

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

**STATE OF WYOMING'S LETTER BRIEF COMMENTING ON SPECIAL
MASTER'S MEMORANDUM OPINION ON WYOMING'S MOTION TO
DISMISS BILL OF COMPLAINT**

Defendant State of Wyoming submits this letter brief under the Special Master's Case Management Order No. 2.

Suggestions for Changes to the Text of Memorandum Opinion

To the extent that the Special Master may incorporate text from his Memorandum Opinion into his First Report to the Supreme Court, Wyoming suggests that he consider making the following relatively minor changes to that text:

Page 3, 3rd full paragraph, line 10: the citation to the court's order should be 550 U.S. 932, rather than 550 U.S. 732;

Page 7, 1st full paragraph, line 12: “faired” should be “fared.”

Page 10, first full paragraph of “ANALYSIS,” line 5: Second reference to Montana should be to Wyoming;

Page 13, indented paragraph (1), parenthetical: the reference to those rights pre-dating the Compact should more specifically refer to those rights pre-dating January 1, 1950, since Article V(A) of the Compact describes treatment of rights “existing in each signatory State as of January 1, 1950.” The Compact itself was not approved by Congress until 1951. The more specific reference to rights pre-dating January 1, 1950 appears elsewhere in the Memorandum Opinion;

Page 19, 1st continued paragraph, line 3: the reference to a given calendar year should be to a given water year, since Article V(C) of the Compact bases the cumulative divertible flow calculation through any given date upon a water year beginning on October 1, rather than a calendar year.

Page 20, last full paragraph, 2nd line: it appears that the Special Master intended the word “inconsistent” rather than “inconstant;”

Page 22, 1st full paragraph, line 4: “H.R.” Person should be “H.T. Person;

Page 32, 1st full paragraph, line 1: “Yellowstone River Basin” should be “Yellowstone River System;”

Page 35, 1st full paragraph, line 8: reference to Montana should be to Wyoming;

Page 39, 1st full paragraph, line 10: reference to Montana Supreme Court should be to Wyoming Supreme Court;

Page 42, paragraph 5: “Articles” should be “Article.”

Clarification of Paragraph 3 of Special Master’s Conclusions

Wyoming suggests that the Special Master expressly recommend to the Supreme Court that it dismiss Montana’s claims based on the consumption/depletion concept. The Special Master explains on page 21 of his Memorandum Opinion that the doctrine of appropriation is the method under which the Compact protects Montana pre-1950 rights against Wyoming post-1950 rights. He also agrees with Wyoming’s contention that the Compact does not limit Wyoming’s consumptive use, or require Wyoming to deliver specific, fixed quantities of water to its border with Montana. Mem. Op. at 20.

However, when the Special Master reiterates in his numbered conclusions that Montana pre-1950 appropriative rights can potentially cause Wyoming to restrict diversions to post-1950 Wyoming rights, he does not specifically state the means by which Montana may and may not require Wyoming's restriction. *See* Mem. Op. at 42, ¶ 3. Wyoming sought a ruling in its motion to dismiss that the consumption/depletion concept was not the Compact's method of restricting Wyoming withdrawals. Since the Special Master has stated in the body of his Memorandum Opinion that the doctrine of appropriation, not the consumption/depletion concept, is the method under which Montana pre-1950 rights receive protection, Wyoming believes this rejection of the consumption/depletion concept is ripe for immediate resolution by the Supreme Court as a matter of law.

Finality on this point will lead to efficiency in further proceedings. By making clear that the consumption/depletion concept is not a means of Article V(A) enforcement, the Court will eliminate discovery and expert witness studies relating to consumptive use issues. Instead, the parties will focus their case development on what the Special Master has identified as "typical" processes of prior appropriation doctrine. *See* Mem. Op. at 21. For example, to show a past violation of Article V(A) under the Special Master's interpretation of that article, Montana will presumably attempt to prove that one or more of its water users with pre-1950 rights did not receive sufficient water at the points of diversion at a time when Wyoming allowed a diversion upstream to satisfy a post-1950 right in the face of an adequate demand by Montana. Among other typical defenses under the doctrine of appropriation, Wyoming could potentially interpose a defense that under the particular circumstances Montana had not exhausted its intrastate ability to satisfy its pre-1950 rights. *See* Mem. Op. at 42, ¶ 3. In short, there would be a true case or controversy supporting a justiciable claim.

In summary, Wyoming understands that the Special Master has concluded that Article V(A) of the Compact creates some protection for Montana pre-1950 water rights, but only under the doctrine of appropriation. Wyoming further understands that the Special Master has concluded that Montana's protection for post-1950 rights is provided by the divertible flow allocation in Article V(B) of the Compact. The consumption/depletion concept rejected by the drafters and the Special Master should be explicitly dismissed from the case based on Wyoming's successful presentation on that issue in its motion to dismiss. By making this suggestion, Wyoming does not waive its right to take exception to the Special Master's interpretation of the Compact.

Discussion of Interstate Tributaries in Memorandum Opinion

Wyoming has explained that even if Montana could make an interstate call on post-1950 storage constructed in Wyoming, Montana could not force the release of water previously stored “in priority.” Wyoming’s Mot. to Dismiss Bill of Compl. at 52-53. Since that issue was raised in Wyoming’s motion, the Special Master rightfully decided it in his Memorandum Opinion and it should be part of the Supreme Court’s ruling. By contrast, Wyoming never raised in its motion to dismiss the issue of whether reservoirs diverting from the tributaries to the Interstate Tributaries are subject to either a call by Montana under Article V(A), or allocation under Article V(B). While Wyoming had mentioned the issue when Montana sought leave to file its complaint, the Supreme Court did not discuss it when it granted Montana’s motion for leave to file. *See* Brief in Opposition to Mot. for Leave to File Bill of Compl. at 21; Order Granting Leave to File Bill of Compl., February 15, 2008.

In his Memorandum Opinion, the Special Master analyzes the issue of whether the defined term “Interstate Tributaries” when used in Article V(B) of the Compact, includes tributaries to the four named rivers, even though Wyoming did not raise that issue in its motion to dismiss. At the hearing on the motion to dismiss, the Special Master asked whether the meaning of Interstate Tributaries was an issue that still needed to be addressed. Hr’g Trans. at 125, line 21. Wyoming’s counsel responded that he thought it was an issue that still needed to be addressed, explaining that for Montana to prove a violation of the Compact under the divertible flow allocation, the Special Master would have to determine whether diversions from all tributaries would have to be counted, or just diversions from the “Interstate Tributaries.” *Id.* at 126, line 15. However, Wyoming’s counsel did not state that the issue needed to be addressed immediately in order to decide Wyoming’s motion to dismiss. In fact, later in his discussion of the issue, Wyoming’s counsel indicated that factual development would be helpful in determining whether the drafters would have wanted to include reservoirs on tributaries upstream of the Interstate Tributaries within the coverage of Article V(B) of the Compact. *Id.* at 127, line 17.

Thus, in responding to the Special Master’s inquiry regarding this issue, Wyoming did not intend to suggest that the Special Master should analyze the issue for purposes of the motion to dismiss, especially without briefing and without further development of the case. While the Court has instructed the Special Master to decide Wyoming’s motion to dismiss and then conduct further proceedings after deciding that motion, Wyoming believes that it would be improper for the Special Master to decide issues that Wyoming did not assert in its motion, that were not briefed in connection with that motion, and are not necessary to decide when addressing that motion, although they may have to be decided later in the case. Therefore, Wyoming requests that the Special Master exclude the final paragraph of section III.C.2. on pages 29-30 of his Memorandum Opinion when

he converts that opinion into his First Report to the Court. The issue of whether upstream tributaries are included in the term Interstate Tributaries in Article V(B) of the Compact should be decided only if and when posed later in the case.

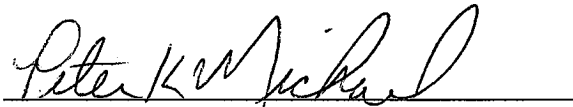
Resolution of Other Legal Issues

Wyoming does not believe that there are other legal issues outside of issues it raised in its motion that the Special Master should resolve before he issues his First Report to the Supreme Court.

WHEREFORE, the State of Wyoming respectfully requests that the Special Master incorporate the foregoing changes and clarifications in his First Report to the Supreme Court.

Dated this 17th day of July, 2009.

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the State of Wyoming's Letter Brief Commenting on Special Master's Memorandum Opinion on Wyoming's Motion to Dismiss Bill of Complaint was served by electronic mail and placing the same in the United States mail, postage paid, this 17th day of July, 2009, to the following:

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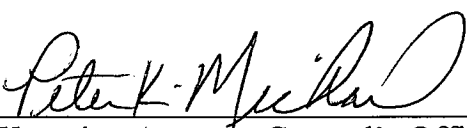
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