

Via Email and U.S. Mail

November 27, 2017

Barton H. Thompson, Jr., Special Master
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way, N182
Stanford, CA 94305

**Re: *Montana v. Wyoming & North Dakota*,
No. 137, Orig., U.S. Supreme Court**

Dear Special Master Thompson:

Thank you for your letter of November 20, asking for Montana's views on certain of Wyoming's suggestions for the Proposed Judgment and Decree ("Decree"), which is Appendix A to your (Draft) Final Report of November 2, 2017 in this case. In particular, you asked for Montana's views on Wyoming's suggestions regarding ¶¶ A(1), B(1), B(6), B(7), D(1), E(1), F(3), G(2) and G(4) of the Decree.

Montana has no objection to Wyoming's suggestions regarding ¶¶ A(1), B(1), F(3), G(2) and ¶ G(4) of the Decree.

Wyoming suggests changing the last sentence of ¶ B(6). Paragraph B(6) relates to the lifting of calls. The last sentence of ¶ B(6) currently reads, "Montana may place a new call at a later point if the conditions of paragraph B(2) are again met." Wyoming suggests replacing the word "point" with the word "date." Wyoming offers no rationale for this change, and Montana can discern no rationale for such a change. Moreover, the change could introduce confusion as to what qualifies as a "later date." Montana therefore recommends that Wyoming's suggestion be rejected.

In Wyoming's comments on ¶ B(7), Wyoming raises a helpful point with respect to groundwater depletions at the time of a call. Wyoming suggests inserting into the second sentence of ¶ B(7) the limitation "to the degree physically possible," so that the sentence would read: "Wyoming also shall, to the degree physically possible, promptly initiate any action needed to ensure that any groundwater withdrawals under post-[January 1,] 1950 appropriative rights are not interfering with the continued enjoyment of pre-1950 surface rights in Montana." This suggestion raises several other important issues with respect to the effects of post-January 1, 1950 groundwater pumping. These

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issues stem primarily from the lagged effects of groundwater pumping on surface waters. Thus, the question may arise whether the groundwater “withdrawals” referenced in the second sentence of ¶ B(7) are withdrawals just during the existence of the call or include also, as they should, groundwater withdrawals prior to the time of the call that are depleting surface waters in the basin during the call.

Wyoming’s contribution is to indirectly point out that it is the depletion of the surface waters during a call that is of concern, even though that depletion is caused by withdrawals at the wellhead. As is well known, the time delay associated with groundwater pumping on streams requires special attention in order that the lagged depletion effect of groundwater pumping is properly accounted for. *See, e.g.*, Second Interim Report at 201 (noting testimony that the impact of groundwater pumping on the Tongue River may continue for a long time after groundwater production has stopped). Thus, it is groundwater withdrawal both before and during a call that is critical to Compact compliance. Accordingly, no post-January 1, 1950 priority groundwater pumping, whenever the pumping occurs, can be allowed to deplete surface waters that should otherwise go to Montana during a call.

Several other changes to ¶ B(7) are called for. First, Wyoming’s proposed language should be included in a slightly different location in the second sentence of the paragraph, in order for it to be parallel to the first sentence. Second, the follow-up obligation in the last sentence should be amended to include depletions caused by groundwater pumping. This will make clear that, as with storage, groundwater pumping depletions, that cannot be initially prevented, should be made up as soon as it is physically possible to do so after a request from Montana.

Further, in the last sentence of ¶ B(7), “under Article V(A)” should be changed to “in violation of Article V(A).” This tracks the language in the previous sentence, which states, “Wyoming shall be liable for diversions, storage, or [depletions] in violation of Article V(A) of the Compact even if it was not possible for Wyoming to prevent the diversions, storage, or [depletions].”

Finally, because, when replacing water depleted during a call in violation of Article V(A) by groundwater pumping, the replacement water cannot literally be the same water molecules, the words “or its equivalent in quantity and quality” should be inserted after “such water” in the last sentence of ¶ B(7). The words “in quantity and quality” are included to clarify that the quality of replacement water should be equivalent to the quality of the water prevented from reaching Montana in violation of Article V(A). Thus, it would not be satisfactory to replace depletions of Tongue River water with lower quality water from another source, such as the Powder River basin.

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As a result, in order to appropriately implement Wyoming's proposed change and the foregoing points, Montana recommends that ¶ B(7) be modified to read as follows, with the new language underlined and previous recommendations in brackets:

7. Upon receiving a call, Wyoming shall promptly initiate action to ensure, to the degree physically possible, that only pre-1950 appropriators in Wyoming are diverting or storing surface water and only to the degree permitted by their appropriative rights and this Decree. Wyoming also shall promptly initiate any action needed to ensure, to the degree physically possible, that any groundwater depletions under post-[January 1,] 1950 appropriative rights are not interfering with the continued enjoyment of pre-1950 surface rights in Montana. Wyoming shall be liable for diversions, storage, or depletions in violation of Article V(A) of the Compact even if it was not possible for Wyoming to prevent the diversions, storage, or depletions. Where it is initially not physically possible to prevent the storage or depletion of water in violation of Article V(A), Wyoming shall deliver such water, or its equivalent in quantity and quality, to Montana as soon as it is physically possible to do so after a request from Montana.

Wyoming recommends adding to the end of the first sentence of ¶ D(1) the words "except as provided in Section B.7 of this Decree." Montana agrees that some reference to ¶ B(7) is appropriate, but contrary to Wyoming's suggestion of there being an exception, Montana suggests that the additional language be "as provided in Paragraph B.7 of this Decree." This recognizes that the Decree does not provide for an exception to the call response requirement in ¶ B(7), but that, just as provided for in ¶ B(7), Wyoming continues to be liable, even if it is physically impossible to immediately comply with the call.

Wyoming's suggestion with respect to the first sentence of ¶ E(1) is conceptually a good suggestion. Montana recommends, however, that it be implemented by adding the words "each water year beginning on October 1," after the words "in the Tongue River Reservoir" so that the sentence would read, "Article V(A) protects Montana's right to store up to, but not more than, 72,500 acre feet of water in the Tongue River Reservoir each water year beginning on October 1, less carry-over storage in excess of 6,571 acre feet."

Thank you for the opportunity to provide Montana's views on the foregoing.

Best regards-

Barton H. Thompson, Jr., Special Master
November 27, 2017

Very truly yours,



John B. Draper

cc: (Email only)
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