

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

---

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.  
SPECIAL MASTER

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WYOMING'S BRIEF IN SUPPORT OF ITS RENEWED MOTION  
FOR PARTIAL SUMMARY JUDGMENT

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The State of Wyoming, through counsel, submits this brief in support of its renewed motion for partial summary judgment and incorporates its opening briefs by this reference.

**COURSE OF PROCEEDINGS AFTER THE SPECIAL MASTER'S  
MEMORANDUM OPINION ON WYOMING'S MOTION**

**A. Montana's Responses to Wyoming's interrogatories**

Shortly after discovery opened, Wyoming served interrogatories asking Montana to identify the dates when it thought Wyoming had violated the Compact by failing to curtail consumption of water, to identify persons that it believed had made calls for curtailment, and to provide other details about any such calls. Exh. A, Mont. Answers to Interrogs. 2a., 3c., 4f., 5d., 6d., 31. Wyoming also asked Montana to state what persons it believed were authorized to make such calls and the basis for such authority. *Id.*, Answers to Interrog. 58.

In its initial answers served on March 19, 2012, Montana only identified 2004 and 2006 as years when Wyoming violated the Compact. *Id.* 2a., 3c., 4f., 5d. However, Montana included the proviso "and possibly other years." *Id.* Montana gave no specific dates or ranges of dates when it contended the violations occurred in 2004, 2006, or other years. *Id.*

In its interrogatory 31, Wyoming asked whether Montana's agents, employees, representatives, or even private water rights holders, had made curtailment calls on Wyoming, and the particulars of such calls. *Id.* Mont. Answers to Interrog. 31. In its answer, Montana simply referred Wyoming to Richard Moy's declaration filed last fall and to a letter dated June 5, 2002, from a Roger Muggli<sup>1</sup> to Montana Attorney General Mike McGrath, that Montana claims Muggli copied to the Wyoming state engineer. *Id.*; *see also* Exh. B hereto. Otherwise, Montana did not answer Wyoming's subparts seeking particulars of any calls.

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<sup>1</sup> Roger Muggli was an irrigator with property in the T&Y Irrigation District at the extreme lower end of the Tongue River. Moy Dep. at 26:19-27:1.

In interrogatory 58 that also dealt with the call issue, Wyoming asked Montana if it intended to assert that any individual other than its Yellowstone River Compact Commissioner had authority to make a call for curtailment to Wyoming, and if so, the details of such authority. Montana answer nonresponsively by merely incorporating its answer to Wyoming's interrogatory 10, in which Montana described how individual irrigators may make intrastate calls within Montana. Exh. A, Mont. Answers to Interrogs.10, 58.

Given the June 15, 2012 deadline for renewing this motion, Wyoming deposed Mr. Moy, Montana's former compact commissioners, and others, while Wyoming waited for Montana to respond to a request to supplement its interrogatory answers.

## **B. Depositions**

Because of earlier proceedings that have established the general history and communications between the states about the Compact, Wyoming will organize its discussion of the new testimony by witness rather than within a single factual chronology.

### **1. Deposition of Richard Moy**

Wyoming first deposed Richard Moy, the water management bureau chief within the Montana Department of Natural Resources and Conservation (DNRC) from 1981 until 2008. Moy Dep. at 7:19-7:22. He served directly under the division administrator of the water resources division of the DNRC. His two immediate superiors from 1981 through 2006 were Gary Fritz followed by Jack Stults. *Id.* at 8:19-9:14; 14:21-14:23. The division administrators, in turn, served under the direct supervision of the DNRC director. Stults Dep. at 13:1-13:22 & Exh. 4 to Stults Dep. From 1981 through at least 2006, the DNRC director served directly under Montana's governor, which put Mr. Moy three steps below the governor. Exh. 5 to Stults Dep.



Mr. Moy first became involved with the Yellowstone River Compact in 1979, while he was the technical services bureau chief. Moy Dep. at 10:20-11:6. He attended his first compact commission meeting that year, along with Montana's newly appointed commissioner, Gary Fritz. 1979 Ann. Rep. at III. The Compact required the annual meetings to occur after September 30 but before the end of the calendar year. Compact Art. III.C. They generally occurred in November or December, but occasionally in early January of a following year. *See Annual Reps. at Commission website, <http://yrcc.usgs.gov>.* Mr. Moy attended the annual commission meetings in the 1980s, while he was one of Montana's technical advisors on issues arising from the Compact. Moy Dep. at 11:7-12:13; 35:5-35:10; 127:2-127:15. He left that role and lost contact with Compact issues in the 1990s, but resumed involvement in the 2000s, when working under Division Administrator and Compact Commissioner Stults. *Id.* at 12:17-12:23; 13:1-13:9. Mr. Moy disclaimed knowledge of complaints Montana may have asserted in the 1990s. *Id.* at 86:5-86:10; 97:19-97:21; 127:8-127-15.

In his declaration of September 22, 2011, Mr. Moy stated that Montana representatives complained to Wyoming about overuse of water in 2004 and 2006 "but also in other years." Moy Decl. ¶ 4. Therefore, at his deposition, Wyoming asked him: (1) whether the complaints included actual demands that Wyoming curtail diversions; (2) whether the complaints occurred during the irrigation season; (3) who made the complaints, and (4) to whom the complaints were made. Mr. Moy also raised a fifth issue during his redirect examination by asserting that he lacked authority to demand that Wyoming curtail water use. Moy Dep. at 229:15-229:20.

**a. Mr. Moy's description of Montana's complaints to Wyoming**

At the hearing on this motion on September 30, 2011, the Special Master asked counsel to describe how Montana and Wyoming historically went about trying to figure out how much

water they were entitled to under the Compact. Tr. of Hr'g Re: Wyoming's Mot. for Partial Summ. J. at 4:24-5:2. Wyoming posits that an answer to this question helps prove the negative-- what Montana did **not** communicate to Wyoming about the division of water. This approach is especially helpful for Mr. Moy's testimony because he often failed to distinguish between, on the one hand, Montana's complaints about methods of Compact administration, and, on the other, actual calls for curtailment during an irrigation season. Mr. Moy ultimately made that distinction, testifying that Montana's oral complaints in the 1980s and 2000s occurred outside of the irrigation seasons in reaction to drought but were not calls for curtailment within the irrigation seasons. Moy Dep. at 105:5-107:5.

Before reaching this testimony, Mr. Moy identified the topics that Montana and Wyoming discussed in the 1980s:

- Interpretation of Article V of the Compact;
- Middle Fork of the Powder River Reservoir project in Wyoming;
- Intake Water Company lawsuit on its request to divert from the Yellowstone River to a site outside the basin under Article X of the Compact;
- Utah International proposal to divert water for coal development;
- Energy (coal) development in general;
- Reaching agreement with Wyoming on a procedure to establish new rights on interstate ditches that divert in one state and deliver water in another.

Moy Dep. at 11:20-12:8. The compact commission's annual reports from the 1980s cover the basics of these various issues, only the first of which is relevant to the issue of curtailment calls. *E.g.*, 1980 Ann. Rep. at IV (team to study allocation issues; Intake Water Company issue). The annual reports confirm Mr. Moy's testimony that technical experts of the two states discussed

how the Compact could be practically administered. *E.g.*, 1984 Ann. Rep. at IV. The States believed they should explore potential administration protocols, because they expected coal mine development in the Yellowstone drainage to put added pressure on water supplies. Moy Dep. at 118:10-119:7; 1980 Ann. Rep. at IV.

As to Article V of the Compact, the technical experts shared concepts on how the states might employ the percentage allocations under Articles V(B) and V(C), which dealt with post-1950 diversions. *See* Doc. WY 11285; 1984 Ann. Rep. at IV; 1985 Ann. Rep. at IV; 1988 Ann. Rep. at IV-V; 1990 Ann. Rep. at IV. Mr. Moy disliked various features of Article V, including Article V(C)'s provision that unused divertible flow should be counted where the four interstate streams discharged into the Yellowstone. On November 30, 2001, he wrote the following electronic mail message to Commissioner Stults:

Jack: Just to let you know, the YR Compact contemplated large federal storage projects, like Yellowtail to be constructed at the interstate border to meet Montana's allocated share. Without such storage, the apportionment formula cannot work for Montana as it is based on diversions, not depletions; is accumulative from Oct 1 to any given time during the water year; and the apportionment occurs after the fact and at the confluence. Further, before you can divided [sic] the post-1950 water, you need a handle on pre-1950 water and that has never been done. The only reason I think Montana agreed to the compact was because of the potential in 1950 for the USBR to build large storage projects on the Powder and Tongue.

Exh. C, Doc. MT-12926; Moy Dep. at 114:3-115:14.

At his deposition, Mr. Moy emphasized that the Compact was not well crafted "period," *id.* at 115:19-115:20, and that Article V(B) cannot work. *Id.* at 122:21-124:23. However, he once believed that the problems with Article V could be overcome if Wyoming would agree to the "Dan Ashenberg protocol." *Id.* at 116:17-116:23; *see also* Fritz Dep. at 22:25-23:12. Mr. Ashenberg was a DNRC hydrologist who worked with Mr. Moy on technical issues, and his protocol would have departed from the arithmetic divertible flow formula of Article V(C) and

put more emphasis on depletions.<sup>2</sup> Exh. D Doc. WY 11285; Moy Dep. at 116:24-118:3, 194:19-197:8; 199:9-200:6; Fritz Dep. at 37:21-42:9. Wyoming ultimately rejected various Montana proposals in the 1980s, and suggested instead that Article V(B) simply be administered through the arithmetic of Article V(C). Moy Dep. at 118:1-118:3; 123:17-123:24. Mr. Moy testified that he was frustrated with Wyoming's decision. Moy Dep. at 163:12-164:2.

While the States dealt largely with V(B) and V(C) allocations in their technical discussions in the 1980s and early 1990s, the annual reports also confirm that, at a few of the commission's annual meetings, Montana's commissioner Gary Fritz expressed concerns about water availability for pre-1950 Montana rights. *See* 1982 Rep. at IV; 1983 Ann. Rep. at IV; 1992 Ann. Rep. at VI. Thus, the annual reports support Mr. Moy's very general statement in his 2011 declaration that Montana representatives "complained" to Wyoming representatives "[d]uring the period 1981-2008" about "overuse under the Compact." Moy Decl. ¶ 4.

Wyoming's counsel questioned Mr. Moy about the content of Montana's complaints, when they were made, and who made and received them. This important discussion is best understood by a complete reading of that part of his deposition. Moy Dep. at 49:20-107:5. However, several of Mr. Moy's particular statements are critical to this motion.

First, Mr. Moy testified that in its complaints, Montana sought more water from Wyoming. Moy Dep. at 105:5-106:23. But Mr. Moy meant this in the general sense of Montana complaining that without an administrative protocol Montana would not receive its share of

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<sup>2</sup>The Montana Legislature passed an act in 1953 requiring post-1950 water users on the four interstate tributaries to install measuring devices at their points of diversion, and to report resultant data to the DNRC. Mont. Code Ann. §§ 85-20-102; -105; -106. The legislature intended these statutes to allow Montana to provide the data for calculating post-1950 diversions under Article V(B). *Id.* § 85-20-102. However, as of the 1980s, and even thereafter through 2006, Montana never enforced the statute as to water rights with priorities between 1950 and 1973. Stults Dep. at 113:8-114:22. Besides Mr. Moy's other objections to Article V, the lack of post-1950 diversion data would have encouraged Montana to seek a new protocol for administering Article V(B) allocations. *See* Exh. D, Doc. WY 11285 at 5 (Ashenberg protocol: measuring and keeping accurate records of water use was the single most critical issue in administering the Compact); Fritz Dep. at 41:8-42:9.

water under Article V. *Id.* at 101:13-107:5. He stated that the complaints Montana made in the 1980s were different than the curtailment call that Montana made in May 2004. *Id.* at 101:13-105:4. When asked directly whether Montana complained for more water in the sense of a demand on Wyoming officials to curtail diversions and send more water downstream during an irrigation season, Mr. Moy denied complaints of that nature. Although he used the word “call,” he defined it to cover complaints made at annual meetings, long after the end of a water year. Moy Dep. at 105:14-106:23. He testified:

A. [Moy] Yes, but not in writing. Verbally, yes, we made the call. We asked them for water. We asked them to satisfy. But it was often to the point, because we wanted to build these administrative procedures, we wanted those procedures in place, and we wanted Wyoming to work with us on them.

Q. [Michael] But was it done in a water year at a time when Wyoming, it was irrigation season, they could cut off somebody and provide more water at the border?

A. Are you kidding me? They would never cut off any water.

Q. No, My question is was—I’m not asking you whether they would have done it or not. I’m asking was the call framed at a time when, if they had complied with it, it was irrigation season—

A. No.

Q. —and water would now come?

A. No. Because most of our meetings were not tied to the irrigation season. Most of them were tied outside of the irrigation season, as far as I know. Did Gary Fritz have direct correspondence with Jeff Fassett at the time and made that very specific in that irrigation season, you would have to ask him.

Q. That helps me, that really helps me, because I had to understand that distinction between the two. The word call, we can get lost in that word. The word call could be a telephone call, and we don’t want to use it in that way.

A. [Moy] Yeah, most everything we did we reacted to a drought situation rather than within a drought situation.

Moy Dep. at 106:1-107:5.

Later in his deposition, Mr. Moy reiterated that Montana did not “demand” curtailment, but that he had made “requests” at compact commission meetings or technical meetings. *Id.* at 227:2-231:20. He doubted the continued existence of any documentation of 95% of what he claimed to have discussed with Wyoming. *Id.* at 232:20-233:8. When explaining that he told Wyoming on some unspecified date that he “would sure like to see some water crossing the border to satisfy pre’50 rights in Montana,” he testified: “Did I demand, no. Did I say within a two-week period, no. Did I have authority to say anything beyond that, no.” *Id.* at 229:15-229:20.

**b. Mr. Moy’s testimony about when Montana made complaints**

In his September 22, 2011 declaration, Mr. Moy stated that Montana’s complaints occurred between 1981 and 2008. Moy Decl. at ¶ 3. However, as Wyoming’s counsel tried to hone in on dates, Mr. Moy admitted that he signed his declaration “between meetings,” and that before his deposition he had not reviewed annual reports to attempt to determine the actual years, much less exact dates of Montana’s complaints. Moy Dep. at 51:6-51:14; 85:3-85:18. He testified that he had no particular years in mind when he signed the declaration and specifically disclaimed knowledge of any complaints in the 1990s, when he had lost touch with Compact events. *Id.* at 52:1-52:22; 97:19-97:21.

Mr. Moy testified that he could not remember in which years Montana water users were short of water, *Id.* at 52:19-52:21, or which years Wyoming overuse may have affected Montana water users. *Id.* at 59:5-59:15. He stated that he thought 1981, 1982 and 1985 were drought years, *id.* at 50:6-50:7, but when confronted by the 1985 annual report’s failure to show any Montana complaint, he retreated to his overall theme that all he could remember was being extremely frustrated in not coming up with an administrative protocol. *Id.* at 90:9-91:14.

He thought that in the drought years in which he made complaints, he made them to the Wyoming state engineer. *Id.* at 93:13-93:18. This is consistent with his testimony that Montana complained at the annual meetings or special meetings that Wyoming's state engineer attended as its commissioner. *Id.* at 94:20-98:19. Mr. Moy denied that he made any such complaints to the Wyoming state engineer outside of the annual or technical meetings. Moy Dep. at 98:13-98:17. The commission held four special meetings in the 1980s, all in April before the start of the irrigation seasons, when any curtailment call would be premature. The annual reports do not show Montana making any curtailment calls at those meetings. 1980 Ann. Rep. at II-III (April 9, 1980; interstate ditch protocol and Intake Water Company issues); 1982 Ann. Rep. at III-IV (April 26, 1982; to formulate approaches to study Tongue and Little Bighorn Rivers); 1983 Ann. Rep. at II-IV (April 27, 1983; same issues as 1982); 1984 Ann. Rep. at III-IV (April 17, 1984; to discuss interstate ditch protocol and Ashenberg protocol for V(B) allocations).

After Mr. Moy returned to Compact issues in the 2000s, the only meetings he attended were the annual meetings in 2001, 2003, 2004, and 2006. The annual reports from 2000 through 2003 do not mention Mr. Moy, or any other Montana representative, having made a curtailment call. By contrast, the report of the 2004 annual meeting states that Montana's commissioner, Jack Stults, reported at the meeting that Montana had made a curtailment call earlier that year. 2004 Ann. Rep. at VIII (meeting of Dec. 6, 2004).

**c. Mr. Moy's testimony about the persons who made and received Montana's complaints**

As to any complaints to Wyoming personnel other than to its state engineer at annual or special meetings, Mr. Moy stated that he could not remember who sat next to him at annual meetings, or even who attended specific meetings. Moy Dep. at 95:12-96:18. He did not witness

any communications between his superior, Gary Fritz, and Wyoming Commissioner Fassett, which might have occurred outside of annual meetings. *Id.* at 98:20-99:1.

## **2. Deposition of Gary Fritz**

It made sense that Mr. Moy suggested to Wyoming's counsel that he ask Gary Fritz about communications with Wyoming about the Compact, Moy Dep. at 98:20-99:1, because Montana's governor had appointed Fritz as compact commissioner in 1979, and he held that position continuously until 1997. Fritz Dep. at 7:15-7:22; 9:1-9:3; 1979 Ann. Rep. at II; 1997 Ann. Rep. at II. During these nineteen years, he was also the administrator of the Water Resources Division, directly subordinate to the DNRC director, and directly superior to Mr. Moy. Fritz Dep. at 6:24-7:6; 13:8-13:12; 14:13-14:18; Exh. 5 to Stults Dep.; Fritz Dep. at 9:22-10:7. Mr. Fritz should know more about Compact matters than Mr. Moy between 1981 and 1997 because: (1) he attended every annual meeting, unlike Mr. Moy who missed most of the 1990s; (2) he cast Montana's votes on the many issues the commission dealt with during his nineteen years; and (3) his position was closer than was Mr. Moy's to the governor, who received the commission's annual reports. *See, e.g.*, 1988 Ann. Rep. at II, VII; Fritz Dep. at 16:12-16:14 (two steps below governor).

### **a. Mr. Fritz did not recall Montana curtailment calls**

Nevertheless, Mr. Fritz remembered little about Compact matters, despite attempts to refresh his memory with documents. Fritz Dep. at 23:17-29:14. For example, even after reviewing the 1983 Ashenberg protocol, Mr. Fritz could say little about issues it raised, even though it was the centerpiece of Montana's entreaties to replace the V(C) formula with modeling. Fritz Dep. at 37:21-40:10; Doc. WY 11285. Mr. Fritz's memory of the annual meetings also failed him even though he had reviewed annual reports on the compact



commission's website to prepare for the deposition. Fritz Dep. at 34:4-34:14; 35:2-35:24; *see also* Fritz Dep. at 13:19-13:24; 16:18-16:21. Mr. Fritz's lack of memory might stem from the fact that he retired from the field of water administration fifteen years ago.<sup>3</sup> Dep. Exh. 6 to Fritz Dep. (resume); Stults Dep. at 67:9-67:16.

In 1981, Mr. Moy wrote a memorandum to Mr. Fritz opining that the Compact would allow Wyoming post-1950 diversions to be shut down in favor of pre-1950 Montana diversions. Exh. E, Doc. WY 13736; Fritz Dep. at 30:9-30:22. After Mr. Fritz reviewed it, Wyoming's counsel asked him if Montana made oral or written claims, calls, or demands to shut down water rights in order to satisfy pre-1950 rights in Montana. But he did not "remember one way or the other," and did not remember talking to the governor of Montana or others within state government about such calls or demands. *Id.* at 30:23-31:6.

Discussing the call issue later, Mr. Fritz made the same distinction as had Mr. Moy between (1) discussions with Wyoming about administrative protocols; and (2) demands for immediate curtailment. He said that if Montana had asked Wyoming between 1979 and 1997 to curtail diversions during a water year, and he had worked with Montana's governor on the issue, "one would think," that he would remember it. Fritz Dep. at 36:6-37:17. His overview of the talks between the states from 1981 through 1997 was quite similar to Mr. Moy's. He remembered Montana's effort to negotiate protocols, which Wyoming rejected:

Q. How about if the discussions were between you and your boss, the head of the DNRC, on that kind of an issue, an issue of actually asking Wyoming to stop allowing some of its irrigators to keep on irrigating in summer, is that something you would remember, that conversation?

A. The best I can respond is in a general way, and that is that we knew there were shortages in Montana; and that, in general, we were – we spent a lot of time trying

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<sup>3</sup> Wyoming deposed Mr. Fritz's predecessor, Orrin Ferris, who held the position of Montana compact commissioner from 1974 through 1978. Since in its supplemental interrogatory answers, Montana has not claimed knowledge of any curtailment calls before 1981, Mr. Ferris's testimony has become irrelevant.

to come to the point where we would could administer the compact and work with Wyoming in developing such a system to do that, and were never successful at that; and that we had a general feeling that Wyoming saw – thought that it would be in their best interests not to do that; and that – so we were pushing a rock up the hill.

That’s – so that’s the general feeling about how we tried – what our views on trying to administer the compact and deal with whatever shortages there might be in Montana.

*Id.* at 36:25-37:17.

**b. The annual reports while Mr. Fritz was Montana’s commissioner buttress his failure to recall any curtailment calls**

The commission reports during Mr. Fritz’s tenure confirm that he supported technical work on a protocol to administer post-1950 diversions in surplus years, he did not pursue curtailment calls for pre-1950 Montana rights in shortage years. At annual meetings in 1982 and 1983, Montana “voiced its concern” that Wyoming should regulate its pre-1950 rights more carefully in low flow years, but Montana promised that it would notify Wyoming when it was not receiving its pre-1950 water. 1982 Ann. Rep. at IV; 1983 Ann. Rep. at IV. But at the 1988 annual meeting, when this issue came up the next time, “Mr. Fritz remarked that when Montana experiences water-supply problems, Wyoming has already began [sic] restricting water use to pre-1950 rights. Administrative models may be of little value. He asked if the Compact should be addressing water shortages and noted that perhaps the only issues the Compact can address are the new projects or post-1950 rights.” 1988 Ann. Rep. at IV-V; *see also* 1989 Ann. Rep. at IV (Mr. Fritz said Compact intended to guide states in sharing water “in terms of post-1950 use.”) Mr. Fritz’s comment was consistent with technical expert Dan Ashenberg’s analysis in his 1983 report. Exh. D, Doc. WY 11285 at 1.

Four years later, at the 1992 annual meeting, Mr. Fritz raised the general issue that both pre-1950 and post-1950 use in Wyoming impacts Montana, although not every year. 1992 Ann. Rep. at VI. However, neither the 1992 report nor any other annual report signed by Mr. Fritz mentions a curtailment call of any sort.

### **3. Deposition of Jack Stults**

Jack Stults replaced Gary Fritz as Water Resources Division Administrator and Montana Compact Commissioner in time for the December 16, 1997 annual meeting. Stults Dep. at 13:20-13:25; 45:2-45:6; 1997 Ann. Rep. at II. He held those positions until he resigned in early August 2006. Stults Dep. at 9:15-9:20. He authored Montana's demand letters of 2004 and 2006. Exhs. A and B to Moy Decl.

#### **a. Mr. Stults's initiatives to negotiate administrative protocols**

At Mr. Stults's deposition, Wyoming's counsel asked him the extent to which he worked with Montana governors on Yellowstone River Compact issues. Stults Dep. at 46:5-46:9. Mr. Stults explained that as the good water years of the late 1990s shifted to drought in 2000, 2001 and 2002, he intentionally avoided getting the governor or legislature involved in Compact issues. *Id.* at 46:5-50:16; 68:16-68:25. He said he felt "it would be the wrong road to take to go down the formal legal road and the right road to take to go through the scientific, more collaborative route" in working with Wyoming on the Compact during drought. *Id.* at 49:23-49:25. He based this conclusion on his knowledge of the history of the two states' disagreements on the meaning of Compact provisions and on his past successes convincing Montana water rights holders to forego strict priority regulation in favor of cooperation. *Id.* at 46:18-49:1. Consequently, he did not approach Governor Martz about Compact issues until the fall of 2003

when he had lost confidence in his ability to “get a collaboration between the two states.” *Id.* at 51:10-51:19.

Mr. Stults confirmed that Montana historically believed there were problems with the technical allocation portions of Articles V(B) and V(C), including the location of the points of measurement at the mouths of the interstate streams. *Id.* at 54:9-56:7. He then discussed Mr. Moy’s November 2001 electronic mail message containing doubts about the workability of the Compact. He explained that at about that time, he wanted to work with Wyoming to get “people along these streams to realize that scientifically you could come up with a system that was better than the random priority-date system.” *Id.* at 58:24-61:11 (quote 59:25-60:3). He described how he tried to take this technical approach in lieu of a legal approach with Wyoming, relying on Mr. Moy, and working with Wyoming State Engineer Pat Tyrrell and one of Wyoming’s technical subordinates, Sue Lowry. *Id.* at 61:12-63:2; 77:13-79:24. However, he denied that his approach involved amending the Compact. *Id.* at 79:25-80:25. He felt that trying to mesh a cooperative system of allocation with the Compact would have been the “kiss of death.” *Id.* Mr. Stults felt that his cooperative approach lost momentum about 2003 or 2004, but as of 2002 he was still taking that approach. *Id.* at 84:8-84:21.

**b. Mr. Stults’s description of Montana’s complaints to Wyoming**

It is essential that the Special Master read Mr. Stults’s unvarnished testimony on the curtailment call issue from page 86 through page 93 of his deposition to make a fair assessment of his answers on the relevant sub-issues: who, what, where, when, and whether there is documentation of a demand or call for curtailment other than in 2004 and 2006. Stults Dep. at 86:6-93:23. Mr. Stults said that he communicated with Wyoming State Engineer Pat Tyrrell and Wyoming’s Sue Lowry in June or May of 2002 and 2003. *Id.* at 91:4-91:14. But he stated that he

did not make a demand but instead questioned the amount of water being diverted in Wyoming. *Id.* at 86:6-90:1. He said he did not want to “trigger a formal legal structure.” *Id.* at 88:17-89:23. He could not give specific dates or remember whether his communications were in person or by telephone. *Id.* at 91:4-91:24. And he denied the existence of contemporaneous documentation of a curtailment call. *Id.* at 91:4-92:12. In fact, he resisted the word “curtailment,” testifying that before 2004 he did not care how Wyoming produced more water at the border. *Id.* He also did not have an amount of water in mind or know who in Montana would be entitled to use it. *Id.* at 92:13-92:24.

A little later in the deposition, Mr. Stults spoke to the issue again, emphasizing that he could not remember specifics. *Id.* at 98:1-102:10. But he did deny that he had sought Compact enforcement for Montana:

Q. [Michael] And did you view what you were doing in those conversations with Tyrrell or with Sue Lowry as seeking to have compact enforced for Montana, the Yellowstone River Compact?

A. [Stults] No.

*Id.* at 99:25-100:4; *see also id.* at 106:16-106:23 (Stults said it was unlikely that he spoke with others from Wyoming besides Tyrrell or Lowry).

In contrast to his description of conversations with Mr. Tyrrell and Ms. Lowry, Mr. Stults described his May 18, 2004 call letter with clarity, as “stating that we felt that we – our rights were not being satisfied, and that they should be releasing water to us, curtailing their use in Wyoming. And it is a call for — formally a call for water.” *Id.* at 130:24-131:15. And, he acknowledged that the 2004 call was “[u]nder the Yellowstone River Compact.” *Id.* at 131:16-131:17. He testified that he obtained the approval from Governor Martz to send the 2004 letter and that Governor Martz talked to Wyoming Governor Freudenthal before the letter went out. *Id.*

at 147:5-148:7; 152:22-153:5. He described the 2004 call letter as the “next step up” from his previous communications with Wyoming; that Montana wanted to make clear that the call was in the “context of the compact,” Montana wanted to go down the road of the dispute resolution process, and “wanted to go down the road of a more formal action under the compact.” *Id.* at 148:8-150:8. On cross-examination by Montana’s counsel, Mr. Stults stated that in his conversations with Pat Tyrrell and Sue Lowry before 2004, he wanted to solve problems with a scientific approach and he “was working hard to try and avoid hitting a tripwire on the – on a formal enforcement of the compact.” *Id.* at 230:7-231:25; *see also id.* at 233:10-234:21.

#### **4. Deposition of Keith Kerbel**

In its supplemental interrogatory answers served after Wyoming deposed Keith Kerbel, Montana asserted that Mr. Kerbel made curtailment calls in all thirteen years from 1981 to 2004 in which runoff was poor. Exh. F, Mont. Supp. Interrog. Answer 31. Mr. Kerbel began working for the State of Montana in 1976 as a water rights technician. Kerbel Dep. at 10:8-10:13. From 1976 through 1979, he was stationed in Broadus and Miles City, Montana, working on the Powder River water rights adjudication that Montana completed through a preliminary decree in 1980. *Id.* at 10:14-11:9. After several additional years in Miles City handling new water rights claims, the DNRC promoted him in January 1981 to regional field manager at its Billings, Montana, office. *Id.* at 11:13-11:20; 18:3-18:9. He held that position until his retirement in 2010. *Id.* at 18:10-18:14.

Upon his promotion to Billings, Mr. Kerbel’s responsibilities shifted to the Yellowstone River and Pryor Creek. *Id.* at 19:21-20:23. The Tongue and Powder Rivers were no longer under his purview but instead were managed by Walter Rolf of the Miles City office until about 1994. *Id.* at 19:15-19:20; 21:6-22:5. 28:4-29:1. When the Miles City office closed due to lack of work,

Montana transferred the responsibilities of that office to Mr. Kerbel and the Billings office. *Id.* at 22:7-22:15. The Yellowstone Compact Commission annual reports reveal that Mr. Kerbel never attended an annual meeting of the commission before 1991, but he did attend two special meetings in the 1980s: (1) April 27, 1983, at which the commission began to “formulate approaches to study the Little Bighorn and Tongue Rivers,” and (2) on April 17-18, 1984, at which the commission addressed interstate ditches and administration of Article V of the Compact. 1983 Ann. Rep. at II-IV; 1984 Ann. Rep. at III-IV (Ashenberg presented his modeling proposal).

From 1979 to 1997, while Gary Fritz was the Water Resources Division administrator, a regional offices supervisor directly under Mr. Fritz and stationed in Helena supervised Mr. Kerbel and the other regional managers. Fritz Dep. at 31:16-32:17; Stults Dep. at 16:10-16:25. So Mr. Kerbel’s position was four steps below the governor. After 1997, Mr. Kerbel and the other regional managers moved up one level because Montana eliminated the position of regional offices supervisor. Stults Dep. at 14:1-16:25; 18:8-18:17. Mr. Fritz testified that he did not remember any direct communication between Mr. Kerbel and the governor involving Compact matters, and that it would be “logical” for him to have been told of it if it happened. Fritz Dep. at 33:1-33:12. Similarly, Mr. Stults testified that it would have been unlikely for Mr. Kerbel to have received direct instruction from the governor. Stults Dep. at 143:20-144:6.

A good part of Mr. Kerbel’s deposition was devoted to his communications with Wyoming personnel. Mr. Kerbel gave some generalities about discussions at commission meetings after 1990, but he also reported conversations outside that venue. Kerbel Dep. at 101:22-104:20 (commission meetings); 273:10-274:15 (telephone calls). He could not connect conversations with dates or places and generally admitted his inability to recall specifics. *Id.* at

107:7-107:22; 278:3-278:25. He was most certain about communications in the years 1983 and 1985, testifying that he knew for a fact that he did **not** have conversations by telephone with Wyoming's Water Division II Superintendent Mike Whitaker. *Id.* at 279:6-279:12.

Mr. Kerbel testified that at least in the late 1980s, possibly July or August of 1988, and also in the 2000s, he complained to Wyoming, especially to Mike Whitaker, about low water in Montana and "inferred" that Wyoming might somehow create more water in the rivers. But he denied making a demand that Wyoming curtail diversions to comply with the Compact. *Id.* at 100:13-111:12; 144:3-147:21; 278:7-279:5; 286:4-288:3. Mr. Kerbel testified that he had few contacts with Wyoming officials during the 1990s and, because they were good water years, those contacts did not include complaints. *Id.* at 278:3-278:25; 281:19-283:2.

### **C. Montana's supplemental answers to Wyoming's interrogatories**

In supplemental interrogatory answers that were served after the depositions of Msrs. Moy, Kerbel, Stults and Fritz, Montana identified Kerbel and Stults as the two persons besides Moy and Roger Muggli who it contended made curtailment calls. Exh. F, Mont. Supp. Interr. Answer 31. Montana asserted that calls were made in every low runoff year since 1981, the same years that it said it was "in the process of investigating," because it was currently "focused on water short years since 1950. . ." *Id.*, Mont. Supp. Interr. Answer 2a. However, it gave no specific dates for any of these curtailment calls. *Id.*, Mont. Supp. Interr. Answer 31. This is not surprising, since Msrs. Moy, Kerbel and Stults could not remember such dates, knew of no documentation of any dates, and the annual reports mentioned no curtailment calls.

After receiving Montana's first interrogatory answers, Wyoming had insisted on an adequate answer to its question of who Montana believed had authority to make a curtailment call on its behalf. In its supplemental answer, Montana identified a large group of present or



former state employees who could make a call if “communications” with Wyoming were within the scope of their positions:

**To the extent that communications with Wyoming are within the scope of their position,** employees of DNRC are, or were, authorized to act on behalf of Montana to make a call, demand or other notification requesting water from Wyoming under the Compact. At a minimum, this would include the Regional Manager in Billings, the Water Management Bureau Chief, the Water Resources Division Administrator, Surface Water Hydrologists and Hydrogeologists working on the Tongue and Powder Rivers, the State Water Projects Bureau Chief, DNRC Director, and other employees working on issues related to the Compact or the YRCC.

Exh. F, Mont. Supp. Interr. Answer 58 (emphasis added).

Thus, although Montana’s witnesses often distinguished between merely communicating with Wyoming personnel and actually making a call or demand for curtailment under the Compact, Montana blurred that critical distinction in its latest discovery response.

## SUMMARY OF ARGUMENT

Interstate water compacts and decrees are by and between sovereign states, not individual water users. Under the Yellowstone River Compact, there are two potential mechanisms for one of the sovereigns to make a demand on the other sovereign for administration of water rights spanning state lines: (1) a demand submitted to the compact commission requesting administration under Article III; or (2) a demand submitted directly to the other state, apart from the proceedings of the commission.

Clear lines of authority are important to states because without them their taxpayers could be bound by the demands, offers, or representations of rogue employees. The authority to bind a state is also important to those dealing with the state. If the law required those others, including other states, to rely on unauthorized demands, then those others would shoulder all the risk of

that reliance, since their counterpart state could disavow the unauthorized demands when convenient. Demands by state employees who lack authority to make them are void and can, and should, be ignored by those who receive them.

Montana witnesses have asserted that they complained at commission meetings about Wyoming overuse of water, which meetings occurred primarily in November or December, except for a few April special meetings. But even if those complaints had happened at a time when Wyoming could have curtailed, Montana had only one authorized representative who could bring matters before the commission and demand that it administer the Compact under Article III--its commissioner. The commission's annual reports to the governors show that no Montana commissioner ever made such a demand to the commission, and Mr. Stults and Mr. Fritz did not contradict those reports.

Alternatively, Montana's witnesses have stated that at vague and undocumented times, they complained directly to Wyoming, outside of the auspices of the commission. They claim this occurred either during side discussions at compact commission meetings, on other occasions when they happened to be together, or on the telephone. Even if these complaints rose to the level of curtailment calls, they are null and void because those making them lacked authority to do so for two reasons.

First, Montana law restricts the authority of state employees to only those powers expressly granted by statute or necessarily implied in order to carry out their duties. None of these witnesses that claim to have spoken to Wyoming about shortage in Montana had acquired such authority by statute or necessary implication. Second, a Montana statute reserves exclusively to the governor the power to make authorized communications to other states. So, while Montana employees may unofficially communicate with employees of other states, when it

comes time for the state itself to make a demand on another state that would bind Montana to the representations it embeds in its demand, only the governor can communicate that demand. No purported Montana curtailment call before 2004 came from its governor, so the State of Montana never communicated an authorized call.

Finally, even if Mr. Stults and Mr. Moy had authority to make official curtailment calls on Wyoming, they testified that they did not intend their complaints to Wyoming to constitute demands upon which Wyoming should have acted. They, and Mr. Kerbel, could not remember the dates of their communications with Wyoming, which are critical components of calls in any prior appropriation scheme. And over five years into the case, they admitted that they lacked documentation to contradict Wyoming's affidavits and the commission's annual reports which show that no curtailment calls occurred before 2004. Therefore, Wyoming is entitled to judgment as a matter of law on this issue.

## ARGUMENT

- I. **The state employees that Montana claims to have made calls for curtailment lacked authority to do so, making any such calls legal nullities**
  - A. **If Montana intended to make curtailment calls to the commission so it would administer the Compact under Article III, only its compact commissioners were authorized to make such calls**

In its original brief in support of this motion, Wyoming argued that Article III of the Compact impliedly required that demands from one state to another for Compact administration be made by the person the Compact designates as a state's representative, the state's compact commissioner. Wyoming continues to urge the merit in this position, since Article III(A) provides that the Compact "shall be administered by a commission composed of one (1)

representative from the state of Wyoming and one (1) representative from the State of Montana, to be selected by the governors of said states as such states may choose, and one (1) representative selected by the director of the United States geological survey. . . .” The Compact, a federal statute, would allow (if not require) Montana to go to the commission for administration, and the commission would then employ its normal process, a formal meeting, to decide whether and how to administer the Compact. The language—“shall be administered by a commission”—appears mandatory. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001).

Compact provisions, and ancillary rules promulgated under the authority of Article III(F) of the Compact, prevent the commission from becoming a dead end for disputes over administration. Article III(F) provides that if the representatives of the two states cannot agree on a matter necessary to the proper administration of the compact, the federal representative “shall have the right” to vote to break the deadlock. On July 22, 1996, Commissioner Fritz for Montana, Commissioner Fassett for Wyoming, and Federal Representative Horak signed rules under which disputes would enter a dispute resolution process, but if the process failed, a vote would resolve the dispute. The rules even empowered the director of the USGS to appoint a voting third party if the federal representative refused to break a deadlock. *See Rules for the Resolution of Disputes over Administration of the Yellowstone River Compact, Section VI. Voting (July 22, 1996) (attached to 2009 Ann. Rep.)*.

If Montana had an issue which it felt the commission needed to take action upon during a water year, it could have requested such action. The commission’s rules for administration, first adopted in 1953, provide for special meetings that may be necessary in addition to the annual meeting held after the end of the water year. Rules and Regulations for Administration of the Yellowstone River Compact, Article V. Meetings. Given the commission’s practice of holding

formal votes on matters called before the commission upon motion by a commissioner and the second of one of the other commissioners, Montana's commissioner would be the only person under Article III who on Montana's behalf could ask the commission to administer the Compact by ordering Wyoming to curtail diversions.

If Montana is asserting that it sought administration by the commission before 2004, then Wyoming is entitled to judgment as a matter of law on its motion. Montana's commissioner from 1979 to 1997, Gary Fritz, did not remember making any curtailment calls of any sort. His surviving Wyoming counterpart, Gordon Fassett, disclaimed any such calls in his affidavit. Fassett Aff. ¶ 4. Moreover, the annual reports showed no calls for curtailment, although they did show after-the-fact generalized complaints of poor water supply at a few annual meetings held after the particular irrigation seasons had ended.

Jack Stults, Montana's next commissioner, said he made complaints to Wyoming in 2002 and 2003 but not formally at any commission meetings. Consistent with Mr. Stults's testimony that he wished to keep his complaints scientific and not legal, and wished to keep them away from the governors, the annual reports for those years show no hint of a curtailment call at any commission meeting. Even as to 2004, when Governor Martz and Mr. Stults did make a curtailment call on Wyoming, Mr. Stults did not direct it to the commission for action. Rather, "[i]t was to have Wyoming respond to our call." Stults Dep. at 141:5-141:11. There is no genuine issue of material fact that no Montana commissioner has ever made a curtailment call directed to the commission.

**B. Only Montana's governor held authority to make a curtailment call directly to Wyoming**

If the Special Master decides that Montana need not make curtailment calls by having its commissioner move for administration at a commission meeting, presumably that decision would

rest on the Special Master's observation that the Compact is silent as to who must make calls. Given such silence, and given that the authority to speak for a state is a field traditionally occupied by the states, it follows that the Compact would not pre-empt Montana law on who from Montana could make a direct curtailment call on Wyoming. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). Like any other state, Montana has both constitutional provisions and statutes on this issue.

Montana did not assert in discovery that private citizen Muggli was authorized to speak for Montana. So if Montana believes that Mr. Muggli's June 5, 2002, letter to the Montana Attorney General constituted a curtailment call based on Montana's further allegation that Muggli copied it to Wyoming's state engineer, then Montana must also believe that a curtailment call need not originate with the State of Montana, but could originate from a third party to the agreement.<sup>4</sup> However, like any interstate compact or decree, the Yellowstone River Compact is an agreement between the sovereigns, and it is the responsibility of the sovereigns to impose the Compact's requirements on their respective water users. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Those water users lack the authority to veto the agreement that their sovereigns have made on their behalf. *Id.* These principles would be turned on their head if individual water users could nevertheless insert themselves into Compact administration that was either reserved to the Compact commission under Article III, or, at a minimum, reserved to the sovereigns. *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) ("The [*parens patriae*] principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached

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<sup>4</sup> The Muggli letter is attached to this renewed motion as Exhibit B. It purports to be copied to various people, but not to the Wyoming state engineer or anyone else in Wyoming. In the letter, Muggli and his co-authors ask the Montana attorney general to take legal action regarding flows on the Tongue and Powder Rivers. They do not ask Wyoming to do anything.

on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.”) Moreover, it takes little imagination to see the chaos that would result if a state, like Wyoming, was bound to honor the demands of the subjects of another state, in addition to the demands that the other state might press through its authorized officer.<sup>5</sup>

At this juncture, one former employee of Montana, Richard Moy, testified that he lacked authority to demand curtailment by Wyoming while another former employee, Keith Kerbel, testified that he had such authority because of his “position.” Moy Dep. at 229:15-229:20; Kerbel Dep. at 280:3-280:11. Montana has reiterated Mr. Kerbel’s theory in its supplemental answer to interrogatory 38, quoted above. However, that theory conflicts with Montana’s own Constitution, statutes, and judicial precedent.

The Montana Constitution vests the executive power of the state in the governor. Mont. Const. Art. VI, § 4; State ex rel. *Bennett v. Bonner*, 214 P.2d 747, 752 (Mont. 1950). But “[s]ince the governor is purely an executive officer, his general authority is narrowly limited by the Constitution,” and the manner and methods by which the governor exercises his power must be “ ‘within the limitations prescribed by the Constitution and statutes of the state.’ ” *Bennett, supra*, at 752, quoting 24 Am. Jur., *Governor* § 5 (now found at 38 Am. Jur., *Governor* § 4 (2010)). As to executive branch employees below the governor, Article VI, § 7 of the Montana Constitution allows for up to twenty principal departments, whose respective functions, powers, and duties “shall be allocated by law.”

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<sup>5</sup> Even without private citizens entering the fray, this case already suffers from inconsistent communications from Montana personnel to Wyoming. Mr. Kerbel testified that he made a complaint of shortage to Mike Whitaker in July or August of 1988, while in November of that same year, Mr. Fritz signed an annual report to the governors that said he questioned whether the Compact should be addressing water shortages, and failed to mention any Montana curtailment calls that year. 1988 Ann. Rep. at IV-V; see also 1989 Ann. Rep. at IV.

Under the authority of § 7, the Montana Legislature has established the DNRC, as well as other departments. Mont. Code Ann. §§ 2-15-111 and 2-15-3301. The legislature has created the powers and duties of the heads of these departments in Mont. Code. Ann. § 2-15-112. That power may not exceed that which the legislature granted by statute, or which could be necessarily implied. *Bell v. Dep't of Licensing*, 594 P.2d 331, 332 (Mont. 1979); *Dragstedt v. State Bd. of Education*, 62 P.2d 330, 331-332 (Mont. 1936).

Montana Department heads may delegate any functions vested in them to subordinate employees. *Id.* § 2-15-112(2)(b). But Montana lacks any statute giving express authority to the DNRC director to make demands on another sovereign state. Mont. Code. Ann. § 2-15-112. And, the only Montana statute that expressly authorizes DNRC employees below the director to communicate with other states is Mont. Code Ann. § 85-1-233, which allows the DNRC to negotiate compacts with other states or with Indian tribes. That statute clearly states, however, that the authority and duties it imposes “are limited to the preparation and proposal of the compact” and that the compact is not binding until approved by the Montana Legislature. This statute could not be stretched to authorize a DNRC employee to make a curtailment call long after a compact has been negotiated and concluded. *See Dragstedt, supra*, 62 P.2d at 331-332 (no authority beyond that which is expressed in statute or necessarily implied).

Even if some source of authority could be squeezed from statute to allow Messrs. Moy, Stults, and Kerbel to make curtailment calls on Wyoming, Montana Code Ann. § 2-15-201 would negate that authority. It states that Montana’s governor “is the **sole official organ of communication between the government of this state and the government of any other state** or of the United States.” Montana administrative officers and agencies “ ’have no power to authorize or acquiesce in the doing of a thing unauthorized or forbidden by statutory mandate,



even though acting within the general jurisdiction conferred on them by statute.’ ” *State ex rel. Anderson v. State Bd. of Equalization*, 319 P.2d 221, 227 (Mont. 1957), quoting 73 C.J.S. *Public Administration Bodies Procedure* § 59 (now found at 73 C.J.S. *Public Administrative Law and Procedure* § 107 (2004)).

Under both statutory and case law, Montana statutory phrases such as “sole official organ” must be ascribed their plain meaning. Mont. Code Ann. § 1-2-101; *State v. Johnson*, 2012 WL 1602467, 2012 MT 101, \*3 (Mont. 2012). The word “sole” is synonymous with “only,” or “being the only one,” *Nixon v. United States*, 506 U.S. 224, 231 (1993), and also a synonym of “exclusive.” *State v. Bosch*, 242 P.2d 477, 487 (Mont. 1952). The adjective “official” means “derived from the proper office or officer; authoritative.” Webster’s Student Dictionary 502 (1998). An “official act” is an “authorized act.” Black’s Law Dictionary 978 (5th ed. 1979). Finally, the word “organ” in § 2-15-201 has one definition that would fit the statute: a governmental instrumentality operating as a part of a larger organization. Webster’s Third New International Dictionary 1589 (1986). Thus, under the statute, the governor is the exclusive part of Montana government whose communications with another state are authorized acts of Montana.

The acts of employees or officials acting beyond the scope of their actual authority are legal nullities. *Trent v. Sherlock*, 66 P. 700, 702 (Mont. 1901) (act of a person which is an agent for another, but not authorized to do the act, is indistinguishable from the act of a stranger); see also *Marsh Inv Corp. v. Langford*, 490 F. Supp. 1320, 1324 (D. La. 1980) (acts of unauthorized person acting for corporation “cannot have a legal effect,” is null and void); *Flavell v. Dept. of Welfare*, 355 P.2d 941, 943 (Colo. 1960) (acts or orders of administrative officers or agencies that exceed their powers “are not merely erroneous, but are void”). Because Mssrs. Moy, Stults,

and Kerbel (and private citizen Muggli) did not occupy the office of governor, they were not authorized to communicate with Wyoming on Montana's behalf. Not only did their communications not bind the State of Montana, they were void. The communications could not trigger any requirement that Wyoming act on them.

This is not to say that communications between Montana DNRC employees and Wyoming officials could not take place. Unofficial communications can serve the purpose of developing processes, procedures, or even agreements or compacts, which the states eventually adopt through their authorized officers or legislatures. But an appropriator's call on another appropriator is serious business, and a Montana call based on the Yellowstone River Compact, which Compact creates a prior appropriation scheme covering groups of water rights in two separate states, is even more serious. *See* Stults Dep. at 33:4-33:6. Mr. Stults emphasized this distinction when he testified that he and Governor Martz handled the 2004 call differently than he had handled his other communications with Wyoming because in 2004 Montana was making a "formal" call for water to be produced by Wyoming curtailment. *Id.* at 130:24-131:17.

When Mr. Stults decided it was time to "trigger a formal legal structure" and make a demand on Wyoming based on what he thought were Montana's rights under the Compact, he knew that he could no longer keep the matter from his governor. *Id.* at 88:17-89:23; *see also id.* at 130:24-131:17 (Stults identified 2004 letter as a formal call for Wyoming to curtail its use of water). While Governor Martz did not sign the call letter of May 18, 2004, she telephoned Governor Freudenthal before the letter went out. *Id.* at 152:22-153:5. Mr. Stults testified that he mentioned in his call letter that Governor Martz had directed him to send it "[b]ecause of what we say here [in the letter], that it is Montana's call. We wanted to make sure that they understood that it was being done with the full support and authority of the governor." Stults Dep. at 141:15-

141:19. Mr. Stults handled his various communications with Wyoming in line with § 2-15-201. He kept the scientific collaborative discussions outside the governor's office but took the 2004 demand for curtailment to his governor.

Montana's statute giving exclusive authority to its governor for official communications with other states has been in place since 1895 and is not an anomaly. Mont. Code Ann. § 2-15-201; § 370(4), Political Code of Montana (1895). Ten other states have the same or very similar statutes. Ariz. Rev. Stat. Ann. § 41-101(4) (West); Cal. Gov't Code § 12012 (West); Idaho Code Ann § 67-802 (West); N.C. Gen. Stat. Ann. § 147-12 (West); N.D. Cent. Code Ann. § 54-07-01 (West) S.D. Codified Laws § 1-7-1; Tex. Const. art. 4, § 10; Utah Code Ann. § 67-1-1 (West); Vt. Const. art. Ch II, §20; Va. Code Ann. §2.2-114; Wash. Rev. Code Ann. 43.06.010 (West). These statutes serve the obvious purpose of ensuring that the highest executive officer of the state is not blindsided by a demand or other act by one of his subordinates that could cause conflict with another state. When Montana moved to file this case in the Supreme Court, it stated in its introduction to its motion for leave to file that its attorney general had constitutional authority to "bring this action on behalf of the State of Montana." Motion for Leave to File at 2 (Jan. 2007). Proper authority to make curtailment calls that ultimately led to this suit was equally vital. Yet Montana now claims in discovery that any employee of the DNRC involved with the Yellowstone River Compact was authorized to make such a call on Wyoming. Exh. F, Mont. Supp. Interr. Answer 31 (quoted above).

In summary, under Montana law, Montana's communications to Wyoming before 2004, even if they had been intended to be curtailment calls, were void as a matter of law because they came from others besides the governor. Mr. Moy was correct that he lacked authority to make a demand on Wyoming. Mr. Kerbel, by contrast, was wrong when he testified that his position

authorized him to communicate a curtailment call. Finally, Mr. Stults also lacked such authority to make a direct demand on Wyoming, although he would have been authorized as Montana's commissioner to make a motion at a commission meeting for the commission to administer the Compact under Article III.

**II. Even if Kerbel, Moy or Stults had the authority to make curtailment calls, the undisputed facts show that none of them made one before 2004**

Even if Mssrs. Moy, Stults, or Kerbel had been authorized to serve as organs of communication with Wyoming, there is no genuine issue of material fact that requires a trial on the issue of whether any of their communications constituted curtailment calls requiring Wyoming action.

**A. Standard for summary judgment**

Wyoming incorporates by this reference the standard it described in its opening brief on this motion.

**B. A specific date is an essential element of proof of a curtailment call**

The date upon which a senior appropriator makes a call on a junior is a critical element of any attempt to administer a prior appropriation system. First, as Wyoming showed in its opening brief, there is no such thing as a post-season call because it is too late for the senior water right holder to receive any benefit. At best, it would be a request to reform an administration scheme for the future. *See Kerbel Dep.* at 104:12-104:20.

Second, the doctrine of appropriation cannot accommodate an anticipatory call because precipitation events can change hydrology even in a basin largely dominated by snowmelt. The year 2005 in the Powder and Tongue River Basins is a good example of this. After the tough drought year of 2004 and a poor winter, it appeared as of the April 2005 special commission

meeting that 2005 might be the same. 2005 Ann. Rep. at VI; *see also* Kerbel Dep. at 258:3-258:18. But then the skies opened for an extended period, ultimately causing flooding near Billings on the Yellowstone and causing Tongue River Reservoir to spill. Kerbel Dep. at 121:24-122:6. Montana did not send a call letter that summer, as it had in 2004, and as it would in 2006. *Id.* at 122:7-122:11.

Finally, even in a year when a call is made during the irrigation season, the actual date is critical. In a system with rapidly reducing runoff, an irrigator who can continue diverting to June 30 may get a second cutting of hay that would not be possible if a senior's call came on June 10. For that same reason, damages available to a group of irrigators in the hindsight of litigation could vary greatly depending on the specific date of a call. In order to make a case for an Article V(A) violation "under the doctrine of appropriation," Montana must do better than show that Mr. Stults's may have complained about shortage to Pat Tyrrell or Sue Lowry at a compact site tour, or at a Western States Water Council meeting during an irrigation season, even if he had intended the complaint to rise to the level of a curtailment call. Stults Dep. at 91:20-91:24. To obtain damages, Montana must prove a specific date.

### **C. Montana made no curtailment calls in the 1980s**

The history of relevant compact communications is best analyzed by decade-- the 1980s, 1990s and 2000s. Mr. Moy and Mr. Fritz are the two key Montana employees from the 1980s. Commissioner Fritz, who should have been the most knowledgeable, did not remember any curtailment call between 1978 and 1997 and said he thought he would have, if it occurred. His recollection was essentially the same as Mr. Moy's-- Montana and Wyoming discussed an allocation protocol. While Mr. Fritz did not remember any more general complaints, the annual reports confirm that Mr. Fritz made several of them, when Wyoming Commissioner Fassett

responded that Montana would have to notify of shortages during the water year, and Mr. Fritz promised to do so. 1982 Ann. Rep. at IV; 1983 Ann. Rep. at IV. But the annual reports do not show that Montana ever did it, and Mr. Moy confirmed that he did not make either requests or demands on Wyoming during a water year. Moy Dep. at 106:1-106:23.

The annual reports are especially significant, because Mr. Moy testified that in the early 1980s he personally shouldered the task of improving their content, Moy Dep. 44:23-45:12, that the reports were carefully done during his tenure as bureau chief, *id.* at 44:8-44:15, that they were reasonably accurate, *id.* at 47:8-47:14, and that the commissioners reviewed them for accuracy before signing them. *Id.* at 44:16-44:22; *see also* Kerbel Dep. at 110:3-111:2. He could not contradict the contents of these reports from any of his own annual meeting notes because he discarded those notes shortly after the meetings. Moy Dep. at 46:22-47:7.

The annual reports reveal that Mr. Kerbel could not have remembered complaints to Wyoming at annual meetings during most of the 1980s, because he did not attend any such meetings until 1991. *See* Annual Reports of 1981-1990. He admitted that he was not an “active participant back then.” Kerbel Dep. at 109:3-109:24. He attended special meetings in April of 1983 and 1984, but the annual reports covering those meetings show no curtailment calls by Montana. 1983 Ann. Rep. at IV; 1984 Ann. Rep. at IV. Moreover, Mr. Kerbel testified that until 1994, Montana maintained a DNRC regional office in Miles City, whose regional supervisor, Walter Rolf, dealt with the Tongue and Powder Rivers. Mr. Kerbel, by contrast, mainly dealt with issues on the main stem of the Yellowstone and tributaries unrelated to this case. Kerbel Dep. at 19:15-20:23; 21:6-22:5; 28:4-29:1.

Nevertheless, Mr. Kerbel testified that he recalled telephoning Wyoming Division II Water Superintendent Mike Whitaker, perhaps sometime in July or August 1988, to complain

about water use in Wyoming affecting Montana diversions. He denied that he posed it as a demand. *Id.* at 286:4-286:14. This is consistent with the 1988 annual report, which does not mention any curtailment call from Montana to Wyoming that year. 1988 Ann. Rep. II. In fact, 1988 was the year when Montana Commissioner Fritz told the commission that he thought the Compact was not intended to address water shortages but only the allocation of surplus water to post-1950 rights. *Id.* at IV-V. Mr. Fritz reiterated that belief even more strongly in the annual meeting the next year. 1989 Ann. Rep. at IV.

In any case, without a more specific date, Mr. Kerbel's testimony fails to support Montana's contention of a 1988 curtailment call by telephone. Mr. Kerbel retained no documentation to refresh his memory about what he said or the date when he said it. Kerbel Dep. at 283:3-283:8. He also admitted that he did not report his telephone call to his superiors because "this was a conversation between Mike and I to try to solve a problem." Kerbel Dep. at 288:5-288:14. Surely Mr. Fritz would have wanted to know if Mr. Kerbel had made a curtailment call, which all the witnesses admitted would be a major event, because Mr. Fritz had promised Wyoming at the 1983 annual meeting that Montana would do so if it sought action. 1983 Ann. Rep. at IV.

In a supplemental interrogatory answer, Montana lists 1981, 1982, and 1985 as years that Mr. Kerbel made a curtailment call to Wyoming. Exh. F, Supp. Mont. Interr. Answer 31. But not only did Mr. Kerbel fail to attend the annual meetings those years, he testified that only spoke with Mike Whitaker by telephone in the **late** 80s and 2000s and knew "for a fact" that he did **not** speak by telephone with him in 1985. Kerbel Dep. at 279:1-279:12.

**D. Montana made no curtailment calls in the 1990s**

The depositions, together with the annual reports and Wyoming affidavits, show that no curtailment calls occurred in the 1990s. Mr. Fritz did not remember any occurring through 1997, and his successor, Mr. Stults, testified that he began talking about shortages with Pat Tyrrell and Sue Lowry in 2002. Stults Dep. at 91:4-91:14. Mr. Moy stepped away from the Compact in the 1990s, contradicting the implication in his declaration that he could speak to the issue at all. *Compare* Moy Dep. at 52:1-52:22; 97:19-97:21 and Moy Decl. ¶ 4 (“During the period 1981-2008”). Mr. Kerbel never identified a particular year in the 1990s when Montana made a curtailment call, even in response to pointed cross-examination by Montana’s counsel. Kerbel Dep. at 141:13-142:24; 64:3-64:25; 272:5-272:19. He testified that his few conversations with Mike Whitaker in those years were friendly because of good water conditions. *See id.* at 281:19-282:16. The 1992 annual report reveals that Mr. Fritz complained at the annual meeting that Montana research showed that in some years Wyoming post-1950 use impacted Montana use, but that report shows no curtailment call at any time that year. 1992 Ann. Rep. at VI.

**E. Montana made no curtailment calls in the 2000s until 2004**

As to the years 2000, 2001, 2002 and 2003, the annual reports that Mr. Stults signed mention no curtailment calls. It is unfathomable that Mr. Moy or Mr. Stults would have reviewed and approved an annual report to their governor, and Wyoming’s governor, if the report failed to mention a curtailment call that had actually occurred. Late in his deposition, Mr. Kerbel tried to explain away the fact that annual reports did not mention any curtailment calls. He claimed that shortages of water were discussed in “sidebar” conversations, or even “across the table” at annual meetings, but did not make it to the reports because the reports only “hit the high spots.” Kerbel Dep. at 268:11-269:14. Montana’s Commissioners Fritz and Stults, and Mr. Moy,



certainly would have disagreed with Mr. Kerbel's assessment that a demand for curtailment was not a "high spot." Both Mr. Moy and Mr. Stults explained that before 2004 they consciously refrained from demanding that Wyoming curtail diversions during a water year. They well knew that a curtailment call would be a serious political event, and Mr. Moy even stated that he lacked the authority to make a demand. Stults Dep. at 46:5-50:16; Moy Dep. at 229:15-229:20. Both Mr. Stults and Mr. Moy summarized this issue compellingly when they expressly contrasted what happened in 2004 with earlier years. Mr. Stults testified that in 2004, he finally decided to cross a "tripwire" by getting "more formal," but only after he met with Governor Martz, prepared a careful letter to Wyoming's commissioner (copied to Wyoming's governor), and sent the letter by facsimile only after Governor Martz had telephoned Governor Freudenthal. Stults Dep. at 234:1-234:10; 141:12-142:24; 146:5-148:7.

The 2004 call was described in the annual report that Mr. Stults signed later that year. 2004 Ann. Rep. at VIII. Similarly, Mr. Moy testified that his earlier communications with Wyoming were different than what happened in 2004. Moy Dep. at at 101:13-105:4. Indeed they were; different enough so that no reasonable finder of fact would see a genuine issue of Montana having made a curtailment call before 2004.<sup>6</sup> Wyoming is entitled to judgment as a matter of law that no curtailment call occurred before May of 2004, even if the Court were to find that Mssrs. Moy, Stults or Kerbel spoke for Montana from their positions several steps below the governor.

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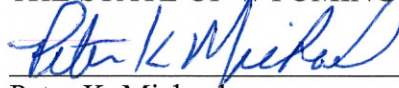
<sup>6</sup> Although Wyoming has conceded that Montana made a call in the nature of a state to state demand in 2004, Wyoming does not concede that the substance of the call could support liability. Mr. Stults stated in his letter of May 18, 2004, that Montana wanted Wyoming to curtail **pre-1950** diversions that were junior to Montana pre-1950 diversions. Exh. A. to Moy Decl. 2<sup>nd</sup> page, middle paragraph. Mr. Stults confirmed in his deposition that Montana did not assert its 2004 call against **post-1950** Wyoming diversions, but truly intended what the letter said. Montana, still held this position in the spring of 2005 but retreated from it in its 2006 letter, where it called for curtailment of **post-1950** Wyoming diversions. Stults Dep. at 137:18-139:16; 173:11-173:20; 2005 Ann. Rep. at VI; Exh. B to Moy Decl. at xxii.

## CONCLUSION

Wyoming requests that the Special Master recommend that the Court grant its motion for partial summary judgment.

Dated this 15th day of June, 2012.

THE STATE OF WYOMING



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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Wyoming's Brief in Support of its Renewed Motion for Partial Summary Judgment was served by e-mail and United States mail, postage paid to the below parties, this 15th day of June, 2012.

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# Appendix

- A) Montana's Responses to Wyoming's First Set of Interrogatories
- B) Letter to Mike McGrath from Muggli, dated June 5, 2002
- C) Email from Rich Moy to Jack Stults, dated November 30, 2001
- D) Draft Report A Cooperative Plan to Administer the Yellowstone River Compact, dated November, 1982
- E) Memo to Gary Frtiz from Rich Moy, dated June 1, 1981
- F) Montana's First Supplemental Responses to Wyoming's First Set of Interrogatories

## **Deposition Transcripts and Exhibits:**

- 1) Richard Moy
- 2) Gary Fritz
  - a) Deposition Exhibit 6
- 3) Jack Stults
  - a) Deposition Exhibit 4
  - b) Deposition Exhibit 5
- 4) Keith Kerbel