

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

Wyoming's Proposed Motion to Compel

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Pursuant to Rule 37 of the Federal Rules of Civil Procedure, and the Case Management Plan, the State of Wyoming hereby moves this Court to compel the State of Montana to provide adequate responses to Wyoming's Third Set of Interrogatories (Ex. A), Second Request for Production of Documents (Ex. B), and Second Request for Admissions. (Ex. C). Prior to filing this motion, counsel for Wyoming consulted with counsel for Montana and the parties have been unable to resolve this matter. *See* Ex. E and F.

In these requests, Wyoming seeks factual information and admissions that are relevant to its defense of this case. Montana's failure to provide responsive answers has hampered Wyoming's ability to prepare its defense for both trial and a rapidly approaching dispositive motion deadline. Consequently, Wyoming asks this Court to order Montana's prompt and complete response to these discovery requests, or alternatively deem Wyoming's Second Request for Admissions, admitted.

BACKGROUND

For the past six and a half years, Wyoming has repeatedly inquired about the details of Montana's claims. In order to adequately defend this case, Wyoming must know which Montana irrigators allegedly suffered harm, when those irrigators allegedly suffered harm, and who in Wyoming allegedly caused those harms. Montana failed to include this fundamental information in its Bill of Complaint, which forced Wyoming to wait until the commencement of discovery to request this information from Montana.

Since discovery commenced on January 16, 2012, Wyoming has diligently sought answers to its questions. On February 3, 2012, Wyoming submitted its First Set of Interrogatories and First Request for Production of Documents. On September 18, 2012, Wyoming made its Second Set of Interrogatories and First Request for Admissions. On January 28, 2013, Wyoming issued its Third Set of Interrogatories, Second Request for Admissions and Second Request for Production of Documents. Each of these written discovery requests were aimed at helping Wyoming understand what Montana claims in this case. Unfortunately, each of these efforts was met with a series of legal objections and evasions, which have prejudiced Wyoming's ability to defend this case.

In its most recent effort, Wyoming asked a series of questions aimed at narrowing or clarifying some of the basic issues in this case. However, several of Wyoming's key questions continue to go unanswered. Wyoming's dissatisfaction with Montana's responses revolve around a number of straightforward inquiries. Wyoming simply wants to know: (1) if any documents exist *from* the years at issue evidencing that Montana placed a call on Wyoming in that year; (2) which Montana pre-1950 water rights were harmed by post-1950 water use in Wyoming; (3) what specific date did Montana officials regulate post-1950 water rights in Montana for the benefit of pre-1950 rights; (4) which specific post-1950 rights were regulated in Montana; (5) which Montana water rights were harmed in the five years not discussed in Montana's expert reports; and (6) which Wyoming post-1950 rights caused harm to Montana pre-1950 rights in the five years not discussed in Montana's expert reports.

Wyoming asked many of these same questions in one form or another over the course of the past year and a half. Each time, Montana responded with a series of excuses for not answering. For example, when Wyoming expressed concerns about Montana's responses to its Second Set of Interrogatories, Montana asserted that the information Wyoming sought would be included in Montana's expert reports. However, those reports leave many questions unanswered.

In particular, those reports do not address all nine years at issue in this case. The reports provided by Montana's experts, and summarized in Dale Book's report, only identify four years in which Montana alleges a pre-1950 water right was harmed by post-1950 diversions in Wyoming. (Ex. D, at MT14520). It is worth noting that in those years (2001, 2002, 2004, and 2006), the very best claim Montana can make is that Wyoming actions only caused an average loss to Montana of approximately 3.9 c.f.s. per year on a river that typically runs in the hundreds or even thousands of c.f.s. per day.¹ *Id.* (2,850 acre-feet per year is 3.9 c.f.s). For the remaining five years, Montana's reports are silent, which contributed to the need to propound the present round of written discovery.

In this current round of discovery, Montana again evaded Wyoming's straightforward inquiries. When Wyoming asked for contemporaneous documents evidencing a call in the years at issue, Montana provided non-responsive documents from

¹ While Wyoming contends that Mr. Book's methodology is flawed, he acknowledged in his recent rebuttal report that using his methodology the average is actually more than 25% less than the amount included in his original report. *See* Book Rebuttal Report at Table 3.

other years. (Ex. A at 2). When Wyoming requested that Montana identify the pre-1950 water rights that allegedly went unsatisfied when a post-1950 water right in Wyoming continued to divert, Montana refused to specify any such rights. (Ex. A at 7-8). When Wyoming wanted to know what specific date Montana officials regulated post-1950 water rights in Montana for the benefit of pre-1950 rights, and which rights it regulated, Montana told Wyoming to look at deposition transcripts of its Water Commissioners. *Id.* at 5-6. But those depositions do not contain that information. When Wyoming asked which specific Wyoming post-1950 rights caused harm to Montana pre-1950 rights in the five years not discussed in Montana's expert reports, Montana pointed at a pile of documents and told Wyoming the answers are in there somewhere. *Id.* at 8. Wyoming read those documents again, and the answers are not there.

Because of Montana's non-responsive answers, Wyoming sent a letter to Montana on April 23, 2013, expressing its concern with Montana's continued failure to respond to the basic questions outlined above. (Ex. E). Montana responded on May 10, 2013, by asserting that Wyoming was trying to force Montana to adopt its view of the facts. (Ex. F). To the contrary, Wyoming merely requests that Montana either admit that certain *facts* do not exist, or produce the documents that show those *facts* do exist. These *facts* exist independently of either party's theory of the case. Montana remains free to argue that its failure to engage in intrastate regulation is of no concern to Wyoming and that it is entitled to delivery of water if state line flows drop below a certain level regardless of actual demand by pre-1950 water users in Montana. Conversely, because the relationship

between the states is governed by the doctrine of appropriation, Wyoming may request admissions, documents, and information showing that Montana does not have an intrastate regulatory regime that adheres to the doctrine.

As set forth below, it appears that Montana simply refuses to admit what has become obvious—the *information* Wyoming seeks does not exist. If Montana contends that the information Wyoming seeks is irrelevant because it has a different theory of the case, then Montana should have no difficulty admitting that the information does not exist. If the information does exist, however, then Montana should produce it immediately and explain how it is responsive to Wyoming's requests so that Wyoming can adequately prepare for the dispositive motion deadline and trial.

LEGAL STANDARD

At issue here is whether the responses Wyoming received from Montana comply with the goal of full and fair disclosure of relevant information as required under the Federal Rules of Civil Procedure. When reviewing Montana's responses, Rule 37(a) provides that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37 (a)(4). Ultimately, the question of what constitutes satisfactory responses to discovery requests lies within the sound discretion of the Court. *Martin v. Easton Publishing Co.*, 85 F.R.D. 312, 316 (E.D. Pa. 1980).

Rule 26(b)(1) governs the bounds of discovery, and states, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter

involved in the pending action." As a general matter, "relevance" for discovery purposes is broadly construed, and "information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); see, e.g., *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) ("The scope of examination permitted under Rule 26 (b) is broader than that permitted at trial.") (internal quotation marks omitted). Courts have long held that pretrial discovery is "to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.")

All parties are entitled reasonable access to "all evidence bearing on the controversy between them, including that in control of adverse parties. This, of course, requires the absolute honesty of each party in answering discovery requests and complying with discovery orders." *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 91 F.R.D. 574, 576 (S.D.N.Y. 1981). Complete and accurate responses to discovery are required for the proper functioning of our system of justice. *Averbach v. Rival Mfg. Co.*, 879 F.2d 1196, 1201 (3rd Cir. 1989). The parties have a duty to provide true, explicit, responsive, complete and candid answers to discovery, *Dollar v. Long Manufacturing N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977), and their attorneys have a continuing duty to advise their clients of their duty to make honest, complete, non-evasive discovery disclosures, as well as the spectrum of sanctions they face for violating

that duty. F.R.C.P. 26(g). Providing false or incomplete discovery responses violates the Federal Rules of Civil Procedure and subjects the offending party and its counsel to sanctions. *Hogue v. Fruehauf Corp.*, 151 F.R.D. 635, 637 (N.D. Ill. 1993).

DISCUSSION

I. Montana does not have documents from seven of the nine years at issue showing it placed a call on Wyoming, and it should admit as much.

As the Court is aware, whether calls were made in years other than 2004 and 2006 will likely be a hotly contested issue at trial. Consequently, the existence or non-existence of contemporaneous writings that might confirm whether calls were made in these years is an important subject for discovery. Thus far, Wyoming believes that there are no documents from years other than 2004 and 2006 which corroborate that calls were made. To confirm this belief, Wyoming asked Montana to admit that it does not have documents from these years that show it made a call on Wyoming in those years. For example, Wyoming made the following request for admission related to 1987 and Montana responded as follows:

REQUEST #2: Admit that Montana has no documents from 1987 evidencing a call on Wyoming in 1987.

RESPONSE: Montana objects to Request for Admission No. 2-2 as vague and ambiguous due to the use of the language "documents from 1987" and "call." Subject to, and without waiving this objection, Montana denies Request for Admission No. 2-2

(Ex. C at 2).

Wyoming's request is neither vague nor ambiguous. Either Montana has a document dated sometime in 1987 that shows a call was made on Wyoming during that year or it does not. Montana asserted that it did. Accordingly, Wyoming followed this request for admission with a request for production asking for the documents from 1987 that justify Montana's denial. Wyoming's request and Montana's response are as follows:

REQUEST #1: If Montana denied any or all of Request Nos. 2, 4, 6, 8, 10, 12, and 14 of Wyoming's Second Requests for Admissions, for each request denied, please produce all documents in your possession, custody, or control evidencing a call in those years specified in the Requests.

RESPONSE: [Restatement of prior objections]. Subject to, and without waiving these objections, Montana states that documents responsive to this request have already been produced or made available to Wyoming pursuant to previous discovery requests or the Joint Document Production Order. Responsive documents may include all documents related to the extensive briefing on the form and timing of notice provided by Montana in each of the years at issue. Documents related to the form and timing of notice provide by Montana can also be found in the Declarations of Rich Moy and Jack Stults, the depositions of Rich Moy, Jack Stults, and Keith Kerbel, and in Yellowstone River Compact Commission Meeting and technical committee minutes, and in the following bates numbered documents. MT 1098-99, MT 9882-9899, MT 10051, MT 1297-12928, MT 10883-10884, MT 10899-10908, MT 10910-10914, MT12406-12410, MT 12929, MT 12970-12971, MT 12972-12973, MT 12975-12979, MT 12979-12980, MT 12981-12982, MT 12983-12984, MT 12985-12987, MT 13083-13084, and documents previously disclosed in response to Interrogatory No. 53.

(Ex. B at 2).

Montana's response looks imposing, but ultimately led Wyoming on a wild goose chase. None of these documents were created in 1987. (Ex. E at 2-6, G through W). Moreover, Montana points Wyoming to declarations and deposition testimony of

Montana officials, but the request called for the production of contemporaneous documentation of a call, not after the fact testimony. Even more troubling, not one of the documents referenced by Montana shows that Montana made a call on Wyoming in 1987. (Ex. E at 2-6; Ex. G through W). None of the documents were sent to a Wyoming resident, or a Wyoming water official, and none refer to any kind of oral or written communication that could be construed as a call on Wyoming. *Id.*

In its letter responding to Wyoming's concerns, Montana made two inexplicable arguments in an effort to justify its responses. First, Montana claimed that it did not read Wyoming's Requests for Admissions to be "inquiring about documents that were created or drafted during each of the specific years." (Ex. F at 4). Considering Wyoming's requests asked Montana to admit that it did not have "documents from 1987 evidencing a call on Wyoming in 1987[]" Montana's confusion is difficult to understand.² (emphasis added)

Second, Montana suggested that Wyoming's Requests for Admissions were an attempt to force Montana to adopt Wyoming's interpretation of the facts. *Id.* at 2. Montana's assertion could not be further from the truth. Wyoming understands that Montana contends that it made a valid call in each of the nine years remaining in this case. Based on the fact that every witness from Wyoming, and some from Montana, denied that calls were made before 2004, Wyoming disagrees, and intends to offer the

² In its letter, Montana said it would review its responses for these years and let Wyoming know whether or not it would be revisiting its original responses by May 17, 2013. (Ex. F at 4). To date, Montana has not provided additional responses.

absence of any contemporaneous documents corroborating these alleged calls as evidence that Montana's claims are false. The existence or non-existence of these facts does not force Montana to adopt Wyoming's view of the facts or theory of the case. Montana has never contended that it is required to provide written notification of a call to Wyoming, and Wyoming does not seek such an admission here. Wyoming seeks only admission of the fact that no such documents exist, or alternatively, the production of those documents. Montana wrongfully avoided doing either of those things for 1987.

In addition to 1987, Wyoming asked the same questions and got essentially the same answers with regard to 1988, 1989, 2000, 2001, 2002, and 2003. (Ex. C at 3 through 6; Ex. B at 2). Montana did identify several documents created in 2001, 2002, and 2003, but those documents did not respond to Wyoming's request. (Ex. E at 2 through 6; Ex. G through W). Not one of those documents was sent to someone in Wyoming or shows that Montana communicated to Wyoming that a Montana water user was not receiving enough water to satisfy its pre-1950 water right in any of those years. *Id.*

After more than a year of discovery in which the parties have produced competing mountains of paper, it seems fairly clear that Montana does not have documents from seven of the nine years at issue showing it placed a call on Wyoming. If it will not admit as much voluntarily, the Court should compel it to do so. Accordingly, Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 2, 4, 6, 8, 10, 12, and 14, or supplement its response to Request for Production No. 1.

II. Montana officials did not regulate post-1950 water rights for the benefit of pre-1950 water rights during times of shortage, and Montana should admit as much.

The extent of Montana's intrastate regulation of post-1950 water rights is a matter of significant, and in Wyoming's view, dispositive consequence in this litigation. To date, Wyoming has not discovered facts that show that Montana engaged in meaningful regulation of its post-1950 water rights during the years at issue. Accordingly, Wyoming asked a series of requests for admission seeking confirmation of this fact for each year in issue. For example, for 1987 Wyoming requested and Montana responded as follows:

REQUEST FOR ADMISSION NO. 49: Admit that no Montana official or employee regulated or curtailed the use of a post-1950 surface water right on the Tongue River for the benefit of a pre-1950 right in 1987.

RESPONSE: Montana objects to Request for Admission No. 2-49 as vague and ambiguous due to the use of the language "regulated or curtailed" and "for the benefit of a pre-1950 water right," and further objects to Request for Admission No. 2-49 as asking a compound question. Subject to, and without waiving this objection, Montana admits that "no Montana official or employee" curtailed "the use of a post-1950 surface water right on the Tongue River for the benefit of a pre-1950 right in 1987." Unless specifically admitted, the remaining statements in Request for Admission No. 2-49 are denied.

(Ex. C at 24).³

Wyoming made the same request for 1988, 1989, 2000, 2001, 2002, 2004, and 2006 respectively. *Id.* at 25-30. In response Montana also admitted that no Montana official or employee curtailed the use of a post-1950 surface water right on the Tongue

³ Montana's denial of the request for admission as it relates to the term "regulated" is premised on the farfetched notion that Montana's water users self regulate, and therefore, the State does not have to be involved for regulation to occur. (Ex. F at 5).

River in 1988, 1989, and 2003, but denied the requests for the remaining years. (Ex. C at 26, 28-29).

For each of the years that Montana denied Wyoming's request Wyoming asked Montana to "set forth in detail the factual basis for the denial, including identifying which Montana official or employee regulated or curtailed production from a post-1950 surface water right, when they did it, which rights were regulated, and why." (Ex. A at 5 through 6). Wyoming also asked Montana to produce the documents in its possession "supporting the denial, including documents that identify which Montana official or employee regulated or curtailed production from a post-1950 surface water right, when they did it, which rights were regulated, and why." (Ex. B at 5 through 6).

In its response, Montana only answered the first question by stating that the Montana Water Commissioners regulated post-1950 water rights during those years. *Id.* Montana then referred Wyoming to the entire deposition transcripts of the Montana Water Commissioners, and the documents of those Commissioners. This response is inadequate.

As an initial matter, it is improper and unresponsive to answer a discovery request with a generic citation to an entire deposition. *See, e.g., Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 501 (D. Kan. 2006) (a party may not answer an interrogatory by generically referring to deposition testimony, but rather must indicate with specificity where the information can be found); *Union Pacific R. Co. v. Larkin*, 229 F.R.D. 240, 243 (D.N.M. 2005) (generic reference to depositions without providing page numbers of

depositions to which it was referring was insufficient response to interrogatory concerning evidence which plaintiff intended to rely to prove its claims); *In re Savitt/Adler Litigation*, 176 F.R.D. 44, 49-50 (N.D.N.Y. 1997) (depositions are not business records under Rule 33(d), and therefore, generic references to them in response to interrogatories is improper).

Nevertheless, Wyoming took the depositions of these Water Commissioners and is familiar with the testimony of these witnesses. The Water Commissioners testified that their job was to account for releases and deliveries of storage water from Tongue River reservoir, but they were not charged with regulating direct flow diversions. (Ex. X at p. 14 ln. 23-25, p. 15 ln. 1-12, p. 26 ln. 1-7, p. 51 ln. 7-15; Ex. Y at p. 27 ln 6 to p. 28 ln. 11; Ex. Z at p. 16 ln. 8 to p. 17 ln. 6). Moreover, the documents maintained by the Water Commissioners do not show that they regulated a post-1950 direct flow right, when the regulation occurred, or why regulation occurred. Instead, the Commissioners testified that the documents they maintained only showed an accounting of stored water delivered to Tongue River reservoir contract holders. (Ex. AA; Ex. X at p. 15 ln 4-12; p. 27 ln 20 to p. 28 ln 19; Ex. Y at p. 12 ln 6-20; p. 14 ln 25 to p. 15 ln 3; p. 15 ln 21 to p. 16 ln 8).

Consequently, in its follow-up letter Wyoming requested that Montana answer the remaining three questions. (Ex. E). Montana responded by claiming that its responses to Wyoming's discovery requests, "are complete and correct answers in accordance with the Federal Rules of Civil Procedure." (Ex. F at 4). Montana's explanation clearly falls short of its obligation under the rules to provide full and fair responses. In fact, Montana

refuses to identify the specific dates that the Commissioners regulated post-1950 water rights, which post-1950 water rights they regulated on those dates, and why they regulated those rights on those dates. Thus, Montana's responses are only "complete and correct" if the facts are, as Wyoming believes, that the Commissioners never regulated or curtailed a post-1950 water right for the benefit of a pre-1950 water right. If that is the case, Montana should admit as much. Otherwise, it should be compelled to provide the facts that justify its denial.

Accordingly, Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 55, 57, 59, 63, and 65, or supplement its responses to Request for Production No. 6 and Interrogatory No. 6.

III. Montana cannot identify a pre-1950 water right in Montana that was harmed in 1987, 1988, 1989, 2000, or 2003, and it should admit as much.

In light of the fact that Montana's experts had nothing specific to say about five of the nine years in issue, Wyoming sought to confirm that no water user in Montana was harmed by actions in Wyoming during these years. For example for 1987, Wyoming requested and Montana responded as follows:

REQUEST FOR ADMISSION NO. 67: Admit that Montana cannot identify a pre-1950 water right in Montana that was harmed by depletions to the Tongue River by post-1950 water users in Wyoming in 1987."

RESPONSE: Montana objects to Request for Admission No. 2-67 as vague and ambiguous due to the use of the language "harmed by depletions to the Tongue River by post-1950 water users in Wyoming." Subject to, and without waiving this objection, Montana denies Request for Admission No. 2-67.

(Ex. C at 31).

Notwithstanding the fact that Montana's objection is grounded in an intentionally obtuse reading of this straightforward request, Montana's denial suggests that it can identify a pre-1950 right in Montana that was harmed by actions in Wyoming in 1987. Accordingly, Wyoming asked Montana to do so. Wyoming's request and Montana's response are as follows:

INTERROGATORY NO. 8: If Montana denied any or all of Request Nos. 67 through 71 of Wyoming's Second Requests for Admissions, for each request denied, please set forth in detail the factual basis for the denial, including identifying which Montana pre-1950 water right was harmed and when the injury occurred.

RESPONSE: [Restatement of prior objections]. Subject to, and without waiving these objections, Montana incorporates its answers and objections to Interrogatory No. 2-2. In addition, Montana states that as established in the expert report of Dale Book, in several months in 1987, 1988, 1989, 2000 and 2003, insufficient water was passing into Montana to satisfy Montana's pre-1950 rights. At that same time, Wyoming has acknowledged that it was not regulating some post-1950 rights in Wyoming including post 1950 rights on the mainstem of the Tongue River in Wyoming. Stateline gauge data available to Wyoming also indicates other years and the periods in which flows crossing the State border were insufficient to serve all of Montana's pre-1950 priority date water rights. As a result of the shortage in Montana, Montana water users with pre-1950 water rights were harmed, and many were forced to go to an alternative supply of stored water. A list of pre-1950 water rights in Montana, a list of Tongue River Water Users Association members, and documents indicating when water users requested water and/or storage releases began were previously disclosed to Wyoming.

(Ex. A at 7 through 8). Similarly, when asked to provide documents "identifying which Montana pre-1950 water right was harmed and when the injury occurred," Montana

responded with similarly non-specific materials and deposition transcripts. (Ex. B at 7-8).

Again, though it looks imposing, Montana's answer is wholly unresponsive to Wyoming's simple questions. Montana cites to stateline gauge data, a list of water rights in Montana, lists of the Tongue River Water Users Association members for each year, documents indicating when water users requested stored water and/or storage release began, and thirty-five deposition transcripts of Montana water users. (Ex. B at 6-7). However, none of these documents identify a specific Montana water right that was not satisfied in 1987 or any of the other years excluded from the expert reports due to post-1950 uses in Wyoming. Similarly, Montana's assertion that Wyoming acknowledges that it was not regulating some rights on the mainstem of the Tongue River is equally nonresponsive. (Ex. A at 7-8). Wyoming asked Montana to identify specific rights in Montana that were harmed by acts in Wyoming, and Montana either could not or refused to identify even one water right. The failure to identify allegedly injured water rights in these years has severely prejudiced Wyoming's ability to defend this case as Wyoming cannot even begin to evaluate a futility defense if it does not know which right is making the call for regulation.

This not the first time Montana has dodged these requests as evidenced by Montana's reference to an earlier interrogatory in its response. In fact, Wyoming sought similar information from Montana in its September 2012 discovery requests. Interrogatory No. 2 of those requests asked, "For each year in which Montana claims it

made a call on Wyoming, please identify the Montana water users with pre-1950 water rights who you claim were not receiving water that they were entitled to under the Compact." (Ex. CC at 2). Montana's answer at that time contained three parts. First, it contended that the request sought expert analysis, work product, and testimony before the expert disclosure deadline. Second, it contended that the State of Montana, not individual water users is entitled to receive water under the Compact. Third, Montana indicated that it was still in the process of investigating the specific water rights that did not receive water, and that it would disclose those results upon completing its investigation. (Ex. CC at 2). Accordingly, Montana's response at that time could be fairly characterized as "we'll let you know when we designate our experts."

Montana's inadequate answers were the subject of discussion during the November 30, 2012, status hearing. At that hearing, Wyoming reiterated its frustration with Montana's failure to respond to Wyoming's very targeted interrogatories that were aimed at honing in on some of the specific details of Montana's claims. At various times during that hearing, the Special Master sympathized with the fact that Wyoming had to wait more than six years to discover information that should have been included in Montana's original Bill of Complaint. At one point, the Special Master stated, "I certainly understand the frustration of Wyoming that at this stage, there's still some basic contentions there that have not been specified, and particularly those with respect to when Montana did not have adequate water in order to satisfy its pre-1950 appropriative water rights, which I would have thought would have been readily available to Montana and

that Montana would have an answer to." (Ex. DD p. 39 ln 25 through p. 40 ln 8). On at least two other occasions, during that hearing the Special Master referenced the difficulties Montana's failures were causing Wyoming. *Id.* at p. 41 ln 3-7.; p. 42 ln 10-13. Nevertheless, in light of the impending expert designation deadline, Wyoming agreed that it would wait until Montana's expert designation to get the information it needed to adequately defend this case. (Ex. DD at p. 42 ln 9 through p. 43 ln 19.)

Montana designated its experts on January 4, 2013, and cited to those reports in its responses to Wyoming's current discovery requests. However, the reports do not answer any of Wyoming's questions about 1987, 1988, 1989, 2000, and 2003.⁴ It is reasonable to assume that if Montana could show that post-1950 water rights in Wyoming were injuring pre-1950 water rights in Montana during those five years, it would have done so in those reports. It did not. That alone should be enough to require Montana to admit that it cannot identify an injured pre-1950 right in Montana, and frankly, to summarily dismiss these five years from this case. Even Montana admits that the type of information Wyoming requested is necessarily the subject of expert testimony. This fact is evidenced by Montana's specific refusal to answer Wyoming's earlier discovery requests because they allegedly called for expert testimony before the designation deadline. (Ex. CC at 3).

⁴ The limited answers Wyoming did get about 2001, 2002, 2004, and 2006, are equally problematic, but in different ways, and those problems will be among the subjects addressed in the impending motion for summary judgment.

After being given multiple opportunities to identify injured pre-1950 water rights in the years at issue, Montana could only make colorable claims that injuries occurred in four of the remaining nine years. Montana should follow the lead of its experts and admit as much. Accordingly, Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 67 through 71, or supplement its responses to Request for Production No. 8 and Interrogatory No. 8.

IV. Montana has no documents showing that a pre-1950 water right in Montana was harmed in 1987, 1988, 1989, 2000, and 2003, and it should admit as much.

Because Montana's expert reports included no specific allegations about five of the nine remaining years, and to this point in discovery, Wyoming has found no documents that show that a pre-1950 right in Montana was injured during these years, Wyoming asked Montana to admit that no such documents exist. Wyoming requested and Montana responded as follows:

REQUEST FOR ADMISSION NO. 72: Admit that Montana has no documents evidencing that a pre-1950 water right in Montana was harmed by depletions to the Tongue River by post-1950 water users in Wyoming in 1987.

RESPONSE: Montana objects to Request for Admission No. 2-72 as vague and ambiguous due to the use of the language "harmed by depletions to the Tongue River by post-1950 water users in Wyoming." Subject to, and without waiving this objection, Montana denies Request for Admission No. 2-72.

(Ex. C at 32 through 33).

Again, Montana's denial suggests that it has documents that would show harm to some water right in Montana, and so Wyoming asked for those documents. Wyoming's request and Montana's response are as follows:

REQUEST FOR PRODUCTION NO. 9: If Montana denied any or all of Request Nos. 72 through 80 of Wyoming's Second Requests for Admissions, for each request denied please produce all documents in your possession, custody, or control supporting the denial."

RESPONSE: [Restatement of prior objections]. Subject to, and without waiving these objections, Montana states that documents responsive to this request have already been produced or made available to Wyoming pursuant to previous discovery requests or the Joint Document Production Order. Responsive documents may include gauge records at the state line; the Wyoming Hydrographer Reports; the Wyoming Tag Books; the Wyoming Tabulation Books; documents disclosed to Wyoming by the Tongue River Water users Association; the expert reports disclosed by Montana; the deposition transcripts of Wyoming water users and Wyoming water officials; the deposition transcripts of [the Montana Water Commissioners and Montana water users]; and documents identified with the following Bates Numbers: MT 3650-3660, MT 3803, MT 3943-4045, MT 4807-4808, MT 4889-5346, MT 6711-6722, MT 7819-7905, MT 9089-9090, MT 9125-9581, MT 9900-9919, MT 10946-10951, MT 11301-11305.

(Ex. B at 7 through 8).

Yet again Montana's response looks serious but is actually entirely unresponsive. Montana cites to dozens of documents covering hundreds of pages; however, none of these documents show any harm to a particular pre-1950 water user in Montana. (Ex. B, at 8, citing Ex. GG-RR; Ex. E at 10-13). For example, in its responses Montana identified a 1968 water allocation study in the Tongue River Basin, one of many it cites predating any of the years at issue in this case. (Ex. B at 8, citing Ex. II). The purpose of

the study was to quantify the available unused and unappropriated water of the Tongue River system that would be available for use in Montana under the terms of Article V.C. of the Yellowstone River Compact. Wyoming finds it difficult to understand how a document created nineteen years before 1987, the first year at issue here, responds to a request for documents showing that a pre-1950 water right in Montana was harmed by depletions to the Tongue River by post-1950 water rights in Wyoming in 1987, or any of the other years at issue.

As another example, Montana cites its expert reports to show that pre-1950 water rights in Montana were unsatisfied in 1987, 1988, 1989, 2000, and 2003 due to post-1950 use in Wyoming. Yet, Montana's expert reports are specific to 2001, 2002, 2004 and 2006. (Ex. D at MT 14520). Wyoming did not ask about these four years in these particular requests. Instead, Wyoming wanted to know if Montana has similar information for the five years that were not addressed in the reports. Montana's answer demonstrates that it does not.

In addition to the request for documents showing harm to a pre-1950 water users, Wyoming asked Montana to explain its denial. Thus, if Wyoming could not see for itself how the documents identified by Montana were responsive, then Montana could explain it to Wyoming. Wyoming requested and Montana Responded as follows:

INTERROGATORY NO. 9: If Montana denied any or all of Request Nos. 72 through 80 of Wyoming's Second Requests for Admissions, for each request denied please set forth in detail the factual basis for the denial.

ANSWER: [Restatement of prior objections]. Subject to, and without waiving these objections, Montana states that numerous documents, including but not limited to gauge records at the state line, the Wyoming Hydrographer Reports, the Wyoming Tag Books, the Wyoming Tabulation Books, documents disclosed to Wyoming by the Tongue River Water Users Association, and the expert reports disclosed by Montana tend to show or "evidenc[e] that a pre-1950 water right in Montana was harmed by depletions to the Tongue River by post-1950 water users in Wyoming" in the years at issue.

(Ex. A at 8).

As is apparent, Montana refused to answer the question and instead pointed Wyoming to many of the same nonresponsive documents it identified in response to the request for production. Montana provided no actual explanation about why those documents tended to show a pre-1950 water right was injured by actions in Wyoming in the years that are not addressed in the expert reports. If anything, the expert reports tend to prove that no one was injured in these years, otherwise those injured water rights would have been identified in the reports.⁵

Because Montana failed to explain its denials, Wyoming asked Montana to supplement its responses in its April 23rd letter. Montana responded by suggesting, as one example, that if Wyoming reviewed three types of documents, it would find that Montana water users were being harmed by depletions to the Tongue River by post-1950

⁵ It may be worth noting that even in 2001, 2002, 2004, and 2006, the only water right the expert reports identify as suffering injury as a consequence of actions in Wyoming is the reservoir right in the Tongue River Reservoir. Thus, even in the years addressed by the reports Montana cannot identify a farmer or other water user downstream of the reservoir that was harmed by actions in Wyoming.

water users in Wyoming in the years at issue. (Ex. F at 6.) Wyoming reviewed those documents and it did not find Montana's assertion to be true.

First, Montana asked Wyoming to look at a 2002 reconnaissance study allegedly showing expanded use of water in Wyoming since 1950. In essence, this document attempts to identify areas under irrigation in 2002 that were not irrigated in 1950. (Ex. QQ). While this may evidence some post-1950 development, which is contemplated by the Compact, it does not identify any specific post-1950 water rights in Wyoming irrigating during any of the years in question. In fact, the authors of the study said they used aerial photography from the 1990s to show changes in irrigated acreage from the 1950s to the present. (*Id.* at MT10947). Since the 1990s are not part of this case, nothing in the study evidences post-1950 irrigation taking place at a time when a pre-1950 right in Montana was not satisfied in 1987, 1988, 1989, 2000, or 2003.

Second, Montana asked Wyoming to look at Wyoming tag books⁶ to show that Wyoming did not curtail post-1950 uses. (Ex. F at 6). However, tag books are not a reliable source of all or even most regulatory actions taken by a Wyoming official in a given year, making reliance upon them problematic. Tag books do not exist for every tributary of the Tongue River for every year. In fact, there are no tag books from 1987, 1988, or 1989 anywhere in the Tongue River basin of Wyoming, yet regulation certainly

⁶ Tag books are a book of receipts depicting dates that a Wyoming official manually shut off a diversion structure or pump in the course of regulating the stream on a priority basis. The water official will put a tag on a headgate to notify the water right holder that he is no longer in priority and keep a duplicate of the tag in the tag book.

occurred during those years and on most, if not all tributaries of the Tongue River. Additionally, a water official may find himself only applying a tag to a headgate in instances where he physically has to shut off a diversion structure. If a landowner voluntarily complies with a request to curtail use, officials often do not tag the diversion works, and thus the tag book would not reflect all regulatory action. (Ex. SS at p. 62 ln. 22 to p. 63 ln 2.). More importantly regulation in Wyoming evidenced in the tag books relates to only half the equation. That regulatory activity provides no insight into the actual contemporaneous demand in Montana by pre-1950 water rights holders which would support a claim of injury.

Finally, Montana suggested that the depositions of Montana water users describe a lack of water during the years at issue. However, as previously discussed, it is improper and unresponsive for an answer to an interrogatory to generically refer to whole depositions. See, e.g., *Cont'l Illinois Nat'l Bank & Trust Co. of Chicago*, 136 F.R.D. at 686. Regardless, Wyoming has read these depositions and they do not contain testimony that responds to Wyoming's discovery requests.

For example, during the deposition of Bret Aye, who holds a 1938 water right along the lower reach of the Tongue River of Montana, Wyoming counsel and Mr. Aye had the following exchange regarding shortages of water:

Q: Have there been times where there's simply no water in the river?

A: Yes.

Q: Is that a common occurrence or an infrequent occurrence?

A: Infrequent.

Q: So, you've [Mr. Aye] been there for 30 years, plus or minus a few years.

Would you say it's happened less than ten years?

A: It's only two years that I know that there was not enough water.

Q: What years were those?

A: I do not recall the year.

Q: Were they recent, or were they when you were kind of a kid?

A: They were probably about 10 years ago.

Q: Were they two years that were relatively close in succession or--

A: Yes.

Q: --back -to-back years?

A: Yeah. It's all drought related.

Q: So other than the two years, the water that you need has been available?

A: Yes.

(Ex. TT, p. 22-24).

Wyoming also deposed Alfred Leatherberry, who had a 1938 water right along the Tongue River in Montana prior to selling his ranch in 2008, and Dick Brewer who holds a 1897 and a 1910 right on the Tongue River. Wyoming asked both of these irrigators questions similar to the ones posed to Mr. Aye. Like Mr. Aye, these water users also testified that although they may have experienced shortages of water at some point, they cannot recall with any certainty specific years or dates within specific years that they may have been short water. (Ex. UU at 43-44; Ex. VV at 36-39). A review of the other 32 water user depositions reveals generally similar testimony. Though some may generally refer to being short of water at some point, the users have difficulty reciting which years they were short, let alone when during those irrigation seasons they may have been short.

Thus, the documents, even when read together, fail to answer the question Wyoming asked—identify a specific Montana pre-1950 water right that was short water because a specific post-1950 water right in Wyoming continued to divert during the

identified years. If Montana believes the documents answer that question, it should explain its reasons in response to Wyoming's interrogatory. An appropriate response to Wyoming's interrogatory would look like this: "Wyoming tag book 1 indicates that irrigator X with a post-1950 water right was diverting on x/x/1987. At that time, Montana irrigator Y, with a pre-1950 water right was not satisfied, as shown on page 6 of irrigator Y's deposition transcript."⁷ Absent this level of specificity, Montana should be compelled to admit that it does not have the documents Wyoming requests.

Accordingly, Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 72, 73, 74, 75, and 76, or supplement its responses to Request for Production No. 9 and Interrogatory No. 9.

CONCLUSION

Through six and a half years of litigation, and multiple rounds of discovery requests, Wyoming has repeatedly and diligently sought information about the details of Montana's claims. Over that same time period, through a series of objections, vague responses, and posturing, Montana has steadfastly refused to answer the most straightforward questions that Wyoming needs in order to adequately defend this case: (1) when during the irrigation season did Montana place a call on Wyoming; (2) which Montana irrigators allegedly suffered harm; (3) when did those irrigators allegedly suffer harm; and (4) who in Wyoming does Montana believe to have caused those harms.

⁷ A complete answer would also include a representation that no post-1950 water users were taking water in Montana at that time.

Wyoming's attempts to obtain answers to these questions through its Second Requests for Admissions, Third Set of Interrogatories, and Second Request for Production were met with similar evasions. Accordingly, the State of Wyoming requests that the Court order Montana to produce or identify, by a date certain, all documents responsive to Wyoming's Second Request for Production of Documents, and to give complete answers to Wyoming's Third Set of Interrogatories. If Montana cannot provide complete responses to all of Wyoming's discovery requests, then it must so admit.

Alternatively, Montana could and should follow the lead of its experts and simply admit that its claims related to 1987, 1988, 1989, 2000, and 2003, are unsupported on any basis, and therefore, should be dismissed with prejudice. Similarly, Montana should follow the lead of its own witnesses, admit that no calls were made before 2004, and dismiss claims related to 2001 and 2002 as well. Finally, Montana should admit that it has no evidence that farmers and other water users downstream of the Tongue River Reservoir have ever suffered any harm as a result of post-1950 water use in Wyoming, and it should dismiss any claims related to water rights in Montana other than the reservoir.

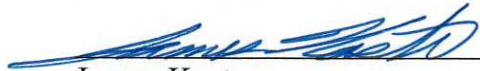
WHEREFORE the State of Wyoming requests that the Court Compel Montana to provide responsive and complete answers to the following:

- Wyoming's Second Request for Admissions: 2, 4, 6, 8, 10, 12, 14, 55, 57, 59, 63, 65, 67 through 76.
- Wyoming's Second Request for Production: 1, 6, 8, 9

- Wyoming's Third Set of Interrogatories: 6, 8, 9

Dated this 10th day of June, 2013.

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 10th day of June, 2013.

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