

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

**Reply in Support of Wyoming's Motion in Limine to Exclude Evidence of
Operational Decisions at the Tongue River Reservoir for the Purpose of
Determining Montana's Rights Under Article V(A)**

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The State of Wyoming, offers the following reply in support of its motion for an order excluding evidence and argument at trial related to the voluntary operational decisions at the Tongue River Reservoir to bypass available water outside of the irrigation season for the purpose of determining Montana's rights under Article V(A) of the Yellowstone River Compact.

Montana is correct that the determination of this motion requires the Special Master to say what the law is with regard to whether the Yellowstone River Compact allows Montana to bypass water for non-beneficial purposes at Wyoming's expense. Wyoming has shown that the explicit definition of beneficial use in the Compact and the general principles of the doctrine of appropriation dictate that Montana cannot charge Wyoming for these non-beneficial bypasses. This is true regardless of whether Montana has historically released water for these purposes because Montana cannot rewrite the definition of beneficial use in the Compact through its course of conduct. Nor can it unilaterally change the doctrine of appropriation to permit multiple fills during times of shortage by force of habit. Both parties would benefit from knowing what the law requires on this issue before the trial begins, and determination of this motion at this time is particularly appropriate because there are no facts in dispute that can affect the outcome.

Montana asserts that some of Wyoming's reservoir operators engage in some of the same discretionary practices, such as winter bypasses, but this fact makes no difference in determining what the Compact requires. It is true that some reservoirs in

Wyoming engage in winter bypasses and other operations to protect their infrastructure. However, these operators do so at their own peril. If evidence related to operational decisions is required at trial, Wyoming's witnesses will testify that these foregone storage opportunities may be counted against satisfaction of the storage right and would preclude a reservoir from making a call on an upstream junior appropriator. In the Tongue River basin in Wyoming, however, this issue is unlikely to ever arise because most of Wyoming's reservoirs are located at the top of the system and there are no upstream junior appropriators in the Big Horn Mountains. Thus, if the high mountain reservoirs do not fill due to their operational practices, they simply do not fill. They assume the risk of their operations as a matter of geography, but in other areas of Wyoming where reservoirs are located in the middle of a system, reservoir operators assume the risk of their operations as a matter of law. Similarly, as a matter of law Montana assumed the risk of its operational decisions on the Tongue River Reservoir when it agreed to limit the types of beneficial uses recognized by the Compact.

Montana next asserts that it did not adopt the one-fill rule in *Federal Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941). Montana most assuredly did adopt the one-fill rule in that case as the Court specifically explained that M.R.C. § 7093 necessarily included a one-fill limitation on reservoirs. M.R.C. § 7093 authorized appropriations for reservoir water in Montana, and that authorization to impound and appropriate storage water persists with this limitation in place in Mont. Code Ann. § 85-2-305. Had the Montana legislature intended to overrule the limitation specifically set forth in *Morris* on

reservoirs in Montana, it certainly could have done so at any time during the last seventy years, but it has not.

Of course, even if Montana had not explicitly adopted the one-fill rule, it is a fundamental component of the doctrine of appropriation incorporated into the Compact as explained by the Idaho court in *In re SRBA*, Case No. 39576, Basin-Wide Issue 7, Subcase No. 00-91017 (5th Dist. Idaho Mar. 20, 2013). Montana asserts that *In re SRBA* is legally distinguishable from this case, but points to no relevant differences between the doctrine of appropriation as reflected in the laws of the State of Idaho and the laws of the State of Montana. The Idaho court clearly and concisely explained why the one-fill rule is necessarily part of the doctrine of appropriation, and Wyoming cannot hope to restate that explanation with more clarity. Thus, as a matter of law, Montana has no right to forego storage opportunities at the expense of its neighbor.

Any claim by Montana that it can call for the regulation of Wyoming post-1950 water rights to replace water the Tongue River Reservoir could have stored but voluntarily released is clearly contrary to the law of the doctrine of appropriation and the Yellowstone River Compact. The doctrine of appropriation protects senior appropriators and junior appropriators alike, and in this case, it is Wyoming that is entitled to protection from Montana's profligate winter bypasses. Any evidence Montana might attempt to introduce related to these bypasses or a maximum winter storage limitation is irrelevant to a determination of whether Tongue River Reservoir filled in a given year and would

result in a waste of time at trial. Accordingly, the Special Master has the authority and the obligation to exclude this evidence from trial.

WHEREFORE the State of Wyoming requests that the Court exclude any evidence or argument offered by the State of Montana related to the voluntary operational decisions at the Tongue River Reservoir to bypass available water outside of the irrigation season for the purpose of determining Montana's rights under Article V(A) of the Yellowstone River Compact.

Dated this 9th day of October, 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 9th day of October, 2013.

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