



# *Office of the Attorney General*

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May 9, 2014

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Re: MT v. WY: Supreme Court of the United States No. 137, Original  
**Submission of Additional Authority Following Post-Trial Arguments**

Dear Special Master Thompson:

At the post-trial hearing held in Palo Alto on May 1, 2014, you invited the parties to supply you with additional authority or record citations which may be relevant to and assist you with answering the questions you posed during the hearing. Generally, Wyoming will rely upon the considerable briefing already presented during the course of this case and the arguments it made at the hearing. This letter merely supplements those offerings with regard to two issues you referenced during the hearing.

First, with regard to post-1950 direct flow diversions in Wyoming in 2004 and 2006, you asked whether it would be appropriate for you to pro rate the total water used by those appropriations over the course of the irrigation season to determine the quantities used both before and after the call dates. The answer to your question must be no, and Wyoming provided relevant legal and record citations in its Post-Trial Brief. Wyoming's Post-Trial Brief at 57-60. Additionally, there is no evidence which supports a finding that diversions by these appropriations were made at a constant rate over the

course of each irrigation season. To the contrary, the evidence supports finding that these rights generally use more water at the beginning of each irrigation season than they use at the end of each irrigation season.

For example, in 2006, post-1950 diversions from the main stem of the Tongue River were not receiving water after July 28 due to either regulation by Wyoming's water Commissioners or lack of available flow. Tr. Vol. 10 at 2161-62. Mr. Benzel also reported regulation of the South Side Ditch which diverts from the main stem of the Tongue River, and which supplies water to Bill White's pivots identified by Montana. Ex. M449 at 3. Furthermore, in every year, the Interstate Ditch is unable to take its full appropriation of pre-1950 water rights later in the irrigation season due to dropping stream flows. Tr. Vol. 12 at 2729. As these undisputed facts illustrate, post-1950 rights in Wyoming did not divert water at a constant rate during the course of the 2004 or 2006 irrigation seasons, nor do they in any irrigation season. Accordingly, dividing the total water used by each right on a pro-rata basis over the course of the irrigation season would be arbitrary and unsupported by the evidence.

Second, a number of your questions related to Wyoming's position that Montana's failure to store wintertime flows in excess of that needed by downstream, senior rights constitutes waste under the doctrine of appropriation. In addition to the authorities Wyoming has already submitted, the United States Court of Appeals for the District of Columbia reached the following, relevant conclusion regarding the obligation of a federal Reclamation reservoir during times of water shortage:

Furthermore, the entire project has been handicapped at times by serious shortage of water. When this occurs, not only the secondary and surplus uses, but the primary ones, are jeopardized. Every reasonable measure of conservation is required to protect both and to secure the rights of individual water users. Although the doctrine of prior appropriation fixes priorities among individual appropriators in the use of water according to the maxim, *qui prior in tempore, prior in jure est*, it confers no right upon the prior appropriator to waste water. His right is qualified by the limitation, made in favor of subsequent appropriators and the widest possible use of water on arid lands, that all of the water he uses must be beneficially applied and with reasonable economy in view of the conditions under which the application must be made. Hence a use which is wasteful may be restricted in the interest of subsequent appropriators and thus of the conservation of water. Shortage makes the elimination of waste imperative.

...

Of the three reservoirs, the Minidoka Dam lies farthest downstream. There is no other below it. Water passing the dam therefore exhausts its usefulness in passing, for the entire project and for beneficial application except domestic, stock watering and municipal uses below the dam. Water passing in winter serves only to generate power at the plant for commercial sale, is useless for irrigation and pumping, and is lost therefore to the project, including Burley District, for its primary purposes. Winter flow is therefore highly wasteful.

*Burley Irr. Dist. v. Ickes*, 116 F.2d 529, 535 (D.C. Cir. 1940) (footnote omitted). Likewise, during the water short years at issue in this case, Montana's failure to store winter flow was highly wasteful.

I hope you find these citations helpful.

Respectfully,



Christopher M. Brown  
Senior Assistant Attorney General

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