

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 Motion in Limine to Exclude Evidence or Argument that the 1999
Tongue River Reservoir Enlargement is Protected by Article V(A) of the
Yellowstone River Compact**

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The State of Wyoming, through counsel, moves for an order excluding evidence or argument at trial that the 1999 Tongue River Reservoir enlargement is protected by Article V(A) of the Yellowstone River Compact. In support of this motion, Wyoming states as follows:

Authority

Wyoming's motion to exclude this evidence is proper under Rule 17.2 of this Court's rules and Rules 402 and 403 of the Federal Rules of Evidence. In original jurisdiction cases before this Court, the Federal Rules of Evidence may be taken as guides. Sup. Ct. R. 17.2. The rules state that evidence is relevant if "it has a tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. If evidence is irrelevant it is inadmissible. Fed. R. Evid. 402. Relevant evidence can also be excluded if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Background

There is no real dispute that the storage capacity of the Tongue River Reservoir after its completion in 1940 was approximately 69,400 acre-feet. *See, e.g.*, Dalby Expert Rpt. at 1; Book Expert Rpt. at 9; Aycock Rebuttal Expert Rpt. at 5. This approximate capacity has been repeatedly cited in multiple documents since the construction of the original dam. *See, e.g.*, Anderson & Bucher, Tongue River Modeling Study, Final Report

at 12 (July 20, 1990) (69,653 acre-feet); *Tongue River Basin Project Final Environmental Impact Statement* at Summary-7 (March 1996) (67,000 acre-feet). Similarly, there is no real dispute that the Tongue River Reservoir was enlarged in 1999 to a total capacity of approximately 79,000 acre-feet. *See, e.g.*, Dalby Expert Rpt. at 1; Book Expert Rpt. at 9; Aycock Rebuttal Expert Rpt. at 5.

Despite the fact that the pre-1950 capacity of the Tongue River Reservoir is not subject to serious debate, it is clear that the State of Montana will seek to introduce evidence at trial that Wyoming breached the Yellowstone River Compact in years when the Tongue River Reservoir did not completely fill to its current enlarged capacity of approximately 79,000 acre-feet. Aycock Rebuttal Expert Rpt. at 20; Book Expert Rpt. at 19-21. Montana should be precluded from effectively backdating the enlargement and should be precluded from introducing any such evidence as a matter of law.

Discussion

Under the law of the case, “Montana’s Complaint raises only allegations regarding its right to water for pre-1950 uses.” Mem. Op. of the Special Master on Montana’s Claims Under Article V(B), at 11 (Dec. 20, 2011). Article V(A) of the Yellowstone River Compact provides: “Appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory state as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.” A right to fill the Tongue River Reservoir to its enlarged capacity cannot be an appropriative right covered under Article

V(A) because the enlarged capacity did not exist as of January 1, 1950. Instead, the capacity created by the Reservoir's enlargement is counted under Article V(B) because the enlargement is storage in an existing reservoir "developed after January 1, 1950," or storage "completed subsequent to January 1, 1950." Art. V(B)(ii)-(iii).

Similarly, the doctrine of appropriation also prohibits the expansion of Tongue River Reservoir from being considered under Article V(A). "As they come online, appropriators acquire rights to the stream basically as it exists when they find it. Accordingly, subject to the fulfillment of all senior users' existing rights, under the no-injury rule junior users can prevent senior users from enlarging their rights to the junior users' detriment." *Montana v. Wyoming*, __ U.S. __, 131 S. Ct. 1765, 1772 (2011) (citing 2 Kinney, *Law of Irrigation and Water Rights* § 803, pp. 1403–04 (2d ed. 1912); 1 W. Hutchins, *Water Rights Laws in the Nineteen Western States* 573 (1971)) (citations omitted). A Tongue River Reservoir with an enlarged capacity of 79,000 acre-feet did not exist when the majority of Wyoming post-1950 rights came along, and the no-injury rule protects those junior Wyoming rights from being required to limit their use or provide water to an expanded Tongue River Reservoir.

Moreover, the Northern Cheyenne Tribe Compact does not change the Article V(B) nature of the enlargement. That compact specifically states that nothing in it shall be construed or interpreted to alter or amend any provisions of the Yellowstone River Compact. Northern Cheyenne Compact, Art. VI, § A(10) (codified in Mont. Code Ann. § 85-20-301). The Tribe's reserved water rights on the Tongue River were created with the

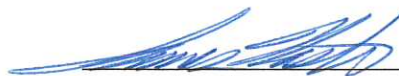
Northern Cheyenne Indian Reservation (established through executive orders in 1884 and 1900), and predated the Tongue River Reservoir's construction. *See* Northern Cheyenne Compact, Art. I, § 17 (definition of "Reservation"); *see also* *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976) (providing that a federally reserved water right "vests on the date of the reservation and is superior to the rights of future appropriators"). Therefore, the Tribe's rights would have been among the original capacity of the Tongue River Reservoir and not affected by the Reservoir's enlargement. The benefit of the enlargement instead went to Montana's water right for the Reservoir.

Because the 79,000 acre-foot capacity of the enlarged Tongue River Reservoir cannot be the capacity of the Reservoir protected by Article V(A), any evidence related to the enlarged capacity is irrelevant to whether Wyoming injured Montana's pre-1950 rights or violated Article V(A). Accordingly, any such evidence should be excluded from the trial of this matter.

WHEREFORE the State of Wyoming requests that Montana be prohibited from introducing any evidence, exhibit, testimony, or argument that the 1999 Tongue River Reservoir enlargement is protected by Article V(A) of the Yellowstone River Compact.

Dated this 24th day of September, 2013.

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 24th day of September, 2013.

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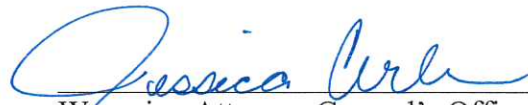
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