

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

REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE THE REPORT
AND TESTIMONY OF DOUGLAS R. LITTLEFIELD, PH.D.

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The State of Wyoming hereby submits the following reply in support of its motion in limine for an order excluding the testimony and report of Douglas R. Littlefield, Ph.D., on the grounds that if his testimony was ever relevant, it no longer is, and the presentation of this evidence would be a waste of time.

In the main, Wyoming relies on its original motion and its *Reply in Support of Motions In Limine to Exclude Scientific Literature and Affidavits* submitted concurrently herewith, but writes separately here to address a fundamental misunderstanding expressed in footnote one of Montana's response. The trial of this breach of contract case is limited to the following considerations: (1) Montana must show that its pre-1950 appropriations were unsatisfied at specific times; (2) that at those specific times Montana engaged in intrastate regulation sufficient to ensure that no post-1950 appropriations in Montana were receiving water; (3) that Montana then placed a call on Wyoming for regulation; (4) that Wyoming appropriators continued to divert water under post-1950 appropriations after the call was made; and (5) that these diversions in Wyoming caused harm to Montana's pre-1950 appropriations. Obviously, the burden of proof lies with Montana on each of the essential elements of its claim for breach of contract, and Dr. Littlefield's proposed testimony has no bearing on any of these inquiries.

Montana asserts in footnote one that the Court can presume that its administration and regulation of water rights is acceptable under the Compact. Even if this were true, and not a strained interpretation of the dicta in the memorandum opinion, it misses the salient point. Compatibility with the Compact is not the same inquiry as whether Montana has shown all of the essential elements of its breach of contract claim. Montana

has the burden to show as a matter of fact, at the times in issue, that its post-1950 appropriators were not receiving water and would not be the recipients of water generated by regulation of post-1950 appropriations in Wyoming. This factual inquiry cannot be answered by reference to a nonexistent evidentiary preference on a wholly unrelated issue. Montana's repeated attempts to shift the burden of proving its case onto Wyoming are growing tiresome, and should be definitively rejected at the earliest possible moment.

WHEREFORE the State of Wyoming requests that the Court enter an order excluding the testimony and report of Douglas R. Littlefield, Ph.D., from the trial of this matter.

Dated this 8th day of October, 2013.

Respectfully submitted,

THE STATE OF WYOMING



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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 8th day of October , 2013.

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