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 FOR LEAVE TO RESPOND TO WYOMING'S PROPOSED DECREE AND BRIEF

TIMOTHY C. FOX
Attorney General of Montana

ALAN L. JOSCELYN
Chief Deputy Attorney General
215 North Sanders
Helena, Montana 59620-1401

JEFFREY J. WECHSLER
Special Assistant Attorney General
KARI E. OLSON
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87501
jwechsler@montand.com

JOHN B. DRAPER*
Special Assistant Attorney General
MATTHEW E. DRAPER
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, New Mexico 87501
john.draper@draperllc.com
**Counsel of Record*

March 2, 2017

Comes now the State of Montana and renews its earlier request, by means of this motion, to the Special Master for an opportunity to respond to the State of Wyoming's Proposed Decree and Brief in Support. Montana requests that it be allowed 21 days from the date of Wyoming's filing, that is, until March 20, 2017, to file its response to Wyoming's Proposed Decree and Brief in Support. Montana's basis for this request is as follows.

I. Background

On December 19, 2016, the Opinion of the Special Master on Remedies ("Opinion" or "Op.") was issued by the Special Master. The Opinion required Montana to submit a proposed decree to Wyoming for its comments and asked the States to confer and reach an agreement on the form of decree, if possible. Op. 30-31. Montana submitted its proposed judgment and decree to Wyoming, but Wyoming, instead of commenting on the provisions proposed by Montana, produced its own separate proposal. The States conferred to the extent possible, but no progress was made toward a joint decree.

On February 10, 2017, Montana filed Montana's Proposed Judgment and Decree and Brief in Support ("Montana's Proposal" or "Mt. Pr."). As part of Montana's Proposal, Montana requested that it be given an opportunity to respond to whatever proposal Wyoming might file. Mt. Pr. 13. Wyoming filed Wyoming's Proposed Decree and Brief in Support ("Wyoming's Proposal" or "Wy. Pr.") on February 27, 2017, opposing Montana's request to be allowed to respond to Wyoming's submittal, arguing that it is neither necessary nor warranted, and that both States have had an equal opportunity to make their cases. Wy. Pr. 13-14.

II. Montana Has Not Had a Fair Opportunity to Address Wyoming's Proposal

Contrary to Wyoming's assertions, Montana has had no opportunity to respond either to Wyoming's brief or proposed decree. Montana did not know what position Wyoming would take until Wyoming submitted its Proposal on February 27, 2017. To now deny Montana the opportunity to address Wyoming's Proposal would unfairly disadvantage Montana. For instance, more than half of Wyoming's Brief in Support of its Proposal is, in fact, a critique of the substance of Montana's Proposal. *See* Wy. Pr. 6-13. Montana has had no equivalent opportunity to critique Wyoming's Proposal. Basic fairness requires that Montana be accorded the opportunity to respond fully to Wyoming's Proposal.

III. Due Process Requires that Montana Be Given a Chance to Respond to Wyoming's Submittal

It is a basic tenet of due process that a party be allowed to respond to a pleading filed against it by an opposing party. *See, e.g., Montana v. Wyoming*, 135 S.Ct. 1479 (2015) (allowing replies and sur-replies on exceptions); Sup. Ct. Rules 15 (providing for responses and replies on petitions for writs of certiorari) and 24 (same on merits briefs).

IV. The Court Accords State Parties in the Original Jurisdiction a Special Opportunity to Complete the Record Beyond Normal Due Process

The Court has been very clear over the centuries that it will insist on a full record as the basis for a resolution of a dispute between States. This is appropriate where the decision before the Court is not between private citizens, but rather a decision between States, which are considered Sovereigns for purposes of allocation of interstate resources. *See, e.g., Kansas v. Colorado,* 185 U.S. 125, 141-145 (1902). With respect to evidence, for instance, "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of

high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950), *citing Kansas v. Colorado, supra*, at 144, 145 and 147.

In *Rhode Island v. Massachusetts*, 39 U.S. 210 (1840), the Court explained that in original actions "the most liberal principles of practice and pleading ought unquestionably to be adopted in order to enable both parties to present their respective claims in full strength." *Id.* at 257. Similarly, in *Virginia v. West Virginia*, 234 U.S. 117 (1914), the Court allowed West Virginia to file a pleading which would have been denied between ordinary litigants:

> As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the *amplest opportunity to be heard*, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

Id. at 121 (emphasis added). *See also Iowa v. Illinois*, 151 U.S. 238, 242 (1894); *United States v. Texas*, 143 U.S. 216 (1891); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Wyoming*, 331 U.S. 440 (1947).

Likewise, denying one of the States in this original proceeding a fair opportunity to put its views before the Special Master and the Court on the proper form of the final judgment and decree would run counter to the Court's steadfast adherence to its insistence upon a full record. *See, e.g., Virginia v. West Virginia, supra,* 234 U.S. at 119 (describing the Court's rejection of Virginia's

motion in that case "to proceed at once to a final decree" before hearing further from West Virginia). Certainly, a full record is important at the final stage of a case, where a final order is to be entered setting out the rights and obligations of the parties that will govern their future conduct.

V. Allowing Montana to Respond Will Not Unduly Interfere With the Orderly Entry of the Decree in This Case Nor Will It Be Unduly Prejudicial to Wyoming

Montana is asking that it be allowed only until March 20, 2017, less than three weeks from now, to consider and comment on the Wyoming Proposal. This still allows for entry of a final decree in a far shorter time than the time required in prior compact enforcement cases. *See, e.g., Kansas v. Colorado*, No. 105, Orig. (final judgment and decree entered 15 years after initial finding of liability by Special Master). Wyoming does not argue that granting this request would be prejudicial to Wyoming. And, in line with the Court's prior statement in *Virginia v. West Virginia, supra,* allowing Montana to respond "operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy." 234 U.S. at 121.

VI. Conclusion

For the foregoing reasons, the State of Montana requests that it be allowed to submit its response to Wyoming's Proposed Decree and Brief in Support on March 20, 2017.

Respectfully submitted,

TIMOTHY C. FOX
Attorney General of Montana

ALAN L. JOSCELYN
Chief Deputy Attorney General
215 North Sanders
Helena, Montana 59620-1401

JEFFREY J. WECHSLER
Special Assistant Attorney General
KARI E. OLSON
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87501
jwechsler@montand.com

BY: 

JOHN B. DRAPER*
Special Assistant Attorney General
MATTHEW DRAPER
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, New Mexico 87501
john.draper@draperllc.com
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CERTIFICATE OF SERVICE

I certify that copies of Montana's Motion For Leave To Respond To Wyoming's Proposed Decree and Brief were served electronically and by U.S. Mail to the following on March 2, 2017, as indicated below:

Peter K. Michael
Attorney General of Wyoming
Jay Jerde
Christopher M. Brown
Andrew Kuhlmann
James C. Kaste
The State of Wyoming
123 Capitol Building
Cheyenne, WY 82002
peter.michael@wyo.gov
jjerde@wyo.gov

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

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302

chris.brown@wyo.gov
andrew.kuhlmann@wyo.gov
james.kaste@wyo.gov

jwhiteing@whiteinglaw.com

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

Michael B. Wigmore
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
mwigmore@velaw.com

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
Nadia Hermez, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 Via Ortega
Stanford, CA 94305-4205
(Original and 3 copies by U.S. Mail)
nhermez@stanford.edu

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

John B. Draper