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

WYOMING'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO REMEDIES

PETER K. MICHAEL*
Attorney General

JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
ANDREW KUHLMANN
Senior Assistant Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6196

**Counsel of Record*

Defendant, State of Wyoming, through counsel, hereby replies as follows in support of its Motion for Summary Judgment:

INTRODUCTION

The remaining disputes between the parties can be resolved at this time without further evidentiary proceedings. Wyoming's Motion for Summary Judgment is consistent with the Court's order remanding this case for a remedies phase as the Special Master determines necessary and appropriate. Nothing about the Court's order constrains the Special Master's discretion to limit the remedies phase where no genuine questions of material fact exist and the parties are entitled to judgment as a matter of law. No genuine questions of material fact remain in this case, and the basic principles of contract law dictate the proper award of damages and prejudgment interest. The specific controversy Montana brought to trial has been resolved, and the Special Master should exercise the discretion reposed in him by the Court to enter judgment against Wyoming and dismiss Montana's Bill of Complaint with prejudice.

STANDARD OF REVIEW

In original actions, the Supreme Court is not bound by the Federal Rules of Civil Procedure but uses Rule 56 of those rules as a guide. *Alabama v. North Carolina*, 569 U.S. 330, 344 (2010) (citing Sup. Ct. R. 17.2). The Court applies the same general test set forth in Rule 56: "[S]ummary judgment is appropriate where there 'is no genuine issue as to any material fact' and the moving party is 'entitled to judgment as a matter of law.' " *Id.*

(quoting Fed. R. Civ. P. 56(c) (standard now contained in subsection (a) following 2010 amendments to Rule 56)). The substantive law governing the dispute determines which facts are material to the summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), *cited in Alabama*, 569 U.S. at 344.

A genuine issue of material facts persists, and requires the court to deny a motion for summary judgment, only when a reasonable finder of fact could return a verdict for the non-moving party at trial. *Anderson*, 477 U.S. at 248-49. However, if the moving party supports its motion with sufficient materials that would prevent a reasonable fact finder from deciding in favor of the non-moving party, the latter can defeat the motion only by submitting materials showing sufficient facts to create a genuine issue for trial. *Id.* at 250.

ARGUMENT

I. Montana has failed to show that it is entitled to anything more than the cost of available replacement water.

Montana continues to avoid answering the salient question related to the measure of its damages for Wyoming's breaches in 2004 and 2006. As set forth in Wyoming's exception, Montana's damages are strictly limited to the cost of available replacement water. (Wy. Exception at 8 through 13). In its response to Wyoming's exception and its present response, Montana has not argued or otherwise shown that this basic rule of contract law is incorrect or inappropriate in this case. Instead, Montana asserts that genuine questions of fact preclude the entry of judgment utilizing this rule of contract law. In response to a summary judgment motion, Montana cannot merely allege that genuine

questions of fact exist. Rather, it must submit evidence, in the form of affidavits or otherwise, demonstrating that genuine questions of material fact preclude the entry of judgment. Fed. R. Civ. P. 56(c). It failed to do so.

As it relates to damages, Montana alleges that five genuine questions of material fact preclude the entry of judgment in Wyoming's favor. (Mont. Resp. at 13). Before addressing each in turn, Wyoming must address Montana's assertion that summary judgment would unfairly deprive Montana of the opportunity to conduct discovery. (Mont. Resp. at 9 through 11, 14 through 15). This assertion has no merit.

Montana has access to all the information necessary to calculate its own damages without result to formal discovery procedures. After all, it is Montana's reservoir at issue, and it should know or be able to calculate how much water was available in its reservoir at any given time. Moreover, nothing precluded Montana from obtaining and submitting affidavits with its response from its water users demonstrating the true price of water or that replacement water was unavailable. At any time in the year since Wyoming filed its exception, Montana could have called its own water users and obtained information contradicting the testimony at trial. *See, e.g., In re Am. Med. Sys., Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 946 F. Supp. 2d 512, 514 (S.D. W. Va. 2013) ("As a general rule, in the absence of a specific prohibition, potential witnesses are fair game for informal discovery by either side of a pending action."); *Claytor v. Computer Assoc. Int'l, Inc.*, 262 F. Supp. 2d 1188, 1200 (D. Kan. 2003) ("[P]laintiff could have attempted to obtain affidavits from [a third party] at any time prior to filing the response to defendant's motion for summary

judgment and could have done so outside the formal discovery period."). Montana has an obligation to investigate its claims, search its own records, and contact its own witnesses. It cannot sit idle and avoid the entry of summary judgment.

Montana's claim that it needs to conduct discovery rings hollow for other reasons as well. Montana does not explain what discovery it needs from Wyoming to prove its damages. Discovery is not a talisman Montana can wave to avoid the entry of judgment when it is otherwise appropriate as a matter of law. Instead, Montana must show what discovery it needs, that it does not already have that information in its possession after nine years of litigation, and why this new round of discovery would make a difference in the outcome. *See, e.g., California ex rel. California Dep't of Toxic Substances Control v. Campbell,* 138 F.3d 772, 779 (9th Cir. 1998) (party seeking to conduct discovery in response to a summary judgment motion has the burden of showing (1) that there are specific facts that it hopes to elicit from further discovery; (2) that those facts actually exist; and (3) that they are "essential" to resist the summary judgment motion); *Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006) (non-movant must identify the probable facts not available, what steps have been taken to obtain these facts, and explain how additional time will enable him to rebut the movant's allegations of no genuine issue of material fact.)

While Montana does state that it would like to inquire into the benefits Wyoming received, such an inquiry would be pointless because Montana's damages are limited as a matter of law to the cost of available replacement water. Similarly, Montana has not alleged that it was precluded from obtaining necessary information through its own internal or

informal investigations such that it must now resort to a lengthy formal discovery period. Discovery might be necessary if all of the water users in Montana on the Tongue River refused to cooperate with Montana, but Montana has not shown or alleged that this is the case. *See* Fed. R. Civ. P. 56(d) (non-movant can show by affidavit or declaration that it cannot present facts essential to justify its opposition). Accordingly, Montana's desire to conduct unspecified discovery does not bar the entry of judgment at this time.

In turn, the Special Master can readily discard each of the questions of material fact raised by Montana. First, Montana raises "[w]hether water was available from the Northern Cheyenne Tribe in both 2004 and 2006 in sufficient quantities for all Montana water users to purchase water."[1] (Mont. Resp. at 15). In its exception, Wyoming demonstrated that replacement water was available based on the testimony of multiple witnesses and multiple exhibits at trial. (Wyo. Exception at 5). Montana submitted nothing to contradict this evidence.

Second, Montana asks "[i]f water was available from the Northern Cheyenne Tribe in both 2004 and 2006 what was the cost?" (Mont. Resp. at 15). Again, through the testimony of multiple witnesses at trial, Wyoming showed that the price of available replacement water was between $9 and $15 an acre foot during the drought years. (Wyo. Exception at 5). Montana offers no evidence of an alternative price.

---

[1] The relevant inquiry is whether 1,300 acre feet and 56 acre feet of replacement water was available for purchase in 2004 and 2006 respectively. Neither Wyoming's liability nor Montana's damages are measured by the needs or desires of "all Montana water users."

Third, Montana asks, "[w]hat were Montana's necessary secondary losses as a result of Wyoming's violations of the Compact?" (Mont. Resp. at 15). This question is precisely suited for summary judgment now because Montana is not entitled to secondary damages as a matter of law. *See* Restatement (Second) of Contracts § 350 illus. 5 (1981). Instead, Montana's damages are limited to the cost of available replacement water. (Wyo. Exception at 8 through 11). This reality also negates Montana's assertion that it has not yet decided what damages it will pursue. (Mont. Resp. at 15 through 16). Payment in water is not an option for Montana in this case as a matter of law because it failed to mitigate its damages by covering the loss with substitute water. (Wyo. Exception at 8 through 11).

Fourth Montana asks "What were Wyoming's gains as a result of Wyoming's violations of the Compact?" (Mont. Resp. at 15). Wyoming's gains are not the measure of Montana's damages. (Wyo. Exception at 8 through 11). Montana asserts that it may be entitled to disgorgement as a remedy (Mont. Resp. at 17), but the evidence presented at trial demonstrated that Wyoming's breach was not done knowingly. (Wyo. Exception at 11 through 12). Rather than show that Wyoming's breach was done knowingly, Montana asserts that it should be permitted to conduct discovery on this subject in the remedies phase. (Mont. Resp. at 13). But Montana fails to acknowledge that this question was one for the liability phase of these proceedings, not the remedies phase. Montana fully explored the basis for Wyoming's failure to honor Montana's calls in 2004 and 2006, and no additional discovery will demonstrate that anyone in Wyoming consciously calculated that

it was better to breach and pay damages. Therefore, unlike *Kansas v. Nebraska*, 574 U.S. ___, 135 S. Ct. 1042 (2015), disgorgement is not an appropriate remedy.

Finally, Montana asks "[w]hat is the appropriate level of pre-judgment interest?" But this question poses an issue of law not of fact. (Mont. Resp. at 15). "The ministerial task of calculating prejudgment interest can be accomplished if the judgment amount, the prejudgment interest rate, and the date from which prejudgment interest accrues have been established." *SEC v. Carrillo*, 325 F.3d 1268, 1272 (11th Cir. 2003). Some courts have concluded that "[g]enerally, the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-judgment interest." *Blankenship v. Liberty Life Assur. Co. of Boston*, 486 F.3d 620, 628 (9th Cir. 2007) (internal quotation marks omitted); *see also Asdale v. Int'l Game Tech.*, 763 F.3d 1089, 1093 (9th Cir. 2014) (noting that post-judgment interest rate is often used for prejudgment interest). However, "[m]any circuits have held that courts are not required to use section 1961 in calculating prejudgment interest and that the calculation rests firmly within the sound discretion of the trial court. *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1287-88 (10th Cir. 2002) (citing cases).

Accordingly, it is for the Court to decide what interest rate to apply, and it has wide discretion to apply either the statutory rate for post-judgment interest found in 28 U.S.C. § 1961 or another rate that it determines to be equitable. Wyoming suggested that the Court apply the generous rate of seven percent per annum set forth in Wyoming state law. (Wyo. Exception at 12 through 13). But the federal statutory rate would be acceptable as well. In

either event, the calculation itself is ministerial and no additional evidence would assist the Special Master in determining the appropriate award of prejudgment interest.[2]

Montana presents no genuine questions of material fact that require either additional discovery or additional proceedings. Although admittedly somewhat counterintuitive, Wyoming is entitled to the immediate entry of judgment against it in the amount of at most $20,340.00 plus prejudgment interest.

II. Montana is not entitled to additional declaratory relief.

It remains unclear what declaratory relief Montana seeks. It purports to ask for a declaration of its "rights" under the Compact (Mont. Resp. at 25) but seems instead to be asking the Special Master to write a comprehensive set of "rules" for future operations on the river. It is true that in some cases invoking the Court's original jurisdiction, the Court upon the recommendation of the Special Master, or with the consent of the parties, has issued detailed decrees setting forth operational principles and memorializing mathematical models. (Mont. Resp. at 22 (citing cases)). But the Court must "'mould each decree to the necessities of the particular case' and 'accord full justice to all parties.'" *Kansas v. Nebraska*, 135 S. Ct. at 1053.Therefore, the decrees in other cases are largely inapplicable and uninstructive. This is particularly true in this case because the

[2] Assuming replacement water cost $15 per acre foot, using the federal rate results in $3,164.26 in interest on the sum of $19,500 beginning on April 14, 2004, through July 27, 2016, the date of the hearing on this matter, and $438.72 on the sum of $840 beginning on July 28, 2006, through July 27, 2016. The applicable rates are 1.32% for the week ending April 9, 2004, and 5.22% for the week ending July 21, 2006. Using the state rate rather than the federal rate more than triples the amount of prejudgment interest.

Yellowstone River Compact does not prescribe delivery of a specific quantify of water but rather implements the doctrine of appropriation. As a result of the varying hydrologic conditions in any given year, compact administration cannot be reduced to a uniform mathematical model.

As set forth in Wyoming's Reply to Montana's Exception, the specific questions raised at trial, or the "necessities of the particular case," have been fully resolved, and the Special Master should continue to decline to render advisory opinions on issues not yet ripe for adjudication. Montana is the plaintiff in this case, and Montana needs more than speculation that future disputes are "inevitable" to justify additional declaratory relief. (Mont. Resp. at 28). The parties are bound to a Compact that will exist in perpetuity, far beyond the lifetime of any natural person alive now, and future generations will have some dispute over issues no one can anticipate. Inevitably, conditions will change on both sides of the border, and litigation could arise. But inevitability is not the same as imminence.[3] It took nearly sixty years for the present dispute to ripen into litigation. There is no evidence demonstrating that the next dispute is imminent, that the rulings of the Court, which now include the contents of the Second Interim Report, are inadequate to govern the conduct of the parties for the foreseeable future, or that the Compact Commission will be unable to resolve future disputes over Compact administration.

[3] Montana's reliance on a mathematical calculation of storage demand at the reservoir does not show imminence. (*See* Wyo. Resp. to Mont.'s Mot. for Summ. J. at 3 through 5).

Montana has not presented concrete evidence demonstrating that it needs or deserves a specific additional declaration of its rights under the Compact. Accordingly, the Special Master can enter judgment in this case immediately as a matter of law without declaratory relief.

III. Montana is not entitled to an injunction.

As with its request for declaratory relief, it is unclear what injunction Montana wants other than an order requiring Wyoming generally to comply with the Compact.[4] While Montana again points to other cases invoking the Court's original jurisdiction where injunctions have issued, injunctions do not issue as a matter of course. *Wienberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). They do not issue where the complaining party has an adequate remedy at law, such as money damages, like Montana has in this case. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Nor do they issue in the absence of a "cognizable danger of recurrent violation."[5] *Kansas v. Nebraska*, 135 S. Ct. at 1059. The mere fact that other states have obtained injunctive relief in other cases does not dictate that all states should obtain injunctive relief.

---

[4] It also is unclear why a decision on injunctive relief is premature. Although it asserts that it is entitled to conduct discovery on the question, Montana fails to identify what discovery it would conduct or how the results would bear on the question. (Mont. Resp. at 39 through 40). Again, Montana cannot avoid the entry of summary judgment with vague assertions.

[5] On this point, Montana's response confuses the high burden for obtaining injunctive relief with the lower and inapplicable burden associated with demonstrating mootness resulting from voluntary cessation of an activity. (Mont. Resp. at 36 through 38).

Instead of articulating real and substantial reasons why a specific command from the Court is necessary, Montana appears to ask the Court for punitive relief. Montana asserts that the Court needs to remind Wyoming of its obligations and deter future violations. (Mont. Resp. at 33). For the same reasons that disgorgement is not an appropriate remedy, punitive injunctive relief calculated to send a message should not issue.

Montana has not presented concrete evidence that it needs or deserves a specific injunction against Wyoming. Accordingly, the Special Master can enter judgment in this case immediately as a matter of law without injunctive relief.

IV. The parties should bear their own costs.

All the cases cited by both parties establish that costs are a matter of discretion awarded where equitable. Both parties received judgment in their favor on various issues in the case. Wyoming obtained summary judgment on a host of Montana's claims and won additional claims at trial. (Wyo. Exception at 17 through 20). Montana asserts that to deny it costs would be tantamount to a penalty that should not be imposed without a valid reason. (Mont. Resp. at 49 through 52). Having prevailed on numerous claims itself, Wyoming asserts the same.

Montana also asserts that Wyoming brought the costs of this litigation on itself when it violated the Compact. (Mont. Resp. at 52). While true Wyoming should bear responsibility for the consequences of its conduct, it is also true, that the costs associated with this litigation have been grossly disproportionate to the importance of the issues as a

direct result of Montana's litigation decisions. This case could have and should have been limited to surface water in the Tongue River basin during the years 2004 and 2006 from the outset. The significant discovery related to subjects outside these two years predominated the case. (Wyo. Exception at 17 through 20). Montana brought these costs on itself, and like Wyoming, Montana should bear responsibility for the consequences of its conduct.

CONCLUSION

Wyoming acknowledges and respects the decision in the Second Interim Report to recommend that this matter proceed to a remedies phase. At that time, the parties had not fully fleshed out their arguments for and against additional proceedings. They have now done so in the form of summary judgment motions. In so doing, the parties have presented the Special Master with the facts and arguments necessary to conclude that no genuine questions of material fact preclude the entry of a money judgment in favor of Montana. Such a judgment will make Montana whole and represents the entirety of the relief to which it is entitled. This case is ripe for final adjudication and no further discovery or additional proceedings will change the ultimate result.

//

//

//

//

WHEREFORE the State of Wyoming requests that the Special Master recommend that the Court summarily enter a money judgment against Wyoming in the amount of $20,340.00 plus prejudgment interest and dismiss these proceedings with prejudice.

Dated this 11th day of July 2016.

Respectfully submitted,

PETER K. MICHAEL*
Attorney General of Wyoming
**Counsel of Record*

JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
ANDREW KUHLMANN
Senior Assistant Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
307-777-6946
peter.michael@wyo.gov

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Wyoming's Reply in Support of Motion for Summary Judgment as to Remedies was served by electronic mail and by placing the same in the United States mail, postage paid, this 11th day of July, 2016.

John B. Draper
Draper & Draper
325 Paseo de Peralta
Santa Fe, NM 87501
john.draper@draperllc.com

Jeffrey Wechsler
Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, NM 87501
jwechsler@montand.com

James J. 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

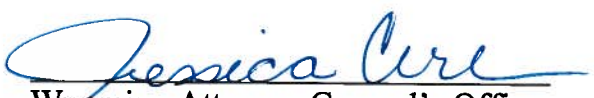
Michael Wigmore
Vinson & Elkins
2200 Pennsylvania Ave., NW
Suite 500 W
Washington, DC 20007
mwigmore@velaw.com

Alan L. Joscelyn
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401
alanjoscelyn@mt.gov

Jennifer Verleger
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
jverleger@nd.gov

Donald B. Verrilli, Jr.
Solicitor General of the United States
US Department of Justice
950 Pennsylvania Avenue, Room 5614
Washington, DC 20530-0001
SupremeCtBriefs@usdoj.gov

Barton H. Thompson Jr.
Laurita Wheeler, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205
lauritaw@stanford.edu



Wyoming Attorney General's Office