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

STATE OF WYOMING'S RESPONSE TO MONTANA'S LETTER BRIEF RE MEMORANDUM OPINION ON MOTION TO DISMISS

Pursuant to the Special Master's Case Management Order No. 2, Defendant State of Wyoming submits this response to Montana's Letter Brief Re Memorandum Opinion on Motion to Dismiss, which Montana served on July 17, 2009.

Montana has Improperly Rebriefed the Increased Efficiency and Consumption/Depletion Issues

The Special Master should decline to address Montana's letter brief because it violates the Special Master's admonition in Case Management Order No. 2 against rebriefing Wyoming's motion to dismiss. When describing the purposes of the letter briefs in the order, the Special Master wrote:

> On or before Friday, July 17, 2009, Montana and Wyoming shall file letter briefs with the Special Master regarding the Memorandum Opinion on Wyoming's Motion to Dismiss Bill of Complaint, dated June 2, 2009 (the "Memorandum Opinion"), and the Special Master's plan to prepare and file a First Report with the Supreme Court based on that opinion. This is not an opportunity to rebrief Wyoming's Motion to Dismiss, and the letter briefs should not cover matters already addressed in the briefs filed on that motion.

Despite this admonition, Montana's entire letter brief addresses the merits of two related matters that were extensively briefed for Wyoming's motion to dismiss: (1) whether efficiency gains from changed irrigation practices in Wyoming can violate the Yellowstone River Compact (the "Compact") if those gains reduce return flows from lands irrigated under pre-1950 water rights; and (2) whether Article V(A) of the Compact provides Montana a right of action under the depletion/consumption concept.

Wyoming devoted four full pages of its brief on dismissal to the matter of efficiency gains. Wyoming's Motion to Dismiss Bill of Complaint at 55-58 (April 2008). Wyoming included a discussion of three Wyoming cases on the topic, *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940), *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957), and *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980). *Id.* at 57. Montana briefed this matter in response to Wyoming's motion, although it declined to discuss the *Binning, Bower* and *Fuss* cases. Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint at 47-49 (May 2008).

There is no doubt that Montana has rebriefed the matter of efficiency gains in its letter brief of July 17, 2009. Almost twelve pages of its fifteen page letter brief appear under the heading: "I. The Yellowstone River Compact Requires that Depletions Caused by Increased Consumption on Precompact Acreage in Wyoming Be Accounted For." Montana's Letter Brief Re Memorandum Opinion on Motion to Dismiss at 1-12 (July 17, 2009) (hereinafter "Mont. Ltr. Br."). In fact, Montana devotes the final three pages of that section of its letter brief to discussion of the *Binning* and *Bower* cases. *Id.* at 10-12. Montana argues that *Binning* and *Bower* involve "salvage" water, and therefore are not authority for the Special Master's acceptance of Wyoming's motion to dismiss the efficiency gain allegation. Montana cites numerous new cases that it asserts support the salvage water distinction. *Id.* at 7-8. Montana had an opportunity to make all of these arguments in its response to Wyoming's motion to dismiss, but did not do so. If Montana had made these arguments at the appropriate time, Wyoming would have had an opportunity to reply to them in its reply brief on its motion to dismiss.

Montana's rebriefing of this matter has resulted in unfairness that the Special Master attempted to guard against by ordering the parties to refrain from rebriefing. Balancing the playing field at this late date would require yet additional briefing by Wyoming and the United States, undermining the finality that the Special Master no doubt intended. It is well-established that substantive briefing must occur before a court decides a motion, even when the court asks for supplemental briefing on the merits. The Special Master not only declined to ask for such supplemental briefing on the merits after he announced his decisions in this case, but affirmatively ordered the parties to refrain from rebriefing the merits of the motion.

Another matter that Montana briefed on Wyoming's motion to dismiss, and rebriefs in its recent letter brief, is its consumption/depletion interpretation of the Compact. Wyoming briefed this matter for its motion to dismiss. Wyoming's Motion to Dismiss Bill of Complaint at 39-42 (April 2008). Montana briefed it in its response. Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint at 23-35, 38-41 (May 2008). Wyoming then devoted much of its reply brief to this matter. Wyoming's Reply Brief in Support of its Motion to Dismiss Bill of Complaint at 4-9 (May 2008).

Now, in its letter brief, Montana recycles its unsuccessful textual argument that the word "use" in Article V(A) of the Compact entitles Montana to a mass allocation of stateline flows based on 1950 circumstances. *Compare* Mont. Ltr. Br. at 13, *with* Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint at 33, 38-41 (May 2008). Montana adds an argument based on the Arkansas River Compact, but that argument is still directed at the depletion/consumption issue, and could have been raised by Montana in its earlier substantive briefing. Mont. Ltr. Br. at 14.

In its recent letter brief, the United States correctly points out that "Montana *renews* its reliance on the depletion principle and adds some contentions not previously raised." Letter from William M. Jay to Barton H. Thompson, Jr. at 2 (July 24, 2009) (emphasis added) (hereinafter United States Ltr. Br). The United States also correctly hints that this renewal of the depletion matter may not be "properly within the scope of the letter briefing requests by the Special Master[.]" *Id.*

In summary, Montana's letter brief should be disregarded because it violates the Special Master's Case Management Order No. 2.

Montana's New Authorities in its Letter Brief do not Support its Arguments

In its rebriefing of the efficiency gain and depletion/consumption matters, Montana contends that general prior appropriation law features a broad "no injury" rule that severely constrains an irrigator's practices that fall within the scope of his or her water right. Montana cites numerous cases in the course of this argument. However, even if the Special Master were to consider this argument, he would find that Montana's citations do not support its proposition.

First, the "no injury" cases that Montana cites only support the proposition that a state may not allow a senior appropriator to formally change important attributes of his or her water right, such as the place of use, point of diversion, or type of use, if the change would injure junior downstream appropriators. *Quigley v. McIntosh*, 103 P.2d 1067, 1072 (Mont. 1940) (appropriator cannot add use onto new lands in violation of no injury rule); *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1974) (*en banc*) (appropriator cannot apply water saved from conservation through phreatophyte eradication to land served by wells under a different water right, if it injures junior appropriators); *City of Boulder v. Boulder and Left Hand Ditch Co.*, 557 P.2d 1182 (Colo. 1976) (change of place of use must comply with no injury rule); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 631-32 (Colo. 1954) (change of point of diversion and change of use to municipal use must comply with no injury rule); *East Bench Irr. Co. v. Deseret Irr. Co.*, 271 P.2d 449, 455-57 (Utah 1954) (change of use and place of diversion subject to no injury rule). Montana has not cited a case that supports its position that the no-injury rule broadly restricts increased consumptive use by an irrigator who increases consumption within the scope of his or her unchanged water right by altering crops, adopting sprinkler systems, or otherwise.

In fact, four of the cases Montana cites at least imply that variations of quantity of use by a senior appropriator from year to year within the original acreage cannot support a complaint by downsteam juniors. *McDonald v. State of Montana*, 722 P.2d 598, 605 (Mont. 1986) (if irrigator switched from flood to sprinkler irrigation reducing consumption, but then returned to more consumptive flood irrigation, he would be in no different position than an irrigator whose use varied between wet and dry years; the irrigator could use up to the full amount of his appropriation as against junior appropriators); *Salt River Valley Water Users' Assoc. v. Kovacovich*, 411 P.2d 201, 203 (Ariz. Ct. App. 1966); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 634 (Colo. 1954); *East Bench Irr. Co. v. Deseret Irr. Co.*, 271 P.2d 449, 455-456 (Utah 1954). In summary, Wyoming agrees with the limited application of the no-injury rule as explained by the Special Master and supported by the very cases that Montana cites. Mem. Op. at 38 (June 2, 2009); *see also* United States Ltr. Br. at 3-4 (in which the United States notes that increased consumption by a senior appropriator

without a change of use, place of use, or point of diversion does not trigger the no injury rule).

Second, in its letter brief, Montana alleges that under general prior appropriation law, downstream junior irrigators can bar increased consumption by upstream seniors based on the downstream irrigators' right to appropriate water from the watercourse from which the seniors divert. Mont. Ltr. Br. at 1-3. However, the cases cited by Montana do not actually establish a right for downstream juniors to call for water from the lands of upstream seniors to satisfy an entitlement to fixed return flows. Rather, these cases simply state that once return flows reach the watercourse, such water is considered to be commingled with water from springs, snowbanks and raindrops so that it becomes appropriable again from the watercourse. *Stubbs v. Ercanbrack*, 368 P.2d 461, 464 (Utah 1962) (water appropriable by downstream juniors after it leaves control of upstream senior and is commingled with natural supply); *McNaughton v. Eaton*, 242 P.2d 570, 574 (Utah 1952) (water can be recaptured by upstream senior appropriator if within his or her control, but can be appropriated by downstream junior when it leaves such control and commingles); *Jones v. Warmsprings Irr. Dist.*, 91 P.2d 542, 548 (Or. 1939); *Wills v. Morris*, 50 P.2d 862, 871 (Mont. 1935); *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1077 (Mont. 1933); *Popham v. Holloron*, 275 P. 1099, 1103 (Mont. 1929).

Thus, even if Montana had cited these cases in its brief on Wyoming's motion to dismiss, the cases would not have supported Montana's argument that "downstream appropriators may object to a reduction in that return flow." Montana Ltr. Br. at 3; *see also* United States Ltr. Br. 3-4 (in which the United States notes that cases establishing a downstream junior's right to appropriate return flows once they join the flow of the watercourse do not relate to a restriction on the volume of water that the senior puts to use on his or her land upstream).

Third, Montana cites in its letter brief cases in which courts have held that senior appropriators may not waste water, and to the extent water rights are not based on reasonable beneficial use, they can be partially abandoned. Mont. Ltr. Br. at 4-5. Wyoming agrees that reasonable beneficial use is the basis for water rights in prior appropriation states, including Wyoming. However, this does not mean that when an irrigator changes methods to more efficiently employ a water right on existing acreage and within his volumetric appropriation, the prior methods were necessarily wasteful so that the amount of water formerly returned to the water course is automatically abandoned to downstream juniors, thereby forfeiting part of the senior's right. *See McDonald v. State of Montana*, 722 P.2d at 605 (if irrigator switched from flood to sprinkler irrigation reducing consumption, but then returned to more consumptive flood irrigation, he would be in no different position than an irrigator whose use varied between

wet and dry years; the irrigator could use up to the full amount of his appropriation as against junior appropriators); *Salt River Valley Water Users' Assoc. v. Kovacovich*, 411 P.2d at 203; *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d at 634; *East Bench Irr. Co. v. Deseret Irr. Co.*, 271 P.2d at 455-56 (all four of these cases were cited by Montana in its letter brief). Moreover, Montana's attempt to parlay this exaggerated abandonment concept into an interpretation of Article V(A) that would create a mass stateline allocation based on 1950 consumption patterns, is equally misguided. As pointed out by the Special Master in his Memorandum Opinion, the drafters rejected the consumption/depletion allocation method. Mem. Op. at 20. The United States correctly notes in its recent letter brief that the consumption/depletion interpretation, while valid for the Arkansas River Compact, was not adopted in Article V(A). United States Ltr. Br. at 2-3.

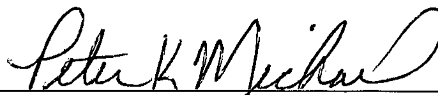
Conclusion

While the United States may be correct that Montana has not pleaded a distinct claim for relief based on the consumption/depletion theory, Montana has made it quite clear that it believes that it has stated a claim under that theory. *See* Mont. Ltr. Br. at 1, 13-15. Montana has forthrightly stated in its conclusion to its letter brief that all evidence of increased depletions, including consumption on pre-1950 irrigated acreage in Wyoming, should be entertained in further proceedings. Mont. Ltr. Br. at 15. Montana's extensive rebriefing of the consumption/depletion issue, both as a facet of the efficiency gain issue, and as an issue in its own right, only emphasizes the importance of a final interim order on this issue. The Special Master should decline the United States' suggestion that he avoid directly confronting this issue in his interim report. United States Ltr. Br. at 2. Instead, as Wyoming suggested in its letter brief, the Special Master should include in his first interim report a legal conclusion against Montana on consumption/depletion, not just on the efficiency gain issue.

The State of Wyoming respectfully requests that the Special Master refuse to consider the rebriefing contained in Montana's letter brief, and that he incorporate in his first interim report to the Supreme Court the clarifications that Wyoming requested in its letter brief.

Dated this 3rd day of August, 2009.

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the STATE OF WYOMING'S RESPONSE TO MONTANA'S LETTER BRIEF RE MEMORANDUM OPINION ON MOTION TO DISMISS was served by electronic mail and placing the same in the United States mail, postage paid, this 3rd day of August, 2009, to the following:

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