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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The State of Wyoming submits this reply brief in support of its motion for partial summary judgment. Wyoming generally treats Montana's arguments in the order presented in the opposition brief, except that Wyoming addresses the sufficiency of its materials before addressing Montana's argument that Wyoming's motion is premature. Also, Wyoming has no comments on Montana's Standard of Decision section.

STATEMENT OF MATERIAL FACTS

In its brief, Montana draws a different line for materiality than does Wyoming. Sporadic Montana complaints at fall or winter commission meetings between 1981 and 2004, which Mr. Moy mentions in his declaration, are not directly relevant to the factual issue of whether Montana made a call in any water year at a time it would do any good. Those complaints are only indirectly relevant to the extent they show that the compact commissioners knew to report any disputes that arose during the water year to their governors in the annual reports. The silence in those reports about any calls, together with the affirmative reports in most years that the states made no administration efforts, gains importance against this backdrop. To be sure, Montana has provided no direct evidence of any timely calls between 1952 and 2004, while Wyoming has provided affidavits directly disclaiming any such calls for most of the years since 1952.

Relying on the Yellowstone River Compact Commission ("YRCC") annual reports, Montana emphasizes that there were some years of low runoff between 1952 and 2004, specifically 1960, 1961, 1980, 1981 (on the Powder), 1985, and 2000-2002, implying that those were years when Wyoming could have violated Article V(A) of the Yellowstone River Compact ("Compact"). Mont. Br. in Opp'n to Wyo. Mot. for Partial Summ. J. ("Mont. Br.") at 4-6, ¶¶ 5-7, 9-10. Such information is not directly relevant to this motion, although it also supports the lack

of calls by showing that the commissioners diligently followed and reported low water conditions, and would not have overlooked reporting any calls in the annual reports, if Montana had made them.

Moreover, in the first five low-water years that Montana identifies from 1960 to 1985, the commissioners did not just report that the states failed to allocate post-1950 rights under V(B). The commissioners broadly reported a lack of any events relating to administration:

> 1960- "No questions of water use pertinent to the Compact were referred to the Commissioners." 1960 YRCC Ann. Rep., Ltr. to Govs. 1.
> 1961- "No questions of water use pertinent to the Compact were referred to the Commissioners prior to the annual meeting." 1961 YRCC Ann. Rep., Ltr. to Govs. at 1.
> 1980- "No incidents during the year required administration of the water in accordance with the provisions of the Compact." 1980 YRCC Ann. Rep., Gen. Rep. at 2.
> 1981- "No incidents during the year required administration of the water in accordance with the provisions of the Compact." 1981 YRCC Ann. Rep., Gen. Rep. at 2.
> 1985- "No incidents during the year required administration of the water in accordance with the provisions of the Compact." 1985 YRCC Ann. Rep., Gen. Rep. at 2.

Mr. Tyrrell's affidavit shows that Montana made no calls during the low water years of 2000, 2001, and 2002. Tyrrell Aff. ¶ 4.

Finally, Montana cites Mr. Moy's declaration for the proposition that Montana failed to make calls or other complaints between 1981 and 2009, but only because it determined that such calls would be futile. Mont. Br. at 8, ¶ 16.[1] Montana makes no legal argument as to why there should be an exception to a call requirement based on perceived futility, so Mr. Moy's vague assertion that in "other years" Montana failed to make calls only bolsters Wyoming's motion.[2]

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[1] The "futile call" doctrine is a defense interposed by a junior appropriator, not an excuse for a senior who never makes a call. David H. Getches, *Water Law in a Nutshell* 111 (4th ed. 2009).

[2] Wyoming disagrees with Montana's contention throughout its brief that the representatives of the two states became estranged to the point where open communication was chilled. Even in the

ARGUMENT

I. Montana's arguments on whether a timely call is required

A. Montana's argument about whether the Compact has provisions that would require a call

Montana contends that the Compact lacks a specific provision as to how a call would protect Montana's "continued enjoyment" of its pre-1950 rights, and that the doctrine of appropriation also lacks any call requirement. Mont. Br. at 1-15. Wyoming agrees that such a specific provision is lacking, and argued for some time that the lack of such a specific provision showed that the drafters merely recognized pre-1950 rights in each state and did not provide affirmative interstate protection for them. Wyoming argued that those rights would be administered solely in each state subject to the doctrines of appropriation in the two states. Special Master's 1st Interim Rep. ("FIR") at 19; Wyo. Mot. to Dismiss at 42-43.

After considering Wyoming's claims, the Special Master did not reject Wyoming's logic, but instead rejected the premise that the Compact lacked any means by which downstream Montana pre-1950 rights could assert their rights against upstream Wyoming post-1950 rights under the doctrine of appropriation. *See* FIR at 29 ("Western states regularly require junior appropriators to reduce their diversions when needed to protect the water rights of senior appropriators. Article V(A) establishes a similar, interstate requirement for the waters of the

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harsh drought years of 2004 and 2006, when the states disagreed on the interpretation of V(A), the commissioners and their professional staffs communicated freely. *E.g.*, Wyo. Br. in Opp'n to Mont. Mot. for Leave to File App. B, at B-4 to B-6, ¶¶ 8-10; Moy Decl. Ex. A, at 17. Wyoming's legislature supported its water professionals by appropriating $100,000 in 2006 for a joint study with Montana of water supplies and uses on the Tongue River. Wyo. Br. in Opp'n to Mont. Mot. for Leave to File App. B, at B-6, ¶ 11. Wyoming believes this would have confirmed for Montana that even under its interpretation, Wyoming had not violated V(A) because Wyoming's post-1950 diversions were shut off long before shortages appeared at pre-1950 Montana headgates. *See* Moy Decl. Ex. B, at 14-15. It was Montana who ultimately declined to participate in the study.

Yellowstone River tributaries in those situations where it is necessary to protect pre-1950 appropriations in Montana."). The Special Master and the Court have decided the law of the case on this issue, finding that V(A) rights in Montana enjoyed protection against upstream diversions in Wyoming under a rule of prior appropriation applied across the state line, with the rule's details determined "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." FIR at 37; *Montana v. Wyoming,* 131 S. Ct. 1765, 1771 (2011).

Relying on mostly the same documents that Mr. Littlefield relies upon in his declaration, the Special Master rejected the contentions of Wyoming, and now Mr. Littlefield, that the drafters' fears of an integrated prior appropriation scheme precluded *any* seniority scheme crossing the state line. FIR at 19, 22, 30-37. The Special Master distinguished between pure prior appropriation across the state line between pre-1950 rights on both sides, which the drafters clearly rejected, and a modified scheme arising from the three-tiered Compact, whereby Montana pre-1950 rights were protected against Wyoming post-1950 rights. *Id.* at 18, 30-37. He decided that the modified scheme at issue in this motion could be practically refereed through "the doctrine of appropriation" incorporated in V(A).[3] *Id.* at 29, 37.

Thus, the Special Master did not reject Wyoming's logic that protection across state lines would require an enforcement mechanism. Rather, he rejected Wyoming's premise that there was no such mechanism, instead finding that the doctrine of appropriation was the fount of that mechanism. The Court followed this principle in analyzing Montana's first exception. It held that the "doctrine of appropriation," as applied across state lines, held the key to Montana's

[3] Montana overlooks this decision in its opposition brief at page 14, stating that the "Compact removes the fundamental principle of priority from its purview," in contradiction to the Special Master's express finding that pre-1950 Montana rights were protected by a three tiered priority hierarchy that Montana had advanced since its very first brief in this case. FIR at 18; *see* Mont. Br. in Supp. of Mot. for Leave to File at 12-13.

protection under V(A), in that instance applying the doctrine to increased consumptive use on pre-1950 Wyoming lands. 131 S. Ct. at 1771-77.

Montana argues that if the Special Master were to follow the Court's decision that the doctrine of appropriation dictates how its pre-1950 rights are protected under V(A), then Wyoming would "have it both ways." Mont. Br. at 14. However, Wyoming is not asking to have it both ways since it never got "its" way in the first place. Wyoming's argument for the absence of an explicit call mechanism failed. Wyoming accepted its defeat, and now hews to the Court's decision that Montana's continued enjoyment of its pre-1950 rights is "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."

Montana, by contrast, was successful in arguing for a state line call, but now seeks to have it both ways by arguing against any call procedure. In its brief in response to Wyoming's motion to dismiss it stated: "The Senate Report indicates Congress did intend a state line call to be the appropriate remedy for excessive depletions by an upstream state." Mont. Br. in Resp. to Wyo. Mot. To Dismiss at 27 (citing Sen. Rep. App. A at 3a).

Since Wyoming has to honor the law of the case to which neither party took exception, and expose its post-1950 diversions to Montana senior rights under the appropriation doctrine created by the tiered compact structure, Montana's enjoyment of its pre-1950 rights must likewise be governed by the same doctrine under the law of the case. In fact, it is Montana, not Wyoming, that is "cherry picking" by accepting the benefits of the Special Master's decision that the doctrine of appropriation protects Montana's enjoyment of its V(A) rights, without also accepting the doctrine's boundaries to such enjoyment, such as the call requirement that Montana has not substantively questioned in its brief in opposition. *See* Mont. Br. at 13-15.

After rejecting the doctrine of appropriation as a regulator of its V(A) rights, Montana suggests that its rights are protected with no practical mechanism at all, alleging that the Compact is "self-executing." *Id.* at 15. Montana quotes the Special Master's statement that Wyoming is to ensure on a constant basis that its post-1950 users do not deplete flows to such an extent that Montana pre-1950 users run short. *Id.* at 16. However, the Special Master's discussion of a "constant basis" was merely shorthand for the concept that V(A) is based on the doctrine of appropriation, under which junior irrigators are subject to curtailment "on a daily basis" during the irrigation season if the downstream senior needs and wants the water. FIR at 29; *see also, e.g., Cook v. Hudson,* 103 P.2d 137, 146 (Mont. 1940), *disapproved of on other grounds by Grimsley v. Estate of Spencer*, 670 P.2d 85, 93 (Mont. 1983). The Special Master's statement was in response to a Wyoming argument that Articles V(B) and V(C) were the only provisions necessary to protect Montana pre-1950 rights. FIR at 28-29.

The Special Master and the Court have answered the question as to how the Montana pre-1950 rights are to be protected on a continuous basis during the water year – under the doctrine of appropriation incorporated by V(A). FIR at 31-32, 37; 131 S. Ct. at 1771. Montana's alternative, "self-execution," would mean that Montana could sit on its rights, allow its senior appropriators to suffer the hardship of not receiving water during drought, and at some later date, perhaps many years later, as in this case, sue Wyoming for not having the clairvoyance to curtail its post-1950 rights when Montana was in need. Perhaps, "self-execution" – meaning Wyoming would regulate without any Montana information– could work in a scheme involving a mass delivery obligation measured at a state line gauge. But the Court has rejected that scheme in this Compact.

In summary, Wyoming and Montana are both bound by the prior decision in this case that Montana's V(A) rights, and Wyoming's subordinated V(B) rights, interact across the state line through the doctrine of appropriation, which as Wyoming showed in its opening brief, requires timely calls from Montana.

B. Montana's argument about the historical record

The Special Master made his findings based on a thorough review of the historical record, essentially the same record that Mr. Littlefield discusses in his declaration. FIR at 6-9, 30-37. Mr. Littlefield opines that the drafters rejected interstate administration in toto, but the Special Master has agreed only that pre-1950 rights in Montana cannot call off more junior pre-1950 rights in Wyoming. Littlefield Decl. at 34, ¶ 55; FIR at 22, 29, 30, 37. He also found in Montana's favor that pre-1950 Montana rights have some protection from post-1950 Wyoming rights. FIR at 29, 37. The parties did not take exception to this analysis. 131 S. Ct. at 1771 ("The States did not object to most of the Special Master's findings, and we have issued orders accordingly."). Thus, the further historical analysis proposed by Montana on a decided issue, largely in the form of Mr. Littlefield's opinions, comes too late to assist the Court. Fed. R. Evid. 702. It is inadmissible and cannot be considered on the motion for partial summary judgment. Fed. R. Civ. P. 56(c)(2); *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 85 (1950).

C. Montana's argument about plausibility of an interstate call requirement

Montana contends that an interstate call requirement is implausible because Montana knew too little about its existing rights in 1950 and would not have committed to any enforcement scheme involving interstate calls under the doctrine of appropriation or otherwise. Mont. Br. at 19-20. First, Montana's self-execution suggestion, apparently to be administered by Wyoming clairvoyance of Montana's needs, is not plausible. Second, in 1982 and 1983

Montana's commissioner committed to Wyoming's commissioner that Montana would notify Wyoming of any future shortages among Montana pre-1950 users. 1982 YRCC Ann. Rep., Ltr. to Govs. at IV; 1983 YRCC Ann. Rep., Ltr. to Govs. at IV. Montana's commissioner, for one, did not think that making calls for upstream releases or determining the needs of Montana's pre-1950 rights was too difficult. Finally, when Montana actually made a call in 2004, it supplied Wyoming with its May 1914 Tongue River Decree listing the priority dates of rights on the Tongue River up to 1914. Moy Decl. Ex. A, at 8-9. Therefore, Montana knew something about its pre-1950 rights on the Tongue River well before 1950. Montana's past actions and actual available information demonstrate that interstate calls in a prior appropriation scheme, made from official commissioner to official commissioner, are quite plausible.

D. Montana's argument that interstate calls would be unprecedented

In this section, Montana offers the same tired argument comparing the Compact to other interstate compacts to show that the Compact could not mean what it says. Mont. Br. at 20. The Court rejected this approach in its earlier decision in this case, and the argument deserves the same fate here. *Montana v. Wyoming*, 131 S. Ct. at 1779.

E. Montana's argument that Wyoming is estopped from urging a call

Montana claims that because Commissioner Tyrrell rejected Montana's calls in 2004 and 2006 on the grounds that Wyoming interpreted V(A) to support no claim against Wyoming post-1950 rights, Wyoming is estopped from arguing that a call was required. Mont. Br. at 22. Montana mischaracterizes the 2004 discussions. In that year, Montana claimed that Wyoming should curtail *pre-1950* rights that were junior to Montana pre-1950 rights. Moy Decl. Ex. A, at 2. Montana also asked Wyoming to release previously stored water from post-1950 reservoirs. Wyoming's rejection of these calls was absolutely correct, since the Compact creates no prior

appropriation scheme as between pre-1950 rights, and post-1950 water stored in priority is not subject to a senior's claim. FIR at 32, 42; 131 S. Ct. at 1772. Wyoming cannot be estopped from taking a correct position.

In 2006, Montana "called" for Wyoming to curtail post-1950 diversions. *See* Mont. Br. in Supp. of Mot. for Leave to File at 17; Mont. Br. in Resp. to Wyo. Mot. to Dismiss at 10. Wyoming denied Montana's theory that Montana's pre-1950 rights "must be met by contemporaneous regulation of post-1950 right in Wyoming." While Wyoming mentioned the lack of a procedure for calls in the Compact, its denial of Montana's call was not based on the lack of a specific call procedure, but instead on Wyoming's interpretation of the extent of Montana's V(A) rights. In fact, Mr. Tyrrell suggested that the states work on an administration system to address the allocation of water under Article V(C), the Compact provision that Wyoming believed created Montana calling rights. Moy Decl. Ex. B, at 13-14. Thus, Mr. Tyrrell did not reject the concept of a call, only the underlying right to make the call.

But even if Mr. Tyrrell had written in 2006 that calls were unnecessary, Montana could not claim that it detrimentally relied on Mr. Tyrrell's letter in the years before it was written. And since Wyoming has already conceded that Montana preserved its right to seek money damages, if any, from any Wyoming violations Montana can prove in 2004 and 2006, an estoppel argument is irrelevant for those years.

If there were an argument for equitable estoppel in this case, it more likely arises from Montana's commitment in 1982 to notify Wyoming if Montana's pre-1950 rights ever became short. *E.g.*, 1982 YRCC Ann. Rep., Ltr. to Govs. at IV. Between 1982 and 2004, Montana never gave such notice, and yet is now contending that Wyoming should have forgotten this commitment and acted despite the lack of notice. Montana claims Wyoming should have

"ensured," apparently through clairvoyance, that Montana's pre-1950 rights always got their water. Mont. Br. at 16.

Finally, Wyoming's arguments in section I(A) above rebut Montana's judicial estoppel argument. Wyoming is not asking the Court to take inconsistent positions that would call the judicial process into disrepute. Instead, Wyoming has accepted the Court's decision recognizing that Montana's continued enjoyment of pre-1950 rights creates a cross border claim against Wyoming post-1950 rights. Wyoming only asks that the Court remain consistent with its earlier decision, and apply the necessary features of the doctrine of appropriation.

II. Montana's arguments on the application of the facts to the call requirement

A. The burden of reviving a genuine issue of material fact has shifted to Montana and Montana has failed to carry that burden to date

Montana has offered no evidence to counter the statements of Wyoming's affiants that Montana made no timely calls during the affiants' tenures as commissioners. Richard Moy's declaration does not address the issue of timely calls, since the most he states in support of Montana's attempt to resurrect a genuine issue is that Montana "complained." Moy Decl. ¶¶ 4-5. On the contrary, Mr. Moy supports Wyoming's position that no timely call occurred between 1981 and 2004 because he states that when Wyoming rejected Montana's complaints, Montana essentially gave up on saying anything thereafter until 2004 and 2006. *Id.* ¶ 5.

Montana's response to Wyoming's motion for partial summary judgment has therefore distilled the factual question down to the following: During the years from 1952-1956, 1958-1962, and 1975-1983, do the contents of the official annual reports sufficiently prove the negative that Montana failed to make a call, so that the burden shifts to Montana to prove otherwise? Mont. Br. at 27-28.

It must be presumed that the duly appointed commissioners charged with the Compact's administration, have been earnest and capable persons. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *Bracy v. Gramley*, 520 U.S. 899, 909 (1997). The Special Master's evaluation of the lengthy negotiating process, lately supported by Mr. Littlefield's declaration, leaves little doubt but that this was true of the Compact drafters. FIR at 6-9; Littlefield Decl. at 6-31, ¶¶ 13-50. Wyoming negotiators L.C. Bishop and Earl Lloyd, and Montana's delegation chief, Fred Buck, were the states' commissioners from 1952 through 1962, except for Paul Rechard, who represented Wyoming in 1957. *See, e.g.*, 1962 YRCC Ann. Rep., Ltr. to Govs. at 2; 1957 YRCC Ann. Rep., Ltr. to Govs. at 2.

Without clear, contrary evidence, it is unreasonable to infer that Montana would have made a call for regulation between 1952 and 1962 without Mr. Buck, or the Wyoming commissioners, insisting that this fact be reported to the governors in the annual reports that the commissioners signed. The commissioners had the duty and power to collect, correlate, and present factual data, maintain records "bearing on the administration of the compact," make administrative recommendations to the states, and report to the governors annually. Compact Art. III(C). The Special Master should infer that the commissioners properly performed these duties. *See Chem. Found.*, 272 U.S. at 14-15; *Bracy*, 520 U.S. at 909.

Moreover, between 1952 and 1962, these men reported that there was insufficient development in Wyoming to raise any concerns about compact allocations. *E.g.,* 1955 YRCC Ann. Rep., Ltr. to Govs. at 1; 1958 YRCC Ann. Rep., Ltr. to Govs. at 1. Montana argues that this was a reference to percentage allocations under V(B). Mont. Br. at 28. But even if it was, lack of

development of post-1950 rights in Wyoming is a critical fact when it comes to a possibility of a violation of V(A). If during the first decade of the Compact, as these annual reports show, Wyoming had few post-1950 rights established, the likelihood of a V(A) violation was slim because, as the commissioners well knew from their experience drafting the Compact, pre-1950 rights in Montana only garnered protection against post-1950 rights in Wyoming. Yet the commissioners overtly reported no concerns based on those rights. In summary, because the 1952 through 1962 annual reports lack any mention of a Montana call during any of those water years, and since they affirmatively report the lack of post-1950 development in Wyoming, the reports dispel any issue of material fact as to a Montana call.

We must also presume, but can actually do more than presume, that the states' commissioners between 1975 and 1983 were sufficiently competent and vigilant to report a Montana call to their governors in the annual reports, if a call had occurred. That competence and vigilance is demonstrated by the 1981, 1982, and 1983 annual reports that described Montana's concerns over satisfaction of its pre-1950 rights. Even though Montana was able to fill Tongue River Reservoir in the drought year of 1981, Montana stated at the annual meetings that it almost had been unable to do so. 1981 YRCC Ann. Rep., Ltr. to Govs. at III; 1982 YRCC Ann. Rep., Ltr. to Govs. at IV. Montana's ability to make a call in a low-flow year, and report it at the commission's meeting later that year, can hardly be doubted, since in both 1982 and 1983, the commissioners reported that "Montana in turn must notify Wyoming when it is not able to obtain its pre-1950 water." *E.g.,* 1982 YRCC Ann. Rep., Ltr. to Govs. at IV.

The Montana commissioners who signed the annual reports that showed such vigilance would not have signed such reports forgetting to mention the salient fact that they had made a call on one of the rivers. While it is true that any favorable inference that can be drawn for the

non-moving party, should be drawn, a non-inference cannot be drawn, no matter how much the non-moving party would be favored by it.

Montana declarant Moy was on the scene between 1981 and 2008, but only makes the vague statements that some unspecified representatives of Montana, in some unspecified "other years," made some "complaints" to unspecified Wyoming representatives, at unspecified times of year, about Montana suffering shortages. Moy Decl. ¶ 2-4. He concedes that "at times" during this period "it was considered futile" by some unspecified Montana decision makers "to continue to complain." *Id.* ¶ 5.

Part of Mr. Moy's recollection is confirmed by the annual reports. Montana did vaguely and belatedly "complain" in 1982, 1983, and 1992 at the annual meetings, but the annual reports, like Mr. Moy's declaration, do not mention a timely call during any water year within this long time period. From 1985 to the present, Wyoming's former commissioner Fassett, and current commissioner Tyrrell, affirmatively state that Montana made no timely call before 2004, and Mr. Moy does not contradict this. Fassett Aff. ¶ 4; Tyrrell Aff. ¶ 4.

In short, under this Compact, Montana is not excused from asserting its rights because Wyoming might reject the entreaty. As Wyoming has conceded, when Montana made the required calls, it preserved its ability to make claims for V(A) violations. Montana's failure to make calls in any other years of shortage should not be excused under the doctrine of appropriation. *See Worley v. U.S. Borax & Chem. Corp.*, 428 P.2d 651, 654 (N.M. 1967).

In summary, Wyoming's affidavits, together with the annual reports, dispel any genuine issue regarding the material fact of whether Montana ever made a call before 2004. Montana's only declaration on this issue, Mr. Moy's, does not contradict the fact that no call was made.

B. If Wyoming's motion is premature, that concern is easily corrected while still disposing of this vital issue early in the case

A decision on the call issue is important to the scope of discovery in this case. Wyoming has been able to submit robust materials showing no call other than in 2004 and 2006. Likewise, Montana and North Dakota have significantly investigated the case, resulting in the joint appendix on the motion to dismiss and in the disclosure of North Dakota's entire file. Montana obtained a declaration from long-time employee Richard Moy, and as the plaintiff, had plenty of motive and time to locate its compact commissioners between 1952 and 2005 that survive. Mr. Littlefield's declaration reveals Montana's extensive effort to review archives on the call issue. If Wyoming's motion is premature, it must be because discovery would allow Montana to do something else that it has been prevented from doing.

With respect to potential documentary evidence, if Montana had made a written call before 2004, it is hard to believe that Montana would not have kept a copy, found it, and submitted it by now. If Montana believes that Wyoming has a copy of some lost document, and is hiding it, then the Special Master should by all means allow Montana to make a request for production to satisfy itself. This could be done expeditiously.

Also in its brief, Montana argues that an oral call between a host of water officials would be legally sufficient, and Montana needs the opportunity to find someone who may remember an oral call. Mont. Br. at 26. Wyoming disagrees that an oral call between non-commissioners should be adequate. *See* Wyo. Br. in Supp. of Mot. for Summ. J. at 25-26. If Wyoming wins the legal issue on the call requirement, it concedes that neither party gains anything if the outcome on the factual issue is tainted by an unfair procedure. If, after a reasonable period of time counted in months, Montana cannot produce a witness that can vouch for any oral call between 1952 and 2004, then discovery of events in those years can be removed from this case. Also, if no evidence

of an oral call is found, the Special Master need not decide the legal issue whether an oral call would be sufficient. If the Special Master wishes to proceed in this fashion, Wyoming does not object.

CONCLUSION

The Special Master should recommend that Wyoming's motion be granted, or in the alternative, take the motion under advisement with respect to the factual component to allow Montana reasonable discovery so that it may find evidence that could contradict the evidence supporting Wyoming's motion.

Dated this 28th day of September, 2011.

THE STATE OF WYOMING

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Wyoming's Reply Brief In Support of Its Motion for Partial Summary Judgment was served by electronic mail and by placing the same in the United States mail, postage paid, this 28th day of September, 2011.

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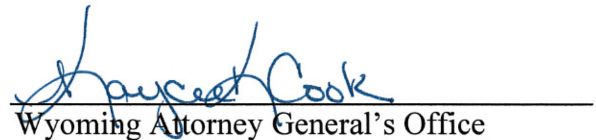

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