

**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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**BEFORE THE HONORABLE BARTON H. THOMPSON, JR.**

**SPECIAL MASTER**

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**AFFIDAVIT OF GORDON W. FASSETT IN SUPPORT OF  
WYOMING'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Gordon W. Fassett, being sworn, states:

1. I am a registered professional engineer and a vice president with HDR Engineering, Inc. My current business address is 1720 Carey Ave., Cheyenne, Wyoming 82001. I held the position of Wyoming State Engineer from March 16, 1987 to June 15, 2000. I was appointed by Governor Mike Sullivan as Wyoming Commissioner to the Yellowstone River Compact Commission shortly after my appointment as State Engineer in 1987 and held that position throughout the remainder of my tenure as State Engineer. I have personal knowledge of the facts stated herein and am competent to make this affidavit. I make this affidavit in support of Wyoming's Motion for Partial Summary

Judgment. Throughout my personal and professional life I have also been called by and referred to by my nick-name, Jeff, and the records of the Wyoming State Engineer's Office and Yellowstone River Compact Commission often identify me as Jeff Fassett.

2. My predecessor as Wyoming State Engineer and Wyoming Commissioner to the Yellowstone River Compact Commission was George L. Christopulos, now deceased. He held the position of Wyoming State Engineer from December 1, 1974 to March 15, 1987. He was Wyoming's Yellowstone River Compact Commissioner from 1975 until my appointment in 1987. From March of 1984 through March 15, 1987, I was Deputy State Engineer under Mr. Christopulos. In that capacity, and among other duties, I worked extensively on interstate water issues, including the Yellowstone River Compact. For example, I attended the annual Yellowstone River Compact Commission meetings in 1984, 1985, and 1986, while I was deputy. If Montana had made any written or oral calls, claims, demands or contemporaneous notifications regarding administration of waters of the Tongue or Powder River basins under the Yellowstone River Compact to Commissioner Christopulos from March of 1984 through early 1987, Commissioner Christopulos would have informed me of such communications. I never heard of any such communications during that time period from Christopulos or from any other source.

3. Article 8, § 5 of the Wyoming Constitution gave me "general supervision of the waters of the state and of the officers connected with its distribution," during my tenure as State Engineer. Based on this constitutional authority as well as Wyoming statutory

authority, I supervised an agency with a staff of approximately 120 persons from my primary office in Cheyenne, Wyoming and a series of field offices throughout the State of Wyoming. This staff included four water division superintendents, each of whom are appointed by the Wyoming Governor, one for each of the four water divisions into which Wyoming is divided, and their staffs. I was also President of the Wyoming State Board of Control, which was comprised of me and the four water division superintendents. The Board of Control adjudicates water rights in the State of Wyoming, and approves changes in those water rights. In my dual capacities as State Engineer and President of the Board of Control, I was personally involved in the official creation of water rights through the issuance of permits, the adjudication of rights and in changes in water rights, and the administration and regulation of water rights in the State of Wyoming.

4. During my tenure as Wyoming State Engineer and Wyoming Commissioner to the Yellowstone River Compact Commission, I attended annual and technical meetings of the commission, reviewed and commented upon drafts of the annual commission reports and drafts of the minutes of the commission's annual meetings, and signed the cover letters to the Governors and the annual reports. I also communicated by writing and telephone with the Montana commissioners and the federal representatives who served as commission chairmen. During my tenure as Wyoming State Engineer and compact commissioner I never received a call, claim, demand, or other contemporaneous notification, either orally or in writing, from a Montana commissioner, or anyone acting under his authority, in which they notified Wyoming that Montana water users in the

Tongue or Powder River Basins, or any other waters covered by the compact, suffered from a shortage of water resulting from actions of Wyoming water users, and that Wyoming should take some action to address Montana's shortage.

5. If the State of Montana made such a call, claim, demand, or other contemporaneous notification upon Wyoming under the Yellowstone River Compact between March 15, 1987 and June 15, 2000, and it was not made to me personally in my capacity as Wyoming's Commissioner to the Yellowstone River Compact Commission, but was instead made to any agent of the state with authority over the regulation or adjudication of any waters of the State of Wyoming, or even to the Governor of Wyoming, it should have reached me through the chain of command and proper protocols.

6. While I was Wyoming State Engineer and compact commissioner various disputes arose between Montana and Wyoming regarding administration of the compact. These included Montana's concern that the states were not technically prepared to account for, track, and potentially administer post-1950 appropriative rights under the percentage allocations of Articles V(B) and V(C) of the compact, and Montana's dissatisfaction with the Federal Representative's repeated refusal to vote on certain disputed issues. Beginning in 1995, Montana Commissioner Gary Fritz, me, and our staffs, worked on a set of rules for dispute resolution by the commissioners, which culminated with the completion, and commission adoption, of a document entitled "Rules for the Resolution of Disputes over the Administration of the Yellowstone River

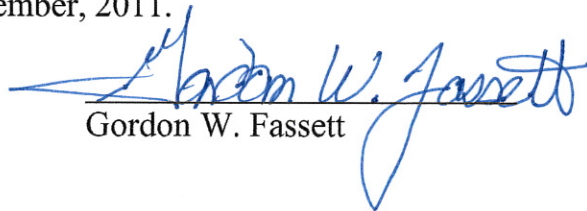
Compact,” dated December 19, 1995. Mr. Fritz, Federal Representative William F. Horak, and I, approved and signed the rules in July of 1996. A copy of these rules was routinely included in later annual commission reports.

7. During my tenure as commissioner, I relied on Montana Compact Commissioners Gary Fritz and, later, Jack Stults, to inform me of circumstances in Montana that could affect administration of water in Wyoming pursuant to the compact. When Montana raised issues, its commissioners did use me as the point of contact, except in those instances when we authorized our staffs to communicate with each other directly.

8. As Wyoming State Engineer I was responsible for administration of water rights in accordance with the prior appropriation doctrine and for regulating the delivery of water to fulfill Wyoming water rights statewide. I carried out these duties with the help of personnel of my office who are stationed throughout the state and in Cheyenne. The Tongue and Powder River basins are entirely within Wyoming Water Division II. The superintendent, hydrographers, and commissioners of Water Division II were not authorized by law, or by me, to regulate or administer the water rights of the Tongue and Powder River basins outside the State of Wyoming. While the staff worked with Montana water officials on occasion when adjudicating water rights for points of diversion in Wyoming that ultimately delivered water via interstate ditches for use in Montana under Article VII of the compact, the Wyoming superintendent, hydrographers, and commissioners did not administer the diversion of water to those ditches and canals once the water crossed into Montana.

9. While I was State Engineer, the State of Wyoming did not appropriate funds for the purpose of compensating state employees to administer water rights in the State of Montana and did not authorize its officers or employees, by statute or otherwise, to administer water rights in Montana. Unless authorized by me to cooperate with Montana water officials with respect to issues involving interstate ditches or canals, or to accompany Montana water officials on joint inspection visits of Montana facilities, Wyoming hydrographers, commissioners, and superintendents should not have entered Montana to perform any official functions there, and I am not aware of that happening while I was State Engineer and compact commissioner.

Dated this 9<sup>th</sup> day of September, 2011.

  
Gordon W. Fassett

STATE OF WYOMING    )  
  ) ss  
COUNTY OF LARAMIE )

The foregoing Affidavit of Gordon W. Fassett in Support of Wyoming's Motion for Partial Summary Judgment was subscribed and sworn to before me, a notary public, by Gordon W. Fassett this 9<sup>th</sup> day of September, 2011.

Witness my hand and official seal.



  
Notary Public

My Commission Expires: 1.23.2012