

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 LIST OF ISSUES OF FACT AND LAW FOR RESOLUTION
UNDER CASE MANAGEMENT ORDER NO. 6**

Defendant State of Wyoming submits this list of issues of fact and law that it currently believes the Supreme Court will still need to resolve in reaching a final decision in this case, as ordered by the Special Master in paragraph 4 of Case Management Order No. 6. Wyoming does not include in this listing the issue of whether it has a mass delivery obligation at the state line as opposed to an obligation to curtail post-1950 rights at times when Montana pre-1950 rights are not satisfied. In the letter brief that is due on July 27, 2011, Wyoming will brief its position that the Court has already conclusively determined that salient issue in Wyoming's favor. The issues Wyoming lists below are

based on Wyoming's belief that the compact does not impose any type of mass state line water delivery obligation on Wyoming.

In addition, Wyoming has not attempted to identify any issues relating to Article V(B) of the compact because Montana has not asserted in proceedings to date that it is currently asserting any claims under that article.

Issues of Law

1. Must Montana officials notify Wyoming officials—make a call on the rivers—on behalf of a Montana pre-1950 water user(s) that is short of water in the water year of an alleged violation, in order to preserve a claim of violation under Article V(A)?

- a. If a call is required, who must make the call on behalf of Montana?
- b. If a call is required, to whom must the call be made in Wyoming?
- c. If a call is required, must the call be written or can it be oral?
- d. If a call is required, what information must Montana provide to Wyoming with the requested call?
- e. Must Montana prove that its pre-1950 rights that received less water at their points of diversion than they would have received in the absence of contemporaneous post-1950 Wyoming diversions were pre-1950 rights that were ready, willing and able to put such water to beneficial use?

2. The following sub-issues are based on Conclusion 3 on page 89 of the Special Master's First Interim Report under which Montana is to solve shortages to pre-1950 rights by intrastate means when possible so long as Montana's use of its intrastate means does not prejudice Montana's rights under the compact:

- a. Do those intrastate means include curtailing Montana post-1950 direct flow diversions when such curtailment will make water available for beneficial use by the pre-1950 water rights that are not fully satisfied?
- b. Do those intrastate means include curtailing the filling of Montana reservoirs under post-1950 reservoir rights when such curtailment will make water available for beneficial use by the pre-1950 water rights that are not fully satisfied?
- c. Do those intrastate means include curtailing hydrologically connected groundwater beneficial uses under post-1950 rights when such curtailment will make water available for beneficial use by the pre-1950 water rights that are not fully satisfied?
- d. If a call on Montana post-1950 water rights to satisfy pre-1950 rights would be futile, has Montana availed itself of its intrastate means?

- e. What rights under the compact may Montana assert under the proviso that it need not curtail post-1950 rights if such curtailment would prejudice its own compact rights?
- f. To what extent must pre-1950 water rights in Montana that are not receiving sufficient water to fully satisfy those rights employ water previously stored in Montana before requesting a call against post-1950 rights in Wyoming?
- g. To what extent must pre-1950 water rights correct deficiencies or improve the capabilities of structures to fully divert or pump water from the divertible flow before post-1950 rights in Wyoming must be curtailed?

3. Must Wyoming curtail post-1950 rights when Montana makes a call, if Wyoming's curtailment would not provide water for beneficial use in the same water year to the Montana pre-1950 rights whose lack of satisfaction triggered the call? In other words, does the doctrine of futile call apply to a prior appropriation administration and regulation call under Article V(A)?

4. Which of the legal and factual issues in the case are elements of Montana's claim for relief such that Montana has the burden of proving them?

5. Which of the legal and factual issues in the case are elements of issues that are in the nature of affirmative defenses such that Wyoming has the burden of proving them?

6. Is the burden of proof for claims and defenses proof by a preponderance of the evidence?

7. What is the level of hydrological connection with the Tongue and Powder Rivers, and their tributaries, required for groundwater sources to be covered by Article V(A)?

8. In order to satisfy its burden of proving such a hydrological connection between a groundwater source and the Tongue and Powder Rivers and their tributaries, must Montana show that diversions from a groundwater source cause a reduction in the waters of the Yellowstone River System available for diversion by pre-1950 rights in Montana in the same water year that the pre-1950 rights are unsatisfied?

9. What is the test for Montana to prove that contemporaneous Wyoming diversions to post-1950 rights have caused Montana pre-1950 rights to receive less water at their points of diversion than they would have received in the absence of such Wyoming diversions--“but for” causation, “proximate” cause, or some other test?

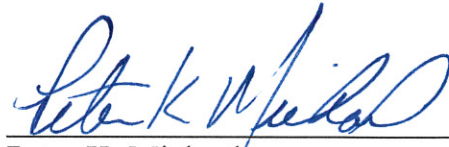
10. What is the measure of damages for a proven Wyoming violation of Article V(A) that caused harm to Montana pre-1950 rights?

11. For purposes of evaluating alleged compact violations, does each state’s own law, including statutes, rules, regulations and case law, apply in the respective states with respect to the permitting, perfection, adjudication and administration of water rights to the beneficial use of water?

Issues of Fact

1. Did Montana make calls to Wyoming under Article V(A), and if so, when, covering what periods of time, and what was the content of them?
2. In the periods that Wyoming was subject to Montana calls under Article V(A), did Wyoming have any post-1950 rights diverting surface water, filling reservoirs or withdrawing hydrologically connected groundwater covered by Article V(A) in the Tongue River and Powder River watersheds?
3. In periods that Wyoming was subject to a Montana call, did Montana use intrastate means of prior appropriation administration and regulation that were reasonably available to satisfy its pre-1950 rights?
4. In periods that Wyoming was subject to a Montana call, if Wyoming post-1950 rights were diverting surface water, filling reservoirs, or withdrawing hydrologically connected groundwater, would Wyoming's curtailment of such diversions or withdrawals have provided water for beneficial use by the Montana pre-1950 rights whose shortage triggered the requested call?
5. If the Supreme Court decides that Wyoming violated Article V(A) of the compact, what damages did Montana pre-1950 water users suffer as a result?
6. If the Supreme Court decides that Wyoming violated Article V(A) of the compact and that the violation caused damage to Montana, what is the amount of money or other compensation that Montana should receive?

Dated this 20th date of July, 2011

A handwritten signature in blue ink, appearing to read "Peter K. Michael", written over a horizontal line.

Peter K. Michael
Counsel of Record
Chief Deputy Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6946

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Wyoming's List of Issues of Fact and Law for Resolution Under Case Management Order No. 6 was served by electronic mail and by placing the same in the United States mail, postage paid, this 20th day of July, 2011.

Jeanne S. Whiteing
Whiteing & Smith
1136 Pearl Street, Suite 203
Boulder, CO 80302
jwhiteing@whiteingsmith.com

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

Jennifer Anders
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401
janders@mt.gov


Todd A. Sattler
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
tsattler@nd.gov

James J. Dubois
Office of the Solicitor
US Department of Justice
Natural Resources Section
1961 Stout Street, 8th Floor
Denver, CO 80294
James.dubois@usdoj.gov

William M. Jay
Assistant to Solicitor General
US Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
William.m.jay@usdoj.gov

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

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