

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

DEPOSITION OF CHUCK DALBY

Helena, Montana  
January 29, 2013  
8:52 a.m. - 5:02 p.m.

APPEARANCES:

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Water & Natural Resources Division  
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By: DAVID WILLMS  
ANDREW KUHLMANN

ATTORNEYS FOR THE DEFENDANT STATE OF WYOMING.

ALSO PRESENT: Anne Yates, DNRC

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1 BE IT REMEMBERED that on January 29, 2013, at the  
2 hour of 8:52 a.m. - of said day, at the offices of the  
3 Department of Natural Resources and Conservation,  
4 1424-9th Avenue, Helena, Montana, and before Lisa Lewis  
5 Devine, Court Reporter and Notary Public for the State of  
6 Montana, pursuant to Notice, the deposition of CHUCK DALBY  
7 was taken on oral interrogatories.

8  
9 Thereupon,

10 CHUCK DALBY,  
11 having been first duly sworn to tell the truth, the whole  
12 truth and nothing but the truth, testified upon his oath as  
13 follows:

14  
15 EXAMINATION BY MR. WILLMS:

16 Q Would you please state your full name for the  
17 record.

18 A My full name is Charles Elliott Dalby.

19 Q Thank you for coming in today. I'm going to hand  
20 you what will be marked as Deposition Exhibit 180.

21 (Deposition Exhibit No. 180 marked for  
22 identification.)

23 Q (BY MR. WILLMS) Have you seen this document?

24 A Yes.

25 Q And this is the notice of deposition duces tecum

1 report completed?

2 A A draft report was prepared in house, and a final  
3 was never completed. Rich and I and Gary had -- did not  
4 agree on all the conclusions, the tentative conclusions,  
5 and we never finalized the report.

6 Q When you say that the two issues were addressed,  
7 is that what you mean, they were addressed in that draft  
8 report?

9 A That's correct.

10 (Deposition Exhibit No. 195 marked for  
11 identification.)

12 MR. WILLMS: In front of you is Deposition  
13 Exhibit 195, which is a draft report entitled "The  
14 Yellowstone River Compact in the 1990's: Historic and  
15 Contemporary Water Uses in the Yellowstone River Basin and  
16 Need to Administer the Yellowstone River Compact," prepared  
17 by Chuck Dalby. Is this the draft report you're referring  
18 to?

19 THE WITNESS: It is.

20 MR. WILLMS: We're probably going to spend a  
21 little time on that report, so this is probably a good time  
22 to take a little break.

23 MR. DRAPER: Okay, sounds good to me.

24 (Whereupon, a recess was taken at 4:00 p.m. to  
25 4:15 p.m.)

1 Q (BY MR. WILLMS) Before we went on the break, we  
2 were just starting to look at this report. You'd mentioned  
3 that this was the report that you were referring to in  
4 Exhibit 194. Do you recall who asked you to prepare this  
5 report?

6 A Yes, Gary Fritz.

7 Q And why were you asked to prepare this report?

8 A The department had just spent a little more than  
9 over 10 years of dedicated management of the staff time  
10 attempting to work with Wyoming and secure, I guess, a  
11 consensus interpretation of the compact and means to  
12 administer the compact, and we felt that we had made very  
13 little progress, and at the same time there were other  
14 competing natural-resource issues in the state which  
15 required attention.

16 So the thinking was to have me do an analysis and  
17 basically see if all the time we're putting into this is  
18 worth it, are we in fact being harmed by lack of compact  
19 administration. So that was the mission.

20 Q What did you conclude?

21 A I don't recall the specific conclusions. It's  
22 been, I guess, a little over 20 years since this work was  
23 done. So I would have to --

24 Q Sure.

25 A I would have to look.

1 Q You had mentioned that you and Gary Fritz and  
2 Rich Moy didn't agree on the conclusions from the report?

3 A Right. And the -- the primary -- their primary  
4 concern, in fact it was a concern of mine at the time, is  
5 that the -- in the early 1990s, the availability of good,  
6 solid information, you know, whether it was appropriate  
7 stream-flow data at right points in the basin or good,  
8 accurate information on irrigated acreage, that those data  
9 limitations limited the ability of the analysis to answer  
10 the questions. A second disagreement we had concerned the  
11 role of water quality in water administration of the  
12 compact.

13 Q What was it about the availability of information  
14 that limited your analysis? In what way did it limit your  
15 analysis?

16 A I think one -- probably the best example is that  
17 in the early 1990s, not quite, but basically, you know,  
18 ten years before geographic information systems, GIS,  
19 became available and aerial photography and satellite  
20 imagery was routinely available for analysis, it was almost  
21 impossible to get -- even if the total amount of irrigated  
22 acreage in a basin is correct, to get that spatially  
23 located and distributed around the basin, you know, we just  
24 couldn't do that, as compared to now days.

25 So you're left with making some fairly gross

1 comparisons at a large scale with irrigated acreage and  
2 looking at things, you know, on an annual or maybe, you  
3 know, seasonal quarterly-type basis in terms of effects,  
4 and it just doesn't -- it doesn't provide the temporal  
5 resolution you need, you know, to really answer the  
6 questions we set out to answer.

7 Q I should probably -- just for purposes of the  
8 record, the document I gave you, I had removed a number of  
9 the graphs and charts on the back of the report, so it's --  
10 it's the text of the report, and the very last page starts  
11 the figures --

12 A Starts the figures.

13 Q -- and the graphs and stuff. I wanted to make  
14 that clear for the record.

15 I'll have you turn to Page 35 of your report --  
16 draft report here, which is marked as Bates MT-10997,  
17 looking specifically at the section entitled "Tongue River  
18 Water Allocation Methodology." I'll give you a minute to  
19 review that.

20 A Okay.

21 Q That section, it carries over onto the next page.

22 A Okay.

23 Q First of all, the first sentence under that  
24 section, "Tongue River Water Allocation Methodology," says,  
25 "Administration of post-1950 uses of water via Article V of

1 the Yellowstone River Compact is not in need in the Tongue  
2 River basin." Do you recall what you meant by that  
3 statement?

4 A I think it was based on the fact that at that  
5 time there had been little post-'50 development in Montana  
6 based on the period of record of stream flow analyzed, and  
7 the best estimate that I had of irrigated acreage in each  
8 state, it did not appear that we would have been harmed,  
9 that we would have been -- would have encountered  
10 water-shortage conditions relative to post-'50 uses, except  
11 perhaps in very dry years, and the same was the conclusion,  
12 I believe, with pre-'50 uses, although, you know,  
13 recognizing limitations of the data.

14 Q On the top of the next page, that first line,  
15 which is a continuation of the sentence from the prior  
16 page, it says, "Wyoming and Montana developed a consensus  
17 interpretation of Article V that was used in the Tongue  
18 River Water Allocation Model...this understanding was  
19 recently formalized by a Memorandum of Understanding  
20 between the two states..."

21 First of all, do you recall what that consensus  
22 interpretation of Article V was for the Tongue River?

23 A I don't.

24 Q And do you know what memorandum of understanding  
25 is -- you're referring to there that was finalized by the

1 the Yellowstone River Compact in the 1990's." Have you  
2 seen this document before?

3 A I'm thinking it was -- I guess there's some  
4 overlap. Boy, I'm not sure what the origin of this is.  
5 There appears to be text which is out of this report,  
6 MT-109959, but other writing in here doesn't appear to be  
7 mine. (Indicating.)

8 Q Do you know which writing in there doesn't appear  
9 to be yours?

10 A Actually, it's long enough ago that I -- it just  
11 -- when I looked through it quickly, some of it seems  
12 unfamiliar, and some of it seems familiar. It's not a  
13 precise demarkation.

14 Q Okay.

15 (Deposition Exhibit No. 197 marked for  
16 identification.)

17 Q (BY MR. WILLMS) In front of you is Deposition  
18 Exhibit 197. It's a memo from you, Chuck Dalby, to  
19 Larry Marshall, product manager, Engineering Bureau --

20 A Uh-huh.

21 Q -- dated February 24th, 1989 regarding  
22 Yellowstone River Compact status, Tongue River. Who's  
23 Larry Marshall?

24 A Let's see. Larry Marshall was an engineer in  
25 State Water Projects Bureau in the late 1980s.

1 two states?

2 A I don't.

3 Q The next -- the rest of that section talks about  
4 the consensus interpretation, and the first bullet point  
5 there says, "Each --" the second sentence: "Each state  
6 agreed to treat additional uses of water between 1950 and  
7 1980 as existing supplemental uses of water. This has the  
8 effect of allocating only post-1980 water under Article V."  
9 Do you recall -- does that help you recall the agreement?

10 A I believe that at the time this was written that  
11 the MOU may have either been in progress or have just been  
12 -- just been finalized. I don't remember the memorandum of  
13 understanding in particular, but I know that in order for  
14 the consultants to develop the model, the states had to  
15 reach a consensus on these -- on these three -- these three  
16 issues.

17 Q When you're talking about the model there, is  
18 that referring to the model we were talking about earlier  
19 that was part of the environmental impact statement?

20 A Correct. It's the Tongue River allocation model  
21 which was done by GRI.

22 (Deposition Exhibit No. 196 marked for  
23 identification.)

24 Q (BY MR. WILLMS) You have in front of you what's  
25 marked as Deposition Exhibit 196, "Montana's Perspective on

1 Q Do you know if he did any work in the Tongue  
2 River basin?

3 A I don't.

4 Q Do you recall why you sent this memo to Larry  
5 Marshall? And you can take a minute to review it if you  
6 need to.

7 A It's likely that Larry, working in the  
8 Engineering Bureau, would have requested -- would have been  
9 involved with the Tongue River project and requested an  
10 update on the compact.

11 Q In the third paragraph of that memo, there's a  
12 sentence that starts "In addition to..."

13 A Yes.

14 Q "In addition to an evaluation of flow allocation  
15 models, the report will examine pre- and post-1950 water  
16 uses in the Tongue River basin." Is this the report you  
17 were talking about earlier that never --

18 A Yeah. It's Deposition Exhibit 195.

19 Q So it's not referring to the earlier Deposition  
20 Exhibit 191, the Yellowstone River Compact work plan?

21 A No. Nope.

22 Q Are you familiar with Montana Statute 85-20-105?  
23 I don't have a copy in front of me. That's why I'm going  
24 to try to represent to you what it -- what it's saying. It  
25 requires every new appropriate right acquired subsequent

CERTIFICATE OF WITNESS

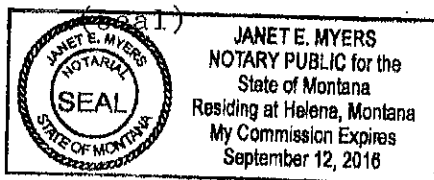
PAGE	LINE		CORRECTION
17	15	strike	" <del>or not 1950, it</del> "
66	10	strike	"17"
118	9	strike	"of the" substitute "AND"
119	24	strike	"days"
127	23	spell	"Bawder" is spelled "BAWder"
131	19	"	SAME

I hereby certify that this is a true and correct copy of my testimony, together with any changes I have made on this and any subsequent pages attached hereto.

Dated on this the 21<sup>st</sup> day of March 2013.

*Chuck Dalby*

CHUCK DALBY, Deponent.



*Janet E. Myers*

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Q And that's what you mean by "standing up for rights under the compact"?

A Yes.

MR. WILLMS: No more questions.

MR. DRAPER: Okay, I think that will do it.

WITNESS EXCUSED

\* \* \*

CERTIFICATE OF REPORTER

STATE OF MONTANA )

) ss.

County of Lewis & Clark )

I, Lisa Lewis Devine, Court Reporter and Notary Public for the State of Montana, residing in Great Falls, Montana, do hereby certify:

That I was duly authorized to and did report the deposition of CHUCK DALBY in the above-entitled cause;

That the reading and signing of the deposition by the witness have been expressly reserved;

That the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this the 9th day of February 2013.

\_\_\_\_\_  
Lisa Lewis Devine

CERTIFICATE OF WITNESS

PAGE LINE CORRECTION

I hereby certify that this is a true and correct copy of my testimony, together with any changes I have made on this and any subsequent pages attached hereto.

Dated on this the \_\_\_\_ day of \_\_\_\_\_ 2013.

\_\_\_\_\_  
CHUCK DALBY, Deponent.