

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

WYOMING'S FINAL PRETRIAL MEMORANDUM

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Pursuant to Case Management Order No. 11, the State of Wyoming offers the following final pretrial memorandum:

JURISDICTION, PARTIES, VENUE, AND PLEADINGS

The Court originally exercised jurisdiction over this matter pursuant to Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251, however, Wyoming contends that this case no longer meets the standards for the discretionary exercise of the Court's original jurisdiction. All necessary parties are present, Wyoming does not contest venue, and Wyoming does not currently contemplate any further amendments to the pleadings.

GENERAL NATURE OF THE CLAIMS

This is a breach of contract case, in which Montana claims that Wyoming breached the Yellowstone River Compact by using water under post-1950 appropriations at times when Montana's pre-1950 appropriations went unsatisfied. Montana claims that whenever the water flowing in the Tongue River at the state line reached certain levels, Wyoming was obligated to curtail its post-1950 diversions, and that Wyoming failed to do so in all but three years since 1961. Montana also claims that whenever the Tongue River Reservoir does not fill to its enlarged capacity, Wyoming is obligated to curtail its post-1950 diversions and release any water stored under a post-1950 priority date, regardless of how Montana operates the Tongue River Reservoir. Finally, Montana claims that coal bed methane production in Wyoming impacts the Tongue River at the state line, and when the reservoir did not fill or state line flows are insufficient, Montana is entitled to be compensated for the impacts of that groundwater production.

Wyoming contends that to prove a breach of the Compact, Montana must show that its pre-1950 appropriations were unsatisfied at specific times, that at those specific times Montana engaged in intrastate regulation sufficient to ensure that no post-1950 appropriations in Montana were receiving water, that Montana then placed a call on Wyoming for regulation, and that Wyoming appropriators continued to divert water under post-1950 appropriations after the call was made to the detriment of Montana's pre-1950 appropriations.¹ Wyoming contends that Montana cannot show any of these necessary prerequisites to liability in any year. With regard to Tongue River Reservoir, Wyoming further contends that Montana cannot call on Wyoming to fill the 1999 enlargement, and Montana must store all available water except that which is necessary to satisfy downstream senior water rights. To the extent Montana fails to store all available water, those amounts must be treated as if they were stored for purposes of determining whether the reservoir filled to its pre-1950 capacity. With regard to coal-bed methane production, Wyoming contends that there is no discernible impact from that production on the Tongue River, and even if there is a discernible impact, it is de minimus and not covered by the Compact. Finally, Wyoming contends that during the specific times at issue, Montana was wasting significant quantities of water, and this waste precludes any judgment in favor of Montana.

¹ While this is breach of contract case, the parties contractual obligations are established by the laws governing the doctrine of appropriation, which necessarily imports certain tort concepts into the determination of breach, most notably causation and injury. *See, e.g., Kerbs v. Walck*, 229 P.3d 974, 977 (Wyo. 2010) (acknowledging that claims for wrongful interference with water rights state a claim in tort). Thus, where Montana makes no attempt to prove the necessary elements of causation or injury, such as in the years 1987 through 1989, 2000, and 2003, it cannot prove that a breach occurred.

CONTESTED ISSUES OF FACT

1. Did Montana make calls on Wyoming in years other than 2004 and 2006, and if so, when were the calls made?²
2. During the nine years that remain in issue, when, if ever, were Montana pre-1950 appropriations unsatisfied?
3. During periods, if any exist during these nine years, where Montana pre-1950 appropriations were unsatisfied, did Montana engage in appropriate intrastate regulation of all of its post-1950 appropriations, including its coal bed methane wells, before it made a call on Wyoming?
4. During the nine years in issue, were post-1950 appropriations in Wyoming diverting water at times when Montana pre-1950 appropriations were going unsatisfied, after Montana had fulfilled its intrastate regulatory obligation, and after Montana made a valid call on Wyoming?

² While Wyoming specifically relied on prior rulings granting partial summary judgment to Wyoming for all but nine years when it conducted discovery in this matter, it now appears that Montana seeks to present evidence related to all years between 1961 and 2006. Wyoming would be materially prejudiced by this change and objects to the presentation of any evidence by Montana related to years other than those that survived the initial summary judgment proceedings (1987 through 1989, 2000 through 2004 and 2006). In the absence of a call, there can be no breach, and the Special Master previously concluded that "[f]or all other years, [] Wyoming is entitled to partial summary judgment precluding Montana from claiming damages *or other relief* for violations of Article V(A)." *See, e.g.*, Mem. Op. Regarding Wy. Mot. for Part. Sum. Judg. (MT's Supp. Evid.) at 2 (emphasis added). Accordingly, only evidence related to these nine years should be admitted in these proceedings, and Wyoming should not have to file a subsequent motion to obtain relief previously awarded.

5. During the nine years in issue, at the specific times in issue, did any failure to curtail post-1950 diversions in Wyoming harm unsatisfied pre-1950 appropriations in Montana?

6. Is there a discernible impact from coal bed methane production in Wyoming and Montana on the Tongue River?

7. During or preceding the periods in issue, did Montana waste water and/or fail to mitigate the effects of post-1950 use in Wyoming?³

CONTESTED ISSUES OF LAW

It does not appear to be contested that breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract. *See* 23 *Williston on Contracts* § 63:1 (4th ed.). Similarly, it would seem beyond dispute that "[t]he party alleging the breach has the burden of proof on all of its breach of contract claims." *Id.* § 63:14. And that "[a] party seeking to enforce a contract containing a condition precedent bears the burden of proof as to the occurrence of the condition, and if there is no evidence of the occurrence of the condition, the duty of the defendant has not been triggered and his or her promise cannot be enforced." *Id.* Accordingly, it appears that the contested issues of law are:

1. Can Montana show that pre-1950 appropriations were unsatisfied at any given time, a necessary condition precedent to Wyoming's performance, without showing that there existed actual contemporaneous demand? Stated another way, is proof of the

³ Wyoming has the burden of proving waste and/or failure to mitigate.

existence of a paper water right in and of itself sufficient proof of unmet demand under the doctrine of appropriation to require performance by Wyoming?

Wyoming asserts that it is not. *See, e.g., Quigley v. McIntosh*, 290 P. 266, 268 (Mont. 1930); *Cook v. Hudson*, 103 P.2d 137, 146 (Mont. 1940)(disapproved of on other grounds by *Grimsley v. Estate of Spencer*, 670 P.2d 85 (1983)); *McDonald v. Montana*, 722 P.2d 598, 602 and 605 (Mont. 1986); *Worley v. U.S. Borax and Chem. Corp.*, 428 P.2d 651 (1967).

Wyoming also specifically asserts that Montana bears the burden of proof on this issue as it does on every essential element of its claim for breach of contract. In fact, the Montana Supreme Court has already addressed this question and found "[i]n sustaining the burden of proof above referred to, it was therefore necessary that plaintiff prove *his need for the water as well as his right thereto* and his ability to use the same through his system of distribution[.]" *Tucker v. Missoula Light & Water Co.*, 250 P. 11, 15 (Mont. 1926) (emphasis added). In that case, the plaintiff proved "at all times complained of he had urgent need for that amount of water, with ample means for its use." *Id.* at 16. Plaintiff demonstrated his need with testimony showing that "plaintiff's crops were properly planted, cultivated, and irrigated up to July 1st of each of the years mentioned, and were then in good condition, and would have produced bountiful crops, provided they would have been properly irrigated during the month of July of each of said years." *Id.* Plaintiff went on to demonstrate that during the month of July "he went repeatedly to the agents and the manager of defendant company, and requested and demanded water for the irrigation of his crops, but each time was refused[.]" *Id.* Tucker aptly demonstrates the kind of evidence that could satisfy the burden of proving need and that such evidence must come from the plaintiff.

Moreover, fixing the burden of proof on Montana is consistent with the evidentiary principle that the party with access to information is commonly assigned the burden of proof with respect to that element of a claim. *See U.S. Bank Nat. Ass'n v. Safeguard Ins. Co.*, 422 F. Supp. 2d 698, 706 -707 (N.D. Tex. 2006) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n. 45 (1977) ("Presumptions shifting the burden

of proof are often created to reflect judicial evaluations of probabilities *and to conform with a party's superior access to the proof.*") (emphasis added)). Here, only Montana can know whether there is an actual need for water within its boundaries.

Parshall v. Cowper, 143 P. 302 (Wyo. 1914), does not dictate a contrary result as that case did not purport to fix the burden of proof in an action for breach of contract by a calling appropriator with superior knowledge on a junior appropriator. Rather, that action was between an appropriator who had been regulated by the water commissioner and the water commissioner. 143 P. at 302. The court merely found that an adjudicated water right was conclusive until superseded in a proper proceeding, and therefore, the water commissioner had no right to deny that Plaintiff ever acquired a water right, or to allege forfeiture or abandonment. *Id.* at 304. More importantly, however, the court went on to find that the "*volume of water to which an appropriator is entitled at any particular time is that quantity, within the limits of the appropriation, which he can and does apply to the beneficial uses stated in his certificate of appropriation.*" *Id.* (emphasis added). Thus, the water commissioner could assert as a defense to that action that, pursuant to his statutory duties, he allowed all the water that was being put to beneficial use through the ditch. *Id.* Accordingly, the only relevance of that case to these proceedings is that it reinforces the proposition that beneficial use, not the paper water right, is the basis, the measure, and the limit of the right, and that right is measured in the present.

2. Can Montana bypass water available for storage in Tongue River Reservoir for purposes that are not beneficial uses of the water necessary to fulfill downstream senior water rights at Wyoming's expense?
3. Can Montana backdate the enlargement of the Tongue River Reservoir?
4. Does Montana's failure to regulate, compensate, or otherwise account for its own coal bed methane produced water under the doctrine of appropriation bar its claims

related to Wyoming's coal bed methane produced water? Does it bar all of Montana's claims?

5. If there is a discernible impact from coal-bed methane production in Wyoming and Montana on the surface of the Tongue River, is the amount at issue sufficient to be governed by the Compact?

6. If Montana wastes water at the Tongue River Reservoir, at the T&Y Canal, and at other locations, does such waste bar its claims in this case whether viewed as a constituent element of the doctrine of appropriation or as a failure to mitigate?

7. Are Montana's claims related to 1987 through 1989 barred by the doctrine of laches?

For purposes of assessing whether a breach occurred in any given year, Wyoming concedes that the preponderance of the evidence standard applies. However, before the Court can impose any injunctive relief on Wyoming, Montana must demonstrate that the breach is of "serious magnitude and established by clear and convincing evidence." *See e.g., State of Connecticut v. Com. of Mass.*, 282 U.S. 660, 669 (U.S. 1931). Moreover, Montana must prove that there is a real and immediate threat of repeated injury. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

WITNESSES

The witnesses who may or will be called by Wyoming to offer testimony at the trial of this matter are listed in Wyoming's witness list appended hereto as Attachment A. Wyoming reserves the right to call any of the witnesses identified by any other party, including expert witnesses which have been listed either in their expert witness

disclosure, their disclosures pursuant to Rule 26(a), their discovery responses, or their pretrial memoranda. Wyoming also reserves the right to call any additional witnesses necessary for impeachment and rebuttal as they may become known or as may be required by the evidence introduced at trial. Wyoming incorporates herein its Designation of Expert Witnesses, the expert reports of those witnesses, and all related materials, as notice to the other parties about the testimony expected to be elicited from each of those experts at trial. In addition, all witnesses identified in Attachment A may testify as to any matter touched upon during their depositions where taken in connection with this case. Wyoming has not designated the custodians of any records, but reserves the right to do so as necessary to establish the authenticity and foundation of any record.

EXHIBITS

The exhibits Wyoming anticipates introducing into evidence are listed on Attachment B. These exhibits have been made available for inspection by Plaintiff's counsel prior to the pretrial conference. Wyoming reserves the right to enlarge portions of these exhibits for use as demonstrative exhibits at trial. Wyoming also reserves the right to use at trial any exhibits designated by any other party before or during trial. Wyoming further reserves the right to designate additional exhibits as may become necessary for impeachment or rebuttal during trial, and such exhibits as may be revealed in the course of further investigation and discovery concerning the matters at issue in the case.

TRIAL SETTING, LENGTH, AND POSSIBILITY OF SETTLEMENT

Trial is scheduled to begin on October 16, 2013, in Billings Montana as set forth in Case Management Order No. 11. At this time, Wyoming anticipates that it will require 10 to 12 trial days to put on its case-in-chief. Wyoming believes that there is no reasonable possibility of settlement.

STIPULATIONS

Wyoming is aware of no factual stipulations which would result in the savings of any time at trial.

OTHER MATTERS

Wyoming requests the opportunity to present an opening statement to orient the Special Master to the arguments and facts of particular import, introduce the witnesses who will testify, and explain their place in the context of the case.

Dated this 23rd day of September, 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 23rd day of September, 2013.

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