

No. 137, Original

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In The  
Supreme Court Of The United States

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STATE OF MONTANA,  
Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA  
Defendants.

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

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**Notice of Filing of the  
Third Declaration of Richard M. Moy**

COMES NOW the State of Montana, pursuant to the Supplemental Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirement for Damages), and gives notice of the filing of the Third Declaration of Richard M. Moy. The Third Declaration is attached hereto as Exhibit A.

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**THIRD DECLARATION OF RICHARD M. MOY**

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COMES NOW Richard M. Moy, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am over 18 years of age. Currently, I am a Commissioner, appointed by the President of the United States, of the International Joint Commission, U.S. Department of State. The International Joint Commission oversees administration of the Boundary Waters Treaty (1909) with Canada, arbitrates trans-boundary water disputes and issues orders with regard to trans-boundary reservoirs.

2. I am a former water resources manager for the State of Montana, Department of Natural Resources and Conservation ("DNRC"). I was the DNRC Water Resources Management Bureau Chief from 1981 to December 2008.

3. During my tenure as DNRC Water Management Bureau Chief, I had responsibility for oversight of the Yellowstone River Compact ("Compact") for Montana and attended meetings of the Yellowstone River Compact Commission ("Commission" or "YRCC").

**EXHIBIT  
A**

THIRD DECLARATION OF RICHARD MOY  
PAGE 1

As part of my responsibilities, I was authorized to communicate directly with Wyoming water officials regarding matters related to the Compact, including water shortages in Montana, administration of the Compact, and Wyoming's obligations under the Compact.

4. I have read my original Declaration filed in this matter, which is dated September 22, 2011. I have also read my Second Declaration in this matter, which is dated December 7, 2012. After reading those Declarations, I reaffirm the statements I made in those documents. I thought that I had conveyed the statements contained in this Third Declaration in my previous testimony, but in the event that the original Declaration, the Second Declaration, or my deposition testimony was unclear, this Third Declaration is intended to clarify that testimony.

5. Rather than a series of isolated facts, the statements in this Declaration should be read as related to each other, and related to the statements that I made in both my original and my Second Declaration, as well as in my deposition.

6. One of my personal priorities in my position as DNRC Water Management Bureau Chief was to ensure that Montana received its share of water under the Compact. In particular, I was concerned that Montana was not receiving sufficient water to satisfy pre-1950 water rights in Montana. For that reason, I oversaw several efforts to evaluate water rights, storage, and water use in both Montana and Wyoming. Some of those efforts are described in my Second Declaration. *See* Second Declaration ¶¶ 15-16, 18-19.

7. As I described in my Second Declaration, I also made repeated efforts to develop a methodology that would allow the Compact to be administered so that both Montana and Wyoming received their share of water. During the 1980s the individuals that I worked with from Wyoming were George Christopoulos, Jeff Fassett, Lou Allen, John Shields, Mike Whitaker, and Sue Lowry. For purposes of this Third Declaration, I will refer to these individuals as the "Wyoming Water Officials."

8. As a separate effort, I also repeatedly communicated with Wyoming Water Officials concerning Montana's rights under the Compact, and what I perceived to be a problem with Montana not receiving its share of Compact water. Because I was concerned that Montana was not receiving its allocation of water under Article V(A), I raised this issue at every opportunity, especially during water short years.

9. I recall three sources of information that informed Montana when it was not receiving sufficient water: the flows of the rivers as reflected in the stateline gauging stations, communications with senior water right holders in Montana, and the water level in the Tongue River Reservoir. As I described in my Second Declaration, based on this information, I believed

that Montana was not receiving sufficient water to satisfy its pre-1950 water rights in 1987, 1988, and 1989.

10. At every opportunity I had during those three years, I raised the issues of water use in Wyoming, water shortage in Montana, and the need for action to protect Montana's Compact rights.

11. As I stated in my Second Declaration, I personally informed Wyoming Water Officials that Montana was not receiving enough water to satisfy its pre-1950 uses, and that "we needed to administer the Compact to remedy that problem." Second Declaration ¶ 27.

12. To be clear, in 1987, 1988, and 1989, I placed Wyoming Water Officials on notice that Montana was not receiving adequate water under the Compact to satisfy Montana's Article V(A) rights, and that Wyoming was therefore required to reduce its diversions, storage, and water use to allow additional water to flow downstream for Montana. These discussions would have occurred during the irrigation season, when Wyoming was in a position to take some action to protect Montana. Second Declaration, ¶ 27.

13. I have read the transcript of my deposition that was taken in this matter. I understand a "call" as it relates to water administration to be a communication that requests or demands the upstream user, in this case, Wyoming, to shut off or curtail its water use so that water can flow to the downstream user, in this case Montana. As I indicated in my deposition, in the 1980s both my staff and I made calls to Wyoming Water Officials. Based on my review of records, review of data, and review of historical documents, I can confirm that those years included 1987, 1988, and 1989. These discussions would have occurred during the irrigation season, when Wyoming was in a position to take some action to protect Montana. Second Declaration, ¶ 27.

14. In my Second Declaration I described several informal meetings that I had with Wyoming Water Officials. The purpose of those statements was to show that there were many opportunities during the years 1987, 1988, and 1989 to communicate with Wyoming Water Officials outside of the formal Compact Commission meetings.

15. As I indicated in my Second Declaration, my communications with Wyoming Water Officials, and specifically including the "calls" for water, occurred during the irrigation season in May or June.

16. Those communications were made to the Wyoming Water Officials, including Jeff Fassett, Lou Allen, John Shields, Mike Whitaker, and Sue Lowry. I do not recall the specific dates that I communicated to each of these individuals, but I generally recall that my

communications went to these individuals because each represented Wyoming in Compact matters, including at Commission meetings, Technical Committee meetings, and informal meetings. By virtue of their representation of Wyoming in Compact meetings, I understood that the Wyoming Water Officials were authorized by Wyoming to act in matters related to the Compact.

17. In sum, during the irrigation seasons in 1987, 1988, and 1989, I personally informed Wyoming Water Officials, including Jeff Fassett, Lou Allen, John Shields, Mike Whitaker, and Sue Lowry, that Montana was not receiving sufficient water to satisfy Montana's pre-1950 water rights on the Tongue River, and requested Wyoming to reduce its post-1950 uses of water in these years in order to allow more water to flow into Montana.

18. I have also read the Supplemental Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirements for Damages).

19. I understand that there was a question raised regarding the difference, if any, between the communications referred to in Paragraphs 24 and 35 of my Second Declaration. In Paragraph 24, I stated that during "informal meetings from 1987 to 1989, I personally informed Wyoming water officials that Montana was not receiving sufficient water to satisfy its pre-1950 water rights." As described in my Second Declaration, and in this Third Declaration, those communications took place during Commission meetings, and during informal meetings during the irrigation season.

20. Paragraph 35 of my Second Declaration states that "I believe that Montana was not receiving sufficient water to satisfy its pre-1950 water rights in the following years: 1988, 1989, 2001, and 2002, when Montana was unable to fill the Tongue River Reservoir." Paragraph 35 is intended to convey that I personally informed Wyoming Water Officials that Montana was not receiving sufficient water to fill the Reservoir during the spring of 1988 and 1989.

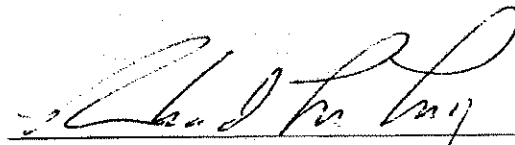
21. The difference between Paragraph 24 and Paragraph 35 is that I did not include 1987 in Paragraph 35. I believe that the omission of 1987 from Paragraph 35 was appropriate because I do not recall, and I have not reviewed any evidence, that indicates that the Tongue River Reservoir had trouble filling in 1987. That being said, it was appropriate to include 1987 in Paragraph 24, because regardless of the status of the Tongue River Reservoir, in 1987 Montana was not receiving sufficient water to satisfy its pre-1950 water rights because its direct flow rights were not being satisfied.

22. Paragraph 36 of my Second Declaration was intended to refer to both the more general communications described in Paragraph 24, as well as the more specific communications regarding the Tongue River Reservoir described in Paragraph 35. In general, I intended to

convey the message that during May or June of 1987, 1988, and 1989, I personally informed Wyoming Water Officials, that Montana was not receiving sufficient water to satisfy Montana's pre-1950 water rights on the Tongue River, including direct flow rights and the Tongue River Reservoir, and I requested Wyoming to reduce its post-1950 uses of water to allow more water to flow into Montana. My communications were verbal, but as I described in my deposition, they were otherwise the same as the written "call letters" that were sent by Montana to Wyoming in 2004 and 2006.

I state under penalty of perjury that the foregoing is true and correct.

Executed on December 19, 2012.

  
Richard M. Moy

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**CERTIFICATE OF SERVICE**

I certify that a copy of Notice of Filing of the Third Declaration of Richard M. Moy was served by electronic mail on this 19th day of December, 2012, and by placing the same in the U.S. mail on December 20, 2012, to the following:

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I further certify that all parties required to be served have been served.

  
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Jeffrey J. Wechsler