

No. 137, Original

THE SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA,

Plaintiff,

-vs-

STATE OF WYOMING and STATE OF NORTH DAKOTA,

Defendant.  
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BEFORE THE HONORABLE BARTON H. THOMPSON, JR.  
SPECIAL MASTER

DEPOSITION OF GORDON AYCOCK

Helena, Montana  
Friday, July 19, 2013  
11:10 - 2:52 P.M.

APPEARANCES:

MONTGOMERY & ANDREWS  
Attorneys at Law  
325 Paseo de Peralta  
Santa Fe, New Mexico 87501

By: JOHN B. DRAPER  
Attorneys for Plaintiff State of Montana

JAMES KASTE  
Senior Assistant Attorney General  
123 Capitol Building  
Cheyenne, Wyoming 82002  
Attorneys for Defendant State of Wyoming

ALSO PRESENT: Fred Robinson, Anne Yates, Jay Weiner,

Kevin Smith

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1 trouble hearing me, please let me know. If you have any  
2 confusion about any of my questions, please ask me to  
3 clarify.

4 I ask, as you saw, a lot of questions that are  
5 goofy. If you don't understand it or you need me to  
6 clarify, I'm great with that. It is important that we  
7 understand each other and that that's well reflected on the  
8 record. So any misunderstanding, please, let me know.

9 Otherwise, everything you say of course is going  
10 to be written down by the court reporter. And you're under  
11 oath, you have to tell the truth. And if at any time  
12 during the course of your testimony you realize that  
13 something that you said earlier needs to be corrected,  
14 please let me know and we'll go back and fix it. And I  
15 will try not to interrupt you when you speak, so that we  
16 can get good, clear answers on the record. Does that sound  
17 all right?

18 A Sounds all right.

19 Q All right.

20 EXHIBITS:

21 (Deposition Exhibit No. 379 marked for  
22 identification.)

23 Q (BY MR. KASTE) Let me give you what we marked as  
24 Exhibit 379. And this is a copy of the notice of your  
25 deposition here today. Did you receive a copy of your

1 BE IT REMEMBERED that on Friday, July 19, 2013 at  
2 the hour of 11:10 a.m. of said day, at the Attorney  
3 General's Conference Room, 215 N. Sanders, Helena, Montana,  
4 and before Gregory A. Frank, RPR, a Notary Public for the  
5 State of Montana, pursuant to Notice, the deposition of  
6 GORDON AYCOCK was taken on oral interrogatories.

7  
8 Thereupon,

9 GORDON AYCOCK,  
10 having been first duly sworn to tell the truth, the whole  
11 truth and nothing but the truth, testified upon his oath as  
12 follows:

13  
14 EXAMINATION BY MR. KASTE:

15 Q Morning, Mr. Aycock?

16 A Morning.

17 Q Would you state your name for us?

18 A My name is Gordon Aycock.

19 Q All right. Have you ever been deposed before?

20 A Years ago, yes.

21 Q Well, you sat through much of Mr. Smith's  
22 deposition just a moment ago, so --

23 A Yes.

24 Q -- the process is pretty simple. The one thing I  
25 can say, sometimes I speak softly and if you have any

1 notice?

2 A I did.

3 Q Did you bring anything with you pursuant to that  
4 notice?

5 A I brought a flash drive that has a number of  
6 documents on it, electronic format.

7 Q Is that flash drive for me?

8 A You know, we were going back and forth with  
9 things. I think it should be all right, but --

10 Q Or do we need to make copies and then distribute  
11 them?

12 MR. DRAPER: Do you have a copy of that flash  
13 drive?

14 THE WITNESS: I do. I was trying to remember if  
15 there is -- it should be fine, if you want.

16 MR. KASTE: Do you have a copy of it, Mr. Draper?

17 MR. DRAPER: As long as he's got a copy, I'm  
18 okay.

19 THE WITNESS: I don't have an exact copy, so  
20 maybe we should --

21 MR. DRAPER: Is there a way we can get it copied  
22 so we have a record of exactly what was provided?

23 Q (BY MR. KASTE) Well, we'll hang on to it and  
24 figure it out later in the course of this deposition.

25 A If we take a break, I could use my computer and I

1 on you. But the last bullet point on Page 18 talks about  
2 predevelopment level and I don't get it, can you explain to  
3 me what your -- what's going on there?

4 A That's one of the more somewhat complicated to  
5 explain. But since there is no records on how the Wyoming  
6 reservoirs fill on a month-to-month basis, these are those  
7 smaller ones that are addressed here.

8 I had to find a way to go back and estimate how  
9 that storage was occurring. I had -- I knew what the total  
10 storage was, but I didn't how it was accumulated over the  
11 October through June period.

12 So what I did is, I looked at the flow at Goose  
13 Creek at Acme, which is I think the major gauging station  
14 down below this basin that has those reservoirs in it, and  
15 looked at that flow distribution for each of these years,  
16 so took the actual record for each of these years.

17 But I knew that that flow, you know, when you're  
18 up at the reservoir, there's no -- it is pretty much  
19 natural conditions, there's no influences by man upstream  
20 that affecting those flows. But all of that water has to  
21 eventually come down to the gauge.

22 And so if you can remove those development  
23 impacts from the gauge, then it gets it back to a more  
24 natural state or would be the natural state of that river  
25 down there. And that would be fairly representative of

1 doing the same thing with Tongue River Reservoir?

2 A I'm not saying it counts against you, all I'm  
3 trying to do is determine what actually happened. This is  
4 to get back to -- you know, it is my understanding those  
5 reservoirs do not release water through the winter to any  
6 degree. And so all I'm trying to do is account for how  
7 that water was taken out of the basin.

8 It has nothing to do with, you know, whether  
9 that's appropriate or not appropriate, it's just the fact  
10 that that's what happened, what was occurring.

11 Q All right. And is that the method you used to  
12 break those up month by month, is that something that you  
13 have conceived for purposes of this litigation or did you  
14 use a sort of standard methodology to come up with your  
15 analysis?

16 A I don't know that there's any standard  
17 methodology for it. It was to try to find a reasonable way  
18 that I felt could give us some fairly accurate results. I  
19 did look at some other stations to see if those flows  
20 appear to be in the ballpark and they did once they were  
21 adjusted, so I felt fairly comfortable with them.

22 Q All right. Table 3 is your summary of post-1950  
23 impacts to the State and I think, you tell me if I got this  
24 wrong, you started with, as sort of your baseline, the end  
25 point of Mr. Book's analysis and then you have refined it

1 what is occurring up at the reservoirs, although it would,  
2 it would probably overestimate the winter flow a little bit  
3 because you have more groundwater coming in.

4 Q You're talking about development impacts between  
5 reservoir and this gauge?

6 A Yes.

7 Q Okay.

8 A No, between -- well, no -- yeah, it is mainly  
9 between. It includes the reservoirs.

10 Q All right. And so the whole, the whole import of  
11 this portion of your analysis is to determine how much  
12 storage is occurring month by month in Wyoming's  
13 reservoirs?

14 A Right.

15 Q I get that. Okay. Because you did this  
16 differently than you did -- than you sort of broke out the  
17 month by month with regard to Tongue River Reservoir, it  
18 popped into my head, is there a different standard being  
19 applied to Wyoming's reservoirs than the Tongue River  
20 Reservoir in your analysis?

21 A What do you mean by different standard?

22 Q Well, it seems like what I have down here is that  
23 you're counting sort of all our available storage  
24 opportunities in saying that counts against you, Wyoming,  
25 in these various months, but it doesn't seem like we're

1 and the results of your refinement are outlined here on  
2 Table 3?

3 A Right.

4 Q And very simply, the refinement you made was to  
5 remove those depletions for the periods of time in which  
6 the reservoir was at or above the 45,000 acre-foot maximum  
7 storage capacity?

8 A I don't know if -- I didn't really remove them  
9 from the analysis, but I only looked at the impacts after  
10 the reservoir got past that restriction and could start to  
11 store water. I mean, the impacts are on the tables, if you  
12 look at Appendix A, all of those impacts are listed, but  
13 you'll see -- like on, go to 2004 because -- this one  
14 doesn't seem to be colored, but 2004, you know, the blue  
15 impacts are those impacts.

16 Then when you get down to April, you get past  
17 that winter season. Those are summed up separately from  
18 the total. So the numbers you see in the total are Dale's  
19 numbers. If you go over to the last column, you see that  
20 1984, that would be Dale's, should be Dale's figure.

21 Q All right. And then below that, the April  
22 through September figure, that is your figure?

23 A Yes.

24 Q And it is higher than Mr. Book's figure because  
25 you have removed return flows in excess of the depletions

1 to look at it and I frankly don't care, they can mess it up  
 2 or not.  
 3 A I don't think it's --  
 4 Q The difference in your refinement from Mr. Book's  
 5 report is pretty small at the end of the day, but I  
 6 appreciate you taking a fine tooth comb to it.  
 7 MR. KASTE: I don't think I have any further  
 8 questions for you. Mr. Draper is probably going to ask you  
 9 something that leads me down 20 minutes, but maybe not.  
 10 Thank you very much.  
 11 MR. DRAPER: Okay. Let's take a break.  
 12 (Whereupon, a brief recess was taken at 2:24 to  
 13 2:49 P.M.)  
 14  
 15 EXAMINATION BY MR. DRAPER:  
 16 Q Okay. So we'll go on the record.  
 17 Mr. Aycock, I'd just like to document the  
 18 correction pages that you have provided and which is an  
 19 exhibit to this deposition. And it is marked as Deposition  
 20 Exhibit 381, and it consists of a corrected page for each  
 21 of the following pages in your report. Page 3. Page 20,  
 22 and you've actually marked on that to correct the page  
 23 number to read Page 20?  
 24 A Yes.  
 25 Q The following page in the exhibit is Page 21, it

1 MR. DRAPER: Thank you.  
 2 Q (BY MR. DRAPER) Another point that we should  
 3 make with respect to the same exhibit, Exhibit 381, is that  
 4 on the first page, you have reprinted only four paragraphs,  
 5 some of which were corrected as you have testified, but  
 6 you've omitted paragraph No. 5 from that page, which  
 7 appears on Page 3 in the original report in which you  
 8 intended to retain?  
 9 A Intended to retain and there were no changes to  
 10 that paragraph.  
 11 MR. DRAPER: Very good, thank you.  
 12 MR. KASTE: All done?  
 13 MR. DRAPER: I think that does it. Thank you.  
 14 WITNESS EXCUSED  
 15 \* \* \*  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1 is a corrected version of your Table 3?  
 2 A Correct.  
 3 Q Next two pages in the exhibit are Pages 25 and  
 4 26, which you have marked on the bottom of those pages, the  
 5 first words of title are Depletion slash Accretion; is that  
 6 correct?  
 7 A Correct.  
 8 Q That follows Pages 28 and 29 with the title  
 9 Wyoming Post Compact Reservoir Storage Allocation and lists  
 10 2001, 2002, 2004 and 2006 at the top. And those are two  
 11 pages covering the years 2001, 2002, 2004 and 2006; is that  
 12 right?  
 13 A Correct.  
 14 Q And, again, you've marked the page numbers in  
 15 hand at the bottom?  
 16 A Correct.  
 17 Q And finally, the same thing, the last two pages  
 18 of your, of your correction page are entitled Estimated  
 19 Pre-development Flow for Goose Creek near Acme, Wyoming,  
 20 and again for the four years in question?  
 21 A Correct.  
 22 Q All right.  
 23 MR. DRAPER: Thank you very much.  
 24 MR. KASTE: Do you want to put anything on about  
 25 this paragraph?

CERTIFICATE OF WITNESS  
 PAGE LINE CORRECTION

I hereby certify that this is a true and correct copy of my  
 testimony, together with any changes I have made on this  
 and any subsequent pages attached hereto.

Dated on this the \_\_\_\_ day of \_\_\_\_\_ 2013.

\_\_\_\_\_  
 GORDON AYCOCK, Deponent.

CERTIFICATE OF REPORTER

STATE OF MONTANA )

) ss.

County of Cascade )

I, Gregory A. Frank, RPR, Court Reporter and Notary Public for the State of Montana, residing in Great Falls, Montana, do hereby certify:

That I was duly authorized to and did report the deposition of GORDON AYCOCK in the above-entitled cause;

That the reading and signing of the deposition by the witness have been expressly reserved.

That the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this the 1st day of August, 2013.

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Gregory A. Frank, RPR  
Registered Professional Reporter  
Notary Public, State of Montana  
Residing in Great Falls, Montana.  
My Commission expires: 2/10/2015.