

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

TRIAL MEMORANDUM REGARDING THE TREATMENT OF RETURN
FLOWS FROM DIVERSIONS OF WATER STORED IN TONGUE RIVER
RESERVOIR AS NATURAL FLOW

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The State of Wyoming asserts that the doctrine of appropriation incorporated into the Yellowstone River Compact dictates that return flows from diversions of water stored in the Tongue River Reservoir, upon reaching the Tongue River, become part of the natural flow of the river and available for use by all natural flow diverters within the limitations of their appropriation. In support of this assertion, Wyoming states as follows:

Although the Tongue River Reservoir releases significant quantities of storage water on any given day, much of that water is used multiple times as it flows to the Yellowstone River. Once this storage water is used by an appropriator and returns to the Tongue River it becomes part of the natural flow of the river, and if used again, its use must be made pursuant to a direct flow appropriation. This basic principle of the doctrine of prior appropriation is widely recognized. In fact, it has been said that "[i]n all of the western states, proprietary rights in water actually diverted are lost when that water is abandoned to a public watercourse, and the abandoned water once again becomes public property subject to appropriation." Frank R. Booth, *Ownership of Developed Water: A Property Right Threatened*, 17 St. Mary's L.J. 1181, 1186 (1986) (citing *Nebraska v. Wyoming*, 325 U.S. 589, 637 (1945); *Stevens v. Oakdale Irrigation Dist.*, 90 P.2d 58, 61, 13 Cal. 2d 343, 345 (1939); *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 773 (Wyo. 1925)). And the Court itself has determined that "[r]eturn flows once returned to the river and abandoned are part of the natural flow available for use by all natural flow diverters within the limitations of the apportionment." *Nebraska v. Wyoming* 325 U.S. at 634. See also, e.g., *Reynolds v. City of Roswell*, 654 P.2d 537, 540-

41 (N.M. 1982) (once the effluent actually reaches a water course or underground reservoir, the original appropriator has lost control over the water and cannot recapture it).

The law on this issue is well settled. Once storage water from the Tongue River Reservoir is used and returns to the Tongue River it is natural flow, and must be treated as such in any accounting by Montana. *See* Mem. Op. of the Special Master on MT's Mot. for Sum. Judg. on the Compact's Lack of Specific Intrastate Admin. Requirements at 5 (Sept. 16, 2013) (holding that Montana's intrastate regulation and administration of water rights must meet the requirements of Article V(A) of the Compact, including the beneficial use and prior appropriation requirements).

Dated this 30th day of September, 2013.

Respectfully submitted,

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 30th day of September, 2013.

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