



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

July 24, 2009

Honorable Barton H. Thompson, Jr.
Special Master
Jerry Yang & Akiko Yamazaki
Environment & Energy Building, MC-4205
473 Via Ortega
Stanford, CA 94305-4205

Re: Montana v. Wyoming, No. 137, Original

Dear Special Master Thompson:

The United States respectfully submits this letter brief pursuant to Case Management Order No. 2.

1. Interstate Tributaries

Wyoming has requested that the Special Master exclude the final paragraph of section III.C.2 on pages 29-30 of the Memorandum Opinion. It argues that although the Special Master asked at oral argument whether the meaning of "Interstate Tributaries" was still an issue to be resolved, and received an affirmative response, the issue should not be resolved at this juncture. Wyoming argues that further briefing and factual development would be appropriate before this issue is decided. Wyo. Letter Br. 4-5.

The Supreme Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented," and to that end will dispose of antecedent legal questions at the earliest stage "feasible." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). Accordingly, part of a Special Master's role is to focus the proceedings by narrowing the issues in dispute, to the extent feasible. See U.S. Invitation Br. 17-19. The scope of the Compact term "Interstate Tributaries" is one of those issues that should be resolved at an early stage, before discovery commences. The United States does not agree with Wyoming's suggestion (Wyo. Letter Br. 4) that "factual development" would be needed before resolution of this legal issue, which turns on normal tools of Compact interpretation, see U.S. Invitation Br. 17-18.

Wyoming appears to be correct, however, that resolution of this issue is not strictly necessary to the disposition of the Motion to Dismiss: Montana's allegations do not specify particular reservoirs, and Wyoming has informed the Court that there are at least some post-January 1, 1950 reservoirs on the mainstems of the two rivers at issue. Wyo. Br. in Opp. 22.

So long as the issue is resolved at an appropriately early juncture, the United States takes no position on whether the First Interim Report should resolve this issue (following further briefing if necessary) or whether that First Report should instead be confined to resolution of the Motion to Dismiss. If the latter, the United States would urge that the tributaries issue be resolved as soon as practicable in a subsequent Interim Report.

To the extent the Special Master deems the issue to be properly raised, the United States substantially agrees with the Memorandum Opinion's interpretation of the Compact. Cf. U.S. Br. 26.

2. Depletion Principle

The United States has previously stated that it agrees with Wyoming that the Compact drafters rejected a "depletion" theory. U.S. Br. 19-20, 29-30. The Memorandum Opinion's conclusions are consistent with that reading of the compact. While Wyoming requests that the Special Master expressly recommend that Montana's reliance on such a theory be "dismissed," Wyo. Letter Br. 3, that additional step appears unnecessary: Montana has not pleaded a distinct claim for relief based on any such theory, and to the extent that such a theory underlies one of Montana's "alternative factual bases for its claim," Memorandum Opinion 2, the Special Master has recommended dismissal of that alternative pleading.

Montana renews its reliance on the depletion principle and adds some contentions not previously raised. To the extent that Montana's arguments are properly within the scope of the letter briefing requested by the Special Master, the United States does not agree that modifications to the Memorandum Opinion are warranted.

a. Montana's analogy to the Arkansas River Compact at issue in *Kansas v. Colorado*, 514 U.S. 673 (1995), is inapposite. See Mont. Letter Br. 14-15.

The Arkansas River Compact between Colorado and Kansas is clearly based upon depletion principles: while allowing for future development, it provides "[t]hat the waters of the Arkansas river * * * shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction." Arkansas River Compact Art. IV-D, 63 Stat. 147. Tracking of depletions and Compact compliance is accomplished through a complex computer model that predicts diversions on a daily time step and return flows on a monthly basis while making assumptions about usability of flows on only a seasonal basis. See 2 Fifth and Final Report of the Special Master at 2-4, *Kansas v. Colorado*, 129 S. Ct. 1294 (2009) (No. 105, Original); 3 *id.* at 22-58, 209-211.

The Yellowstone Compact, by contrast, did not adopt a nondepletion principle that guaranteed a certain amount of water for Montana's first-tier rights as against Wyoming's first-tier rights. U.S. Br. 19-20, 29-30. And the Yellowstone Compact did not provide for day-to-day analysis and accounting of water rights in the first tier (or any other tier, see U.S. Br. 12-13). Rather, the

Compact guaranteed only that Montana's first-tier rights would not be infringed by Wyoming's second- or third-tier rights. See U.S. Br. 18.

Because the Yellowstone Compact is structurally and procedurally different from the Arkansas River Compact, Montana's analogy is not persuasive.

b. Wyoming argued in its brief supporting the Motion to Dismiss that the common-law doctrine of prior appropriation supported its position that more efficient irrigation of existing acreage does not violate the Compact. Wyo. Br. 56-57. In its responsive brief, Montana contended that *any* depletion of the water supply delivered to Montana, including an increasingly consumptive use, violates the Compact. Mont. Br. 47-49. The Special Master's conclusion that Article V(A) of the Compact incorporates the law of prior appropriation, not a depletion principle writ large, necessarily rejected Montana's argument on that point. See Memorandum Opinion 21, 39-40.

In its letter brief, Montana now argues that, under the doctrine of prior appropriation, downstream users are entitled to protection against changes in methods of irrigation that result in decreased return flows to the stream. As the United States has previously noted, the most relevant "laws governing the acquisition and use of water under the doctrine of appropriation" are the "laws" of each respective signatory State. U.S. Br. 30. The Special Master saw no divergence between the laws of the two States. See Memorandum Opinion 27-28, 40. Montana does not allege such a conflict; rather, although it focuses on its own law, it contends that Wyoming law is in accord. Mont. Letter Br. 1.

In the United States' view, the state-law discussion in Montana's letter brief does not detract from the Special Master's conclusion that the Compact does not limit use rights based on return flows. The most apposite precedent remains the statement in *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957), that:

No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation [sic] to the river, no other appropriator can complain.

Id. at 601.

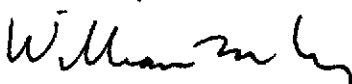
The issue is whether an appropriator irrigating on a specified parcel can change the method of irrigation, consume more of the diverted irrigation water on that parcel, and allow less to escape. Under those circumstances, an appropriator is not changing the actual use that defines the water right. Nor is he changing the point of diversion, place of use, or type of use in a way that implicates the no-injury rule. Similarly, the decisions cited by Montana pertaining to the appropriation of water

once it escapes, whether as seepage or return flow, are inapposite because they do not relate to the volume of water actually being put to the initial use.

Respectfully submitted,

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