

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

**MONTANA'S RESPONSE TO WYOMING'S MOTION IN LIMINE TO
EXCLUDE EVIDENCE OR ARGUMENT THAT THE 1999 TONGUE
RIVER RESERVOIR ENLARGEMENT IS PROTECTED BY ARTICLE V(A)
OF THE YELLOWSTONE RIVER COMPACT**

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The State of Montana hereby responds in opposition to Wyoming's Motion In Limine To Exclude Evidence or Argument that the 1999 Tongue River Reservoir Enlargement Is Protected By Article V(A) of the Yellowstone River Compact ("Motion"). Wyoming argues that Montana should be precluded from introducing evidence or arguing that the expansion of the Tongue River Reservoir ("TRR") capacity in 1999 is protected by Article V(A) of the Yellowstone River Compact ("YRC") because the increased capacity of the TRR did not exist prior to 1950. Therefore, Wyoming maintains that the expansion constitutes a post-1950 water right subject to Article V(B) of the YRC and subject to Wyoming's post-1950 appropriations that pre-date the expansion.

As explained below, Wyoming is seeking to pursue a subject appropriate for a summary judgment motion in the guise of a motion in limine. Further, Wyoming's Motion relates to the priority of the enlargement of Tongue River Reservoir by 6,571 acre-feet. This increased capacity, however, is not involved in this case. The original 72,500 acre-foot capacity of TRR is the only capacity involved because the TRR's shortfall did not exceed 72,500 acre-feet in any year. Therefore, the priority of the capacity added by the 1999 enlargement is irrelevant. Wyoming's Motion is thus misguided and should be denied.

ARGUMENT

First, Wyoming's Motion is procedurally flawed because it improperly seeks summary judgment on a non-evidentiary legal issue involving interpretation of the Northern Cheyenne-Montana Compact ("NCT Compact") and YRC under the guise of a motion in limine. Second, the Motion seeks a legal ruling on an issue that is unnecessary to the resolution of this case.

- 1. Wyoming's Motion Seeks to Resolve Non-Evidentiary Issues That Are Properly the Subject of Dispositive Motions**

Wyoming's Motion effectively seeks a dispositive pretrial ruling on the priority of the 1999 expansion of TRR. As explained below, Wyoming's attempt to seek summary judgment on non-evidentiary issues should be rejected.

The Sixth Circuit Court of Appeals recently considered the propriety of using a motion in limine to resolve non-evidentiary factual and legal issues in *Louzon v. Ford Motor Co.*, 718 F.3d 556 (6th Cir. 2013). The Court explained that a motion in limine serves the limited purpose of addressing evidentiary issues and excluding anticipated prejudicial or inadmissible evidence before the evidence is actually offered. It continued, explaining that a motion for summary judgment, which is subject to procedural safeguards and a particularized analysis, is the mechanism for resolving non-evidentiary issues prior to trial. *Louzon*, 718 F.3d at 561, citing, e.g., *Provident Life & Accident Ins. Co. v. Adie*, 176 F.R.D. 246, 250 (D.Mich.1997) (motion in limine cannot be used as substitute for motion for summary judgment); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069–70 (3d Cir.1990) (motions in limine are not subject to the same procedural safeguards as motions for summary judgment).

The Court rejected Ford's attempt to couch its motion in evidentiary terms, noting that the motion required a ruling on a non-evidentiary legal issue in order to reach the admissibility question: "if these tactics were sufficient, a litigant could raise any matter in limine, as long as he included the duplicative argument that the evidence relating to the matter at issue is irrelevant." *Id.*, at 563. The Court concluded: "Where, as here, the motion in limine is no more than a rephrased summary-judgment motion, the motion should not be considered." *Ibid.*

The motion argues that there is "no real dispute" that the storage capacity of the TRR was 69,400 acre-feet in 1940¹; that there is "no real dispute" that the TRR was enlarged in 1999 to a

¹ Contrary to Wyoming's assertion, the exact capacity of the original Tongue River Reservoir was 72,500 acre-feet. See Expert Rebuttal Report of Gordon Aycock at 5 n.2.

capacity of approximately 79,000 acre-feet; and, therefore, Montana should be precluded from introducing evidence or argument that the 1999 increased capacity is protected by Article V(A) of the Compact “as a matter of law.” Wyoming does not seek a ruling on the admissibility of evidence. Rather, as in *Louzon*, Wyoming seeks a dispositive ruling that the current storage capacity of the TRR is not protected by Article V(A) of the YRC. In doing so, it asks this Court to make a determination regarding the interpretation and legal effect of the NCT Compact and Article V(A) of the YRC as applied to the facts in this case.

2. The Status of Water Stored in the 1999 Enlargement Capacity is Not at Issue

The amount of the 1999 enlargement was 6,571 acre-feet, which is the original capacity of 72,500 acre-feet subtracted from the new total capacity of 79,071 acre-feet. There is no dispute that the capacity before enlargement was precompact. If there is a need to distinguish between filling of that capacity and filling of the incremental enlargement of capacity, the original capacity is filled first. This is the way the operations of reservoirs have been analyzed by both States.

Thus, when a reservoir in Wyoming with both precompact and postcompact capacity is filled, the precompact capacity is filled first and then the postcompact capacity. Likewise, when stored water is released, the precompact water is released first and then the postcompact water is released. If this agreed methodology is applied to Tongue River Reservoir, the part that is filled first is the original capacity, and then the enlarged incremental capacity is filled. Similarly, the first water released is from the original capacity, and the need to refill the reservoir amounts to refilling the original capacity unless the reservoir is drawn down to below 6,571 acre-feet of total storage. The reservoir has not been drawn down that low in the years in question. Therefore, the priority associated with the 6,571 acre-feet of incrementally enlarged capacity is not at issue in

this case. If it were an issue, it would raise serious concerns regarding the absence of indispensable parties. *Cf.* Trans. of Hearing on Summary Judgment Motions, August 29, 2013, at 213-216. Consequently, Wyoming's Motion should not be granted.

CONCLUSION

For the reasons stated above, the Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Montana's Response to Wyoming's Motion in Limine to Exclude Evidence or Argument That the 1999 Tongue River Reservoir Enlargement Is Protected By Article V(A) of the Yellowstone River Compact was served electronically, and by U.S. Mail on October 7, 2013, to the following:

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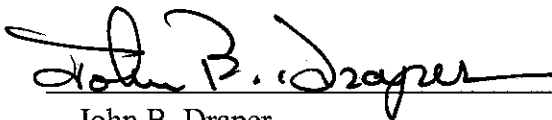
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I further certify that all parties required to be served have been served.


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