

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 RESPONSE TO MONTANA'S MOTION TO STRIKE A PORTION
OF THE AFFIDAVIT OF PATRICK T. TYRRELL**

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The State of Wyoming responds to Montana's Motion to Strike a Portion of the Affidavit of Patrick T. Tyrrell as follows:

In support of its Motion for Summary Judgment, Wyoming offered an affidavit from the Wyoming State Engineer explaining his determination, formed during the normal course of his employment, that the groundwater produced in association with coal bed methane production in the Tongue and Powder River Basins in Wyoming is not water so interconnected with the Tongue River or any surface stream as to constitute in fact one source of supply pursuant to Wyo. Stat. Ann. § 41-3-916. Tyrrell Aff. ¶7. The State Engineer is the only State of Wyoming official authorized to make this determination which is as much a policy decision as a factual determination.¹ The consequence of this determination is that coal bed methane groundwater rights are not regulated under a single schedule of priorities with surface water rights in these basins. Tyrrell Aff. ¶¶ 7 and 8. This testimony conforms precisely to the Order Regarding Expert Witness Designation issued on April 23, 2013.

Montana objects to the Wyoming State Engineer's statements of fact about how and why Wyoming does not regulate coal bed methane groundwater and surface water as a single source of supply on the grounds that they constitute expert testimony. Montana's objection is exactly the kind of shenanigans Wyoming hoped to avoid with its original overly forthcoming expert designation. However, it appears that having prevailed on its

¹ The Wyoming State Engineer's determination should be distinguished from a purely scientific determination that there is no hydrologic connection between the ground and surface waters. Instead, the Wyoming State Engineer as a matter of policy based on fact, science, and the laws of Wyoming must determine whether it is appropriate to regulate the two as one source of supply.

motion to strike Wyoming's percipient witnesses from the expert designation, Montana intends to cry "expert testimony" at every turn. Montana's objection likely foreshadows constant interruptions of the testimony of Wyoming's employees who, as Wyoming advised the Court and the parties, will necessarily impart scientific, technical, and other specialized knowledge formed in the normal course of their employment during their testimony. The Court should not countenance this behavior and should nip it in the bud before it overwhelms the presentation of evidence at trial.

WHEREFORE the State of Wyoming requests that Montana's Motion to Strike a Portion of the Affidavit of Patrick T. Tyrrell be denied.

Dated this 7th day of August, 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 7th day of August, 2013.

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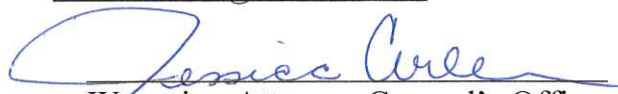
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