NO. 137, ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA, PLAINTIFF

V.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, DEFENDANTS

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BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

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

The State of Wyoming submits this brief in support of its motion for partial summary judgment in compliance with the Special Master's Case Management Order No. 8.

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## INTRODUCTION

Wyoming presents the legal question of whether Montana is barred from obtaining damages or other relief under the Section V(A) of the Yellowstone River Compact ("the compact") if Montana did not timely notify Wyoming when Montana's pre-1950 water rights were not receiving adequate water. If this question is answered in Wyoming's favor, then the Special Master, and ultimately the Supreme Court, must determine the time periods from 1952 to the present when Montana failed to provide such notice.

Wyoming does not raise the issue of whether Montana gave notice of a claim for damages in the context of a governmental claim or tort claim requirement that would allow a plaintiff to give such notice weeks, months, or years *after* he has suffered a shortage. Instead, because this motion is directed at Montana's claims for relief under Section V(A) of the compact, and that article incorporates the doctrine of appropriation, Wyoming focuses on "calls" by Montana in the context of timely demands by senior appropriators for immediate administration of a watercourse under the doctrine. Thus, Wyoming uses the term "call" in this brief to mean a demand from a water user to a public official or other water user, or, more specific to this case, from Montana to Wyoming, so that if the call is heeded, the calling users will quickly receive the resulting augmented flow.

## STATEMENT OF FACTS

To prove the negative proposition that Montana did not make timely calls for water in particular years, Wyoming submits six affidavits, five of which are from former

and current Wyoming compact commissioners. These affidavits cover all but 21 years of the relevant period from 1952 through 2006. The gaps occur because three of Wyoming's former commissioners, L.C. Bishop, Earl Lloyd, and George Christopulos, are deceased.

However, these gaps are filled by a highly reliable record that disproves that any Montana compact calls occurred during those 21 years, the annual reports of the Yellowstone River Compact Commission. The compact requires the commission, consisting of one commissioner each from Montana and Wyoming, plus a federal representative, to submit an annual report to the governors of Montana and Wyoming before December 31, covering the foregoing water year. Compact, Art. III C. Since Congress did not approve the compact until October 30, 1951, after the close of the 1951 water year on September 30, 1951, the compact commission did not issue its first report until 1952. Compact, 65 Stat. 663 (1951).

Each year from 1952 through 2006, the commission met sometime between September 30 and December 31, and made its annual report. The reports usually consisted of a summary letter to the governors followed by a general report. Images of the annual reports are conveniently available online at the compact commission's official website maintained by the United States Geological Survey, with each annual report indexed and linked by year. http://yrcc.usgs.gov/YRCC%20-%20Commission%20Annual%20Reports.htm; *see also* Pring Aff. ¶¶ 3-6 (vouching for the accuracy of the reports posted on the website).

During the first 11 years of the commission's existence, from 1952 through 1962, three different commissioners represented Wyoming: L.C. Bishop from 1952 through 1956, Paul Rechard in 1957, and Earl Lloyd from 1958 through 1962. Bishop and Lloyd are both deceased, but Mr. Rechard affirms in his affidavit that Montana made no call in 1957. Rechard Aff. ¶¶ 2-3.

With minor variation, the commissioners reported annually from 1952 through 1962 that there was insufficient post-1950 water development in Wyoming to cause any concern of compact violation. *E.g.,* 1955 YRCC Ann. Rep., Ltr. to Govs. at 1 ("Your Commissioners feel assured that water uses under the Compact were not exceeded by the upstream State or States during the report period ending September 30, 1955.").

In 1963, Wyoming Governor Clifford Hansen appointed Floyd Bishop as Wyoming State Engineer and compact commissioner, and Mr. Bishop held those positions through the commission's annual meeting in late 1974. Bishop Aff. ¶ 1. Mr. Bishop states that during those years, Montana never made a call or otherwise notified him, directly or indirectly, that its pre-1950 rights were unsatisfied on the Tongue or Powder Rivers, or the other interstate tributaries to the Yellowstone River. *Id.* ¶¶ 3-4. Mr. Bishop's recollection is confirmed by the 12 annual reports published while he was Wyoming commissioner, which stated that no matters relating to the allocation of streamflow were noted, irrigation supplies were satisfactory, or there were no developments or incidents "during the year which required allocations of water in

accordance with the provisions of the Compact." 1964 YRCC Ann. Rep., Ltr. to Govs. at 1; 1968 YRCC Ann. Rep., Ltr. to Govs. at 3; 1966 YRCC Ann. Rep., Ltr. to Govs. at 1.

George Christopulos succeeded Mr. Bishop as Wyoming State Engineer and Yellowstone River Compact Commissioner in 1975 and held those posts through the 1986 water year. He is deceased. But from 1984 through early 1987, Gordon W. "Jeff" Fassett was his deputy state engineer. Fassett Aff. ¶ 2. In that capacity, Mr. Fassett worked closely with Mr. Christopulos on compact matters and attended the Yellowstone River Compact Commission meetings in 1984, 1985, and 1986. *Id.* Mr. Fassett would have known of any Montana calls during those three years, but he never heard of one, either from Mr. Christopulos or any other source. *Id.*

Mr. Fassett cannot speak from memory as to Montana calls during the other eight Christopulos years, 1975 through 1983, but for purposes of this motion, they are covered by the annual reports. None of those reports mention Montana calls during the irrigation seasons. Rather, the commissioners made the following statement in each of those annual reports (with inconsequential variations): "There were no incidents during the year that required administration of the water in accordance with the provisions of the Compact." *E.g.*, 1975 YRCC Ann. Rep., Gen. Rep. at 6.

In reports covering two of the water years during Mr. Christopulos's term, 1982 and 1983, the commissioners did explain to the governors that while flows in those years had been generally high enough so that compact administration was unnecessary, Montana had nevertheless "voiced its concern that during low-flow years Wyoming

needs to regulate its post-1950 water rights more carefully so that Montana can use its pre-1950 water." 1982 YRCC Ann. Rep., Ltr. to Govs. at IV; 1983 YRCC Ann. Rep., Ltr. to Govs. at IV. The reports went on to state: "Montana, in turn, *must notify Wyoming when it is not able to obtain its pre-1950 water*. A situation developed during the spring of 1981 in which Montana was *almost* unable to fill the Tongue River Reservoir even though it has a pre-1950 water right." *Id.* (emphasis added).

These issues arose once more during Mr. Christopulos's term, at the 1986 annual meeting. Again, the annual report affirmatively stated that there were no incidents that year that required administration, so Montana's commissioner, Gary Fritz, was simply expressing his opinion that Montana could not determine if Wyoming was abiding by the compact in water-short years. 1986 YRCC Ann. Rep., Ltr. to Govs. at VI. In reply, Mr. Christopulos "questioned whether the state of Montana has actually been shortchanged in the past. He [Mr. Christopulos] could only remember once when pre-1950 water rights may not have been satisfied in Montana." *Id.* Based on the earlier annual reports, Mr. Christopulos's reference to a possible Montana pre-1950 shortage in the past must have been a reference to 1981, the water year that Mr. Fritz had belatedly referenced at the 1982 and 1983 commission meetings where he stated Montana had "almost" failed to fill Tongue River Reservoir, and that he would notify Wyoming in the event of a shortage. In summary, Montana made no calls from 1975 through 1986 while Mr. Christopulos was Wyoming's commissioner.

Mr. Fassett succeeded Mr. Christopulos as Wyoming's State Engineer and compact commissioner, and held that post from 1987 through 1999. Fassett Aff. ¶ 1. During that time, Mr. Fassett never received a call from Montana, either directly or indirectly, notifying Wyoming that Montana water users in the Tongue or Powder River basins, or in the basins of any other Yellowstone River interstate tributaries, suffered from water shortages resulting from the actions of Wyoming water users. Fassett Aff. ¶¶ 4-5. Also, there is nothing in the annual reports for those 13 years to contradict Mr. Fassett's memory on this issue. On the contrary, the annual reports stated that no incidents during the year required administration under the compact or that no diversions were regulated by the commission during the year. *See, e.g.,* 1987 YRCC Ann. Rep., Gen. Rep. at 2; 1992 YRCC Ann. Rep., Gen. Rep. at 2.

There was one year while Mr. Fassett was Wyoming commissioner, 1992, in which Montana complained at the annual meeting about potential harm to pre-1950 Montana rights from post-1950 Wyoming diversions. However, the 1992 annual report shows that Montana never went beyond generalities despite being asked for specifics. The commissioners' joint 1992 letter to the governors stated that Montana Commissioner Gary Fritz "had concluded that pre-1950 use impacts Montana and evidence suggests that post-1950 use also affects Montana's utilization of water in the basin. He noted that the impacts do not occur every year but that they do occur." 1992 YRCC Ann. Rep., Ltr. to Govs. at VI. In response, Mr. Fassett asked for specific examples because "he saw little benefit from resolving issues in the abstract but agreed that real issues should be

addressed." *Id.* The report does not state whether Mr. Fritz ever provided specifics at the 1992 meeting. But even if he had, those specifics would not have constituted a timely call to which Wyoming could have responded during the 1992 water year because the 1992 annual meeting, like all the others, occurred after the water year had ended on September 30, 1992. *Id.* (1992 annual meeting occurred December 1, 1992).

When Mr. Fassett resigned as Wyoming State Engineer and Wyoming compact commissioner in June of 2000, he was replaced for six months by Acting State Engineer and acting commissioner Richard G. Stockdale. Stockdale Aff. ¶ 1. In his affidavit accompanying this motion, Mr. Stockdale states that he did not receive a call for regulation from Montana directly or indirectly while he was Wyoming's acting commissioner. Stockdale Aff. ¶¶ 2-3.

Governor Jim Geringer appointed Wyoming's current State Engineer and compact commissioner, Patrick T. Tyrrell, to those posts in January of 2000. From 2000 through 2003, and in 2005, the commission's annual reports, signed by Mr. Tyrrell and his Montana counterpart, Jack Stults, said nothing about a call for regulation by Montana in those years. In his affidavit supporting this motion, Mr. Tyrrell confirms that Montana made no calls during those years. Tyrrell Aff. ¶¶ 4-5.

On May 18, 2004, and again on July 28, 2006, Montana's Commissioner Stults submitted written calls for regulation to Commissioner Tyrrell. Tyrrell Aff. ¶¶ 6 and exs. 1 and 2 thereto. In each instance, these calls generated a response by Mr. Tyrrell and further discussion among the commissioners, including the federal representative. Tyrrell

Aff. ¶¶ 6-7. The annual reports described the calls as well as information about Montana's assertions supporting the calls. 2004 YRCC Ann. Rep., Ltr. to Govs. at VIII; 2006 YRCC Ann. Rep., Ltr. to Govs. at x-xi.

Montana filed its Motion for Leave to File Bill of Complaint in early 2007, not long after the compact commission's December 6, 2006 annual meeting for the 2006 water year. At the hearing on Wyoming's Motion to Dismiss on February 3, 2009, Montana's counsel summarized her understanding of the history of Montana calls. She stated that Montana made "calls" in 2004 and 2006 based on the proposition that Wyoming was using water for post-1950 rights when Montana's pre-1950 rights were not being satisfied. Tr. of Hr'g on Wyoming's Mot. to Dismiss at 52:2-5; 60:16-23. She further stated that Montana first raised the issue of its unsatisfied pre-1950 water rights in 2004 because before that year the representatives of the two states had been focused on Article V(B) percentage allocations. *Id.* at 71:20-25; 72:1-7. The annual reports and the five affidavits of Wyoming commissioners confirm that her comments were correct with respect to compact calls, although at the 1982, 1983, and 1992 annual meetings, Montana's commissioners had belatedly raised the general issue of unsatisfied pre-1950 water users.

In summary, the evidence is undisputed that Montana made no calls to Wyoming except in 2004 and 2006. If under the compact, such calls are a condition of Montana obtaining damages or other relief under Section V(A), then Wyoming is entitled to partial

summary judgment except for any Wyoming V(A) violations that Montana can prove occurred in 2004 and 2006 after the Montana calls.

## ARGUMENT

### I. Legal standard for summary judgment

In original actions, the Supreme Court is not bound by the Federal Rules of Civil Procedure, but uses Rule 56 of those rules as a guide. *Alabama v. North Carolina*, 130 S. Ct. 2295, 2308 (2010) (citing Sup. Ct. Rule 17.2). The Court applies the same general test set forth in Rule 56: "[S]ummary judgment is appropriate where there 'is no genuine issue as to any material fact' and the moving party is 'entitled to judgment as a matter of law.'" *Id.* at 2308 (quoting F. R. Civ. P. 56(c) (standard now contained in subsection (a) following 2010 amendments to Rule 56)). The substantive law governing the dispute determines what facts are material to the summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), *cited in Alabama*, 130 S. Ct. at 2308. For purposes of this motion, the material facts are those that show what calls Montana made between 1952 and 2006.

A genuine issue of material fact persists, and requires the court to deny the motion, when a reasonable finder of fact could return a verdict for the non-moving party at trial. *Anderson,* 477 U.S. at 248-49. However, if the moving party supports its motion with sufficient materials that would prevent a reasonable fact finder from deciding in favor of the non-moving party, the latter can defeat the motion only by submitting materials showing sufficient facts to create a genuine issue for trial. *Id.* at 250.

## II. The Yellowstone River Compact requires Montana to make a call on Wyoming as a precondition of Wyoming liability under Section V(A)

### A. Section V(A) incorporates the doctrine of appropriation, which imposes a call requirement

The Supreme Court has held in this case that the "laws governing the acquisition and use of water under the doctrine of appropriation" establish the extent to which pre-1950 Montana rights enjoy protection under the compact. *Montana v. Wyoming,* 131 S. Ct. 1765, 1771 (2011). In proceedings on Wyoming's Motion to Dismiss, the Special Master and the Court acknowledged potential choice of law questions posed by Section V(A) of the compact, which does not state a specific source jurisdiction for the "laws governing the acquisition and use of water under the doctrine of appropriation." *Id.* at 1771 n.4, 1775-76; First Interim Rep. of the Special Master at 38-39. However, as the Special Master observed with respect to the issues raised by Wyoming's earlier motion, the laws of Wyoming and Montana, and the prior appropriation doctrine as generally applied in other states, "thankfully" all converged, obviating any conflict of law. First Interim Rep. of the Special Master at 39. The same convergence occurs on the issue raised by this motion, because all prior appropriation states either do or, if posed the question, would, require a timely call as a condition of a later claim for damages.

#### 1. The doctrine of appropriation requires senior appropriators to make a call on upstream junior appropriators as a condition of liability

Wyoming has been able to find only one court, the Supreme Court of New Mexico, which has directly addressed the legal issue raised by this motion. *Worley v. U.S.*

*Borax and Chem. Corp.,* 428 P.2d 651 (1967). It is likely that most appellate courts in prior appropriation states have not addressed this issue because senior appropriators would typically choose to timely assert their water rights to mitigate crop or other damage, and not silently suffer such damage hoping to later mitigate it through risky and expensive litigation. In any event, the New Mexico Supreme Court's decision and reasoning were sound, and other courts would likely follow its lead.

In *Worley,* the plaintiff, Austin Worley, claimed that he had suffered crop damage because several upstream junior appropriators on the Pecos River, United States Borax Chemical Corporation and Southwestern Public Service Company, diverted water that would have otherwise reached Worley's point of diversion. *Id.* at 652-53. Borax and Southwestern moved for summary judgment, submitting affidavits that showed that Worley failed to make a demand directly to Borax or to ask the state engineer or water master to restrict the upstream diversion. *Id.* at 653. The district court granted the motion, and Worley appealed to the New Mexico Supreme Court. *Id.*

The court began its analysis with the basic principle that a junior appropriator is not bound to allow water to pass his point of diversion unless a downstream senior appropriator needs the water. *Id.* at 654 (citing *Cook v. Hudson*, 103 P.2d 137, 146 (Mont. 1940); *Vogel v. Minn. Canal & Reservoir Co.*, 107 P. 1108 (Colo. 1910)). The court then explained that if the junior had to exercise this privilege at his peril, even when the downstream senior was silent, such a rule would encourage the waste of water. *Id.* Once the junior let the water pass his diversion point out of fear of potential liability, the

water could not be recalled and would be lost to beneficial use if it turned out that the downstream senior did not need the water. *Id.* (quoting N.M. Const. art. 16, § 3). The court rejected such a poor policy outcome by holding: "The downstream senior appropriator is entitled to use water to the extent of his needs, and within his appropriation. If needed, and if the water is not reaching his diversion point, he must make his needs known." *Id.* (citing *Vogel*, 107 P. 1108; *Cook*, 103 P.2d 137). The court concluded that it did not need to determine how Worley should have made his call—whether on the State Engineer, the water master, the upstream juniors, or one or more of them—because it was undisputed that Worley made no call at all. *Id.* The court affirmed summary judgment. *Id.* at 655.

The *Worley* court was correct that junior appropriators would occupy an untenable position if they could be liable to senior appropriators who failed to timely make a call. Junior irrigators who are busy with their own farming or ranching would also have to continuously determine the seniors' needs and intentions throughout the irrigation season. However, if as the *Worley* court held, the burden falls on the seniors to notify the juniors or the appropriate water regulatory authority when the seniors need or want the water, that burden would be light. The senior users can easily determine when they suffer shortage, and are the only ones who can know their own intentions to irrigate. *See Tucker v. Missoula Light & Water Co.*, 250 P. 11, 13-14 (Mont. 1926) (downstream senior appropriator made timely requests and demands to upstream junior appropriator; senior could maintain later damage claim after junior failed to curtail his diversions).

Moreover, as the *Worley* court explained, the rule requiring seniors to initiate calls as a condition of later damage claims rests upon the bedrock principles of beneficial use and avoidance of waste. 428 P.2d at 654; s*ee also, e.g.,* Wyo. Const. art. 8, § 3; Wyo. Stat. Ann. § 41-3-101; *Montana v. Wyoming,* 131 S. Ct. at 1772 (citing *Quinn v. John Whitaker Ranch Co.*, 92 P.2d 568, 570-71 (Wyo. 1939); *Bailey v. Tintinger,* 122 P. 575, 583 (Mont. 1912)). The phrase "beneficial use" may be employed not only to refer to types of uses that are considered worthy of the law's protection, as in Section V(A) of the Yellowstone River Compact, but also to refer to the quantity of water that a user needs to enjoy his right. *Compare Montana v. Wyoming,* 131 S. Ct. at 1778 (compact employs the phrase beneficial use to refer to type of use), *with* First Interim Rep. of the Special Master at 59 (citing *Bailey v. Tintinger,* 122 P. 575, 580 (Mont. 1912)). The law of forfeiture and abandonment of water rights stems from the concept that non-beneficial or wasteful use, or extended non-use, are not worthy of protection. *See, e.g.,* Wyo. Stat. Ann. § 41-3-401. These principles would be undermined by a rule of law that would encourage junior appropriators to curtail their beneficial use to avoid potential future liability even though there have been no regulatory calls from senior users and the seniors might not even use the water the juniors elected to not use. *See* Wyoming regulation forms attached to exs. 3-5 to Tyrrell Aff. ("The appropriator is obligated to notify the hydrographer commissioner or water commissioner prior to the date when water will no longer be used so that the proper adjustments may be made to avoid the waste of water.").

In summary, the New Mexico Supreme Court stated in *Worley* what should be the general rule under the doctrine of appropriation on the key legal issue raised by Wyoming's motion: A senior appropriator may not make a claim for damages against a junior appropriator if the senior did not timely notify either public officials responsible for regulating the river, or the upstream junior appropriator, that the senior is receiving insufficient flows to satisfy his right.

### 2. The Montana Supreme Court would likely impose the call requirement

Although there is no Montana case directly on point, it is likely that the Montana Supreme Court would adopt the *Worley* holding if the question arose. In 1926, the Montana Supreme Court answered the converse of the question posed in *Worley,* holding that if a downstream senior appropriator makes a timely call on an upstream junior through his only available mechanism for a call, the senior does not lose his claim for damages if the upstream junior continues to divert in spite of that call. *Tucker v. Missoula Light & Water Co.* 250 P. 11, 13 (1926). Fourteen years later, in *Cook v. Hudson,* 103 P.2d 137, 146 (1940), the court recognized the logical predicate for the rule later stated in *Worley*, holding that an upstream junior is privileged to divert water that a downstream senior does not need. The Montana Supreme Court stated:

> It is a fundamental principle of water right law that a prior right may be exercised only to the extent of the necessities of the owner of such prior right and when devoted to a beneficial purpose within the limits of the right. When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right or rights in the order of priority may use the water until such time as the prior appropriator's

> needs justify his demanding that the junior appropriator or appropriators give way to his superior claim.

*Id., quoted in Worley*, 428 P.2d at 654, *and cited in United States v. Gila Valley Irr. Dist.*, 804 F. Supp. 1, 13 (D. Ariz. 1992) *and* I Wells A. Hutchins, WATER RIGHTS LAW IN THE NINETEEN WESTERN STATES 574 (1971).

While the Montana court did not expressly hold that a senior's damage claim depended on a timely call, it inferred such a burden on the senior when it stated that junior could divert until such time as the senior's needs justified "his demanding" that the junior cease. *Cook,* 130 P.2d at 146. After it quoted from the Montana Supreme Court's statement in *Cook*, the *Worley* court did not have to extend the Montana court's logic very far to decide that a senior needed to make demand to preserve a damage claim. The rule stated in *Cook,* and the *Worley* holding extending that rule, are both based on the policies of encouraging beneficial use and discouraging waste, policies fundamental to Montana water law. Mont. Code Ann. § 85-1-101(1); *Bailey v. Tintinger,* 122 P. 575, 583 (Mont. 1912). The Montana Supreme Court would undoubtedly adopt the *Worley* holding if faced with such a case.

A Montana Supreme Court decision requiring a senior to make a timely call would also be consistent with Montana administrative practice. Montana regulators currently emphasize in their directives to Montana appropriators that those appropriators have an obligation to make their needs and desires known to protect their water rights. The Montana Department of Natural Resources states on its water use complaint form: "In

most instances, the DNRC will not act if the appropriator has not been contacted by the complainant." Mont. Dept. of Nat. Res. and Cons., Water Res. Div., Water Use Complaint form, http://dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/609.pdf.

### 3. Wyoming law requires a call as a condition of a damage claim

Like the appellate courts in most other prior appropriation states, the Wyoming Supreme Court has not yet decided a case like *Worley*. However, the Wyoming court would undoubtedly agree with the New Mexico Supreme Court.

The drafters of the Wyoming Constitution, Wyoming legislatures since statehood, and the Wyoming courts have all embraced the principles of beneficial use and avoidance of waste, and would undoubtedly support those principles by agreeing with the New Mexico Supreme Court that senior water users need to make regulatory calls if they are to preserve damage claims against junior appropriators. Wyo. Const. art. 8, § 3; Wyo. Stat. Ann. § 41-3-101; *Montana v. Wyoming,* 131 S. Ct. at 1772 (citing *Quinn v. John Whitaker Ranch Co.,* 92 P.2d 568, 570-71 (Wyo. 1939)).

Wyoming's first legislature made regulatory calls an important aspect of priority administration by passing a statute that barred water commissioners from commencing work to administer water rights until they received written calls from two or more owners of ditches in their district. 1890 Wyo. Sess. Laws 104. Eleven years later, in 1901, the statute was broadened to allow water commissioners to begin administration "at the written call of one appropriator, owner or manager if the reasons given for the same are deemed sufficient to the commissioner." 1901 Wyo. Sess. Laws 107. Then in 1907, the

statute was further broadened to allow a commissioner to regulate upon a single appropriator's demand without any reasons from the appropriator. 1907 Wyo. Sess. Laws 141. The current version of the statute, which the legislature passed in 1991, states: "Any holder of a Wyoming water right may request that the source of supply for his water rights be regulated by a water commissioner as authorized by law and in accordance with established priorities. Requests for regulation shall be in writing submitted to a water commissioner or water superintendent." Wyo. Stat. Ann. § 41-3-606; 1991 Wyo. Sess. Laws 280.

The Wyoming State Engineer and Board of Control have adopted rules and forms to allow Wyoming appropriators to avail themselves of their longstanding statutory right to demand regulation to protect their priorities. Bishop Aff. ¶ 8 and ex. 1 thereto at 59-60; Tyrrell Aff. ¶ 10 and exs. 3, 4 and 5 thereto. All of these statutes and rules require that calls for regulation be in writing, which shows that the Wyoming Legislature and the Wyoming State Engineer and Board of Control treat calls for regulation as serious business affecting the livelihoods of water users. *See id.*; Wyo. Stat. Ann. § 41-3-606.

Based on Wyoming's policy favoring beneficial use and on its statutes and rules providing for written regulatory calls, the Wyoming Supreme Court would reject an argument by a senior water user that he could ignore his right to make a call for regulation, leave an upstream junior in the dark about the senior's need for regulation, leave the water commissioner in the dark about the need to shut off the upstream junior's

headgate, but still make a later claim for damages that could have been alleviated by prompt assertion of the senior's rights.

In summary, the doctrine of appropriation requires a senior water appropriator to give timely notice of his need for water if the senior is to later maintain a claim for damages. When the drafters of the Yellowstone River Compact adopted the "doctrine of appropriation" as the mechanism by which pre-1950 rights would "continue to be enjoyed" under Section V(A), this common law rule was included.

### B. The compact's administrative structure necessarily implies a call requirement

The compact drafters' incorporation of the doctrine of appropriation in Section V(A) is not the only part of the compact from which a call requirement arises. The compact's administrative structure, centered on Article III, also strongly suggests that Montana must make a call for regulation if Section V(A) is to perform its function of protecting Montana pre-1950 rights. On one hand, the drafters' compact commission structure provides a straightforward avenue for a Montana call. On the other hand, the drafters' decision to reject imposing an interstate water regulation agency with local water masters deputized to ignore state lines, makes formal compact calls from the Montana compact commissioner to his Wyoming counterpart the only feasible and fair way to implement Section V(A).

### 1. The compact's administrative provisions require cooperation, which in turn depends on communication between the commissioners

The Supreme Court, the Special Master, and the parties, have recognized that the drafters rejected a pure prior appropriation scheme that would have allowed a Montana pre-1950 user to require a junior pre-1950 Wyoming user to curtail his diversion, and instead, that the drafters created in Section V(A) a modified scheme under which pre-1950 Montana rights could obtain curtailment of post-1950 diversions in Wyoming. *Montana v. Wyoming,* 131 S. Ct. at 1772 (citing Mont.'s Exception and Br. at 23; Br. for the United States at 12); First Interim Rep. of the Special Master at 29. The drafters of the compact could have included express provisions creating an administrative agency consisting of hydrographers who would physically travel up and down the rivers and across state lines to enforce Section V(A). Perhaps such an agency of interstate hydrographers could apply Section V(A) by receiving and enforcing calls for regulation by individual irrigators, just as Wyoming and Montana regulators now enforce intra-state calls. Given enough manpower and a large enough budget, perhaps such an agency could even regulate the rivers through direct observation, without relying on pre-1950 appropriators in Montana to communicate when they are short of water and would beneficially use it if they could get it.

However, the compact drafters did not establish such an agency, and the Yellowstone River Compact Commission has not attempted to do so in the succeeding 61 years. *See, e.g.,* 2004 YRCC Ann. Rep., Gen. Rep. at 21 (Rules and Regulations for the

Administration of the Yellowstone River Compact), 25 (Rules for the Resolution of Disputes over the Administration of the Yellowstone River Compact), 28 (Rules for Adjudicating Water Rights on Interstate Ditches). On the contrary, as the Special Master explained in his First Interim Report, the drafters disavowed any intent to enforce the modified V(A) appropriation scheme through a unified or integrated regulatory commission. *See* First Interim Report of the Special Master at 36-37 and Congressional reports and drafters minutes cited therein. This conclusion is further supported by the Wyoming delegation's express rejection of the phrase "regardless of state lines" that Montana had proposed to engraft onto Section V(A) during final negotiations of the compact. First Interim Rep of the Special Master at 32-33. The parties have not taken exception to this conclusion.

Upon rejecting the concept of a super-agency with the authority and capacity to administer Section V(A) without regard to state lines, the drafters established a three-member compact commission that was to function through communication and cooperation, relying on data collected within each state by its own water agencies, and making recommendations to the states as to how they should administer intra-state rights in compliance with the compact. *See* Compact, Art. III C and D. The drafters further fostered communication and cooperation by requiring annual commission reports to the governors. Compact, Art. III C. Subsequent compact commissions adopted rules for administration and dispute resolution, which also mandated communication and cooperation. *See, e.g.,* 2004 YRCC Ann. Rep., Gen. Rep. at 23 (requiring annual

meetings and allowing special meetings), 25-26 (consensus process of dispute resolution). If Montana were permitted to obtain damages based on shortage, without having communicated that shortage to Wyoming in time for Wyoming curtail its overuse by post-1950 irrigators, Montana would face no consequences for evading the important compact principles of communication and cooperation.

**2. Without notice, Wyoming could not anticipate Montana shortages under Section V(A)**

The compact, and the protocols that the states have adopted under it, do not authorize the Wyoming and Montana commissioners to unilaterally determine first-hand what is going on in the other state for administration purposes. Also, the sovereignty of each state precludes extra-territorial administration by water regulators outside of their jurisdiction. *State ex. rel. Sorensen v. Mitchell Irr. Dist.,* 262 N.W. 543, 547 (Neb. 1935) (Wyoming administrators lack authority to regulate water within Nebraska); *see also* Tyrrell Aff. ¶¶ 8-9; Fassett Aff. ¶¶ 7-9. Therefore, even if Wyoming had the funds and the will to expend those funds on monitoring daily water use on the Tongue and Powder Rivers in Montana, it could not determine whether it might be at risk of diverting water to post-1950 uses at times when Montana pre-1950 uses are short. The obvious way for Wyoming to reliably learn of Montana's needs is through notification from Montana, which has the power, as well as the responsibility, to protect its individual water users through enforcement of the compact. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 107-08 (1938).

A compact notification under Section V(A), from Montana commissioner to Wyoming commissioner, serves the same purpose here as a call for regulation serves in an intra-state scheme. It provides the Wyoming commissioner, in his capacity as representative for upstream post-1950 Wyoming users, with notice that Montana pre-1950 irrigators need more water, and that they also want to use that water. Both pieces of information are necessary to satisfy the concepts of beneficial use and prevention of waste that were incorporated into Section V(A) as part of the "doctrine of appropriation." It does Wyoming no good to know that insufficient water is passing the state line to satisfy all pre-1950 Montana rights, unless Wyoming also knows from the Montana commissioner that the holders of those rights will make beneficial use of additional water that would be released if Wyoming curtails post-1950 diversions. Yet Wyoming officials are not empowered by the compact or other law to independently require Montana water users to disclose their water situations or intentions.

Montana has the power to gather the relevant information from its pre-1950 water users, check that information to determine if its users have a legitimate basis to make a call, and transmit that call to Wyoming from one voice—the voice of Montana's compact commissioner. *See Hinderlider*, 304 U.S. at 107-08; *see also* Mont. Code Ann. §§ 85-2-112 through -113 (duties of Montana Dep't of Natural Res. to administer water rights). Wyoming's receipt of that call triggers Wyoming's investigation of its post-1950 diversions. Neither state is required to accept what the other says at face value, but the communication process begins. Without the triggering event of a compact call, and

subsequent cooperation, Wyoming is no more capable than a regular upstream junior appropriator in an intra-state situation of understanding the needs or desires of downstream pre-1950 appropriators in Montana.

### 3. Compact commissioners from both states have long recognized the necessity of notification for Section V(A) to function

Montana has proven by its actions that a compact call is not only fair and necessary, but easily accomplished. In the 1982 and 1983 commission meetings, when Montana Compact Commissioner Fritz stated his retroactive concerns about possible shortage suffered by Montana pre-1950 rights in 1981, he offered that if the concern arose in future water years, Montana would notify Wyoming. 1982 YRCC Ann. Rep., Ltr. to Govs. at IV; 1983 YRCC Ann. Rep., Ltr. to Govs. at IV. Presumably, Commissioner Fritz would not have made this commitment if he thought it was impractical or onerous.

Then, in 2004 and 2006, Montana honored this earlier offer. Commissioner Stults notified Commissioner Tyrrell, in the thick of those water years, that Montana pre-1950 appropriators were experiencing shortage, and Wyoming should do something about it. As a result, Wyoming could no longer assume that Montana pre-1950 users were satisfied with any Wyoming post-1950 diversions that were still occurring. Montana included a disclaimer in its July 28, 2006 call letter, stating that the compact did not require it to so notify Wyoming. Tyrrell Aff., ex. 2, p. 2. While that disclaimer may prevent the 2006 letter from becoming a Montana admission that a formal call is necessary, it does not

diminish the fact that the letter and its attachments showed that Montana was in a unique position under this compact to understand its appropriators' circumstances, and should therefore have a corresponding duty to share such knowledge with Wyoming through a timely call.

**4. The elements of a compact call**

In order to decide whether Montana made a valid call in a particular year, one must know what a call would look like if it were made by answering the following questions: (1) who should make the call? (2) to whom should the call be directed? (3) when should the call be made? (4) how should the call should be made, orally or in writing? and (5) what information must the call contain to notify the recipient of a problem under Section V(A)?

The first two questions are easily answered. Under *Hinderlider*, states represent their various water users for purposes of compact negotiation and administration under the *parens patriae* doctrine. 304 U.S. at 106. Once the states and Congress approved the Yellowstone River Compact, it superseded any water rights administration across the state lines through independent federal court litigation between individual irrigators. *See, e.g., Bean v. Morris*, 221 U.S. 485 (1911) (federal court litigation in the absence of a compact). The Yellowstone River Compact provides that Montana and Wyoming each contribute a commissioner to the compact commission, which is empowered to make recommendations to the states. Compact, Art. III C. The states then administer their water rights internally to comply with the compact, and if they do not, are subject to liability to

the other state. The compact commissioners are the only proper conduits for compact calls and Montana understood this when it made its calls in 2004 and 2006. In those years, Montana gathered facts from its individual water users and presented them to Wyoming in affidavits attached to its call letters. *See* Tyrrell Aff. exs. 1 and 2.

The answer to the third question, when the call should be made, is actually just a restatement of the key issue in this motion. The point of a call, as Wyoming defines it, is to get water to a senior appropriator when it will do the senior some good, when the senior is still trying to make beneficial use but is unable to because of junior appropriators' uses. A junior appropriator, or an upstream state, would rarely be able to physically recall water back to a river once the water was diverted and put to use. Moreover, it would be an administrative nightmare for Wyoming's regulators to try to put a system back to the *status quo* that existed weeks or months earlier, if they had to honor a Montana call retroactively.

The fourth question, whether a call should be made orally or in writing, might be answered differently in a compact case than in an intra-state case. While Wyoming has long required written calls under its statutes and rules, and Montana currently requires written calls to its regulators, the Montana Supreme Court's 1926 *Tucker* decision, 250 P. 11, 13, implied that an oral call could be adequate. *See also Worley,* 428 P.2d at 654 (court declined to decide how call should be made since lack of any call was undisputed). However, the case for a writing requirement is compelling in the context of a compact call.

In its initial brief in this case, Montana contended that this compact dispute between sovereigns was of sufficient seriousness and dignity to invoke the Court's original jurisdiction. Mot. for Leave to File Bill of Compl., Bill of Compl., and Br. in Supp. at 21. And it is true that the drafters of the Yellowstone River Compact understood the high importance of their compact, stating that it was to "remove all causes of present and future controversy between the States and between persons in one and persons in another." Compact, preamble. To that end, the drafters established a compact commission with the duty of negotiating disputes, gathering information, and compiling and transmitting annual reports to the governors. Compact, Art. III A and C. In 2004 and 2006, Montana submitted its calls to Wyoming in writing from its commissioner to Wyoming's, and Montana later characterized those writings as official notifications. *See* Mot. for Leave to File Bill of Compl., Bill of Compl., and Br. in Supp. at 17 (Jan. 2007). As Montana apparently understood, official calls are matters of high importance that require a paper trail and the reliable evidence it provides both states.

The writing requirement may be moot in this case, because Wyoming knows of no evidence that shows that Montana made a call for regulation from 1952 through 2006 that was unsupported by a formal written demand. However, if the Special Master is to provide guidance for future compact administration, he should require a written call.

On the final question as to what should be the content of a call, Wyoming does not assert that the writing must contain complete information about every aspect of the shortage being suffered by pre-1950 users in Montana or about the post-1950 diversions

in Wyoming that may be contributing to the low flows. A call should simply allege an existing or imminent shortage in the downstream state and a request that the upstream state take timely action if an investigation warrants it. A valid call under Section V(A) of the compact would consist of a written statement from the Montana commissioner to the Wyoming commissioner that Montana is presently in shortage and Wyoming may have to take immediate action to curtail diversions.

In summary, the compact's administrative structure supports the compact's incorporation of a regulatory call requirement as part of the doctrine of appropriation. The fundamental concepts of fairness, beneficial use, and prevention of waste, which justify a regulatory call requirement in an intra-state setting, justify the same requirement in this interstate setting where the upstream state lacks the authority to independently determine when the lower state is in shortage. Montana's commissioner must make timely calls to the Wyoming commissioner in order to preserve a claim for damages under Section V(A).

## III. Montana only made a call in 2004 and 2006, and its Section V(A) claims should be limited accordingly

Montana made no compact calls on Wyoming in any years other than 2004 and 2006. Wyoming's affidavits prove the absence of such calls, except for the years 1952-1956, 1958-1962, and 1975-1985, when the deceased L.C. Bishop, Earl Lloyd, and George Christopulos, were its commissioners. And in each of those 21 years, the commission's annual reports are silent about any Montana calls. Moreover, during those

21 years and most of the other years between 1952 and 2003, the commissioners consistently supplemented that silence in their official reports with affirmative statements to their governors that there had been no circumstances or occurrences that warranted interstate administration of the rivers.

By contrast, when Montana officially notified Wyoming in 2004 and 2006 that its pre-1950 users were unsatisfied and something needed to be done, the commission confirmed that notification in its annual reports. 2004 YRCC Ann. Rep. , Gen. Rep. at VIII; 2006 YRCC Ann. Rep., Gen. Rep. at X and Attachment B thereto. And even in years such as 1982, 1983, and 1992, when Montana raised only vague complaints about satisfaction of its pre-1950 rights, the commissioners noted those complaints in the reports. Based on Wyoming's affidavits and the annual reports, a reasonable finder of fact could not conclude that Montana made a call except in 2004 and 2006. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986). Wyoming is therefore entitled to partial summary judgment as a matter of law.

## CONCLUSION

The doctrine of appropriation as it would be applied throughout the prior appropriation states, including Montana and Wyoming, requires a senior appropriator to make a timely call for regulation if that appropriator is to maintain a later claim for damages against an upstream junior appropriator. The drafters of the compact incorporated this rule when they incorporated the doctrine of appropriation in Section V(A).

Also, to enforce the operative provisions of the compact, including Section V(A), the drafters adopted intra-state regulation by each state's existing authorities, subject to direction from the three-member compact commission. The drafters rejected any system of regulation consisting of a body of regulators with authority to ignore state lines. Consequently, the policies that support a call requirement in an intra-state setting also demand that the requirement be imposed on the downstream state under the compact.

Montana failed to make any calls upon Wyoming under Section V(A) from 1952 through 2003, and also made no call in 2005. Its claims under Section V(A) should be limited to the years 2004 and 2006 as a matter of law.

Dated this 12th day of September, 2011.

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 Motion for Partial Summary Judgment was served by electronic mail and by placing the same in the United States mail, postage paid, this 12th day of September, 2011.

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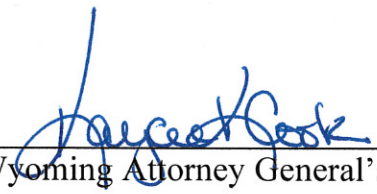

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