

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 TO STRIKE THE REPORT AND EXCLUDE THE TESTIMONY OF
DOUGLAS R. LITTLEFIELD, PH.D.

GREGORY A. PHILLIPS
Attorney General of Wyoming

PETER K. MICHAEL*
Chief Deputy Attorney General

JAY JERDE
Deputy Attorney General
JAMES KASTE
Senior Assistant Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
DAVID J. WILLMS
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, pursuant to Section VII C. 3(c) of Case Management Plan No. 1, as modified by subsequent orders, and hereby moves this Court to strike the expert report and exclude the testimony of Douglas R. Littlefield, Ph.D., on the grounds that his testimony consists of legal conclusions on ultimate issues of law. In support of this motion Wyoming offers the following:¹

Mr. Littlefield is a historian who was retained by Montana to render opinions on the *meaning* of the Yellowstone River Compact. (Rebuttal Report at 1-5). In short, he opines that the compacting states "meant for pre-Compact water rights in use as of January 1, 1950, to be defined, administered, and managed by each state in accordance with its laws and practices, and the Compact was not meant to impose any particular form of administration of pre-Compact rights as a prerequisite for a state to enjoy its Compact Rights." *Id.* at 5. After offering this opinion on the meaning of the Compact he states that the opinions of Wyoming's expert, Mr. Bern Hinckley, regarding Montana's wasteful operational decisions at the Tongue River Reservoir for uses that are not recognized beneficial uses under the Compact² must be incorrect as they do not acknowledge that Montana law controls. *Id.* at 36.

¹ Counsel for Wyoming and Montana conferred about this motion but were unable to resolve their dispute.

² The Court has decided that a " 'beneficial use' within the meaning of the Compact, therefore, is a type of use that depletes the water supply." *Montana v. Wyoming*, 563 U.S. ---, 131 S.Ct. 1765, 1778 (2011). Accordingly, Montana's discretionary decisions to forego the opportunity to store significant quantities of water for non-depletive purposes are not recognized beneficial uses for Compact purposes regardless of the laws of either state.

As an initial matter, Mr. Littlefield is plainly wrong and this issue has already been decided. The First Interim Report of the Special Master specifically provides:

Article V(A) does not provide for the use of water under the "laws of the separate states," as the 1935 Draft Compact did. *See* 1935 Draft Compact, *supra*, Art. V(a), Joint App. at 278. Instead, Article V(A) of the final Compact refers generically to "the laws governing the acquisition and use of water under the doctrine of appropriation," suggesting that the Compact incorporates a general concept of appropriation law rather than the law of any specific state. The analysis that follows therefore looks first but not exclusively to the laws of Montana and Wyoming, and also includes an examination of (1) relevant decisions of the United States Supreme Court regarding the appropriation doctrine, and (2) general practice in applying appropriation law in other western states.

First Interim Report of the Special Master at 39.

More importantly for purposes of this motion, however, his legal opinion is not admissible expert testimony. It is well established that the only legal expert in a federal courtroom is the judge, and therefore, testimony involving pure questions of law is not admissible. *See, e.g.*, Fed. R. Evid. 704 advisory committee note (Federal Rules of Evidence "stand ready to exclude opinions phrased in terms of inadequately explored legal criteria."); *Sun Yung Lee v. Claredon*, 453 Fed.App. 270, 278 (4th Cir. 2011) ("While expert witnesses may testify as to the ultimate matter at issue, Fed. R. Evid. 704(a), this refers to testimony on ultimate facts; testimony on ultimate questions of law, i.e., legal opinions or conclusions, is not favored."); *United States v. Jennings*, 348 Fed. App. 165, 166 (7th Cir. 2009) ("Interpreting a statute is a legal question for the court, not a fact issue on which expert testimony is appropriate"); *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008) ("The only legal expert in a federal courtroom is the judge."); *Anderson v. Suiters*, 499 F.3d 1228, 1237 (10th Cir. 2007) ("While expert witnesses may

testify as to the ultimate matter at issue, Fed. R. Evid. 704(a), this refers to testimony on ultimate facts; testimony on ultimate questions of law, i.e., legal opinions or conclusions, is not favored"); *United States v. Leo*, 941 F.2d 181, 196-97 (3rd Cir. 1991) (district court must limit expert testimony so as to not allow the expert to offer opinion on "what the law required" or "testify as to the governing law").

Mr. Littlefield's proffered expert testimony, while cloaked in an interesting but at this point largely irrelevant discussion of the historical evolution of the Compact, is no more than an erroneous legal conclusion, and it should be excluded from these proceedings.

WHEREFORE the State of Wyoming requests that the Court strike the expert report and exclude the testimony of Mr. Littlefield from these proceedings.

Dated this 10th day of June, 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 Motion to Strike the Report and Exclude the Testimony of Douglas Littlefield was served by electronic mail and by placing the same in the United States mail, postage paid, this 10th day of June, 2013.

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

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

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

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

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

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

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

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