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

♦

MONTANA'S RESPONSE TO THE (DRAFT) FINAL REPORT OF THE SPECIAL MASTER

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November 15, 2017

Comes now the State of Montana and submits its Response to the (Draft) Final Report of the Special Master provided to the parties on November 2, 2017 ("Draft Report" or "Report"). Montana's Response consists of the points made below and the line-by-line suggestions and comments contained in the attached Word version of the Draft Report.

The Special Master specifically asked the States to address two provisions of the Decree contained in Appendix A to the Draft Report. The first of these related to Paragraph G, "Exchange of Information." The second related to Paragraph B(2)(b). Montana submits comments on these subjects and one other below.

Paragraph G: "Exchange of Information."

First, Montana would suggest that it be made clear that Paragraph G.1 applies to surface water rights and not to groundwater rights. Groundwater is sufficiently treated in Paragraph G.2. Therefore, the word "surface" should be added to the first two sentences of Paragraph G.1, as shown in the attached redline.

Second, the rest of the language of Paragraph G.1, providing for lists of the surface water rights of the two States to be appended to the Decree, should be retained. This will provide a more confident, shared and transparent description of the States' water rights, which are at the heart of their respective rights under the Yellowstone River Compact ("Compact"). The size of the list for each State should be workable. If necessary, the information can be placed on a DVD and appended to the Report in that form, much as the Court has done in other interstate decrees with respect to computer models necessary to assess compact compliance in the future. *See, e.g.,* Final Report of the Special Master with Certificate of RRCA Groundwater Model, *Kansas v. Nebraska,* No. 126, Orig., at 9 & App. A (September 17, 2003) ("RRCA Model DVD (see inside

back cover)") (containing "The RRCA Model, consisting of the computer code, input files, and pre-processing and post-processing programs").

The possible alternative provided in the draft Decree is much looser and could lead to problems if one of the States is unable to easily access materials located outside the Decree. The Court has opted for directly incorporating in its interstate water compact enforcement decrees documentation and materials needed to implement those decrees. *See id.*; Fifth and Final Report of the Special Master, *Kansas v. Colorado*, No. 105, Orig., Vol. III at C.178 & Attachment 6.1 ("DVD (*In Pocket to Volume III*)") (January 2008) (containing the Hydrologic-Institutional Model's code, input files, pre-processing programs and input files, post-processing programs, calibration programs and data, usable flow programs, output files and logical flow charts). Montana believes the burden on the States of providing the lists of water rights will be relatively small. Wyoming, for instance, should be able to sort the entries in its Tab Book for Division 2 (Ex. J-63) for all the Tongue River water rights. Mr. Book sorted the Tab Book for Tongue River water rights with priorities of January 1, 1950 or later. *See* Ex. M-5, App. G.

With respect to annual updates to the water rights of each State, Montana recommends that the phrase "unless such information is publicly available to the other State" be omitted. The basis for this recommendation is the same as the basis for preferring direct submission of the basic water rights lists— to facilitate the mutual provision of information vital to the proper functioning of the Compact. Wyoming is rightly proud of its water rights information system. This provides the basis for Wyoming to easily provide important information. Montana can do the same. This is highly preferable to the States' going out on their own to try to track down critical information.

Assuming that the Decree will continue to contain the Appendices A and B as presently constituted, Montana recommends that the States be allowed to submit their respective appendices within 30 days after any exceptions to the Final Report are resolved.

Paragraph B(2)(b): Basis for a Reservoir Call

The Special Master has requested comments on the type of evidence that should be required as the basis for Montana's belief that the Tongue River Reservoir ("Reservoir") might not fill. The Special Master has suggested two alternatives to "significant evidence:" either "substantial evidence" or "available evidence."

Montana recommends the adoption of the second alternative, "available evidence," for several reasons. First, "available evidence" is one of the formulations used by the Special Master in the Draft Report to describe the Reservoir call requirement at several points. *E.g.*, Draft Rep. at 64 ("Montana must make a reasonable and good-faith determination based on the available evidence."). Thus, it fits the description that the Special Master has given of this condition on Montana's right to call as being "fact-based." *Id.* at 64-65. Second, "available evidence" is likely to be less open to dispute than "significant evidence" or "substantial evidence." "Substantial evidence" is a term commonly used in the review of findings by an appellate court. *See* Draft Rep. at 65.

Further, the Special Master equates "significant evidence" with "substantial evidence" and refers to the use of that standard in appellate proceedings. *Id.* ("As with the more common legal concept of 'substantial evidence,' significant evidence means 'more than a mere scintilla—that is 'such relevant evidence as a *reasonable mind* might accept as adequate to support a conclusion'" (emphasis in the Report), citing *Richardson v. Perales*, 402 U.S. 389 (1971), a case

that considered the standard of review of evidence on appeal)). Therefore, both "significant evidence" and "substantial evidence" suffer from the fact that they have been developed to serve the needs of an appellate judicial process that is not particularly relevant here. Here, the relevant evidence is the readily available information concerning reservoir content, reservoir inflows, snowpack and the historic record, which has little to do with the needs of an appellate court.

"Available evidence" is also the preferable term because it is more easily objectively verified. It indicates that no involved expert analysis, such as modeling or statistical forecasting, is required before Montana can make a call. Rather, Montana need only look to what information is available, as Montana did in 1981, 2004 and 2006, when it gave notice, which the Special Master has ruled constituted a valid call in each of those years. *See* Second Interim Report of the Special Master (Liability Issues) at 75-79, 88-89 ("Second Report").

The same change, to "available evidence," will need to be made to the provision on lifting a call, Paragraph B(6).

Appendix B

Montana recommends that the entire Compact be included in Appendix B. Excerpts can be confusing, and the entire Compact would require only 16 pages. *See* App. B to Second Report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of Montana's Response to the (Draft) Final Report of the Special Master was served electronically and by U.S. Mail to the following on November 15, 2017, as indicated below:

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