

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 LETTER BRIEF UNDER CASE MANAGEMENT ORDER NO. 6

Defendant State of Wyoming submits this letter brief under the Special Master's Case Management Order No. 6.

As a result of discussions following the case management conference on May 19, 2011, Wyoming and Montana have come close to an agreement on the staging of discovery, but could not agree on some important language to be included in the draft case management plan. The sticking point is how to describe the distinction between the part of the case that will be subject to the initial round of discovery, and part of the case involving remedies for which discovery will be deferred. The sticking point is a reflection of the states' vastly different view of the essential legal issue embedded in Montana's claims for relief.

As Wyoming stated in its letter brief that it submitted to the Special Master on July 17, 2009, and as Wyoming has confirmed by its failure to take exception to the First

Interim Report, Wyoming accepts the Special Master's decision that Wyoming could violate Article V(A) of the Yellowstone River Compact by failing to curtail diversions to post-1950 water rights at times when one or more pre-1950 Montana water rights are unsatisfied downstream. This could occur through direct diversions to post-1950 rights in Wyoming, through diversions to post-1950 reservoir storage, or through the pumping of groundwater sources sufficiently connected to surface waters so as to impact downstream appropriators in Montana.

Wyoming contends that two basic concepts within the doctrine of appropriation apply to these potential violations—(1) that the State of Montana would have to notify the State of Wyoming when pre-1950 Montana direct flow rights are short so that Wyoming could investigate whether the pre-1950 Montana rights were in fact unsatisfied and also whether any of Wyoming's post-1950 rights had not been curtailed; and (2) that if the Wyoming post-1950 rights were curtailed, that curtailment would not be futile, but instead would result in water actually reaching the Montana pre-1950 rights. In addition, the Special Master concluded in paragraph 3 or page 89 of the First Interim Report that Montana's right to require curtailment of post-1950 rights in Wyoming could be conditioned on Montana's efforts to satisfy its pre-1950 rights from other resources in Montana's control, as long as Montana's other rights under the compact are not prejudiced. Such conditions would be identified based on facts to be proven later in this case. (First Interim Report of the Special Master at 28 (Feb. 10, 2010)).

Because Montana filed this case over four years ago, Montana should now shoulder its burden of disclosing its evidence supporting the elements of Wyoming's violations, including when, where, how, and to what extent Montana appropriators with pre-1950 rights were damaged by Wyoming's failure to curtail post-1950 rights. Montana should also be required to disclose in the first phase its evidence regarding the other issues of notification, futile calls, and Montana intrastate water rights administration ("self-help"). If Montana is unable to disclose such evidence in the first phase of discovery, then Wyoming can file a dispositive motion that may partially or entirely dispose of the case, and save the substantial resources that would go into both the second phase of discovery, and into a trial on the merits.

Wyoming does not oppose Montana's request to stage discovery in this case, so long as Montana does not postpone Wyoming's ability to discover Montana's evidence of the violation, causation, and damages elements of its case, and so long as the second phase of discovery is truly postponed only on the issue of remedies—that is, the money or other future consideration that might be ordered by the Court to compensate Montana for the actual physical shortage of water that its pre-1950 water rights have sustained as a result of any Wyoming violation proven by Montana. On June 2, 2011, Wyoming offered to Montana several sentences to be added to section VIII.A. of the draft case management plan, which would require Montana to disclose its evidence of Wyoming violation, causation, and actual physical damage to pre-1950 rights in the first phase of discovery,

while delaying to the second phase the disclosure of evidence supporting a monetary or other remedy:

The discovery on remedies issues that is stayed pending further order generally consists of discovery of information relating to compensation to the State of Montana for its individual water users in money, or in future water administration requirements imposed on Wyoming and its water users. Discovery on liability issues generally consists of discovery of information relating to specific instances of, whether, when and to what extent Wyoming has violated the Yellowstone River Compact; whether and to what extent such violations have caused loss of water to the State of Montana and its individual water users; and the amount of such loss of water in terms of the volume of water not available to individual Montana water users as a result of the violations, and in terms of the quantification of impairment to crop or livestock production or other beneficial uses as a result of the violations.

Wyoming also suggested that the parties add a new subsection (e) to Section VIII.C.3. as follows:

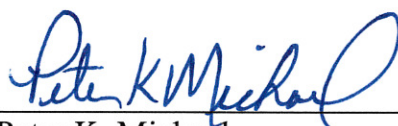
(e) The parties shall not be required to disclose the identity or opinions of expert witnesses on remedies issues while the stay of discovery of such issues is pending.

Montana did not accept Wyoming's draft language on grounds that Montana does not believe that it must prove that particular Montana pre-1950 water rights have suffered physical shortage as a result of post-1950 diversions in Wyoming. Rather, Montana asserts that the compact imposes a "delivery obligation" that requires Wyoming to deliver a mass quantity of water each year at the state line consistent with what would have crossed the state line as of 1950 under particular hydrologic conditions prevailing in a water year at issue. Montana proposed that the bifurcation clause of the case management plan use the phrase "delivery obligation." Wyoming would not accept this phrase because it believes that it is wholly inconsistent with the Special Master's interpretation of Article V(A) in his First Interim Report, a report whose purpose was to dispose of such legal issues in order to streamline the case.

The recent discussions between counsel for Wyoming and Montana about the bifurcation clause have been beneficial, in that they have brought into stark relief the states' disagreement about the essence of a compact violation. Case Management Order No. 6 already requires Wyoming and Montana to submit by July 20, 2011 a list of the issues of fact and law that they believe the Court will need to resolve in reaching a final decision, and those submissions should confirm the states' basic disagreement that Wyoming has described in this submission.

Wyoming agrees that the Special Master has at a minimum the same broad authority to control the scheduling of discovery as would a United States district judge or magistrate judge under Rule 16, Fed. R. Civ. P. Moreover, Wyoming does not oppose Montana's proposed staging of discovery on the remedy issue, and accepts Montana's contention that the delay might prevent unnecessary expense by both parties for economists or other similar experts. The disagreement that Wyoming asks the Special Master to resolve is over how the bifurcation should be described in the case management plan so that Wyoming may obtain in the first phase of discovery Montana's evidence on all of the issues of fact and law that the Court must ultimately decide, except for the amount of any compensation due Montana. Wyoming requests that the Special Master take the bifurcation clause under advisement pending the parties' submission of their lists of issues of fact and law, and after reviewing those submissions in the context of his First Interim Report and the Court's decision of May 2, 2011, that he then incorporate the language Wyoming has quoted above into the final case management plan.

Dated this 28th day of June, 2011.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Wyoming's Letter Brief Under Case Management Order No. 6 was served by electronic mail and placing the same in the United States mail, postage paid, this 28th day of June, 2011, to the following:

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