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 RESPONSE TO MONTANA'S MOTION FOR SUMMARY JUDGMENT ON TONGUE RIVER RESERVOIR

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Defendant, State of Wyoming, through counsel, opposes Montana's Motion for Summary Judgment on Tongue River Reservoir because Montana is not entitled to further declaratory relief for the reasons previously articulated by Wyoming in its post-trial and exceptions briefing.

In their post-trial briefs the parties vigorously argued about the nature and extent of Montana's right to fill the Tongue River Reservoir. *See* Wy. Post-Trial Br. at 13-18; Mt. Post-Trial Br. at 95-105. The Special Master devoted an extensive amount of the Second Interim Report to a discussion of those arguments. Second Interim Report at 99-162. Montana argued that the Compact entitled it to store more than 32,000 acre feet each water year, but the Special Master found that Montana's argument raised "multiple issues, including Montana's pre-Compact intent and practice." *Id.* at 138. After noting that there was evidence supporting both sides of the argument, the Special Master ultimately decided, "the Court need not resolve this question as part of this proceeding." *Id.* at 140.

Undeterred by this ruling, Montana seeks a second bite at the same apple in what amounts to a motion for reconsideration. As set forth in Wyoming's Reply to Montana's Exception the Special Master should decline to revisit this ruling. Wyoming will not repeat the contents of its prior reply here, nor will it repeat the arguments it made in its post-trial brief on the substantive question of the extent of Montana's right to fill the Tongue River Reservoir. Instead, Wyoming incorporates by reference those briefs as if fully set forth herein.

Wyoming writes briefly in addition to its previous submissions to address three assertions made by Montana in its motion. First, Montana asserts that a dispute will likely arise every year if Montana's full reservoir right is not declared. Mt. Mot. Summ. J. at 12-14. The events of the last two water years contradict this assertion. The parties attached the correspondence recounting how the states addressed the call to fill the Tongue River Reservoir during the 2014-2015 water year to their exceptions and those communications show that the call for regulation was honored and withdrawn without dispute. Similarly, Montana made a call for regulation to fill the Tongue River Reservoir earlier this year, which Wyoming honored and Montana withdrew without the least controversy. *See* Tyrrell Aff. and Exs. A through E.

Mr. Book's Affidavit does not create a genuine question of material fact or demonstrate that the parties are destined for future conflicts. The historic amount of water carried over in the Tongue River Reservoir each year is a matter of record in these proceedings already and not subject to dispute. Ex. M5 Table 4A. Montana asserts that those amounts demonstrate that demand has historically exceeded 32,000 acre feet of water each year. Book Aff. ¶¶ 5-6. Therefore, Montana mistakenly claims demand will likely exceed that amount in future years as well. However, the evidence at trial demonstrated that between 1950 and 1999 Montana could not fill the reservoir to a capacity of 72,500 acre feet due to sedimentation even if it wanted to. *See, e.g.*, Ex. M5 at 9 (prior to 1999 enlargement maximum capacity was approximately 69,000 acre feet); Ex. W3 at 3 (active storage of the reservoir before 1999 was 65,165 acre feet); Ex. J2 at App. C (1952 Annual

Report listing the Tongue River Reservoir's capacity as 69,440 acre feet). The evidence also demonstrated that Montana historically did not attempt to fill the reservoir to capacity at every opportunity due to safety concerns, to control ice downstream, for operational convenience, and for flood control purposes. *See* Ex. W3 at 5-7. Accordingly, a comparison of historic carryover to paper capacity is not an accurate representation of either historic or probable future storage demand.

Current reservoir operations such as occurred this year reveal that in all but the driest or successively dry years, if Montana operates the reservoir over the winter to store up to its expanded winter carryover of 50,000 acre feet, the reservoir can be filled to its physical capacity during the spring runoff with less than 32,000 acre feet of water. This commitment to expanded winter storage within the bounds of safe and responsible operations, coupled with a reservoir operational practice dedicated to storing available inflows when the ice comes off the reservoir, is a recipe for success not perpetual dispute. Tyrrell Aff. at ¶ 8.

The last two years demonstrate that the states have worked collaboratively both before and after Montana called the river to ensure that the calls were properly made, regulation ensued in a timely and comprehensive manner, and calls were withdrawn when warranted by conditions. According to the Wyoming State Engineer, "The events of the current water year, coupled with those of last year, demonstrate that future disputes between the states over the Tongue River Reservoir are likely to be the exception rather than the rule." *Id.* at ¶ 8. In short, the facts belie Montana's assertion that there continues to be a "fundamental disagreement" between the parties in need of attention from the Court.

Mt. Mot. Summ. J. at 11. Instead, there has been substantial agreement since the Second Interim Report.

Second, Montana claims that the "Court has repeatedly awarded the sort of declaratory relief Montana seeks here: judicial determination of a state's rights under a compact that goes beyond the specifics of the previous violations." Mt. Mot. Summ. J. at 14. Here Montana confuses necessary injunctive with unnecessary declaratory relief. In both, *Texas v. New Mexico*, and *Kansas v. Colorado*, the Court's decrees provided prospective injunctive relief requiring the states to adhere to certain equations and models in future years. 482 U.S. 124, 135 (1987); 485 U.S. 388 (1988); No. 105 Orig., Fifth and Final Report Vol. II. at 2-5. While in *Kansas v. Nebraska*, the parties settled their dispute, and the Court provided no relief at all. *See Kansas v. Nebraska*, --- U.S. ---, 135 S. Ct. 1042, 1050 (2015). The Court did not declare the rights of one state or the other to prevent proactively a possible future dispute in any of these cases. Instead, the Court's injunctions were necessary to resolve the real and present dispute between the parties as evidenced by the fact that no party in any of the three cases cited by Montana complained that the Court's decree was advisory. Thus, while the Court has awarded injunctive relief on occasion in cases where there is a "cognizable danger of recurrent violation," *Kansas v. Nebraska*, --- U.S. ---, 135 S.Ct. 1042, 1059 (2015), it is not routine for the Court to grant declaratory relief beyond that necessary to resolve the present dispute.

Finally, Montana asserts that the Article III prohibition on advisory opinions only applies when the judiciary passes upon acts of the Legislative or Executive branches of

government. Mt. Mot. Summ. J. at 12, fn. 2 (citing *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). Not true. *Flast v. Cohen* actually says, "**When** the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Id.* at 97 (emphasis added). Conversely, when the federal judicial power is not invoked to pass upon the validity of actions by the other branches, Article III does not implement the separation of powers prescribed by the Constitution, but the case or controversy requirement of Article III still prohibits the federal courts from issuing advisory opinions. *See, e.g., Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007) (both disputes between private parties). The judicial power is not boundless and cannot be invoked to give "an opinion advising what the law would be upon a hypothetical state of facts[,]" even in "Controversies between two or more states." *MedImmune*, 549 U.S. at 127; U.S. Const. art. III, § 2.

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WHEREFORE the State of Wyoming requests that Montana's Motion for Summary Judgment on Tongue River Reservoir be denied.

Dated this 27th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Wyoming's 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 27th day of June, 2016.

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