

# ATTORNEY GENERAL

## STATE OF MONTANA

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August 21, 2012

**VIA FIRST CLASS AND E-MAIL**

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RE: *Montana v. Wyoming and North Dakota*  
No. 137, Orig., U.S. Supreme Court  
*Follow-up Letter on Intrastate Calls*

Dear Special Master Thompson:

The purpose of this letter is to clarify a question of Montana law that is presented in Wyoming's Letter Brief of August 17, 2012, entitled "Submission of Supplemental Authority on Summary Judgment Standard." In that letter brief, Wyoming makes the following statement that is unrelated to the summary judgment standard, and purports to interpret Montana law on water rights regulation and enforcement:

As is apparent from Wyoming's prior submission and the attached materials **both Wyoming and Montana require their water users to submit a document in writing before either state engages in administrative regulation.**

8/17/12 WY Letter Brief at 5 (emphasis added). In support of this statement, Wyoming attaches an excerpt from a publication entitled "Water Rights in Montana" (dated April 2012), an electronic page from the website maintained by the Montana Department of Natural Resources and Conservation (MDRNC), and a "Water Use Complaint" form.

The implication of Wyoming's statement is that Montana actively oversees or somehow manages disputes between junior and senior water users, and that this

process is invoked by the “Water Use Complaint” form. This is not the case.

I am informed by the MDNRC that the primary purpose of the “Water Use Complaint” form is to address the illegal use of water. According to MDNRC, those illegal uses include, but are not limited to:

- Use of water without a water right (a common situation involves construction of a pond without a water right)
- Change of use without authorization (for example, the landowner has a water right for irrigation but adds a pond without authorization for storage)
- Change in place of use without a permit (the landowner changes irrigation methods to include land outside the water right claim place of use)
- Expansion of water right without permission (where the landowner irrigates new acreage but does not obtain authorization or a new permit)
- Diverting water outside the authorized period of use (for example, where there is no adequate headgate to control the diversion to meet the elements of the water right)
- Failing to comply with post-1973 permit conditions, i.e., keeping and filing records, diverting only at trigger flows, notifying neighboring water users when diverting, etc.

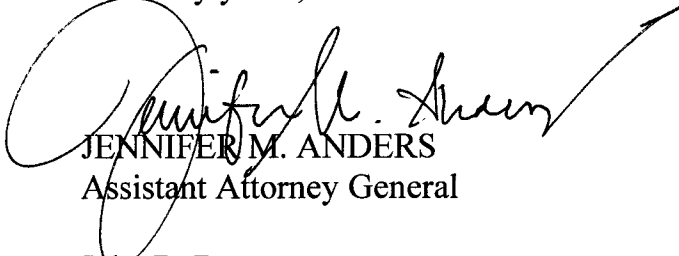
If the complaint involves any of the above activity, the MDNRC may pursue a judicial enforcement action under Mont. Code Ann. § 85-2-114. The MDNRC does not use the term “administrative regulation,” and it considers its enforcement authority to be narrowly tailored. For that reason, any reported activity in the nature of a “call” between water users will not prompt judicial enforcement, let alone a process described by Wyoming as an “administrative regulation.” The MDNRC is available to help people understand water use laws, encourage cooperation between neighbors, and provide information about water rights and uses – but it does not “regulate” the curtailment of water rights in priority. If the dispute is not resolved by the water users themselves, the next step involves the district court, the water court, or a water commissioner – not the MDNRC. These options are set forth in the *Staff Report to the Montana Water Policy Interim Committee* attached to Montana’s Letter Brief of August 13, 2012.

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There is no requirement in the law that documentation of a "call" be filed with MDNRC. Although the MDNRC website setting forth "Water Right Dispute Options" suggests that is the case, the law imposes no such requirement. Water users are encouraged to file complaints because it is assumed they will not distinguish between a "call" situation and an "illegal use" that might trigger judicial enforcement by MDNRC. But the form itself is not a prerequisite to a "call," nor is the form intended for that purpose.

As you can see, there are complexities in Montana's regulatory scheme that are not apparent from or explained in the documents submitted by Wyoming. Montana selected the *Staff Report to the Montana Water Policy Interim Committee* as most responsive to your request for information regarding calls between junior and senior water users. Please accept my apologies if you were expecting forms and publications intended for other purposes. With the foregoing explanation, Montana is not opposed to your consideration of the Water Use Complaint form, as well as the two other publications that Wyoming has submitted.

Sincerely yours,



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