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

MONTANA'S RESPONSE TO WYOMING'S PROPOSED MOTION TO COMPEL

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The State of Montana hereby responds to Wyoming's Proposed Motion to Compel (the "Motion"). Montana has provided complete and correct answers to the disputed discovery requests in accordance with the Federal Rules of Civil Procedure and Wyoming's argument is without merit.

INTRODUCTION

This litigation was necessitated because Wyoming refused to recognize that the Yellowstone River Compact protects Montana's pre-1950 rights. Now that the Court has held that Wyoming has obligations under Article V(A), Wyoming has apparently adopted a new strategy of arguing that, despite severe drought conditions, Montana water users had a sufficient supply or did not want to irrigate, that Wyoming's over-use of water did not harm Montana, and that Montana is to blame for the shortages on its side of the border. At base, the Motion is a thinly veiled attempt to convince the Special Master to accept Wyoming's interpretation of the facts.

Wyoming's factual characterization is patently incorrect and entirely implausible. Wyoming will have the opportunity to present its case at trial. Montana is also entitled to present its case. Ultimately, the task will rest with the Special Master to sort through the competing views of the law and the facts. Wyoming's attempt to foist its views on the Special Master through a motion to compel is improper.

Wyoming's Motion must fail for at least two reasons. First, the Federal Rules do not contemplate the relief Wyoming seeks; once a responding party has denied a request for admission ("RFA"), the propounding party's only remedy is to seek recovery of its expenses in proving the allegedly improperly denied matter. See Fed. R. Civ. P. 37(c). Thus, Wyoming's attempt to "compel" Montana to admit a contention that Montana has denied is procedurally

deficient and should be rejected by the Special Master. Second, Montana has fully responded to Wyoming's discovery requests and identified documents in its possession that support Montana's responses. Accordingly, the Motion should be denied.

BACKGROUND

1. On January 28, 2013, Wyoming served its Second Request for Admissions, Second Request for Production of Documents, and Third Set of Interrogatories to Montana.

2. On February 27, 2013, Montana served its Objections to Wyoming's Third Set of Interrogatories and its Responses to Wyoming's Second Request for Admissions.

3. On March 14, 2013, Montana served its Responses to Wyoming's Third Set of Interrogatories.

4. On March 29, 2013, Montana served its Responses to Wyoming's Second Request for Production of Documents.

5. On April 23, 2013, Wyoming sent a letter to counsel for Montana claiming that Montana had provided insufficient responses to Wyoming's Second Request for Admissions, Second Request for Production of Documents, and Third Set of Interrogatories, and requesting that Montana supplement its responses to these discovery requests. Letter from D. Willms to J. Draper (April 23, 2013), attached hereto as Exhibit A.

6. On May 10, 2013, counsel for Montana responded to Wyoming's April 23rd letter and explained that Montana had provided complete and accurate discovery responses. Letter from J. Wechsler to D. Willms (May 10, 2013), attached hereto as Exhibit B.

7. On June 11, 2013, Wyoming served the Motion.

LEGAL STANDARD

Federal Rule of Civil Procedure 36 generally governs requests for admission. The relevant section of the rule governing answers to requests for admission provides that:

> If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

Fed.R.Civ.P. 36(a)(4).

Rule 36 is "not a discovery device." *T. Rowe Price Small-Cap Fund v. Oppenheimer & Co.*, 174 F.R.D. 38, 42 (S.D.N.Y. 1997); see also *Lakehead Pipe Line Co., v. American Home Assurance Co.*, 177 F.R.D. 454, 457- 458 (D. Minn. 1997) (responding party is not required to provide a factual basis for its denials because Rule 36 requests are not a discovery device). The purpose of Rule 36 "is to reduce the costs of litigation by eliminating the necessity of proving facts that are not in substantial dispute, to narrow the scope of disputed issues, and to facilitate the presentation of cases to the trier of fact." *T. Rowe Price Small-Cap Fund,* 174 F.R.D., at 42-43. "In order for [requests for admission] to be an orderly procedure, the requesting party bears the burden of setting forth its requests simply, directly, not vaguely or ambiguously, and in such a manner that they can be answered with a simple admit or deny without an explanation, and in certain instances, permit a qualification or explanation for purposes of clarification." *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 77 (N.D.N.Y. 2003). The prevailing understanding is that "a request for admission should not attempt to cover virtually the entire case. It should be confined to facts which are not in substantial dispute." *United States v. Watchmakers of Switzerland Info. Ctr., Inc.*, 25 F.R.D. 197, 201 (S.D.N.Y. 1959).

"The only permissible responses to requests [for admission] are an admission, a denial or a statement that the contention cannot honestly be either admitted or denied." *United States v. New Orleans Chapter, Associated Gen. Contractors of Am., Inc.*, 41 F.R.D. 33, 34 (E.D. La. 1966). The Federal Rules provide two avenues for challenging a party's answer to a request for admission: Rule 36(a)(6), which addresses the *form* of the answer, and Rule 37(c)(2), which addresses the answer's factual *accuracy.* Rule 36(a)(6) provides:

> *Motion Regarding the Sufficiency of an Answer or Objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

Rule 37(c)(2) provides:

> *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:
>
> > (A) the request was held objectionable under Rule 36(a);
> > (B) the admission sought was of no substantial importance;
> > (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
> > (D) there was other good reason for the failure to admit.

As explained below, Montana has properly and completely responded to each of Wyoming's RFAs by specifically admitting or denying the contentions set forth in each RFA. Wyoming's attempt to "compel" further responses to its RFAs is both procedurally and substantively misguided.

DISCUSSION

I. Good Faith Disputes Over the Facts Must Be Resolved at Trial

Wyoming's Motion amounts to an attempt to litigate the facts of the case before trial. Wyoming complains that Montana has been "non-responsive," Motion at 5, and "refuses to admit" that information Wyoming seeks "does not exist," *id.* at 6. What Wyoming terms a failure to respond, however, is actually a good faith dispute over the facts.

Indeed, the "straightforward" questions for which Wyoming seeks answers have been candidly answered on multiple occasions. Specifically, Montana has (1) discussed at length in the briefing on the Renewed Motion for Summary Judgment "when during the irrigation season" Montana notified Wyoming that it was not receiving sufficient water; (2) explained that during the years at issue, none of Montana's pre-1950 water rights received a full supply; (3) identified the months in each of the years at issue when Montana water rights were not being satisfied and were being harmed; and (4) clarified that Wyoming caused the harm by failing to curtail the post-1950 uses in Wyoming that are carefully identified in Montana's expert reports. See Motion at 27 (identifying the "straightforward questions" for which Wyoming seeks answers).

The bulk of Wyoming's Motion is not focused on Montana's responses to these questions, but rather on arguing Wyoming's view of the facts and documents. What is abundantly clear is that the two States have very different views of the evidence in this case. It is not productive for either State to argue its case in a discovery motion, and Montana will not attempt to respond to all of the factual assertions in Wyoming's Motion. Suffice it to say that Montana rejects Wyoming's view as completely unsupported. On the issues that Wyoming raises in its Motion, Montana is confident that the evidence presented at trial will show the following:

- Montana notified Wyoming that it was not receiving sufficient water to satisfy its pre-1950 water rights, and made every reasonable effort to work with Wyoming to ensure that the Compact was administered properly;
- Up until this lawsuit, Wyoming maintained that it had no obligations to ensure that Montana's pre-1950 rights were enjoyed. Accordingly, Wyoming did not regulate its post-1950 water rights for the benefit of Montana, and did not regulate post-1950 rights on the mainstem of the Tongue River at all;
- In all but three years since 1961, Montana did not receive sufficient water to satisfy its pre-1950 rights during the irrigation season;
- Montana properly administered water in accordance with Montana law. There is no meaningful evidence that Montana water users on the Tongue River took water out of priority;
- Montana was deprived of water to which it was entitled under the Compact.

Based on the Motion, it appears that the States have differences in the understanding and interpretation of documents, the meaning of previous deposition testimony, the actions taken by Montana water officials, the use of water in Montana, the demand for water in Montana, the amount of water that was available in the years at issue, the water administration scheme in Montana, the operation of Montana water rights, and other critical issues. For purposes of this Motion, what is important is that for each of the RFAs that Montana denied, Montana had a genuine reason, grounded in a disagreement over the facts, to deny the statements. Ultimately, those disputes will need to be resolved at trial.

II. Montana Cannot Be Compelled to Admit Assertions that it Has Denied

The primary relief sought by Wyoming in its Motion is an order compelling Montana to admit Wyoming's RFAs. See Motion at 11 ("Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 2, 4, 6, 8, 10, 12, and 14"), 15 ("Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 55, 57, 59, 63, and 65"), 20 ("Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 67 through 71"), and 27 ("Wyoming requests that Montana be compelled to admit Requests for Admission Nos. 72, 73, 74, 75, and 76"). That relief, however, is unavailable. Montana cannot be compelled to admit an RFA that it has denied.

When faced with a request for admission under Rule 36 of the Federal Rules of Civil Procedure, a responding party can: (1) admit the matter at issue; (2) deny the assertion; (3) object to the request; (4) move for a protective order; or (5) set out the reasons why the party cannot respond to the request as drafted. *Foretich v. Chung*, 151 F.R.D. 3, 5 (D.D.C. 1993); see also *Interland, Inc. v. Bunting*, 2005 WL 2414990, at *8 (N.D. Ga. March 31, 2005). If a party denies a request, or explains why it cannot respond to the request as drafted, Rule 36 is fully satisfied. See *In re Katrina Canal Breaches Consolidated Litigation*, 2007 WL 1959193, at *3 (E.D. La. June 27, 2007) (denying the plaintiff's motion to compel defendant to provide a "more sufficient" answer to a request that the defendant denied: "[T]he answer of the [defendant] to this request includes an express denial. That answer is sufficient, so that the motion is denied . . . ."); *Wanke v. Lynn's Transp. Co.*, 836 F. Supp. 587, 598 (N.D. Ind. 1993) (one word response "denied" sufficient as denial to request at issue). Especially where requests address issues in dispute, a denial is "a perfectly reasonable response." *Pfizer, Inc. v. Ranbaxy Labs., Ltd.*, 2004 WL 830388, at *1 (D. Del. Apr. 12, 2004).

In the present case, Montana provided a complete answer to each of the RFAs when it objected to and denied Wyoming's requests. The Motion to compel is therefore improper. See, *e.g.*, *Nat'l Semiconductor Corp. v. Ramtron Int'l Corp.*, 265 F. Supp. 2d 71, 74 (D.D.C. 2003) (denying motion to compel where plaintiff provided a qualified denial). On the other hand, if Wyoming questions the veracity of the denials, its remedy is to seek costs under Fed. R. Civ. P. 37(c)(2). See *id.* at 74-75 (denying motion to compel further response where party provided a qualified denial, noting that "the validity, or *bona fides*, of a qualified answer to a request for admission must await the trial"). That Rule - which provides for a *post-trial assessment* of the factual issues raised by requests for admission - is the exclusive avenue of relief for a requesting party that believes an assertion should have been admitted. See Fed. R. Civ. P. 37(c)(2); *Doe v. Mercy Health Corp.*, No. 92-6712, 1993 WL 377064, at *14 (E.D. Pa. Sept. 15, 1993) ("[T]he remedy for an insufficient or inaccurate response to a Request for Admission lies exclusively within Rule 37(c)."); Fed. R. Civ. P. 36, 1970 Advisory Committee Notes to Rule 36(a) ("The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).").

Wyoming fails to cite a single case in which a court has weighed the facts in dispute as part of a pretrial determination of whether a party appropriately denied a request for admission. On the contrary, overwhelming authority holds that courts should not engage in the practice of assessing denials of requests for admission in a pretrial setting. See *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1269 (11th Cir. 2002). For instance, in *Foretich v. Chung,* 151 F.R.D. 3 (D.D.C. 1993), the court held that the movants were "incorrect in their assumption that the right to challenge the 'sufficiency' of a response is the equivalent to the right to challenge the veracity of a denial." *Id.* at 5. The court explained that "there is simply no provision of the Federal Rules

allowing a party to litigate a denied request for an admission" at the discovery stage of the proceedings. *Id.;* see also *Central Transp. Int'l, Inc. v. Global Advantage Distribution, Inc.,* No. 2:06-CV-401-FTM-29SPC, 2007 WL 3124715, at *2 (M.D. Fla. Sept. 11, 2007) (denying defendant's motion to compel answers to requests for admissions for requests that plaintiff denied: "the Court cannot order the Plaintiff to admit to something it denies. That is a question for the trier of fact."); *Nat'l Semiconductor Corp.*, 265 F. Supp. 2d at 74 (denying defendant's motion to compel better responses where plaintiff provided a qualified response because "the validity, or *bona fides,* of a qualified answer to a request for admission must await the trial ..."); *United States v. Operation Rescue Nat'l,* 111 F. Supp. 2d 948, 968 (S.D. Ohio 1999) (denying defendant's motion to deem plaintiff's denied requests admitted: "[A] party may not seek a pre-trial determination of the accuracy of an opponent's denial of a request for admission . . . .").

In sum, Montana has responded to Wyoming's RFAs by admitting or denying the contentions set forth therein, and no further response is required. If, at trial, Wyoming establishes the truth of a matter that Montana denied, then Wyoming may move to recover its reasonable expenses incurred in making the proof. The Federal Rules do not provide any procedure under which Wyoming may "compel" Montana to admit an RFA it has previously denied. It follows that the Motion must be denied.

III. Montana Properly Responded to Request for Admission Nos. 2-2, 2-4, 2-6, 2-8, 2-10, 2-12, and 2-14; and Request for Production No. 2-1

RFA Nos. 2-2, 2-4, 2-6, 2-8, 2-10, 2-12, and 2-14 request Montana to admit that it "has no documents from [a specified year] evidencing a call on Wyoming in [the specified -year]." No definition was provided for the term "call," and Montana interpreted that term consistent with the Memorandum Opinion on Wyoming's Motion for Summary Judgment (Dec. 20, 2011) and Memorandum Opinion on Wyoming's Renewed Motion for Summary Judgment (Sept. 28, 2012)

(defining "call" as . . . .) Because this is an issue that has been addressed at length by the parties and the Special Master, and because Montana has produced numerous documents showing that it notified Wyoming that Montana was receiving insufficient water to satisfy its pre-1950 water rights during the relevant years, Montana responded by denying each of these RFAs. RFP No. 2-1 asked Montana to produce documents "evidencing a call in those years specified in the Requests." In response, Montana identified a number of documents that were responsive to the requests, including documents that had been produced as part of the briefing on the summary judgment motions.

Montana does not understand these RFAs to be asking whether a formal letter akin to those provided in 2004 or 2006 exists. Rather, Montana understands these RFAs to be asking whether there are any documents that support the fact that Montana notified Wyoming that it was not receiving sufficient water in each of the years at issue. "Evidencing" as used in the RFAs is defined by Webster as "to tend to prove or disprove something." The documents identified provide ample support for Montana's denial of the RFAs as they "tend to prove" that Montana notified Wyoming that it was receiving insufficient water to satisfy its pre-Compact rights.

For example, the document identified by bates numbers MT12975-12979 is a letter from the Tongue River irrigators to former Montana Attorney General Mike McGrath, copying several Montana officials, regarding their "concern over the implementation of the Yellowstone River Compact." In this letter, the irrigators specifically "request[ed] that the State of Montana take 'the appropriate legal action with Wyoming to protect Montana's share of the tributaries to the Yellowstone.'" See MT12975 – 12979. Montana is aware from its investigation that this letter prompted Montana officials, including Mr. Stults, to call for water from Wyoming. *See* Stults Declaration. At trial, this document will likely be presented as part of Mr. Stults' testimony to

show that he notified Wyoming that Montana was receiving insufficient water to satisfy its pre-Compact rights. It follows that this document evidences, supports, or tends to show that such communications were made. Thus, Montana properly denied RFA No. 2-12 and identified the documents which support its denial. Each of the other documents identified by Montana similarly evidences the calls and communications that were made by Montana in each of the years.

Wyoming bears the burden of drafting its RFAs in a clear and unambiguous fashion. See *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 77 (N.D.N.Y. 2003) ("[i]n order for [requests for admission] to be an orderly procedure, the requesting party bears the burden of setting forth its requests simply, directly, not vaguely or ambiguously, and in such a manner that they can be answered with a simple admit or deny without an explanation, and in certain instances, permit a qualification or explanation for purposes of clarification."). Due to the nature of RFAs, Montana was careful with its responses, and was unwilling to make assumptions about the meaning of those RFAs. In RFA Nos. 2-2, 2-4, 2-6, 2-8, 2-10, 2-12, and 2-14 Wyoming used the ambiguous language that there were no documents "from" a particular year. The RFAs do not use the words "created" or "contemporaneous," and Montana did not understand the RFAs to be inquiring about documents that were created or drafted during each of the specific years identified.

In its letter to Montana complaining about the discovery responses, Wyoming explained for the first time that it intended to ask Montana to admit that it had no documents "created" in each of the years specified. In its Motion, Wyoming now acknowledges that Montana identified documents created in 2001, 2002, and 2003. Motion at 11. The same can be said for the year 2000. Therefore, the only years at issue for this set of RFAs are the years of 1987, 1988, and

1989.[1] As Montana explained in its letter to Wyoming, in light of Wyoming's explanation that it is seeking documents *created* in each of the years, Montana is willing to re-evaluate its responses. After reviewing the available documents, Montana is not currently aware of any documents created in 1987, 1988, or 1989, and it will amend its response to RFA Nos. 2-2, 2-4, and 2-6 accordingly.

IV. Montana Properly Responded to Request for Admission Nos. 2-55, 2-57, 2-59, 2-61, 2-63, and 2-65; Request for Production No. 2-6; and Interrogatory No. 3-6

Montana's responses to RFA Nos. 2-55, 2-57, 2-59, 2-61, 2-63, 2-65, RFP No. 2-6, and Interrogatory No. 3-6 are complete, accurate, and correct. These RFAs request Montana to admit that "no Montana official or employee regulated or curtailed the use of a post-1950 surface water right on the Tongue River for the benefit of a pre-1950 right in [the specified -year]." As Wyoming recognizes, Montana admitted that no Montana official curtailed the use of a post-1950 surface water right on the Tongue years River for the benefit of a pre-1950 right in 1987, 1988, 1989, and 2003. Montana denied the request for the other specified years because Water Commissioners were appointed on the Tongue River in 2000, 2001, 2002, 2004, and 2006..

Interrogatory No. 3-6 asked Montana to "set forth in detail the factual basis for the denial, including identifying which Montana official or employee regulated or curtailed production from a post-1950 surface water right, when they did it, which rights were regulated, and why." Montana responded by explaining:

> surface water diversions in Montana are subject to statutory and regulatory requirements found at Title 85 Chapter 2 Part 3, MCA and ARM Chapter 36.12, and are regulated by DNRC. In addition, in 2000, 2001, 2002, 2004, 2005, and 2006 Water Commissioners were appointed by the district court on the Tongue River. In each of these years, the Commissioners worked with all Montana water users in the Tongue River Basin to ensure that they were not taking more water

[1] Wyoming suggests that the documents created in 2000, 2001, 2002, and 2003 "did not respond to Wyoming's request." Motion 11. But as explained above, those documents "evidence" communications by Montana, and Wyoming's protestations amount to nothing more than a dispute over the interpretation of those documents.

> than they were entitled. The work of the Water Commissioners benefitted all water rights with a pre-1950 priority date. The depositions of Charles Kepper, Charles Gephardt, and Alan Fjell, and documents produced to Wyoming related to the work of the Water Commissioners provide additional information responsive to Interrogatory No. 3-6 on the activities of the Water Commissioners during these years.

See Montana's Response to Wyoming's Third Set of Interrogatories at 5-6.

This response explains the basis of Montana's denial, identifies the relevant Montana officials (the Water Commissioners), identifies when the Water Commissioners curtailed post-1950 rights (during the irrigation season, and after their appointments in the years 2000, 2001, 2002, 2004, 2005, and 2006), identifies which rights were affected (all post-1950 direct flow water users in the Tongue River Basin), and identifies why post-1950 rights were curtailed (to ensure that water users were not taking more water than they were entitled to). No more was required by the Federal Rules.

RFP No. 2-6 requested Montana to produce all documents "supporting the denial, including documents that identify which Montana official or employee regulated or curtailed production from a post-1950 surface water right, when they did it, which rights were regulated, and why." In response, Montana identified numerous responsive documents. While Wyoming may disagree with Montana's interpretation of these documents, this disagreement does not render Montana's response deficient.

V. Montana Properly Responded to Request for Admission Nos. 2-67 through 2-71; Request for Production Nos. 2-8; and Interrogatory No. 3-8

RFA Nos. 2-67 through 2-71 request Montana to admit that it "cannot identify a pre-1950 water right in Montana that was harmed by depletions to the Tongue River by post-1950 water users in Wyoming in [the specified -year]." Montana responded by denying each of these RFAs.

Interrogatory No. 3-8 asks Montana to "set forth in detail the factual basis for the denial, including identifying which Montana pre-1950 water right was harmed and when the injury occurred." Montana responded to this interrogatory by stating:

> as established in the expert report of Dale Book, in several months in 1987, 1988, 1989, 2000 and 2003, insufficient water was passing into Montana to satisfy Montana's pre-1950 rights. At that same time, Wyoming has acknowledged that it was not regulating some post-1950 rights in Wyoming, including post-1950 rights on the mainstem of the Tongue River in Wyoming. Stateline gauge data available to Wyoming also indicates other years and the periods in which flows crossing the State border were insufficient to serve all of Montana's pre-1950 priority date water rights. As a result of the shortage in Montana, Montana water users with pre-1950 water rights were harmed, and many were forced to go to an alternative supply of stored water. A list of pre-1950 water rights in Montana, a list of Tongue River Water Users Association members, and documents indicating when water users requested stored water and/or storage releases began were previously disclosed to Wyoming.

See Montana's Response to Wyoming's Third Set of Interrogatories at 7-8. This response identifies which water rights were injured (all pre-1950 water rights), and when the injury occurred (after stored water was requested during the irrigation season in 1987, 1988, 1989, 2000 and 2003).

As Montana's response explains, there is no dispute in this action that Wyoming was allowing post-1950 water rights to be used in the years at issue. See generally, Deposition Transcripts of Pat Tyrrell, Jeff Fassett, Mike Whitaker, Pat Boyd, Carmine LoGuidice, and Bill Knapp. In fact, Wyoming made no effort until very recently to curtail post-Compact users on the mainstem of the Tongue River at all. At the same time, Montana has shown through its expert reports that insufficient water was entering the State of Montana to satisfy pre-1950 users in all but three years since 1961. For that reason, Montana has repeatedly explained that *none* of Montana's water users, including the first right on the river, received a full supply in the years at issue. See, Montana's First Supplemental Response to Wyoming's Second Set of Interrogatories

2-2 (Nov. 21, 2012); Deposition Transcript of J. Nance. Given that Montana's pre-1950 water users were not receiving their full supply, which many Montana water users testified impacted their crop yield, it is difficult to understand Wyoming's assertion that Montana was not harmed by Wyoming's Compact violations.

RFP No. 2-8 asks Montana to produce all documents "supporting the denial, including identifying which Montana pre-1950 water right was harmed and when the injury occurred." In response, Montana identified numerous documents, including "the expert report of Dale Book and related documents; stateline gauge data; the spreadsheet containing pre-1950 water rights in Montana; lists of Tongue River Water Users Association members for each year; documents indicating when water users requested stored water and/or storage releases began." See Montana's Response to Wyoming's Second Set of Requests for Production at 7. Wyoming complains that these documents do not identify specific Montana water rights that were not satisfied in the years at issue. See Motion at 17. To the contrary, Montana's response identifies "the spreadsheet containing pre-1950 water rights in Montana." Thus, as it has repeatedly done throughout the course of this litigation, Montana's response once again notified Wyoming of Montana's position that all pre-1950 water rights in Montana were harmed during the years in question as a result of Wyoming's failure to deliver sufficient water to the state line.

VI. Montana fully Responded to Request for Admission Nos. 2-72 through 2-80; Request for Production No. 2-9; and Interrogatory No. 3-9

RFA Nos. 2-72 through 2-80 ask Montana to admit that it "has no documents evidencing that a pre-1950 water right in Montana was harmed by depletions to the Tongue River by post-1950 water users in Wyoming in" 1987 in 1987, 1988, 1989, 2000, and 2003. Montana responded by denying each request.

RFP No. 2-9 asked Montana to produce all documents supporting Montana's denials.

In response, as Wyoming recognizes, Montana identified a number of documents that show Montana's water needs and the way that shortages impact Montana water users, that Wyoming was allowing post-1950 water use, or that Montana was not receiving sufficient water to satisfy its pre-1950 water rights. See Motion at 21. For example, the HKM Reconnaissance Study (MT10946-10951), which is criticized in the Motion, shows expanded use of water in Wyoming. Expanded use leads to additional depletions. Coupled with the tag books and other documents showing that Wyoming did not curtail post-1950 uses, and the depositions of Montana water users in which they describe a lack of water during the years at issue, these documents tend to show that Montana and its water users were "harmed by depletions to the Tongue River by post-1950 water users in Wyoming" in the years at issue. The sufficiency and weight of these documents and other evidence will be determined by the Special Master at trial. Wyoming's inappropriate attempt to litigate the merits of this case in the guise of a discovery motion should not be entertained.

Montana also fully responded to Interrogatory No. 3-9. The documents identified in response to RFP No. 2-9 tend to evidence or show that pre-1950 water rights in Montana were harmed by depletions to the Tongue River by post-1950 water users in Wyoming in the years at issue, and thus provide the factual basis for Montana's denials. While the states may disagree about the proper interpretation of these documents, the weight of the evidence must be left for trial.

CONCLUSION

The Federal Rules do not provide for the relief Wyoming seeks. Montana has fully responded to Wyoming's RFAs in accordance with Rule 36, and thus Wyoming's only remedy is to seek recovery of its expenses should it prove at trial that Montana improperly denied a contention set forth in an RFA. Furthermore, Montana's responses to Wyoming's Interrogatories

and RFPs are complete and accurate. Montana has answered each interrogatory and identified responsive documents. While Wyoming may dispute Montana's interpretation of these documents, a motion to compel is not the proper procedural device for resolving such disputes.

WHEREFORE, Montana respectfully requests that the Court deny the Motion.

Respectfully submitted,

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Before the Honorable Barton H. Thompson, Jr.
Special Master

CERTIFICATE OF SERVICE

I certify that a copy of Montana's Response to Wyoming's Proposed Motion to Compel was served electronically, and by placing the same in the U.S. mail on June 26, 2013, to the following:

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Chief Deputy Attorney General
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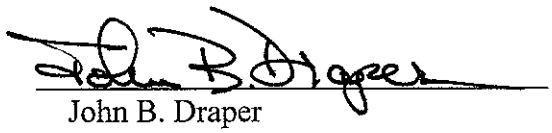

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John and Jeff,

We have received Montana's Responses to Wyoming's Second Request for Admissions, Second Request for Production and Third Set of Interrogatories, and were disappointed that Montana continues to evade questions that at this point in the case, should be easy to answer. I am providing you with this letter to articulate our concerns with Montana's responses in hopes that Montana will supplement or amend its responses accordingly.

Generally, Wyoming's frustration lies in the fact that when asked to provide evidence supporting its denials of Wyoming requests for admissions, Montana cited to thousands of pages of documents, which upon review fail to respond to the simple requests set forth by Wyoming. If Montana intends to continue denying these aspects of the case, then it must provide actual responsive evidence supporting the denial. If it cannot do so, then Montana must amend its responses to Wyoming's Requests for Admissions accordingly. If Montana does not satisfactorily address the following concerns by May 7, 2013, then Wyoming will bring these issues to the Special Master for resolution.

EXHIBIT A

(1) Request for Admission Nos. 2-2, 2-4, 2-6, 2-8, 2-10, 2-12, and 2-14. Request for Production 2-1.

Wyoming very straight-forwardly asks Montana to admit that it does not have any contemporaneous documents from 1987, 1988, 1989, 2000, 2001, 2002, or 2003 showing a call on Wyoming. Montana denied each of these requests, and consequently, Wyoming asked for all of the documents in Montana's possession created during each of those years evidencing an actual call upon Wyoming.

In response, Montana lists many documents it alleges are responsive. However, whether read individually or collectively, none of these documents contains the information Wyoming requested. Generally, the documents do not originate from the years identified above--the fundamental requirement necessary to adequately respond to Wyoming's request. Further, none of the documents even vaguely indicate nor can they be interpreted through the most liberal construction that Montana placed a call on Wyoming to deliver water under the terms of the Yellowstone River Compact. Wyoming's specific objections to each of the unresponsive documents evidenced by Montana are discussed below.

- Montana cites recent declarations and depositions testimony of Montana officials as a source of evidence of calls in the years at issue. However, none of these documents are responsive to Wyoming very specific request of producing documents created in 1987, 1988, 1989, 2000, 2001, 2002, or 2003 that evidence Montana making a call on Wyoming that year.

- **MT 1098-1099** is a 2002 letter from Montana DNRC Director Bud Cinch to Montana rancher Art Hayes. The letter responds to an earlier letter from Mr. Hayes to Montana's Water Resources Director, Jack Stults, where Mr. Hayes expressed concerns about Montana abandoning an effort to study Wyoming's post-50 water use in order to determine if Montana was receiving its share of water under the Compact. No reasonable person can read this letter to be evidence that Montana placed a call on Wyoming in 2002, or any other year for that matter. It can only be read for what it is, an intrastate communication about the desire to learn more about water uses under the Compact.

- **MT 9882-9899** are the handwritten notes of an unidentified person from an April 23, 2004, Tongue River Reservoir Operating Committee Meeting. The notes make reference to the possibility of making a call on Wyoming in 2004. However, Wyoming did not request the production of documents evidencing a call in 2004, making this document unresponsive.

- **MT 12406-12410** is 2003 testimony from a Tongue River rancher and the Montana DNRC to a Montana Legislative Committee. The testimony supports a proposed resolution to study whether Montana receives its share of water under the Yellowstone River Compact. Again, nothing in this document indicates that Montana made demands for water on Wyoming in 2003 or any other year. It is simply an intrastate communication with an intent of gaining a better understanding of various water uses under the Compact.

- **MT 10051** is a DVD of Keith Kerbel's computer files. The DVD contains on number of files, including drafts of agendas, and minutes of Technical Committee meetings, reservoir content spreadsheets, and other various minor documents. None of these documents show a call on Wyoming in any of the years identified above.

- **MT 12927-12928** is an email sent from Keith Kerbel to Jack Stults on March 2, 2001. The message summarized a meeting that Mr. Kerbel had with employees from the Wyoming State Engineer's Office in Ucross, Wyoming. The general discussions revolved around water planning in the Tongue and Powder River basins, as well as information about coal bed methane in Wyoming. Mr. Kerbel also summarized conversations he had with water users on the Powder River about a water project they were interested in constructing. Nowhere in this email does Mr. Kerbel reference Montana making a call on Wyoming in 2001, nor is there any context to this email in which a reasonable person could conclude this email was anything more than reporting the details of a Wyoming meeting to his superior.

- **MT 10883-10884** and **MT 12929** are documents related to a January 16, 2002, meeting to discuss water supply issues in the Tongue River basin. First of all, this communication takes place well before the irrigation season begins, so it cannot be used as evidence of a call during the irrigation season. Second, the minutes reflect that Montana started the meeting by stating that they were "interested in learning more about the hydrology and forecasting abilities in the Tongue River drainage[.]" Reading through the minutes further clearly support the idea that this was simply an information gathering meeting. At no point did Montana make any demands upon Wyoming, nor did it suggest regulation was imminent.

- **MT 10899-10908** and **MT 10910-10914** are minutes from meetings of the Yellowstone River Compact Commission and the Commission's Technical Committee from 2004. Since Wyoming did not ask for information related to a call in 2004, and nothing in the minutes suggests a call being made in any prior year, the minutes are unresponsive.

- **MT 12970-12971** is a May 3, 2002, letter from Art Hayes to Jack Stults. In it, Mr. Hayes expresses disappointment that the DNRC dropped funding for a Compact engineering study regarding post-1950 Wyoming irrigation on the Tongue River. He encouraged Montana to "continue gathering information needed in order to insure [sic] that Montana gets it [sic] fair share of water from the Yellowstone Compact." Nowhere in the intrastate communication does Mr. Hayes request that Montana place a call on Wyoming in 2002, nor is there any evidence that Montana actually did place a call on Wyoming in 2002. As such, the letter fails to respond to Wyoming's request.

- **MT 12972-12973** is a May 6, 2002, letter from Montana Representative Norma Bixby to Jack Stults encouraging that funding not be eliminated for the purposes of studying post 1950 Wyoming irrigation on the Tongue River. She indicates that such a study is necessary to assure that Montana is getting its fair share of water from the Yellowstone River Compact. This letter neither directs Montana to make a call on Wyoming, nor evidences that a call was ever made. Instead, it only urges the collection of data so that Montana is in a better position to document its share of water under the Compact.

- **MT 12975-12979** is a June 5, 2002, letter from Montana irrigators along the Tongue and Powder Rivers to Montana Attorney General Mike McGrath. In it, the irrigators express their concern over the implementation of the Yellowstone River Compact, and request that the State of Montana take "the appropriate legal action with Wyoming to protect Montana's share of the tributaries to the Yellowstone." This letter on its face is not evidence of a call on Wyoming in 2002. Obviously, complaints from citizens of a state to their government requesting legal action cannot be interpreted as evidence of a specific action taken by that state. Instead, Montana needs to provide evidence from 2002 that the State of Montana made a subsequent demand on Wyoming, in response to that letter. Montana did not provide any such evidence, making this letter unresponsive.

- **MT 12979-12980** is a draft of the same letter identified by MT 12975-12979, and is unresponsive for the same reasons.

- **MT 12981-12982** is a May 23, 2002, response letter from Jack Stults to Montana Representative Norma Bixby summarizing Montana's desire to do an initial assessment of Wyoming post-50 development for purposes of future communications with Wyoming. In no way does this intrastate communication evidence a call upon Wyoming in 2002. It suggests that Montana needs to gather

more information for future discussions with Wyoming, not necessarily future calls.

- **MT 12983-12984** is a May 29, 2002, response letter from Jack Stults to Art Hayes. In it, Mr. Stults mentions an attempt to work with Wyoming to informally manage water supplies to the advantage of all users in the Tongue River basin. On its face, this appears to be an intrastate communication summarizing a conversation where Montana informally asked Wyoming if it would be willing to share shortages like Montana does on the Powder River. It does not evidence a formal call for water to satisfy pre-1950 water rights in Montana. Additionally, Mr. Stults summarizes the DNRC's pursuit of funds to do an initial assessment of post-50 development in Wyoming to "clearly describe our concerns in our next interactions with representatives of the State of Wyoming." This pronouncement indicates a desire for future communication. It does not imply a 2002 call.

- **MT 12985-12987** is a June 3, 2002, memorandum from Craig Stiles to the Tongue River Advisory Committee Members in regards to the minutes of a May 15, 2002, Tongue River Advisory Committee Meeting. There is some evidence of a discussion about wanting to initiate research into Wyoming's water use. However, at no point does the memorandum suggest, imply, or purport to make a demand on Wyoming for water in 2002. An intrastate communication that expresses a desire to conduct further research is not evidence of a call, and this document is unresponsive to Wyoming's request.

- **MT 13083-13084** is the proposed and actual agenda for the December 2002, meeting of the Yellowstone River Compact Commission. Nothing in the agenda references Montana making a call on Wyoming for water under the Compact in 2002, nor does it reference a potential call in subsequent years. The agenda itself appears to be established as a way for the states to exchange information on identified topics in a more formal setting. However, absent any evidence of a call, this document, like every other document Montana cites is unresponsive.

The remainder of the documents cited, including minutes from the Yellowstone River Compact Commission meeting and the Commission's Technical Committee fail to provide even a scintilla of evidence from those years that Montana made a call on Wyoming. When you couple the information provided by Montana here with the deposition testimony of Chuck Dalby and Art Hayes, Montana clearly needs to revisit the answers to the admissions referenced in this section.

During his deposition, Mr. Dalby indicated that, (1) 2003 was the first year Montana ever considered entertaining the prospect of placing a call on Wyoming, Dalby

Tr. at 53, (2) Montana made a call on Wyoming for the first time in 2004, *Id.* at 56-57, and (3) the exclusive focus of Compact Commission meetings until at least 1991 was implementation of Compact Article V.C., not V.A. *Id.* at 58-59.

Mr. Hayes stated that the mid-1990s were the first time that he started being concerned that Montana may not be receiving everything it was entitled to under the Compact. Hayes Tr. at 141. At that time, he spoke with the DNRC in Montana expressing his concern, but did not request that Montana do anything. *Id.* Mr. Hayes testified that he and other water users were not concerned about water supply in the 1980s because the Northern Cheyenne Tribe did not track its water use, which allowed other irrigators to use tribal water as a buffer against shortages. *Id.* at 42-43.

Montana must either supplement its responses to Wyoming's Request for Production with actual documentation from those years showing that Montana made a call upon Wyoming for water, or it must amend its responses to Wyoming's Request for Admissions and admit that it has no contemporaneous documentation evidencing a call.

(2) Request for Admission 2-55, 2-57, 2-59, 2-61, 2-63, 2-65. Request for production 2-6. Interrogatory No. 3-6.

Wyoming asked Montana to admit that no Montana official or employee regulated or curtailed the use of a post-1950 water right on the Tongue River for the benefit of a pre-1950 water right in 2000, 2001, 2002, 2003, 2004, or 2006. Montana admitted that in 1987, 1988, and 1989 no Montana official or employee regulated the river, so presumably, the subsequent denials are the result of a Montana District Court appointing Commissioners to monitor releases and deliveries of storage contract water in those years. In light of the denial, Wyoming asked Montana to produce documents and set forth the factual basis supporting the denial. Specifically, Wyoming asked Montana to identify which Montana official or employee regulated or curtailed production from a post-1950 surface water right, when they did it, which rights were regulated, and why.

Montana cites to numerous deposition transcripts, Water Commissioner documents and a series of documents in an attempt to respond to Wyoming's request. Upon review, Wyoming remains concerned about Montana's inability or refusal to answer these specific questions that Wyoming has repeatedly asked. Wyoming's more specific concerns follow.

- Montana provides no documentation of the District Court appointing a Water Commissioner in 2003. In fact, the Court did not appoint a Commissioner, so no Montana official or employee could have curtailed or regulated the use of post-

1950 water rights on the Tongue River in Montana for the benefit of pre-1950 water rights in 2003.

- **MT 9919-9921** is a July 13, 2001, petition from the Tongue River Water Users Association to the Montana State District Court requesting that a water commissioner be appointed to "measure and distribute the stored water released from Tongue River Dam Project." Nothing about this document suggests that anyone actually regulated or curtailed post-50 water rights in Montana for the benefit of pre-1950 water rights. In fact, the very statute referenced by the petitioners says, "The court may make an order requiring the commissioner or commissioners appointed by the court to distribute stored water when and as released to water users entitled to the use of the water." MT 09919, *citing* Mont. Code. Ann. 85-5-101(3). Simply put, requesting that the District Court appoint someone to distribute *stored* water is not tantamount to regulating post-1950 water rights for the benefit of pre-1950 rights.

- **MT 9967-9985** is the 2001 order arising from the above petition. In it, the Court appointed Charles Kepper to serve as a Water Commissioner for the purpose of delivering "the stored water purchased by the Tongue River Water Users Association[.]" Consequently, this document is unresponsive for the same reasons as MT 9919-9912.

- **MT 9986-9995** is an April 26, 2004 petition, and accompanying May 2, 2004 order regarding the appointment of Commissioners for the Tongue River. Like 2001, the water users requested the Commissioner to distribute *stored* water. Also, like 2001, this document also fails to show there was any actual regulation of post-1950 water rights for the benefit of pre-1950 rights.

- **MT 9996-10014** is an April 22, 2005 petition, and accompanying May 2, 2005, order regarding the appointment of Commissioners for the Tongue River. Again, the water users requested a Commissioner to distribute *stored* water. This document shows no actual regulation of post-1950 water rights for the benefit of pre-1950 rights.

- **MT 10015-10038** is a May 2, 2006 petition, and accompanying May 4, 2006, order regarding the appointment of Commissioners for the Tongue River. The water users made and were granted two requests in 2006. First, the Court appointed a Commissioner to distribute stored water. Second, the Court tasked the Commissioner with delivering and distributing 1914 decreed water and Yellowstone Compact water in Big Horn County. However, as evidenced below, no such distribution ever occurred. Further, even if it did, Big Horn County

comprises only a small portion of the Tongue River, from the state-line to just below Tongue River Reservoir. Therefore, Commissioners were not even authorized to regulate direct flow rights over the majority of the river where most of the 1914 decreed water rights lie. Finally, this document shows no actual regulation of post-1950 water rights for the benefit of pre-1950 rights.

Each Commissioner testified that they never regulated or curtailed the use of direct flow water rights, let alone a post-1950 water right for the benefit of a pre-1950 water right. Charles Gephart even testified that in 2006 he did not even know about the 1914 decree, and therefore, did not distribute water under its terms. Gephart Tr. 27-28. Instead, they each testified to a couple of important facts: (1) that only two very senior water rights received any direct flow while everyone else used storage water from Tongue River Reservoir, and (2) their principal duties were relaying requests for storage water to Art Hayes, and then measuring and reporting on stored water diverted by each storage contract holder. The Montana landowners that Wyoming deposed confirmed the Commissioner's assessment. Each testified that no Montana official regulated or curtailed their direct flow rights in any way. It is no coincidence then, that Montana has produced no documents showing active regulation or curtailment of post-50 users for the benefit of pre-50 users in Montana.

Wyoming's request for admission was very specific—either show Wyoming that a Montana official physically curtailed or told a post-1950 direct flow water user to curtail use at their headgate so a pre-1950 direct flow right could be satisfied, or admit the above Request for Admissions. Nothing contained in Montana's responses to Wyoming's production request or interrogatory answer these basic questions.

(3) Request for Admission 2-50, 2-52, 2-54, 2-56, 2-58, 2-60, 2-62, 2-64, and 2-66. Request for Production 2-7. Interrogatory No. 3-7.

Wyoming asked Montana to admit that it knows of no other person or entity that regulated or curtailed the use of a post-1950 surface water right on the Tongue River in Montana for the benefit of a pre-1950 Montana water right in 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, or 2006. Montana denied each of these years, and upon request for documentation evidencing such regulation, Montana pointed to the same documents identified in section (2) of this letter.

Montana's response to Wyoming's corresponding interrogatory sheds no light on the information Wyoming seeks. Montana points Wyoming to Table 5 of Dale Book's expert report and suggests that once Tongue River Water Users Association members request stored water, there is no water available for direct flow right. This may be true; however, it fails to actually answer Wyoming's questions. In fact, nothing provided

answers these simple questions: Who regulated or curtailed production from a post-1950 surface right? Montana suggests that the individual water users and the Commissioners do that. However, nothing in the record indicates that either is true. Commissioners admittedly do not curtail anyone, and most water users said they never call their neighbors demanding water. Others refused to identify who they called, and struggled to identify when they called. Only one, Ray Muggli, said he stopped diverting a direct flow right after Roger Muggli called him. However, even he did not say whether the right he curtailed was a pre-1950 or post-1950 right. Without knowing more specificity, such as did any of these landowners request a post-1950 water right curtail its use for the benefit of their pre-1950 right, Montana's answers remain unresponsive.

(4) Request for admission 2-67 through 2-71. Request for Production 2-8. Interrogatory No. 3-8.

Wyoming seeks an admission from Montana that it cannot identify a pre-1950 water right in Montana that was harmed by depletions to the Tongue River by post-1950 diversions in Wyoming in 1987, 88, or 89, 2000 or 2003. Because Montana denied all of these years, Wyoming requested that Montana provide all documents and the factual basis for the denial identifying which Montana pre-1950 water right was harmed and when the injury occurred. The information provided by Montana is unresponsive.

The lists of water rights, storage releases, and state line gauge data referenced by Montana do not tell Wyoming who in Montana was harmed by post-1950 diversions in Wyoming. For example, providing a list of water rights may establish who could potentially be regulated. However, it does not indicate if any of those rights were actually irrigating with direct flow water in those years in question, or if they wanted to irrigate with direct flow water if such water was available. Relying on the documents cited forces one to make numerous assumptions about Montana water use that are simply not true. Also, many irrigators testified that they never had difficulty satisfying their water needs. For example, both Roger Muggli and Art Hayes testified that there was plenty of water in the 1980s.

Montana also suggests that Wyoming look to Mr. Dale Book's expert report to identify Montana pre-1950 water rights harmed by Wyoming post-1950 water use. There are two problems with relying on a report that only attempted to quantify the total harm in acre-feet to Montana for 2001, 2002, 2004, and 2006. First, Mr. Book did not address any of the years Wyoming asks about in its Request for Admissions 2-67 through 2-71. Second, he does not identify specific water users in Montana allegedly harmed by Wyoming post-1950 use. Instead, he uses a list of paper rights and a set of assumptions in an attempt to identify a total quantity of water required to satisfy all Montana pre-1950 rights. This ignores a number of potential factors, such as, but not limited to, (a) some of

the pre-1950 rights may not have irrigated in those years, (b) some of the pre-1950 rights may not have wanted direct flow water, but instead preferred storage, (d) some of the pre-1950 rights may not want to divert their entire water right, or (c) some of the pre-1950 rights may not have irrigated even if direct flow was available due to water quality concerns.

Wyoming has a right to know who Montana alleges was harmed by water use in Wyoming and when that harm occurred. Wyoming has asked this question multiple times, and is entitled to a straight answer, even if as appears to be the case, the answers are no one and never.

(5) Request for admission 2-72 through 2-76. Request for Production 2-9. Interrogatory No. 3-9.

Wyoming is seeking an admission from Montana that it has no documents evidencing that a pre-1950 water right in Montana was harmed by depletions to the Tongue River by post-1950 water users in Wyoming in 1987, 1988, 1989, 2000, and 2003. In response, Wyoming requested that Montana provide both the factual basis for the denial and all documents supporting the denial. Montana cites a number of documents it contends are responsive, yet after review, they clearly fall well short as articulated below.

- The Wyoming Hydrographer reports, Wyoming Tag Books, Wyoming Tabulation Books and depositions of Wyoming officials help paint the picture of water rights, use, and regulation in Wyoming. However, much of the information is unavailable from 1987-89, making Wyoming's post-50 water use in those years nearly impossible to ascertain. Of course, none of this information takes the next step of showing that Wyoming's use actually caused harm in Montana in the years identified above. The remaining documents fail to make that connection for those years.

- Montana seemingly includes documents from the Tongue River Water Users' Association, and various deposition transcripts, as evidence of water rights, usage, and regulation in Montana. However, none of these documents provides the critical information requested by Wyoming. In fact, a review of some of these paints a very different story. For example, Roger Muggli confirmed that even in 1988, the driest year on record there was water in the Tongue, and that he "never, ever worried about water coming down the Tongue." Muggli Tr. 100-101, ex. 213. He also indicated that the first time he started seeing shortages on the Tongue River was in either 2005 or 2006. Tr. at 101. Art Hayes offers similar testimony during his deposition that they never suffered shortages during the

1980s, and that 2001 was the first time that Tongue River Reservoir could not meet all of its demand. Hayes Tr. 65, 42-43. Mr. Hayes also testified that there were only three years that between his direct flow and storage rights, he was short water: 2001, 2006, and 2007. *Id.* at 37. In 2001, he purchased water from the Tribe to make up the difference, so he did not suffer harm. Even so, the deposition transcripts are unresponsive because they are from 2013, whereas Wyoming requested contemporaneous documents from 1987, 1988, 1989, 2000, and 2003.

- Montana's Expert Reports are unresponsive for the same reasons laid out in section (4) of this letter. None of the reports were created in the years in question. Further they do not address potential harm to Montana in 1987, 1988, 1989, 2000, or 2003— the years at issue in these particular discovery requests.

- **MT 3650-3660** is a document entitled, "Water Available for Irrigation Reservations in the Yellowstone River Basin." This document never discusses water use in Wyoming beyond the possibility that future development in Wyoming could affect the water available for the irrigation reservations in Montana. This has nothing to do with existing demands, or shortages for pre-1950 rights in Montana due to the use of Wyoming post-1950 rights. Also, the document does not identify any date or origin, so in that regard it is unresponsive as well. Finally, the bulk of the discussion relates to the water reservations on the mainstem of the Yellowstone River—a water body that is not part of this case.

- **MT 3803** is a portion of a letter from Diane Fitz Lozovoy of Syracuse, New York to Caralee Cheney of Montana's DNRC. This document fails to respond for two reasons. First, it merely references a "finished" report on water availability of the Yellowstone River based on modeling. It does not purport to identify post-1950 water rights in Wyoming that have harmed Montana pre-50 water rights. In fact, it alleges no harm at all, it is simply references a report that, based on some type of modeling, estimated what quantity of water may be available for future development. Second, the letter is dated 1981, which pre-dates the earliest year at issue by six years. It is patently absurd that this document could be read to allege prospective harm to Montana water rights by Wyoming post-50 rights.

- **MT 3943-4045** is a 1968 study of water allocation in the Tongue River Basin under Article V.C. of the Yellowstone River Compact. The purpose of the study was to establish the quantity of unused and unappropriated water of the Tongue River system which would be available for use in Montana. This document is unresponsive for the same reasons as other documents. First, 1968 is nineteen years before the first year at issue. Second, there is no allegation or inference of

harm to pre-1950 water rights in Montana from Wyoming post-1950 use. Certainly, there is no allegation of such harm in 1987, 88, 89, 2000, or 2003 in this 1968 document.

- **MT 4889-5346** is a Draft of "The Tongue River Water Model" created in 1991 for purposes of describing the terms of the Water Rights Compact with the Northern Cheyenne Tribe. Like other documents presented here, this is simply a model of theoretical water availability under assumed conditions. This is not, as Montana apparently wishes to allege, documentation of Wyoming post-50 rights causing harm to Montana pre-50 rights.

- **MT 6711-6722** are Wyoming's Lou Allen's notes from 1984 regarding a allocation methodology proposed by Montana for the Tongue River. Again, this fails to respond to Wyoming request because it predates any of the years in question. Also, it is simply one person's notes on an ongoing dialogue about how to implement the allocation provision of Article V.C. of the Compact. These early 1980s notes do not preemptively evidence post-1950 Wyoming rights harming pre-1950 Montana rights. Further, they were not created during any of the years in question, which is the quintessential requirement to adequately respond to this request.

- **MT 7819-7905** is another draft of "The Tongue River Water Model" created in 1991 for purposes of describing the terms of the Water Rights Compact with the Northern Cheyenne Tribe. It is unresponsive for the same reasons identified regarding MT 4889-5346.

- **MT 9089-9090** is an undated document entitled "Tongue River Water Quantification and Allocation." This is a relatively generic attempt to summarize an allocation model that is used to determine how the Tongue River should be apportioned between Montana and Wyoming. It speaks almost entirely to what water may be available for post-1950 development under Article V.C., but makes no allegations of harm to Montana pre-1950 water rights by Wyoming post-1950 uses.

- **MT 9125-9581** are a series of minutes and agendas from meetings of the Tongue River Water Users Association. While there is some vague discussion of Compact issues with Wyoming, they are non-existent until the documented call year of 2004. The water users never discuss, nor do the documents show that Wyoming post-1950 water use caused any harm to pre-1950 uses in Montana.

- **MT 9900-9919** are notes from a Tongue River Reservoir Operations Committee Meeting from 2004, which is not one of the years Wyoming is seeking information on in these requests. It does not reference or allege any harm in any of the years identified in this section (5) of this letter. Therefore, this document is unresponsive.

- **MT 10946-10951** is a 2002 "Reconnaissance Study of Expanded Irrigation Water Use Tongue River Drainage—Wyoming" The report attempts to evaluate the changes in the extent of irrigated lands in Wyoming's Tongue River drainage. It never alleges that post-1950 water rights in Wyoming harm Montana's pre-1950 rights. As we all know, the Compact allows for post-1950 development. A mere survey of what new development may exist in Wyoming does not constitute evidence that such development is being used at a time when Montana pre-50s are short and wanting water. It also does not indicate whether any water, if released to Montana, would arrive at the desired pre-1950 right. This document does little to answer Wyoming's very simple questions, and like everything else Montana provided in this discovery response, is unresponsive.

- **MT 11301-11305** is a map of irrigation in the Tongue River Basin in the 1940s and 1950s vs. 1990s, and is part of the Reconnaissance Study discussed above. For the same reasons specified above, this document is unresponsive.

After reviewing all of the documents produced and cited by Montana purporting to provide contemporaneous evidence from 1987-89, 2000, and 2003 Montana clearly must admit that it does not have any evidence from those years showing harm to Montana pre-1950 water rights by Wyoming post-1950 rights. Nearly all of the documents were created in years other than the ones identified above. The documents that were created in those specific years, even when read together, do not show any evidence of harm to Montana.

(6) Request for admission 2-77 through 2-80. Request for Production 2-9

By denying these requests, Montana asserts that it has documents evidencing that a pre-1950 water right in Montana other than those in the Tongue River Reservoir was harmed by depletions to the Tongue River by post-1950 water users in Wyoming in 2001, 2003, 2004, and 2006. However, none of the documents referenced in its response to Request for Production 2-9 provide the any such evidence. Wyoming objects to these responses for the same reasons articulated in section (5) of this letter.

(7) Request for Admission 2-81 through 2-84. Request for Production 2-10. Interrogatory No. 3-11.

Wyoming asked Montana to Admit that Montana released water that it could have stored in 2001, 2002, 2004, and 2006. After denying, Montana was asked to provide all documents that supported this denial, and through an interrogatory, set forth in detail the factual basis for the denial. However, after reviewing the documents citied and provided by Montana, and its interrogatory response, Wyoming maintains that Montana failed to provide a single document responsive to Wyoming's request.

Montana seems to take the position that it is legally obligated to either release a specific quantity of water during the winter months for certain downstream purposes or operate the reservoir in a particular way. Yet, what becomes patently clear upon reviewing the documents is that while Montana desires to provide for downstream winter uses, it fails to identify any legally protected quantity of water that must be released to satisfy downstream uses. The documents show varying degrees of *suggested* winter releases, but in no instance is there a document articulating that such releases are necessary to satisfy a pre-1950 water right. Further, the operation conditions do not appear to be rooted in law, but rather, are set by negotiated guidelines that are not steadfast. Wyoming's concerns with each document are referenced below:

- **MT 00005-00011**--Presumably Montana meant to start with MT 00004. This is a 1971 letter from the USDOI to the members of the Yellowstone River Compact Commission. The purpose of the letter was to aid in making a preliminary plan to better determine water use in the Yellowstone River Basin, and identify administrative procedures for the purpose of allocating water between the states under the terms of the Yellowstone River Compact. The letter suggests that Montana recognizes stock water rights on the Tongue River in Montana during the winter, equal to the inflow of Tongue River Reservoir or 167, cfs, whichever is less. However, the number is inconsistent with other numbers Montana provides below, indicating no actual, defined existing pre-1950 water right subject to protection under the Compact. Despite this fact, Dale Book's expert report shows that the outflows during the winter months of 2006 often exceeded inflows, and that outflows exceeded 167 cfs for most of the winter months. This fact alone would require an admission for 2006.

- **MT 3293-3300** is a memo prepared by Donald Sullivan (no reference to position) regarding the historical and proposed operation of Tongue River Reservoir. In the memo, Mr. Sullivan suggested that winter flows should never exceed 167 cfs, and that water users indicated that a winter flow of 167 cfs would be adequate to

provide for stock water. This document is deficient for the same reason as the previous document.

- **MT 7505** is one page of a much larger document that shows the storage levels of Tongue River Reservoir on October 1, in the years 1971 through 1976. This says nothing about releases, nor does it provide evidence about the status of or legal basis for releases in the 2000s. It is difficult to read this document in any way but unresponsive.

- **MT 7506-7593** and **MT 10427-10474** are transcripts from a 1977 hearing regarding the DNRC's Tongue River Reservation Application for the purpose of providing water storage for future multi-purpose beneficial uses. MT 10475-10511 is the DNRC's application for the reservation of water on the Tongue River. On MT 7535, line 5-8, the testimony suggests that for modeling purposes for enlarging the Tongue River Reservoir, an October through April average release of 75 cfs was used for stock water, prevention of ice jams, and for fish and municipal uses. While it identifies an estimated quantity of water needed, that number is inconsistent with other documentation Montana apparently uses to evidence some existing obligation to release water in the winter. Later, on MT 7541, three different operation scenarios are laid out with two of the three suggesting that winter releases would match the inflow up to 75 cfs. This means that at times the releases could be much smaller, but that any inflow over 75 cfs should be stored. These documents do not provide any indication that the winter releases are rights existing as of January 1, 1950, only that water is needed for those purposes. While Wyoming understands that fish need water, towns need water, stock need water, and ice jams are undesirable, absent some link to evidence of existing rights predating the Compact, this document is unresponsive. Additionally, Mr. Book's report shows that when a maximum of 75 cfs is the number necessary for winter releases, then there is additional water leaving the reservoir that Montana could have stored in 2001, 2002, 2004, and 2006.

- **MT 7697-7784** is the Operating Plan and a series of draft Operating Plans for Tongue River Reservoir. It includes a set of guidelines for managing the reservoir. The document, negotiated in the 1990s, shows a recommended minimum outflow during winter months of 175 cfs or inflow, whichever is less. This is unresponsive for a number of reasons. First, this is the third distinct number provided indicating winter releases, and Wyoming knows of others showing even different numbers. Second, the guideline in this document says that the operator should "generally" maintain a minimum outflow of 175 cfs, which indicates flexibility in management. In fact, Art Hayes testified there was flexibility in the Operating Plan. He, in conjunction with the DNRC, willfully

exceeded the maximum winter storage amount on several occasions in hopes of ensuring that the reservoir would fill. To do so required decreasing winter releases over extended periods of time. Clearly, if there were a mandate to release a minimum amount of water for downstream stock purposes, in this case, an amount no less than the inflow, Mr. Hayes could not have taken such action. Third, Mr. Book's report shows that outflows exceeded 175 cfs on several occasions in the winter of 2006, which clearly indicates additional water that Montana could have stored.

- **MT 9932-9951** is a 1969 storage agreement between the State of Montana and the Tongue River Water Users' Association. It articulates the irrigation season demands and obligations. However, it does not speak to water storage, pass-through or release requirements. Wyoming fails to see how this document is responsive.

- **MT 12412** is a chart showing storage contents in Tongue River Reservoir in each month for each year of the reservoir's operation. This document clearly indicates the availability of storage space in the reservoir, which eliminates a potential basis for being unable to store water that was allowed to pass through the reservoir.

- The other attached documents include MT 016448-016463, which presumably attempt to establish the bounds of the Tongue River Reservoir water right for purposes of the Tongue River adjudication. Nothing is this document appears to be responsive to Wyoming's request. There is no reference to a winter release requirement, or why certain releases were required in the 2000s.

As has been the case with Wyoming's previous discovery requests, in responding to the current requests Montana has evaded giving straight answers to simple straightforward questions at every turn. The plain truth in this litigation is that Montana never made calls before 2004, no Montana water user was harmed by Wyoming's allegedly wrongful use, Montana does not regulate its water users diligently and did not do so before making calls in 2004 and 2006, and Montana can fill the Tongue River Reservoir every year if it so chooses. Absent admission of these now obvious facts, Wyoming cannot abide these deficient discovery responses. Accordingly, Wyoming requests that Montana revisit and supplement these discovery requests with responsive documents or with answers that no such documents exist, coupled with the appropriate admission. If you have any questions about our concerns, please contact me at your earliest convenience. If Montana has not satisfactorily addressed Wyoming's concerns by May 7, 2013, then Wyoming will be forced to take these issues to the Special Master for resolution.

Finally, Montana advised Wyoming during its depositions of Montana's experts that certain documents were withheld from each expert's files. Montana represented that it would provide Wyoming a privilege log of those documents withheld, which to date, Wyoming has not received. Wyoming requests that Montana send this privilege log immediately.

We look forward to your timely response.

Regards,

David Willms
Senior Assistant Attorney General

cc: Cory J. Swanson

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May 10, 2013

Via Electronic Mail

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Re: *Montana v. Wyoming*, No. 137 Orig.: Response to your April 23, 2013 Letter

Dear David:

We have received your letter of April 23, 2013 ("Letter"). The purpose of this response is to address Wyoming's concerns regarding Montana's Objections to Wyoming's Third Set of Discovery (Feb. 27, 2013), Responses to Wyoming's Second Request for Admissions (Feb. 27, 2013), Third Set of Interrogatories (March 14, 2013), and Second Request for Production (March 29, 2013). In this letter I will generally address the issues you raise, and then more specifically address the discovery requests that you identify.

Much of your Letter seems concerned with arguing Wyoming's view of the facts and documents. What is abundantly clear is that the two States have a very different view of the facts and documents in this case. It does not seem productive for either State to argue its case in a discovery letter, but suffice it to say that we reject the factual assertions you make as completely unsupported. Based on your Letter, it appears that the States have differences in the understanding and interpretation of documents, the meaning of previous deposition testimony, the actions taken by Montana water officials, the use of water in Montana, the demand for water in Montana, the amount of water that was available in the years at issue, the water administration scheme in Montana, and the operation of Montana water rights. For purposes of this letter, what is important is that for each of the requests for admission ("RFAs") that were denied, Montana has a

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genuine reason, grounded in a disagreement over the facts, to deny the statements. Ultimately, those disputes will need to be resolved at trial.

The focus of Wyoming's third set of discovery was on 93 requests for admission. As you know, an issue admitted under Rule 36 "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P. 36(b). For that reason, Montana takes very seriously any request for admission, and I hope that you can appreciate that Montana would never admit any request that is ambiguous or that it has a genuine reason to dispute.

Moreover, "[i]n order for [requests for admission] to be an orderly procedure, the requesting party bears the burden of setting forth its requests simply, directly, not vaguely or ambiguously, and in such a manner that they can be answered with a simple admit or deny without an explanation, and in certain instances, permit a qualification or explanation for purposes of clarification." *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 77 (N.D.N.Y. 2003). Indeed, the prevailing understanding is that "a request for admission should not attempt to cover virtually the entire case. It should be confined to facts which are not in substantial dispute." *United States v. Watchmakers of Switzerland Info. Ctr., Inc.*, 25 F.R.D. 197, 201 (S.D.N.Y. 1959).

While it would be understandable for Wyoming to use RFAs to narrow the issues for trial, Wyoming's discovery and your Letter appear to be an attempt to force Montana to accept Wyoming's view of the facts. It does not.

This litigation was necessitated because Wyoming refused to recognize that the Compact protects Montana's pre-1950 rights. Now that the Court has held that Wyoming has obligations under Article V(A), Wyoming has apparently adopted a new strategy of arguing that, despite severe drought conditions, Montana water users had a sufficient supply or did not want to irrigate, that Wyoming's admitted over-use of water did not harm Montana, and that Montana is to blame for the shortages on its side of the border due to poor administration. In your words,

> "The plain truth in this litigation is that Montana never made calls before 2004, no Montana water user was harmed by Wyoming's allegedly wrongful use, Montana does not regulate its water users diligently and did not do so before making calls in 2004 and 2006, and Montana can fill the Tongue River Reservoir every year if it so chooses."

Letter at 16. Each of the requests for admission was designed to further this argument. This factual characterization is patently incorrect and entirely implausible. Nonetheless, Montana recognizes that Wyoming has a right to its interpretation and will have the

opportunity to present its case at trial. At the same time, Montana also is entitled to present its case. Ultimately, the task will rest with the Special Master to sort through the competing view of the facts.

1. **Request for Admission Nos. 2-2, 2-4, 2-6, 2-8, 2-10, 2-12, and 2-14; and Request for Production No. 2-1**

RFA Nos. 2-2, 2-4, 2-6, 2-8, 2-10, 2-12, and 2-14 request Montana to admit that it "has no documents from [a specified year] evidencing a call on Wyoming in [the specified year]." No definition was provided for the term "call," and Montana interpreted that term consistent with the Memorandum Opinion on Wyoming's Motion for Summary Judgment (Dec. 20, 2011) and Memorandum Opinion on Wyoming's Renewed Motion for Summary Judgment (Sept. 28, 2012). In response to RFP No. 2-1, Montana identified a number of documents that were relevant to the request, including all documents that had been produced as part of the briefing on the summary judgment motions.

In your Letter, you raise two issues. First, you claim that none of the documents identified by Montana tends to show that Montana notified Wyoming that it was not receiving sufficient water to satisfy its pre-1950 rights. As part of your assertion, you provide a lengthy interpretation of the documents. Montana does not share your understanding or interpretation of the documents. But the fact that we do not agree does not make Montana non-responsive.

Montana does not understand these RFAs to be asking whether a formal letter akin to those provided in 2004 or 2006 exists. Rather, Montana understands these RFAs to be asking whether there are any documents that support the fact that Montana notified Wyoming that it was not receiving sufficient water in each of the years at issue. "Evidencing" as set out in the RFAs is defined by Webster as "to tend to prove or disprove something." Your description of the documents provides ample support for Montana's denial of the RFAs because it shows that the documents "tend to prove" that Montana notified Wyoming that it was receiving insufficient water to satisfy its pre-Compact rights.

For example, as you recognize, the document identified by bates numbers MT12975-12979 is a letter from the Tongue River irrigators to former Montana Attorney General Mike McGrath, copying several Montana officials, regarding their "concern over the implementation of the Yellowstone River Compact." As you correctly note, the irrigators specifically "request[ed] that the State of Montana take 'the appropriate legal

action with Wyoming to protect Montana's share of the tributaries to the Yellowstone.'" Letter at 4 (quoting MT12975 – 12979). We know from our investigation that this letter prompted Montana officials, including Mr. Stults, to call for water from Wyoming. *See* Stults Declaration. At trial, this document will likely be presented as part of Mr. Stults' testimony to show that he called for water. It follows that this document evidences, supports, or tends to show that such communications were made. Thus, it is not possible for Montana to admit RFA No. 2-12. Each of the other documents identified by Montana similarly evidences the calls and communications that were made by Montana in each of the years.

Second, you suggest for the first time that Wyoming was asking for "documents in Montana's possession created during each of these years." Letter at 2. The RFAs do not make this point clear, and Montana did not originally understand the RFAs to be inquiring about documents that were created or drafted during each of the specific years identified. Given your clarification, Montana will investigate whether it is appropriate to amend its response to RFA Nos. 2-2, 2-4, and 2-6, and will inform you by Friday, May 17, 2013 of our intentions.

2. Request for Admission Nos. 2-55, 2-57, 2-59, 2-61, 2-63, and 2-65; Request for Production No. 2-6; and Interrogatory No. 3-6

Montana's responses to these discovery requests are accurate and correct. You state that "Wyoming remains concerned about Montana's inability or refusal to answer these specific questions that Wyoming has repeatedly asked." Letter at 6. Please do not confuse Montana's answers with an "inability or refusal" to respond. Wyoming may not agree with the responses, but Montana has provided complete and correct answers in accordance with the Federal Rules of Civil Procedure.

Given that the expert testimony shows that insufficient water reached Montana from Wyoming to satisfy Montana's pre-1950 uses, Wyoming's inquiries into water administration in Montana are irrelevant. That aside, as you correctly note, water commissioners were appointed to regulate water use on the Tongue River in Montana by administering stored water in the years 2000, 2001, 2002, 2004 and 2006. You suggest that the appointment from the court indicates the commissioners took no action to regulate post-1950 water use. Letter at 7. This is incorrect. As should be evident, it was not possible for the water commisioners to ensure that stored water arrived at the correct users without also making sure that post-1950 users were not taking more than their share. Contrary to your suggestion, the depositions of Montana water users confirm this. The unmistakable picture that emerges from those depositions is that (1)

the water commissioners met with the water users at the beginning of the years and explained the rules and allowable use of water; (2) the commissioners actively monitored and took necessary actions to administer water; and (3) Montana water users used water in priority and did not exceed their right.

3. Request for Admission Nos. 2-50, 2-52, 2-54, 2-56, 2-58, 2-60, 2-62, 2-64, and 2-66; Request for Production No. 2-7; and Interrogatory No. 3-7

RFA Nos. 2-50, 2-52, 2-54, 2-56, 2-58, 2-60, 2-62, 2-64 and 2-66 ask Montana to admit that it "knows of no other person or entity which regulated or curtailed the use of a post-1950 surface water right on the Tongue River in Montana for the benefit of a pre-1950 water right" in each of the years at issue. Montana cannot admit these RFAs because, as Montana explained in its response to Interrogatory No. 3-7 and elsewhere, it is aware that Montana water users curtailed their water use as necessary in order to stay within the limits of their rights. Wyoming has pointed to no evidence to the contrary. To the extent that Wyoming disagrees, you are free to raise the issue at trial. Montana stands by its answer as correct and responsive.

4. Request for Admission Nos. 2-67 through 2-71; Request for Production Nos. 2-8; and Interrogatory No. 3-8

As with each of the other issues you raise, the two States simply disagree on RFA Nos. 2-67 through 2-71.

There is no dispute in this action that Wyoming was allowing post-1950 water rights to be used in the years at issue. *See, e.g.,* Deposition Transcripts of Pat Tyrrell, Jeff Fassett, Mike Whitaker, Pat Boyd, Carmine LoGuidice, and Bill Knapp. In fact, Wyoming made no effort until very recently to curtail post-Compact users on the mainstem of the Tongue River at all. At the same time, through Montana's expert reports, we have shown that insufficient water was entering the State of Montana to satisfy pre-1950 users in all but three years since 1961. For that reason, Montana has repeatedly explained that none of Montana's water users, including the first right on the river, received a full supply in the years at issue. *See, e.g.,* Montana's First Supplemental Response to Wyoming's Second Set of Interrogatories (Nov. 21, 2012); Deposition Transcript of J. Nance. Given that Montana's pre-1950 water users were not receiving their full supply, which many Montana water users testified impacted their crop yield, it is difficult to understand Wyoming's assertion that Montana was not harmed by Wyoming's Compact violations.

5. Request for Admission Nos. 2-72 through 2-80; Request for Production No. 2-9; and Interrogatory No. 3-9

RFA Nos. 2-72 through 2-80 seek admissions that there are no documents that tend to "evidenc[e]" or show that Montana was harmed in each of the years at issue. In response, Montana identified a number of documents that show Montana's water needs and the way that shortages impact Montana water users, that Wyoming was allowing post-1950 water use, or that Montana was not receiving sufficient water to satisfy its pre-1950 water rights. For example, the HKM Reconnaissance Study (MT10946-10951) shows expanded use of water in Wyoming. Coupled with the tag books showing that Wyoming did not curtail post-1950 uses, and the depositions of Montana water users in which they describe a lack of water during the years at issue, these documents tend to show that Montana and its water users were "harmed by depletions to the Tongue River by post-1950 water users in Wyoming" in the years at issue.

6. Request for Admission Nos. 2-81 through 2-84; Request for Production No. 2-10; Interrogatory No. 3-11

RFA Nos. 2-81 through 2-84 request that Montana admit that it "released water from the Tongue River Reservoir that it could have stored" in each of the years at issue. These RFAs are vague, and in any event, as Wyoming has been aware since prior to the adoption of the Compact, safety, hydrology, water rights, and operational reasons require that the Tongue River Reservoir bypass a minimum amount of water during the winter. For example, the abstract pending in the adjudication court provides that water "is diverted into storage and released under the Operation Plan for Tongue River Reservoir developed pursuant to the Northern Cheyenne-Montana Compact." That Operation Plan, which was adopted in conjunction with the United States and the Northern Cheyenne, requires a winter bypass of 175 cfs. The expert reports of Kevin Smith and Chuck Dalby, and the depositions of Kevin Smith, Chuck Dalby and Art Hayes, confirm that the winter flows in each of the years at issue were necessary. As a result, Montana did not "release water from the Tongue River Reservoir that it could have stored."

7. Privilege Log

Attached please find the privilege log listing the protected documents that were withheld from those documents produced at the depositions of Montana's expert witnesses. Many of the emails were provided to our legal team in text format, which is why you will find that multiple emails were located on the same page.

Finally, Wyoming's persistent accusations of bad-faith are not helpful. Throughout this litigation Montana has made every effort to answer Wyoming's discovery requests completely and accurately. What you term "evasive" is nothing more than a good-faith dispute over the facts.

Please call if you would like to discuss any of these issues further.

Very truly yours,

Jeffrey J. Wechsler

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