissed from this case is irrelevant, and should be excluded from the trial of this matter. Any other ruling would materially prejudice Wyoming which prepared to defend this case in reasonable reliance on the rulings of the Special Master.

WHEREFORE the State of Wyoming requests that the Court enter an order consistent with its prior rulings limiting the presentation of evidence in this case to the nine years that survived Wyoming's initial Motion for Partial Summary Judgment and requiring that Montana specify which of the 556 exhibits on its exhibit list will be eliminated as a result of the order.

Dated this 26th day of September, 2013.

Respectfully submitted,

THE STATE OF WYOMING



James Kaste
Senior Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
307-777-6946

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 26th day of September, 2013.

Jeanne S. Whiteing
Whiteing & Smith
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

Cory J. Swanson
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401
coswanson@mt.gov

John B. Draper
Jeffrey Wechsler
Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, NM 87501
jdraper@montand.com
jwechsler@montand.com

Jennifer Verleger
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
jverleger@nd.gov

James J. Dubois
United States Department of Justice
Environmental and Natural Resources
Division of Natural Resources Section
999 18th St. #370 South Terrace
Denver, CO 80202
James.dubois@usdoj.gov

Solicitor General of the United States
US Department of Justice
950 Pennsylvania Avenue, Room 5614
Washington, DC 20530-0001
SupremeCtBriefs@usdoj.gov

Michael Wigmore
Bingham McCutchen, LLP
2020 K Street NW
Washington, DC 20006-1806
Michael.wigmore@bingham.com

Barton H. Thompson Jr.
Susan Carter, Assistant
Jerry yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205
Susan.carter@stanford.edu


Wyoming Attorney General's Office