

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 MOTION IN LIMINE TO LIMIT THE
PRESENTATION OF EVIDENCE IN THIS CASE TO THE NINE YEARS THAT
SURVIVED WYOMING'S INITIAL SUMMARY JUDGMENT MOTION

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The State of Wyoming hereby offers the following reply in support of its motion in limine for an order limiting the presentation of evidence in this case to the nine years that survived Wyoming's initial Motion for Partial Summary Judgment.

The outcome of the present motion is dictated by the simple and previously determined proposition that a call is a necessary precondition to a breach of the contract at issue. Wyoming specifically raised and clearly won this issue in the initial summary judgment proceedings as "other relief" necessarily includes prospective injunctive relief. Without a call there can be no breach, and while the evidence was remarkably weak, the Special Master ruled that Montana had presented evidence of calls in nine years sufficient to survive summary judgment in the liability phase of this litigation.¹ Of course, Wyoming asserts that the evidence at trial will show that Montana only made calls in 2004 and 2006, and therefore, Montana's breach of contract claim fails in each of the other remaining seven years.² Accordingly, because Montana failed to present sufficient

¹ The materials attached to Montana's response would not change this finding. These materials were discovered late in the discovery process because they were mistakenly filed in the State Engineer's office in the wrong spot. These materials were produced as soon as they were discovered. Moreover, they do not evidence an actual call by Montana, and instead reflect an inquiry outside the irrigation season as to what Wyoming would do under different circumstances. These could hardly be construed as a call, which is by its very nature a present demand for water in response to the existing conditions and demands on the river. " 'A call is placed on a river when a senior appropriator forces upstream juniors to let sufficient water flow to meet the requirements of the senior priority.' " *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1145 n.5 (Colo. 2001) (quoting *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 171 n.2 (Colo. 1997)).

² As a consequence of the recent summary judgment proceedings, for five of the remaining seven years, 1987 through 1989, 2000, and 2003, Montana is already precluded from seeking damages as a remedy. At the appropriate time, Wyoming will

evidence on an essential element of its breach of contract claim for all but nine years, there is no good reason to admit evidence related to these other years.³

Montana in its responses to Wyoming's motions in limine repeatedly resorts to the assertion that there is no need to exclude any evidence from the trial of this matter because the Special Master, unlike a jury, cannot be confused or misled. Montana's assertion misses the point. The presentation of evidence such as that covered by the instant motion related to years no longer in issue, while not necessarily confusing for the Special Master, can only waste the time of all involved. *See* Fed. R. Evid. 403. The fact that this is an original proceeding before the Supreme Court does not mean that Montana is entitled to free rein to filibuster with inconsequential evidence. The Special Master has the power and the duty to administer these proceedings in a manner that eliminates unjustifiable expense and delay. *See, e.g.,* Fed. R. Civ. P. 1; Fed. R. Evid. 102 and 611. This can only occur if the parties and the Special Master focus their undivided attention on the elements of Montana's breach of contract claim in the few years that survived summary judgment.

Montana's persistent resort to the notion that the Special Master has to provide the Supreme Court with a complete record and has no real authority to control these

ask the Special Master to conclude that where causation is an essential element of a breach of contract claim, if the evidence is insufficient to support an award of damages, the same evidence necessarily is insufficient to support an award of other relief in any form.

³ Wyoming readily concedes that evidence outside the specific years in issue can provide context and background, but that evidence cannot be permitted to predominate, and Montana should not be permitted to transform context into the presentation of claims previously dismissed.

proceedings is an ominous sign of things to come. It is clear that the Special Master needs to take the reins of this litigation firmly in hand, and hold them tight throughout this trial. In particular, the Special Master should strictly limit the presentation of evidence to that which is relevant to the five essential elements of Montana's claim and Wyoming's affirmative defenses. Otherwise, this case, which ought to take three weeks of trial time, will never end.

WHEREFORE the State of Wyoming requests that the Court enter an order consistent with its prior rulings limiting the presentation of evidence in this case to the nine years that survived Wyoming's initial Motion for Partial Summary Judgment and requiring that Montana specify which of the 556 exhibits on its exhibit list will be eliminated as a result of the order.

Dated this 8th day of October, 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 8th day of October, 2013.

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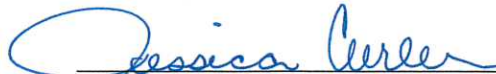
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