

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**

**AFFIDAVIT OF DAVID SCHROEDER IN SUPPORT OF WYOMING'S MOTION FOR
SUMMARY JUDGEMENT**

David Schroeder, being sworn, states;

1. I became employed by the Wyoming State Engineer's office in 2005 as a coal bed methane reservoir inspector, and became a Hydrographer Commissioner in 2009. I am currently the Hydrographer Commissioner for Districts 9, 10 and 11 within Water Division II in Wyoming. I have knowledge of the facts set forth herein either from my own personal knowledge or from the records of Division II, and am competent to testify thereto.

2. The Hydrographer Commissioners within Division II do not use trigger-flows to determine when junior water rights should be regulated without regard to actual

demand by senior water rights. Instead, and after years of experience which were related to me when I began work as a Hydrographer Commissioner, we know that certain flow amounts likely indicate that regulation is imminent, although these flow amounts may change over time. Once these flows occur we know that we need to begin communicating with the water users within our Districts to ensure that senior appropriators are receiving the direct flow water they can put to beneficial use and to ensure that junior appropriators receive the stored water they have ordered if any. We know that there is an actual demand for the available direct flow water at the various headgates at all times after the streams go into regulation, and that the appropriators are receiving that water in priority, through constant communications with our appropriators and personal observations. These constant communications often preempt the need for appropriators to make formal calls because the appropriators are generally assured that the stream is being regulated in priority and that their neighbors are not receiving water that they are not entitled to or have no intention to use. Division II Hydrographer Commissioners would not and do not shepherd water to appropriators that are out of priority or that do not have a present intention and actual ability to put the water to beneficial use.

3. As I stated in my deposition, not all irrigators within my Districts inform me when they are cutting hay. However, both through my firsthand observation of their activities and sometimes from watching lower stream gages, I can tell to a degree when irrigators are cutting hay.

4. When a stream is in regulation and a hay cutting does occur, typically irrigators will curtail or shut off their storage water rights out of Lake DeSmet, Kearney Lake, or Willow Park Reservoir. Prairie Dog Ditch is an example. During the course of the irrigation season, and especially during regulation, I speak to the Ditch representative regularly and he informs me of the irrigators' water supply needs. If the Ditch is carrying more water than they need, they will usually curtail their release out of Kearney Lake or I will leave the excess water in the creek for other, more junior users. Under scenarios such as this, I have certainly put water back in the system previously needed and used by a senior right because of lessening demand, but not specifically because I was told the irrigators are cutting hay. It has also happened several times when a certain ditch within the Prairie Dog system is down for maintenance and/or repair.

5. In my experience since 2009, once a stream I am responsible for goes into regulation it usually remains in regulation for the remainder of the irrigation season. Even though demand by irrigators will decrease at certain times during an irrigation season and therefore make more water available for junior users, the stream will usually remain in regulation and under my control.

6. When the Hydrographer Commissioners within Division II indicate that a stream typically remains in regulation until the end of the water year that just means that the stream remains within our control. The exact distribution of water made by the Hydrographer Commissioner to the various appropriators while the stream is in regulation may change frequently depending on demand and the available water supply. Stating that the stream remains in regulation does not mean that we deliver water to

