

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

**RESPONSE IN OPPOSITION TO WYOMING'S MOTION IN LIMINE TO
EXCLUDE THE REPORT AND TESTIMONY OF
DOUGLAS R. LITTLEFIELD, PH.D.**

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Montana hereby submits this Response in Opposition to Wyoming's Motion in Limine to Exclude the Report and Testimony of Douglas R. Littlefield, Ph.D. ("Motion"). Wyoming summarily asserts, in its second attempt to exclude the testimony of Dr. Littlefield, that the Special Master's ruling on Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements ("Intrastate Motion") resolved the issues for which Dr. Littlefield's report and testimony is offered. Motion at 2. On this basis alone, Wyoming contends that Dr. Littlefield's report and testimony should be excluded at trial. *Ibid.* For the reasons stated below, the Motion should be denied.

ARGUMENT

Dr. Littlefield's testimony and report regarding the history and circumstances of negotiating the Compact are relevant to issues for trial, particularly issues regarding Compact requirements. In addition, the exclusionary rules of evidence should not be applied in a nonjury trial. This is particularly true here, in a case in the original jurisdiction, where the Special Master has an obligation to provide the Court with a complete record.

I. Dr. Littlefield's Report and Testimony Are Relevant to Issues Regarding Compact Requirements

The general rule is that relevant evidence is admissible. Fed. R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The purpose of a motion in limine is to obtain a ruling in advance of trial on the admissibility of evidence that would confuse or mislead the factfinder. See Fed. R. Evid. 402; Fed. R. Evid. 403; see also, *e.g.*, *Gold v. State Farm Fire & Cas. Co.*, Civil Action No. 10-cv-0825-RBJ-MJW, 2013 WL 1910515, at *6 (D. Colo. May 8, 2013). Such determinations are usually deferred until

trial so that questions regarding the evidence may be resolved in the proper context. See *Gold*, 2013 WL 1910515, at *6.

In the Memorandum Opinion on Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements ("Intrastate Memorandum Opinion"), the Special Master concluded "that Montana is not required to adopt any specific intrastate regulations or administration of its water rights, but that its regulations and administration must comply with the requirements and obligations of the Compact – in particular, the 'beneficial use' and prior-appropriation requirements for protection of pre-1950 water rights under Article V(A) of the Compact." Intrastate Memorandum Opinion at 5. The Special Master expressly recognized that application of the standard to particular regulations and administration would be addressed at trial. *Ibid.* Dr. Littlefield's report and testimony are directly relevant to Wyoming's contention that Montana's regulations and administration are inconsistent with Compact requirements. See *id.*, at 4; Wyoming's Final Pretrial Memorandum at 3 (Sept. 23, 2013) ("Wyoming contends that to prove a breach of the Compact, Montana must show . . . that at those specific times Montana engaged in intrastate regulation sufficient to ensure that no post-1950 appropriations in Montana were receiving water . . .").¹

Dr. Littlefield's report and testimony address the history and circumstances of negotiations regarding the Compact, particularly with regard to Article V(A). Such information will assist the Special Master in appreciating the relevant context in which the Compact was negotiated. Dr. Littlefield will testify regarding particular events and actions with regard to

¹ Wyoming appears to contend that Montana bears the burden to establish its intrastate regulation was sufficient to ensure that no post-1950 appropriations in Montana were receiving water. See Wyoming's Final Pretrial Memorandum at 3. However, the Special Master has ruled that Montana's existing regulation and administration of its water rights are initially presumed to be acceptable under the Compact. Intrastate Memorandum Opinion at 4. Thus, Montana does not carry the initial burden. Rather, Wyoming has the initial burden to rebut this presumption.

Compact negotiations, such as commonly understood meanings of particular phrases at particular points in time, and the context within which particular provisions were negotiated. These topics were recognized as appropriate for testimony by the Special Master in his ruling on Wyoming's previous motion to strike Dr. Littlefield's report and exclude his testimony. See Transcript at 11:8-11, Motions Hearing (Aug. 29, 2013) ("08/09/13 Transcript").

Moreover, Dr. Littlefield's testimony regarding the history of Compact negotiations is highly relevant as background to establish a complete record for the Court's consideration. See Fed. R. Evid. 401, Advisory Committee Notes ("The fact to which the evidence is directed need not be in dispute. . . . Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.") As further recognized by the Special Master, Dr. Littlefield's historical insight can be valuable in this proceeding. 08/09/13 Transcript at 10:5-7. For this reason alone, Wyoming's Motion should be denied.

II. Exclusion of Evidence Is Not Warranted in This Original Jurisdiction, Non-Jury Trial

Notably, in the overwhelming majority of circumstances, the exclusion of evidence is warranted only when a jury is sitting as factfinder. See Fed. R. Evid. 104, Advisory Committee Notes, 1972 Proposed Rule (recognizing that "the exclusionary law of evidence" is "the child of the jury system") (internal quotation marks and citation omitted); see also 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2885, at 623 (2012) ("In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence.") This case is not a jury trial. It is an original proceeding before the United States Supreme Court, which has been assigned to a special master for the purpose of creating a complete record and making recommendations to the Supreme Court. Under these

circumstances, excluding evidence would deprive the Court of the complete record necessary to resolve complex and important issues between two sovereign States. Further, there is no danger of misleading a jury, and thereby causing prejudice. The Special Master and the Court are capable of viewing the evidence without being confused or misled. In other words, neither is susceptible to confusion of the issues or persuasion “by illegitimate means.” See 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5215, at 275, 279 (1978) (“‘Prejudice’ is not an inherent feature of the evidence but a description of the way the jury will respond to it.”).

As Special Master Kayatta explained in *Kansas v. Nebraska & Colorado*, discussing the need for pretrial *Daubert* motions:

“[T]he parties were allowed to submit objections to any pre-filed testimony or expert reports. Because there was no jury, I discouraged the filing of so-called *Daubert* motions. Simply put, it made the most sense to hear the expert testimony and to determine whether or not it was relevant and persuasive, thereby mooted any need to make the more refined determination of whether it was so inadequate as to be inadmissible.” Draft Report of the Special Master, at 9 (January 9, 2013).

Special Master Kayatta’s reluctance to entertain *Daubert* motions rested on “the structure of this proceeding and given what would be [his] caution in constructing a record that allows the Court to make an independent judgment, if it should disagree, and not wanting to have a path unnecessarily cut off that would require a remand.” Transcript, Telephone Conference before Special Master William J. Kayatta, Jr., *Kansas v. Nebraska & Colorado*, Orig. No. 126, page and line 63:15-21 (Mar. 23, 2012); see also, e.g., *United States v. State of Wyoming*, 331 U.S. 440, 459-61 (1947) (remanding to allow the special master to take evidence regarding good faith, which had been erroneously excluded). The same circumstances exist here and warrant denial of Wyoming’s Motion.

CONCLUSION

For all of the reasons stated herein, the Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Montana's Response in Opposition to Wyoming's Motion in Limine to Exclude the Report and Testimony of Douglas R. Littlefield, Ph.D. was served electronically, and by U.S. Mail on October 7, 2013, to the following:

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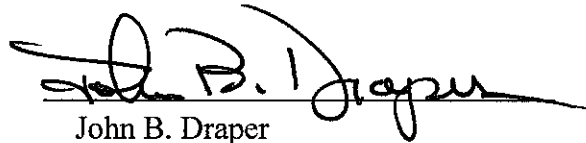
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I further certify that all parties required to be served have been served.


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