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Barton H. Thompson, Jr., c/o
Kimberly Dorst, Faculty Support
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Re: MT v. WY: Supreme Court of the United States No. 137
WY Comments on the (Draft) Final Report of the Special Master

Special Master Thompson,

Thank you for the opportunity to review the Draft Final Report. Wyoming believes that the draft provides an appropriate overview of the proceedings since the Second Interim Report. Wyoming does not believe that anything of consequence is missing from the draft and that the draft accurately represents the parties' arguments, except as noted below. Wyoming will address the two provisions of the decree that you requested substantive comments, followed by a few additional comments about particular provisions in the decree and, finally, Wyoming will address a few small typographical issues in the draft report.

With regard to section G.1 of the proposed decree. Wyoming strongly prefers the alternative language. The Court has no need for the appendices contemplated by the original language, it would be a burden to both parties to prepare that information in a form fit for filing with the Court, and the parties already have electronic access to the information. In the same vein, Wyoming would suggest that section G.2. be modified to begin with the words "If requested." Currently, groundwater pumping data in both states is limited and of little use to either state. The decree should not force the states to compile and provide information every year that the other state likely will not use. If one state

requests the information, certainly, the other state should provide it, but if not, neither should be burdened with a meaningless annual exercise.

With regard to the alternatives to “significant evidence,” Wyoming prefers the term “substantial evidence.” “Substantial evidence” is a well-recognized term of art in the law; significant evidence is not. The draft report defines significant evidence using the definition of substantial evidence, indicating that there is not a difference in the two standards in your view. That being so, it makes sense to use a familiar term, one that has been refined and honed by many decisions, rather than to inject a new standard that might confuse future readers.

Wyoming offers the following suggested revisions to the proposed decree:

- In section A.1., the word “system” in the phrase Yellowstone River System should be capitalized, because this is a defined term in the Compact.
- In section B.1., consider adding the words “or storage” after “flow” to make clear that the principle applies to both direct flow and storage rights.
- In the last sentence of section B.6., consider using the word “date” rather than “point.”
- In the second sentence of section B.7., consider inserting the phrase “to the degree physically possible” after “Wyoming also shall” to make clear that the qualification applies equally to groundwater withdrawals as it does to surface water diversions identified in the first sentence.
- In section D.1., consider adding the following at the end of the first sentence, “except as provided in Section B.7. of this Decree.” Including this language recognizes that Wyoming may not be physically able to prevent storage at the time of a call, and that it will not violate the Decree if it provides any water stored out of priority as soon as physically possible after a request from Montana.
- In the first sentence of section E.1., consider clarifying that Article V(A) protects Montana’s “annual” right to store.
- Section F.3. seems overbroad. What if a Wyoming reservoir owner wants to stop irrigating and breach his reservoir? That could potentially cause an injury to

Montana water users because it will change the storage pattern and return flows. The Compact obviously does not go so far as to prevent that. This provision arose out of Wyoming's concerns about Montana's operation of the Tongue River Reservoir. Those operations are specifically addressed elsewhere in the decree, so perhaps this section should be eliminated.

- In section G.2., consider explicitly excluding domestic and stock uses. While the Compact exempts certain groundwater wells, this section does not seem to. To avoid future arguments, perhaps this section should be clear on its applicability.
- In section G.4., consider saying "the provisions of paragraph G" rather than this paragraph, which could be construed as limited to section G.4.

Wyoming has the following suggested revisions to the draft report:

- On page 21, the draft states that the plaintiff in *Kansas v. Colorado* "did not argue strongly" for monetary relief. That sentence should be revised to say the plaintiff "argued strongly" for monetary relief.
- On page 24, the draft references \$35,877.06, which reflected the cost of available replacement water and prejudgment interest calculated at a specific date. It would not be clear to most readers why the draft used this number here rather than the \$20,340.00 referenced at other points in the brief. To be consistent, consider using "\$20,340.00 plus interest."
- On page 27, Mr. Tyrrell's middle initial is T rather than J. That typographical error can be found in multiple places in the draft, particularly on pages 34 and 35. Also on pages 35 and 69, Mr. Tyrrell's name is misspelled as "Tyrell."
- On page 33, it was not Wyoming's position that "Montana is entitled to store at least 32,000 acre feet in addition to whatever Montana can store during the winter months." Neither those words, nor anything like them, appear in the brief cited in the draft. Wyoming's position was that Montana is entitled to store 32,000 acre feet annually and no more, and that water stored or bypassed in the winter counted against this limitation. See Wyoming's Post-Trial Brief at 13-27 and Wyoming's Response to Montana's Motion for Summary Judgment on Tongue River Reservoir at 2, incorporating Wyoming's Post-Trial Brief.

- On page 37, in the third sentence of the first paragraph, that begins, “In Wyoming’s view there thus is no ...” eliminate the word “thus.”
- On page 60, in the last sentence of the middle paragraph the word “sows” should be “shows.”
- On page 63, the sentence “If Montana does not believe, based on the available evidence, that the Reservoir will fill, calling the River would be wasteful,” should be “If Montana believes, ...”
- On page 62, the draft suggests that Montana’s failure to take exception to the contents of the Second Interim Report should not preclude Montana from disagreeing with the report now. Wyoming strongly disagrees with this assertion in the report, notes that there is no authority cited for the proposition, and asserts that the law of the case doctrine bars Montana from re-litigating matters that should have been brought to the Court’s attention in a timely exception.
- On page 74, in the third sentence of the first paragraph in Section E on costs, the word “ether” should be “either.”

Thank you again for the opportunity to comment on the draft report and decree, and please let us know if you have any questions or concerns about any of the foregoing suggestions.

Respectfully,



James Kaste
Deputy Attorney General

c: All Counsel