

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 FLOYD A. BISHOP IN SUPPORT OF
WYOMING'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Floyd A. Bishop, being sworn, states:

1. I am a retired professional engineer. I held the position of Wyoming State Engineer from my appointments by Governor Clifford Hansen on May 1, 1963 until December 1, 1974. I held the position of Wyoming Commissioner to the Yellowstone River Compact Commission from 1963 through the commission's annual meeting of November 26, 1974. I have personal knowledge of the facts stated in this affidavit and am competent to testify to those facts. I make this affidavit in support of Wyoming's Motion for Partial Summary Judgment.

2. Under Article 8, § 5 of the Wyoming Constitution, I was given “general supervision of the waters of the state and of the officers connected with its distribution,” during my tenure as State Engineer. As of my last year as State Engineer, 1974, I supervised a staff of approximately 77 persons. This staff included four water division superintendents, one for each of the four water divisions into which Wyoming is divided, and their staffs. I was also President of the Wyoming State Board of Control, which was composed of me and the four water division superintendents. The Board of Control adjudicates water rights in the State of Wyoming, and approves changes in those water rights. In my dual capacities as State Engineer and President of the Board of Control, I was personally involved in the official creation of water rights through the issuance of permits and adjudication of rights, in changes in water rights, and in the administration of the use of water under those rights in Wyoming. In my capacity as Wyoming’s Commissioner to the Yellowstone River Compact Commission, I was in charge of all matters relating to that compact on behalf of Wyoming.

3. If between 1963 and 1974, the State of Montana, through its Yellowstone River Compact Commissioner, or other authorized agent, made a call, claim, demand, or other notification, either orally or in writing, seeking any action by Wyoming under the compact, and that communication was not made to me personally in my capacity as Wyoming’s Commissioner to the Yellowstone River Compact Commission, but was instead made to any agent of the state with authority over the regulation or adjudication

of any waters of the State of Wyoming, or even to the Governor of Wyoming, such communication should have reached me through the chain of command.

4. During my tenure as Wyoming State Engineer and Wyoming Commissioner to the Yellowstone River Compact Commission, I attended annual meetings of the Yellowstone River Compact Commission, reviewed and commented upon drafts of the annual reports of the compact commission, signed the final annual reports of the compact commission, and communicated by writing and telephone with the Montana Commissioners as well as the Chairmen/Federal Representatives. During my tenure as Wyoming State Engineer and Wyoming Commissioner to the Yellowstone River Compact Commission, I never received a call, claim, demand, or other notification, either orally or in writing, from a Montana Commissioner or an acting commissioner to the Yellowstone River Compact, or anyone acting under their authority, in which they notified the State of Wyoming that Montana water users in the Tongue, Powder, Big Horn, or Clark's Fork River basins suffered from a shortage of water in response to which the State of Wyoming should take some action, such as curtailing water use in those basins in Wyoming.

5. As Wyoming State Engineer I was responsible for regulating the delivery of water to fulfill Wyoming water rights statewide. I performed this duty with the help of personnel of my office who are stationed throughout the state and in Cheyenne. Under the authority of Wyoming statute, my office employed division superintendents in each of the four water divisions of the state who reported directly to me, and hydrographers

and commissioners who reported to me through the superintendents. The Tongue and Powder River basins were entirely within Wyoming Water Division II while I was State Engineer.

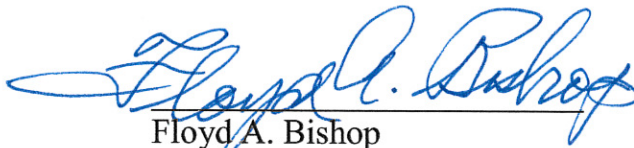
6. The superintendents, hydrographers, and commissioners of Water Division II were not authorized by law, or by me, to regulate or administer the waters of the Tongue and Powder River basins outside the State of Wyoming. While I was State Engineer, the State of Wyoming did not appropriate funds for the purpose of compensating state employees to administer or regulate water in the State of Montana and did not authorize its officers or employees, by statute or otherwise, to administer or regulate water in Montana. Unless authorized by me to cooperate with Montana water officials with respect to issues involving interstate ditches or canals, or to accompany Montana water officials on inspection visits of Montana facilities or waters under the auspices of the Yellowstone River Compact Commission, Wyoming hydrographers, commissioners, and superintendents should not have entered Montana to perform any official functions there.

7. I relied on the Montana Compact Commissioner to inform me of circumstances in Montana that could affect administration of water in Wyoming for compact compliance.

8. In 1974, my office promulgated new agency rules that became effective March 25, 1974. The new rules included a section explaining administration of water rights, and within that section there was a subsection describing "Regulation." A copy of the title

page and pages 59 and 60 of the 1974 rules containing this provision is attached to this affidavit as Exhibit 1.

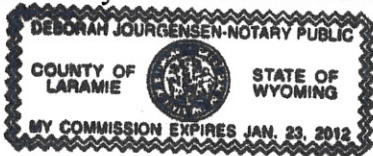
Dated this 7th day of September, 2011.

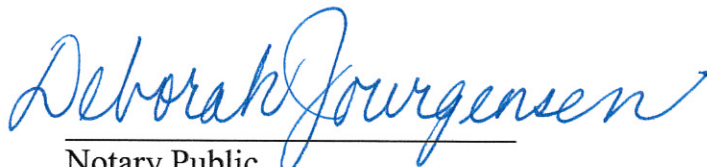

Floyd A. Bishop

STATE OF WYOMING)
) ss
COUNTY OF LARAMIE)

The foregoing Affidavit of Floyd A. Bishop in Support of Wyoming's Motion for Partial Summary Judgment was subscribed and sworn to before me, a notary public, by Floyd A. Bishop this 7th day of September, 2011.

Witness my hand and official seal.




Notary Public

My Commission Expires: 1.23.2012

Rules and Regulations
STATE ENGINEER'S OFFICE
State of Wyoming

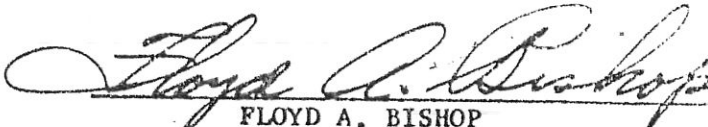
I certify that the copy hereto attached is a true copy of the rules
of the

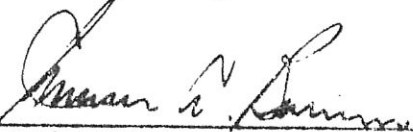
State Engineer's Office
relating to the revision of the State Engineer's Manual of Regulations
and Instructions, Part IV, in accordance with Sections 9-276.19 through
9-276.24, Wyoming Statutes 1957; and that the original rules are on file
in this department. This revision shall supersede and replace all other
rules previously filed.

Prior to adoption, these rules were made available for public inspec-
tion on the 13th day of February 1974.

The effective date of the attached rules is 20 days after filing by
the Secretary of State as indicated by the authenticating file stamp.

Signed this 28th day of February, 1974.


FLOYD A. BISHOP
State Engineer


Approved as to Authority and Substance
Office of the Attorney General

STATE OF WYOMING } ss
Office of the Secretary

Filed this 5th day of March
1974, at 2:35 P.M.

THOMAS H.
Secretary of State

PART IV.

CHAPTER VII.

WATER ADMINISTRATION

Section 1. Introduction. This chapter provides a general outline of water administration and also explains in detail some of the more complex areas. In addition, a complete explanation is given concerning rotation of water use, the conditions which must be met in order for rotation to be allowed, including the rotation form which must be completed.

Section 2. What is a Water Right? A water right consists of the right to the use of the water of the State for the purpose and at the place for which the right was acquired. A small number of water rights in the State were established through adjudication by Court Decree prior to the establishment of the office of the State Engineer and the State Board of Control. Generally all other rights initiated prior to Statehood were adjudicated or finalized by the State Board of Control on the basis of Claims to Water filed under Territorial Law and are known as Territorial appropriations.

A comprehensive water code was enacted by the first State Legislature establishing a filing procedure for securing water rights by permit from the State Engineer with final adjudication by the State Board of Control. The majority of water rights have been secured under this permit system.

Water rights are issued for the direct diversion of the natural flow of a stream, for the storage of water or for the withdrawal of water from a ground water source. Direct flow and ground water rights attach to specific lands for irrigation or other uses. Storage rights may attach to specific lands. Rights may not be detached from the lands or points of use except under certain circumstances or if the right is to be changed to preferred use.

A direct flow right is usually measured in cubic feet of water per second of time, a storage right in acre-feet and a ground water right in gallons per minute.

Section 3. Who Administers the Water of the State? The State Engineer is responsible for the "general supervision of the waters of the State and of the officers connected with its distribution". The State is divided into four water divisions and a Water Division Superintendent is responsible for water administration in each division. Each water division is divided into water districts with a Hydrographer-Commissioner or a Commissioner responsible for water administration in one or more water districts. Hydrographer-Commissioners are full-time employees of the State, while Water Commissioners are county paid and generally work on a seasonal basis.

Section 4. Explanation of Certain Areas of Administration.

a. Regulation. Rights are regulated on a stream generally upon

PART IV.

request of a water user and such request should normally be in writing. When such a request is received, the Water Commissioner will regulate all water rights, direct flow and storage, to the amount of water to which each is entitled and deny water to those rights for which none is available due to a limited supply.

b. Reservoirs. A reservoir is entitled to be filled, in order of priority if water is available, once each year. If a portion of the water remains in the reservoir, unused, at the end of the normal use period, this water is termed "carry-over storage" and helps to provide water to meet the following year's supply for the appropriation. For example, if a reservoir which has a right to store one thousand (1000) acre-feet, has two hundred (200) acre-feet remaining in storage which is carried over until the following year, then this appropriation is entitled, as the right comes into priority, to again fill to the one thousand (1000) acre-foot level. This right can therefore store eight hundred (800) acre-feet and is considered to have satisfied its appropriation in full.

In order to conserve the waters of the State, it is a necessary requirement that all reservoirs be filled at such times that will not interfere with or provide the least interference with the use of water by direct flow appropriators and thereby prevent a waste of water. Section 41-63, Wyoming Statutes 1957 provides authority to the Water Commissioner to order such filling and reads in part as follows:

"Such Water Commissioner shall have authority to require the filling of any reservoir whenever practical and water is available for storage from the stream or streams for which the appropriations for such reservoir are established."

All water which is allowed to flow past the reservoir after receipt of the notice or order to store will be chargeable to the storage in said reservoir and the right to store may be reduced by that amount.

c. Surplus Water. Whenever the supply of water in a stream reaches the point where there is water available in excess of the total amount required to fill all existing appropriations prior to March 1, 1945, then the stream is in a surplus flow condition. When surplus flows are available, this water is divided proportionally among the irrigation rights with priorities before March 1, 1945, up to an additional one (1) cubic foot per second for each seventy (70) acres irrigated. Rights with priorities later than March 1, 1945 are not entitled to divert or use water until the demands for surplus water are filled.

d. Preferred Uses. Certain uses of water including municipal, stock and domestic uses are defined by law as preferred uses. Water rights for such uses may be secured under the regular filing procedures or by acquiring the right to use water already appropriated for some other purpose, such as irrigation, and petitioning for change of the right to the new use. Regardless of how such appropriation is acquired, the right to divert is subject to regulation in accordance with the date