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.

WYOMING'S REPLY TO MONTANA'S EXCEPTION

PETER K. MICHAEL*
Attorney General of Wyoming

JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
ANDREW KUHLMANN
Senior Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
307-777-6946
peter.michael@wyo.gov

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

STATEMENT

In this original action the State of Montana claimed that the State of Wyoming had repeatedly violated the terms of the Yellowstone River Compact resulting in "substantial and irreparable injury to the State of Montana and its water users." Bill of Compl. ¶¶ 13-15. In addition to damages for these alleged violations, Montana requested both declaratory and prospective injunctive relief. *Id.* at 5. As the case progressed, the Court decided various issues, and Montana voluntarily dismissed other significant issues. *See, e.g., Montana v. Wyoming,* 563 U.S. ___, 131 S. Ct. 1765 (2011). By the time it submitted its Final Pretrial Memorandum,

> Montana ha[d] narrowed its claims to those related to protection of Montana's Tongue River allocation under the Compact. Montana's remaining contentions [we]re that Wyoming ha[d] breached its Article V(A) obligations in two ways: (1) Wyoming has allowed its post-1950 water users to take water when Montana's pre-1950 storage rights have been unsatisfied in four years (2001, 2002, 2004 and 2006); and (2) Wyoming has allowed its post-1950 water users to take water when Montana's pre-1950 direct flow rights have been unsatisfied in 43 years (1961-2007, except 1968, 1978, and 1998).

Montana's Final Pretrial Memo. at 2 (Sept. 23, 2013). Thus, at trial Montana asked the Special Master to

determine if Montana's pre-1950 storage rights went unsatisfied in specific years.

The parties vigorously argued about the nature and extent of Montana's right to fill the Tongue River Reservoir, and the Special Master devoted an extensive amount of the Second Interim Report to a discussion of those arguments. Second Interim Report at 99-162. As a threshold matter, the Special Master found that, at the time the Compact was signed, "the Montana Conservation Board had contracted to provide the [Tongue River Water Users Association] with at least 32,000 [acre feet] each year 'for the purpose of irrigation, watering of stock, domestic and municipal uses and for other purposes.'" *Id.* at 129. Consequently, he found that "Article V(A) of the Compact therefore protects Montana's right to store at least 32,000 [acre feet]." *Id.* at 130.

The Special Master concluded that water that could have been stored, but instead was bypassed through the reservoir over the winter as part of routine reservoir operations, did not count towards Montana's right to 32,000 acre feet of water each year. Second Interim Report at 114-57. Thus, when Montana's right to store is coupled with its right to avoid storage during the winter without prejudice to its right to call the river, Montana's reservoir right is significantly larger than 32,000 acre feet. However, the Special Master explained that Montana's reservoir right remains bounded by the fact that it may not waste water, and Wyoming "is free to challenge"

Montana's reservoir operations with specific evidence in future years. Second Interim Report at 156-57.

Montana argued that the Compact entitled it to store more than 32,000 acre feet each water year, but the Special Master found that Montana's argument raised "multiple issues, including Montana's pre-Compact intent and practice." *Id.* at 138. After noting that there was evidence supporting both sides of the argument, the Special Master reasoned that

> the Court need not resolve this question as part of this proceeding. Montana stored only about 10,000 [acre feet] in the Tongue River Reservoir in 2004. *See* Ex. M-5, p. 30 tbl. 4-A (Book expert report). In 2006, Montana stored less than 32,000 [acre feet]. *Id.* Because Montana was not able to store even 32,000 [acre feet] in either year, it is inconsequential to this case whether it was entitled under Article V(A) to store more.

Id. at 140 (footnote omitted).[1]

The Special Master ultimately concluded that Montana "was entitled under Article V(A) of the Compact to store **at least** 32,000 acre-feet of water in the Tongue River Reservoir, in addition to any carryover with which it entered the water year." *Id.* at 161

[1] The Special Master also determined that Article V(A) of the Compact only protects the pre-1950 reservoir capacity of 72,500 acre feet and that the remaining 6,571 acre feet of post-1950 capacity is covered by Article V(B). Second Interim Report at 141-44.

(emphasis added). Applying this conclusion to the years actually at issue at trial, the Special Master determined that Montana's pre-1950 storage rights went unsatisfied in both 2004 and 2006. *Id.* As a result, he recommended that Wyoming be held liable for all of its post-1950 use and storage in those two years after the dates Montana called the river. *Id.* at 231. He then found that the sum total of Wyoming's post-1950 use in 2004 and 2006 was 1,300 and 56 acre feet of water respectively. *Id.* Both parties assent to these conclusions.

Because both parties accept all the substantive recommendations of the Special Master, absent *sua sponte* action by the Court, Wyoming's liability is fixed. Moreover, Wyoming repeatedly has committed to honoring a valid call from Montana in future years in compliance with the rulings of the Court and recommendations of the Special Master. Nevertheless, Montana takes exception to the Special Master's recommendation that the Court need not decide whether Montana is entitled under the Yellowstone River Compact to store more than 32,000 acre feet of water per year in the Tongue River Reservoir. *See* Montana's Exception Br. at 1. As a consequence, Montana requests that this issue be remanded to the Special Master for a declaration of the maximum extent of Montana's water right in the reservoir. *Id.* at 2.

SUMMARY OF ARGUMENT

Rather than end these proceedings without further delay, Montana asks this Court to remand this matter back to the Special Master to declare the maximum extent of its water right in the Tongue River Reservoir in any given year. The Court should decline this request. The Special Master decided the questions presented to him by Montana and went no further than necessary to decide this case. His recommendation that the Court exercise judicial restraint in these proceedings is consistent with the Court's well-established practice of limiting its use of the judicial power to concrete cases and controversies. Remanding this matter to the Special Master for a declaration on this issue will not alter Wyoming's liability to Montana or change the outcome in this case. Nor will it permit the parties to test their future relations under the new paradigm established in these proceedings that Wyoming must curtail its post-1950 uses for the benefit of Montana's pre-1950 water rights. Montana's exception asks this Court for an advisory opinion, and the exception should be denied.

ARGUMENT

The Court should not require further proceedings because the specific controversy Montana voluntarily brought to trial has been resolved by a report and recommendation that neither party contests.

In original actions, like other litigation in the federal courts, the Court may provide declaratory relief when authorized by the Declaratory Judgment Act. *See, e.g., Virginia v. Maryland*, 540 U.S. 56, 60, 79-80 (2003) (granting declaratory judgment sought by Virginia); *Maryland v. Louisiana*, 451 U.S. 725, 734, 760 (1981) (granting Maryland a declaratory judgment against Louisiana). The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The phrase "case of actual controversy" refers to the type of "Cases" and "Controversies" justiciable under Article III of the United States Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937).

The express limitation in the Declaratory Judgment Act to cases "of actual controversy" is an "explicit recognition" that the Court does not render advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). As the Court has explained,

> [the] Court is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.

Alabama State Fed'n Labor v. McAdory, 325 U.S. 450, 461 (1945) (citations omitted). The Court's considered practice in this regard "is as true of declaratory judgments as any other field." *Golden*, 394 U.S. at 109.

The Court has described the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 241 (1952). "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948). "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

In exercising its discretion to resolve a request for a declaratory judgment, the Court requires that

the dispute be "'definitive and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life*, 300 U.S. at 240-41). "Basically the question in each case is whether the facts alleged, under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). "[N]o controversy exists when a declaratory judgment plaintiff attempts to obtain a premature ruling on potential defenses that would typically be adjudicated in a later actual controversy." *MedImmune*, 549 U.S. at 139 (Thomas J., dissenting) (citing *Coffman v. Breeze*, 323 U.S. 316 (1945)).

In this case, as the plaintiff and master of its own lawsuit, Montana explicitly limited its claims at trial to the determination of whether Montana's reservoir right went unsatisfied in specific years. The Special Master concluded that Montana's right went unsatisfied in two of the years in issue and assessed Wyoming's liability accordingly. Now Montana asks the Court to go further and declare the maximum extent of its reservoir right untethered to the claims and facts presented at trial. It is neither necessary nor

advisable to do so as the controversy Montana sought to resolve by trial has been resolved. Any further declaratory relief will be by its very nature an academic exercise.

The Court's rulings in this case have altered the positions of the parties as they relate to the future administration of the Compact. Wyoming no longer can 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. How the Court's ruling will affect the future actions of the parties in response to the specific hydrologic conditions in any given year has yet to be seen. It may be that the existing rulings will not prevent future disagreements, or it may be that the rulings will prove sufficient once the parties have had an opportunity to apply them. Certainly there is no imminent, concrete threat to Montana's reservoir right. Instead, Montana seeks to test prematurely its defense to a possible future claim by Wyoming that Montana has wasted water by calling the river in excess of the amount protected by Article V(A) of the Compact. Whether this will ever occur or not is uncertain, but what is certain is that Montana is not entitled to a preliminary declaration on the validity of any such defense.

Considerations of practicality and wise judicial administration also counsel against additional proceedings in this case, because those additional proceedings cannot change the outcome of this case. The

Special Master found Wyoming liable for all its post-1950 water storage and use after Montana called the river in 2004 and 2006. The size of Montana's reservoir right has no effect on this determination. In its own exception, Wyoming has shown that further proceedings would be wasteful, and this is doubly true when the additional proceedings cannot alter the substantive legal relationship between the parties. It makes little sense to reopen these proceedings at the expense of the public when both parties assent to the substance of the Special Master's Report and Recommendation and nothing will change.

Nor will additional declaratory relief serve as a meaningful incentive to Wyoming to alter its future conduct as Montana claims because the penalty for transgression of the Compact will not change. Montana asserts that Wyoming must be coerced into compliance or it will take advantage of its position as the upstream state by taking water and paying actual damages therefore. *See* Montana Br. at 18-20. However, further declaratory relief will not increase Wyoming's liability or the probability that punitive measures will be imposed by the Court in future litigation. Wyoming's liability in future years will be limited, as it was in the past, to the amount of water Wyoming wrongfully used or stored under post-1950 rights. This amount will likely be small irrespective of whether Montana has a right to store 32,000 acre feet in the reservoir or more than that in a given year.

In this regard, consider that even in these two years of extreme drought Montana could have filled

the reservoir to its current capacity if it would have reduced bypasses through the reservoir. Second Interim Report at 144. In both years, the amount of post-1950 use in Wyoming after the call dates exceeded "by orders of magnitude" the amount Montana bypassed unused through the reservoir. *Id.* Thus, while the Special Master concluded that the reservoir right went unsatisfied in 2004 and 2006, in future years, as in the past, the critical factor determining whether the reservoir fills will be the amount of water Montana chooses to bypass unused through the reservoir rather than the amount of post-1950 use by Wyoming water users. Under these circumstances, additional declaratory relief on a subject of little practical consequence to whether the reservoir fills is unlikely to alter the behavior of either party.

Additionally, declining further proceedings in this case avoids the premature adjudication of difficult collateral issues affecting non-parties. The Court has often noted that its original jurisdiction should be exercised "sparingly." *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (citing cases). In fact, the Court's original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

Even in cases arising from the Court's appellate jurisdiction, the Court prefers to exercise judicial restraint whenever it can. "In general, courts should think hard, and think hard again, before turning

small cases into large ones." *Camreta v. Greene*, 563 U.S. ___, 131 S. Ct. 2020, 2032 (2011). The "less burdensome course" is generally the prudent course. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007). When the Court can "readily" dispose of a case on one threshold ground, it should not reach another one that "is difficult to determine." *Id.* Similarly, "[c]ourts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing." *Eccles*, 333 U.S. at 432.

Here the Special Master found that Montana's arguments about the maximum extent of its right in the reservoir raised "multiple issues," the resolution of which were not necessary to a determination of the present case. Second Interim Report at 138, 140. One such issue would be the effects on Montana and Wyoming of the allocation of 20,000 acre feet of storage in the Tongue River Reservoir to the Northern Cheyenne Indian Tribe in 1991. The Special Master concluded that it was unnecessary to decide how the "[Yellowstone River] Compact treats Indian rights in order to resolve the current dispute between Montana and Wyoming." Second Interim Report at 160. Were the Court to remand this matter to the Special Master, it would become necessary to resolve this issue in order to determine the correct measure of the rights in the reservoir and how the Yellowstone River Compact governs them.

The Special Master counseled restraint in conformity with the Court's practice of deciding only

what is necessary to resolve the case presently before it. This is the prudent course, and likely the only available course given that the Northern Cheyenne Tribe is not a party to this litigation. In light of the current lack of a concrete controversy between the parties, the Court should follow the thoughtful approach recommended by the Special Master, and reject Montana's exception.

In addition, the Court should be particularly reluctant to grant declaratory relief in suits between states where resolution in another forum is available. *See Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (the Court's original jurisdiction "will not be exerted in the absence of absolute necessity"); *see also California v. Nevada*, 447 U.S. 125, 133 (1980) (having settled the immediate boundary dispute between the states, the Court declined to address individual ownership questions that may have been within its original jurisdiction, noting that litigation in other federal court forums "seems an entirely appropriate means of resolving whatever questions remain."). In this case, an alternative forum is available, namely the Yellowstone River Compact Commission established by the Compact itself. *See* Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663, art. III (1951) (establishing the Commission to administer the provisions of the Compact as between Montana and Wyoming). The Commission has established *Rules for the Resolution of Disputes Over the Administration of the Yellowstone*

River Compact.[2] Now that the fundamental legal disputes that prevented Compact administration have been resolved by the Court, this alternative forum may prove more than adequate to address future specific disputes between the parties should they arise. In either event, the Court should give the Commission the opportunity to succeed or fail before preempting an as yet undefined potential future dispute.

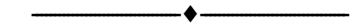
Montana asserts that this case is similar to *Oklahoma v. New Mexico* where the Court remanded an unresolved issue back to the Special Master. *Oklahoma v. New Mexico,* 501 U.S. 221, 241 (1991). In that case, the Special Master recommended that the Court remand to the Canadian River Commission a question about how the interstate compact treated certain water stored in a desilting pool in the Ute Reservoir. *Id.* at 240. The Special Master declined to address the question until after the states had first made an attempt to resolve the issue through the Commission. *Id.* at 241. The Court disagreed with the Special Master's recommendation acknowledging that it "'does have a serious responsibility to adjudicate cases where there are actual, existing controversies' between the States over the waters in interstate streams." *Id.* (quoting *Arizona v. California*, 373 U.S. 546, 564 (1963)). The Court concluded there that there was "no doubt" that the dispute related to the

[2] These rules are available on the website of the Yellowstone River Compact Commission by following the "Information" link.

treatment of the desilting pool continued to exist, and therefore, there was no legal basis for the Special Master to refuse to decide the question. *Id.*

By contrast, there is no remaining controversy in this case. Montana's claims related to 2004 and 2006 have been resolved, albeit on narrower grounds than Montana would prefer. Accordingly, *Oklahoma v. New Mexico* is inapplicable here.

While relying heavily on *Oklahoma v. New Mexico*, Montana neglects to cite the Court to the more recent, and more analogous, case of *Kansas v. Colorado*, 543 U.S. 86 (2004). In that case, Kansas listed fifteen disputed issues that the Special Master had not decided and asked the Court to require the Special Master to decide them. *Id.* at 104-05. Both the Special Master and the Court found that there were good reasons not to decide those issues immediately. *Id.* at 105. In particular, the Court concluded that resolution of the remaining issues, which implicated both technical and legal concerns, was best left to the parties and their experts in the first instance. *Id.* at 105-06. Thus, the Court allowed the parties to implement the Court's rulings on the larger issues and waited to see if a dispute on the remaining issues ripened before acting. The Court should follow the same stepwise course in this case.



CONCLUSION

Through this litigation, the Court has altered the legal landscape in the Tongue River basin. Future disputes may arise, but until then, the Court should refrain from issuing an advisory opinion on a matter neither ripe for resolution nor made concrete by the existence of a specific set of determinative facts. Instead, the Court should allow these proceedings to come to a close without further delay and give the parties the opportunity to begin administering the Tongue River in accord with the Court's resolution of the specific claims brought by Montana.

Dated this 7th day of May, 2015.

Respectfully submitted,

THE STATE OF WYOMING

PETER K. MICHAEL*
Attorney General of Wyoming

JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
ANDREW KUHLMANN
Senior Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
307-777-6946

**Counsel of Record*