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

MEMORANDUM OF *AMICUS CURIAE* ANADARKO PETROLEUM CORPORATION IN SUPPORT OF WYOMING'S POST-TRIAL BRIEF

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Pursuant to Case Management Plan No. 1, Sect. IV.C., *amicus curiae* Anadarko Petroleum Corporation ("Anadarko") respectfully submits this memorandum in support of Wyoming's Post-Trial Brief.

INTEREST OF THE *AMICUS*[1]

Anadarko is an independent oil and gas exploration and production company. Anadarko has extensive oil and gas leaseholds in Wyoming on which it engages in the extraction of natural gas from coal seams, referred to as coalbed methane or "CBM." That extraction requires pumping water located in underground coal seams. After a trial on the merits, this Court is now asked to consider, among other issues, whether pumping of CBM groundwater is covered by the Yellowstone River Compact, 65 Stat. 663 (1951) (the "Compact"), and if so whether such pumping infringes on Montana's rights under the Compact.

INTRODUCTION AND SUMMARY OF ARGUMENT

Montana seeks to expand the reach of the Compact well beyond its plain language and the intent of the parties, in an effort to impose restrictions on CBM groundwater pumping in Wyoming that Montana itself does not impose on its own in-state CBM operations. While the Compact may be interpreted to encompass "*some* forms of groundwater that are hydrologically connected to the surface waters of the Powder and Tongue Rivers," First Interim Report of the Special Master,

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Montana v. Wyoming and North Dakota, No. 137 Orig., p. 44 (Feb. 10, 2010) ("FIR") (emphasis added), the Compact's plain language and complex allocation structure make clear that the parties did not contemplate its extension to deep groundwater aquifers like those associated with CBM production. The water allocations under Article V of the Compact prescribe specific percentages to individual stream segments that operate on a rolling daily basis and reset annually as of October 1 of each water year. But any effects of CBM pumping on surface flows are highly speculative and attenuated, and their locations and timing cannot be ascertained to a degree that would allow application of the Compact's framework. Moreover, even if any such effects could be ascertained, they could not possibly be remedied on an "annual water year basis" that the Compact requires. Article V(C). Plain and simple, the Compact just does not work when applied to deep underground aquifers. Therefore, under a straight-forward construction of the Compact, it does not cover CBM groundwater pumping.

Further, the Compact incorporates the doctrine of appropriation. While both states regulate alluvial groundwater pumping under the doctrine of appropriation, to this day neither Wyoming nor Montana regulates CBM groundwater pumping under its law of appropriation as hydrologically interconnected to surface waters. The parties' course of conduct to an agreement is "'evidence of [the agreement's] meaning.'" *New Jersey v. Delaware*, 552 U.S. 597, 619 (2008) (quoting *O'Connor v. United States*, 479 U.S. 27, 33 (1986)). By now arguing the Compact should be interpreted to cover CBM groundwater pumping in Wyoming, Montana essentially

seeks to burden Wyoming water users with restrictions that Montana does not impose within its own borders. At a minimum, the prior rulings in this case that Montana must first avail itself of in-state remedies, *see* FIR at 15, 89; Wyoming's Post-Trial Brief at 36-38, requires that Montana undertake such actions within its own borders before seeking to have Wyoming do so.

Even if the Compact's language could be construed to cover pumping of some groundwater, the timing and location of any effects relating to CBM pumping on surface flows are theoretical and speculative, and at most *de minimis*. There is no reason to believe that the parties intended the Compact to cover such *de minimis* impacts, and the Supreme Court does not involve itself in such trifling matters. *Washington v. Oregon*, 297 U.S. 517, 526 (1936) (dismissing complaint where any injury resulting from complained diversion was "unsubstantial and uncertain").

Finally, even if the Compact could reasonably be construed to cover CBM pumping (which it cannot), and Montana first prevailed in imposing an intrastate remedy of ceasing all CBM pumping in the Powder River Basin in Montana (which it has never attempted), the futile-call doctrine would still prevent Montana from invoking its rights under the Compact to cease CBM pumping in Wyoming. The Compact is governed by the doctrine of appropriation, Art. V(A), and the law of appropriation in both states recognizes the futile-call doctrine. A senior downstream user can prevent a junior user's diversion only if it would result in a *useful* additional quantity of water being available to the senior user that can be put to beneficial use. *See Raymond v. Wimsette*, 31 P. 537, 540-41 (Mont. 1892). There is

no evidence that curtailing coalbed methane pumping in Wyoming would have any appreciable effect on the amount of surface water available for diversion under a pre-1950 water right in Montana. Thus, even if the Compact were interpreted so as to cover CBM groundwater, Montana's attempts to issue a call on such groundwater pumping in Wyoming would be futile and ineffective as a matter of law.

ARGUMENT

THE YELLOWSTONE RIVER COMPACT DOES NOT COVER COALBED METHANE GROUNDWATER.

The First Interim Report of the Special Master concluded that the Compact encompasses "some forms of groundwater that are hydrologically connected to the surface waters" – but not all groundwater. FIR at 44. The FIR specifically left open the issue of "the exact circumstances under which groundwater pumping violates Article V(A)." *Id* at 54. Although the Compact may cover "some" groundwater, as a matter of law it does not cover CBM groundwater. Interpreting the Compact to cover CBM groundwater pumping would contravene the plain language of the Compact.

A. The Plain Language of the Compact Does Not Cover Coalbed Methane Groundwater.

It is black-letter law that "[a]ll contracts are to be construed to accomplish the intention of the parties." *In re Binghamton Bridge*, 3 Wall. 51, 74, 18 L. Ed. 137 (1865). To ascertain the parties' intent, courts will look first to the plain language of

the contract.[2] *See United States v. Winstar Corp.*, 518 U.S. 839, 911-12 (1996); *Green*, 21 U.S. (8 Wheat.) at 89-90 (holding that a compact between states must be interpreted in accordance with its "plain and obvious meaning").

The plain language of the Compact demonstrates no intent to cover pumping from deep underground aquifers, like those associated with CBM operations. As noted above, the water allocations under Article V of the Compact prescribe specific percentages to individual stream segments, such as 40% of the unused and unappropriated waters as of January 1, 1950 of the Tongue River being allocated to Wyoming, and 60% to Montana. Article V(B)(3). Those percentages apply on a rolling daily basis beginning on October 1 of each year, and reset annually in each water year. Article V(C) ("The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3, and 4 of this Article V, shall be determined *on an annual water year basis* measured from October 1st of any given year through September 30th of the succeeding year.") (emphasis added). And even Article V(A) only protects specific "appropriative rights" existing in each state as of January 1, 1950.

This Court has clearly held that the Compact was not "intended to guarantee Montana a set quantity of water," and instead only protects pre-1950 "appropriative rights." *Montana v. Wyoming and North Dakota*, 131 S. Ct. 1765, 1779 (2011); Wyoming's Post-Trial Brief at 5-7; *cf.* Montana's Post-Trial Brief at 131 ("In order to

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[2] In addition to being a contract, the Compact is also a statute. 65 Stat. 663 (1951). The same plain-language interpretative principles apply to statutes. *See Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1821).

determine how much water *Wyoming was required to deliver to the state line* to satisfy Montana's pre-1950 direct flow water rights . . . .") (emphasis added). As the Supreme Court explained, "if Article V(A) were intended to guarantee Montana a set quantity of water, it could have done so *as plainly as other compacts just do that.*" *Montana v. Wyoming*, 131 S. Ct. at 1779 (emphasis added) (citing the Colorado River Compact and Republican River Compact as examples).

Although only Montana's claims under Article V(A) of the Compact remain in this case, *see* FIR at 95-96, activities that are subject to the Compact are subject to all of its provisions. Nothing in the Compact reasonably supports an interpretation that a particular "use of the waters of the Yellowstone River System," *see* Article I(B), which, as Montana complains, depletes the surface flows available for diversion in the Tongue River, can somehow be subject only to Article V(A) and not subject to the percentage allocations in Article V(B) and the timing provisions in Article V(C). If a specific use, such as groundwater pumping, is deemed to be covered by the Compact, it is covered for all purposes and subject to all of the Compact's restrictions. See FIR at 95 ("Article V, moreover, constitutes a comprehensive scheme of which Article V(A) is one interconnected part.")

But any effects of CBM pumping on surface flows are highly speculative and attenuated. *See* Barton H. Thompson, Jr., *Beyond Connections: Pursuing Multidimensional Conjunctive Management*, 47 IDAHO L. REV. 273, 282 (2011) ("The impact of groundwater withdrawals on surface water is often delayed, sometimes by months or years, and one acre-foot of groundwater withdrawals typically translates

into only a fractional reduction in surface-water availability"). And the locations and timing of any such effects cannot be ascertained to a degree that would allow application of the Compact's framework. Moreover, even if any such effects could be ascertained, they could not possibly be remedied on the "annual water year basis" that the Compact requires. Article V(C). The Compact's provisions cannot rationally be applied in the context of pumping from deep underground aquifers where the timing and locations of any effects on surface flows cannot be meaningfully determined.[3]

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[3] Although Montana argues that the effect of CBM pumping on surface flows *crossing the Wyoming/Montana boundary* was modeled by its experts, *see* Montana's Post-Trial Brief at 80, that is not in fact what Montana's experts' reports conclude. Mr. Larson's report attempts to calculate only the *quantity* of any reductions of surface flows *within the entire Tongue River Basin above the Tongue River Reservoir*, but not in any particular location. Expert Report Prepared by Steven P. Larson (Ex. M9 at 8, 12; MT-14832, 14836) (Jan. 4, 2013). Mr. Book accepts those modeled quantities, but then simply *assumes* all of those calculated reductions occur at the state line. Expert Report Prepared by Dale E. Book, P.E., (Ex. M5 at 21; MT-14498) (Jan. 4, 2013) ("The CBM impacts are *assumed* to occur at the Stateline.") (emphasis added); Expert Rebuttal Report Prepared by Dale E. Book, P.E., (Ex. M6 at 27 Table 3 Notes; MT-016625) (Jun. 4, 2013) ("CBM impacts at Stateline; no transit loss applied."). Because Mr. Larson does not opine *where* within the Tongue River Basin any such reductions may occur, and notwithstanding Mr. Book's unsupported *assumption* that they all occur at the state line, it is entirely possible instead that any such reductions would never have been available for diversion in Montana by a pre-1950 appropriator. For example, if any modeled reduction occurred in a Wyoming stream segment where it was available to be appropriated by a pre-1950 right in Wyoming, or any such reduction occurred in a stream segment where it would have been lost naturally due to seepage or evapotranspiration before crossing into Montana, the theoretical reductions assumed by Mr. Book to have occurred at the state line would not have been available for diversion in Montana in any event. Thus, neither report supports a conclusion of a particular reduction in surface flows crossing the state line as a result of CBM pumping. Regardless, as noted above, the Supreme Court has held the Compact does not impose *any* state-line delivery requirement on Wyoming.

Therefore, under a straight-forward construction of the Compact, it does not cover CBM groundwater pumping.

B. The Compact's Context Confirms That It Was Not Intended to Cover Coalbed Methane Groundwater.

Confirming the plain language above, the Compact's surrounding context reveals that it was not intended to cover groundwater pumping from deep underground aquifers, like CBM pumping. *See Winstar*, 518 U.S. at 911 ("Under ordinary principles of contract law, one would construe the contract in terms of the parties' intent, as revealed by *language and circumstance*." (emphasis added)).

The Compact incorporates the doctrine of appropriation. Art. V(A). It is undisputed that neither Montana nor Wyoming regulates CBM groundwater under the law of appropriation as being interconnected with surface waters. *See generally* Wyoming Post-Trial Brief at pp. 61-64. This strongly supports an argument that the Compact cannot now be interpreted to cover CBM groundwater pumping. The parties' course of conduct to an agreement is "evidence of [the agreement's] meaning." *New Jersey v. Delaware*, 552 U.S. at 618-21 (quotation omitted) (adopting the Special Master's finding that New Jersey's conduct was "fundamentally inconsistent with the position advanced by New Jersey," *id.* at 621, regarding how the compact should be interpreted). "It is hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning. . . . We have applied that principle before to treaty cases (the Compact here is of course a treaty)." *New Jersey v. New York*, 523 U.S. 767, 830-31 (1998) (Scalia, J., dissenting) (citing 17A Am. Jur. 2d, Contracts § 357

(1991); Restatement (Second) of Contracts §§ 202(4), 203 (1979); Uniform Commercial Code § 2–208(1)).

C. The Compact Cannot be Interpreted to Cover the Speculative and *De Minimis* Effects – If Any – On Surface Flow Caused by Coalbed Methane Pumping.

Montana complains that CBM pumping in Wyoming adversely affects interstate surface waters in Montana, impairing the rights of Montana's pre-1950 users. But even if the Compact covers *certain* groundwater, the effect on the surface of CBM pumping, which occurs deep underground, is *de minimis*. Montana law recognizes exceptions for *de minimis* uses of alluvial groundwater, *see* MONT. CODE ANN. § 85-2-306(3)(a), and thus Montana cannot colorably argue that the Compact was intended to cover deep groundwater with such a minimal, tenuous connection to the surface flow. *Cf. Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 31 (Colo. 2006) (en banc) ("The surface right holder, in order to receive relief, must prove that the pumping of then-designated ground water has *more than a de minimis impact* on their surface water rights and is causing injury to those rights." (emphasis added)).

The Compact was intended to resolve causes of controversy between Wyoming and Montana with respect to the Yellowstone River and its tributaries. The Supreme Court is concerned only with claims intended to address an "invasion of rights [that is] of *serious magnitude*." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923)) (emphasis added) (additional citations omitted); *see also Washington v. Oregon*, 297 U.S. at 526 (dismissing complaint where injury based on complained water diversion was "unsubstantial and uncertain"). There is no evidence that the

impact of CBM pumping on surface flows is more than negligible, much less an impact of a "serious magnitude."

In fact, the evidence strongly suggests that neither Montana nor Wyoming anticipated the Compact's covering *de minimis* effects of groundwater usage, particularly deep groundwater like that used in CBM production. Montana now seeks to manufacture a significant (*i.e.*, greater than *de minimis*) connection between CBM pumping in Wyoming and the Tongue River Basin. Any such connections, however, are dependent on a multitude of factors, including location, depth, soil, the coal formation, geography, disposal of the water, recharge, temperature, weather, number of wells in operation, etc. As the Supreme Court has held, a water source's nominal contribution to a stream does not make it a tributary of the river. *See Wyoming v. Colorado*, 259 U.S. 419, 487-89 (1922) (discussing Sand Creek's nominal contribution and concluding that Sand Creek was not a tributary). The theoretical connection between Wyoming's CBM wells and the interstate surface waters is simply too attenuated to reasonably conclude that the parties intended the Compact to cover CBM groundwater. *See* Compact Art. V(E) (exclusions from the Compact for existing and future domestic and stock water uses, provided any reservoir for stock water uses does not exceed 20 acre-feet). Rather, it is far more reasonable to conclude that the parties intended pumping from deep aquifers like CBM groundwater to remain within the discretion of each State's regulators. And as already discussed, those state regulators have spoken: both

Wyoming and Montana have chosen *not* to regulate CBM pumping under the law of appropriation as tributary to surface streams.

Even under Montana's own law, any potential effects on surface flows caused by withdrawals from CBM wells are *de minimis*. Montana recognizes *de minimis* exemptions for groundwater appropriations. *See* MONT. CODE ANN. § 85-2-306(3)(a).[4] While Montana does not regulate *any* CBM groundwater under its appropriation law, *see supra* Section B, whatever effect CBM pumping has on the surface likely falls below Montana's *de minimis* exemptions in any event. *See* MONT. CODE ANN. § 85-2-306(3)(a).

With that in mind, Montana's position in this case contradicts its own laws and management of groundwater. Montana is trying to dictate how Wyoming should regulate its groundwater, but Montana itself recognizes that certain operations are *de minimis* such that regulation is not warranted. *Cf.* Thompson, *supra* at 282-83 ("States therefore must decide how immediate and material an impact must be to justify legal intervention. Although hydrologic models are increasingly sophisticated, moreover, uncertainties regarding the connection between groundwater withdrawals and surface-water availability can still be significant."). The Compact could not have been intended to allow such an invasion of Wyoming's sovereignty.

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[4] The Montana statute grants an exemption of 10 acre-feet per year if the water is outside a stream depletion zone, and 2 acre-feet per year if it is within a stream depletion zone. *Id.* The latter exemption was added by the Montana legislature in 2013.

EVEN IF THE YELLOWSTONE RIVER COMPACT COVERED COALBED METHANE PUMPING, THE FUTILE-CALL DOCTRINE PRECLUDES MONTANA'S CLAIM FOR PRIORITY.

Even assuming the extraction of water as part of CBM production eventually does result in some non-*de minimis* effects on surface flows that otherwise would be available for diversion in Montana to pre-1950 appropriators, curtailment of CBM production in Wyoming would provide no contemporaneous benefit to a senior user in Montana. Thus, regardless of Montana's other arguments, any call relating to Wyoming's CBM groundwater pumping fails under the "futile call" doctrine.

As an initial matter, as the Special Master previously ruled in this case, Montana must first avail itself of intrastate remedies addressing any post-1950 uses before calling on Wyoming to do so. FIR at 15, 89; *see generally* Wyoming Post-Trial Brief at 5, 36-38, 64. Although Montana argues in its Post-Trial Brief that it availed itself of intrastate remedies in the years at issue before making a call on Wyoming to do so, noticeably absent from Montana's argument is any claim to have curtailed in-state post-1950 *groundwater* pumping, including CBM pumping. Montana Post-Trial Brief at 138. Montana is foreclosed from seeking relief in Wyoming relating to CBM pumping that it fails to undertake first within its own borders.

Under the futile-call doctrine, a senior appropriator has a right to prevent a junior appropriator's diversion "only when doing so benefits the senior; otherwise, the attempt to prevent a junior's diversion *is a 'futile call' and will not be allowed.*" Harrison C. Dunning, *The 'Physical Solution' in Western Water Law*, 57 U. COLO. L. REV. 445, 466 n.116 (1986) (emphasis added); *see also* Edella Schlager, *Challenges of*

Governing Groundwater in U.S. Western States, 14 HYDROGEOLOGY JOURNAL 350, 353 (2006) ("[I]f shutting down a diversion by a junior appropriator does not make more water available to a senior appropriator during a period of time when the water is needed, the junior appropriator can continue the water use."). If environmental factors outside the appropriators' control—*e.g.*, seepage, evaporation, channel absorption, etc.—would prevent the water from reaching the senior appropriator in "sufficient quantity" for beneficial use, the junior appropriator may continue to divert the water. *Albion-Idaho Land Co. v. Naf Irrigation Co.*, 97 F.2d 439, 444 (10th Cir. 1938). The senior appropriator's priority "does not justify him in insisting that the water be wasted and lost by denying its use to the junior appropriator." *Id.*

Montana has recognized the futile-call doctrine for more than a century. *Irion v. Hyde*, 105 P.2d 666, 674 (Mont. 1940); *Raymond*, 31 P. at 540-41. As the Montana Supreme Court explained, "[T]he prior appropriator may insist that the water remain in the stream, from which he has the right of prior appropriation, so long as any *useful quantity* thereof would reach his point of diversion, if allowed to remain." *Raymond*, 31 P. at 540-41 (emphasis added). Several other states—including Wyoming—also recognize the futile-call doctrine. *See, e.g.*, *City of Aurora ex rel. Util. Enter. v. Colo. State Eng'r*, 105 P.3d 595, 603 & n.4 (Colo. 2005) (en banc); *San Carlos Apache Tribe v. Superior Court ex rel. Cnty. of Maricopa*, 972 P.2d 179, 195 & n.9 (Ariz. 1999) (en banc); *Gilbert v. Smith*, 552 P.2d 1220, 1224 (Idaho 1976); *State ex rel. Cary v. Cochran*, 292 N.W. 239, 246 (Neb. 1940); *Fenstermaker v.*

Jorgensen, 178 P. 760, 763 (Utah 1919); *In Re July 25, 2012 Decision of the State Eng'r*, Civ. Action No. 95074-A, at 10 (Wyo. 7th Jud. Dist. Ct. Feb. 27, 2013); *see also* WYO. STAT. § 41-3-1008(a)(ii).

The futile-call doctrine defeats Montana's attempt to use the Compact to control Wyoming's CBM groundwater pumping. Curtailing CBM production in Wyoming during any portion of a given year would not actually benefit any specific pre-1950 appropriative right in Montana. As already discussed, the hydrological connection between CBM groundwater in Wyoming and surface water in Montana is tenuous, at best. Indeed, courts have found that "[b]ecause CBM water comes from deep underground aquifers, it would not reach the Tongue River were it not for [the] extraction process." *N. Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003).

If Montana and Wyoming were both to cut off CBM pumping, there is no reason to believe that any additional "useful quantity" of surface water would be available downstream for Montana's pre-1950 beneficial use. *Raymond*, 31 P. at 540-41; *see also Albion-Idaho Land*, 97 F.2d at 444. Far more likely, the elimination of CBM pumping in both states would result in "waste[]" of that groundwater. *Albion-Idaho Land*, 97 F.2d at 444; *see also Cochran*, 292 N.W. at 246.

Even the State of Montana's own attorneys have recognized that the futile-call doctrine applies where (as here) "the hydrological connection between surface water and ground water is unclear." Memorandum from Helen Thigpen, Montana Staff Attorney, to Montana Water Policy Interim Committee of the 62nd Legislature

(Aug. 30, 2011), at 6, *available at* http://leg.mt.gov/content/Committees/Interim/2011-2012/Water-Policy/Staff-Reports/ground-water-calls.pdf ("Thigpen Memo"). The Thigpen Memo explains that, where the hydrological connection is tenuous, "a ground water user could invoke the futile call doctrine and argue that the senior would not receive any water to fulfill the senior's right despite curtailment of the use." *Id.* The memo recognizes that, as here, the senior appropriator "will likely run into several challenges in attempting to enforce the call, *including the futile call doctrine*." *Id.* (emphasis added). And in fact, the Thigpen Memo acknowledges that the futile-call doctrine could create challenges for the senior appropriator *even where* the hydrological connection is "clear" (which is far from the case here). *Id.* Thus, contrary to the arguments advanced by Montana in this case, Montana state attorneys have recognized the applicability of the futile-call doctrine where speculative and minimal quantities of groundwater are at issue.

The futile-call doctrine brings a level of equity into the law of appropriation. Even if Montana prevails on its argument that CBM groundwater pumping is covered by the Compact, and even if Montana is successful in first shutting down all CBM groundwater pumping in Montana as the Compact requires, the futile-call doctrine would still prevent Montana from using the Compact in an effort to shut down Wyoming's CBM groundwater pumping.

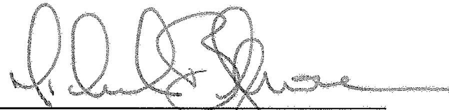
CONCLUSION

The Yellowstone River Compact was never intended to cover CBM groundwater production. This is clear not only from the plain language of the Compact, but

also because to this day neither state regulates CBM groundwater under the doctrine of appropriation as tributary to surface waters. In any event, any effects of CBM pumping are *de minimis*, and not worthy of consideration by the Supreme Court in an original jurisdiction action such as this. Finally, even if the Compact could be construed to cover certain deep groundwater aquifers like those relating to CBM operations, Montana's attempts to issue a call on Wyoming's CBM groundwater would still fail under the "futile-call" doctrine.

For the reasons above, this Court should grant judgment to Wyoming and hold as a matter of law that (1) the Yellowstone River Compact does not encompass CBM groundwater, and (2) Montana cannot use the Compact as a mechanism to regulate CBM pumping in Wyoming.

Respectfully submitted,



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The undersigned hereby certifies that I caused a true and correct copy of the Memorandum of *Amicus Curiae* Anadarko Petroleum Corporation in Support of Wyoming's Post-Trial Brief to be served by first class mail, postage paid and by electronic mail, as noted, this 24th day of April, 2014, to the following:

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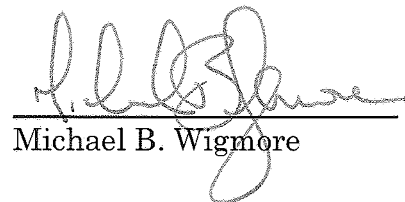

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