

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

**REPLY IN SUPPORT OF MONTANA'S MOTION TO STRIKE
A PORTION OF THE AFFIDAVIT OF PATRICK T. TYRRELL**

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The State of Montana (“Montana”) hereby submits this Reply in support of its Motion to Strike a Portion of the Affidavit of Patrick T. Tyrrell (“Motion”). As explained in the Motion, Mr. Tyrrell impermissibly opines as an expert witness in paragraph 7 of his Affidavit. Paragraph 7 should therefore be struck in accordance with the Special Master’s Order Regarding Expert Witness Designation (“April 23 Order”).

ARGUMENT

As a threshold matter, Montana agrees with Wyoming that additional direction regarding the scope of permissible statements by employee witnesses would be helpful prior to trial. It appears that Wyoming is intent on offering expert opinions under the guise of percipient testimony, and the trial process would be disrupted by requiring Montana to object at trial each time a Wyoming employee witness testifies to opinions constituting expert statements. Wyoming was given the option of amending its expert disclosure so that its employee witnesses could provide expert testimony, but Wyoming declined. Expert opinions by Wyoming’s employee witnesses are therefore excluded. Mr. Tyrrell’s statements in paragraph 7 fall within this category and should be struck from the record.

Wyoming acknowledges that its employees are offered only as “percipient witnesses.” *See Wyoming’s Response to Montana’s Objections to Wyoming’s Expert Designation* at 6 (filed April 17, 2013). However, Wyoming ignores the limitations placed on percipient witness testimony. Instead, Wyoming again asserts that its employee witnesses “will necessarily impart scientific, technical, and other specialized knowledge formed in the normal course of their employment.” *Wyoming’s Response to Montana’s Motion to Strike a Portion of the Affidavit of Patrick T. Tyrrell* at 3 (filed August 7, 2013) (“Response”). Wyoming has a fundamental misconception about the scope of statements permissible for a percipient witness. As explained

in the Motion, percipient witnesses who offer opinions must base their opinions on facts or prior events that they actually perceived by their senses. Motion at 2-3; *see* Fed. R. Civ. Proc. 701(a).

The April 23 Order is consistent with this foundational requirement for a percipient witness. *See, e.g., United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005) (“The purpose of this final foundation requirement is to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702 and the pre-trial disclosure requirements”). The April 23 Order expressly provides that “fact witnesses may testify as to *personal actions, experiences, and observations* in the normal course of their employment even if their work involved scientific, technical, or other specialized knowledge or skills.” *Id.* (emphasis added). Thus, the predicate to any employee witness’ testimony is that it must be directly related to an act that they performed, an event that they experienced, or a condition that they observed. Fed. R. Civ. Proc. 701.

Mr. Tyrrell’s statements in paragraph 7 of his Affidavit do not relate to an act that he performed, an event that he experienced, or a condition that he observed. Rather, as explained in the Motion, Mr. Tyrrell’s statements are opinions based on scientific or technical conditions unrelated to Mr. Tyrrell’s personal experiences. Motion at 3-4. Thus, the statements in paragraph 7 are not the type of lay or percipient testimony contemplated by the April 23 Order or by Rule 701.

The Special Master discussed the distinctions between permissible testimony by a percipient witness and impermissible expert testimony in the telephonic hearing held on April 18, 2013. For example, the Special Master compared testimony on return flows that were measured or observed by the employee witness (permissible) with testimony on return flows that

were not measured or observed (impermissible). Tr. 04/18/13 at 12:19-13:13; *see also* Reply in Support of Montana’s Objections to Wyoming’s Expert Designation and Expedited Motion for Supplemental Depositions at 5 (April 18, 2013). The Special Master specifically asked Wyoming counsel if he would agree with the “distinction between the two different types of testimony.” Mr. Kaste responded “Yep. . . . I think we made that clear in three separate pieces of paper now when we said that they were going to testify about facts they observed and the opinions that they formed from those facts.” *Id.* at 13:8-17; *see also id.* at 14:24-15:2 (“So I don’t know how many times I have to tell them, to reassure them of the fact that these are going to be limited to the perceptions of our witnesses, but this will be the fourth time.”). Nonetheless, Mr. Tyrrell’s statements in paragraph 7 clearly fall within the impermissible example set forth by the Special Master—testimony on hydrological conditions “that were not measured or observed.”

If Wyoming intended to offer the type of evidence submitted by Mr. Tyrrell in paragraph 7, Wyoming was required to comply with Rule 26(a)(2)(C), which provides for a summary of the specific opinions and facts to which the witness will testify, and was required thereafter to allow deposition of Mr. Tyrrell on his specific opinions and facts. *See* Fed. R. Civ. P. 26(a)(2)(C), advisory committee’s note (2010) (stating that a party must provide the disclosure under Rule 26(a)(2)(C) if its fact witness, such as an employee of a party or a treating physician who does not regularly provide expert testimony, also provides expert testimony). This would have allowed Montana to test Mr. Tyrrell’s expertise against the facts and opinions to be offered and ensures that the Court can serve in its gatekeeping role. *See, e.g., Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 141 (1999). Wyoming had the opportunity to designate Mr. Tyrrell as an expert witness and to comply with Rule 1-026(a)(2)(B), but it chose not to do so. Wyoming cannot now shoehorn expert testimony into Mr. Tyrrell’s testimony as a percipient

witness. This is precisely the type of situation that the Special Master intended to preclude by entering the April 23 Order.

The distinction that Wyoming fails to recognize is evident by comparing the statement made by Mr. Tyrrell in paragraph 8 (permissible) with the statements made by Mr. Tyrrell in paragraph 7 (impermissible). Paragraph 8 addresses a past circumstance of which Mr. Tyrrell is aware as a result of his observations in the course of his employment as the State Engineer:

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.

In contrast, in paragraph 7, Mr. Tyrrell states an opinion that is not based on his observations, but rather “on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Civ. Proc. 701.

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 that they are semi-confined aquifers – provides a basis for this result in Wyoming.

Notably, in his Affidavit, Mr. Tyrrell does not refer to any specific observations that he or anyone in the employ of the State Engineer has made, any study that was undertaken, or any testing that was done, regarding the hydrological connection between CBM produced water and surface water streams. Nor does the Response reference any specific act, complaint, testing, or occurrence in which the State Engineer made such a determination. *See generally* Response. If the State Engineer had made a specific determination regarding the hydrological connection between CBM produced water and surface water streams, at a hearing, as a result of testing, or in the course of an administrative investigation, Mr. Tyrrell could testify regarding such a

determination. *Cf.* Tr. 04/18/13 at 21:4-8 (Special Master Thompson, stating that “[t]he first question is: Under what circumstances does somebody who is testifying as a percipient witness and testifying only to either things that they did or events that they were witness to need to be designated as expert witnesses?”). But Wyoming identifies no previous determination when it makes the conclusory assertion that “[t]he Wyoming State Engineer [is] explaining his determination.” Response at 2. This is not enough to satisfy the requirements for a percipient witness’ testimony, and it does not come within the parameters of the April 23 Order.¹

CONCLUSION

Mr. Tyrrell’s statements in paragraph 7 are not based on his perceptions as required by Rule 701 and the April 23 Order, but rather on scientific, technical, or other specialized knowledge within the scope of Rule 702. These statements by Mr. Tyrrell, as a percipient witness, are not permissible under Rule 701. Wyoming failed to comply with the expert disclosures required by Rule 1-026(a)(2)(C) regarding Mr. Tyrrell. Thus, the statements in paragraph 7 should be struck from the record.

Respectfully submitted,

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¹ Montana does not dispute that the final sentence in paragraph 7 is permissible, if it were not dependent on the first two sentences. Montana believes that Mr. Tyrrell has personally observed, in the course of his employment as the State Engineer, that “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.” However, to the extent that Mr. Tyrrell’s statement in the third sentence is based on the first two impermissible statements, as appears to be the case based on Wyoming’s use of the word “accordingly,” the third statement is likewise impermissible.

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CERTIFICATE OF SERVICE

I certify that a copy of Montana's Reply in Support of Motion to Strike A Portion of the Affidavit of Patrick T. Tyrrell was served electronically, and by U.S. Mail on August 22, 2013, to the following:

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

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