

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 ADDITIONAL CITATIONS RESPONSIVE TO ISSUES AND
QUESTIONS RAISED DURING CLOSING ARGUMENT**

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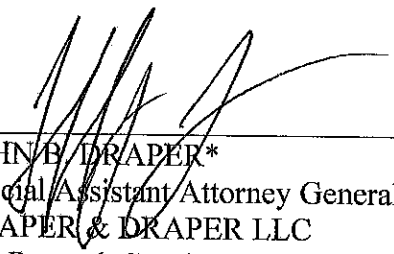
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May 09, 2014

At the hearing on May 1, 2014, the Special Master asked the States to provide citations to facts in the record and precedent responsive to the questions and issues raised by the Special Master. Below is a table containing Montana's citations in response to certain questions raised by the Special Master at the hearing.

Respectfully submitted,

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Table of Additional Citations Responsive to Issues and Questions Raised During Closing Argument

| Hearing Transcript Citation | Question or Issue Raised by the Special Master | Factual or Legal Citation |
|---------------------------------------|---|--|
| <p>Rough Draft (“RD”) 54:8 – 55:2</p> | <p>Following the 1982 YRCC minutes, what evidence is there of Wyoming’s position on how it would have responded to a call?</p> | <p>Ex. J65; Ex. J69; Ex. M64 (Governor explaining in 1984 that Wyoming is entitled to use water so long as its Article V(B) allocations are not exceeded); Ex. M183 at 2; Ex. M157; Ex. W76; Tr. 689:15-23 (Stults); Tr. 2556:18 – 2557:4 (Moy); Tr. 2556:18 – 2557:4 (Moy); Tr. 2595:2 – 2598:1 (Moy); Tr. 2631:3-21 (Moy) (describing “Wyoming’s position from day one”); Tr. 4991:6-16 (Lowry); Tr. 4994:8 – 49096:2 (Lowry); Tr. 5025:18 – 5026 (Lowry); Tr. 5052:4-24 (Lowry) Tr. 5289:3-13 (Tyrrell) (agreeing that Wyoming’s position “was very clear at that time that there was no provision under the Compact for a call”).</p> |
| <p>RD 58:12-23; RD 60:19-21</p> | <p>A. Is a demand an essential element of a call under the doctrine of appropriation and/or the Compact? B. If a demand is an essential element of a call, did Montana demand water?</p> | <p>A. <i>Kerbs v. Walck</i>, 229 P.3d 974, 980 at ¶ 28 (Wyo. 2010) (describing a “call” in Wyoming as “express[ing] concern that [a water user] was not receiving the water he was entitled to receive”); <i>Worley v. United States Borax & Chem. Corp.</i>, 428 P.2d 651, 654 (NM 1967) (“The downstream senior appropriator is entitled to use water to the extent of his needs, and within his appropriation. If needed, and if the water is not reaching his diversion point, he must make his needs known.”); Ex. J32 at IV (States agreed that Montana “must notify Wyoming when it is not able to obtain its pre-1950 water”); Tr. 1967:19 – 1968:3 (LoGuidice) (describing a call as a water user’s notification “that they need some water in their ditch, that they feel they</p> |

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| <p>are senior to somebody upstream of them”); Tr. 1967:19 – 1968:3 (LoGuidice) (describing a call as a water user’s notification “that they need some water in their ditch, that they feel they are senior to somebody upstream of them”); Tr. 2232:12 – 2233:4 (Boyd); Tr. 2067:8-22 (Knapp). “It might be as simple as the senior right calling and saying, hey, I’m short of water.” Tr. 2232:19-22 (Boyd); Tr. 2067:8-22 (Knapp). “It might be as simple as the senior right calling and saying, hey, I’m short of water.” Tr. 2232:19-22 (Boyd).</p> | | |
| <p>B. Tr. 684:5-20 (Stults) (“I felt we were entitled to more water. And I made it – I believe honestly that I made it clear to my counterparts in Wyoming”); Tr. 687:17-24 (Stults); Tr. 904:14-19 (Stults); Tr. 952:2 - 953:5 (Kerbel); Tr. 960:2-17 (Kerbel); Tr. 2627:19 – 2628:20 (Moy); Tr. 2698:5 – 5670:10 (Moy); Tr. 2704:15 (Moy).</p> | | |
| <p>All of the procedures proposed by Montana protected pre-Compact rights before allocating post-Compact water. The evidence shows that Montana’s efforts failed because Wyoming was unwilling to consider a procedure that would protect Montana’s pre-Compact rights. See Mont. Br. at 14-15, ¶¶ 48-50 (and citations therein).</p> | <p>What evidence is there that Montana proposed administrative procedures that were specifically targeted to protect pre-Compact rights?</p> | <p>RD 69:1-71:21</p> |
| <p>Dec. 20 Mem. Op. 8; Sept. 28 2012 Mem. Op. at 13, 16. <i>Texas v. New Mexico</i>, 484 U.S. 124, 129 (1987):</p> <p>“New Mexico, however, argues that it has no obligation to deliver water that it, in good faith, believed it had no obligation to refrain from using. It is true that Texas and New Mexico have been at odds on the interpretation of the Compact and that</p> | <p>What citations support allowing recovery of damages for post-Compact use in Wyoming prior to the date of the call?</p> | <p>RD 74:1-23</p> |

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| <p>their respective views have not been without substantial foundation. . . . But good-faith differences about the scope of contractual undertakings do not relieve either party from performance. . . . There is often a retroactive impact when courts resolve contract disputes about the scope of a promisor's undertaking; parties must perform today or pay damages for what a court decides they promised to do yesterday and did not. In our view, New Mexico cannot escape liability for what has been adjudicated to be past failures to perform its duties under the Compact."</p> <p><i>Cf.</i> Pecos River Compact, Article IX ("In maintaining the flows at the New Mexico-Texas state line required by this compact, New Mexico shall in all instances apply the principal of prior appropriation within New Mexico.").</p> | |
| <p>RD 84:5-10</p> | <p>What evidence supports the release of water that was stored prior to the date of the call in each year?</p> <p>A. The Wyoming reservoirs are not accessible in the winter or during the spring runoff period. Tr. 1740:5-8 (Whitaker); Tr. 1766:21 – 1767:1 (Whitaker); Tr. 2013:15 – 2014:3 (LoGuidice).</p> <p>B. In Wyoming, as in most western states, <i>e.g.</i>, Colo. Rev. Stat. Ann. § 37-80-120, the reservoirs are managed according to the principle of "highority." Mont. Post-Trial Br. at 69-74, ¶¶ 271-275, 282, 285 (and citations contained therein).</p> <p>C. Wyoming's "free river" policy allows post-1950 usage in Wyoming when Montana's storage rights in Tongue River Reservoir are unsatisfied. Tr. 5282:21-5283:5 (Tyrell).</p> |
| <p>RD 105:12-24; 106:19-24</p> | <p>Is it Wyoming's position that the notice provided in 2004 was deficient because Montana asked for</p> <p>Wyoming's Final Pretrial Memorandum, at 4 (Sept. 23, 2013) (stating first contested issue of law as "Did Montana make</p> |

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| | the wrong thing? | <p>calls on Wyoming in years <i>other than</i> 2004 and 2006, and if so, when were the calls made?” No mention of an issue whether call was invalid because Montana asked for the wrong thing)</p> <p>Wyoming’s Post-Trial Brief, at 55 (Mar. 31, 2014) (“There is no dispute that Montana did provide adequate notice to Wyoming on May 18, 2004”)</p> |
| <p>RD 126:25-127:13; RD 179:17-180:5</p> | <p>Should the Special Master certify a question to the Montana Supreme Court regarding application of the one-fill rule in Montana?</p> | <p><i>Montana v. Wyoming</i>, ___ U.S. ___, 131 S. Ct. 1765, 1773 n.5 (2011) (“The highest court of each State, of course, remains ‘the final arbiter of what is state law.’”) (internal citations omitted);</p> <p><i>Arizonans for Official English v. Arizona</i>, 520 U.S. 43, 77 (1997);</p> <p><i>Virginia v. Am. Booksellers Ass’n, Inc.</i>, 484 U.S. 383, 395 (1988), <i>certified question answered sub nom.</i> 372 S.E.2d 618 (Va. 1988);</p> <p><i>Lehman Bros. v. Schein</i>, 416 U.S. 386, 390 (1974);</p> <p>Mont. R. App. P. 15</p> |
| <p>RD 135:3-6; RD 140:4-23; RD 140:4-23; RD 142:11-14; RD 235:20-236:8</p> | <p>What does Montana needs to show in order to prevail on its claim regarding direct flow rights?</p> | <p><i>Colorado v. New Mexico</i>, 467 U.S. 310, 317 (1984) (in equitable apportionment case, Court stated “[w]ith these principles in mind, we turn to review the evidence the parties have submitted concerning the proposed diversion. As our opinion noted last Term, New Mexico has met its initial burden of showing “real or substantial injury” because “any diversion by Colorado, unless offset by New Mexico at its own expense, [would] necessarily reduce the amount of water available to</p> |

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| | | <p>New Mexico users.” 459 U.S., at 188, n. 13, 103 S.Ct., at 547, n. 13. Accordingly, the burden shifted on remand to Colorado to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to New Mexico would be outweighed by the benefits to Colorado from the diversion.”)</p> <p><i>Id.</i> at 318 (“We share the Master’s concern that New Mexico may be overstating the amount of harm its users would suffer from a diversion. Water use by appropriators along the Vermejo River has remained relatively stable for the past 30 years, and this historic use falls substantially below the decreed rights of those users. Unreliable supplies satisfactorily explain some of this difference, but New Mexico’s attempt to excuse three decades of nonuse in this way is, at the very least, suspect. Nevertheless, whatever the merit of New Mexico’s explanation, we cannot agree that Colorado has met its burden of identifying, by clear and convincing evidence, conservation efforts that would preserve any of the Vermejo River water supply.”)</p> |
| RD 155:5-16 | What was the intent of the negotiators of the Compact with respect to the reservoir rights? | <p>A. “Montana [was] interested in preserving as far as possible vested and present uses, and obviously any compact which might seriously interfere with such uses would be difficult of ratification.” Ex. M12 at 17; Tr. 2409:4-17 (Littlefield).</p> <p>B. The negotiators were aware of the Tongue River Reservoir, and that the storage capacity in 1950 was over 69,000 acre feet. Mont. Post-Trial Br. at 32-33, ¶¶ 112-115 (and citations therein).</p> |

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| <p>C. As discussed at length, the firm annual yield of the Tongue River Reservoir was perfected prior to January 1, 1950. See, e.g., Mont. Post-Reply. at 6-25.</p> | | |
| <p>Tr. 1057:2 – 1058:8, 1131:10-21 (Smith) (In Montana, a State Project water right is perfected after the reservoir is built, the water is offered for sale, and the reservoir is filled)</p> <p>Tr. 1816:23 (Aycock) (In Mr. Aycock's experience working on Reclamation projects throughout the West, a reservoir storage right is fully perfected once the reservoir fills to capacity)</p> | <p>What is the proper interpretation of Article V(C)(3) with respect to the meaning of the term "storage," whether the term has to do with capacity the amount of water actually stored, and whether beneficial use is measured by the amount of water applied to the land or by storage for the purpose of sale?</p> | <p>RD 156:13-21, 157:10-19, 158:11- 161:8, 161:25-162:5, 163:7-10</p> |
| <p>Tr. 1828:13 – 1830:13 (Aycock) (describing Wyoming's recognition of the original water right for Buffalo Bill Reservoir after restoration to the original capacity)</p> | | |
| <p>Tr. 4276:23 – 4277:22 (Fassett) (explaining Wyoming's position that the Middle Fork project would have had a pre-1950 water right protected under Article V(A), even though construction of that project would not have occurred until after the Compact)</p> | | |
| <p>Tr. 5151:12-20 (Tyrrell) (stating that a water right for a reservoir in Wyoming "is defined by its capacity at the high water line. So if you've got a 200 acre-foot reservoir, you will get a water right to store 200 acre-feet")</p> | | |
| <p><i>Montana v. Wyoming</i>, 131 S. Ct. 1778 (holding that Wyoming pre-1950 irrigators could increase their efficiencies and therefore their consumption because the Compact protects the exercise of pre-1950 appropriative rights within the full scope of their original appropriation)</p> | | |

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| | <p><i>Donich v. Johnson</i>, 250 P. 963, 972-73 (Mont. 1926) (recognizing that enlargements of reservoirs do not constitute new appropriations except to the extent they exceed the original capacity of the reservoir)</p> | |
| RD 194:25-195:10 | <p>See Mont. Post-Reply. At 30-35; see also Tr. 3689:19-3690:4 (Hirsch) (explaining that after spring runoff, no post-1950 rights were diverting); Tr. 3316:2-14, 3335:24-3336:19, 3367:17-24 (Kepper) (same); Tr. 3545:10-16 (Gephart) (same); Tr. 3587:6-24 (Fjell) (same)</p> | <p>What is the standard for determining the adequacy of Montana's system of administration?</p> |
| RD 205:16-206:5 | <p>Steven P. Larson, <i>The Use of Complex Computer Modeling of Groundwater Systems</i>, 53 Rocky Mtn. Min. L. Inst. 17-1 (2007); Robert E. Schween and Steven P. Larson, <i>Groundwater Modeling Capabilities and Limitations, Use and Abuse</i>, 32 Rocky Mtn. Min. L. Inst. 22 (1986);</p> <p><i>United States v. Dico, Inc.</i>, 266 F.3d 864, 870 (8th Cir. 2001) (“[T]he model itself passes scrutiny under <i>Daubert</i>. Known as MODFLOW, the model is sanctioned by the EPA and is considered a standard model that is acceptable and commonly used by hydrogeologists.”);</p> <p><i>Abarca v. Franklin Cnty. Water Dist.</i>, 761 F. Supp. 2d 1007, 1077 (E.D. Cal. 2011) (“The degree of variance between Bartlett’s model and the well data requires a factual foundation to decide the truth of Bartlett’s grounds for minimizing most of the observed test data. This credibility determination will bear on the ultimate admissibility of the model. The Court reserves the right to exclude the model after hearing the evidentiary foundation for the model at trial.”); <i>Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.</i>, 285 F.3d 609, 614 (7th Cir. 2002);</p> <p><i>Kansas v. Colorado</i>, No. 105 Orig., Report of Special Master</p> | <p>What standard should the Supreme Court use in evaluating whether Mr. Larson’s groundwater model is reliable?</p> |

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| <p>at Vol. II p. 136 (July 1994) (“Initially, the United States questions whether Kansas’ expert testimony based upon the revised H-I model satisfies threshold standards of reliability, citing the Supreme Court’s recent decision in <i>Daubert, et al. v. Merrell Dow Pharmaceuticals, Inc.</i>, 509 U.S. 579, 125 L.Ed.2d 469 (1993). I note that the decision is limited to the “scientific” portion of Rule 702 although the rule also applies to “technical, or other specialized knowledge.” Moreover, the discussion is seemingly aimed at jury cases. Nonetheless, if the decision, including the “general observations” of the Court, does apply to all of the expert testimony in this case, I believe that <i>admissibility</i> requirements have been met.”);</p> <p><i>League of United Latin Am. Citizens #4552 (LULAC) v. Roscoe Indep. Sch. Dist.</i>, 123 F.3d 843, 846 (5th Cir. 1997) (Much of this trial was a familiar battle of experts. “The credibility determination of witnesses, including experts, is peculiarly within the province of the district court.”).</p> | | |
| <p><i>Kansas v. Nebraska & Colorado</i>, No. 126 Orig., Report of the Special Master, 141 & n. 46 (Nov. 15, 2013) (Special Master Kayatta pro-rated damages upon finding that the defendant should be charged with less damages than claimed)</p> | <p>Whether the Special Master should pro-rate damages if he determines that Wyoming’s liability extends only to part of an irrigation season in a given year.</p> | <p>RD 232:24-233:24</p> |
| <p>Montana’s burden is to show that Wyoming’s post-1950 diversions reduced the amount of water flowing into Montana when Montana’s pre-1950 rights were not being satisfied. See <i>Colorado v. New Mexico</i>, 467 U.S. 310, 317 (1984) (New Mexico met its burden to show real or substantial injury “because any diversion by Colorado, unless offset by New Mexico at its own expense, would necessarily reduce the amount of water available to New Mexico users”)</p> | <p>Is Montana required to show that post-1950 water that would have gone into the river would actually make it to the pre-1950 Montana users?</p> | <p>RD 235:20-236:8</p> |

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I certify that a copy of *Montana's Additional Citations Responsive to Issues and Questions Raised During Closing Argument* was served electronically on May 09, 2014 to the following:

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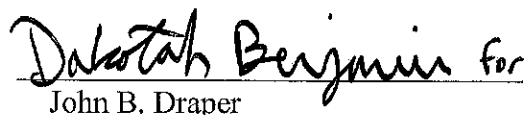
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I further certify that all parties required to be served have been served.


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