

No. 137, Original

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In The  
Supreme Court Of The United States

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STATE OF MONTANA,  
Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

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

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**RESPONSE IN OPPOSITION TO WYOMING'S MOTION IN LIMINE TO  
EXCLUDE EVIDENCE OF OPERATIONAL DECISIONS AT THE TONGUE  
RIVER RESERVOIR**

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October 7, 2013

The State of Montana ("Montana") hereby submits this Response in Opposition to Wyoming's Motion in Limine to Exclude Evidence of Operational Decisions at the Tongue River Reservoir for the Purpose of Determining Montana's Rights Under Article V(A) ("Motion").

Wyoming requests the Court to exclude any evidence and argument related to Montana's operational decisions at the Tongue River Reservoir ("Reservoir"). Motion at 2-3. Wyoming asserts that this limitation is proper because Montana's decision to bypass water at the Reservoir is not protected under doctrine of appropriation, and that this bypassed water should be counted in determining if the Reservoir filled during the years at issue. The Motion is improper as it requires the Special Master to make a dispositive, legal determination before reaching the evidentiary issue. Additionally, Wyoming's legal argument is misplaced as it once again ignores the fact that Montana has not adopted the "one fill rule," the concept of which forms the basis for Wyoming's expert analysis regarding alleged foregone storage opportunities at the Reservoir. Moreover, Wyoming's attempt to impose Idaho law on Montana should be rejected. Montana has operated the Reservoir consistently since it was constructed, these historic operational decisions constitute part of the attributes of the Reservoir's water right, including storage, and Montana's operation of Tongue River Reservoir is consistent with the doctrine of appropriation in Montana. For all of the reasons stated herein, the Motion should be denied.

### **BACKGROUND**

1. The Tongue River Reservoir was constructed in the late 1930s and completed in 1940. Rebuttal Expert Report of Gordon L. Aycock at 5 (June 4, 2013) ("Aycock Rebuttal Report"). The original full capacity of the Reservoir was 72,500 acre-feet. *Id.*, at 5 n.2.

2. The Reservoir is owned by the Montana Department of Natural Resources and Conservation (“DNRC”). DNRC exercises its proprietary interests in the Reservoir through its Montana State Water Projects Bureau (“SWPB”). The Tongue River Water Users Association (“TRWUA”) operates and maintains the dam with oversight from SWPB. Expert Report of Kevin Smith (Jan. 4, 2013) (“Smith Report”) at Attachment 1, pg. 1.

3. The Reservoir was rehabilitated in 1999 as part of the implementation of the Northern Cheyenne Tribe Compact (“NCT Compact”) and the Congressional Act ratifying the NCT Compact. At that time, the capacity of the Reservoir was increased to 79,071 acre feet. The additional storage was part of the NCT Compact and was associated with a 20,000 acre-foot storage right that was recognized for the Tribe under Article II.A.2.b of the NCT Compact.

4. Two water rights are associated with the water stored in the Tongue River Reservoir. These rights are held by the DNRC and the Northern Cheyenne Tribe (“Tribe”). The DNRC water right is identified in Montana’s general stream adjudication as Water Right No. 42B 119280-00. See Smith Report at Attachment 2.

5. Although the proceedings on Water Right No. 42B 1119280-00 are not final, the right has been entered as part of the Montana Water Court’s preliminary decree for the Tongue River Basin Above and Including Hanging Woman Creek (Basin 42B), and the parties who objected to that right have entered and filed an Amended Stipulation agreeing on attributes of the water right. Among the parties that agreed to the attributes of the water right in the Amended Stipulation were the Federal Government and the Tribe. The notice of intent to appear parties, Diamond Cross Ranch, Ball Ranch, and Apsalooka Crow tribe reviewed the Amended Stipulation and filed conditional withdrawals of their notices of intent to appear contingent on the Water Court accepting the Amended Stipulation and adopting it in a Masters Report and the

Final Report. The Amended Stipulation is part of Attachment 2 to the Smith Report. The deadline for filing comments or objections on the stipulation has long passed, and Wyoming did not file any response with the Montana Water Court. Smith Report at 5.

6. Under the Amended Stipulation for Case 42B-62, the DNRC water right is commingled and administered in conjunction with water stored in Tongue River Reservoir that has been reserved for the Northern Cheyenne Tribe pursuant to the NCT Compact. Smith Report at Attachment 2.

7. Under the Amended Stipulation, the Tongue River Reservoir is authorized to provide up to 40,000 acre feet of stored water per year to the TRWUA and 20,000 acre feet of stored water per year to the Tribe. *Id.*

8. The Amended Stipulation recognizes that water is diverted and released pursuant to the Operating Plan developed by the Advisory Committee established under the NCT Compact. *Id.*

9. The priority date of both the DNRC's right and the Tribe's right is April 21, 1937. *Id.*

10. The Operating Manual imposes a maintenance and safety restriction on winter storage for the Tongue River Reservoir. It provides as follows:

“Maximum Winter Storage: The maximum reservoir elevation for winter storage is 3,417.5 feet with 45,000 acre-feet of storage. This maximum helps prevent damage to the riprap and embankment from wind-driven waves and ice.” Smith Report at Attachment 2, pg. 21.

Similarly, the Operating Plan states:

“The Advisory Committee recommends that the maximum preferred carry-over be 45,000 AF (elevation 3417.5) in order to minimize freeze-thaw damage to the dam by allowing water to remain at the bottom of the concrete walls.” *Id.*, at A6.

11. The pre-1950 operating records for the Tongue River Reservoir show that the Reservoir was consistently operated below a storage level of 45,000 acre-feet during the October through March season. Aycock Rebuttal Report at 11-13.

12. The Tongue River Reservoir relies primarily on spring runoff from April to June to fill to or near its normal full capacity. *Id.*, at 16-17. The Advisory Committee determined that the Tongue River Reservoir should be operated to fill the Reservoir primarily during the spring runoff. Smith Report at Attachment 1, A4.

13. Allowing the River to flow through the Reservoir in the winter is necessary for Tongue River Reservoir operational, safety, and water rights purposes. Smith Report at 14-15; Rebuttal Expert Report of Kevin Smith, P.E. at 14-17 (June 4, 2013) (“Smith Rebuttal Report”); Aycock Rebuttal Report at 3, 11-16.

14. Prior to 1950, the winter outflows from the Reservoir were similar to the 175 cfs level established by the Advisory Committee. Smith Report at 14; Aycock Rebuttal Report at 12-13, 15-16. Long-term average monthly outflows during the non-irrigation season ranged from 168 cfs to 350 cfs over the period 1939 through 2012. Smith Report at 14.

15. The Tongue River Reservoir did not fill in 2001, 2002, 2004, and 2006. Expert Report of Dale E. Book at 11, Tables 4-A through E, Table 12 (Jan. 4, 2013) (“Book Report”).

16. When timing of storage is considered, the Tongue River Reservoir would not have filled to either its original or rehabilitated capacity in 2001, 2002, 2004, and 2006, even if the River flow had been restricted to 75 cfs for the entire winter. Expert Rebuttal Report of Dale E. Book, P.E. at 20, Figure 9-A, Figure 9-B (June 4, 2013) (“Book Rebuttal Report”); Aycock Rebuttal Report at 17-21, Table 3.

## ARGUMENT

### I. Wyoming's Motion Seeks a Dispositive Ruling

Wyoming's Motion is a substantive, dispositive motion cloaked as a procedural motion in limine. In order to grant the Motion, the Special Master must first determine that Montana's operation of the Tongue River reservoir is inconsistent with the doctrine of appropriation. As the Special Master has recognized, this issue has not been decided. See Memorandum Opinion of the Special Master on Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements at 4 (Sept. 16, 2013) ("Intrastate Administration Mem. Op."). Montana respectfully submits that a motion in limine is not an appropriate vehicle for determining such an important dispositive question. See *Pellegrini v. Weiss*, 165 Cal. App. 4th 515, 530 (Cal. Ct. App. 2008) ("Generally speaking, in limine motions are disfavored in cases in which they are used not to determine in advance the court's projected ruling if presented with an evidentiary objection during trial, but instead to serve as a substitute for a dispositive statutory motion."); see generally William D. Rehwald, *The Unfortunate Use of Motions in Limine as Dispositive Motions*, 31-DEC L.A. Law 11 (Dec. 2008) (discussing the problems inherent in using a motion in limine to decide a dispositive question). This is true in part because the nonmoving party is not allowed the ordinary protections provided for a party in addressing a substantive issue, such as adequate time to research and draft a response. See *Pellegrini*, 165 Cal. App. 4th at 530.

Notably, a motion in limine is used to exclude evidence before a jury sitting as factfinder. This case, however, is not a jury trial. It is an original proceeding before the United States Supreme Court, which has been assigned to a special master for the purpose of creating a complete record and making recommendations to the Supreme Court. Under these

circumstances, excluding evidence in the manner Wyoming seeks would deprive the Court of the complete record necessary to resolve complex and important issues between two sovereign States. For this reason alone, the Motion should be denied.

The purposes of a motion in limine are to rule in advance on the relevance of evidence and to allow a court to exclude evidence that is unfairly prejudicial or may mislead the jury. See Fed. R. Evid. 402; Fed. R. Evid. 403; see also, *e.g.*, *Gold v. State Farm Fire & Cas. Co.*, Civil Action No. 10-cv-0825-RBJ-MJW, 2013 WL 1910515, at \*6 (D. Colo. May 8, 2013); *Hulse v. State*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75. Ordinarily, such a determination is reserved for trial so that the evidentiary questions may be resolved in the proper context. *Gold*, 2013 WL 1910515, at \*6. Such is the case here.

## **II. Montana's Precompact Operation of the Tongue River Reservoir Forms Part of Its Storage Right**

In Montana, historic operation practices, including pattern of use, are part of a water right under the doctrine of appropriation. See *McDonald v. State*, 722 P.2d 598, 609 (Mont. 1986) (noting that calculation of reservoir carryover turns “on the physical facts and historical use patterns unique to each water right”); *Town of Minturn v. Tucker*, 293 P.3d 581, 592 (Colo. 2013) (“Established practice in water adjudication proceedings makes historical use a significant or controlling factor in the determination of parties' water rights.”) As described above, the operational decisions Wyoming attacks have been part of the Tongue River Reservoir's operation since it was constructed and thus are part of the water right. See Smith Rebuttal Report at 11-12; Aycock Rebuttal Report at 12-13.

Importantly, Wyoming bears the burden of proving that Montana's reservoir operations are inconsistent with the Yellowstone River Compact and the doctrine of appropriation. See *Archer v. LaMarch Creek Ranch*, 571 P.2d 379, 383 (Mont. 1977) (“The burden of proving an

affirmative defense rests on the defendant.”); see also *Parshall v. Cowper*, 143 P. 302, 304 (Wyo. 1914) (adjudication of quantity of water is as conclusive upon water distributor as the determination of priorities, and the burden was on defendant water regulators to show that plaintiffs were not entitled to the full maximum amount of water granted them by the adjudication); *Matter of Clark Fork River Drainage Area*, 908 P.2d 1353, 1355 (Mont. 1995) (party claiming that user abandoned right carries the “initial burden of proving that a water right has not been used for a sufficiently long period of time to raise a rebuttable presumption of an intent to abandon that right.”) The Special Master recently recognized that it is Wyoming’s burden to prove that Montana’s practices waste water or are otherwise inconsistent with beneficial use under the doctrine of appropriation. See Intrastate Administration Mem. Op. at 4 (“[T]he initial presumption is that Montana’s existing regulation and administration are acceptable under the Compact.”); see also *id.* at 32 n.5. Wyoming has conceded that it bears the burden to establish waste. See Wyoming’s Final Pretrial Memorandum at 5 n.3 (Sept. 23, 2013).

Wyoming has not identified any evidence that Montana’s operational decisions are inconsistent with beneficial use under the doctrine of appropriation.<sup>1</sup> Furthermore, Wyoming engages in many of the same reservoir practices it attacks in the Motion. For example, Wyoming bypasses winter flows at the Kearney Lake reservoir in order to prevent freezing that could cause problems. See Deposition Transcript of John Koltiska at 23:22-24: 6, 45:19-46:5 (May 22, 2013); Deposition Transcript of Tom Koltiska at 41:13-45:13 (Sept. 24, 2013). As Wyoming’s own practices thus demonstrate, bypassing winter flows for reservoir maintenance or dam safety is reasonable and permitted under the doctrine of appropriation. Under Wyoming’s rigid interpretation – which it does not apply to its own water users – Montana is required to store

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<sup>1</sup> Both Wyoming and Montana treat instream uses as a beneficial use. See *In re Adjudication of the Existing Rights to the Use of All the Water*, 55 P.3d 396, 401-02 (Mt. 2002); *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 835 P.2d 273, 279 (Wyo. 1992).



water even when doing so would be inconsistent with historic operations and would create safety risks that could potentially cause damage to the Reservoir. Neither the doctrine of appropriation nor the Compact require such an absurd result.

Indeed, Wyoming's own proffered expert Bern Hinckley does not suggest that Montana is required to store all water flowing into the Tongue River Reservoir whenever it is available. As explained in Mr. Hinckley's report:

"Because a storage right is inherently based on future use, there can be no immediate injury to that right due to diversions by upstream juniors. Only if the storage right subsequently fails to fill will an impact from such diversions be realized. Thus, it is reasonable to require a storage right to make reasonable efforts to store all available inflows. Again, the result of regulation otherwise would be a waste of water." Expert Report of Bern Hinckley at 12 (Apr. 2, 2013).

According to Wyoming's proffered expert, in order to not waste water, Montana must make "reasonable efforts to store all available inflows." *Ibid.* Wyoming has not identified any evidence or authority that operating the Reservoir according to long-standing practices established prior to the Compact, including allowing water to flow through the Reservoir for safety reasons and to avoid causing damage to the Reservoir, is unreasonable or amounts to a waste of water. At trial, Montana will demonstrate through expert testimony that its operation of the Tongue River Reservoir is reasonable and in accordance with pre-Compact operations. Accordingly, the Motion should be denied.

### **III. Montana Has Not Adopted the "One-Fill" Rule and the SRBA Case Is Inapplicable**

Wyoming relies on an Idaho District Court case, *In re SRBA*, Case No 39576, Basin-Wide Issue 17, Subcase No. 00-91017 (5th Dist. Idaho Mar. 20, 2013) to support its argument that Montana's operational decisions amount to "an unlawful attempt to refill the Reservoir." See Motion at 8. As an initial matter, Idaho law is not controlling in Montana. As noted above, the Special Master has already held that "the Compact does not require Montana to follow any

particular rules or administrative approach in implementing the beneficial use rule . . . .” Intrastate Administration Mem. Op. at 4. Additionally, there are many aspects of Idaho water law that Wyoming itself does not follow. For example, Idaho law requires conjunctive groundwater management, an approach Wyoming has not adopted. See, e.g., Idaho Admin. Code r. 37.03.11.042 (2013). Thus, Wyoming’s attempt to impose another state’s law on Montana should be rejected.

Importantly, Wyoming is incorrect in claiming that *Federal Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941), established the one-fill rule in Montana. *Federal Land Bank* arose in the context of a small, intermittent coulee that only flowed during heavy rain and spring runoff. *Id.*, at 1008. The Court framed the issue relating to reservoir storage rights as follows:

“It is clear that both reservoirs were constructed and maintained with the intention of holding more water than required for irrigation in any one year. This could only have been done to provide for an extra supply during the wet years for use in the dry years. Could they do this at that time?” *Id.*, at 1010-11.

While the Court stated in dicta that it “like[d] the language used in *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 98 P. 729, 733,” which discusses the one-fill rule, the Court’s ultimate holding relating to reservoir rights was as follows:

“We are satisfied that the laws of Montana that apply to the acquisition of running water equally apply to the storage and use of flood or waste water, and the doctrine of ‘first in time, first in right’ applies to both.

Generally, and briefly, in this state what are the reservoir rights of any person? We would say that, in any year, to store for use in that or succeeding years what he has a right to use, and also any additional amounts that others would not have the right to use, and that would otherwise go to waste, seems to cover the situation in this case.” *Id.*, at 1012.

Nowhere in the case does the Court purport to adopt the one-fill rule. Rather, *Federal Land Bank* stands for the unremarkable proposition that the doctrine of appropriation applies to storage rights in Montana. Unlike Colorado, Montana has never adopted a statute establishing the one-

fill rule. Additionally, there is no Montana case where such a rule was ever applied, and Montana's Water Court has never implemented such a rule to limit the operations at any of Montana's state owned reservoirs. Accordingly, to the extent *In re SRBA* relies on application of the one-fill rule, it is inapplicable in Montana.

Furthermore, *In re SRBA* is not factually or legally on point. The court in *In re SRBA* considered whether, under the Idaho's doctrine of prior appropriation, a reservoir could fill, release water for a purpose not enumerated in the reservoir's decreed water right, and refill again in order to fulfill the reservoir right's stated purpose. See *In re SRBA, supra*, at 7-8. The court held that a reservoir was not permitted to refill in this manner to the detriment of junior water users. Here, Montana is not claiming that it is entitled to fill the Tongue River Reservoir, release for a non-beneficial use, and then refill again during the spring runoff. Rather, Montana allows the river to flow through the Reservoir during the winter months, consistent with the historic operation of the Reservoir, for dam safety, flood control, and instream fish and wildlife purposes, and fills the Reservoir primarily during spring runoff. Montana is not releasing stored water as in the *SRBA* case. Only after the initial fill and the release of water for irrigation does Montana refill the Reservoir, conditions permitting. This is an entirely different factual scenario than the one presented by *In re SRBA*. Thus, the Idaho case that Wyoming so heavily relies upon does not support granting Wyoming's Motion.

**CONCLUSION**

For all the reasons state above, Montana respectfully requests that the Motion be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of Montana's Response in Opposition to Wyoming's Motion in Limine to Exclude Evidence of Operational Decisions at the Tongue River Reservoir was served electronically, and by U.S. Mail on October 7, 2013, to the following:

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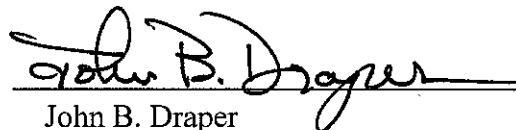
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I further certify that all parties required to be served have been served.

  
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