No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants

OFFICE OF THE SPECIAL MASTER

APPENDIX TO THE UNITED STATES OF AMERICA'S MOTIONS IN LIMINE

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The United States of America hereby provides the following Appendix in conjunction with its Motions in Limine. The following documents have been submitted to the Special Master via electronic media and have been e-mailed to parties:

1. Attachment A - Special Master's Report and Recommendation Regarding Winter Storage Motions, Vol. III, *Kansas v. Colorado*, No. 105, Orig. (1994);

2. Attachment B - Motions Hearing Transcript, *Montana v. Wyoming*, No. 137, Org. (Aug. 29, 2013); and,

3. Attachment C - Final Pretrial Hearing Transcript, *Montana v. Wyoming*, No. 137, Org. (Oct. 15, 2013).

Respectfully submitted this 20th day of July 2021.

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ATTACHMENT A

No. 105, ORIGINAL

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

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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

In The

SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

MOTIONS HEARING

Thursday, August 29, 2013

Before the Honorable Barton H. Thompson, JR.

Special Master

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

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

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

MR. FOX: Good morning, Your Honor.

SPECIAL MASTER: Good morning.

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

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

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

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

SPECIAL MASTER: Thank you very much,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, Mr. Draper?

MR. DRAPER: Thank you, Your Honor. And I'd just like to confirm that I will be very assiduous in observing the distinction that I think you very definitely drew this morning. Thank you.

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

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

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

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

STATE OF MONTANA
Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA
Defendants.

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

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

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

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

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

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

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

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

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

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

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

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