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U.S. MAIL AND EMAIL

Honorable Barton H. Thompson, Jr.
Special Master
Jerry Yang & Akiko Yamazaki
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Stanford, CA 94305-4205

RE: *Montana v. Wyoming & North Dakota*
No. 137, Orig., U.S. Supreme Court
Montana's Reply to the Letter Briefs of Wyoming and the United States

Dear Special Master Thompson:

In accordance with Case Management Order No. 2, Montana submits this Reply to the Letter Briefs of Wyoming and the United States.

I. Reply to Wyoming

A. The Special Master Should Reject Wyoming's Requested "Clarification of Paragraph 3 of Special Master's Conclusions"

1. Wyoming Mischaracterizes the Memorandum Opinion

In its Motion to Dismiss, Wyoming argued that Montana failed to state a claim because the Yellowstone River Compact utilizes divertible flow as opposed to depletions to allocate the waters of the Yellowstone River. After considering Wyoming's arguments, the Special Master concluded that the Motion to Dismiss should be denied. Mem. Op. at 43. Wyoming now renews its non-depletion argument, and urges the Special Master to recommend issuing a general order that dismisses undefined "claims based on the consumption/depletion concept." Wyo. Ltr. Br. at 2. Montana agrees with the United States that the Special Master should reject this request. U.S. Ltr. Br. at 2.

Wyoming also argues that the Special Master agreed in the Memorandum Opinion "that the Compact does not limit Wyoming's consumptive use." Wyo. Ltr. Br. at 2. This does not appear to be the case, however. In fact, the Memorandum Opinion reaches a contrary conclusion: "Protection of pre-1950 appropriations under Article V(A), by contrast, requires Wyoming to insure on a constant basis that water uses in Wyoming that date

from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 uses in Montana." Mem. Op. at 21.

Wyoming characterizes the Special Master as having rejected the "consumption/ depletion concept," Wyo. Ltr. Br. at 3, but Montana does not read the Memorandum Opinion in this manner. Wyoming confuses the Special Master's discussion of the Compact's allocation of unused and unappropriated waters in Article V(B) clause 2, *see* Mem. Op. at 20-21, with the Special Master's conclusions regarding Article V(A), *see* Mem. Op. at 17. Wyoming is correct that Article V(B) clause 2 of the Compact allocates the "unused and unapportioned" waters based upon percentages for storage or diversion. It does not follow from this allocation of *post-1950* water, however, that the Compact places no limit on Wyoming's consumption of *pre-1950* water under Article V(A) to the detriment of Montana. Mem. Op. at 21; *see also Id.* at 12-13, 28, 35-37. To the contrary, "Article V of the Compact unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals [(*i.e.* depletions)] in Wyoming subsequent to January 1, 1950." *Id.* at 12.

2. Wyoming's Position is Inconsistent With the Plain Language of the Compact

Where the plain language of the Compact is clear, there is no need to resort to outside sources or case law for interpretation. *See, e.g., New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221, 234 (1991). The Compact represents the agreement of the signatory states as approved by Congress. Accordingly, it is federal law, and its terms control. *Kansas v. Colorado*, 514 U.S. 673, 690 (1995). Once the Compact was enacted, the allocation negotiated by the states was established. While it is true that the Compact incorporates the doctrine of appropriation, to the extent that aspects of that doctrine are inconsistent with the allocation set forth in the Compact, it is the Compact that governs. Any other rule would cause the allocation between the signatory states to be variable, and would invite conflict. Once the Compact was enacted, its terms governs the allocation between Wyoming and Montana. *Hinderlider v. LaPlata River and Cherry Creek Ditch*, 304 U.S. 921 (1938).

As discussed in Montana's opening Letter Brief, the plain language of Article V protects the "beneficial uses" defined as: "that use by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." Article II. H (emphasis added). Thus the definition of "beneficial use" expressly incorporates the concepts of depletion and consumption. Upon enactment of the Compact into federal law, Montana became the downstream appropriator relative to Wyoming, and changes in beneficial uses, *i.e.* uses which deplete the water supply of a drainage basin, protected in Article V(A) must be made without doing injury to Montana water users. Wyoming's requested clarification is inconsistent with the plain language.

Moreover, consistent with the definition of "beneficial use," "diversion" is defined as "the taking or removing of water from the Yellowstone River or any tributary thereof *when the water so taken or removed is not returned* directly into the channel of the

Yellowstone River or of the tributary from which it is taken." Article II(G.) (emphasis added). This is a further indication that Wyoming's request for clarification of Paragraph 3 of the conclusions should be denied.

3. The Doctrine of Appropriation Incorporates the Concept of Depletion

Montana agrees that the Compact incorporates the doctrine of prior appropriation where not inconsistent with the terms of the Compact. Wyoming is mistaken, however, that the concepts of consumption and depletion are inconsistent with the doctrine of appropriation. On the contrary, they are fundamental to that doctrine, as the Special Master's statement, quoted above, shows.

The Compact drafters and the federal engineers on whose reports they relied so heavily understood this. The record contains discussion of consumption throughout the basin for the reason that the engineers and hydrologists studying the basin knew that, in accordance with the uniform practice throughout the west, the downstream appropriators would have a right to the return flows in the stream. *See, e.g.*, Joint App. 0502 (net water duty); 0523, 0764; App. to Wyo. Mtn. to Dismiss at 52.

The Special Master recognizes that the doctrine of appropriation incorporates the concepts of consumption and depletion. Mem. Op. at 12-13, 21. For example, the no injury rule is based on the principle that no water use occurs in isolation. Similarly, appropriative rights take into consideration depletion because it is the historic depletion to the stream that defines the scope and limit of the right. *In the Matter of Basin Elec. Power Coop. v. State Bd. of Control*, 578 P.2d 557, 566-68 (Wyo. 1978).

B. The Special Master's Analysis of the Interstate Tributaries Issue Should Not Be Excluded from the Memorandum Opinion

Wyoming requests that the Special Master "exclude the final paragraph of section III.C.2 on pages 29-30 of his Memorandum Opinion." Montana opposes this request for several reasons.

Wyoming argued, as a matter of law, in its Brief in Opposition to Motion for Leave to File Bill of Complaint, at page 21, stating: "Montana cannot complain about the specific Wyoming reservoirs it discusses in its brief. (Mont. Br. 14) All of these reservoirs are located on tributaries to the Tongue and Powder, and not on the Mainstems of those rivers." Wyoming correctly identifies all of the reservoirs cited by Montana in support of its motion for leave to file as being reservoirs on tributaries. Thus, reservoirs on tributaries of the Interstate tributaries are certainly central to the Montana claim based on increased postcompact storage. In fact, pending discovery in this case, Montana is not aware of any significant reservoirs on the mainstems of the Interstate tributaries. Therefore, Wyoming's claim that reservoir storage on the tributaries is excluded from the Compact, goes to the heart of Montana's claim regarding postcompact storage in Wyoming. Accordingly, the Wyoming request to exclude the Special Master's ruling on

this matter should be denied.

II. Reply to the United States

A. Interstate Tributaries

Montana joins the United States in expressing its agreement with the Memorandum Opinion's interpretation that Article V of the Compact applies to Interstate tributaries. *See* U.S. Ltr. Br. at 2. Montana opposes the request of Wyoming that the treatment of this subject in the Memorandum Opinion should be excluded.

B. Depletion Principle

1. The United States Does Not Refute the Principles Presented by Montana

In its Letter Brief, Montana clarified that its claim regarding increased efficiency relates to return flows. Montana's first argument is that the plain language of the Compact supports its claim. As reported to Congress, the "Allocations [of the Compact] take into account return flows and uses of them, as well as original runoff." 82d Congress, Senate Rpt. No. 883 (Oct. 2, 1951). The United States offers no contrary explanation for the plain language of Article V(A) that protects Montana's "beneficial uses."

In the event that the Special Master does not agree with Montana's understanding of the terms of the Compact, Montana explained that the doctrine of appropriation, and therefore the Compact, protects a downstream appropriator from changes that cause a reduction in return flows.[1] The United States' letter brief on this issue misses Montana's argument altogether, because it continues to rely on the rule that applies to waste water. As Montana explained in its Letter Brief, there is an important distinction between return flow and waste water. *Bower v. Big Horn Canal Association*, 307 P.2d 593 (Wyo. 1957), the case the United States continues to assert is relevant, applied to waste water that did not return to a natural water course. *Id.* at 594. Understood in this light, the dicta in the *Bower* decision relied upon by the United States is not unusual. In contrast, even Wyoming law recognizes that a downstream appropriator has a valid and vested right to return flow water as against the upstream appropriator. *See, e.g., Fuss v. Franks*, 610 P.2d 17, 20-21 (Wyo. 1980). Montana claim involves return flows that form part of the historic flows of the Tongue and Powder Rivers.

Moreover, the United States does not contradict the principles or cases raised in the Montana Letter Brief. Instead, it argues without citation that "the state-law discussion in Montana's letter brief does not detract from the Special Master's conclusion that the Compact does not limit use rights based on return flows." U.S. Ltr. Br. at 3. This is incorrect. Taken together, these unrefuted principles establish that a downstream appropriator has a right to the maintenance of the stream, and that an upstream

[1] The Compact explicitly incorporates the "doctrine of appropriation" in both V(A) and V(B).

appropriator may not reduce historic return flows where the water has returned to the natural water course from which it originated.

Further, the United States' attempt to distinguish the cases cited by Montana based on its concept that they do not "relate to the volume of water actually being put to the initial use" is neither persuasive nor accurate. *Id.* The United States assumes that the no-injury rule and associated principles apply only where there is a change in the point of diversion, place of use or type of use. *Id.* Apparently, the United States understands the no-injury rule to be coextensive with a state's administration of a water right by permit. But the no-injury is not so limited. For example, in the case of *Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1993), the court addressed a suit for an injunction by the downstream appropriator to prevent the upstream appropriator from reducing flows by converting from flood to sprinkler irrigation. *Id.* at 1224. In analyzing the case, the *Steed* court applied the very principles that Montana advocates. There, the Court denied the injunction because the water at issue was waste water that was available to plaintiffs only as a result of defendant's actions. *Id.* at 1226-27. Application of these same principles yields a different result in the present case, however, because Montana claims water that returns to the same stream from which it was diverted by Wyoming. Upon enactment of the Compact into federal law, Montana became the downstream appropriator relative to Wyoming, and changes in beneficial uses, *i.e.* uses which deplete the water supply of a drainage basin, protected in Article V(A) must be made without doing injury to Montana water users.

2. If Resort Must Be Had to Law Outside the Compact, the Relevant Law is the Law As Understood At the Time of the Compact's Adoption

The United States' continued reliance on a postcompact Wyoming case raises an important issue that deserves further attention, U.S. Ltr. Br. at 3 (citing *Bower v. Big Horn Canal Ass'n,* 307 P.2d 593 (Wyo. 1957)); *cf.* Mem. Op. at 27. In prior cases, when the Supreme Court has found it necessary to resort to law outside a compact to interpret the compact, it has been careful to look to the law as it was understood at the time of the adoption of the compact. In *New Jersey v. New York,* 523 U.S. 767 (1998), a dispute regarding the sovereignty of the two states over Ellis Island, the Supreme Court stated:

> Nor can we draw any conclusion in New York's favor from the failure of the Compact to address the consequences of landfilling, however common the practice may have been. There would have been no reason to do so, simply for the reason that the legal consequences were sufficiently clear under *the common law as it was understood in 1834* [the date of the Compact].

Id. at 783 (footnotes omitted, emphasis added).

Similarly, in *Kansas v. Colorado,* 533 U.S. 1 (2001), in determining whether prejudgment interest would automatically be awarded as part of damages for violation of

the Arkansas River Compact, the Court stated:

> However, despite the clear direction indicated by some of our earlier opinions, we cannot say that by 1949 [the date of the Compact] our case law had developed sufficiently to put Colorado on notice that, upon a violation of the Compact, we would automatically award prejudgment interest from the time of injury. *Given the state of the law at that time*, Colorado may well have believed that we would balance the equities in order to achieve a just and equitable remedy rather than automatically imposing prejudgment interest in order to achieve full compensation.

Id. at 13-14 (emphasis added).

These precedents argue strongly for reference to the law at the time the Compact was adopted. Consequently, references to cases decided and state statutes enacted after the Yellowstone River Compact was adopted in 1951 cannot be dispositive of the Compact meaning unless it can be shown affirmatively that they are statements of the law as it was understood in 1951.

3. The Compact Controls Over State Law

Reliance on the *Bower* decision, the post-Compact Wyoming statutory provision on supplemental rights, *In re App. for Change of App. Water Smith Farms, Inc.*, 1999 Mont. Dist. LEXIS 433 (Mont. Dist. Ct. 1999), and the Montana salvage statute should be reconsidered. Once the Compact was enacted into federal law, its plain language governs usage in that basin as between the states and supplants conflicting state law. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) ("the apportionment is binding upon the citizens of each state and all water claimants, even when the state had granted the water rights before it entered into the Compact").

Assuming *arguendo* that under either Montana or Wyoming law a water right owner may eliminate return flows that had historically returned to the stream, and recapture and reuse the water to the detriment of downstream appropriators, once the Compact was enacted by Congress, any elements of the state rights contrary to the Compact were supplanted by the Compact. Thus, Article V(A) protects only that increment of a water right that had been wholly perfected (*i.e. used)* as of January 1, 1950, and Article V(B) clause 1 provides a preference for supplemental waters only to acres previously irrigated. The plain language of the Compact in those circumstances not only affects state law rights allowing recapture and reuse, but also affects the prior appropriation rule that allows incremental development to relate back to the initial filing date so long as the appropriator exercised due diligence in completing the diversionary works.

Accordingly, the Special Master correctly ruled that any irrigation of additional acres post-January 1, 1950 had to be accounted for under V.B Clause 2 even if such acres might have been awarded pre-compact priority dates under the relation back doctrine of prior appropriation law. To the extent such state laws conflict with the plain language of

the Compact, they are superseded by the Compact under the Supremacy Clause. Another example of this is that the prior appropriation doctrine allows diversion out of one watershed into another, and most western states have many examples of transbasin diversions. In the Yellowstone Basin, however, no such diversion of water outside the basin is permissible, regardless of state authorization, because it is prohibited under the Compact except upon prior unanimous consent of the compacting states. Yellowstone River Compact, Art. X; *Intake Water Co. v. Yellowstone Compact Comm'n*, 769 F.2d 568 (9th Cir. 1985). It necessarily follows that the Compact governs over state law.

Further briefing on this subject may be useful prior to the submittal of a Report to the Supreme Court.

Respectfully submitted,

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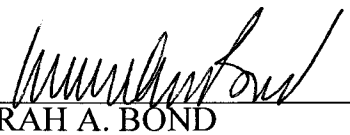
By 
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