

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 FINAL PRETRIAL MEMORANDUM

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

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

**Counsel of Record*

September 23, 2013

Pursuant to Case Management Orders Nos. 11 and 12, Montana submits the following Final Pretrial Memorandum.

JURISDICTION

Montana filed its Motion for Leave in this case in January 2007 pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28, Section 1251(a), of the United States Code. On February 19, 2008, the Court granted Montana's Motion. 128 S.Ct. 1332. In the same order, the Court allowed Wyoming to file a motion to dismiss, which it did. On October 20, 2008, the Court appointed Special Master Thompson to, *inter alia*, "direct subsequent proceedings" in the case and to "submit Reports as he may deem appropriate." 129 S.Ct. 480. The Special Master submitted his First Interim Report recommending denial of Wyoming's Motion to Dismiss. The Court denied the Motion to Dismiss and recommitted one of Montana's exceptions to the Special Master. In its Opinion of May 2, 2011, the Court overruled Montana's other exception, 131 S.Ct. 1765, and the case has been proceeding before the Special Master since that time. In sum, the Court has unequivocally chosen to exercise its original jurisdiction in this case. See, *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991) ("Where the States themselves are before this Court for the determination of a controversy between them, . . . this Court must pass upon every question essential to such a determination").

MONTANA'S GENERAL CONTENTIONS

Montana claims that Wyoming has breached its obligations under the Yellowstone River Compact. Wyoming has accepted the ruling of the Special Master in his First Interim Report that Article V(A) of the Compact protects Montana's unsatisfied pre-1950 water uses from post-

January 1, 1950 (“post-1950”) Wyoming water uses. Montana has narrowed its claims to those related to protection of Montana’s Tongue River allocation under the Compact. Montana’s remaining contentions are that Wyoming has breached its Article V(A) obligations in two ways: (1) Wyoming has allowed its post-1950 water users to take water when Montana’s pre-1950 storage rights have been unsatisfied in four years (2001, 2002, 2004 and 2006); and (2) Wyoming has allowed its post-1950 water users to take water when Montana’s pre-1950 direct flow rights have been unsatisfied in 43 years (1961-2007, except 1968, 1978, and 1998).

MAJOR ISSUES OF FACT

1. Were Montana’s pre-1950 storage rights unsatisfied in 2001, 2002, 2004, and 2006, and, if so, in what quantity? Burden of proof: Montana.

2. If so, did Wyoming allow the diversion or depletion of surface water by post-1950 rights for immediate use or storage while Montana’s pre-1950 storage rights were unsatisfied in 2001, 2002, 2004, and 2006, and, if so, in what quantity? Burden of proof: Montana.

3. If (a) Montana’s pre-1950 storage rights were unsatisfied in 2001, 2002, 2004, and 2006, and (b) Wyoming allowed the diversion or depletion of surface water by post-1950 rights for immediate use or storage while Montana’s pre-1950 storage rights were unsatisfied, was there a causal connection between (a) and (b)? Burden of proof: Montana.

4. Were Montana’s pre-1950 direct flow rights unsatisfied in 1961-1967, 1969-1977, and 1979-2007? Burden of proof: Montana.

5. If so, did Wyoming allow the diversion or depletion of surface water by post-1950 rights while Montana’s direct flow rights were unsatisfied in 1961-1967, 1969-1977, and 1979-2007? Burden of proof: Montana.

6. If (a) Montana's pre-1950 direct flow rights were unsatisfied in 1961-1967, 1969-1977, and 1979-2007 and (b) Wyoming allowed the diversion or depletion of surface water by post-1950 rights for immediate use or storage while Montana's pre-1950 direct flow rights were unsatisfied, was there a causal connection between (a) and (b)? Burden of proof: Montana.

7. In 2001, 2002, 2004, and 2006, was sufficient notice, for purposes of damages or other retrospective relief, given to Wyoming that Montana's pre-1950 storage rights were unsatisfied? Burden of proof: Montana.

8. In 1961-1967, 1969-1977, and 1979-2007, was sufficient notice, for purposes of prospective relief (if any is required), given to Wyoming that Montana's pre-1950 rights were unsatisfied? Burden of proof: Montana.

9. Has Coal Bed Methane ("CBM") pumping in Wyoming depleted surface flows necessary to satisfy pre-1950 water rights in Montana, and, if so, to what extent? Burden of proof: Montana.

10. Were there periods during the years in question when additional water from Wyoming would not have been put to beneficial use in Montana, and, if so, in what periods and in what quantities? Burden of proof: Wyoming. E.g., *Parshall v. Cowper*, 143 P. 302, 304 (1914).

11. Are the historical operations of Tongue River Reservoir consistent with the Compact? Burden of proof: Wyoming. Mem. Op. on Montana's Mot. For S/J (9/16/13), at 4 ("the initial presumption is that Montana's existing regulation and administration of its water rights are acceptable under the Compact").

MAJOR ISSUES OF LAW

1. Should the winter pass-through at Tongue River Reservoir (“Reservoir”) be taken into account in determining Wyoming’s liability for interfering with storage in the Reservoir, and, if so, how?
2. Should the Reservoir’s maximum carry-over be taken into account in determining Wyoming’s liability with respect to the Reservoir’s failure to fill, and, if so, how?
3. Is it necessary for Montana to show, in order to establish the existence of a Compact violation, as opposed to establishing damages, that Montana provided notice to Wyoming (given the Special Master’s previous ruling that “Wyoming’s obligation . . . stems from the Compact, not the call,” Mem. Op. 9/28/12, at 15)?
4. Is there an exemption for *de minimis* or immaterial impacts of post-1950 CBM pumping in Wyoming from the requirement of Article V(A) of the Compact that Wyoming not interfere with the enjoyment of pre-1950 rights in Montana, and, if so, how is the scope of such an exemption defined?

ESTIMATED TIME TO PRESENT MONTANA’S CASE-IN-CHIEF

Montana estimates the time to present its case-in-chief to be approximately 7-10 days, not counting time for cross-examination and redirect examination.

MONTANA’S WITNESSES AND EXHIBITS

Please see Montana’s List of Witnesses and Montana’s List of Exhibits submitted simultaneously herewith.

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

A handwritten signature in black ink, appearing to read "John B. Draper", with a long horizontal flourish extending to the right.

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.

Before the Honorable Barton H. Thompson, Jr.
Special Master

CERTIFICATE OF SERVICE

I certify that a copy of *Montana's Final Pretrial Memorandum* was served electronically, and by U.S. Mail on September 23, 2013, to the following:

Peter K. Michael
Attorney General of Wyoming
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.kaste@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

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

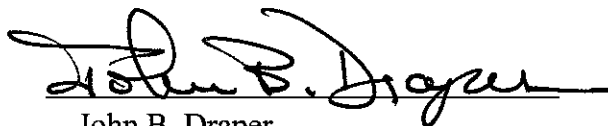
Jennifer L. Verleger
Assistant Attorney General
North Dakota Attorney General's
Office
500 North 9th Street
Bismarck, ND 58501-4509
jverleger@nd.gov

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