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 PROPOSED DECREE AND BRIEF IN SUPPORT

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Defendant, State of Wyoming, through counsel, pursuant to the December 19, 2016, *Opinion of the Special Master on Remedies* hereby submits the attached proposed decree[1] and offers the following in support of its proposed decree and in opposition to the State of Montana's proposed judgment and decree:

I. The parties' failed to agree on the contents of a joint decree.

Montana provided Wyoming with a draft decree on January 20, 2017. Montana did not include any citations to the record in support of any of the provisions in its proposed decree. After review, counsel for Wyoming spoke with counsel for Montana, and advised that Montana's draft decree was generally unacceptable to Wyoming. In particular, it included a number of provisions imposing obligations on Wyoming that are nowhere to be found in the opinions of the Court or the Special Master.

Rather than attempt to edit Montana's draft, Wyoming prepared and provided Montana with its preferred proposed decree on January 24, 2017.[2] Each provision in the proposed decree was supported by citations to the opinions of the Court and the Special Master. Wyoming attempted to remain faithful to the language of those opinions while fitting the rulings to their new purpose, and Wyoming's draft imposed no new obligations

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[1] Wyoming's proposed decree is attached to the electronic version of this brief in Word format for the Special Master's convenience.

[2] The attached proposed decree is substantially the same as the one Wyoming submitted to Montana on January 24. Adjustments have made to reflect that the decree is not a joint submission, and that Montana has elected repayment in money rather than water.

on either party. Montana did not provide Wyoming with any comments, either general or specific, on Wyoming's draft.

Instead, on February 8, 2017, Montana provided Wyoming with a second draft decree, which in all fairness eliminated a number of provisions that Wyoming had previously communicated were unacceptable. Nevertheless, Montana's second draft continued to impose new obligations on Wyoming, and frankly, misstated in several instances the substance of the rulings in this case. Accordingly, on February 10, 2017, counsel for Wyoming informed counsel for Montana that Wyoming was willing to continue to work towards a joint draft decree, but that those negotiations would have to proceed using Wyoming's draft as the baseline. Montana declined to proceed on that basis without identifying any concerns it had regarding Wyoming's proposed draft. Later that day, Montana submitted its proposed decree to the Special Master, and for the first time, identified citations to the record that it claimed supported the various provisions of its proposed decree.

II. Wyoming's proposed decree is adequate and accurate.

The Special Master instructed the parties that, "the provisions of the decree typically should come directly from the Supreme Court's 2011 opinion, the Court's various orders and judgments, [the Special Master's] reports, or this opinion." Wyoming's proposed decree does just that.

Wyoming's proposed decree accurately sets forth all the rights and obligations of both parties' as they have been determined over the course of this litigation. This is true

regardless of whether Wyoming won or lost any particular issue. A cursory comparison of the two parties' decrees reveals that Wyoming's decree has no glaring omission of an important question actually litigated and decided in these proceedings. In addition, Wyoming's faithful recitation of the rulings in this case can be verified by reference to the cited opinions.

There is one provision in Wyoming's draft decree that contains an important deviation from the language of the existing opinions. Section II.D of Wyoming's proposed decree memorializes the concept set forth on several occasions in the existing opinions, that pre-1950 appropriators in Wyoming can "improve their irrigation systems, even to the detriment of downstream appropriators." *Montana v. Wyoming*, 563 U.S. 368, 385 (2011). However, the savings realized by such improvements cannot be used to expand their water rights, by using the conserved water on "new lands or for other purposes." *First Interim Report* at 90. This same basic concept can be found in sections 1.d and 3 of Montana's proposed decree, which also provides in section 3 that Wyoming appropriators can use the conserved water "to irrigate the same lands that they were irrigating as of January 1, 1950[.]"

Use of the terms "same lands" and "new lands" in a decree, which Wyoming concedes accurately reflect the language of the Court and the Special Master, could lead to confusion about an appropriator's right to change the place of use of a pre-1950 water right. Both states allow such changes so long as other appropriators are not injured, and both states employ processes to protect against such injuries. *See* Wyo. Stat. Ann. § 41-3-104;

Mont. Code Ann. § 85-2-402. Montana never claimed that a change of place of use that followed Wyoming's statutory procedure violated the Compact, and the issue was not addressed by either party during the trial. Similarly, the Special Master recognized in 2011 that the proceedings had not addressed the effect of changes in pre-1950 appropriative rights. *See* July 29, 2011 Status Hearing Transcript at 13.

Use of the exact language in the existing opinions could also create confusion in other ways. First, it could be construed to preclude the owners of pre-1950 storage rights in Wyoming from using their stored water on any land or for any purpose they choose. Of course, under Wyoming law, unless those storage rights are appurtenant to land through secondary permits, the water can be used anywhere regardless of where or for what purpose it was used in 1950 so long as it is permitted for multiple purposes. Second, the existing opinions provide that Wyoming may use conserved water to irrigate lands it was irrigating "as of January 1, 1950." *First Interim Report* at 90. Obviously, no irrigation was taking place on January 1, 1950. That being so, does the existing language mean the lands irrigated during the 1949 water year? Does it mean lands irrigated within 5 years of January 1, 1950? Does it mean lands irrigated at any time prior to January 1, 1950? Or does it mean any lands permitted to be irrigated with a Wyoming water right with a priority date before January 1, 1950?

In order to prevent future confusion and disputes about this language, Wyoming suggests that rather than distinguishing between "same lands" and "new lands" and using the words "as of," the decree should provide that appropriators may "manage water

diversions within the legal parameters of the appropriative rights." This language effectively prevents the expansion prohibited by the Compact and the Court's ruling, because in neither state can an appropriator lawfully expand their water right to new lands or change a place of use of a water right unilaterally. At the same time, this language makes clear that changes to water rights authorized by the laws of the states were not prohibited as a result of this litigation even though such changes might permit an appropriator to change the place of use of a pre-1950 water right.

III. Montana's proposed decree is inaccurate and would impose new obligations on Wyoming.

Unlike Wyoming's proposed decree, Montana's proposed decree is neither adequate nor accurate. Montana's proposed decree includes both new obligations and misstates the rulings of the Court and the Special Master to make them more favorable to Montana. The Special Master should reject Montana's multipronged attempts to change the outcome of this case.

Montana's proposed decree contains many new obligations that Wyoming did not and will not agree to. These include:

- A requirement to create a list of Wyoming's post-1950 water rights. Section A.6.
- Dates and circumstances when Montana may make a call not specified in any prior opinion. Sections B.3 through 7.

- Accounting procedures for winter flows in the Tongue River Reservoir. Section B.5.
- One-sided call procedures. Sections B.9 through 12.
- A requirement that Wyoming provide Montana a report on the amount and location of groundwater pumping in both the Tongue and Powder River Basins. Section B.16.

Wyoming made its objection to any new obligations clear to Montana during the parties' discussions about their proposed decrees. Some of these subjects were raised in the parties' failed settlement negotiations and some might be proper subjects of discussion between the parties in the future, or perhaps a proper subject for administration by the Compact Commission, but they do not reflect the rulings in this case and are not necessary to implement the decree. Consequently, all of these provisions should be rejected.

Apart from being beyond the rulings in this case, some of these new obligations serve no useful function other than to punish Wyoming. In this regard, the groundwater report is particularly inappropriate. Wyoming does not have ready access to this information. To get it, Wyoming would have to require all of its groundwater users to install expensive metering devices and then provide for the collection of that data at the state's expense. The Special Master is well aware that groundwater pumping did not affect the Tongue River even when coal-bed methane production was at its peak. If it did, groundwater pumping in Montana would affect the river as well. Accordingly, this data would be useless, and if it were useful, Montana would have to provide the same

information to Wyoming for the parties to obtain a complete understanding of impacts. The utter lack of utility and equality in this new obligation suggests that it is merely punitive.

Similarly, the new requirement that Wyoming provide a list of its post-1950 water rights to Montana also serves no useful purpose. As an initial matter, any such list would be subject to change at any time. An appropriator can still obtain a post-1950 water right in the Tongue River basin in either state, and existing rights can be and are abandoned. Attaching a list that is constantly subject to revision serves no purpose other than to punish Wyoming with future burden and expense. The punitive nature of the requirement is readily apparent from the fact that Montana proposes imposing no such requirement on itself, despite its own obligation to regulate its post-1950 water rights before making a call on Wyoming. Moreover, this information is currently available to Montana. Wyoming has provided Montana with current copies of the Division II Tab book on more than one occasion, and Montana has unlimited online access to Wyoming's e-permit system. Montana's proposed appendices only seem calculated to create an opportunity for future mischief and discord.

Even where Montana's proposed decree addresses appropriate topics, the decree skews the actual rulings in large and small ways to favor Montana. For example, section B.2. provides that "Whenever Montana places a call, Montana shall ensure that all post-January 1, 1950 water rights in the Tongue River Basin in Montana upstream of the unsatisfied pre-1950 rights are regulated off." Montana cites page 49 of the Second Interim Report as authority for this proposition, but neither that page nor any page in that report

contains this language. Obviously, Montana is attempting to omit its post-1950 water users downstream of the Tongue River Reservoir from curtailment when the reservoir has called the river. That is not a holding in this case. It is not consistent with Montana's obligation to remedy its shortages through intrastate means in the first instance. And it should be rejected.

Another more subtle example can be found in section B.13. There Montana states that "Montana shall have complete discretion in setting the winter bypass flows from Tongue River Reservoir." Montana cites pages 147-157 and 222-23 of the *Second Interim Report* in support of this statement, although these words do not appear in those pages. Instead, the Second Interim Report actually provides that "Montana's right to establish outflows is not unlimited" and "Montana should be given significant discretion in how it sets its winter outflows." *Second Interim Report* at 149 and 154. There is a world of difference between the Second Interim Report and Montana's proposed decree. Montana's transparent attempt to change the Special Master's conclusion should be rejected.

Similarly, multiple provisions of Montana's proposed decree contain versions of the language set out in section B.8 that "all pre-1950 water rights in the Tongue River Basin in Wyoming shall be strictly regulated to their adjudicated amounts, and all Wyoming rights identified in Appendix B shall be regulated off." Montana cites to page 89 of the *First Interim Report* for this proposed provision, but again this language appears nowhere on that page or anywhere within that report. Instead, page 89 of the *First Interim Report*

provides that the "Compact requires that Wyoming ensure that new diversions or withdrawals in Wyoming not interfere with pre-1950 appropriative rights in Montana."

Montana's language attempts to impose burdens on Wyoming that the Special Master and the Court have not. Namely, that the staff of Division II is required to place every post-1950 water right in the basin under regulation in response to a Montana call, whether those rights are interfering with Montana's pre-1950 water rights or not. This distinction is not unmeaning or inconsequential. For example, in response to the last two calls, after diligent inquiry and inspection, Wyoming determined that few, if any, Wyoming appropriators were using water at the time Montana made its call. Accordingly, little physical regulation was required to ensure that Wyoming's post-1950 water users were not interfering with pre-1950 appropriative rights in Montana.

In addition, Montana's proposed language is broad enough to include post-1950 groundwater rights in Wyoming. Why should Wyoming automatically regulate off post-1950 groundwater rights when the evidence in the case showed that those rights do not interfere with pre-1950 rights in Montana?

Moreover, the phrase "to their adjudicated amounts" seems calculated to form the basis of a future argument that holders of pre-1950 appropriative rights in Wyoming are no longer entitled to the use of surplus water as provided in Wyoming Statutes §§ 41-4-318 through -324. While the evidence at trial revealed that Wyoming water users are rarely able to exercise this right, the right itself was not affected by this litigation, and surplus water is part of an adjudicated right. This attempt by Montana to alter the obligations imposed

by the Court and the Special Master and to alter rights that were not at issue in the litigation should be rejected.

At a minimum, the Special Master should reject each individual misstatement and mischaracterization by Montana of the rights and obligations of the parties. But because Montana's draft decree is replete with inaccuracies that attempt to skew the existing rulings in ways favorable to Montana, the Special Master should simply reject Montana's proposed decree in whole, and adopt Wyoming's proposed decree.[3]

IV. Montana's proposed decree includes unnecessary provisions.

In addition to a host of new obligations imposed on Wyoming, which are not found in the existing opinions, Sections C and D of Montana's proposed decree are unnecessary and should be rejected.

Section C of Montana's proposed decree provides that "Nothing in this Decree shall affect the water rights or other rights of any Indian Tribe or any Indian Reservation." Montana cites only to the language of the Compact for this proposition, and not to a ruling of the Court or the Special Master in this litigation. The decree is not an appropriate place to repeat the terms of the Compact. More importantly, the language the Special Master used when discussing the rights of the Northern Cheyenne Tribe varies significantly from Montana's proposed decree. The Special Master found that the Court "lacks jurisdiction to

[3] The fact that Wyoming has not specifically discussed each provision in Montana's proposed decree in this brief should not be construed as consent to any of the provisions in Montana's proposed decree. Wyoming objects to Montana's proposed decree in its entirety and to each separate provision.

determine the Tribe's rights under the Yellowstone River Compact in this lawsuit[,]" and that it was "ultimately unnecessary to decide how the Compact treats Indian rights in order to resolve the current dispute between Montana and Wyoming." *Second Interim Report* at 159-60.

Wyoming cannot and does not presume that Montana's deviation from the language of the *Second Interim Report* is without purpose. As the Court lacked jurisdiction to determine the Northern Cheyenne Tribe's rights in this lawsuit, any decree purporting to set forth the rights and obligations of the parties, recalling that the Northern Cheyenne Tribe was not a party to these proceedings, need provide nothing in this regard. To the extent the Special Master believes the decree should provide something with regard to the Northern Cheyenne Tribe , Wyoming asserts that the decree should reflect the language of the *Second Interim Report*.

Section D of Montana's proposed decree provides that the Court will retain jurisdiction to enforce the decree as necessary and that the parties can seek further relief under the existing Bill of Complaint. First, the Court should not provide for or entertain any application for further relief under the existing Bill of Complaint. Montana's existing Bill of Complaint has been fully and finally addressed, and should be dismissed by the Court. Second, while it is typical for the Court to retain jurisdiction to enforce its decrees in interstate stream litigation, it is unnecessary and counterproductive here. Montana has been granted all the relief it is entitled to for Wyoming's breaches in 2004 and 2006, and there is no injunction or other prospective relief for the Court to enforce. Wyoming will

not accede to Montana's attempts to persist in a state of perpetual litigation and to press the Court into service as a de facto river master. If future disputes arise, they should be addressed first by the Commission, and failing resolution there, by motion for leave to file a subsequent bill of complaint.

V. Simple interest is appropriate.

Wyoming agrees that Montana is entitled to prejudgment interest from the time of the breach through the entry of judgment, which has yet to occur. Wyoming does not agree, however, that compound interest is required by any relevant authority or that Montana should get to pick and choose the parts of Wyoming Statute § 40-14-106(e) that it finds favorable while ignoring the remainder. That statute provides for simple interest at a generous rate. Similarly, the statutory rate for post-judgment interest found in 28 U.S.C. § 1961 that courts often apply for purposes of awarding prejudgment interest provides for simple rather than compound interest. If Montana would like compound interest, Wyoming requests that the interest rate reflect actual interest rates over the relevant period. Wyoming suspects that in the end use of Wyoming Statute § 40-14-106(e) as it is written would result in a larger prejudgment interest award than compounding interest at realistic rates.

V. No reply is necessary or warranted

Montana has requested a reply brief and Wyoming expects Montana to file a "proposed" reply brief before the Special Master considers whether to grant the request. Understanding that this discussion probably will be rendered moot by the filing of a "proposed" reply, Wyoming does not believe that a reply is either necessary or warranted.

Both Montana and Wyoming have had an equal opportunity to make the case for their respective decrees knowing full well the contents of the other state's decree. Little more need be said about either, and the Special Master should proceed directly to enter a fair and accurate decree.

WHEREFORE the State of Wyoming requests that the Special Master recommend that the Court enter a decree in substantially the form proposed by Wyoming.

Dated this 27th day of February 2017.

Respectfully submitted,

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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 27th day of February, 2017.

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