

# ATTACHMENT A

No. 105, ORIGINAL

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In The  
Supreme Court of the United States  
October Term, 1985



STATE OF KANSAS,

*Plaintiff,*

v.

STATE OF COLORADO,

*Defendant,*

and

UNITED STATES OF AMERICA,

*Defendant-Intervenor.*



ARTHUR L. LITTLEWORTH, Special Master

REPORT

VOLUME III

July 1994

for resolving questions of intent, such as exist with respect to the 1951 Resolution; and (3) that summary judgment is disfavored for deciding questions in complex litigation.

The fundamental question here involves the powers of the Compact Administration. That is a question of the statutory interpretation of the Arkansas River Compact and the Federal legislation authorizing the Fryingpan-Arkansas Project. Volumes of documentary history have been submitted to aid in such interpretation. While the conclusions to be drawn from this record are certainly at issue, there do not appear to be material issues of fact. Matters of statutory interpretation and application present issues of law, not fact, and in the final analysis, it is “. . . the province and duty of the judicial department to say what the law is.” *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (quoting *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1801)); see also *Fed. Election Comm’n. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981); *State of Cal. ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm.*, 877 F.2d 743, 745-46 (9th Cir. 1989). Particularly is this true with respect to interstate compacts. In *Texas v. New Mexico*, 462 U.S. 554 (1983), for example, the Supreme Court recognized that:

“If there is a compact, it is a law of the United States . . . and our first and last order of business is interpreting the compact.” 462 U.S. at 567-568.

There is no indication that documentary evidence not already presented with this motion, or other admissible non-documentary evidence on the issue, would be offered at trial. Kansas has presented two affidavits in

support of its argument that material issues of fact are in dispute. Colorado has moved to strike the crucial portions of these affidavits, but apart from the Special Master's ruling on that motion, these affidavits do not demonstrate material factual issues concerning the matters decided in this Report.

It is evident from the affidavit of the historian, Dr. Littlefield, that he has undertaken the same kind of examination of source documents that would ordinarily be made by a court for purposes of determining legislative or administrative intent. The events recited in Dr. Littlefield's affidavit are simply part of the historical record available to the Court for its review. The interpretation given by Dr. Littlefield to those actions are his own conclusions, not facts, drawn from the historical record, and cannot supplant the interpretation which ultimately is within the power of the Court to make. The conclusions in the Littlefield affidavit are actually more guarded than Kansas sometimes claims. Nonetheless, and even if the affidavit were to be considered, the Special Master reaches different conclusions based on his review of the historical record.

The affidavit of Carl E. Bentrup indicates that he has been a Kansas Commissioner on the Arkansas River Compact Administration since June 7, 1957. He testifies about what the "parties intended" in the 1951 Resolution, and what was "understood by all concerned." However, from the affidavit itself, it appears that his conclusions came from conversations with two of the first Commissioners. Other portions of his affidavit are factual and based on personal knowledge, but appear to relate to Colorado's allegations of laches and estoppel. Those

issues are not necessary to a resolution of Colorado's motion.

Citing Professor Moore, Kansas also asserts that summary judgment is disfavored for resolving questions of intent. Kansas' Response at 28. However, Moore clearly states that summary judgment is proper when there are no triable issues of fact and the moving party is entitled to summary judgment as a matter of law. 6 J. Moore & J. Wicker, *Moore's Federal Practice*, ¶56.17 (2d. ed. 1981). Summary judgment provides an appropriate mechanism for resolving legal questions of statutory and regulatory construction. *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1066 (Temp. Emer. Ct. App. 1978); *Mobil Oil Corp. v. Federal Energy Administration*, 566 F.2d 87 (Temp. Emer. Ct. App. 1977).

Finally, Kansas contends that partial summary judgment should be denied because the present case constitutes "complex litigation." Kansas' Response at 29. Kansas relies on Justice Jackson's opinion for the Court in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). That decision was based, in part, on the need for "a more solid basis of findings based on litigation." 334 U.S. at 257. However, there is no indication here that the evidence at trial on the issue now decided would be different than the record now before the Special Master. Most courts have recognized that if the decision rests upon an issue of law, the fact that it is complex or poses difficult problems of interpretation or application should not stand in the way of a summary judgment motion, if there is no triable issue of fact. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2732, at 304-307, citations omitted. Only a narrow legal issue, albeit important, has been

# ATTACHMENT B

No. 137, Original

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In The  
SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA,  
Plaintiff,  
v.  
STATE OF WYOMING  
and  
STATE OF NORTH DAKOTA,  
Defendants.

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MOTIONS HEARING  
Thursday, August 29, 2013

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Before the Honorable Barton H. Thompson, JR.  
Special Master

1 representatives of the amici or the State of North  
2 Dakota who are in back of the bar, if you could  
3 introduce yourself also to the members in the back  
4 and who you are. And, in fact, I guess that's  
5 probably true for virtually everybody up here.

6 So I sent out two days ago, and  
7 hopefully everyone received, a schedule of the  
8 order in which I plan to take the various motions  
9 this morning. I plan to start with the two  
10 motions to strike, then hear Wyoming's motion for  
11 summary judgment, then hear Montana's motion for  
12 summary judgment, and then a status conference.

13 But before we actually begin with the  
14 first motion, Mr. Fox, you asked if you could  
15 address the Court.

16 MR. FOX: Good morning, Your Honor.

17 SPECIAL MASTER: Good morning.

18 MR. FOX: And I would like to also say  
19 congratulations to my colleague Pete Michael for  
20 his ascension to the Attorney General's position  
21 in Wyoming.

22 May I first preface my comments by  
23 saying that we appreciate our neighbors. We  
24 appreciate our neighbors in Wyoming, and we  
25 appreciate our neighbors in North Dakota and the



1 surrounding states. I am privileged to represent  
2 the People of the State of Montana as their  
3 attorney general, and we appreciate the  
4 opportunity, Your Honor, to move this case forward  
5 here today toward resolution of some longstanding  
6 issues that concern the water compact  
7 administration.

8 In my short eight months as Montana's  
9 attorney general, many important matters have  
10 crossed my desk. Few, if any, however, are as  
11 important as this case to Montana. This case  
12 directly affects real people in profound ways, in  
13 many, many ways over the years and will affect  
14 them in the future as well. And as an Eastern  
15 Montanan whose family owns property just a few  
16 miles from the Tongue River, no one knows the  
17 importance of this case more than I do. Montana  
18 looks forward to a vigorous argument here today,  
19 and the people of Montana appreciate your careful  
20 consideration of the issues in this case, and we  
21 wish to thank Your Honor for the time that you've  
22 put into this. We look forward to a resolution.  
23 Hopefully, we will appreciate our neighbors much,  
24 much more in the future. Thank you.

25 SPECIAL MASTER: Thank you very much,

1 Mr. Fox. I appreciate your comments. I think the  
2 United States Supreme Court recognizes that these  
3 types of interstate water disputes are extremely  
4 important to the states that are involved, and  
5 they frequently involve more than specifically an  
6 acre-foot here, an acre-foot there. This is an  
7 issue of each state's ability to control the water  
8 which belongs to them. So thank you very much for  
9 your comments.

10 So with that, again, what I'd like to  
11 do is turn to the two motions to strike. I don't  
12 think either of these motions are likely to take  
13 very long. And what I would propose is that in  
14 each case I give you a sense of where I currently  
15 stand on each of the various motions. And then if  
16 either side wants to say anything more at that  
17 point, you're more than welcome to do so.

18 So let's start with the motion of  
19 Wyoming to strike the report and exclude the  
20 testimony of Douglas R. Littlefield, Ph.D. So  
21 Wyoming's argument in this particular motion is  
22 that the testimony includes a variety of legal  
23 conclusions on ultimate issues of law that is  
24 inappropriate for an expert witness to address. I  
25 think that Wyoming's concerns are well taken.

1 There's been, I think, a movement in courts to let  
2 people address ultimate issues of law that  
3 ultimately are issues for a court to decide rather  
4 than for an expert opinion.

5 At the same time, I think that  
6 Mr. Littlefield can testify. Historical insight  
7 can be valuable in these types of proceedings. As  
8 Chief Justice Renquist pointed out in the Hunter  
9 vs. Underwood case, coming from a university where  
10 there are also lots of extremely good historians,  
11 I think I would be probably mistaken if I did not  
12 recognize that they are experts in their own  
13 rights.

14 At the same time, however, it is going  
15 to be very important that Mr. Littlefield not  
16 testify regarding either the meanings of  
17 particular provisions of the compact, that is  
18 ultimately an issue of law; or testify as to what  
19 the intent was of the states and negotiators and  
20 the members of Congress in agreeing to a  
21 particular point. And I think if you look at the  
22 various portions of Mr. Littlefield's testimony  
23 that were ultimately struck by Arthur Littleworth  
24 in the Kansas vs. Colorado case, which was No.  
25 105, Original, in the United States Supreme Court,

1 you'll see that virtually all of those various  
2 provisions went to one or another of those types  
3 of testimony. They were either testimony saying  
4 that in that particular case that a particular  
5 article meant X; or that the parties, in using a  
6 particular phrase, intended Y.

7           Now, on the other hand, as an  
8 historian, I think that Mr. Littlefield can  
9 testify regarding particular events or actions,  
10 and can also testify as to various indicators of  
11 intent. For example, what commonly understood  
12 meanings were of particular phrases at a  
13 particular point in time. Similarly, I think it  
14 would be appropriate for an historian to testify  
15 as to the context within a particular provision  
16 was negotiated. And I actually don't think  
17 differentiating between those two categories is  
18 that difficult. There could be some lines drawn  
19 if it's necessary, but I don't think as a general  
20 matter that that would be very difficult to  
21 distinguish between them.

22           So then the question becomes: How do  
23 we approach the testimony of Mr. Littlefield.  
24 Rather than just letting him testify and then  
25 letting Mr. Kaste decide what he wants to object

1 to, my preference would be that, Mr. Draper, you  
2 or whoever it is that is questioning  
3 Mr. Littlefield when he is on the stand be very  
4 conscious of that distinction and not ask  
5 questions that will naturally lead him to the area  
6 that is reserved for a court rather than for an  
7 expert witness. And I will leave that actually up  
8 to Mr. Kaste whether or not you would prefer, on  
9 the one hand, just to keep your objections to a  
10 variant, or object every time you hear a question  
11 or an answer which you think is illegitimate. You  
12 can do it one way or the other, but not both. So  
13 that would be the way I would propose to resolve  
14 this. I will embody that in a short decision on  
15 this that counsel can refer to as to what is  
16 appropriate and what is not appropriate. But I  
17 think there's a clear dividing line, and I think  
18 that would permit Mr. Littlefield to provide all  
19 of the valuable expertise that the United States  
20 Supreme Court may ultimately want to refer to in  
21 deciding this particular case without slopping  
22 over into the ultimate role of the Supreme Court  
23 itself.

24 So with that, Mr. Kaste, it's your  
25 motion, and maybe you can address that for me.

1 MR. KASTE: Thank you, Your Honor. I  
2 don't have much to say, other than if I get to  
3 pick the process, I choose to object at the time,  
4 in the moment. It saves me a lot of work on the  
5 back end, and I just think that process always  
6 makes more sense.

7 And then with regard to the substance  
8 of your ruling, I honestly think we're going to  
9 avoid this problem in the main because the  
10 relevance of the historical testimony may end up  
11 falling away as a result of the rulings that you  
12 make on summary judgment. Because if nothing  
13 else, it sort of teed up the essential question  
14 Dr. Littlefield was looking at for resolution on  
15 summary judgment. And in the course of your  
16 ruling, I think you're going to say one way or the  
17 other, and the historical background may not  
18 necessarily be all that relevant by the time we  
19 get to trial. So it may not really be much of an  
20 issue at all, but the way in which you propose to  
21 resolve it is great for us. Thank you.

22 SPECIAL MASTER: You're welcome. And  
23 again, whether or not the testimony of  
24 Mr. Littlefield is ultimately relevant in the  
25 trial, I happen to think this will move relatively

1 well, because I think Mr. Draper would certainly  
2 want a distinction to make sure that  
3 Mr. Littlefield doesn't again cross over the line.

4 So, Mr. Draper?

5 MR. DRAPER: Thank you, Your Honor.

6 And I'd just like to confirm that I will be very  
7 assiduous in observing the distinction that I  
8 think you very definitely drew this morning.  
9 Thank you.

10 SPECIAL MASTER: Thank you. So the  
11 next motion then is Montana's motion to strike a  
12 portion of the affidavit of Patrick T. Tyrell. So  
13 this is also a motion that requires line drawing.  
14 And if we go back to the April 23 order in this  
15 particular case which provides specifically that  
16 the fact witnesses may testify as to personal  
17 actions, experiences, and observations in the  
18 normal course of their employment without being  
19 designated as an expert witness, even if their  
20 work involved scientific, technical, or other  
21 specialized knowledge or skills.

22 And in this particular instance,  
23 Montana seeks to strike Paragraph 7 of  
24 Mr. Tyrell's affidavit on the grounds that it  
25 appears to be addressing an expert issue without

1 establishing that this is a personal action or  
2 observation of Mr. Tyrell in the course of his  
3 work. And again, I think that Montana's concern  
4 in this particular case has some merit. The two  
5 problems that I see with Paragraph 7 is that  
6 although I realize that it addresses and uses  
7 explicitly the language of the Wyoming statute  
8 dealing with integration of surface water and the  
9 groundwater, it can be read as an expert opinion  
10 as to the degree of interconnection of groundwater  
11 and surface water.

12           And second of all, there is no context  
13 in the affidavit as to how Mr. Tyrell came to this  
14 particular conclusion. It is, ultimately, a  
15 conclusion. So there is nothing in the affidavit  
16 itself that says, for example, that Mr. Tyrell was  
17 at some point required to make a decision as to  
18 whether or not the CBM groundwater in the Tongue  
19 River watershed was so connected with the Tongue  
20 River or a surface stream as to constitute, in  
21 fact, one source of supply; or even more  
22 generally, that he has decided in his role as the  
23 Wyoming state engineer that CBM groundwater is  
24 generally not so interconnected with surface  
25 streams as to constitute, in fact, one source of



# ATTACHMENT C

No. 137, Original

IN THE SUPREME COURT OF THE UNITED STATES  
TRANSCRIPT OF FINAL PRETRIAL HEARING

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STATE OF MONTANA

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

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BEFORE THE HONORABLE BARTON H. THOMPSON, JR.  
Special Master  
Stanford, California

James F. Battin United States Courthouse  
2601 2nd Avenue North  
Billings, Montana 59101  
9:16, Tuesday, October 15, 2013

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Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

1           SPECIAL MASTER: Okay. Thank you,  
2 Mr. Draper.

3           So let me try and make several points with  
4 respect to this discussion. The first is, as  
5 Mr. Draper just pointed out, and as I know Mr. Kaste is  
6 aware, under the Supreme Court rules -- I looked at  
7 both the Federal Rules of Civil Procedure and the  
8 Federal Rules of Evidence for guidance, but I'm not  
9 bound by them.

10           In thinking about the proceedings, I would  
11 probably draw a distinction between two or three  
12 different types of evidentiary disputes that I can  
13 imagine that we would have. The first would be over  
14 the relevance of particular testimony. And this, for  
15 example, brings up the questions that we'll come to in  
16 a moment under the Daubert rule.

17           To the degree that I believe that it's  
18 possible that the Supreme Court would go a different  
19 direction than I would in the actual resolution of the  
20 case and that if they are going to go a different  
21 direction, that they will want to have that evidence  
22 upon which to rule, then I will be inclined to admit  
23 more than I otherwise would. Because, again, the  
24 ultimate decision maker in this particular case is the  
25 United States Supreme Court. My role is simply to pull

1           Okay. So the next motion in limine is the  
2 motion in limine to limit the presentation of evidence  
3 in this case to the nine years that survived Wyoming's  
4 initial summary judgment motion. So, Mr. Draper, based  
5 on some of the telescoping of my views on this and some  
6 of my prior opinions, you probably won't be surprised  
7 on this. But I'm going to grant this motion in part  
8 but also deny it in part.

9           And in particular, my inclination -- I should  
10 give you a chance, Mr. Draper, before I give my final  
11 ruling to respond if you want. But my current  
12 inclination is to exclude the evidence regarding what  
13 I'll call the summary judgment years -- and the summary  
14 judgment years are 1952 to 1986, 1990 to 1999, and  
15 2005 -- to exclude the evidence for those years for the  
16 purpose of establishing liability for those years or  
17 seeking any relief retrospective or prospective for  
18 those years.

19           Looking back at both the motion and also my  
20 rulings on Wyoming's motion for a partial summary  
21 judgment, I think it is clear that those motions were  
22 addressed to any form of relief. And I see no basis  
23 for distinguishing, in this particular case, between  
24 liability on the one hand and relief on the other. In  
25 other words, there's nothing special about notice that

1 would suggest that it is a matter of the relief rather  
2 than a matter of the liability itself.

3           So both based on, again, the language of the  
4 motion, in my opinion, and on the conclusion that the  
5 issue is really one that goes to the liability question  
6 rather than the relief issue, I would exclude the  
7 evidence, again, for purposes of establishing liability  
8 for those years, which is really what we've been  
9 talking about for the last year and a half in any case.

10           However, I will permit evidence from or about  
11 those years for the limited purpose of trying to  
12 establish liability for the years that actually are in  
13 issue at this particular stage of the proceeding, which  
14 is 1987 to 1989, 2000 to 2004, and 2006. And my  
15 understanding from Wyoming's reply is that they  
16 actually concede that, in fact, evidence from those  
17 years can be admitted for context and background.

18           I realize that, of course, that opens up the  
19 potential for trying to get all of that evidence in as  
20 context and background. But I trust that counsel for  
21 Montana is not going to try and bring in all of the  
22 evidence for those years unless they are useful as  
23 background for the years that are actually in issue in  
24 this particular case. And, of course, Wyoming can  
25 object if they think that particular evidence from