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 OBJECTIONS TO WYOMING'S EXPERT DESIGNATIONAND EXPEDITED MOTION FOR SUPPLEMENTAL DEPOSITIONS

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The State of Montana hereby submits this Reply in support of its Objections to Wyoming's Expert Designation and Expedited Motion for Supplemental Depositions ("Objections").

I. Wyoming Should Be Allowed to Voluntarily Remove the Employee Witnesses from Its Designation

In its Response to Montana's Objections (filed April 17, 2013), Wyoming responds to Objection Nos. 1 and 2 in Montana's Objections by claiming that it was not required to state "a summary of the facts and opinions to which the [Employee Witnesses are] expected to testify," Fed. R. Civ. P. 26(a)(2)(C)(ii), because their testimony will be based upon their "personal observations." Response at 2. As discussed below, Wyoming's Response to Objection Nos. 1 and 2 in Montana's Objections to Wyoming's Expert Designation ("Response") suffers from two analytical flaws: first, Wyoming confuses the basis on which a witness is determined to be an expert; and second, contrary to Wyoming's argument, it cannot designate an expert witness without full compliance with Rule 26. To remedy the improper disclosures, Montana has no objection to Wyoming's suggestion that it be allowed to voluntarily remove the Employee Witnesses from its Expert Designation.

The first flaw in Wyoming's reasoning is in its determination that the Employee Witnesses were experts for the purposes of trial. A witness is identified as an expert for the purposes of trial based on the substance of his or her testimony, and Wyoming has failed to identify any specific expert opinion that the thirteen employees and former employees listed in its Expert Designation ("Employee Witnesses") will offer. Contrary to its Expert Designation, in its Response, Wyoming now indicates that it only intends to

offer the Employee Witnesses as "percipient witnesses" that will testify to personal observations made in the normal course of their duties. Although the Employee Witnesses have not developed expert opinions, Wyoming explains that it designated the Employee Witness as experts as a precaution because the routine duties of their employment require specialized knowledge and skills. Response at 3. In so designating its employees and former employees as experts, Wyoming appears to have confused the basis for such a designation.

The determination of whether a witness is an "expert" who must be disclosed under Rule 26(a) is based on the substance of the witness' trial testimony, not on whether the witness' job duties require the witness to have scientific, technical or other specialized knowledge. *See, e.g.*, Steven S. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary*, Rule 26, at footnotes 51-52 and related commentary. The distinction between expert and lay witnesses has been described as follows:

> The term 'expert witness' in Rule 26 refers to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. It does not encompass a percipient witness who happens to be an expert. The triggering mechanism for application of rule 26's expert witness requirements is not the status of the witness, but, rather, the essence of the proffered testimony. Accordingly, a party need not identify a witness as an expert if the witness played a personal role in the unfolding of the events at issue and the anticipated questioning seeks only to elicit the witness's knowledge of those events.

6 Moore's Federal Procedure § 26.23[2][a][i] (internal quotation marks, citations and footnotes omitted). If a witness intends to offer ***opinion testimony*** based on scientific, technical or specialized knowledge, that witness must be disclosed under Rule 26(a), and be accompanied by all the required information. *See* Fed. R. Evid. 702. On the other hand, a witness who will testify only to personal experiences and observations made in

the normal course of his or her job duties is a fact witness, even if the witness' job requires scientific, technical, or specialized knowledge. As Wyoming acknowledged in its Response, "it is generally accepted that a person with specialized training ***does not testify as an expert*** by giving first-hand participant testimony, even though it appears to be expert testimony." Response at 4 (citing *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 113 (1st Cir. 2003) (emphasis added)).

Wyoming thereby relies on *Gomez* for the proposition that nondisclosure of the substance of its expert testimony and opinions does not bar a percipient witness with technical knowledge from providing "first-hand participant testimony." This is an unremarkable position that is consistent with Montana's request that the Special Master strike the designation of the Employee Witnesses as experts. *Gomez* itself confirms that a percipient witness with technical knowledge may testify *only* as a fact witness, stating:

> "[A] party need not identify a witness as an expert so long as the witness played a personal role in the unfolding of the events at issue, *and the anticipated questioning seeks only to elicit the witness' knowledge of those events.*

Id. at 113-114 (emphasis added). Thus, if Wyoming intends its employees and former employees to testify only as "percipient witnesses" offering "first-hand participant testimony," then the only relief Montana would seek is removal of those individuals from Wyoming's Expert Designation, and Montana agrees that no additional expert depositions of those individuals are necessary at this time. If, however, any of those witnesses intend to offer expert opinion testimony that goes beyond their first-hand experiences and perceptions in the course of their employment, then Wyoming's Designation is insufficient.

For example, in its Designation, Wyoming suggests that Mr. Boyd may offer testimony on return flows. As a percipient witness, Mr. Boyd can offer testimony on the

return flows that he measured or observed in the years at issue. However, he cannot attempt to offer opinions about return flows that he did not measure or observe, or on the impact of return flows to Montana.

Notably absent from the Response is any suggestion that Wyoming complied with the Rule 26 requirement to summarize the expert opinions of the Employee Witnesses. Indeed, Wyoming appears to concede that the Employee Witnesses have no expert opinions to offer. Response at 7 (Employee Witnesses "have not developed expert opinions specifically for the purposes of this litigation"). Notwithstanding this omission, Wyoming argues that its "disclosures satisfy both the letter and the spirit of Rule 26." Response at 9. In making the argument that its Designation was sufficient despite the failure to identify the substance of any expert opinion, Wyoming seems to be claiming that it should be allowed to designate its Employee Witnesses as experts without having to comply with the disclosure requirements of Rule 26 or subjecting them to an expert deposition. Despite the experience claimed by Wyoming, *see* Response at 6, it fails to cite any case in support of this proposition, and there is no exception to the mandatory disclosure requirement set forth in Rule 26. There are certain advantages that accrue from being designated as an expert such as the ability to offer analysis, interpret data and facts, rely on inadmissible evidence, and offer expert opinions. But these advantages only apply to a witness who has an expert opinion in the first place, and only if a party complies with Rule 26. As Montana explained in its Objections, full compliance with Rule 26, including a "summary of the facts and opinions to which the witness is expected

to testify," Rule 26(a)(2)(C)(ii), is necessary for any fact witness that also intends to provide expert testimony.[1]

In its Designation, Wyoming suggested that the Employee Witnesses would "provide opinions" about a laundry list of topics. *See, e.g.*, Designation at 12 (indicating that Mr. Boyd would "testify and *provide opinions* regarding return flows, irrigated acreage, augmentation of water supplies, reservoir usage, abandonment, consumptive use, irrigation patterns and methods, changes to water rights" and other topics). As discussed in Montana's Objections, Wyoming's Designation offered no guidance as to the substance of those opinions, and given that it was part of Wyoming's expert disclosures, Montana logically concluded that Wyoming intended to offer expert opinion pursuant to Rule 702. In its Response, Wyoming clarifies for the first time that the Employee Witnesses are actually "fact witnesses who also happen to be experts," and that they "will testify to the facts and information obtained through their ordinary employment, and therefore . . . they have not developed expert opinions specifically for the purposes of this litigation." Response at 7. As long as the Employee Witnesses confine their testimony to matters related to first-hand observations and factual matters, Montana has no objection to their testimony, so long as they are not designated as experts.

In short, the resolution of Objection Nos. 1 and 2 depends primarily on a single question: Does Wyoming intend for its Employee Witnesses to offer expert opinions beyond "first-hand participant testimony" or "the facts and information obtained through

[1] Wyoming cites *Nat. R.R. Pass.Corp v. Railway Express, LLC*, 268 F.R.D. 211, 214 (D. Md. 2010) for the proposition that such "hybrid fact/expert witnesses" do not need to prepare an expert report. Designation at 4. While this proposition is true, such witness are nevertheless subject to Rule 26(a)(2)(C), which requires disclosure of their specific opinions and the particular facts upon which those opinions are based. Although Rule 26(a)(2)(C) disclosures are summary in nature and are "much less extensive than full written reports," they still require specificity as to the opinions that will be offered and the facts supporting those opinions. *Nat. R.R. Pass. Corp.* does not speak to the requirements of Rule 26(a)(2)(C) because that case was decided before Rule 26(a)(2)(C) became effective in December of 2010.

their ordinary employment?" Given Wyoming's recent representations that the answer to this question is no, and that the Employee Witnesses will be limited to "historic and factual testimony," Response at 9, Montana agrees that no expert deposition is necessary at this time, and Wyoming need not summarize the testimony of the Employee Witnesses. However, the Employee Witnesses also should not be accorded the benefit of designation as an expert for the purposes of trial. For that reason, the Special Master should accept Wyoming's recommendation that it be allowed to "remove [the Employee Witnesses] from its disclosures." *Id.* Those same witnesses can be designated as fact witnesses at the appropriate time.

II. Montana Is Willing to Reserve Objection Nos. 3 and 4 for Trial

Wyoming also misapprehends Montana's Objection Nos. 3 and 4. Montana does not seek to prohibit Wyoming's witnesses from all testimony or discussion that responds to the testimony offered by Montana's witnesses. Rather, Montana's objections are primarily concerned with clarifying that Wyoming's expert witnesses, like Montana's expert witnesses, may only offer testimony that is connected to their previously disclosed opinions.

In its Response, Wyoming suggests that Objection Nos. 3 and 4 are premature and should be raised at trial. In light of Wyoming's representations that the Employee Witnesses will not be offering expert opinions, Montana is comfortable with this approach, and is willing to reserve Objection Nos. 3 and 4 for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Reply in Support of Montana's Objection to Wyoming's Expert Designation and Motion for Supplemental Depositions was served electronically, and by placing the same in the U.S. mail on April 18, 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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