U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

July 27, 2011

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, as amicus curiae, respectfully submits this letter brief pursuant to paragraph 1 of Case Management Order No. 7.

Montana has recently renewed its contention that Wyoming's delivery obligation "is a stateline delivery requirement that varies only with water supply conditions." Mont. 6/28/2011 Letter at 3. The United States does not agree with that contention.

1. In his initial decision addressing the scope of the Yellowstone River Compact and the issues raised by Wyoming's motion to dismiss, the Special Master stated that the Compact does not require Wyoming "to deliver a specific fixed quantity of water to its border with Montana," as other compacts such as the Colorado River Compact do. 6/2/2009 Mem. Op. at 20.

Wyoming then requested that the Special Master expressly state that he was granting the motion to dismiss with respect to any reliance by Montana on a "depletion" theory of compact administration. In his Supplemental Opinion, the Special Master rejected that request as unnecessary. He reiterated that Wyoming has no fixed stateline delivery obligation and observed that that conclusion, along with all others made at the motion-to-dismiss stage, would "inform all further proceedings in this action, except to the extent that the United States Supreme Court modifies them in any future decisions or opinions in this case." 9/4/2009 Supp. Op. at 30.

Accordingly, the Special Master's First Interim Report repeated the explanation that Wyoming is not required to deliver a specific quantity of water to the state line. First Interim Report at 28. Furthermore, the First Interim Report proceeded from that premise in rejecting Montana's theory that Wyoming had violated the Compact by increasing the efficiency of pre-1950 water uses. See, *e.g.*, *id.* at 64 (observing that the Compact did not apportion water based on consumptive use in each State); *id.* at 88 (explaining that even requiring Wyoming to deliver a particular quantity of

water at the state line, as Montana requested, would require Wyoming to engage in complex administration of use and consumption by pre-1950 appropriators).

2. In its exceptions to the First Interim Report, Montana emphasized its view that the Compact must award Montana a particular quantity of water, rather than a form of priority for its pre-1950 users over post-1950 users upstream in Wyoming. Montana argued that actions by individual water users in Wyoming cannot change the amount of water that Montana is entitled to receive under the Compact. See, *e.g.*, Mont. Exception Br. at 9 (arguing that Wyoming must "deliver at the state line a block of water sufficient under the stream conditions then in existence to satisfy Montana's pre-1950 rights"); *id.* at 13-16, 20, 26. Thus, Montana argued, the Compact overrides any right to improve efficiency that pre-1950 users in Wyoming had under the doctrine of appropriation.

The Supreme Court squarely rejected Montana's contention as "simply unpersuasive." *Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011). The Court understood that Montana was "assert[ing] that the Compact requires (subject to river conditions) that the same quantity of water that was reaching Montana as of January 1, 1950, continue to do so." *Id.* at 1778. But, the Court held, nothing in Article V(A) of the Compact overrode basic concepts of beneficial use; Montana could not show any entitlement to a particular quantity of water that would supersede pre-1950 users' existing rights under the doctrine of appropriation. *Id.* at 1778-1779 (citation omitted). And "if Article V(A) were intended to guarantee Montana a set quantity of water, it could have done so as plainly as other compacts that do just that." *Id.* at 1779.

By separate orders, the Supreme Court sustained the portions of the First Interim Report to which no party excepted. See *Montana v. Wyoming*, 131 S. Ct. 442 (2010); *Montana v. Wyoming*, 131 S. Ct. 497 (2010).

3. In light of the Supreme Court's ruling, Montana can no longer argue that the Compact entitles it to receive a particular quantity of water. Rather, as the Special Master has explained, what the Compact protects is Montana's right to insist that its pre-1950 users be satisfied before any water is diverted by post-1950 users in Wyoming. The Supreme Court has recommitted to the Special Master the question whether Wyoming would be in breach if pre-1950 Montana users were short of water but could get water through intrastate remedies against junior users in Montana. See 131 S. Ct. 497 (2010); Mont. Exception Br. 37-40. That issue, however, has nothing to do with whether Montana is entitled to a particular quantity of water even if all its pre-1950 users are *satisfied.*

Consistent with the Supreme Court's longstanding principles for handing original actions, the United States has consistently recommended that legal questions like this one be resolved at the earliest possible stage, to narrow and focus the dispute between the States before the case proceeds to discovery and summary judgment or trial. See, *e.g.*, U.S. Invitation Br. at 15-19; *Ohio* v. *Kentucky*, 410 U.S. 641, 644 ("[I]n original cases," the Court will, "where feasible, . . . dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear."). The Special Master accordingly took pains to entertain all possible arguments about the basic interpretation of the Compact bearing on the motion to dismiss, including

an opportunity to re-brief some issues. See 9/4/2009 Supp. Op. at 3 n.2. The First Interim Report addressed all the issues raised by the motion to dismiss (as well as two other motions), because those issues were "critical to an ultimate decision in this matter" and should be resolved before the litigation proceeds further so as to "limit and frame the future proceedings, including discovery." First Interim Report at 2. And the Supreme Court has now finally resolved those issues.

Furthermore, although the Court decided the issue in the context of Montana's increased-efficiencies theory, that is because Montana's exception pertained only to that theory. See Mont. Exception 1. But the Special Master's rejection of the notion that Montana is entitled to a block of water at the state line was not limited to that theory. Thus, the argument Montana now seeks to make is foreclosed either by the Court's decision to overrule Montana's exception or by Montana's failure to except to the First Interim Report more broadly.

"Although [the Supreme Court has] been reluctant to import wholesale law-of-the-case principles into original actions, prior rulings in such cases 'should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.'" *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) (quoting *Arizona* v. *California*, 460 U.S. 605, 619 (1983)). To warrant reconsideration of this issue, Montana must identify why some recognized exception to the general principles of finality and repose should apply here. To date, Montana has not done so.

Respectfully submitted,

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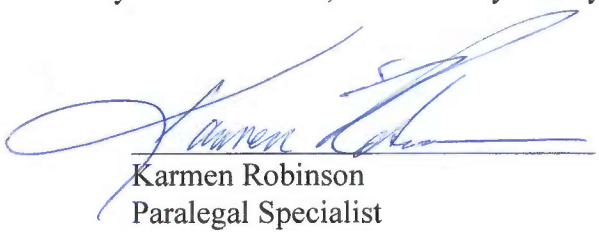
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the United States, **Letter Brief Regarding Wyoming's Compact Obligation**, Case No. 137, Original, was duly served upon the following parties by electronic mail and by first-class mail, this 27th day of July 2011, as follows:



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