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 Special Master Barton H. Thompson, Jr.

MONTANA'S LETTER BRIEF REGARDING WYOMING'S COMPACT OBLIGATION

STEVE BULLOCK
Attorney General of Montana

JENNIFER ANDERS
ANDREW HUFF
Assistant Attorneys General
215 North Sanders
Helena, Montana 59620-1401

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
**Counsel of Record*

July 27, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL MATERIALS

STATUTES

RULES

TREATISES AND OTHER AUTHORITIES

INTRODUCTION

The Special Master ordered briefing on the following question:

> Do the Supreme Court's May 2, 2011 decision and opinion in this case ("Opinion" or "Slip Op.") and/or the First Interim Report of the Special Master ("FIR") preclude Montana's argument that, "subject to any changes in consumption on pre-1950 irrigated acreage," the Compact imposes a "delivery obligation" on Wyoming consisting of "a delivery requirement that varies only with water supply conditions." Case Management Order No. 7 ("CMO No. 7), ¶ 1.

Montana submits this brief in accordance with the Special Master's Order. As shown below, Montana's argument that the Yellowstone River Compact ("Compact") imposes a stateline delivery requirement on Wyoming that varies only with water supply conditions is not precluded by either the Opinion or the FIR. Neither the Opinion nor the FIR contains a statement precluding such an obligation, and the Court's Order of October 12, 2010, expressly recommits the issue to the Special Master, preserving it for further consideration by the Special Master and the Court.

BACKGROUND

1. Montana filed its Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support in January of 2007. "Montana alleged that Wyoming had breached the Compact by consuming more than its share of the Tongue and Powder Rivers." *Montana v. Wyoming & North Dakota*, 563 U.S. __, Slip Op. at 3 (2011). Wyoming opposed the Motion.

2. In February 2008, the Court granted Montana leave to file its Bill of Complaint against Wyoming for breach of the Compact. 552 U.S. 1175 (2008).

3. At the invitation of the Court, Wyoming filed its Motion to Dismiss the Complaint. Wyoming argued that Article V(A) excluded pre-1950 rights from the Compact, and thus afforded no protection to Montana. According to Wyoming "[t]he only Montana [claim] contemplated [by the Compact] is one asserting that on a given date Wyoming has exceeded its cumulative annual percentage under [Article V,] Sections B and C." Wyo. Reply Br. in Supp. of Mot. to Dis. 3.

4. In its Response to Wyoming's Motion to Dismiss, Montana directed its argument at Wyoming's primary contention, which was that the Compact did not afford any protection for water associated with pre-1950 uses in Montana.

5. The Special Master found that "the Compact requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the

border to enable Montana to satisfy its pre-1950 appropriations." FIR, at 15 (Feb. 10, 2010). Accordingly, the Special Master recommended that the Court deny the Motion to Dismiss. Wyoming filed no exceptions to the FIR.

6. Montana filed an exception with the Supreme Court to two conclusions of the Special Master: (1) that the Compact "does not prohibit Wyoming from allowing its pre-1950 appropriators to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands that they were irrigating as of January 1, 1950," FIR at 90 ("First Exception"); and (2) that Wyoming's obligations are contingent upon Montana's actions ("Second Exception").

7. As part of the Second Exception, Montana maintained that "[u]nder any particular set of water supply conditions, there is a determinable amount of water that Wyoming is required to provide to the state line." Montana's Exception and Br. at 38 (excerpt attached hereto as Exhibit A).

8. In response to Montana's Second Exception, the United States counselled that "the Court may wish to leave this issue open for further proceedings before the Special Master." Brief for the United States as Amicus Curiae opposing Plaintiff's Exception at 30 ("U.S. Exception Br."). "Montana did not address intrastate remedies in its responsive briefing before the Master," the United States reasoned, "[a]nd the [FIR] does not definitively establish the boundaries of any obligation to pursue intrastate remedies." *Id.,* at 31.

9. The Court denied the Motion to Dismiss but set the First Exception for oral argument. The Second Exception was "recommitted to the Special Master." Order of October 12, 2010, 562 U.S. __ (2010) (excerpt attached hereto as Exhibit B); *see also* 563 U.S. ___, Slip Op. at 4 n. 2.

10. After oral argument, the Court overruled Montana's First Exception but did not otherwise adopt the First Interim Report. In its opinion, the Court explained that it was addressing only the question of "whether Article V(A) allows Wyoming's pre-1950 water users – diverting the same quantity of water for the same irrigation purpose and acreage as before 1950 – to increase their consumption of water by improving their irrigation systems even if it reduces the flow of water to Montana's pre-1950 users." 563 U.S. __, Slip Op. at 5.

11. Subsequently, the Special Master ordered the States of Montana and Wyoming to confer on the issue of bifurcation of the proceedings. Case Management Order No. 6, at ¶ 1. In those discussions, the States agreed that the case should be bifurcated into liability and remedies phases, but the States disagreed on the scope of the liability phase. The reason for the disagreement was a divergence on whether the Compact imposes a stateline delivery obligation on Wyoming.

12. The States submitted separate letter briefs on the issue. As part of its submittal, Montana requested that the Special Master resolve the issue of whether "Wyoming's delivery obligation is a stateline delivery requirement that varies only with water supply conditions." Ltr. Br. of Montana Re: Bifurcation (June 28, 2011).

13. During July 1, 2011 Telephonic Status Conference, Wyoming raised for the first time the argument that the Court or the Special Master had already resolved the issue of a stateline delivery obligation in its favour.

14. In response, the Special Master ordered the States to brief the issue of whether Montana's argument concerning Wyoming's delivery obligation is precluded. CMO No. 7, ¶ 1. The Special Master did not ask for briefing on the merits of Wyoming's delivery obligation, but only on whether the issue had already been resolved.

ARGUMENT

Montana's argument that the Compact imposes a stateline delivery obligation is not precluded by the Court's Opinion or the First Interim Report. As explained below, this is true for three reasons: (1) Wyoming's stateline delivery obligation was not fully briefed by the parties or squarely decided in the First Interim Report; (2) Wyoming's stateline delivery obligation was not fully briefed by the parties or squarely decided in the Court's Opinion; and (3) the Supreme Court recommitted the issue to the Special Master.

I. Standard of Decision

At base, Wyoming's argument that the stateline delivery issue has been decided in its favour is tantamount to a claim that the doctrine of "law of the case" precludes Montana from raising the issue. The "law of the case" doctrine "is an amorphous concept" that "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (citing 1B J. Moore & T. Currier, *Moore's Federal Practice*, at ¶ 0.404 (1980)). "Law of the case" is discretionary, *id.*; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (acknowledging the Court's authority to reconsider a long-standing ruling), and applies only to issues that are "fully briefed and squarely decided." 1B James Wm. Moore, *Moore's Federal Practice*, at ¶ 0.404[1] 2d ed. 1996). A finding from a lower tribunal that has been implicitly or explicitly vacated ceases to be law of the case. *See, e.g.*, Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4478 (2002).

Moreover, in original cases, the Court itself retains "ultimate responsibility" for both findings of fact and conclusions of law, and it fulfills this obligation with an eye to the long-lasting ramifications of its decisions. *See South Carolina v.*

North Carolina, 130 S.Ct. 854, 869 (2010) (explaining that although special masters assist in the management of the original docket, "responsibility for the exercise of this Court's original jurisdiction remains ours alone under the Constitution") (Roberts, J., dissenting); *United States v. Maine*, 475 U.S. 89, 97 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974). In such cases, "which involve issues of high public importance," *United States v. Texas*, 339 U.S. 707, 715 (1950), the Court has ruled on dispositive issues at an initial stage only in rare instances. *See, e.g., Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("summary procedures . . . present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated legislation, contracting and practice"); *Eccles v. Peoples Bank,* 333 U.S. 426, 434 (1948) ("Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment"). For similar reasons, the Court has "been reluctant to import wholesale law-of-the-case principles into original actions. . . ." *Wyoming v. Oklahoma*, 502 U.S. at 446 (citing *Arizona v. California*, 460 U.S. at 618-19).

II. Whether the Compact Imposes a Stateline Delivery Obligation is Critical to the States

Montana seeks only its fair share of the waters of the Tongue and Powder Rivers. For years, Montana attempted to work cooperatively with Wyoming to achieve this result; only after years of being rebuffed did Montana resort to the Court's original jurisdiction to protect its rights under the Compact. Montana's purpose in bringing this action was to secure an interpretation of the Compact that allows for its fair and effective administration for years to come, not simply to remedy past damages. Montana seeks a decree that avoids future disputes by establishing the amount of water to which each State is entitled for both pre-1950 and post-1950 uses based on water supply conditions in any given year. *See* Bill of Complaint, at 5.

In the First Interim Report the Special Master rejected Wyoming's position on Article V(A), stating that "the Compact requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the border to enable Montana to satisfy its pre-1950 appropriations." FIR at 15. Wyoming, however, would have the Special Master ignore his prior recognition of the protection afforded to Montana under the Compact.

While it is undisputed that the Compact does not specify a fixed amount of water owed under Article V(A), the protection of pre-1950 uses in both States requires that the States know the extent of those uses as of January 1, 1950 and how they are affected by water supply conditions (which can be translated into a an amount of water that Montana has referred to as Wyoming's "stateline delivery obligation"). Subject to any changes in consumption on pre-1950

irrigated acreage, Montana contends that the Article V(A) imposes a derivable stateline delivery obligation on Wyoming that is based on the pre-1950 water rights in both States and that varies primarily with water supply conditions. In contrast, Wyoming now rejects the notion that the Compact imposes such a delivery obligation on Wyoming. Instead, Wyoming, would require that a Compact violation be found only on a showing by Montana that (1) "Montana appropriators with pre-1950 rights were damaged by Wyoming's failure to curtail post-1950 rights"; (2) notification by Montana to Wyoming occurred "when pre-1950 Montana direct flow rights are short so that Wyoming could investigate whether the pre-1950 Montana rights were in fact unsatisfied and also whether any of Wyoming's post-1950 rights had not been curtailed"; (3) the "curtailment [of Wyoming rights] would not be futile, but instead would result in water actually reaching the Montana pre-1950 rights"; and (4) Montana cannot "satisfy its pre-1950 rights from other resources in Montana's control." [1] Wyo. Ltr. Br. Under Case Man. Order No. 6 (June 28, 2011).

By arguing that this Court has resolved the stateline delivery issue in its favor and insisting that Montana's only recourse is to prove harm to individual users without regard to stateline flow, Wyoming is attempting to avoid any practical Compact obligations. The ultimate decision on this issue has important and far reaching implications. For example, resolution of the issue in Wyoming's favour would render enforcement of the Compact entirely unworkable. To be

[1] Wyoming is attempting to "cherry-pick" only those aspects of the doctrine of prior appropriation that will minimize its obligations under the Compact. Wyoming seeks to impose Compact obligations that are based on individual appropriative rights in Montana, *see, e.g.,* Wyoming List of Issues of Fact and Law for Resolution Under Case Management Order No. 6, at ¶¶ 1.e, 2.d, 2.f, 3, 9, 10 (July 20, 2011), yet it would deny those very same individual users the most fundamental protection afforded by the same doctrine– priority. *Cf.* FIR at 5 (explaining that "[w]here there is insufficient water in a stream to meet the right of a given appropriator, the prior appropriation doctrine generally gives the appropriator the right to demand that any upstream appropriators who are junior in time reduce, or, if necessary, cease their diversions to the extent necessary to ensure that the more senior appropriator receives the water to which he or she is entitled"). For example, the futile call doctrine is a defense sometimes available to a junior water user to a priority call from a senior user. In essence, under the futile call defense, the junior water user asserts that it need not curtail its junior use because the water would never benefit the senior user. *See, e.g. San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 195 n.9 (Ariz. 1999); *Loyning v. Rankin*, 165 P.2d 1006, 1012 (Mont. 1946). Even though Wyoming denies that its pre-1950 water users are subject to a priority call from pre-1950 Montana water users, it nonetheless seeks to avail itself of this defense, which is premised on the principle of priority. But Wyoming cannot have it both ways. Either the Compact imposes a stateline delivery obligation on Wyoming, or the Compact protects the right of individual water users to receive water in priority without regard to the stateline. There can be no middle ground. Thus, if Wyoming believes that the defense of a futile call for individual rights applies, then it must also acknowledge that the Compact protects the rights of those same individual users to receive water in priority without regard to the stateline. Any other conclusion would produce the inconceivable result that Montana gave up its right to receive water in priority, *see Bean v. Morris*, 221 U.S. 485 (1911), and gave up its right to seek an equitable apportionment, *see* FIR at 24, but received no benefit in return. Montana never would have entered into such a Compact. "It strains credulity . . . to argue that Montana was willing to give up its interstate protection of its pre-1950 appropriative rights" without protection. *Id.*

sure that a fully informed and considered decision is made on this issue of "high public importance," *United States v. Texas*, 339 U.S. at 715, the Special Master should allow briefing on the stateline delivery issue.

III. Montana Is Not Precluded From Arguing that the Compact Imposes a Stateline Delivery Obligation

A. Wyoming's Stateline Delivery Obligation Was Not Fully Briefed by the Parties Nor Squarely Decided in the First Interim Report

As one leading commentator has explained, the law of the case doctrine applies only to issues that were "fully briefed and squarely decided." 1B James Wm. Moore, *Moore's Federal Practice*, at ¶ 0.404[1] 2d ed. 1996). It is therefore "critical to determine what issues were actually decided in order to define what is the 'law of the case.' "This requires a careful reading of the Court's opinion: observations, commentary, or mere dicta touching upon issues not formally before the court do not constitute a binding determination." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982). In the present case, the issue of whether Wyoming has a stateline delivery obligation was never fully briefed by Montana or squarely decided in the First Interim Report. Rather, Montana responded to, and the Special Master rejected, Wyoming's argument that the Compact carved out, but did not protect, water associated with pre-1950 uses in each State.

Wyoming relies on the briefing and decision denying its Motion to Dismiss to support its contention that the stateline delivery issue has already been decided. A motion to dismiss allows a claim to be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Therefore, the question raised by Wyoming's Motion was whether Montana could "prove [any] set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also* Wyo. Mot. to Dis. at 64 (requesting that "the Court dismiss Montana's Bill of Complaint on grounds that it fails to state a claim upon which relief may be granted"). It is in this narrow context that Wyoming now argues that the Court or Special Master decided the stateline delivery issue.

In its Motion to Dismiss, Wyoming argued that Article V(A) could not serve as the basis for a Compact violation because Article V(A) merely carved out pre-1950 rights, and thus afforded no protection to Montana. *See, e.g.,* Transcript of Hearing on Motion to Dismiss, at 19 (Feb. 3, 2009) (P. Michael) (arguing that Article V(A) "does not create, as the United States says, a protection. It just recognizes the rights that exist."). According to Wyoming, "[t]he only Montana [claim] contemplated [by the Compact] [was] one asserting that on a given date Wyoming has exceeded its cumulative annual percentage under [Article V,]

Sections B and C." Wyo. Reply Br. in Supp. of Mot. to Dis. at 3; *see also* Wyo. Mot. to Dis. at 37 ("Wyoming can violate its allocation only if its cumulative post-1950 diversions and net gains in storage exceed Wyoming's percentage of the cumulative divertible flow from October 1 through a given date."). In the words of the Special Master "Wyoming's argument ultimately boil[ed] down to the contention that Montana has no means, other than what Wyoming refers to as the 'self-correcting' mechanism of Article V(B), to protect pre-1950 appropriative rights in Montana against new diversions or withdrawals of water in Wyoming that prevent sufficient water from reaching Montana." FIR at 37; *see also id.* at 19 ("Wyoming argue[d] that Article V(A) merely recognizes pre-1950 water rights under each state's water laws, without requiring Wyoming to curtail post-1950 uses when needed to ensure that adequate water reaches Montana to protect pre-1950 appropriations in Montana.").

The purpose of a response brief is to directly address the arguments raised by the movant. It is not surprising, therefore, that Montana limited the arguments in its Response to Wyoming's Motion to Dismiss to whether Montana's Bill of Complaint states "a claim upon which relief can be granted." *See Atchison Topeka and Santa Fe Railway Company v. Buell*, 480 U.S. 557, 568 (1987) (acknowledging that when a movant raises a claim in a dispositive motion, the responsive brief is responding to "that narrow argument alone"). Thus, Montana argued that the Bill of Complaint does state a claim upon which relief can be granted, explaining that (1) the Compact apportions all of the Waters of the Yellowstone River not expressly excluded, Mont. Resp. to Mot to Dis. at 23-27, (2) Article V(A) apportions the water supply in use at the time of the Compact, *id.* at 27-35, and (3) Wyoming cannot lawfully deplete the waters apportioned to Montana, *id.* at 38-41. Contrary to the arguments raised by Wyoming in its motion to dismiss, Montana contended that "Montana's pre-1950 rights are thereby protected from any of Wyoming's increases in consumption that deny it the water on which the pre-Compact rights in Montana relied at the time of the Compact." *Id.* at 42. Accordingly, Montana was not required to fully address whether the Compact imposes a stateline delivery obligation on Wyoming.

Likewise, the question before the Special Master in the Motion to Dismiss – whether the Compact carved the water associated with the pre-1950 water rights completely out of the Compact – did not require resolution of whether the Compact includes a stateline delivery requirement and what that requirement might be. As a result, the issue was not squarely before the Special Master, and the First Interim Report does not directly address or resolve the question. Because the question was neither "fully briefed" by Montana nor "squarely decided" by the Special Master, it follows that the First Interim Report is not 'law of the case' on the stateline delivery issue.

Wyoming may be basing its position on its depletion-vs-depletible flow argument. For example, Wyoming argued that

> "Montana assumes that the Compact is a 'depletion' type of compact that guarantees river flows at the state lines as those flows existed as of January 1, 1950. Wyoming contends that the drafters expressly rejected the depletion concept in favor of a divertible flow concept, so claims based on depletion or consumption must be dismissed." Wyo. Mot. to Dis. at 2-3.

As the quoted material illustrates, Wyoming's argument was based on its oft-repeated contention that the Compact was a "divertible flow" compact. However, the Special Master rejected Wyoming's contention that the "divertible flow" concept applied to Article V(A). FIR at 29 ("By the terms of the Compact, however, the cumulative divertible-flow approach of Articles V(B) and V(C) applies only to the 'quantity of water subject to the percentage allocations' in Article V(B) – *i.e.*, to new uses.").

Indeed, several findings in the First Interim Report are consistent with Montana's understanding that the Compact imposes a stateline delivery requirement on Wyoming. For example, the First Interim Report explains that "[t]his case deals with the entitlements of the States of Montana and Wyoming," FIR at 1, and finds that Article V allocates the waters of the Yellowstone River system "among the three states," FIR at 10, principles that support a stateline delivery requirement. Likewise, in summarizing the protections afforded by the Compact, the First Interim Report concludes that "Article V(A) . . . clearly and unambiguously protects pre-1950 appropriative rights in Montana from new diversions or withdrawals in Wyoming *that prevent sufficient water from reaching Montana*. *Id.* at 37 (emphasis added); *see also id.* at 15 ("the Compact requires Wyoming to ensure that new diversions in Wyoming *do not prevent sufficient water from reaching the borde*r to enable Montana to satisfy its pre-1950 appropriations." (emphasis added)). In addition, it is important to acknowledge that the Special Master recommended denying the Motion to Dismiss.

Finally, the First Interim Report's reference to the Colorado River Compact is not inconsistent with Montana's position. *See* FIR 28, citing the Colorado River Compact, 70 Cong. Rec. 324 (1928). The First Interim Report states that "the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana." Montana agrees. The Colorado River Compact requires the upstream states to deliver 75,000,000 acre feet of water to the lower states for any 10 year period. *Ibid.* But unlike the Colorado River Compact, the Yellowstone River Compact does not require Wyoming to deliver a fixed quantity of water to Montana. Montana does not contend that there is an unchanging amount in acre-feet of water that must be delivered during a given period. Rather, Montana contends that Wyoming has a stateline delivery obligation that varies from year-to-year and day-to-day based on water supply conditions.

In sum, Montana respectfully submits that the First Interim Report is "law of the case" on only the direct questions raised by Wyoming of whether the Complaint states a cause of action, and whether the Compact carved the water associated with the pre-1950 water rights completely out of the Compact. In contrast, whether the Compact imposes a derivable stateline delivery requirement on Wyoming based on the pre-1950 water rights in both states and the prevailing water supply conditions was neither fully briefed nor squarely decided.

B. Wyoming's Stateline Delivery Obligation Was Not Fully Briefed by the Parties Nor Squarely Decided in the Supreme Court's Opinion on the First Exception

In its First Exception to the Court, Montana did not fully explore the stateline delivery issue for two reasons. First, as discussed above, the stateline delivery issue was not briefed or decided in the First Interim Report. Thus, there was no impetus for Montana to seek recourse from the Court. Second, to the extent that a stateline delivery obligation was addressed at all by the Special Master, Montana believed that the issue had been resolved in its favour. Montana asserted that "the Special Master correctly found that [the Compact] obligates Wyoming to deliver at the state line a block of water sufficient under the stream conditions then in existence to satisfy Montana's pre-1950 rights. FIR 21-22." Mont. Exception and Br. at 9. This assertion was not contested by Wyoming.

In deciding Montana's First Exception, the Court addressed the limited question "whether Article V(A) allows Wyoming's pre-1950 water users – diverting the same quantity of water for the same irrigation purpose and acreage as before 1950 – to increase their consumption of water by improving their irrigation systems even if it reduces the flow of water to Montana's pre-1950 users." 563 U.S. __, Slip Op. at 5. The Court carefully confined its discussion and decision to this issue. *See, e.g., id.* at n. 4 (explaining that the opinion did not resolve the issue of whether the Compact allows the law to evolve), n.5 (explaining that the decision is not intended to impact state law). Nothing in the Court's opinion is inconsistent with Montana's position that the Compact imposes a derivable stateline delivery obligation. This includes the Court's discussion of the Colorado River Compact. *See* Section III.A, *supra* pg. 7, Indeed, parts of the Court's Opinion support Montana's position. For example, the Court explained that "Montana's pre-1950 users can . . . 'insist that [Wyoming's pre-1950 users] confine themselves strictly within the rights which the law gives them." *Id.* at 7. This rule enables the States to derive the corresponding stateline delivery requirement under each set of water conditions.

In sum, the stateline delivery issue was not fully briefed or squarely decided by the Supreme Court. As a result, the Court's opinion does not

preclude the Special Master from addressing whether the Compact imposes a stateline delivery obligation.

IV. The Supreme Court Recommitted the Issue to the Special Master

The Court denied the Motion to Dismiss without adopting the First Interim Report. 562 U.S. __. While this ruling is relevant, it is the disposition of Montana's Second Exception that is particularly germane to the status of the determination of the issue of Wyoming's stateline delivery requirement. As explained above, Montana disagreed with certain conclusions reached in the First Interim Report. Specifically, Montana took exception to the conclusion that "Wyoming's Compact obligations are contingent upon Montana's actions." In supporting its position that Wyoming's Compact obligations are not contingent upon Montana's actions, Montana explained that

> "While Article V(A) speaks in terms of "Appropriative rights . . . in each signatory State," this formulation is simply a means to an end: the apportionment of the waters of the Yellowstone River among the three States. *Under any particular set of water supply conditions, there is a determinable amount of water that Wyoming is required to provide to the state line. This amount of water is dependent upon water supply conditions in Wyoming*, not upon water administration in Montana or whether Montana has made a 'call on Wyoming." Mont. Exception at 38 (emphasis added).

See also Mont. Sur-Reply 21-25 (maintaining that the Compact's allocation is self-executing and does not depend on actions of individual users or administration in Montana) (excerpts attached hereto as Exhibit A).

In that same Second Exception, Montana correctly predicted the potential mischief that might be caused by the contested conclusion:

> The recommended exhaustion of intrastate remedies requirement is a recipe for precisely the kind of interstate allocation squabbles that the drafters of the Compact sought to avoid. Wyoming will certainly demand that Montana prove as a condition precedent to any inquiry into Wyoming's own actions that Montana has exhausted intrastate sources of supply for its pre-1950 rights, presumably by requiring Montana to show, among other things that ***all*** of its pre-1950 users have called ***all*** junior users on the stream. This will trigger discovery regarding a wide array of water management issues in Montana, at great expense and with a great deal of delay in the ultimate resolution of this case. For this reason, it is important that this Court correct the erroneous recommendation. Mont. Exception 39-40 (emphasis in original).

The present dispute over Wyoming's delivery obligation arose directly from Wyoming's claims regarding the scope of discovery. *See* Ltr. Br. of Mont. Re: Bifurcation. For example, for the purposes of determining liability, Wyoming would seek information about the quantification of impairment to crop or livestock production, application of the futile call doctrine, intrastate water administration in Montana, and notification of Wyoming by Montana, to support its theory that a Compact violation cannot occur unless Montana establishes damages to individuals.

In its Brief on the Second Exception, the United States advised the Court that it "may wish to leave this issue open for further proceedings before the Special Master." U.S. Exception Br. at 30. The United States reasoned that "Montana did not address intrastate remedies in its responsive briefing before the Master," the First Interim Report did not "definitively establish the boundaries" of the issue, and the "Court generally prefers to entertain exceptions only after a Special Master has had the opportunity to address the arguments therein." *Id.*, at 30-31.

The present issue falls squarely within the contours of Montana's Second Exception. The question raised in Case Management No. 7 is whether the issue of a stateline delivery requirement has been conclusively decided. That issue was explicitly raised before the Court. In its briefing on the Second Exception, Montana argued that "Under any particular set of water supply conditions, there is a determinable amount of water that Wyoming is required to provide to the state line. This amount of water is dependent upon water supply conditions in Wyoming, not upon water administration in Montana or whether Montana has made a 'call' on Wyoming." Mont. Exception 38. The Court did not address the Second Exception. Rather, consistent with the United States' recommendation, the Second Exception was "recommitted to the Special Master." *See* Exhibit B, attached hereto. By recommitting the Second Exception, the Court reserved judgment on whether "there is a determinable amount of water that Wyoming is required to provide to the state line." Exhibit A. The clear message is that the Court contemplates further proceedings and decisions on the issue, followed by a subsequent recommendation by the Special Master to the Court. The Court's decision to recommit the issue also establishes that Montana is not precluded from raising the issue. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, 2d § 4478 ("a finding that has been vacated ceases to be law of the case; even implicit vacating has this effect"). Whether the Compact includes a stateline delivery requirement is a critical issue for both States that deserves to be fully briefed by the parties and squarely decided by the Special Master and the Court.

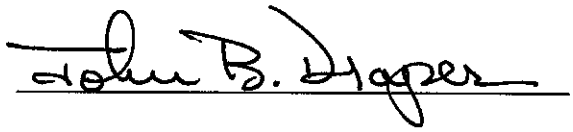
CONCLUSION

Whether the Compact in effect imposes a stateline delivery obligation on Wyoming is a vital issue that deserves full consideration by the Master and the Court. The Special Master should reject Wyoming's position and establish a schedule for briefing on the merits.

Respectfully submitted,

STEVE BULLOCK
Attorney General of Montana

JENNIFER ANDERS
ANDREW HUFF
Assistant Attorneys General
215 North Sanders
Helena, Montana 59620-1401



JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
**Counsel of Record*

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.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Montana's Letter Brief Regarding Wyoming's Compact Obligation** was served by electronic mail and by placing the same in the United States mail, postage paid, this 27th day of July, 2011, as shown below. I further certify that all parties required to be served have been served.

Peter K. Michael
The State of Wyoming
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
pmicha@state.wy.us

James Joseph Dragna
Michael Wigmore
Bingham, McCutchen LLP
355 South Grand Avenue Suite 4400
Los Angeles, CA 90071
michael.wigmore@hingham.com

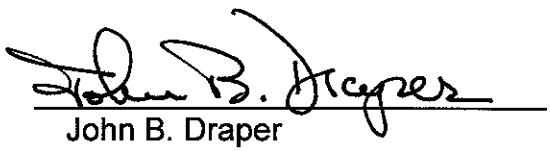
Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

Todd Adam Sattler
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
tsattler@nd.gov

William M. Jay
Solicitor General
United State Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
william.m.jay@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
susan.carter@stanford.edu



John B. Draper

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.

On Exceptions To The First Interim Report Of The Special Master

MONTANA'S EXCEPTION AND BRIEF

STEVE BULLOCK
Attorney General of Montana

CHRISTIAN D. TWEETEN
Chief Civil Counsel
JENNIFER ANDERS
Assistant Attorney General

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jdraper@montand.com
**Counsel of Record*

May 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

EXHIBIT
A

Montana as surface runoff. As a result, the Special Master erred in placing reliance on those cases.

Since, as discussed above, the language of the Compact is plain in its protection of Montana's right to continue to receive water to satisfy its pre-1950 uses, the Court need not address this "inconclusive" and "confused" area of law. Rather, the Court should rely on accepted principles of Compact interpretation to overrule the Special Master's recommendation.

III. Wyoming's Compact Obligations Are Not Contingent Upon Montana's Actions

The First Interim Report contains the following legal conclusion: "Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the solution." FIR 89, ¶ 3. This conclusion of the Special Master shortchanges the Compact rights of Montana in several ways. Most importantly, it suggests that there is a contingent nature to Montana's allocation of waters of the Yellowstone River and its interstate tributaries. But the Compact provides for no such contingencies. In particular, the Compact does not require that Montana demonstrate that it has exhausted its intrastate remedies in order to be entitled to its allocation of water under the Compact. Yet, the Special Master's Conclusion No. 3 assumes that Montana must

determine, and perhaps be in a position to prove, that it has no purely intrastate means to satisfy pre-1950 appropriators in Montana before it can enforce its rights against Wyoming for the water accorded to Montana by the Compact. Moreover, no "call" or any other communication between Montana and Wyoming is necessary for the enjoyment by Montana of its rights under the Compact.

It must be remembered that the Yellowstone River Compact is a congressionally approved compact among three States, not among individual water users in those States. While Article V(A) speaks in terms of "Appropriative rights . . . in each signatory State," this formulation is simply a means to an end: the apportionment of the waters of the Yellowstone River among the three States. Under any particular set of water supply conditions, there is a determinable amount of water that Wyoming is required to provide to the state line. This amount of water is dependent upon water supply conditions in Wyoming, not upon water administration in Montana or whether Montana has made a "call" on Wyoming.

The Court has never interpreted an interstate water allocation compact to mean that enjoyment by the downstream State of its rights under the compact is contingent upon the downstream State's taking certain intrastate administrative actions. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 673 (1995) (compact enforced without regard to actions of downstream state); *Texas v. New Mexico*, 482 U.S. 124 (1987) (same). Nor has a State ever been required to place a

"call" or been required to make any kind of a demand of the upstream State in order to be entitled to receive its water. See *ibid.*

Further, Wyoming's obligation to preserve Montana's allocation of water under the Compact is not dependent upon actions of individual water users in Montana. Wyoming's obligations under the Compact were set at the time of the Compact. See, *e.g.*, Compact at A-1 ("[The States] desiring to remove all causes of present and future controversy . . . with respect to the waters of the Yellowstone River and its tributaries . . . and desiring to provide for an equitable division and apportionment of such waters . . . have agreed upon the following articles, to-wit:"). The allocation of water among the States by the Compact for any given set of water supply conditions was determined at the time of the Compact. Otherwise, the States would not have "remove[d] all causes of present and future controversy," nor would it have "provide[d] for an equitable division and apportionment of such waters." It follows that the obligations of Wyoming are independent of actions by Montana or Montana's water users.

The care exercised by the drafters to avoid creation of an interstate water management process strongly suggests that if they had intended to make Montana prove such a condition precedent, there would be at least some reference to the requirement in the Compact. The recommended exhaustion of intrastate remedies requirement is a recipe for precisely the kind of interstate allocation squabbles that

the drafters of the Compact sought to avoid. Wyoming will certainly demand that Montana prove as a condition precedent to any inquiry into Wyoming's own actions that Montana has exhausted intrastate sources of supply for its pre-1950 rights, presumably by requiring Montana to show, among other things, that ***all*** of its pre-1950 users have called ***all*** junior users on the stream. This will trigger discovery regarding a wide array of water management issues in Montana, at great expense and with a great deal of delay in the ultimate resolution of this case. For this reason, it is important that this Court correct the erroneous recommendation.

CONCLUSION

Although Montana supports the Special Master's recommendation that the Court deny Wyoming's Motion to Dismiss, Montana requests that the Special Master's conclusion that would bar Montana's claim based on Wyoming's increased consumption of irrigation water on pre-Compact irrigated acreage, be overruled. Further, Montana requests that the Court overrule the Special Master's conclusion that

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.

On Exceptions To The First Interim Report Of The Special Master

MONTANA'S SUR-REPLY

STEVE BULLOCK
Attorney General of Montana

CHRISTIAN D. TWEETEN
Chief Civil Counsel
JENNIFER ANDERS
Assistant Attorney General

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant Attorneys General
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jdraper@montand.com
**Counsel of Record*

July 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

"divertible flow" over "consumption" as the basis for allocating the unused and unappropriated water in Article V(B). Nor does the distinction advocated by Wyoming change the fundamental principle that all of the waters of the Tongue and Powder Rivers were apportioned and allocated by the Compact and that one State may not deplete the waters allocated to another State.

II. Wyoming's Duty to Comply With Montana's Pre-1950 Entitlement is Independent of Actions by Montana or Its Water Users

The Special Master has recommended denial of Wyoming's Motion to Dismiss, but has conditioned Montana's relief under the Compact upon exhaustion of intrastate remedies. FIR 27-28, 89. This recommendation has the potential to affect future litigation and administration of the Compact insofar as it allows Wyoming to require Montana to prove certain facts prior to Wyoming being required to meet its delivery obligations under Article V(A). Montana has taken exception to this ruling because Wyoming's Compact obligations are not dependent on the actions of individual users, priority administration in Montana, or any other action or lack of action by Montana. Nonetheless, Montana is amenable to the United States' suggestion that a ruling be deferred.

A. Montana Has Not Waived Its Exception

In Case Management Order No. 2, the Special Master invited the parties to file letter briefs addressing corrections or clarifications to the Memorandum Opinion of June 2, 2009. The Order directed that the letter brief "is not an opportunity to rebrief Wyoming's Motion to Dismiss, and the letter briefs should not cover matters already addressed in the briefs filed on that motion." 6/12/09 Order; see also 6/11/09 Tr. 18, 20-21. The Special Master limited the parties' letter briefs to corrections or clarifications of fact or law, including state law as discussed in the Memorandum Opinion. Montana interpreted this instruction to mean that the Special Master did not want substantive argument on his recommendations, but rather, wanted to ensure his discussion of the law and facts was accurate. The wording of the Special Master's invitation to file the letter briefs refutes Wyoming's assertion that Montana waived its right to bring an exception.

Moreover, in response to the Special Master's suggestion that Montana must first resolve water shortages among its own water users, Montana submitted comments stating: "The issue is compact rights between States, not relative rights of individual water users," and "Wyoming is required by the Compact to comply with Article V(A) without a specific call from Montana." See Comments of Montana on the Draft First Interim Report of the Special Master (Jan. 1, 2010).

B. The Plain Language of the Compact Does Not Require Montana to Exhaust Intrastate Remedies

The Special Master's conclusion finds no support in the text of the Compact. To the contrary, Article V(A) requires that Montana's pre-1950 rights "continue to be enjoyed," and the Special Master has correctly concluded that this language places an affirmative obligation on Wyoming to curtail its post-1950 uses when necessary to deliver sufficient water at the border to supply Montana's pre-1950 entitlement. There is no specific language imposing an obligation to exhaust intrastate remedies.

Perhaps recognizing the absence of a textual anchor in the Compact for their argument, Wyoming and the United States fall back on the mistaken conclusion, discussed above, that the Compact affords rights to individual water users and that "when . . . an intrastate remedy is available for the injury to a Montana water user, that user cannot attribute his injury to Wyoming, or to a Compact breach." U.S. Br. 31. As Montana demonstrates above, the premise of this argument is simply wrong. The Compact creates rights among States, not individual water users.

C. The Allocation is Self-Executing and Does Not Depend on Actions of Individual Users or Administration in the Downstream State

The Compact is a federal law designed to protect existing uses in all three signatory states, and to allocate any leftover water of the Interstate Tributaries on a percentage basis. Article V(A) says nothing about how existing rights are administered within each State; its only requirement is that each State will not interfere with the supply necessary to satisfy pre-1950 users. The Special Master recognized this obligation regarding pre-1950 rights in his First Interim Report by stating: "Protection of pre-1950 appropriations under Article V(A) . . . requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana." FIR 29.

Wyoming's obligation to deliver a supply sufficient to meet pre-1950 uses in Montana is not dependent on Montana having employed any particular method of administration or priority system within its borders. By the same token, Montana may not insist that Wyoming employ any particular method of administration or priority system to satisfy its compact obligations. Wyoming may release storage water, curtail certain uses, limit groundwater pumping, or choose whatever means it sees fit to ensure that Montana's pre-1950 needs are met. But nothing

in the Compact requires Montana, as a downstream State, to pursue intrastate remedies before it may enforce its right to receive water under the Compact.

CONCLUSION

Montana's Exception should be granted in its entirety. In the alternative, the Court may simply wish to defer its ruling on one or both issues, so long as Montana's rights are preserved in the meantime. Following this Court's consideration, the Court should remand the case to the Special Master for further proceedings.

Respectfully submitted,

STEVE BULLOCK
Attorney General of Montana

CHRISTIAN D. TWEETEN
Chief Civil Counsel
JENNIFER ANDERS
Assistant Attorney General

JOHN B. DRAPER*
JEFFREY J. WECHSLER
Special Assistant
Attorneys General
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jdraper@montand.com
**Counsel of Record*

July 2010

(ORDER LIST: 562 U.S.)

TUESDAY, OCTOBER 12, 2010

CERTIORARI -- SUMMARY DISPOSITIONS

09-1443 RYAN, DIR., AZ DOC V. DOODY, JOHNATHAN A.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Florida* v. *Powell*, 559 U.S. ___ (2010).

09-11051 PETERSON, HENRY L. V. McNEIL, SEC., FL DOC, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Holland* v. *Florida*, 560 U.S. ___ (2010).

10-8 EUGENE IOVINE, INC. V. NLRB

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *New Process Steel, L.P.* v. *NLRB*, 560 U.S. ___ (2010). Justice Sotomayor took no part in the consideration or decision of this petition.

10-5211 LOADHOLT, JASON V. MASSACHUSETTS

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

EXHIBIT B

The judgment is vacated, and the case is remanded to the Supreme Judicial Court of Massachusetts for further consideration in light of *McDonald* v. *Chicago*, 561 U.S. ___ (2010).

ORDERS IN PENDING CASES

10M35 WOODS, JEROME V. McCOLLUM, ATT'Y GEN. OF FL

10M36 PEARSON DENTAL SUPPLIES, INC. V. SUPERIOR COURT OF CA, ET AL.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

137, ORIG. MONTANA V. WYOMING, ET AL.

The first exception to the Special Master's First Interim Report is set for oral argument in due course. The second exception is recommitted to the Special Master. Wyoming's motion to dismiss is denied. The motion of the Special Master for allowance of fees and reimbursement of expenses is granted, and the Special Master is awarded a total of $72,008.74 for the period June 13, 2009, through July 9, 2010, to be paid equally by Montana and Wyoming. Justice Kagan took no part in the consideration or decision of these exceptions and these motions.

09-400 STAUB, VINCENT E. V. PROCTOR HOSPITAL

The motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* out of time is granted. Justice Kagan took no part in the consideration or decision of this motion.

09-987) AZ CHRISTIAN SCH. TUITION ORG. V. WINN, KATHLEEN M., ET AL.
)
09-991) GARRIOTT, GALE V. WINN, KATHLEEN M., ET AL.

The motion of petitioner Arizona Christian School Tuition Organization for divided argument is denied. The joint motion of petitioner Gale Garriott and the Acting Solicitor General for