

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 IN LIMINE TO EXCLUDE
EXPERT TESTIMONY BY STEVEN LARSON**

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The State of Wyoming hereby submits the following reply in support of its motion in limine for an order excluding evidence or argument at trial provided by Steven Larson.

The Federal Rules of Evidence and precedents regarding the admissibility of expert testimony, such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (U.S. 1993), are appropriate and useful guidelines that the Court should adhere to even in this original jurisdiction case. The Court's gatekeeping function can and should be exercised even in non-jury trials, as the rules of evidence do not discriminate between jury and non-jury cases. *See* Fed. R. Evid. 104(a) (requiring a court to decide preliminary questions on the qualification of a witness, the existence of a privilege, or the admissibility of evidence, regardless of whether a jury is involved in the case). Montana's repeated assertion that the Court should allow the parties to submit as much information as they want to make a "complete record," regardless of basic evidentiary standards like relevance or the reliability of expert testimony, should be rejected out of hand. A complete record only contains relevant and reliable evidence.

The BLM Model as constructed was not intended to predict stream flow depletions to the Tongue River. Ignoring this fact, Montana asserts that the Model "does not state that [it] cannot be used to evaluate changes to streamflow." Montana's Response to Motion in Limine at 8. Montana cannot identify any statement by the Model's developers that the Model can or should be used to evaluate changes to streamflow in general, let alone analyze an isolated stream in the far northwest corner of the Model.

The developers' failure to fully anticipate and explicitly disclaim Mr. Larson's unreasonable use of their model should not be misconstrued as tacit approval of that use.

Montana also ignores the relevant limitations that the Model's developers did foresee and address. The modelers cautioned against using the regional-scale Model to analyze a local area within the Model's boundaries. BLM Rpt. at 4-36 (attached as Exhibit A to Wyoming's original motion). They also specifically stated that the Model should not be applied, for any specific purpose, to analyze the extreme northwest corner of the modeled area because of the Model's lack of data for that area. *Id.* at 4-37. Mr. Larson's use of the Model to analyze only the Tongue River goes against both of these limitations. In addition, the BLM modelers only considered Powder River base flows when calibrating the model, not Tongue River base flows. *Id.* at 5-9. Therefore, the BLM Model is not appropriate for either Mr. Larson's purpose or his place of focus.

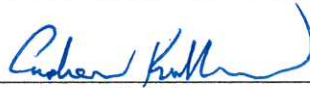
Finally, Montana's discussion of uniqueness skirts the key question under the Rules of Evidence and *Daubert* regarding whether Mr. Larson's methods are reliable. Uniqueness is but one of the reasons why the Model is unreliable for Montana's purposes. More importantly than the question of uniqueness, Montana provides no explanation as to how this regional Model can be reliably used for such a specific purpose in an area where the modelers warned that the model should not be used. Moreover, Montana provides no peer reviewed support stating that a model calibrated to heads is reliable for purposes of predicting stream depletions.

The BLM Model may be reliable for its intended purposes. But Montana is attempting to use the Model in a way it was not intended or designed to be used. Accordingly, Mr. Larson's methods are fatally unreliable and, as a result, the Court should exercise its gatekeeping function and exclude Mr. Larson's testimony.

WHEREFORE the State of Wyoming requests that Mr. Larson be prohibited from giving expert opinions or testimony based upon his use of the 2002 BLM model to predict depletions to streamflows.

Dated this 10th day of October, 2013.

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 10th day of October, 2013.

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