

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 MOTION TO STRIKE A PORTION OF THE
AFFIDAVIT OF PATRICK T. TYRRELL**

TIMOTHY C. FOX
Attorney General of Montana

CORY J. SWANSON
Deputy Attorney General
JEREMIAH D. WEINER
Assistant Attorney General
ANNE YATES
BRIAN BRAMBLETT
KEVIN PETERSON
Special Assistant Attorneys General
215 North Sanders
Helena, Montana 59620-1401

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General

SHARON T. SHAHEEN
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

**Counsel of Record*

August 2, 2013

COMES NOW the State of Montana (“Montana”) and requests that the Special Master strike Paragraph 7 of the Affidavit of Patrick T. Tyrrell in Support of Wyoming’s Motion for Summary Judgment, for the reason that such testimony is expert testimony rather than lay testimony as to personal actions, experiences, and observations in the normal course of his employment. In support of this motion, Montana states as follows:

BACKGROUND

1. The State of Wyoming (“Wyoming”) originally designated its State Engineer, Patrick T. Tyrrell, as an expert witness. State of Wyoming’s Expert Designation, at 10 (Apr. 2, 2013).

2. Montana objected to Mr. Tyrrell’s designation as an expert witness, and, consequently, Mr. Tyrrell was struck from Wyoming’s Expert Designation. Montana’s Objections to Wyoming’s Expert Designation and Expedited Motion for Supplemental Depositions at 2-3 & n.2 (Apr. 12, 2013); Order Regarding Expert Witness Designation, ¶ 1 (“April 23 Order”).

3. As a result, Mr. Tyrrell’s testimony is limited “to personal actions, experiences, and observations in the normal course of [his] employment.” April 23 Order, ¶ 2.

4. Subsequently, on July 1, 2013, Mr. Tyrrell submitted an affidavit containing the following Paragraph 7:

“Groundwater produced in association with coal bed methane within 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. The very hydrogeologic characteristic that traps gas in the coal formations—the fact they are semi-confined aquifers—provides a basis for this result in Wyoming. Accordingly, coal bed methane groundwater rights in Wyoming are not regulated under a single schedule of priorities with any surface rights in accordance with the doctrine of appropriation.”

Affidavit of Patrick T. Tyrrell in Support of Wyoming's Motion for Summary Judgment, ¶ 7 ("Affidavit"), attached hereto.

5. Mr. Tyrrell has not submitted an expert report, as required by Fed. R. Civ. Proc. 26(a)(2)(B).

6. As explained below, Mr. Tyrrell's statements, regarding the interconnection of groundwater pumping in association with the production of coal bed methane ("CBM pumping") and surface water streams, are expert opinion, and as such are outside the scope of his permissible testimony. These statements should therefore be struck from the record.

ARGUMENT

Under Federal Rule of Evidence 701, "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception . . . and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Mr. Tyrrell's statements regarding the interconnection of CBM pumping and surface water streams are not based on his "perceptions." Rather, they are based on scientific and technical knowledge regarding hydrogeology. Such testimony can only be offered by one who satisfies the requirements for expert testimony, as set forth in Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26. The Special Master has already determined that Mr. Tyrrell cannot offer expert testimony. April 23 Order, ¶1. Thus, his expert opinions regarding the hydrological connection of CBM pumping and surface water systems, as set forth in the Affidavit, should be struck from the record.

I. Mr. Tyrrell's Statements Are Not Based on His Perceptions

Rule 701(a) "is the familiar requirement of first-hand knowledge or observation." Fed. R. Civ. Proc. 701, Advisory Committee Notes, 1972 Proposed Rules. It is fundamental that a lay

witness who intends to offer an opinion must satisfy the basic requirement that he or she have personal knowledge. See Fed. R. Civ. Proc. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). Thus, lay witnesses must have perceived facts “from their own senses,” and any opinion offered by such witnesses must be based on and rationally derived from those perceived facts. See *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982) (quoting *Randolph v. Colectramatic, Inc.*, 590 F.2d 844, 847-48 (10th Cir. 1979); see also *United States v. Kaplan*, 490 F.3d 110, 119 (2d Cir. 2007) (holding that lay witness opinion testimony based on experience, what other people said, conversations with the defendant, and “everything that [the witness] had been involved in” was inadmissible because it was not based on facts the witness had observed).

In this instance, however, Mr. Tyrrell’s statements are not based on facts that he perceived with his senses. He does not claim personally to have observed the hydrologic interconnection between CBM pumping and the surface flows of the Tongue River or any related surface stream. Rather, Mr. Tyrrell is relying on facts that are not in evidence to opine as an expert. *Cf.* Fed. R. Civ. Proc. 703 (“An expert may base an opinion on facts or data in the case that the expert has been made aware of . . .”). However, Mr. Tyrrell’s designation as an expert was struck. His opinions regarding the interconnection of CBM pumping and surface water systems should therefore be struck from the record.

II. Mr. Tyrrell’s Lay Opinion Is Inadmissible Because It Is Based on Scientific, Technical, or Other Specialized Knowledge

To the extent that Mr. Tyrrell offers testimony that is not grounded in his personal experience, this testimony is impermissible expert testimony. Mr. Tyrrell’s objectionable

statements are assessments of geological and hydrogeological conditions that are clearly “based on scientific, technical, or other specialized knowledge.” See Rule of Evidence 701(c).

Mr. Tyrrell testifies that “[g]roundwater produced in association with coal bed methane within 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.” Affidavit, ¶ 7. This statement is a scientific or technical conclusion that “results from a process of reasoning which can be mastered only by specialists in the field” and can be founded only upon “scientific, technical, or other specialized knowledge.” See Fed. R. Evid. 701, Advisory Committee Notes, 2000 Amendments (distinguishing expert opinion from lay opinion, which “results from a process of reasoning familiar in everyday life”). It is therefore expert testimony that is not permitted under the April 23, 2013 Order.

Likewise, Mr. Tyrrell testifies that “[t]he very hydrogeologic characteristic that traps gas in the coal formations—the fact that they are semi-confined aquifers—provides a basis for this result in Wyoming.” Again, this is a scientific or technical conclusion, resulting from reasoning that can be mastered only by specialists in the field” and founded upon “scientific, technical, or other specialized knowledge.” Because Mr. Tyrrell is a lay witness, and not an expert witness, these opinions should be excluded from the record.

The last sentence of Paragraph 7 suffers the same problem: “Accordingly, coal bed methane groundwater rights in Wyoming are not regulated under a single schedule of priorities with any surface rights in accordance with the doctrine of appropriation.” This sentence purports to explain the rationale for regulatory non-action on the basis of scientific, technical or other specialized knowledge. For the reasons cited above, it should also be excluded.

III. Mr. Tyrrell Did Not Submit an Expert Report; His Opinion Testimony Should Be Struck on This Basis Alone

As explained previously in other briefing by Montana, a party who identifies a witness as an expert has a duty to provide a report in compliance with Federal Rule of Civil Procedure 26(a)(2)(B). See Reply in Support of Montana's Objections to Wyoming's Expert Designation and Expedited Motion for Supplemental Depositions at 3-6 (Apr. 18, 2013). Montana's failure to comply with Rule 26 with respect to Mr. Tyrrell provides an independent basis that, standing alone, warrants striking the opinion testimony offered by Mr. Tyrrell in his Affidavit.

CONCLUSION

Because Mr. Tyrrell was struck as an expert witness and has not filed an expert report, his opinions related to the interconnectedness of CBM pumping and surface water systems should be struck from the record as impermissible expert testimony that seeks to sidestep the reliability protections of Rule 702. Such testimony would also be contrary to the April 23, 2013 Order.

WHEREFORE, Montana requests that the Special Master strike Paragraph 7 of Mr. Tyrrell's Affidavit.

Respectfully submitted,

TIMOTHY C. FOX
Attorney General of Montana
CORY J. SWANSON
Deputy Attorney General
JEREMIAH D. WEINER
Assistant Attorney General
ANNE YATES
BRIAN BRAMBLETT
KEVIN PETERSON
Special Assistant Attorneys General
Helena, Montana 59620-1401



JOHN B. DRAPER*

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Before the Honorable Barton H. Thompson, Jr.
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CERTIFICATE OF SERVICE

I certify that a copy of Montana's Motion to Strike A Portion of the Affidavit of Patrick T. Tyrrell was served electronically, and by U.S. Mail on August 2, 2013, to the following:

Peter K. Michael
Interim Attorney General
Jay Jerde
Christopher M. Brown
Matthias Sayer
Andrew Kuhlmann
James C. Kaste
The State of Wyoming
123 Capitol Building
Cheyenne, WY 82002
peter.michael@wyo.gov
jjerde@wyo.gov
chris.brown@wyo.gov
matthias.sayer.wyo.gov
andrew.kuhlmann@wyo.gov

James Joseph Dragna
Bingham, McCutchen LLP
355 South Grand Avenue Suite 4400
Los Angeles, CA 90071
jim.dragna@bingham.com

Michael Wigmore
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006-1806
michael.wigmore@bingham.com

james.kaste@wyo.gov

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

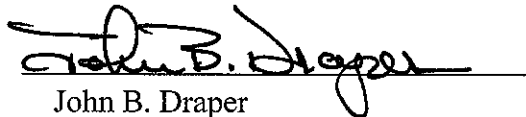
Jennifer L. Verleger
Assistant Attorney General
North Dakota Attorney General's
Office
500 North 9th Street
Bismarck, ND 58501-4509
jverleger@nd.gov

Solicitor General of the United States
U. S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov

James DuBois
United States Department of Justice
Environmental and Natural Resources
Division of Natural Resources Section
999 18th St. #370 South Terrace
Denver, CO 80202
james.dubois@usdoj.gov

Barton H. Thompson, Jr., Special Master
Susan Carter, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 Via Ortega
Stanford, CA 94305-4205
(Original and 3 copies)
susan.carter@stanford.edu

I further certify that all parties required to be served have been served.


John B. Draper

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STATE OF MONTANA, Plaintiff

V.

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**BEFORE THE HONORABLE BARTON H. THOMPSON, JR.
SPECIAL MASTER**

**AFFIDAVIT OF PATRICK T. TYRRELL IN SUPPORT OF WYOMING'S MOTION
FOR SUMMARY JUDGEMENT**

Patrick T. Tyrrell, being sworn, states:

1. I am the current Wyoming State Engineer. I have held that position since January 16, 2001, when I was appointed by the Governor of Wyoming. I have personal knowledge of the facts stated herein and I am competent to make this affidavit. I make this affidavit in support of the State of Wyoming's Motion for Summary Judgment.

2. Article 8, § 5 of the Wyoming Constitution, gives me "general supervision of the waters of the state and of the officers connected with its distribution." Based on this constitutional authority as well as Wyoming statutory authority, I supervise an agency with a staff of approximately 140 persons from my office in Cheyenne, Wyoming. This staff includes four water division superintendents, one for each of the four water divisions into which Wyoming is divided, and their staffs. The Tongue and Powder River drainages are located within Water Division II. I have access to all documentation and information that is maintained regarding Water Division II, including information kept at that division's field office in Sheridan, Wyoming and information kept in my offices in Cheyenne.

3. I am also President of the Wyoming State Board of Control, which is comprised of me and the four water division superintendents. The Board of Control adjudicates water rights in the State of Wyoming and approves changes in those water rights. In my dual capacities as State Engineer and President of the Board of Control, I am personally involved in the official creation of water rights through the issuance of permits, the adjudication of rights, changes in water rights, and the administration and regulation of water rights in the State of Wyoming.

4. I am responsible for administration of water rights in accordance with the prior appropriation doctrine and for regulating the delivery of water to fulfill Wyoming water rights statewide. I carry out these duties with the help of personnel of my office who are stationed throughout the state and in Cheyenne.

5. Wyoming's water law requires conjunctive administration of hydrologically interconnected groundwater and surface water "[w]here underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply[.]" Wyo. Stat. Ann. § 41-3-916. In such circumstances, groundwater and surface water uses from the source of supply are regulated under a single schedule of priorities in accordance with the doctrine of appropriation.

6. Groundwater production needed for lowering of hydrostatic head to allow coal bed methane development in Wyoming is a beneficial use of water. Accordingly, before producing the groundwater, the appropriator must obtain a groundwater permit from my office.

7. Groundwater produced in association with coal bed methane within 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. The very hydrogeologic characteristic that traps gas in the coal formations – the fact they are semi-confined aquifers – provides a basis for this result in Wyoming. Accordingly, coal bed methane groundwater rights in Wyoming are not regulated under a single schedule of priorities with any surface rights in accordance with the doctrine of appropriation.


8. The superintendent, hydrographers, and commissioners of Water Division II are not, and have not been, authorized by law, or by me, to regulate or administer coal bed

methane groundwater rights under a single schedule of priorities with any surface rights in accordance with the doctrine of appropriation.

9. Any Wyoming surface water appropriator may file a written complaint with my office alleging interference with his water right by a junior groundwater right. Wyo. Stat. Ann. § 41-3-911(b). Upon receipt of such complaints, I must investigate to determine whether the alleged interference exists.

10. At no time has any surface water appropriator in Wyoming filed a written complaint with my office alleging interference with his right by coal bed methane groundwater right.

Dated this 1 day of July, 2013.


Patrick T. Tyrrell,
Wyoming State Engineer

STATE OF WYOMING)
) SS
COUNTY OF LARAMIE)

The foregoing AFFIDAVIT OF PATRICK T. TYRRELL was subscribed and sworn to before me, a notary public, by Patrick T. Tyrrell this 1st day of July, 2013.

Witness my hand and official seal.


Notary Public

My Commission Expires: July 18, 2016

