

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

**RESPONSE IN OPPOSITION TO WYOMING'S MOTION IN LIMINE TO
LIMIT THE PRESENTATION OF EVIDENCE TO NINE YEARS**

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**Counsel of Record*

October 7, 2013

Montana hereby submits this Response in Opposition to Wyoming's Motion in Limine to Limit the Presentation of Evidence in this Case to the Nine Years that Survived Wyoming's Initial Summary Judgment Motion ("Motion"). Wyoming requests the Court to limit the presentation of evidence to nine years, specifically 1987-1989, 2000-2004, and 2006. Motion at 2-3. Wyoming asserts that this limitation is proper, because the Special Master ruled that Wyoming is entitled to partial summary judgment precluding Montana from claiming damages or other relief for other years. The Motion is without merit and should therefore be denied.

ARGUMENT

Wyoming's request is overly broad and without merit. The Motion fails for several reasons. First, information related to other years is relevant to issues other than "damages or other relief." Second, this is not a jury trial, and thus the admission of evidence does not have the potential to confuse or mislead a jury sitting as factfinder. Rather, the Special Master has an obligation in a case of original jurisdiction to provide the Supreme Court with a complete record. Third, a motion in limine is not appropriate for resolution of a substantive issue. Fourth, Wyoming fails to recognize the distinction between establishing a Compact violation for purposes of prospective relief and establishing the size of the violation for purposes of retrospective relief. For all of these reasons, among others stated herein, the Motion should be denied.

I. Evidence of Other Years Is Relevant to Issues Aside from Damages

The Motion ostensibly requests the Special Master to exclude any and all evidence relating to any year other than 1987-1989, 2000-2004, and 2006 ("Other Years"). Wyoming bases its request on its assertion that Montana is limited to seeking damages or other relief only in years in which Montana provided notice that it was not receiving adequate water. Motion at 2.

However, Wyoming fails to recognize that evidence of Other Years is relevant to issues other than damages or other retrospective relief.

The general rule is that relevant evidence is admissible. Fed. R. Evid. 402. “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. Notably, evidence of Other Years is relevant to preceding and subsequent years in which the Special Master determines Montana will have the opportunity to establish a violation (“Violation Years”). Such evidence will provide information necessary for comparison to Violation Years. Thus, evidence related to Other Years will have a tendency to make a consequential fact more or less probable than it would be without such evidence.

For example, data regarding stream flows in Other Years will provide context for data regarding stream flows in Violation Years. In addition, data from Other Years is necessary to establish the level of water use in each state on an annual basis. Evidence of Other Years will also illustrate the history of events and circumstances, including disputes with Wyoming, which led Montana to make calls. Indeed, such evidence has a tendency to prove or disprove whether and why Montana did make a particular call. Similarly, evidence pertaining to coalbed methane (“CBM”) produced water is relevant to subsequent years in which impacts on surface water may occur. See Memorandum Opinion of the Special Master on Wyoming’s Motion for Summary Judgment at 26 (Sept. 16, 2013) (“2013 Memorandum Opinion”). In sum, evidence of Other Years will establish why Montana acted as it did and illustrate the relief necessary to ensure that Montana receives the water to which it is entitled under Article V(A).

II. The Admission of Evidence of Other Years is Appropriate in This Original Jurisdiction, Non-Jury Trial

The purpose of a motion in limine is to obtain a ruling in advance of trial on the admissibility of evidence that could confuse or mislead the factfinder. See Fed. R. Evid. 402; Fed. R. Evid. 403; see also, *e.g.*, *Gold v. State Farm Fire & Cas. Co.*, Civil Action No. 10-cv-0825-RBJ-MJW, 2013 WL 1910515, at *6 (D. Colo. May 8, 2013). Such determinations are usually deferred until trial so that questions regarding the evidence may be resolved in the proper context. See *Gold*, 2013 WL 1910515, at *6. This is particularly true when the moving party fails to precisely identify the evidence sought to be excluded, as is the case with Wyoming's Motion. *Capplanco Eleven, Inc. v. Xerox Corp.*, No. 88 C 8565, 1990 WL 51892, *1 (N.D. Ill. Apr. 12, 1990) ("It is inappropriate to exclude evidence as irrelevant without the context of trial, particularly where the movant does not precisely identify the evidence sought to be excluded.")

In the overwhelming majority of circumstances, the exclusion of evidence is warranted only when a jury is sitting as factfinder. See Fed. R. Evid. 104, Advisory Committee Notes, 1972 Proposed Rule (recognizing that "the exclusionary law of evidence" is "the child of the jury system") (internal quotation marks and citation omitted); see also 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2885, at 623 (2012) ("In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence.") This case is not a jury trial; it is an original proceeding before the United States Supreme Court, which has been assigned to a special master for the purpose of creating a complete record and making recommendations to the Supreme Court. Under these circumstances, excluding evidence would deprive the Court of a complete record necessary to resolve complex and important issues between two sovereign States.

Further, there is no danger of misleading the Special Master or the Court, and thereby causing prejudice. A special master is like a judge—capable of viewing the evidence without being confused or misled. In other words, neither the Special Master nor the Court is susceptible to confusion of the issues or persuasion “by illegitimate means.” See 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5215, at 275, 279 (1978) (“‘Prejudice’ is not an inherent feature of the evidence but a description of the way the jury will respond to it.”) In this proceeding, no such danger exists because the fact-finder is not a jury, but rather the Special Master. It is therefore not imperative that a determination be made regarding qualifications or reliability. See *id.*

As Special Master Kayatta explained in *Kansas v. Nebraska & Colorado*, discussing the need for pretrial *Daubert* motions:

“[W]ere this a jury trial we were approaching, that’s something I would have -- I would give very significant weight to. Here though, not only is it a nonjury proceeding, but it’s also a proceeding where part of my job is not just to be the trial judge, but also to compile a record for independent review of my recommendations. So I would be very surprised if there were a *Daubert* issue that could be raised prior to trial that would cause me to strike a witness’s testimony and not even have it presented at trial. It seems to me a much more efficient manner to proceed is bring the expert, put him on, make the *Daubert* and other objections; and I can then share my views both on the *Daubert* issue and on what I think of the expert testimony as well.” Transcript, Telephone Conference before Special Master William J. Kayatta, Jr., *Kansas v. Nebraska & Colorado*, Orig. No. 126, at 62:20-63:13 (Mar. 23, 2012).

Special Master Kayatta went on to explain that his reticence to entertain *Daubert* motions rested on “the structure of this proceeding and given what would be [his] caution in constructing a record that allows the Court to make an independent judgment, if it should disagree, and not wanting to have a path unnecessarily cut off that would require a remand.” *Id.*, at 63:15-21; see, e.g., *United States v. State of Wyoming*, 331 U.S. 440, 459-61 (1947) (remanding to allow the special master to take evidence regarding good

faith, which had been erroneously excluded). The same circumstances exist here and warrant denial of Wyoming's Motion.

Wyoming contends that it will be prejudiced by Montana's presentation of evidence related to Other Years because the parties limited their discovery to 1987-1989, 2000-2004, and 2006. Motion at 3-5. On this basis, Wyoming requests the Special Master to require Montana to identify which of its exhibits on its exhibit list should be eliminated. *Id.*, at 5. Wyoming's request ignores the fact that all of the documents identified in Montana's exhibit list have been produced in the discovery process. Wyoming further ignores the fact that an overwhelming number of the approximately 445 exhibits identified on its exhibit list apparently are not limited to 1987-1989, 2000-2004, and 2006. Thus, Wyoming's protests in this regard are puzzling at best. Wyoming has had a full opportunity to review the exhibits, which were produced in discovery, and to conduct additional discovery accordingly.

III. A Motion in Limine Is Not Appropriate for Resolution of a Substantive Issue

Wyoming's Motion is a substantive, dispositive motion cloaked as a procedural motion in limine. The Motion rests on the assumption that notice is required to establish liability for a Compact violation. As the Special Master has recognized, this issue has not been decided. See 2013 Memorandum Opinion at 16. Montana respectfully submits that a motion in limine is not an appropriate vehicle for determining this dispositive question. See *Pellegrini v. Weiss*, 165 Cal. App. 4th 515, 530 (Cal. Ct. App. 2008) ("Generally speaking, in limine motions are disfavored in cases in which they are used not to determine in advance the court's projected ruling if presented with an evidentiary objection during trial, but instead to serve as a substitute for a dispositive statutory motion.") See generally William D. Rehwald, *The Unfortunate Use of Motions in Limine as Dispositive Motions*, 31-DEC L.A. Law 11 (Dec. 2008) (discussing the

problems inherent in using a motion in limine to decide a dispositive question). This is true because the nonmoving party is not allowed the ordinary protections provided for a party in addressing a substantive issue, such as adequate time to research and draft a response. See *Pelligrini*, 165 Cal. App. 4th at 530. Such is the case here.

Notably, Montana has not had an opportunity to brief the issues related to liability, including notice, for years in which it did not seek damages. As is evident from the briefing on Wyoming's Motion for Summary Judgment, the focus was on establishing notice for years in which Montana was seeking damages. Montana should have the opportunity at trial to present its argument and evidence regarding merits of issues that were not directly addressed prior to trial, including whether Wyoming had notice of water shortages caused by its post-1950 uses and resulting in a failure to satisfy Montana's pre-1950 rights. The dispositive issue of whether notice is an aspect of liability and not just damages can be addressed in post-trial briefing and resolved by the Special Master in his Report. There is no justification for limiting evidence at trial, and thereby narrowing the record before the Court, at this time.

IV. The Special Master's Identification of Specific Years Concerned Only the Issue of Retrospective Damages

The Special Master's ruling regarding 1987-1989, 2000-2004, and 2006, was made with respect to retrospective damages, that is, compensation for past violations in the form of dollars and/or water. See Memorandum Opinion of the Special Master of Wyoming's Motion for Partial Summary Judgment (Notice Requirements for Damages) at 1 (Dec. 20, 2011) ("2011 Memorandum Opinion") (stating that "Wyoming raised the issue of whether Montana *can claim damages* for years in which it did not notify Wyoming . . .") (emphasis added); *id.*, at 3 ("I conclude that, for periods when data was not available to Wyoming regarding the extent of Montana's pre-1950 appropriations, Montana generally should not be entitled to damages . . .");

id., at 4 (“[P]rior appropriation law typically requires a call as a prerequisite for a damages action.”) This premise is highlighted by the Special Master’s modification of the title to the 2011 Memorandum Opinion, resulting from Montana’s comments to the draft 2011 memorandum opinion. By letter of November 11, 2011, Montana suggested that confusion between liability and damages, which could result by using the word “Liability” in the title parenthetical of the draft opinion, would be avoided by changing the parenthetical to “Notice Requirements for Damages.” Letter, John B. Draper to the Special Master at 1-2 (Nov. 11, 2011). The Special Master subsequently changed the title of the 2011 Memorandum Opinion as suggested, thereby recognizing that his ruling pertained to damages, and not liability.

The Special Master further recognized that although Montana would not be allowed to seek damages for those years in which it had not presented sufficient evidence regarding the size of a violation, evidence of Other Years could be presented at trial to establish that a violation had occurred, in support of a future request for prospective relief. 2013 Memorandum Opinion at 28-29. This determination was confirmed in the Special Master’s Clarification Regarding Memorandum Opinion of September 16, 2013 on Wyoming’s Motion for Summary Judgment (Sept. 19, 2013). Therein, the Special Master stated “that Wyoming is not entitled to summary judgment on the question of whether there were violations in [Other Years]. Montana thus can present evidence on this question at trial.” *Id.*, unnumbered ¶ 1 (stating that Montana would be “free to use any finding of liability for other purposes – for example, to argue for any appropriate prospective relief”). Thus, the Special Master concluded that “Montana could potentially prove at trial that violations of the Compact occurred for the other years.” *Id.*, unnumbered ¶ 2; see also *id.*, unnumbered ¶ 3 (“Montana has presented sufficient evidence *for summary judgment purposes* regarding all three essential facts.”).

The importance of providing the Court with a complete record is highlighted by the issues raised in this Motion. Notably, Wyoming's Motion for Summary Judgment was briefed and resolved prior to the time that Montana's expert Dale Book had completed his expert report regarding, *inter alia*, the comparison of stateline flow to direct flow demand in Montana. In Table 5 of Mr. Book's report, the stateline flow is set out annually for each month during the irrigation season. Mr. Book's comparison reveals that in numerous years, stream flow at the stateline was significantly lower than the 200 cfs needed to satisfy even the two most senior pre-1950 rights. Other evidence, such as the 1914 Miles City Decree, reveals that Wyoming knew that the direct flow demand for the two most senior pre-1950 direct flow rights in Montana is approximately 200 cfs. Further evidence reveals that during those times Wyoming was not regulating pre-1950 use on the main stem of the Tongue River. This evidence is sufficient for a factfinder to determine that a Compact violation occurred. Indeed, it is exactly this type of evidence that falls within the second exception identified by the Special Master in the 2011 Memorandum Opinion: "Montana should be free to pursue damages or other relief, despite its failure to provide notice to Wyoming, during any period when Wyoming had other sufficient reason to believe or know that insufficient water was reaching Montana to satisfy Montana's pre-1950 appropriative rights." 2011 Memorandum Opinion at 9.

Moreover, Wyoming failed to timely provide documents highly relevant to Wyoming's knowledge of water shortages to Montana in Other Years. Remarkably, on June 17, 2013 – nearly nine months after the Special Master's September 28, 2012 ruling on Wyoming's Renewed Motion for Summary Judgment – Wyoming produced handwritten notes by Wyoming's John Buyok, recording his conversation of May 14, 1981 with Montana State Engineer Gary

Fritz regarding shortages at the Tongue River Reservoir. See Exhibit 1, at WY048190, attached hereto.¹ Therein, Mr. Buyok states:

“Mr. Fritz then asked if we would be willing to regulate the post ‘39 Wyoming rights and I told him we probably wouldn’t. We discussed the compact and the minutes. Mr. Fritz said that he felt the compact wasn’t very useful for administration because of the point of measurement on the main stem which he feels should be located at the state line. He said that he thinks it would be possible under the present compact for Wyoming post ‘50 rights to be satisfied while pre ‘50 rights in Montana were experiencing a shortage.

. . . . He also asked if our position would be the same for post ‘50 rights as it is for pre ‘50 rights. I said that I thought it would” *Id.* WY048190-WY048191.

This document indicates that in 1981 Wyoming was aware Montana was short water for its pre-1950 uses and that Wyoming contended at that time it was not required to regulate its post-1950 uses for the benefit of Montana’s Article V(A) rights. This is highly relevant to the issue of liability for Compact violations, in addition to other issues as explained above. The Court is entitled to have a complete record with evidence such as the foregoing, particularly when it is reviewing decisions that were made prior to the time such information was made available by the moving party.

Montana notes that the above argument is not an attempt to argue the merits of the notice issue concerning Other Years, but rather to simply highlight the importance of admitting such evidence to provide the Court with a complete record. Importantly, regardless of whether the

¹ The documents produced by Wyoming on June 17, 2013, are directly responsive to category “G. *Written Communications Between the States*” in the Joint Document Production Order at 4, which requires the production of all documents relating to communications between the States regarding the Tongue River *inter alia*, including but not limited to “communications on Water Rights, calls, requests or notifications for curtailment or other regulation of Water Rights, shortages of water, water level or streamflow, drought, rainfall, Compact administration or interpretation, or water needs in either State.”

The same documents are directly responsive to Montana’s Interrogatory No. 71, served May 4, 2012, which in pertinent part asks Wyoming to identify any document related to Montana employees notifying Wyoming employees that one or more Montana water rights in the Tongue River were not being fully satisfied. See Exhibit 2 at 52, attached hereto.


Court determines that a Compact violation has occurred, evidence of Other Years is relevant to determining whether, why, and in what form Montana is entitled to prospective relief.

CONCLUSION

For all of the reasons stated herein, the Motion should be denied.

Respectfully submitted,

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CORY J. SWANSON
Deputy Attorney General
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Assistant Attorney General
ANNE YATES
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**Counsel of Record*

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STATE OF MONTANA,

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Defendants.

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

CERTIFICATE OF SERVICE

I certify that a copy of Montana's Response in Opposition to Wyoming's Motion in Limine to Limit the Presentation of Evidence to Nine Years was served electronically, and by U.S. Mail on October 7, 2013, to the following:

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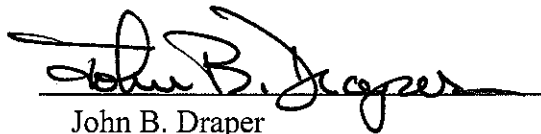
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I further certify that all parties required to be served have been served.


John B. Draper



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Matthew H. Mead

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June 17, 2013

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Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, NM 87501

Re: MT v. WY
Case No. 137

Dear Jeff,

Enclosed please find Bates stamped documents WY47603 through 48207, which include the two newly discovered files we discussed today. Please let me know if you have any questions or concerns about the content of these files.

Sincerely,

A handwritten signature in black ink, appearing to read "James Kaste".

James Kaste
Senior Assistant Attorney General

cc: Cory Swanson
John Draper
Jennifer Verleger
Jeanne S. Whiteing w/o CD
James Dubois w/o CD
Solicitor General of the United States w/o CD
Michael Wigmore w/o CD

EXHIBIT 1

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
WATER RESOURCES DIVISION



TED SCHWINDEN, GOVERNOR

32 SOUTH EWING

STATE OF MONTANA

(406) 449-2872 ADMINISTRATOR
(406) 449-2864 ENGINEERING BUREAU
(406) 449-3760 WATER DEVELOPMENT BUREAU
(406) 449-2872 WATER MANAGEMENT BUREAU
(406) 449-3962 WATER RIGHTS BUREAU

HELENA, MONTANA 59620

*File
PAULS
John S - SB
file - Tongue*

May 4, 1982

George Christopoulos
State Engineer's Office
Cheyenne, Wyoming 82002

Dear George:

We had discussed last year the need to address the problems of interstate regulation of the Tongue River. The more urgent need to come to an agreement on an enlarged Tongue River Reservoir water supply has overshadowed the regulation question. I suggest we postpone further discussion of that question until we have the resources to deal with it properly.

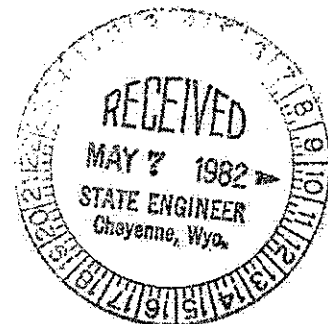
Sincerely,

Gary

Gary Fritz
Administrator

cc: Grady Moore

No. 137, Orig.
Ex. M 136



"AN EQUAL OPPORTUNITY EMPLOYER"

WY048184

Page Nos. In Compact Commission
minutes

Page 2 Feb 1952 1950 meeting Principles
Page 6 Final decision Little Horn
Page 9-10 Little Big Horn

Oct 24-25, 1950 meeting

Page 6-7 page 10 Nov 2 Little Big Horn
Page 3
Page 17 Article V page 16 Little Big Horn

Dec 7-8 1950 Meeting

Page 4

1775 AD
1776 AD
1778 AD

Page 15 Oct 24-25
meeting

5/21/1961

Chap. 1-12 - Memoranda written

on the inter-tribal relations presented

in Memorandum Book 1950 on Sal. Sta.

Wapinitia & also over front

1950 rights in Wino the regulation

for Members 1954 rights

could have be used to be into them

discovery from the front

got back to from by the front

G.L.C.

George,

Thursday 11:00
4:30

Gary Fritz, Natural Resource
Department, in Helena Montana
406-449-2872, called
regarding the management of
the Tongue River under the
Yellowstone Compact. The
Tongue River Reservoir, with
priority of 1939 is low in
storage 20,000 acre feet due
to safety problems. Montana
is wondering if the junior
to 1950 rights in Wyoming can
be regulated to provide water
to supply Tongue River Res.

He would like you to call
him at your earliest convenience.

Thanks

W.A.

Wooded cove'd Rights
 Main stem of Tongue River and Main stem
 of major tributaries
 Total feet 50
 Tongue River 10 rights 7000 ft
 Big Goose Creek 11 rights 4200 ft
 Little Goose Creek 4 rights 14700 ft
 Soldier Creek 1 right 9000 ft
 Prairie Dog Creek 3 rights 12840 ft
 36570 ft
 29600 ft

George,

I called Gary Fite Thursday afternoon and talked to him about regulation of the Targus River. He wants to talk to you about it so I told him that you would call the afternoon of Friday the 15th or on Wednesday the 20th. He said that he would call here on Wednesday if he doesn't hear from us.

John Ruyok

406-449-2872

Post 50 rights to be satisfied while
the present compact for Wyoming
thinks it could be possible under
the state line. He said that he

which he feels should be located at
point of measurement on the main stem
for administration because of the
the fact the compact was not very useful

and the merits. Mr. Fritz said that
was done. We discussed the compact
rights and I told him we probably
willing to negotiate the post of Wyoming

Mr. Fritz then asked if we would like
rights.

to the 1870's or 1880's and that
that Paul Kovich was negotiating about
rights were shut down. I also mentioned
and only about 20 left all post 50

if all post 30 rights were shut down
negotiation would only be about 50 left
rights with Mr. Fritz and explained that
I discussed the attached list of water

Telephone conversation with Gary Fritz
Montana Dept of Natural Resources
Re: Negotiation for Tongue River Reservoir
May 14 1981 3:00 pm
John Pappik

pre-50 rights in Montana were experiencing a shortage.

He asked me why I thought that there shouldn't be interstate regulation by priority and I told him what I'd found in the minutes. He said that a Montana lawyer had gone through the minutes and concluded that Montana had won the point and that interstate regulation by priority was intended. He also asked if our position would be the same for post-50 rights as it is for pre-50 rights. I said that I thought it would but that he should talk to GLL. He said that he definitely thought that regulation of post-50 rights was necessary to make the Compact work. He also mentioned that Montana + Wyoming should sit down together and interpret the Compact to try to agree on what it says. In his opinion, the Compact may have to be renegotiated to clear up the language and make it usable.

I told him that GLL would call

him on Friday the 20th or Wednesday
the 30th. He said that he would call
back on Wednesday if he doesn't hear
from me.

I also sent him a copy of the
Division Two tabulation book.

5/7/81

Gary Fritz Discussed whether
or not water rights pre-1950
in Wyoming, Post 1939 could be
regulated & also can post
1950 rights in Wyo be regulated
for Montana 1979 rights.

Told him we would like into this
discuss w/ Paul K. & try to
get back to him ^{letter post} next week.

GCL

Gary Fritz
Dept. of Natural Resources and Conservation
32 South Ewing
Helena, Mont.

59620

Yellowstone River Compact Negotiations

Feb. 1-2, 1950 Meeting Minutes, pg. 3

Mr. Person of Wyoming suggested two principles to be followed:

- 1) Existing rights shall be recognized and remain unimpaired
- 2) The appropriated unused water shall be divided on the basis of potential development

When asked if interstate priorities should be considered, he replied they should not.

pg. 5

Montana proposes consideration of rights on the stream in terms of priority without respect to state law.

Oct. 24-25, 1950 Meeting Minutes pg. 6-7

There was considerable discussion about existing rights and how to administer them. It was argued that interstate administration would be expensive and difficult and would not be justified by the benefits obtained. Montana favored an Administrative Commission and Wyoming preferred to have existing rights administered under state law.

pg. 12

More discussion on administration with both Wyoming and Montana holding their positions.

pg. 17

Montana moved to amend Article II to include the phrase "including the principle of priority regardless of state law." The motion was modified to eliminate the amendment to the language and the motion was passed. (Copy attached)

In reading through the minutes, it appears that Wyoming and Montana argued the matter of interstate priorities several times and that Montana finally agreed to leave interstate administration on a priority basis out of the Compact.

George,

Thursday 11:00
4:30

Gary Fritz, Natural Resource
Department, in Helena Montana
406-449-2372, called
regarding the management of
the Tongue River under the
Yellowstone Compact. The
Tongue River Reservoir, with
priority of 1939 is low in
storage 20,000 acre feet, due
to safety problems. Montana
is wondering if the junior
to 1950 rights in Wyoming can
be regulated to provide water
to supply Tongue River Res.
He would like you to call
him at your earliest convenience.

Thanks

W.A

WY048197

Article V: It was suggested that the article in the Engineering Committee report be substituted for Article V. There was discussion on this article and of Article III of the Leonard draft, principally paragraph 2 thereof. There was discussion of the language, the theory of Doctrine of Appropriation, and whether adding separate reference to the use of priorities in single streams regardless of state lines materially affected the sense of the paragraph. Mr. Leonard moved that paragraph 2 of Article III of the Leonard draft, with suggested modifications, be substituted for Article V of the Burke draft. The motion was seconded and after discussion, withdrawn. Mr. Bunston moved that the Engineering Committee should use in its draft the language in the Burke draft which appears as the first paragraph under the discussion of Tongue River, for each of the interstate tributaries included in the Compact, with this amendment: to strike the period after "appropriations" add a comma and "including the principle of priority, regardless of state line". Motion was seconded by Mr. Jones. There was discussion following which the motion was modified to eliminate the amendment to the language. The motion was passed.

It was moved, seconded, and carried to include as a separate article of the Compact, the following:

"No sentence, phrase, or clause in this Compact, or in any provision thereof, shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact."

Article V (D): It was agreed that the percentages agreed to in February, and with respect to the Bighorn determined from the addendum to the engineering report, would be used.

Article VI: Agreed to eliminate.

Article VII: Mr. Humpherys read the following language which he had been authorized by the Commissioner of the Bureau of Indian Affairs to propose.

"Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian Tribes and their reservations."

It was moved, seconded, and carried that the language be adopted.

No. 137, Original

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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 FIRST SET OF INTERROGATORIES, FIRST SET OF
REQUESTS FOR PRODUCTION, AND FIRST SET OF REQUESTS FOR
ADMISSION TO WYOMING**

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INTERROGATORY 71:

Is the State of Wyoming aware of any fact, observation, document, or item of evidence that tends to show that in any year(s) other than 2004 or 2006, agents, employees or other representatives of the State of Montana, or any holder of a Montana Water Right, or any agent, employee or representative of a holder of a Montana water right notified any employee, agent or representative of the State of Wyoming that one or more Montana water users with Water Rights within the Tongue River or Powder River basins were not being fully satisfied. If your answer is anything other than an unqualified "No," then for each and every such fact, observation, document and item of evidence, state:

- a. The dates such notifications occurred;
- b. For each such notification, whether it was given to the employee, agent or representative for the State of Wyoming orally or in writing;
- c. For each such notification, the identity, including job title, of the person who notified the employee, agent or representative of the State of Wyoming;
- d. For each such notification, the identity, including job title, of the employee, agent or representative of the State of Wyoming who received the notification;
- e. A summary of the substance of each such notification, including what action was requested.
- f. Identify any documents relating in any way to your answer or response.

RESPONSE: