

NO. 137, ORIGINAL

**IN THE
SUPREME COURT OF THE UNITED STATES**

STATE OF MONTANA, PLAINTIFF

V.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, DEFENDANTS

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

**THE STATE OF WYOMING'S MOTION FOR LEAVE TO AMEND ITS ANSWER TO
INCLUDE THE DEFENSES OF LACHES AND MITIGATION OF DAMAGES**

The State of Wyoming, through counsel, moves for leave to amend its Answer to the Bill of Complaint to include the defenses of laches and mitigation of damages pursuant to Supreme Court Rule 17.2 and Fed. R. Civ. P. 15. Counsel has complied with the meet and confer rule in a telephone conversation occurring on June 14, 2012, followed by electronic mail. Counsel for the State of Montana indicated that Montana takes no position on the motion for leave to amend at this time, but reserves the right to respond after it has reviewed the motion.

In support of its motion, the State of Wyoming provides the following:

A. Discovered Facts Which Support the Laches and Mitigation of Damage Defenses.

Although Montana initiated this case in January of 2007, discovery did not begin until January of 2012. *See* Case Management Plan No. 1, at 8. During that initial five year period, Montana never specifically identified all of the years which it claimed Wyoming violated the Compact, but instead only alleged that such violations occurred since the Compact's inception. *See* Bill of Complaint, ¶¶ 9-12. As a result, Wyoming has not known the full extent of Montana's claims, including the specific years and dates it intended to make those claims.

Shortly after discovery opened in this case, 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 upon Wyoming, and to provide other details about any such calls. Wyoming's Br. in Supp. of its Renewed Mot. for Summ. J. at 1.¹ Wyoming also asked Montana to state what persons it believed were authorized to make such calls and the basis for such authority. *Id.*

Montana served answers to these interrogatories on March 19, 2012. *Id.* As to dates of alleged violations, Montana repeatedly identified only 2004, 2006, "and possibly other years." *Id.* Not until its supplemental interrogatory answers dated May 4, 2012, did Montana assert that it made calls in every low runoff year since 1981, the same years that it listed in its answers as being years of Wyoming Compact violation. *Id.* at 19. Montana identified years but it gave no specific dates for any of those purported curtailment calls. *Id.* Also, for the first time Montana identified Keith Kerbel

¹ Wyoming is filing its Renewed Motion for Summary Judgment and Brief in Support contemporaneously with this motion. Many of the facts Wyoming relies upon in support of that Motion are equally applicable here. To avoid needless redundancy, Wyoming cites to that Brief and incorporates those supported facts in this Motion.

and Jack Stults as two persons besides Richard Moy and Roger Muggli who it contended made curtailment calls. *Id.* at 18.

However, other than years 2004 and 2006, none of the Montana witnesses who purportedly made calls are able to remember any specific call dates or point to any supporting documentation. Mr. Moy testified that he could not remember in which years Montana water users were short of water, or which years Wyoming overuse may have affected Montana water users. *Id.* at 9. He stated that he thought 1981, 1982 and 1985 were drought years, 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.*

Mr. Stults was also quite vague as to what Montana asserted and to whom it was asserted in the context of a call for curtailment. He could not give dates. And, other than 2004 and 2006, he denied the existence of contemporaneous documentation of a call. *Id.* at 15.

Mr. Kerbal's memory is also unclear after the passage of many years. He gave some generalities about discussions at commission meetings after 1990, but he also reported conversations outside that venue. *Id.* at 18. He could not connect conversations with dates or places, and generally admitted his inability to recall specifics. *Id.* He was most certain about the years 1983 and 1985, testifying that he knew for a fact that he did not have conversations with Wyoming water official Mike Whitaker by telephone those years. *Id.* Although Mr. Kerbel had no such contacts in 1985, and did not attend the annual meeting that year, Montana has nevertheless contended that he made a curtailment call that year. *Id.*

Discovery also reveals that Montana will be able to produce little, if any, documentation to evidence much of its state's relevant water use for most of the years it complains of Compact

violations. No Montana court has ever appointed a commissioner to regulate the Powder River. Exh. A, Kerbel Dep. at 45:18-46:10. Similarly, no commissioner regulated the Tongue River until 2001. Ex.B, Mont. Interrog. Answer 14. Also, Montana has never enforced its data reporting statute as to water rights with priorities between 1950 and 1973. Wyoming's Br. in Supp. of its Renewed Mot. for Summ. J. at 6. Without an appointed commissioner and the resulting records a commissioner would submit to the district court who appoints him, or data reported as required by Montana statute, Wyoming is left to the memories and records of individual water users to test Montana's water usage assertions. Kerbel Dep. at 45:18-46:10.

B. The Liberal Rules Governing Pleading Amendments Support Granting Wyoming's Motion to Amend Its Answer.

Supreme Court Rule 17.2 provides that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules . . . may be taken as guides." Sup. Ct. R. 17.2. As a guide and with regard to the amendment of pleadings, the applicable Federal Rule of Civil Procedure states that "the court should *freely give* leave when justice so requires." F.R.C.P. 15(a)(2) (emphasis added). "The function of Rule 15(a), which provides generally for the amendment of pleadings, is to enable a party to assert matters that were overlooked or were unknown at the time the party interposed the original complaint or answer." 6 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 1473 (2012)). The presumption runs in favor of permitting Wyoming to amend its Answer. *Morales v. Landis Const. Corp.*, 715 F. Supp. 2d 86, 90 (D.D.C. 2010)

As in Wyoming's case, defenses may reveal themselves after discovery. "The pertinence of a particular defense may only become apparent after discovery, for example, in which case it would be

reasonable for the court to permit the belated assertion of that defense.” *Venters v. City of Delphi*, 123 F.3d 956, 967 (7th Cir. 1997). Leave to amend should only be denied where there has been undue delay, bad faith, or dilatory motive on the part of the moving party, where an amendment may prejudice the opposing party, or where amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Prejudice to the opposing party is the key factor to evaluate in deciding whether to allow a motion to amend. *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749, 751 (10th Cir. 1975); *United States v. Houghman*, 364 U.S. 310, 316 (1960).

Only after Wyoming was able to engage in discovery did Montana begin to clarify its claims and disclose for which years it intends to assert claims. Previously, Wyoming only knew that Montana’s claimed damage occurred sometime between the birth of the Compact and the date of its suit. Wyoming’s only specific knowledge of Montana’s claims at the time it filed its Answer applied to years 2004 and 2006. Accordingly, Wyoming’s failure to assert the defenses of laches and failure to mitigate damages in its Answer cannot be attributed to its own undue delay, bad faith, or dilatory motive, but to Montana’s ambiguous claims. More importantly, Montana cannot claim prejudice due to Wyoming’s assertion of the defenses at this point in the litigation. Montana has ample time to discover facts relevant to those defenses. Written discovery in this case can continue until March 8, 2013, and the parties may take depositions until April 12, 2013. Case Management Order No. 10, ¶¶ 4, 5.

Wyoming’s requested amendment also does not take the litigation beyond what was reasonably anticipated when Montana filed its original Bill of Complaint. *See State of Nebraska v. State of Wyoming*, 515 U.S. 1, 8 (1995) (citing *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973)) (stating that in original actions between states, “proposed pleading amendments must be scrutinized closely

in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings.”). In *State of Nebraska*, the Court denied Wyoming’s motion for leave to amend its counterclaim because it sought to relitigate the original apportionment which was not within the issues the Court allowed in the initial pleadings. *Id.* at 10. By contrast, this amendment only seeks to assert discovered defenses to Montana’s original claims.

C. Wyoming’s Assertion of the Laches and Mitigation of Damages Defenses is Not Futile or Frivolous.

Denial of Wyoming’s motion to amend would be improper because the defenses it seeks to assert are not clearly futile. 6 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 1487 (2012). Wyoming is not required to conclusively prove the defenses by this motion, but simply show that they appear to be sufficiently well-grounded in fact or law and are not a frivolous pursuit. *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468-469 (D. N.J. 1990). Ultimately, the liberality of the federal rules allows pleading amendments to achieve the ends of justice. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 158 (1964).

1. Laches

Laches is an equitable doctrine which is designed to prevent stale claims for the peace, repose, and welfare of society. As the Court said in *Brown v. County of Buena Vista*, 95 U.S. 157, 161 (1877):

“The law of laches, like the principle of the limitation of actions, was dictated by experience The lapse of time carries with it the life and memory of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society.”

Id. The defense of laches “requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *State of Kansas v. State of Colorado*, 514 U.S. 673, 687 (1995) (citing *Costello v. United States*, 365 U.S. 265, 282, (1961)). Laches can bar or reduce Wyoming’s liability if Montana delayed inexcusably in pressing its claims and the delay prejudiced Wyoming. *State of Kansas*, 514 U.S. at 687.

Montana failed to diligently pursue its claims. To determine whether Montana’s delay in bringing its action is inexcusable, the relevant time period began to run when it knew or, in the exercise of reasonable diligence, should have known of the facts giving rise to its claim. *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990); *Jensen v. Western Irrigation & Mfg., Inc.*, 650 F.2d 165, 168 (9th Cir. 1980); *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 616 F.2d 1315, 1326 (5th Cir. 1980). The Special Master has already concluded that “Montana generally cannot seek damages for years in which it did not notify Wyoming that it was receiving inadequate water to meet its pre-1950 appropriative rights.” Mem. Op. of the Special Master on Wyoming’s Mot. for Partial Summ. J. (Notice Requirement for Damages), at 7 (Dec. 20, 2011). To the extent that Montana did provide the required notifications, it necessarily follows that Montana must have known the facts giving rise to its claims at that time. Montana asserts that it made the required calls as early as 1981, more than twenty five years before filing its action. Montana’s delay in bringing its claims for that year and others is inexcusable.

Montana’s delay has prejudiced Wyoming. Evidentiary or “defense” prejudice may arise due to the loss of evidence, the death of witnesses, or the fading memories of other witnesses, thereby undermining the court's ability to determine the facts. *A.C. Aukerman Co. v. R.L. Chaides*

Const. Co., 960 F.2d 1020, 1033 (Fed. Cir. 1992); *Brown v. County of Buena Vista*, 95 U.S. at 161; *See Indiana v. Kentucky*, 136 U.S. 479, 511 (1890), quoting *Rhode Island v. Massachusetts*, 45 U.S. 591, 639 (1846). Discovery reveals that the primary Montana actors have fuzzy memories at best.

The United States Supreme Court has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact. *State of Kansas*, 514 U.S. at 687. However, it has not foreclosed the applicability of laches in such cases. *Id.*

2. Mitigation of Damages

The Special Master has already identified the potential applicability of the doctrine of mitigation:

It is worth noting that the Supreme Court has emphasized that an interstate compact is essentially a contract between states. See *Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting). And the “duty to mitigate is a universally accepted principle of contract law requiring that *each* party exert reasonable efforts to minimize losses whenever intervening events impede contractual obligations.” Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va. L. Rev. 967, 967 (1983) (emphasis added). Other considerations, however, may make the doctrine of mitigation inapplicable in this case or may vary the requirements from standard mitigation law.

Mem. Op. of the Special Master on Wyoming’s Mot. for Partial Summ. J. (Notice Requirement for Damages) at 7, n.4 (Dec. 20, 2011). The Special Master correctly notes that the duty of an aggrieved party to mitigate its damages upon breach by a counter-party is a well established principle of contract law. *See Restatement (Second) of Contracts* § 350(1) (1981). “[A] nondefaulting party in a contractual arrangement must act reasonably under the circumstances so as not to unnecessarily enlarge damages caused by default.” *Bronken's Good Time Co. v. J.W. Brown & Associates*, 661

P.2d 861, 864 (Mont. 1983) (citations omitted). The fact that the mitigation doctrine was explicitly foreshadowed by the Special Master in response to Wyoming's previous summary judgment argument supports granting Wyoming's motion to amend its Answer. See *Tokio Marine and Fire Ins. Co. Ltd. v. Employers Ins. of Wausau*, 786 F.2d 101, 103 (2nd Cir. 1986) (finding that the defendant's foreshadowing of a defense at summary judgment oral argument supported granting of motion to amend defenses).

In this case, “[i]f Montana knew that it was not receiving adequate water, notifying Wyoming would have given Wyoming the opportunity to curtail post-January 1, 1950 uses and thus reduce any damages.” Mem. Op. of the Special Master on Wyoming's Mot. for Partial Summ. J. (Notice Requirement for Damages) at 5 (Dec. 20, 2011). Providing such notice would certainly be reasonable under the circumstances, not only for the purpose of mitigating its damages, but to secure allocated water for its users, presumably Montana's goal. The Special Master's conclusion that Montana generally cannot seek damages for years in which it did not notify Wyoming that it was receiving inadequate water may ultimately subsume the mitigation doctrine defense.² However, until the Special Master determines the years Montana provided adequate notice and the details attendant to that notice, sufficient facts exist to allow Wyoming to explore and develop the mitigation of damages defense.

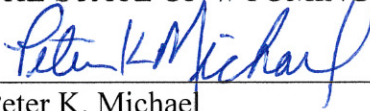
² This result appears more likely to preclude any estoppel defense Wyoming may assert for Montana's failure to provide notice as it represented it would. See Mem. Op. of the Special Master on Wyoming's Mot. for Partial Summ. J. (Notice Requirement for Damages) at 6, n. 5 (Dec. 20, 2011). Accordingly, Wyoming does not include that defense in this motion but reserves the right to assert it and other, additional affirmative defenses that may become apparent as this case proceeds.

CONCLUSION

A proposed State of Wyoming's Amended Answer to Bill of Complaint is attached to this motion. Wyoming requests that the Special Master grant its motion for leave to amend its answer to include the defenses of laches and mitigation of damages.

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 Motion for Leave to Amend its Answer to Include the Defenses of Laches and Mitigation of Damages 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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Wyoming Attorney General's Office

No. 137, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, Plaintiff

V.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, Defendants

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

DEPOSITION OF

KEITH KERBEL

Taken at DNRC Regional Office
1371 Rintop Drive
Billings, Montana 59105

Monday, April 23, 2012
9:03 a.m. - 5:23 p.m.

GRAF COURT REPORTING
2704 Highland Park Place
Billings, Montana 59102
(406) 254-2576

Exhibit A

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16 AND
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18 AND
19 DAVID WILMS, ESQUIRE (by telephone)
20 123 State Capitol Building
21 Cheyenne, Wyoming 82002

22 Counsel for Defendant State of Wyoming

23 ALSO PRESENT:

24 Bern Hinckley

25 Reported by John B. Graf

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1 STIPULATIONS

2 It is hereby stipulated and agreed by and
3 among counsel for the respective parties that the
4 deposition be taken by John B. Graf, Freelance Court
5 Reporter and Notary Public for the State of Montana,
6 residing in Billings, Montana.

7
8 It was also stipulated by and among counsel
9 for the respective parties that the deposition be
10 taken in accordance with the Federal Rules of Civil
11 Procedure.

12
13 It was further stipulated by and among
14 counsel for the respective parties, and the deponent,
15 that the reading and signing of the deposition
16 transcript would be reserved.
17
18
19
20
21
22
23
24
25

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1 INDEX

2	WITNESS:	PAGE:
3	KEITH KERBEL	
4	BY MR. MICHAEL	5, 277
5	BY MR. WECHSLER	267
6		
7	Certificate of Witness	290
8	Certificate of Court Reporter	291
9		

10 EXHIBITS

11	NO.:	DESCRIPTION:
12	1	Water Right Dispute Options
13	2	Final Order
14		
15		
16		
17		
18		
19		
20		
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22		
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25		

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1 Thereupon,
2 KEITH KERBEL,
3 having been duly sworn to tell the truth, the whole
4 truth, and nothing but the truth, testified upon his
5 oath as follows:

6 ---
7 EXAMINATION
8 ---

9 BY MR. MICHAEL:
10 Q. State your name, please.
11 A. Keith David Kerbel, K-e-r-b-e-l.
12 Q. Have you ever had your deposition taken
13 before?
14 A. Yes.
15 Q. How many times?
16 A. Oh, probably -- just a guess, probably
17 five.
18 Q. When was the last time?
19 A. It was for my current job at the Bureau of
20 Reclamation. And it was in December of last year.
21 Q. Have you ever been deposed on issues
22 involving the Yellowstone River Compact?
23 A. No.
24 Q. Have you ever testified in court?
25 A. No.

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1 post-1950 rights?

2 A. Correct.

3 Q. If there was a use right, for example, that
4 was established, say, on the Powder River in 1955,
5 would that right then be required in the adjudication
6 process to install a measuring device? It's not a
7 new claim, is my point.

8 A. Oh, a new claim.

9 Q. No, it's for a claim, but it's a claim for
10 a use right that's been established prior to '73.

11 A. To be honest with you, I don't remember. I
12 really don't.

13 Q. If I wanted to find the answer to that
14 question, is there an adjudication specialist that
15 worked on the Powder or the Tongue, either one of
16 those, that would know the answer?

17 A. Let me see. It would be one of our
18 engineers. I think Laurence Siroky would be -- he
19 still works for the department. He was our
20 supervisor.

21 Q. Can you spell his last name for me?

22 A. S-i-r-o-k-y. We had engineers that did --
23 they reviewed -- I wasn't an engineer. The engineers
24 reviewed irrigation projects on Powder River. I
25 pretty much worked on reservoirs, springs, and

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1 times they just pumped into dikes, and they just
2 filled the dikes. And then they went to the next
3 dike, then they went to the next dike. Some
4 irrigators had ditches, and they dumped water in the
5 ditches, and then they had checks in the ditches that
6 dumped water into the dikes.

7 Q. I'm trying to visualize this dike. I mean,
8 I'm familiar with the -- say an ephemeral drainage
9 that has a spreader --

10 A. That's basically what they were. They were
11 spreader dikes. A lot of what we worked on on the
12 Powder River were spreader dikes.

13 Q. What kind of crops are we talking about?

14 A. Alfalfa predominantly. They did have some
15 corn.

16 Q. But from those pump points, the
17 adjudications of the Powder would give a flow rate --

18 A. Uh-huh.

19 Q. -- that the irrigator was entitled to,
20 correct?

21 A. Correct. We recommended; we didn't give it
22 to them. There's a big difference. We recommended
23 the flow rate to the courts for them to adjudicate.

24 We had no standing power to give anything to anyone.

25 Q. So you could recommend something, but the

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1 anything that deals with -- other than irrigation
2 systems. I did a few small irrigation systems but
3 not many.

4 Q. Was there a type of measuring device that
5 was commonly used on the Powder River?

6 A. No. And the reason is because everybody
7 uses Crisafulli pumps. And basically, at that
8 particular time, we didn't have anything available
9 that would measure the water accurately other than a
10 pump curve.

11 So what we used to determine their
12 historical use was the size of the pump, PTO speed,
13 how much lift they had, and horsepower in the
14 tractor. And then we looked at the duration of their
15 pumping and when they pumped and when they stopped
16 pumping.

17 That was as close as we could get on the
18 Powder River to any kind of measurement. Because
19 once they kicked up -- and they could throttle it
20 back. You know, with the throttle, with the rpm's on
21 the PTO, they could throttle back how much water they
22 were kicking out or not on the Powder River. But
23 basically we used the pump curve.

24 And then they didn't really use ditches.
25 Sometimes they did, sometimes they didn't. A lot of

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1 court may deny it or there might be an objection
2 that --

3 A. Correct.

4 Q. -- leads to a denial?

5 A. Correct.

6 Q. Turn to the next page of that statute,
7 would you please. This is the third page of your
8 packet there. And I'm referring to the statute
9 number 85-20-106.

10 A. Uh-huh.

11 Q. That provides a requirement that the water
12 right claimant -- post-1950 water right claimant send
13 information records to Helena each year in November.
14 Have I paraphrased that fairly well?

15 A. Uh-huh.

16 Q. Has that been enforced, to your knowledge?

17 A. The answer is no.

18 Q. So I guess let me ask this question. The
19 Powder River has never been administered by a
20 commissioner, to your knowledge, correct?

21 A. Correct.

22 Q. Records by prominent diversion method
23 pumpers of their diversions have not been sent to
24 Helena, to your knowledge, correct?

25 A. Correct.

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1 Q. If we wanted to go back from, say, 2008 --
 2 was it 2008 that you left the --
 3 A. 210.
 4 Q. 2010, rather.
 5 -- and tried to reconstruct which post-'50
 6 water rights took what water and when, is there any
 7 database that we could use other than trying to find
 8 the ranchers' own records or their recollections?
 9 A. You would have to -- there would be
 10 individual ranchers.
 11 Q. Let's kind of follow that thread a little
 12 bit on the Tongue River, because there was a decree
 13 on the Tongue River after 1914, correct?
 14 A. Correct.
 15 Q. And we know there were some years that
 16 there were commissioners appointed to administer the
 17 Tongue River diversions, right?
 18 A. Uh-huh.
 19 Q. And that was in the 2000s?
 20 A. Yes.
 21 Q. How many years -- can you give me an
 22 estimate of how many years it was administered?
 23 A. No, I can't.
 24 Q. I take it the record source for -- well,
 25 let me ask you this about the Tongue: Is it similar
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1 measuring device?
 2 A. They know how much they're diverting, so I
 3 assume they do, yes.
 4 Q. Is there a weir, do you know?
 5 A. I don't know, to be honest with you.
 6 Q. And I can ask Roger --
 7 A. Muggli.
 8 Q. -- Muggli?
 9 A. Right.
 10 But they do measure the flows out of the
 11 river. And they kept track of those wells.
 12 Q. Can you describe for me the systems going
 13 up to the Tongue River Reservoir in Montana, or is it
 14 a combination of pumps and also head gates?
 15 A. That pretty much describes how they use
 16 water on the Tongue. It's pumps and head gates for
 17 the most part. A lot of it is sprinkler. People
 18 have gone more to sprinkler than they have in the
 19 past.
 20 They had -- and that was part of the NRCS.
 21 They had a program, basically, that they felt
 22 sprinklers saved water. We found out differently.
 23 But anyway, to make a long story short, they gave a
 24 lot of cost share money, the individuals, to install
 25 sprinklers. So a lot of people took that cost share
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1 to the Powder, or is there also other types of
 2 diversions besides pumping that's significant on the
 3 Tongue?
 4 A. They have gravity ditch. T sprinklers.
 5 Q. Is T&Y -- that starts as a ditch?
 6 A. Yes. That's a gravity ditch with a
 7 diversion dam across.
 8 Q. So the individual users within the -- is
 9 that an irrigation district?
 10 A. Yes.
 11 Q. Are the individual water users within that
 12 district -- how do they remove the water from the
 13 canals?
 14 A. Checks and head gates.
 15 Q. That's a major nonpumping type of diversion
 16 in the Tongue, correct?
 17 A. Correct.
 18 Q. I say "major," but it's a fairly large
 19 diversion, right?
 20 A. Yeah. It's -- they burn 200 cfs about.
 21 And they irrigate about 9,700 acres.
 22 Q. Let me ask you the same questions about --
 23 let's just talk about T&Y. Is there a measuring
 24 device at the T&Y's, a conversion point from the
 25 river? They have a dam, you say, but is there a
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1 and put sprinklers in.
 2 And another reason is -- same thing in
 3 Wyoming is -- is that it's hard to get people to help
 4 in flood irrigation anymore and carry a shovel and go
 5 out there and walk around and tramp in the mud. So
 6 sprinklers accomplish another thing, too; they allow
 7 an opportunity to irrigate without having to hire a
 8 bunch of irrigators to carry a shovel around out
 9 there and push water.
 10 Q. On the Powder River it sounds like it's
 11 more of a flood irrigation system because, you're
 12 talking -- you're telling about me about spreaders
 13 being commonly used in Montana, correct?
 14 A. Yes.
 15 Q. Has there been some sprinkler system in the
 16 Powder River?
 17 A. I understand there's one or two. There's
 18 not very many, a very small amount. But I understand
 19 they've tried to use a few.
 20 Q. How about the Little Powder?
 21 A. That is purely water spraying. They pump
 22 and divert through ditches and pump depending upon
 23 how much lift they have. But the Powder River,
 24 they'll irrigate -- like the Little Powder, they'll
 25 irrigate in February. They'll go out and chop a hole
 Graf Court Reporting
 (406) 254-2576

CERTIFICATE OF DEPONENT

PAGE:	LINE:	CORRECTION:	PG	Line	Correction:
9	16	take out	198	22	contract compact
47	20	use	220	17	exit excess (2x's)
48	11	AS well.	232	15/16	Fort Union Fort
50	12	tend to line	235	10	five
59	3	zone 200	264	17	At Murray's McBirney
61	7	above			
78	3	river dim			
83	3	for spraying haying			
85	1	stayed state			
99	7	Powder River Tongue River			
103	9	may make			
112	20	piezets "piezometers" "piezos"			
113	9	headag haw			
113	11	stake from			

I have read the foregoing transcript of my testimony and believe the same to be true, except for the corrections noted above.

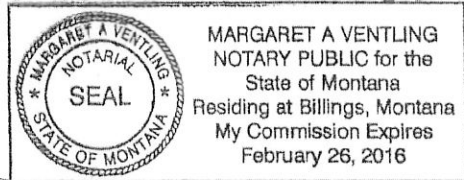
DATED this 30th day of May

2012.

Keith Kerbel

KEITH KERBEL, Deponent *Keith Kerbel*

SUBSCRIBED AND SWORN to before me this 30th day of *May*, 2012.



Margaret A. Ventling
Notary Public for the State of Montana
Residing at *Billings*, Montana
My Commission expires: *February 26, 2016*
Graf Court Reporting
(406) 254-2576

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(406) 254-2576

No. 137, Original

◆

In the
SUPREME COURT OF THE UNITED STATES
◆

STATE OF MONTANA

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA
◆

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

MONTANA'S RESPONSES TO
WYOMING'S FIRST SET OF INTERROGATORIES

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March 19, 2012

Exhibit B

Plaintiff the State of Montana ("Montana") hereby responds to Defendant's First Interrogatories to Plaintiff (Feb. 3, 2012). Responses are being made subject to Montana's Objections to Defendant's First Interrogatories to Plaintiff and Defendant's First Request for Production to Plaintiff (March 5, 2012) ("Montana's Objections"), and subject to further objections as specified below.

DEFINITIONS

The following definitions are to be used by Plaintiff in interpreting the Interrogatories set forth below:

"Plaintiff" or "You" shall mean and refer to the State of Montana, as well as its agents, assigns, attorneys, representatives, and any other person or entity acting or purporting to act on its behalf.

"Defendant" shall mean and refer to the State of Wyoming, as well as its agents, assigns, attorneys, representatives, and any other person or entity acting or purporting to act on its behalf.

The term "beneficial use" shall have the same definition as that term is given in the Yellowstone River Compact.

"Compact" shall mean the Yellowstone River Compact.

The conjunctions "and" and "or" as used herein shall be construed both conjunctively and disjunctively, and each shall include the other throughout these interrogatories.

The terms "regarding," "referring," or "relating" shall mean comprising, reflecting, containing, pertaining, indicating, showing, evidencing, describing, disclosing, mentioning, or bearing upon.

The term "divert" or "diversion" shall have the same definition as those terms are given in the Yellowstone River Compact, and shall also include the pumping or release of groundwater from an underground source to the surface.

The term "document" shall mean written, printed, typed, graphic or photographic matter of any kind or nature, however produced or reproduced, and all mechanical, magnetic, electromagnetic and electronic sound recordings or written transcripts thereof, however produced or reproduced, and including without limitation, all originals no matter how or by whom prepared, all drafts of these whether used or not, and all copies of the original. The term "document" shall likewise include "writings," "recordings," or "photographs" (original, drafts, and copies) as those terms are defined and used in Fed. R. Evid. 1001 and Fed. R. Civ. P.34.

The term "identify," when used with respect to a document, or the description or identification of a document, means that Plaintiff is to describe the nature and substance of the document with sufficient particularity to enable that document to be precisely identified. Plaintiff's document identification must include the date and document control number, if any, that the document bears, the name and address of the document's custodian(s), and the names and address of each person who has a copy of the document.

The term "identify" or "identity," when used with respect to communications, means to state whether the communication was in person, by telephone, or in writing; the names of the persons who were involved in, participated in, heard, authored, or received any part of the communication; the date and time of the communication; where the communication occurred; and the substance of what was communicated by each person who participated in the communication.

The terms "regulate" and "regulation" shall mean any act intentionally undertaken by an official, employee, or agent of a state, to regulate the quantity of water available to one or more holders of water rights or available to any other water users who lack water rights, including, but not limited to, physical acts, orders, administrative proceedings, or litigation initiated by the official, employee or agent.

The term "water year" shall mean the 365 day period running from October 1 of one calendar year through September 30 of the following calendar year, the date of such water year being the date of the calendar year commencing on January 1 within that water year.

INSTRUCTIONS FOR INTERROGATORIES

In accordance with Case Management Order No. 1, Defendant hereby requests that you answer the following Interrogatories within forty-five (45) days of service. You are further advised that these Interrogatories are intended as continuing, requiring you to promptly respond by supplemental responses, setting forth any information within the scope of the Interrogatories that may be acquired by you, your agents, attorneys, or representatives, following your original answers.

1. Every word written in the singular shall be construed as plural, and every word written in the plural shall be construed as singular where necessary to facilitate complete answers.
2. Your answer to each interrogatory should include all knowledge within your custody, possession, or control, including, but not limited to, all documents in the possession of your advisors, associates, agents, or employees. Where facts are set forth in your answers or portions thereof are supplied upon information and belief, rather than actual knowledge, so state, and specifically describe or identify the source or sources of such information and belief. If any estimate can be reasonably made in place of unknown information, set forth your best estimate, clearly designated as such, and describe the basis upon which the estimate is made. If you cannot answer an interrogatory in full after exercising due diligence to secure the information requested, so state, and answer to the fullest extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the answered portion.

3. To the extent that you object to any interrogatory, set forth the reasons for your objection. If you claim privilege as grounds for not answering any interrogatory in whole or in part, describe the factual basis for your claim of privilege, including relevant dates and persons involved in sufficient detail so as to permit the special master or Court to adjudicate the validity of the claim. If you object in part to any interrogatory, answer the remainder completely.

4. A request for a description of the "substance of" or "content of" a meeting, telephone conference, or other event including a call for regulation includes, but is not limited to, the following:

- a. the date of the event;
- b. the location of the event;
- c. the person(s) who attended or participated in such event;
- d. the purpose of the event; and
- e. the substance of the discussions held during the event.

RESPONSES TO INTERROGATORIES

INTERROGATORY 1: Please state the full name, address, and job title of each individual who assisted in answering these interrogatories or who was the source of any information used in answering these interrogatories.

ANSWER TO INTERROGATORY 1:

In addition to counsel, the following individuals assisted in answering these interrogatories: *insert additional names.*

Kevin Smith, Hydrologist, DNRC
Chuck Dalby, Bureau Chief-Water Projects

any instance in which any representative of the State of Montana refused, rejected, reduced, delayed, or amended the type of call identified in Interrogatory No. 13.

INTERROGATORY 14: Identify each water year from October 1, 1949 through the present, in which an employee or agent of the State of Montana did not regulate any surface water body or groundwater well in the hydrologic surface water basin of the Tongue River within Montana.

ANSWER TO INTERROGATORY 14: Montana objects to Interrogatory No. 14 on the grounds specified in Montana's Objections. Subject to, and without waiving these objections, Montana incorporates its answer and objections to Interrogatory No. 12. Montana further states that the Tongue River Water Users Association petitioned for water commissioners in 2001 and 2004-07. With the exception of 2006, water commissioners were appointed to deliver contract water from the Tongue River Reservoir.

INTERROGATORY 15: Identify all individuals responsible for regulating the surface waters and groundwater of the Tongue River, Powder River, and Little Powder River hydrologic and structural basins within the State of Montana between January 1, 1950 and December 31, 2007, and in addition to the requirements of the term "identify" as specified in the definitions to these interrogatories, please state with respect to each of the persons you identify:

- a. The dates during which they had such responsibilities;
- b. The basins and the segments of surface watercourses or reservoirs within those basins where they had such responsibilities;
- c. A description of the land areas encompassing the groundwater wells that they were responsible to regulate.

ANSWER TO INTERROGATORY 15: Montana objects to Interrogatory No. 15 on the grounds specified in Montana's Objections. In particular, Montana objects to Interrogatory

No. 137, Original

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STATE OF WYOMING

and

STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Montana's Responses to Wyoming's First Set of Interrogatories were emailed and placed in the U.S. Mail to counsel listed below, this 19th day of March, 2012.

In addition, a copy of this Certificate of Service was mailed and emailed to all those listed below this 19th day of March, 2012.

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


John B. Draper

NO. 137, ORIGINAL

**IN THE
SUPREME COURT OF THE UNITED STATES**

STATE OF MONTANA, PLAINTIFF

V.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, DEFENDANTS

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

DRAFT

STATE OF WYOMING'S AMENDED ANSWER TO BILL OF COMPLAINT

The State of Wyoming, through counsel, answers the State of Montana's Bill of Complaint as follows:

1. Admit.
2. Admit.
3. It is unclear what Montana means by the phrase "equitably divided" in the first sentence, and it may be used to state a legal conclusion rather than make a factual allegation. Wyoming therefore denies the allegation that the waters of the Tongue and

Powder Rivers have been equitably divided by the Yellowstone River Compact. Wyoming admits the allegation in the first sentence that certain waters of the Tongue and Powder Rivers have been apportioned by the Yellowstone River Compact among the States of Wyoming and Montana. Wyoming denies the allegation in the first sentence that the Compact apportions waters of the Tongue and Powder Rivers to North Dakota. Admit the allegations in the remaining sentences of paragraph 3.

4. Without information sufficient to form a belief as to the truth of the allegation.

5. Admit that certain surface waters within the Tongue and Powder River surface water basins are part of the Yellowstone River System as the term “Yellowstone River System” is defined in the Yellowstone River Compact. Deny that all “waters” of the Tongue and Powder River Basins are part of the Yellowstone River System. Admit that the surface waters of the Tongue and Powder River Basins are located within the Yellowstone River Basin as defined in Article II of the Compact. To the extent Montana intends to allege that underground water located under the surface area of the Tongue and Powder River surface water basins are part of the Yellowstone River Basin as defined in Article II of the Compact, Wyoming lacks information sufficient to form a belief as to the truth of that allegation.

6. Deny.

7. Deny the first two sentences. Admit that Article V allocates water of the Tongue and Powder Rivers by specified percentages but deny that the allocation is of “any remaining water.”

8. Deny.

9. Admit that since January 1, 1950 Wyoming has allowed construction and use of new and expanded storage facilities in the Tongue and Powder River Basins. Deny that such allowance is in violation of Montana's rights under Article V of the Compact.

10. Admit that since January 1, 1950, Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basins. Deny that such allowance is in violation of Montana's rights under Article V of the Compact.

11. Admit that since January 1, 1950, Wyoming has allowed the construction and use of groundwater wells for irrigation and for other uses and has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins. Deny that such allowance is in violation of Montana's rights under Article V of the Compact.

12. Without information sufficient to form a belief as to the truth of the allegation that since January 1, 1950, Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased. Deny that the occurrence or allowance of such an increase was, or would be, in violation of Montana's rights under Article V of the Compact.

13. Deny.

14. Deny.

15. Deny.

16. Deny.

17. Deny.

18. Deny.

Affirmative Defenses

The Bill of Complaint fails to state a claim upon which relief may be granted. Montana's claims are barred, in whole or in part, by the doctrine of laches. Montana has failed to mitigate its damages, if any it has, in whole or in part. The State of Wyoming reserves the right to assert additional affirmative defenses that may become apparent as this case proceeds.

WHEREFORE, the State of Wyoming requests that the Bill of Complaint be dismissed, that Montana take nothing thereby, and that the Court grant Wyoming such other and further relief as is just.

Dated this ____ day of _____, 2012.

THE STATE OF WYOMING

Peter K. Michael
Counsel of Record
Senior Assistant Attorney General
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Cheyenne, WY 82002
307-777-6946

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of DRAFT STATE OF WYOMING'S AMENDED ANSWER TO BILL OF COMPLAINT was served by Federal Express to the Special Master and United States mail, postage paid to the below parties, this _____ day of _____, 2012.

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Wyoming Attorney General's Office