

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.

---

Before the Honorable Barton H. Thompson, Jr.  
Special Master

---

**MONTANA'S RESPONSES TO WYOMING'S  
SECOND SET OF INTERROGATORIES**

STEVE BULLOCK  
Attorney General of Montana  
JENNIFER ANDERS  
Assistant Attorney General  
ANNE YATES  
Special Assistant Attorney General  
215 North Sanders  
Helena, Montana 59620-1401

JOHN B. DRAPER\*  
JEFFREY J. WECHSLER  
Special Assistant Attorneys General  
MONTGOMERY & ANDREWS, P.A.  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
*\*Counsel of Record*

November 2, 2012

Plaintiff the State of Montana ("Montana") hereby responds to Wyoming's Second Set of Interrogatories to Montana ("Second Set of Interrogatories"). Responses are being made subject to Montana's Objections to Wyoming's Second Set of Interrogatories to Montana and Wyoming's First Request for Admissions ("Montana's Objections"), and subject to further objections as set forth below.

**I. WHEN DO YOU CLAIM WYOMING IS LIABLE TO MONTANA?**

**INTERROGATORY NO. 2-1<sup>1</sup>:** For each year in which Montana claims it made a call on Wyoming other than 2004 and 2006, please identify what part of each water year you claim Wyoming was subject to the call.

**ANSWER:** As explained by the Special Master, "the notice or call does not need to be instantaneous in order to provide Montana with the right to pursue damages for any violation of Article V(A)." Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirement for Damages) at 16 (Sept. 28, 2012) ("Memorandum Opinion"). Montana claims that Wyoming was subject to the calls made in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 to the full extent allowed by the Memorandum Opinion.

**II. WHO DO YOU CLAIM WAS DAMAGED?**

**INTERROGATORY NO. 2-2:** For each year in which Montana claims it made a call on Wyoming, please identify the Montana water users with pre-1950 water rights who you claim were not receiving water that they were entitled to under the Compact.

---

<sup>1</sup> In order to differentiate from Montana's responses to Wyoming's First Set of Interrogatories, Montana will designate each of the interrogatories in Wyoming's Second Set of Interrogatories with the prefix "2-". For example, Interrogatory No. 1 in Wyoming's Second Set, will be designated Interrogatory No. 2-1.

**ANSWER:** Montana objects to Interrogatory No. 2-2 to the extent that it seeks expert analysis, work product, and testimony prior to the date designated for disclosure of expert reports in CMP No. 1. Subject to and without waiving this objection, Montana states that it is the State of Montana, and not individual water users that is entitled to receive water under the Compact. Without admitting that individual water users who were not receiving water is a relevant inquiry at this stage of the proceedings, Montana further states that it did not receive sufficient water in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 to satisfy its pre-1950 water rights in the Tongue and Powder Basins. Montana is in the process of investigating the specific water rights that did not receive water, and it will disclose the results upon completing its investigation.

### **III. WHO DO YOU CLAIM IS RESPONSIBLE?**

**INTERROGATORY NO. 2-3:** For each year in which Montana claims it made a call on Wyoming, please identify which Wyoming water users with post-1950 water rights you claim Wyoming should have regulated to provide water that Montana water users were entitled to under the Compact.

**ANSWER:** Montana objects to Interrogatory No. 2-3 to the extent that it seeks expert analysis, work product, and testimony prior to the date designated for disclosure of expert reports in CMP No. 1. Subject to and without waiving this objection, and without admitting that Interrogatory No. 2-3 seeks information that is relevant, Montana states that Montana is in the process of investigating the post-1950 uses in Wyoming that were diverting water in 1987, 1988, 1989, 2000, 2001, 2002, and 2003. In general, information on Wyoming water users and diversions is more readily available to Wyoming than to Montana.

**IV. WHAT DID YOU DO TO REGULATE YOUR WATER USERS BEFORE MAKING A CALL?**

**INTERROGATORY NO. 2-4:** For each water year in which Montana claims it made a call on Wyoming, please describe the intrastate actions you took to investigate and regulate post-1950 water rights on the Tongue and Powder rivers to satisfy pre-1950 water rights before making calls on Wyoming.

**ANSWER:** Montana objects to Interrogatory No. 2-4 as vague and ambiguous due to the use of the terms "intrastate actions" and "investigate and regulate post-1950 water rights," and further objects to Interrogatory No. 2-4 as overly broad. Subject to and without waiving these objections, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 11, 12, 13, 14 and 15 of Wyoming's First Set of Interrogatories to Montana. Montana further states that it monitors the water use on the Tongue and Powder Rivers and the water level of the Tongue River Reservoir. Based on information available in each of the years at issue, including streamflow data, communications with water users, and water use, it concluded that it was not receiving sufficient water to satisfy its pre-1950 water uses.

**V. WHAT LANDS ARE IN DISPUTE?**

**INTERROGATORY NO. 2-5:** Please identify the "new lands" in Wyoming that you claim are being irrigated in violation of the Compact or which you claim are being improperly irrigated with a pre-1950 priority date.

**ANSWER:** Montana objects to Interrogatory No. 2-5 to the extent that it seeks expert analysis, work product, and testimony prior to the date designated for disclosure of expert reports in CMP No. 1, and further objects to Interrogatory No. 2-5 to the extent that it seeks information that is more readily available to Wyoming than to Montana. Subject to, and without waiving,

these objections, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 2 and 4 of Wyoming's First Set of Interrogatories to Montana.

**VI. IF YOU CAN'T ANSWER THESE QUESTIONS, EXPLAIN WHY.**

**INTERROGATORY NO. 2-6:** If you failed to answer any of the foregoing interrogatories on the grounds that you lack sufficient information or knowledge, please explain the investigation you engaged in before offering that answer.

**ANSWER:** Montana did not neglect to respond to any of the interrogatories in Wyoming's Second Set of Interrogatories on the grounds that it lacks sufficient information or knowledge.

**VII. IF YOU DO NOT ADMIT THAT PRE- AND POST-1950 WATER USERS IN MONTANA HAVE HISTORICALLY SHARED WATER WITHOUT REGARD TO THE DATE OF PRIORITY, EXPLAIN WHY.**

**INTERROGATORY NO. 2-7:** If you denied any of Wyoming's First Request for Admissions accompanying these interrogatories, please explain the basis for the denial.

**ANSWER:**

Request for Admission No. 1: Montana objects to Interrogatory No. 2-7 as it applies to Request for Admission ("RFA") No. 1 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 11, 12, 13, 14 and 15 of Wyoming's First Set of Interrogatories to Montana. In 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Request for Admission No. 2: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 2 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana

states that as explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

Request for Admission No. 3: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 3 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 12, and 15 of Wyoming's First Set of Interrogatories to Montana. In 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Request for Admission No. 4: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 4 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

Request for Admission No. 5: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 5 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water

rights in the Tongue River Basin in Montana. Montana is not currently aware of any post-1950 water rights that "continued to use water" from the Tongue River after May 18, 2004.

Request for Admission No. 8: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 8 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that "shared water with water users holding post-1950 water rights" in the Tongue River in 2004.

Request for Admission No. 10: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 10 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that "shared water with water users holding post-1950 water rights" in the Tongue River in 2006.

Request for Admission No. 11: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 11 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any post-1950 water rights that "continued to use water" from the Tongue River after July 28, 2006.

Request for Admission No. 13: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 13 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental

answers to Interrogatory Nos. 10, 12, and 15 of Wyoming's First Set of Interrogatories to Montana.

As explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 1987, 1988, 1989, 2000, 2001, 2002, and 2003, Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Request for Admission No. 14: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 14 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 12, and 15 of Wyoming's First Set of Interrogatories to Montana.

As explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 1987, 1988, 1989, 2000, 2001, 2002, and 2003, Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

Request for Admission No. 15: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 15 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.



Montana is not currently aware of any post-1950 water rights that "continued to use water" after the periods that "Wyoming was subject to a call."

Request for Admission No. 16: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 16 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana. Montana is not currently aware of any post-1950 water rights that "continued to use water" after the periods that "Wyoming was subject to a call."

Request for Admission No. 17: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 17 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that "shared water with water users holding post-1950 water rights" in the Powder River in 1987, 1988, 1989, 2000, 2001, 2002, and 2003.

Request for Admission No. 18: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 10 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that "shared water with water users holding post-1950 water rights" in the Tongue River in 1987, 1988, 1989, 2000, 2001, 2002, and 2003.

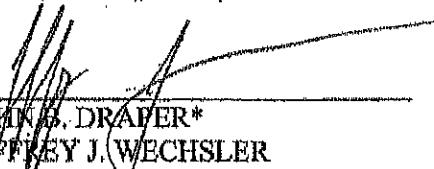
**INTERROGATORY NO. 28:** If you did not admit or deny any of the Requests for Admissions accompanying these interrogatories because you lack sufficient information or knowledge, please explain the investigation you engaged in before offering that answer and when you expect to have sufficient information to admit or deny the request.

**ANSWER:** Montana did not respond to any of the Requests for Admission on this basis.

Respectfully submitted,

STEVE BULLOCK  
Attorney General of Montana

JENNIFER ANDERS  
Assistant Attorney General  
ANNE YATES  
Special Assistant Attorney General  
215 North Sanders  
Helena, Montana 59620-1401


  
JOHN B. DRAFER\*  
JEFFREY J. WECHSLER  
Special Assistant Attorneys General  
MONTGOMERY & ANDREWS, P.A.  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
*\*Counsel of Record*

**VERIFICATION**

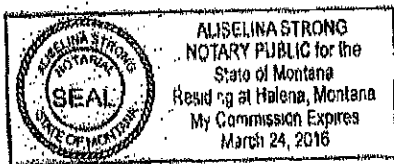
STATE OF MONTANA            )  
  : ss.  
County of Lewis and Clark    )


**MARY SEXTON**, being first duly sworn upon oath, deposes and says:

I am Mary Sexton, the Director of the Montana Department of Natural Resources and Conservation. I have reviewed Montana's Responses to Wyoming's Second Set of Interrogatories, and I hereby confirm that they have been prepared under my direction and are true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
MARY SEXTON

Subscribed and sworn to before me this 2nd day of November, 2012.



  
\_\_\_\_\_