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

MEMORANDUM OPINION OF THE SPECIAL MASTER ON MONTANA'S MOTION FOR SUMMARY JUDGMENT ON THE COMPACT'S LACK OF SPECIFIC INTRASTATE ADMINISTRATION REQUIREMENTS

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MEMORANDUM OPINION OF THE SPECIAL MASTER ON MONTANA'S MOTION FOR SUMMARY JUDGMENT ON THE COMPACT'S LACK OF SPECIFIC INTRASTATE ADMINISTRATION REQUIREMENTS

Montana moves for partial summary judgment that the Yellowstone River Compact does not impose specific requirements on intrastate regulation and administration of water rights as a perquisite for a State's enjoyment of its pre-1950 Compact rights. Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements, July 3, 2013, p. 1. Montana's motion is relevant to several issues that have arisen to date:

- The first is Wyoming's argument that Montana cannot insist on additional water from Wyoming unless it can demonstrate that the water is needed for an actual beneficial use. Montana's motion appears to have been motivated in part by the suggestion in the expert report of Bern Hinckley that Wyoming was not obligated to deliver Article V(A) water to Montana because Montana had not properly administered storage in the Tongue River Reservoir and diversions from the Tongue River. See Brief in Support of Montana's Motion for Summary Judgment, July 3, 2013, pp. 5-6.
- The second is Wyoming's argument, and my prior holding, that Montana cannot insist on additional water from Wyoming to remedy pre-1950 appropriative shortages in Montana if Montana can remedy the shortages through a purely intrastate call that does not prejudice any other rights that Montana might enjoy under the Compact. First Interim Report of the Special Master, February 10, 2010, p. 27. See Wyoming's Brief in Opposition to Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements, August 2, 2013, pp. 1-2 ("Wyoming's Opposition Brief").

Montana's motion may well also affect other issues. Montana, however, does not seek a ruling specific to any particular regulation or administration, but instead seeks a general ruling to the effect that the Compact does not impose specific requirements on the manner in which the States regulate and administer their intrastate waters. See Montana's Reply Brief on Intrastate Administration Requirements, August 16, 2013, p. 4.

The simple answer to the issue posed by Montana's motion is that Montana is not free to do whatever it wants without any consideration of the requirements of the Compact, but that Montana also is not bound to any particular procedure or approach. Indeed, Wyoming agrees that "Montana need not adopt Wyoming's system of administration and regulation, or any other system it does not choose." Wyoming's Opposition Brief, p. 2.

Instead, Montana must engage in whatever intrastate regulation and administration of water rights are necessary to meet the requirements of Article V(A) and related provisions of the Yellowstone River Compact. So long as it does so, the state is otherwise free to design, adopt, and implement whatever intrastate procedures and rules it believes are best. By entering into the Compact, both Montana and Wyoming bound themselves to the requirements of the Compact and, in the process, restricted their prior freedom to determine their own regulations and administration. See, e.g., State ex rel. Intake Water Co. v. Board of Natural Resources & Conservation, 645 P.2d 383, 387 (Mont. 1982) ("Montana's water statutes are subordinate to the Compact provisions"). Wyoming, for example, must ensure that post-1950 uses in Wyoming do not interfere with pre-1950 appropriative rights in Montana. Montana, in turn, cannot insist on additional water under Article V(A) if, under its system of regulation and administration of water rights, that water would be wasted in violation of the beneficial-use doctrine. Nor can Montana insist on additional water where it could meet the needs of its pre-1950 users through a purely

intrastate call without prejudicing its other rights under the Compact. In all these situations, Montana and Wyoming have given up some of the discretion that they enjoy in purely intrastate disputes to determine their own water rules and procedures, but states inevitably give up discretion when they commit themselves to the requirements of interstate water compacts or seek the compacts' benefits.

Montana suggests that Article XVIII of the Compact preserves the ability of Montana to administer and regulate its water rights in accordance with its own laws and procedures. Article XVIII reads:

> No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the *jurisdiction* of the water of each State as apportioned in this Compact.

Compact, art. XVIII (emphasis added). No one questions, however, that Montana retains full jurisdiction (i.e., the official power to make legal decisions and judgments) over the waters that the Compact allocates to it, as does Wyoming over the waters allocated to it. Jurisdiction is not the issue. Montana is not even entitled to water under Article V(A) for pre-1950 appropriative rights if those rights are not being put to a "beneficial use … in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Similarly, pre-1950 appropriative rights in Montana are not actually suffering a shortage if they can make an effective intrastate call on post-1950 rights without prejudicing the State's other rights under the Compact.

Montana's arguments, however, point up the importance of deferring to state regulations and administration whenever possible in applying the Compact. Article XVIII reflects the drafters' general intent to allow states to administer their own water rights as they see fit within the confines of the Compact's obligations and requirements. Furthermore, as the Supreme Court

has recently emphasized, the "background notion that a State does not easily cede its sovereignty has informed [the Court's] interpretation of interstate compacts." Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120, 2132 (2013).

> Given these principles, when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that "[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens."

Id., quoting Virginia v. Maryland, 540 U.S. 56, 67 (2003). The erection of a parallel but separate set of regulations and administration under the Compact also would risk duplication, inconsistency, and confusion in the management of the Yellowstone River system, with different water rights subject to different rules on the same waterway and the same water right subject to different rules depending on the context. As I noted in my first report to the Supreme Court, the history of the Compact also emphasizes that it was not the intent of the drafters to "regulate" or "administer" pre-1950 water rights; in particular, the drafters did not want to subject pre-1950 rights to an integrated set of rules and procedures under the management of the Yellowstone River Compact Commission. First Interim Report, pp. 36-37.

These considerations confirm that the Compact does not require Montana to follow any particular rules or administrative approach in implementing the beneficial use rule or enabling pre-1950 users to relieve water shortages through intrastate calls where appropriate. Instead, the initial presumption is that Montana's existing regulation and administration of its water rights are acceptable under the Compact. Wyoming is free, however, to challenge Montana's regulations and administration as inconsistent with the requirements of the Compact, including the beneficial-use doctrine and the requirement that pre-1950 rights be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Relevant inquiries would include both whether the regulations and administration reasonably

comply with the requirements of the Compact and whether Montana applies its regulations and administration evenly in both intrastate and interstate contexts.

Montana and Wyoming disagree strongly on whether Montana's current regulations and administration are consistent with the Compact and the doctrine of appropriation. However, because Montana does not seek a ruling on the validity of any particular regulation or administrative process, and the record is therefore underdeveloped on specific applications, resolution of these disagreements is inappropriate at this time.

In summary, I conclude that Montana is not required to adopt any specific intrastate regulations or administration of its water rights, but that its regulations and administration must comply with the requirements and obligations of the Compact—in particular, the "beneficial use" and prior-appropriation requirements for protection of pre-1950 water rights under Article V(A) of the Compact. Application of that standard to particular regulations and administration will await trial.