

In The
Supreme Court of the United States

—◆—
STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

—◆—
**On Exceptions To The Second Interim Report
Of The Special Master (Liability Issues)**

—◆—
**MONTANA'S SUR-REPLY BRIEF
IN SUPPORT OF ITS EXCEPTION**

—◆—
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INTRODUCTION

The State of Montana has excepted to the Special Master's conclusion that a full determination of Montana's storage right in the Tongue River Reservoir pursuant to the Yellowstone River Compact ("Compact") is inconsequential and unnecessary in this case. *See* Second Interim Report of the Special Master (Liability Issues) 140-141 ("Second Report"). In its reply to Montana's exception, the State of Wyoming argues that Montana's exception should be denied on the basis that "there is no remaining controversy in this case" and that the declaratory relief sought by Montana would amount to an "advisory opinion." Wyoming's Reply to Montana's Exception 5, 15-16 ("Wyo. Reply").

Wyoming's argument is belied by the record, and indeed by the statements of the Special Master that it asks the Court to uphold. Both before and after trial in the liability phase of this case, Montana and Wyoming have pointedly disagreed over the amount of water that Montana is entitled to store in the Tongue River Reservoir. Montana and Wyoming alike have urged that the question should be decided in order to avoid the necessity of their returning to this Court. The Special Master received the States' evidence on both sides of the question, recognized the importance of the question, and acknowledged the ongoing controversy between the States. The Special Master did not find any impediment preventing him from recommending a full resolution, but nevertheless

concluded that the controversy should be left unresolved. Second Report 140-141.

It is therefore untrue that “there is no remaining controversy in this case.” Wyo. Reply 15. The controversy does indeed remain, and it can be resolved only by the Court’s exercise of its power “to declare rights under the Compact and enforce its terms.” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). Absent a definitive declaration of the States’ respective rights, Wyoming, as the upstream State, will remain in a position to exploit the continuing uncertainty between the States to deprive Montana of the benefit of its share of water under the Compact. *Id.* Montana brought this suit to avoid precisely that outcome. The case should be remanded to the Special Master to recommend a complete remedy for Wyoming’s breach of the Compact, including, among other matters, a declaration of the amount of water that Montana is entitled to store in the Tongue River Reservoir.

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ARGUMENT

Wyoming asks the Court to end these proceedings now without allowing Montana to be heard on the relief that is necessary to afford it a complete remedy for Wyoming’s admitted breach of the Compact. Wyo. Reply 5, 16. It acknowledges that Montana’s complaint in this action seeks declaratory and injunctive relief as well as damages for Wyoming’s breach of the Compact. *Id.* at 1 (citing Bill of Complaint at 5). But

it argues that Montana’s claim for declaratory relief should be denied outright without being heard in a remedies phase (despite the States’ agreement to bifurcate the proceedings into a liability and remedies phase) on the basis that “there is no remaining controversy in this case” and that a declaration of the States’ rights under the Compact would constitute an advisory opinion. Wyo. Reply 5-9, 15-16.

Wyoming is incorrect in its premise that there is no remaining controversy in this case. It is unremarkably true that the constitutional requirement of a case or controversy applies in interstate cases as in other cases in the federal courts. *E.g.*, *Massachusetts v. Missouri*, 308 U.S. 1, 17 (1939) (“To support jurisdiction to give [declaratory] relief, there must still be a controversy in the constitutional sense.”) (citation omitted); *see* U.S. Const. art. III, § 2, cls. 2-3.¹ The Court has determined, however, that Montana’s complaint in this action presents a justiciable controversy. By granting Montana leave to file a bill of complaint, 552 U.S. 1175 (2008), the Court implicitly

¹ The case-or-controversy requirement applies in original actions by operation of Article III itself. Contrary to Wyoming’s assumption, *see* Wyo. Reply 6-9, it is doubtful that Congress’s regulation of federal procedure through 28 U.S.C. § 2201 governs this Court in its exercise of original jurisdiction. *See Kansas v. Colorado*, 556 U.S. 98, 102 (2009) (declining to decide whether Congress, through 28 U.S.C. § 1821(b), could validly regulate procedure in original actions); *see also id.* at 109-110 (Roberts, C.J., concurring). The Court has never relied on or referred to the Declaratory Judgment Act in an original action, nor did Montana plead the Act in its Bill of Complaint.

determined that this case presents a justiciable controversy and that the controversy is of such “seriousness and dignity” to warrant resort to the Court’s original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal citation omitted).²

Wyoming argues that the justiciable controversy presented by Montana’s complaint has ceased to exist because it was resolved in the liability phase of this case. It asserts that before the trial on liability issues Montana “narrowed its claims to those related to protection of Montana’s Tongue River allocation under the Compact” and Montana contended that Wyoming had breached the Compact by underdeliveries of water in specific years. Wyo. Reply 1 (quoting Montana’s Final Pretrial Memo. at 2 (Sept. 23, 2013) (emphasis added, indentation omitted); *see also id* at 8. Wyoming fails to comprehend that the issues at trial in the liabilities phase were necessarily framed by the parties’ agreement and understanding that a remedies phase would follow if liability were found. Montana was properly focused on the issue at hand – Wyoming’s liability – not on the relief to be granted if

² Wyoming has suggested that the extent of its underdeliveries of water to Montana is “*de minimis*.” Wyoming’s Exception to the Second Interim Report of the Special Master (Liability Issues) and Brief in Support of Exception at 7. But the Court has pointedly “decline[d] any invitation to key the exercise of this Court’s original jurisdiction on the amount in controversy.” *Wyoming v. Oklahoma*, 502 U.S. 437, 452-453 (1992). It did so in an action in which Wyoming was the plaintiff State whose claim was alleged to be *de minimis*. *Id.* at 452-453.

and when such liability was established. Montana’s “Tongue River allocation under the Compact” remains the subject of Montana’s claims in this action. But a critical determinant of that allocation – the extent of Montana’s right to store water in the Tongue River Reservoir – has not been decided, and indeed the Special Master has stated that the Court need not decide it. Second Report 140-141.

Wyoming itself agreed during the liability phase that the question of how much water Montana is entitled to store in the Tongue River Reservoir should be resolved in this case once and for all. The Wyoming State Engineer testified at the trial on liability issues that the extent of Montana’s Reservoir right “needs to be settled.” 22 Transcript of Trial Proceedings 5273.³ Even after the trial, Wyoming’s counsel argued that “[f]or the future [the States] need to know the nature of that [Reservoir] right or then we will be right back here.” Transcript of Post-Trial Hearing Proceedings of May 1, 2014, at 28.⁴ Not until Wyoming began arguing that this case should be terminated without the agreed-upon remedies phase did it take the position that “there is no remaining controversy in this case.” Wyo. Reply 15.

³ Available at the Special Master’s website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 448.

⁴ Available at the Special Master’s website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 461.

Wyoming is therefore incorrect to conclude that “the controversy Montana sought to resolve by trial has been resolved.” Wyo. Reply 9. What was resolved at the trial on liability issues (provided that the Court accepts the Special Master’s recommendations to which neither State has excepted) is that Wyoming is liable for breach of the Compact by reason of its underdeliveries of waters of the Tongue River in two years, 2004 and 2006. Second Report 161-162. In contrast, the underlying controversy that Montana brought before this Court for resolution has not been resolved because Montana’s Tongue River allocation under the Compact remains uncertain, *id.* at 1-3. Had Montana limited its prayer for relief in this action to money damages for Wyoming’s breach of the Compact, it might make sense to conflate the determination that Wyoming is liable for underdelivery of water to Montana with a determination that Montana is entitled to money damages only. But Montana’s prayer for relief is not so limited, and its concern throughout this action has been first and foremost to resolve the underlying controversy that led to Wyoming’s underdeliveries of water, namely, the State’s ongoing dispute over Montana’s Tongue River allocation. *See* Bill of Complaint 5, ¶¶ A-D.

Wyoming’s argument rests on the assumption that an award of damages, while not the *only* relief sought by Montana, is the only *proper* relief sought by Montana for Wyoming’s breach of the Compact. Undeniably, however, a complete remedy for breach of interstate compact may be fashioned to prevent

future breaches as well as to compensate for past breaches. See *Kansas v. Nebraska*, 135 S. Ct. at 1057. When an upstream State has been found liable for breach and an award of damages alone will give it no incentive to avoid future breaches, a full remedy for the breach is one that “appropriately reminds [the upstream State] of its legal obligations, deters future violations, and promotes the Compact’s successful administration.” *Id.* To be sure, Wyoming should have the opportunity in a remedies phase to present evidence and argument on why it would be unnecessary or inappropriate to grant relief aimed at preventing future breaches. It has offered no justification, however, for denying all such relief to Montana now without hearing from either State on whether the relief is needed.

Wyoming offers the assurance that it can “no longer refuse to honor a *valid* call by Montana for the benefit of Montana’s pre-1950 water rights, including the pre-1950 right in the Tongue River Reservoir.” Wyo. Reply 9 (emphasis added). The all-important qualification is the term “valid.” Without a resolution of the States’ dispute over Montana’s Tongue River allocation, nothing will restrain Wyoming from refusing to honor Montana’s calls on its pre-1950 rights on the ground that, in Wyoming’s opinion, the calls are invalid. “Possessing the privilege of being upstream, [Wyoming] can (physically, though not legally) drain all the water it wants from the [Tongue] River.” *Kansas v. Nebraska*, 135 S. Ct. at 1057 (internal citation omitted). Wyoming can thereby exploit the ongoing

uncertainty over Montana's Tongue River allocation by arrogating to itself the prerogative to judge whether Montana's calls on its pre-1950 rights are valid. *But see West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State."). Moreover, the likelihood of disagreement between the States over the validity of Montana's calls on its rights under the Compact is not merely theoretical. It has manifested itself in correspondence between the States on whether Wyoming will honor Montana's most recent call under the Compact in April of this year. *See Montana's Reply Brief Opposing the Exception of Wyoming* at 12 & Appendix (May 11, 2015).

For similar reasons, Wyoming is mistaken in its contention that further proceedings in a remedies phase cannot "alter the substantive legal relationship between the parties" or "change the outcome of this case." *Wyo. Reply* 9-10. A full declaration of Montana's Compact rights to the waters of the Tongue River will "materially alter[] the legal relationship between the parties" because it will "modify[] the defendant's behavior in a way that directly benefits the plaintiff." *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (per curiam) (internal citation omitted). If the full amount of Montana's right to store water in the Tongue River Reservoir is adjudicated and declared, Wyoming will no longer be free to dispute the validity

of a call by Montana on the full extent of its right.⁵ The Court's declaration of Montana's right will actually benefit both States by eliminating the current uncertainty that has led to perennial disputes between them. In the words of Wyoming's counsel, it will avoid the need for the States to "be right back here" in this Court. Transcript of Post-Trial Hearing Proceedings of May 1, 2014, at 28.⁶

In contrast, acceptance of Wyoming's position would leave key issues unresolved, paving the way to near certain future litigation. For instance, Wyoming states that it remains to be seen "[h]ow the Court's ruling will affect future actions of the parties in response to the specific hydrologic conditions in any given year. . . ." Wyo. Reply 9. However, the primary goal of any interstate compact is to fix the rights and obligations of the signatory states such that they are not left at the whim of "specific hydrological

⁵ As discussed in Montana's Reply Brief Opposing the Exception of Wyoming, other issues will need to be resolved in the remedies phase in order to ensure future compliance.

⁶ Wyoming protests that Montana could fill the Reservoir to capacity even in dry years by reducing outflows. Wyo. Reply 11. But the Special Master has determined, without exception by Wyoming, that "nothing in the Compact requires Montana to store its water when Wyoming wishes it do so," Second Report 149, and that Montana may properly allow outflows for sound operational purposes such as winter stock watering and prevention of structural damage to the Reservoir, *id.* at 144-157. Wyoming's protestation thus disregards the Special Master's uncontested ruling: Montana is not required to relinquish its rights under the Compact as a condition of demanding Wyoming's performance.

conditions.” Wyoming’s position implies that the States will have to return to the Court for each new hydrologic condition. Such a result is plainly unworkable and would be inconsistent with the Court’s handling of prior interstate compact disputes, wherein it has always endeavored to provide the specific determinants of compact compliance to avoid such a costly and impractical situation.

Wyoming would also have the Court deny Montana declaratory relief on the theory that Montana can seek relief in an alternative forum, the Yellowstone River Compact Commission. Wyo. Reply 13-14. That argument should be rejected. Although the Compact’s provisions are to be “administered” by the Yellowstone River Compact Commission, the Compact gives no indication that the Commission has authority to decide so fundamental a matter as the allocation between the States of the waters of the Yellowstone River and its tributaries. *See* Second Report B-5 to B-7 (Compact art. III). Indeed, the States have never successfully resolved a substantive dispute through the Commission. *See, e.g.,* Ex. J56 at xi-xiii. “In the absence of an explicit provision or other clear indications” that the Commission was intended to “provide an equivalent method of vindicating [Montana’s] rights,” the Compact should not be construed to preclude Montana from seeking complete judicial relief in this Court. *Texas v. New Mexico*, 462 U.S. 554, 569-570 (1983).

In short, the Commission, by its very nature and composition, is not a suitable “forum for appropriate hearing and full relief.” *Wyoming v. Oklahoma*, 502

U.S. 437, 452 (1992); see *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991) (rejecting Special Master’s recommendation to defer question of extent of New Mexico’s water storage right to Canadian River Compact Commission). By contrast, there can be no doubt about this Court’s role and authority “to declare rights under the Compact and enforce its terms.” *Kansas v. Nebraska*, 135 S. Ct. at 1052; see *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28 (“To determine the nature and scope of [compact] obligations as between States . . . is the function and duty of the Supreme Court of the Nation.”) (citation omitted). In the present action, the Court should continue to carry out its “‘serious responsibility to adjudicate cases where there are actual, existing controversies’ between the States over the waters in interstate streams.” *Oklahoma v. New Mexico*, 501 U.S. at 241 (quoting *Arizona v. California*, 373 U.S. 546, 564 (1963)).

Wyoming argues that *Oklahoma v. New Mexico* is distinguishable on the basis that there was “no doubt” there that a dispute continued to exist over the extent of New Mexico’s storage right in that case, whereas, according to Wyoming, “there is no remaining controversy in this case.” Wyo. Reply 14-15. But Wyoming does not really mean that there is no remaining controversy in this case. It means that the same controversy it asked the Special Master to resolve should now be deferred to an alternative forum, or should simply be left unresolved. Compare 22 Transcript of Trial Proceedings 5273, and Transcript of

Post-Trial Hearing Proceedings of May 1, 2014, at 28, *with* Wyo. Reply 13-15. The States' disagreement remains very much alive, and a full determination of the extent of Montana's storage right in the Tongue River Reservoir is "essential" to the resolution of the controversy between them. *Oklahoma v. New Mexico*, 501 U.S. at 241.

Wyoming's reliance on *Kansas v. Colorado*, 543 U.S. 86 (2004), is similarly unavailing. *See* Wyo. Reply 15. The Court there accepted the Special Master's recommendation to leave 15 miscellaneous issues undecided. *Kansas v. Colorado*, 543 U.S. at 105-106. Several of the issues appeared to be moot in that they related to evidence bearing on whether Colorado had depleted the Arkansas River in 1995-1997, but the Special Master had relied on Kansas's own evidence in finding that Colorado was in compliance during those years. *Id.* at 105. The remaining issues could be more accurately decided based on the ongoing operation of a sophisticated computer model, the H-I Model, which the States had agreed to use. *Id.* Significantly, however, the Special Master had recommended, and this Court decided, to "retain jurisdiction over this case and permit [the Special Master] to take up lingering issues at a future date." *Id.* at 106. Contrary to Wyoming's implication, in *Kansas v. Colorado*, where the case was also bifurcated, the Court entered a detailed Judgment and Decree after a remedies phase, containing three volumes of compliance directives and a digital hydrologic computer model, in order to resolve the issues in controversy. 556 U.S. 98, 104-109 (2009).

In the present case, by contrast, the extent of Montana's storage right in the Tongue River Reservoir is not moot. The States continue to disagree over the question even while the Special Master has said that damages can be awarded without fully resolving it. Second Report 140-141. Unlike in *Kansas v. Colorado*, the question will not resolve itself with the passage of time or the running of a computer model. Montana's storage right in the Tongue River Reservoir is a question of law; as noted by the Special Master and acknowledged by Wyoming, resolution of the question hinges on matters such as "Montana's pre-Compact intent and practice." Wyo. Reply 3 (quoting Second Report 138). And, in any event, Wyoming is not asking the Court to retain jurisdiction so that lingering issues can be taken up later. It is asking the Court to deny outright Montana's pleaded claim for declaratory relief without giving Montana an opportunity to be heard in a remedies phase. The opinion in *Kansas v. Colorado* does not support such a result. See 543 U.S. at 105-106.

The Special Master remarked that a full determination of Montana's storage right raises "multiple issues, including Montana's pre-Compact intent and practice." Second Report 138. But he did not suggest that the record developed in the liability phase is insufficient to enable him to recommend a full determination of the question. See *Oklahoma v. New Mexico*, 501 U.S. at 241 (remand of question of New Mexico's conservation storage right to Special Master for further proceedings and recommendation on the merits where Special Master "acknowledged that the

record developed in this case probably was sufficient to permit him to decide this issue”). And if the record developed thus far is lacking in some respect, nothing would prevent the Special Master from hearing additional evidence in the remedies phase as necessary to decide the question.

Having previously urged the Special Master to fully decide the question of Montana’s storage right, Wyoming now argues that the question cannot be decided without also determining “how the [Yellowstone River] Compact treats Indian rights,” i.e., “the allocation of 20,000 acre feet of storage in the Tongue River Reservoir to the Northern Cheyenne Indian Tribe.” Wyo. Reply 12 (quoting Second Report 160). Wyoming was right the first time. The Special Master has determined, without exception by Wyoming, that it is unnecessary to decide how the Compact treats Indian rights because “Montana is not suing Wyoming for interference with the rights of the Northern Cheyenne Tribe. Instead, it is suing for interference with its own rights.” Second Report 160. The Special Master explained,

“If Wyoming fails to reduce its post-1950 diversions and storage when Montana is entitled to water for the Tongue River Reservoir, Montana is entitled to damages for any resulting deficiency, no matter how the Compact treats the Tribe’s storage rights.” *Id.*

That conclusion remains the same whether the quantity of water to which Montana is entitled for the Tongue River Reservoir in a given year is 32,000

acre-feet, 72,500 acre-feet, or some number in between. In any event, Montana is entitled to enforcement of its rights under the Compact as against Wyoming “no matter how the Compact treats the Tribe’s storage rights.” *Id.*

In sum, the premise of Wyoming’s request that Montana’s claim for declaratory relief be summarily denied is that “there is no remaining controversy in this case.” Wyo. Reply 15. That premise is incorrect. Both States litigated the question of Montana’s storage right in the Tongue River Reservoir during the liability phase of this case, and both States urged the Special Master to settle the question. Because the Special Master left the question undecided, the controversy remains. Montana excepts to the Special Master’s view that the ongoing controversy between the States is inconsequential and need not be decided in this case.



CONCLUSION

This case should be remanded to the Special Master to recommend a remedy sufficient to rectify Wyoming's past breaches and to prevent its future breaches of the Compact, including a declaration of Montana's right to store the waters of the Tongue River in the Tongue River Reservoir.

Respectfully submitted,

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