

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 LETTER BRIEF ON PRECLUSION OF MONTANA'S STATE
LINE DELIVERY ARGUMENT**

Defendant State of Wyoming submits this letter brief that the Special Master requested in paragraph 1 of Case Management Order No. 7. The Special Master posed this question:

Do the Supreme Court's May 2, 2011 decision and opinion in this case and/or the First Interim Report of the Special Master preclude Montana's argument that, "subject to any changes in consumption on pre-1950 irrigated acreage," the Compact imposes "a delivery obligation" on Wyoming consisting of "a stateline delivery requirement that varies only with water supply conditions" (Letter Brief of Montana Regarding Bifurcation, June 28, 2011, p. 3)?

The issue of a stateline delivery obligation is precluded by the law of the case doctrine and by general principles of finality and repose because Montana raised the issue

before the Special Master in resisting Wyoming's motion to dismiss and also raised it in the Supreme Court when taking exception to the Special Master's First Interim Report. The issue formed a critical component of Montana's legal argument. Moreover, the parties briefed and argued it at both stages, and as a consequence, the Supreme Court treated the issue thoroughly and definitively in its opinion and order of May 2, 2011.

While the Special Master's First Interim Report may not, in and of itself, conclusively determine the delivery obligation issue because the Special Master's role is to simply recommend decisions to the Court, the Special Master's report triggered Montana's exception. That exception led to the Court's full treatment of the issue, which is now entitled to full preclusive effect under the Court's precedent.

Summary of relevant proceedings

The doctrine of preclusion applicable here, law of the case, raises two fundamental issues of fact: (1) whether the issue to be precluded has been actually litigated; and (2) whether the issue has been decided. *Arizona v. California*, 460 U.S. 605, 617, 628, 616 (1983). To a large degree, the first issue is answered by the affirmative answer to the second question. It would be highly unlikely for the Court to have addressed and decided the stateline delivery issue, as it did, if the parties had not fully argued the issue, which they undoubtedly did.

In paragraph 8 of its Bill of Complaint, Montana alleged that Wyoming violated the compact by refusing to curtail consumption down to pre-1950 levels "whenever the amount of water necessary to satisfy Montana's uses of such water existing as of that date

is not passing the Wyoming-Montana stateline. . . .” Mot. for Leave to File Bill of Compl. at 19 (Jan. 2007) (emphasis added). Montana repeated this contention in its Brief in Response to Wyoming’s Motion to Dismiss at 27, 39-40 (May 2008), and Wyoming addressed it extensively in its reply brief. Wyoming’s Reply Br. in Support of its Mot. to Dismiss Bill of Compl. at 4-9, 16 (May 2008); *see also* Tr. of Hr’g on Wyoming’s Mot. to Dismiss Bill of Compl. at 52:7, 53:4, 65:19, 77:5, 85:24-86:5 (Feb. 3, 2009) (Montana’s attorney referring to stateline calls, depletion and blocks of water).

Montana treated the issue as vital. After it received the Special Master’s draft interim report, it filed a letter brief in which it identified the stateline delivery obligation as one of its two major arguments disputing the Special Master’s analysis of whether Wyoming pre-1950 irrigators could increase their water efficiency. Montana’s Ltr. Br. re Mem. Op. on Mot. to Dismiss at 12-15 (Argument II). While the Special Master declined Wyoming’s request to insert his decision rejecting Montana’s stateline delivery argument into his First Interim Report as a standalone conclusion, he analyzed the issue at length in that report and applied his analysis to Montana’s water efficiency claim. First Interim Rep. of the Special Master at 28 (“As Wyoming notes, the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana. . . .”); *see also id.* at 58-64, 88.

When Montana took exception to the Special Master’s First Interim Report, it made its stateline delivery argument the centerpiece of its brief to the Court. Montana’s Except. and Br. at 9, 11, 13-34. It contended that the Special Master should not have

delved into any state law issues involving water efficiency and return flows because the stateline delivery argument was all that mattered. *Id.* at 34.

Not surprisingly, when the Supreme Court decided the Bill of Exceptions, it devoted one of the two major analytical subheadings of its opinion to the issue of a stateline delivery obligation. *Montana v. Wyoming*, 563 U.S. ___, slip op. at 16-19 (2011) (subheading B). The Court accurately characterized that argument: “Montana asserts 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 16-17 (citing Montana’s Except. and Br. at 26). The Court then explained that “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 18. It definitively held: “We agree with the Special Master that this argument also fails.” *Id.* at 16.

It is important to note for preclusion analysis that the Court’s decision was not fact-based, but instead a legal decision, driven by the text of the Yellowstone River Compact. It is not the type of analysis that could be shaken by future changes in circumstances on the rivers, or which could be profitably returned to the Court for reconsideration at a later date.

The Supreme Court has held that while the law of the case doctrine is not strictly applicable to all issues in original actions, prior rulings in such cases should be subject to the principles of finality and repose embedded in that doctrine, absent changed circumstances.

In *Arizona v. California*, 460 U.S. 605 (1983), the Supreme Court addressed the application of three preclusion doctrines to original actions-- res judicata, collateral estoppel, and law of the case. The first two do not apply here since they preclude claims or issues previously decided in separate cases. *Id.* at 617-18 & n.7. However, the third preclusion doctrine, law of the case, does apply. “As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Id.* at 618. The doctrine does not limit the tribunal’s power, but gives the tribunal the discretion to impose finality, *id.*, thereby supporting the “fundamental precept of common-law adjudication” that an issue once decided by a competent court is conclusive. *Id.* at 619.

The Indian tribes whose water rights had been litigated on their behalf by the United States in the first iteration of *Arizona v. California*, 20 years earlier, and who were subject to the Court’s irrigable acreage determination in that earlier proceeding, sought a new determination of that issue in a continuation of the same case. *Id.* at 615-17 (citing *Arizona v. California*, 373 U.S. 546 (1963)). The Court held that it should not extrapolate the law of the case doctrine “wholesale” into such actions, because decrees in such cases are not always final. Such decrees may allow the Court to retain jurisdiction to make equitable adjustments based on changes in circumstances that may arise, and strict

application of law of the case could interfere with that intended flexibility. *Id.* at 619. On the other hand, the Court held that in the absence of changed circumstances, the important principles of finality and repose should be enforced even if the technical rules “are not strictly applicable.” *Id.* Applying these principles to the facts, the Court held that the tribes were precluded from relitigating the irrigable acreage issue that had been decided years earlier. *Id.* at 626.

The Court’s decision against Montana on the issue of a stateline delivery obligation should be given preclusive effect under the doctrine of the law of the case and principles of finality.

In *Arizona v. California*, the Court carefully examined the changed circumstances exception because its earlier equitable decree that the tribes sought to modify had been entered 20 years earlier, and in that amount of time, circumstances truly could change. By contrast, the Court in *Montana v. Wyoming* ruled against Montana on the stateline delivery obligation less than 3 months ago. There have been no legal or factual circumstances that have changed in that short time. *See Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (“Here, Oklahoma in no way suggests any change of circumstance, whether of fact or law.” The Court precluded further proceedings on the issue of standing, relying on *Arizona v. California*).

Also, while the Court in *Arizona v. California* had to apply the preclusion doctrines to an equitable decree that it had previously entered, the preclusion analysis in this case stems from the Court’s interpretation of a compact between the states. Even if the law or facts changed in the last three months, Montana would not be entitled to make

some equitable argument based on such change that would permit the Court to rewrite the compact. The Court's decision on May 2, 2011 was based on the language of the compact as it was and is, and on a legal analysis that has no reason to change unless and until the parties renegotiate the compact. In summary, the change of circumstances exception that the Court acknowledged but did not apply in *Arizona v. California* likewise does not apply in this case.

The *Arizona* Court declined to apply the exception even though its earlier decree in that case had contained a clause that mentioned the possibility of future modification, a clause that is nowhere to be found in the Court's recent decision in *Montana v. Wyoming*. *Arizona v. California*, 406 U.S. at 621-24. Thus, in the case at bar, the issue of a stateline delivery obligation is even less amenable to relitigation than the issue of tribal irrigated acreage was in *Arizona v. California*, where the tribes were at least able to argue that the Court's earlier decree expressly made some room for future reconsideration.

Moreover, while the tribes' relitigation request in *Arizona v. California* to correct erroneous irrigated acreage determinations could conceivably be granted without placing the judicial process in disrepute, the Court stated a blanket rule against reconsideration to correct factual errors in the absence of changed circumstances: "Our long history of resolving disputes over boundaries and water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made." *Arizona v. California*, 405 U.S. at 623-24. Certainly, if the Court will not reconsider a factual determination, it must also deny

reconsideration of a legal determination. *See id.* at 626. The Court could conceivably blame an error in a factual determination on bad data or erroneous witness testimony, but if it were willing to reverse itself on a legal determination, such as its interpretation of the Yellowstone River Compact, the Court would raise questions about one of its own core competencies, contract interpretation.

An important policy precluding parties from relitigating matters is the policy of fostering “reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id.* at 619 (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). No state would be encouraged to rely on the sanctity of a Supreme Court decision if only a few months thereafter, the Court’s own Special Master invited the parties to re-brief and re-argue the issue, leaving open the possibility that he might contradict himself as well as the Court, ultimately leading to another exception proceeding before the Court on a matter that can only be described as decisively concluded. *See Arizona v. California*, 460 U.S. at 626 (detrimental reliance can be a factor in balancing equities when a change of circumstances has occurred, “but even the absence of detrimental reliance cannot open an otherwise final determination of a fully litigated issue.”).

The Court held in *Arizona v. California* that the tribes were barred from relitigating the irrigable acreage issue because the Court had established water rights in its earlier decree upon which water users undoubtedly had relied. *Id.* at 620. In a corollary to this reasoning, the Court pointed out that a major purpose of the earlier litigation had been to settle water rights among the states of the Southwest and their water users.

Without finality, it would be difficult for these persons and entities to plan their water-reliant futures. *Id.* at 620-621.

This point has parallels in this case. In early case planning discussions, Special Master Thompson stated that a major purpose for his crafting and submission of his First Interim Report was to obtain final rulings on important legal issues raised by Wyoming's Motion to Dismiss. Neither Wyoming nor Montana disagreed with that. They jointly developed an extensive appendix and used that appendix during briefing and argument on the motion. In that process, Montana raised the stateline delivery issue repeatedly, and Wyoming addressed it extensively in rebuttal.

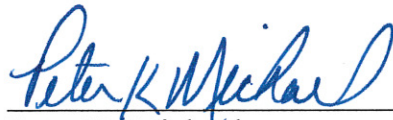
Both states knew as they briefed and argued the stateline delivery issue before the Special Master and ultimately before the Court on exception, that the Court's determination of legal issues at this stage was the primary goal of the Special Master. Both parties embraced this goal as evidenced by their diligence. They also knew that it is this Court's policy in original actions to try to decide legal issues expeditiously to conserve the resources of the Court and the parties. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (cited by Br. of the United States as Amicus Curiae in Opp'n to the Mot. to Dismiss at 14 (May 2008)). Today, Wyoming and Montana still concur that a decision on the state line delivery obligation issue is important in framing the case for further proceedings.

The Special Master recommended to the Court several rulings that were adverse to Wyoming on its motion to dismiss. Wyoming did not take exception to those rulings, and

admits that it is bound by them. Wyoming simply asks that Montana be similarly bound by another decision by the Special Master on a key legal issue, a decision that was confirmed by the Court on exception after a full airing.

In conclusion, the Supreme Court is the final arbiter of all issues in this case. It has definitively rejected a stateline delivery obligation as a matter of compact interpretation. This is a classic case in which to impose the doctrine of the law of the case, and the changed circumstances exception does not apply. The answer to the Special Master's question is that the Court's May 2, 2011 decision precludes Montana's argument for a stateline delivery obligation.

Dated this 27th day of July, 2011.



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 Letter Brief on Preclusion of Montana's State Line Delivery Argument was served by electronic mail and by placing the same in the United States mail, postage paid, this 27th 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

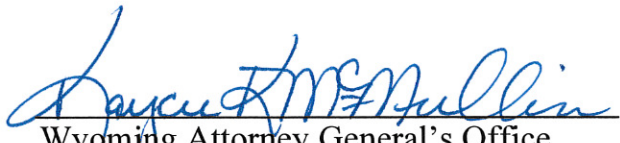
Todd A. Sattler
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
tsattler@nd.gov

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