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Attachments: Montana's Responses to Wyoming's 2d Set of Ints. (00418375).pdf; Montana's Objections to Wyoming's Second Set of Interrogatories (00414730).pdf; Montana's Responses to Wyoming's First Request for Admissions (00414728).pdf; Ltr to MT 11-5-12.pdf; Letter to James Kaste (00419958).pdf; 2012-11-13-Ltr re\_ Discovery.pdf

Categories: Buzz

Ms. Carter,

In anticipation of the upcoming status conference and in conformity with Section VIII, G. 1(b) of Case Management Plan No. 1, the State of Wyoming would like to submit an ongoing discovery dispute to the Special Master for discussion and possible resolution at the status conference scheduled for November 30, 2012. The pertinent discovery requests, objections, and responses are attached. In addition, the parties' correspondence regarding the dispute is attached as well. These materials aptly outline the concerns of the State of Wyoming with the State of Montana's answers to Wyoming's second set of interrogatories and first requests for admission. Please advise if the Special Master requires any additional information related to this dispute prior to the status conference, or if he would like to set aside a different time to discuss this matter.

Thank you.

James.

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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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**MONTANA'S RESPONSES TO WYOMING'S  
FIRST REQUEST FOR ADMISSIONS**

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October 18, 2012

Subject to the objections set forth in Montana's Objections to Wyoming's Second Set of Interrogatories to Montana and Wyoming's First Request for Admissions as well as any objections stated herein, the State of Montana hereby responds as follows to Wyoming's First Request for Admissions.

**REQUEST FOR ADMISSION NO. 1:** Admit that in the year 2004 Montana did not curtail the use of any post-1950 water rights in the Tongue River Basin to satisfy a pre-1950 water right.

**RESPONSE:** Montana objects to Request for Admission No. 1 as vague and ambiguous due to the use of the language "curtail the use." Subject to, and without waiving this objection, Montana denies Request for Admission No. 1.

**REQUEST FOR ADMISSION NO. 2:** Admit that in the year 2004 Montana did not curtail the use of any post-1950 water rights in the Powder River Basin to satisfy a pre-1950 water right.

**RESPONSE:** Montana objects to Request for Admission No. 2 as vague and ambiguous due to the use of the language "curtail the use." Subject to, and without waiving this objection, Montana denies Request for Admission No. 2.

**REQUEST FOR ADMISSION NO. 3:** Admit that in the year 2006 Montana did not curtail the use of any post-1950 water rights in the Tongue River Basin to satisfy a pre-1950 water right.

**RESPONSE:** Montana objects to Request for Admission No. 3 as vague and ambiguous due to the use of the language “curtail the use.” Subject to, and without waiving this objection, Montana denies Request for Admission No. 3.

**REQUEST FOR ADMISSION NO. 4:** Admit that in the year 2006 Montana did not curtail the use of any post-1950 water rights in the Powder River Basin to satisfy a pre-1950 water right.

**RESPONSE:** Montana objects to Request for Admission No. 4 as vague and ambiguous due to the use of the language “curtail the use.” Subject to, and without waiving this objection, Montana denies Request for Admission No. 4.

**REQUEST FOR ADMISSION NO. 5:** Admit that in the year 2004 Montana water users with post-1950 water rights in the Tongue River Basin continued to use water after May 18, 2004.

**RESPONSE:** Montana objects to Request for Admission No. 5 as vague and ambiguous due to the use of the language “continued to use water” and “post-1950 water rights,” and further objects to Request for Admission No. 5 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 5. Montana further affirmatively states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

**REQUEST FOR ADMISSION NO. 6:** Admit that in the year 2004 Montana water users with post-1950 water rights in the Powder River Basin continued to use water after May 18, 2004.

**RESPONSE:** Montana objects to Request for Admission No. 6 as vague and ambiguous due to the use of the language “continued to use water” and “post-1950 water rights,” and further objects to Request for Admission No. 6 as irrelevant. Subject to, and without waiving this objection, Montana admits that certain water users in the Powder River Basin with “post-1950 water rights” may have “continued to use water” on certain dates after May 18, 2004 within Montana. Montana further affirmatively states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

**REQUEST FOR ADMISSION NO. 7:** Admit that in the year 2004 Montana water users with pre-1950 water rights in the Powder River Basin shared water with water users holding post-1950 water rights after May 18, 2004.

**RESPONSE:** Montana objects to Request for Admission No. 7 as vague and ambiguous due to the use of the language “shared water,” and further objects to Request for Admission No. 7 as irrelevant. Subject to, and without waiving this objection, Montana admits that certain water users in the Powder River Basin holding pre-1950 water rights may have “shared water” with water users holding post-1950 water rights on certain dates after May 18, 2004 within Montana. Montana further affirmatively states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

**REQUEST FOR ADMISSION NO. 8:** Admit that in the year 2004 Montana water users with pre-1950 water rights in the Tongue River Basin shared water with water users holding post-1950 water rights after May 18, 2004.

**RESPONSE:** Montana objects to Request for Admission No. 8 as vague and ambiguous due to the use of the language “shared water,” and further objects to Request for Admission No. 8 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 8, and affirmatively states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

**REQUEST FOR ADMISSION NO. 9:** Admit that in the year 2006 Montana water users with pre-1950 water rights in the Powder River Basin shared water with water users holding post-1950 water rights after July 28, 2006.

**RESPONSE:** Montana objects to Request for Admission No. 9 as vague and ambiguous due to the use of the language “shared water,” and further objects to Request for Admission No. 9 as irrelevant. Subject to, and without waiving this objection, Montana admits that certain water users in the Powder River Basin holding pre-1950 water rights may have “shared water” with water users holding post-1950 water rights on certain dates after July 28, 2006 within Montana. Montana further affirmatively states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

**REQUEST FOR ADMISSION NO. 10:** Admit that in the year 2006 Montana water users with pre-1950 water rights in the Tongue River Basin shared water with water users holding post-1950 water rights after July 28, 2006.

**RESPONSE:** Montana objects to Request for Admission No. 10 as vague and ambiguous due to the use of the language “shared water,” and further objects to Request for Admission No. 10 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 10, and affirmatively states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

**REQUEST FOR ADMISSION NO. 11:** Admit that in the year 2006 Montana water users with post-1950 water rights in the Tongue River Basin continued to use water after July 28, 2006.

**RESPONSE:** Montana objects to Request for Admission No. 11 as vague and ambiguous due to the use of the language “continued to use water” and “post-1950 water rights,” and further objects to Request for Admission No. 11 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 11. Montana further affirmatively states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.



**REQUEST FOR ADMISSION NO. 12:** Admit that in the year 2006 Montana water users with post-1950 water rights in the Powder River Basin continued to use water after July 28, 2006.

**RESPONSE:** Montana objects to Request for Admission No. 12 as vague and ambiguous due to the use of the language “continued to use water” and “post-1950 water rights,” and further objects to Request for Admission No. 12 as irrelevant. Subject to, and without waiving this objection, Montana admits that certain water users in the Powder River Basin with “post-1950 water rights” may have “continued to use water” on certain dates after July 28, 2006 within Montana. Montana further affirmatively states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

**REQUEST FOR ADMISSION NO. 13:** For each year other than 2004 and 2006, in which you claim that a call was made or which the Special Master finds to be at issue in his impending ruling on the Renewed Motion for Partial Summary Judgment, admit that Montana did not curtail the use of any post-1950 water rights in the Tongue River Basin to satisfy a pre-1950 water right.

**RESPONSE:** Montana objects to Request for Admission No. 13 as vague and ambiguous due to the use of the language “curtail the use of any post-1950 water rights,” and further objects to Request for Admission No. 13 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 13, and affirmatively states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming

deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

**REQUEST FOR ADMISSION NO. 14:** For each year other than 2004 and 2006, in which you claim that a call was made or which the Special Master finds to be at issue in his impending ruling on the Renewed Motion for Partial Summary Judgment, admit that Montana did not curtail the use of any post-1950 water rights in the Powder River Basin to satisfy a pre-1950 water right.

**RESPONSE:** Montana objects to Request for Admission No. 14 as vague and ambiguous due to the use of the language “curtail the use of any post-1950 water rights,” and further objects to Request for Admission No. 14 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 14, and affirmatively states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

**REQUEST FOR ADMISSION NO. 15:** For each year other than 2004 and 2006, in which you claim that a call was made or which the Special Master finds to be at issue in his impending ruling on the Renewed Motion for Partial Summary Judgment, in the periods that you claim Wyoming was subject to a call admit that Montana water users with post-1950 water rights in the Tongue River Basin continued to use water after the date the call was made.

**RESPONSE:** Montana objects to Request for Admission No. 15 as vague and ambiguous due to the use of the language “continued to use” and “in the periods that you claim Wyoming was subject to a call,” and further objects to Request for Admission No. 15 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 15, and affirmatively states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

**REQUEST FOR ADMISSION NO. 16:** For each year other than 2004 and 2006, in which you claim that a call was made or which the Special Master finds to be at issue in his impending ruling on the Renewed Motion for Partial Summary Judgment, in the periods that you claim Wyoming was subject to a call admit that Montana water users with post-1950 water rights in the Powder River Basin continued to use water after the date the call was made.

**RESPONSE:** Montana objects to Request for Admission No. 16 as vague and ambiguous due to the use of the language “continued to use” and “in the periods that you claim Wyoming was subject to a call,” and further objects to Request for Admission No. 16 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 16, and affirmatively states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

**REQUEST FOR ADMISSION NO. 17:** For each year other than 2004 and 2006, in which you claim that a call was made or which the Special Master finds to be at issue in his impending ruling on the Renewed Motion for Partial Summary Judgment, in the periods that you claim Wyoming was subject to a call admit that Montana water users with pre-1950 water rights in the Powder River Basin shared water with water users holding post-1950 water rights after the date the call was made.

**RESPONSE:** Montana objects to Request for Admission No. 17 as vague and ambiguous due to the use of the language “shared water” and “in the periods that you claim Wyoming was subject to a call,” and further objects to Request for Admission No. 17 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 17, and affirmatively states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

**REQUEST FOR ADMISSION NO. 18:** For each year other than 2004 and 2006, in which you claim that a call was made or which the Special Master finds to be at issue in his impending ruling on the Renewed Motion for Partial Summary Judgment, in the periods that you claim Wyoming was subject to a call admit that Montana water users with pre-1950 water rights in the Tongue River Basin shared water with water users holding post-1950 water rights after the date the call was made.

**RESPONSE:** Montana objects to Request for Admission No. 18 as vague and ambiguous due to the use of the language “shared water” and “in the periods that you

claim Wyoming was subject to a call,” and further objects to Request for Admission No. 18 as irrelevant. Subject to, and without waiving this objection, Montana denies Request for Admission No. 18, and affirmatively states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Respectfully submitted,

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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.

◆  
\_\_\_\_\_  
Before the Honorable Barton H. Thompson, Jr.  
Special Master  
◆  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

As counsel of record for Montana, I certify that a copy of Montana's Responses to Wyoming's First Request for Admissions was served by electronic mail and U.S. mail, on October 18, 2012, on the following:

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

  
John B. Draper

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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**MONTANA'S RESPONSES TO WYOMING'S  
SECOND SET OF INTERROGATORIES**

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*\*Counsel of Record*

November 2, 2012



Plaintiff the State of Montana ("Montana") hereby responds to Wyoming's Second Set of Interrogatories to Montana ("Second Set of Interrogatories"). Responses are being made subject to Montana's Objections to Wyoming's Second Set of Interrogatories to Montana and Wyoming's First Request for Admissions ("Montana's Objections"), and subject to further objections as set forth below.

**I. WHEN DO YOU CLAIM WYOMING IS LIABLE TO MONTANA?**

**INTERROGATORY NO. 2-1<sup>1</sup>:** For each year in which Montana claims it made a call on Wyoming other than 2004 and 2006, please identify what part of each water year you claim Wyoming was subject to the call.

**ANSWER:** As explained by the Special Master, "the notice or call does not need to be instantaneous in order to provide Montana with the right to pursue damages for any violation of Article V(A)." Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirement for Damages) at 16 (Sept. 28, 2012) ("Memorandum Opinion"). Montana claims that Wyoming was subject to the calls made in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 to the full extent allowed by the Memorandum Opinion.

**II. WHO DO YOU CLAIM WAS DAMAGED?**

**INTERROGATORY NO. 2-2:** For each year in which Montana claims it made a call on Wyoming, please identify the Montana water users with pre-1950 water rights who you claim were not receiving water that they were entitled to under the Compact.

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<sup>1</sup> In order to differentiate from Montana's responses to Wyoming's First Set of Interrogatories, Montana will designate each of the interrogatories in Wyoming's Second Set of Interrogatories with the prefix "2-". For example, Interrogatory No. 1 in Wyoming's Second Set, will be designated Interrogatory No. 2-1.

**ANSWER:** Montana objects to Interrogatory No. 2-2 to the extent that it seeks expert analysis, work product, and testimony prior to the date designated for disclosure of expert reports in CMP No. 1. Subject to and without waiving this objection, Montana states that it is the State of Montana, and not individual water users that is entitled to receive water under the Compact. Without admitting that individual water users who were not receiving water is a relevant inquiry at this stage of the proceedings, Montana further states that it did not receive sufficient water in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 to satisfy its pre-1950 water rights in the Tongue and Powder Basins. Montana is in the process of investigating the specific water rights that did not receive water, and it will disclose the results upon completing its investigation.

### **III. WHO DO YOU CLAIM IS RESPONSIBLE?**

**INTERROGATORY NO. 2-3:** For each year in which Montana claims it made a call on Wyoming, please identify which Wyoming water users with post-1950 water rights you claim Wyoming should have regulated to provide water that Montana water users were entitled to under the Compact.

**ANSWER:** Montana objects to Interrogatory No. 2-3 to the extent that it seeks expert analysis, work product, and testimony prior to the date designated for disclosure of expert reports in CMP No. 1. Subject to and without waiving this objection, and without admitting that Interrogatory No. 2-3 seeks information that is relevant, Montana states that Montana is in the process of investigating the post-1950 uses in Wyoming that were diverting water in 1987, 1988, 1989, 2000, 2001, 2002, and 2003. In general, information on Wyoming water users and diversions is more readily available to Wyoming than to Montana.

**IV. WHAT DID YOU DO TO REGULATE YOUR WATER USERS BEFORE MAKING A CALL?**

**INTERROGATORY NO. 2-4:** For each water year in which Montana claims it made a call on Wyoming, please describe the intrastate actions you took to investigate and regulate post-1950 water rights on the Tongue and Powder rivers to satisfy pre-1950 water rights before making calls on Wyoming.

**ANSWER:** Montana objects to Interrogatory No. 2-4 as vague and ambiguous due to the use of the terms "intrastate actions" and "investigate and regulate post-1950 water rights," and further objects to Interrogatory No. 2-4 as overly broad. Subject to and without waiving these objections, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 11, 12, 13, 14 and 15 of Wyoming's First Set of Interrogatories to Montana. Montana further states that it monitors the water use on the Tongue and Powder Rivers and the water level of the Tongue River Reservoir. Based on information available in each of the years at issue, including streamflow data, communications with water users, and water use, it concluded that it was not receiving sufficient water to satisfy its pre-1950 water uses.

**V. WHAT LANDS ARE IN DISPUTE?**

**INTERROGATORY NO. 2-5:** Please identify the "new lands" in Wyoming that you claim are being irrigated in violation of the Compact or which you claim are being improperly irrigated with a pre-1950 priority date.

**ANSWER:** Montana objects to Interrogatory No. 2-5 to the extent that it seeks expert analysis, work product, and testimony prior to the date designated for disclosure of expert reports in CMP No. 1, and further objects to Interrogatory No. 2-5 to the extent that it seeks information that is more readily available to Wyoming than to Montana. Subject to, and without waiving,

these objections, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 2 and 4 of Wyoming's First Set of Interrogatories to Montana.

**VI. IF YOU CAN'T ANSWER THESE QUESTIONS, EXPLAIN WHY.**

**INTERROGATORY NO. 2-6:** If you failed to answer any of the foregoing interrogatories on the grounds that you lack sufficient information or knowledge, please explain the investigation you engaged in before offering that answer.

**ANSWER:** Montana did not neglect to respond to any of the interrogatories in Wyoming's Second Set of Interrogatories on the grounds that it lacks sufficient information or knowledge.

**VII. IF YOU DO NOT ADMIT THAT PRE- AND POST-1950 WATER USERS IN MONTANA HAVE HISTORICALLY SHARED WATER WITHOUT REGARD TO THE DATE OF PRIORITY, EXPLAIN WHY.**

**INTERROGATORY NO. 2-7:** If you denied any of Wyoming's First Request for Admissions accompanying these interrogatories, please explain the basis for the denial.

**ANSWER:**

Request for Admission No. 1: Montana objects to Interrogatory No. 2-7 as it applies to Request for Admission ("RFA") No. 1 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 11, 12, 13, 14 and 15 of Wyoming's First Set of Interrogatories to Montana. In 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Request for Admission No. 2: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 2 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana

states that as explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

Request for Admission No. 3: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 3 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 12, and 15 of Wyoming's First Set of Interrogatories to Montana. In 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Request for Admission No. 4: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 4 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

Request for Admission No. 5: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 5 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water

rights in the Tongue River Basin in Montana. Montana is not currently aware of any post-1950 water rights that “continued to use water” from the Tongue River after May 18, 2004.

Request for Admission No. 8: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 8 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2004 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that “shared water with water users holding post-1950 water rights” in the Tongue River in 2004.

Request for Admission No. 10: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 10 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that “shared water with water users holding post-1950 water rights” in the Tongue River in 2006.

Request for Admission No. 11: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 11 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 2006 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any post-1950 water rights that “continued to use water” from the Tongue River after July 28, 2006.

Request for Admission No. 13: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 13 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental

answers to Interrogatory Nos. 10, 12, and 15 of Wyoming's First Set of Interrogatories to Montana. As explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 1987, 1988, 1989, 2000, 2001, 2002, and 2003, Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Request for Admission No. 14: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 14 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that as the basis for this denial, Montana incorporates its answers and supplemental answers to Interrogatory Nos. 10, 12, and 15 of Wyoming's First Set of Interrogatories to Montana. As explained in Montana's answer to Interrogatory No. 10 of Wyoming's First Set of Interrogatories to Montana, in Montana a senior appropriator may make a call on a junior appropriator requesting that he or she stop diverting water. Based on such a call, the junior appropriator would "curtail" his or her water use. In 1987, 1988, 1989, 2000, 2001, 2002, and 2003, Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana.

Request for Admission No. 15: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 15 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana.

Montana is not currently aware of any post-1950 water rights that “continued to use water” after the periods that “Wyoming was subject to a call.”

Request for Admission No. 16: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 16 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Powder River Basin in Montana. Montana is not currently aware of any post-1950 water rights that “continued to use water” after the periods that “Wyoming was subject to a call.”

Request for Admission No. 17: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 17 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that “shared water with water users holding post-1950 water rights” in the Powder River in 1987, 1988, 1989, 2000, 2001, 2002, and 2003.

Request for Admission No. 18: Montana objects to Interrogatory No. 2-7 as it applies to RFA No. 10 on the grounds that it is irrelevant. Subject to, and without waiving this objection, Montana states that in 1987, 1988, 1989, 2000, 2001, 2002, and 2003 Wyoming deprived Montana of sufficient water to satisfy the pre-1950 water rights in the Tongue River Basin in Montana. Montana is not currently aware of any pre-1950 water rights that “shared water with water users holding post-1950 water rights” in the Tongue River in 1987, 1988, 1989, 2000, 2001, 2002, and 2003.



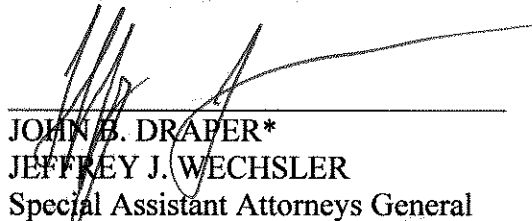
**INTERROGATORY NO. 28:** If you did not admit or deny any of the Requests for Admissions accompanying these interrogatories because you lack sufficient information or knowledge, please explain the investigation you engaged in before offering that answer and when you expect to have sufficient information to admit or deny the request.

**ANSWER:** Montana did not respond to any of the Requests for Admission on this basis.

Respectfully submitted,

STEVE BULLOCK  
Attorney General of Montana

JENNIFER ANDERS  
Assistant Attorney General  
ANNE YATES  
Special Assistant Attorney General  
215 North Sanders  
Helena, Montana 59620-1401



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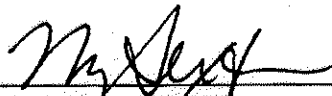
JOHN B. DRAPER\*  
JEFFREY J. WECHSLER  
Special Assistant Attorneys General  
MONTGOMERY & ANDREWS, P.A.  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
*\*Counsel of Record*

**VERIFICATION**

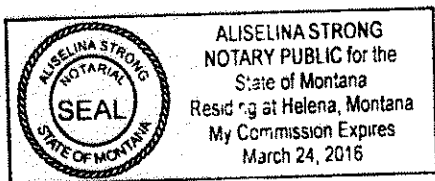
STATE OF MONTANA            )  
  : ss.  
County of Lewis and Clark    )

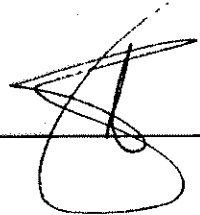
**MARY SEXTON**, being first duly sworn upon oath, deposes and says:

I am Mary Sexton, the Director of the Montana Department of Natural Resources and Conservation. I have reviewed Montana's Responses to Wyoming's Second Set of Interrogatories, and I hereby confirm that they have been prepared under my direction and are true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
MARY SEXTON

Subscribed and sworn to before me this 2nd day of November, 2012.



  
\_\_\_\_\_

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.

---

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

---

**MONTANA'S OBJECTIONS TO WYOMING'S  
SECOND SET OF INTERROGATORIES TO MONTANA AND WYOMING'S  
FIRST REQUEST FOR ADMISSIONS**

STEVE BULLOCK  
Attorney General of Montana  
JENNIFER ANDERS  
Assistant Attorney General  
ANNE YATES  
Special Assistant Attorney General  
215 North Sanders  
Helena, Montana 59620-1401

JOHN B. DRAPER\*  
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Special Assistant Attorneys General  
MONTGOMERY & ANDREWS, P.A.  
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(505) 982-3873  
*\*Counsel of Record*

October 18, 2012

COMES NOW the State of Montana, pursuant to Sections VIII.C.1(b) and VIII.C.1(d) of Case Management Plan No. 1 (December 20, 2011) ("CMP No. 1"), and submits the following initial objections to Wyoming's Second Interrogatories to Montana ("Second Interrogatories") and Wyoming's First Request for Admissions ("First RFA"). Montana's responses to the Second Interrogatories are due on November 2, 2012. Montana will respond to the Second Interrogatories to the extent that those interrogatories or requests are not objectionable.

### **OBJECTIONS**

1. Montana objects to the extent that any interrogatory or request for admission seeks privileged or work product information.

2. To the extent that Wyoming seeks information that is confidential or constitutes a trade secret, such information and documents will be produced pursuant to CMP No. 1, § VIII.F (Confidentiality).

3. Montana objects to those interrogatories and requests for admission that purport to impose a greater obligation on Montana than is imposed by CMP No. 1 or the Federal Rules of Civil Procedure as incorporated in CMP No. 1.

4. Montana objects to those interrogatories and requests for admission that are unduly burdensome, overly broad, or that seek information obtainable from another source that is more convenient, less burdensome, less expensive, or as readily available to Wyoming as to Montana. Interrogatories to which this objection applies include, but are not necessarily limited to, the following: Second Interrogatories, Interrogatory No. 2 ("2-2"), 2-3, 2-5, and 2-7.

5. Montana objects to those interrogatories and requests for admission to the

extent that they seek information neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence. Interrogatories to which this objection applies include, but are not necessarily limited to, the following: 2-3 and 2-4.

6. Montana objects to those interrogatories and requests for admission that seek expert analysis and testimony prior to the date designated for disclosure of expert testimony and reports in CMP No. 1. *See* CMP No. 1, § VII.A. Interrogatories to which this objection applies include, but are not necessarily limited to, the following: 2-2, 2-3, 2-4, and 2-5.

7. Montana objects to those interrogatories and requests for admission to the extent that they seek information and documents pertaining to retrospective or prospective remedies. *See* CMP No. 1, §§ II, VIII.A.

8. Montana objects to those interrogatories and requests for admission that are vague and ambiguous. Interrogatories to which this objection applies include, but are not necessarily limited to, the following: 2-1, 2-2, 2-3, 2-4, and 2-5.

Each of the foregoing objections is incorporated by reference into each of Montana's responses as if fully set forth therein. The responses to interrogatories that will be provided on November 2, 2012, will be provided subject to and without waiver of these objections and subject to and without waiver of any further objections asserted in response to any individual interrogatory or request for admission.

In addition, Montana has not yet completed its investigation and preparation for the adjudication of this action. Montana's answers are based on its current knowledge and understanding. Montana will supplement or amend its answers to the interrogatories

or requests for admission pursuant to CMP No. 1, § VIII.H.

**RULE 33(d) OPTION TO PRODUCE BUSINESS RECORDS**

Consistent with Rule 33(d) of the Federal Rules of Civil Procedure, as incorporated by CMP No. 1, *see* § VIII.B, Montana's answers to many of the interrogatories are contained in certain business records that have already been produced or will be produced in response to the discovery.

Respectfully submitted,

STEVE BULLOCK  
Attorney General of Montana

JENNIFER ANDERS  
Assistant Attorney General  
ANNE YATES  
Special Assistant Attorney General  
215 North Sanders  
Helena, Montana 59620-1401



JOHN B. DRAPER\*  
JEFFREY J. WECHSLER  
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Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
*\*Counsel of Record*

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.

---

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

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**CERTIFICATE OF SERVICE**

As counsel of record for Montana, I certify that a copy of Montana's Objections To Wyoming's Second Set of Interrogatories to Montana and Wyoming's First Request for Admissions was served by electronic mail and U.S. mail, on October 18, 2012, on the following:

Peter K. Michael  
Chief Deputy Attorney General  
Jay Jerde  
David Willms  
Andrew Kuhlmann  
James C. Kaste  
Christopher M. Brown  
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Cheyenne, WY 82002

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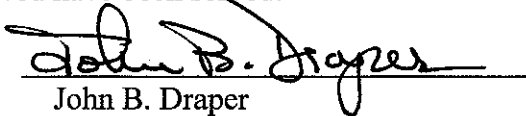
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Barton H. Thompson, Jr., Special Master  
Susan Carter, Assistant  
Jerry Yang and Akiko Yamazaki  
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Stanford, CA 94305-4205  
(Original and 3 copies of Certificate of Service  
only by U.S. Mail)  
[susan.carter@stanford.edu](mailto:susan.carter@stanford.edu)

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

  
John B. Draper





# *Office of the Attorney General*

**Governor**  
Matthew H. Mead

**Attorney General**  
Gregory A. Phillips

Water and Natural Resources Division  
123 State Capitol  
Cheyenne, Wyoming 82002  
307-777-6946 Telephone  
307-777-3542 Fax

**Chief Deputy Attorney General**  
Peter K. Michael

**Division Deputy**  
Jay A. Jerde

November 5, 2012

John B. Draper  
Jeffrey Wechsler  
Montgomery & Andrews  
325 Paseo de Peralta  
Santa Fe, NM 87501

John and Jeff,

We have received Montana's Responses to Wyoming's Second Set of Interrogatories and First Request for Admissions, and were disappointed to see that the State of Montana has avoided answering each of the simple questions set forth therein. At this stage of the litigation there is no reasonable excuse for failing to identify with specificity the basic information underlying Montana's claims. Wyoming is entitled to know which water rights are in issue in both states, when the Compact was allegedly breached, what lands are in dispute, and what specific actions Montana took to regulate specific water users within its borders before making calls on Wyoming. Montana's legal objections are specious and obstructive, the references to previous interrogatory responses unrelated to the current interrogatories are a distraction, and we see no benefit in an extended discussion of these points.

Similarly, in light of Mr. VanCleave's May 17, 2004, e-mail there is no basis for any answer to Request for Admission No. 6 other than an outright admission. Admitting that something might have occurred is no admission at all, and this answer needs to be revisited.

These discovery requests seek the barest foundational contentions upon which this suit is based, and which Montana presumably has possessed since before suit was filed. Montana's continued failure to specify the nature of its claims is prejudicing Wyoming's ability to adequately defend this case. Accordingly, if we cannot obtain straight answers to each of these interrogatories by November 16, 2012, we intend to bring these responses to the attention of the Special Master at the earliest possible time.

John Draper  
November 5, 2012  
Page 2

Thank you for your attention to these matters.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Kaste", written in a cursive style.

James Kaste  
Senior Assistant Attorney General

cc: Jennifer Anders  
Jeanne S. Whiteing  
Jennifer Verleger  
James Dubois  
Solicitor General of the United States  
Michael Wigmore



**MONTGOMERY  
& ANDREWS**

**JOHN B. DRAPER**

Direct: (505) 986-2525

Email: [jdraper@montand.com](mailto:jdraper@montand.com)

Reply To: Santa Fe Office

[www.montand.com](http://www.montand.com)

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Via Email and U.S. Mail

November 9, 2012

James Kaste  
Senior Assistant Attorney General  
State of Wyoming  
123 State Capitol Building  
Cheyenne, WY 82002

**Re: *Montana v. Wyoming*, No. 137 Orig.: Montana's Responses to Wyoming's Second Set of Interrogatories and First Requests for Admission**

Dear James:

Thank you for your letter of November 5, 2012 regarding Montana's Responses to Wyoming's Second Set of Interrogatories and First Requests for Admission ("Montana's Responses"). In your letter you suggest that Montana is intentionally avoiding responding to discovery. I want to assure you that is not the case. Montana is making every effort to litigate this case in good faith as is befitting a dispute between states in the original jurisdiction of the Supreme Court.

Montana stands by its Responses as fully responsive to Wyoming's Second Set of Discovery. Nonetheless, we are open to considering Wyoming's concerns about those Responses. As with past discovery disputes, Montana will make every reasonable effort to address Wyoming's concerns.

In your letter you refer generally to all of Montana's responses to Wyoming's Interrogatories. Following is a detailed review of each of the responses. In order to assess Wyoming's concerns, however, Montana needs further information about the perceived inadequacies and the information that you seek.

---

**REPLY TO:**

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Albuquerque, New Mexico 87176-6210

In Interrogatory No. 2-1, Wyoming seeks information about "what part of each water year [Montana] claim[s] Wyoming was subject to a call." We believe that Montana's answer to this interrogatory is fully responsive. The Special Master addressed this issue in both his original Memorandum Opinion on Wyoming's Motion for Summary Judgment (Dec. 20, 2011), at 8, and in his Memorandum Opinion on Wyoming's Renewed Motion for Summary Judgment (Sept. 28, 2012), at 16. Without further input, Montana is not clear what additional factual or legal information Wyoming is inquiring about.

In Interrogatory No. 2-2, Wyoming seeks the identification of pre-1950 water rights in Montana that did not receive sufficient water in the years at issue. Much of the analysis responsive to Interrogatory No. 2-2 is being performed by Montana's experts, and therefore not subject to discovery. After reviewing Interrogatory No. 2-2 in light of Wyoming's concerns, however, we believe that there may be additional information that we can provide to Wyoming that is not protected and is responsive. In your November 5, 2012 letter, you request supplemental responses on November 16<sup>th</sup>. Unfortunately due to the deposition schedule for next week, that will not be possible. We will commit to providing you a response on November 21, 2012, the same day that we anticipate Wyoming's supplemental responses to Montana's First Set of Discovery.

Interrogatory No. 2-3 seeks information concerning which post-1950 water users in Wyoming should have been regulated in the years at issue. As indicated in Montana's response, Montana is in the process of investigating this issue. Indeed, in an attempt to answer this very question, on May 4, 2012, Montana propounded discovery to Wyoming to obtain the necessary information that is uniquely in the possession of Wyoming. Specifically, Interrogatory Nos. 52, 53, 54, 55, 56, 57, 58, 59, 64, and 65, and Request for Production Nos. 1 and 5 sought information that go to the question of water use and regulation in Wyoming. Unfortunately, Montana did not receive that information from Wyoming. For your convenience, I am attaching a copy of the November 2, 2012 letter that outlines Montana's concerns with Wyoming's responses to these interrogatories. For example, when Montana was in Sheridan viewing documents that Wyoming made available in response to the Joint Document Production Order, Wyoming disclosed an 11 page document that indicated the dates that certain water rights had been regulated in either 2004 and 2006. See email from P. Michael to J. Draper et al. (March 29, 2012). Wyoming subsequently claimed work product for this document, even though it was disclosed and has never been listed on a privilege log. Without information from Wyoming responsive to Montana's discovery requests, Montana is not able to supplement its answer to Interrogatory No. 2-3.

Interrogatory No. 2-4 seeks information about the "intrastate actions [Montana] took to investigate and regulate" post-1950 water rights in Montana. The answer to Interrogatory No. 2-4 provides information about the investigation that Montana undertook in each of those years to determine that it was not receiving sufficient water

James Kaste  
November 9, 2012  
Page 3

from Wyoming. Although you dismiss "references to previous interrogatory responses" as a "distraction," a review of Montana's previous responses referenced will reveal information concerning the Water Commissioners that were appointed in five separate years on the Tongue River, and the way in which water is curtailed by Montana water users, all of which we continue to believe is responsive to Interrogatory No. 2-4.

Moreover, Montana responded generally about the actions it took to investigate because it is unclear what "intrastate actions" Wyoming alleges Montana should have taken or is concerned about. In an attempt to better understand Wyoming's contentions, Montana propounded Interrogatory Nos. 13, 31, 32, 33, 97, and 98 in its First Set of Interrogatories. Unfortunately, Wyoming did not provide answers to those interrogatories. As outlined in Montana's attached November 2, 2012 letter, Montana is hoping to receive information from Wyoming on this issue, which will assist Montana in answering Wyoming's Second Set of Interrogatories. After November 21, 2012, when Montana has had an opportunity to review Wyoming's supplemental responses, Montana may be in a position to supplement its response to Interrogatory No. 2-4.

In the meantime, Montana stands by its answer to Interrogatory No. 2-4 as accurate. If Wyoming would like more information, it would be helpful if you would identify the specific intrastate actions you are concerned about, or otherwise specify the additional information that you are seeking. Until we receive that clarification, we are uncertain whether we are able to address your concern.

Interrogatory No. 2-5 seeks information about post-1950 acreage that is being irrigated in Wyoming. As with Interrogatory No. 2-4, Interrogatory No. 2-5 seeks information that is uniquely in the possession of Wyoming. In its First Set of Discovery to Wyoming, Montana sought information that would allow it to respond to this inquiry in its Interrogatory Nos. 9, 88, 89, and 100. When Montana was in Sheridan, viewing documents that Wyoming made available in response to the Joint Document Production Order, Wyoming disclosed several maps that showed irrigated acreage in Wyoming. Regrettably, Wyoming later claimed that these maps were privileged. See Wyoming Privilege Log (April 30, 2012) (listing "Irrigated Acreage Maps" as privileged under the work product doctrine). Montana does not agree that the information about irrigated acreage in Wyoming is protected from discovery. More importantly for the purposes of Interrogatory No. 2-5, without further information from Wyoming on this issue, Montana has instructed its experts to investigate the information that Wyoming seeks. As expert work product, this information is protected from discovery, and is subject to the expert disclosure deadline in Case Management Plan No. 1.

We assume that you do not have any concerns with Interrogatory Nos. 2-6, 2-7 and 2-8. Please advise if this is not correct.

James Kaste  
November 9, 2012  
Page 4

In your letter, you take issue with Montana's admission to Request for Admission No. 6. It would be helpful if you could provide, or otherwise identify, the email to which you refer in your letter so that we can be certain that we are addressing the same correspondence. While we are willing to consider a modified response, given the broad language of Request for Admission No. 6, we are not willing to consider an "outright admission" as you suggest.

Other than the concern that you raise with respect to Request for Admission No. 6, we assume that you do not have any concerns with respect to Montana's responses to Wyoming's Requests for Admission.

We are available to discuss these issues with you at your convenience.

Sincerely yours,



John B. Draper

JBD:dlo  
enclosure

cc: Jeffrey J. Wechsler, Esq.  
Jennifer Anders, Esq.  
Peter K. Michael, Esq.  
David Willms, Esq.  
Christopher Brown, Esq.



**MONTGOMERY  
& ANDREWS**  
LAW FIRM

JEFFREY J. WECHSLER  
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November 2, 2012

Via Electronic Mail

Peter K. Michael, Esq.  
Chief Deputy Attorney General  
State of Wyoming  
123 State Capitol Building  
Cheyenne, WY 82002  
[peter.michael@wyo.gov](mailto:peter.michael@wyo.gov)

**Re: *Montana v. Wyoming*, No. 137 Orig.: Deficiencies with Wyoming's responses to Montana's First Set of Discovery**

Dear Pete:

I am writing this letter to express Montana's concerns with many of Wyoming's responses to Montana's First Set of Interrogatories, First Set of Requests for Production, and First Set of Requests for Admission to Wyoming, and to request that Wyoming supplement those responses. Our general concerns are set forth below, and more specific issues with certain interrogatories are identified in Exhibit A to this letter.

We recognize that it has taken several months for us to express our concerns. We hope that you appreciate that this short delay was the result of other unavoidable commitments, of which you are aware, and the time necessary to review the tens of thousands of documents that Wyoming claimed were responsive to the interrogatories. As you know, Montana's expert reports are due January 4, 2012. Our experts are unable to perform their analysis without the necessary information requested by Montana in discovery. For that reason, I ask that Wyoming supplement its discovery responses no later than Wednesday, November 21, 2012. In the past we have been able to work together to resolve discovery issues, and I hope that we may continue that effort. We would be happy to discuss Montana's concerns with you, James, David, or Chris at your convenience, in an effort to resolve the issues set forth below. I am generally available next Monday and Tuesday, November 5<sup>th</sup> and 6<sup>th</sup>.

---

**REPLY TO:**

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## INTERROGATORIES

In each of its answers, Wyoming recites a litany of objections contrary to the Rules of Civil Procedure. See Fed. R. Civ. Proc. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity."). For example, in response to almost all of the 105 interrogatories, Wyoming objects "to the extent that it calls for attorney-client privileged communications; attorney's work product; and attorney's trial strategy, legal conclusions, and mental impressions." See, e.g., answer to Interrogatory No. 1. Montana cannot tell from this generic objection whether Wyoming is withholding information. If Wyoming is refusing to provide a full and complete answer to an interrogatory on the basis of attorney client privilege or work product, please be specific with respect to the information for which Wyoming is withholding an answer, in order to allow us to properly evaluate the privilege and work product objections. Otherwise, please confirm that Wyoming is not withholding responsive information on this basis, other than those documents identified on the February 1, 2012 and July 3, 2012 privilege log.

Wyoming also repeatedly objects "to the extent that [an interrogatory] is so vague, ambiguous, or overbroad that it is unduly burdensome or oppressive for Wyoming to answer." See, e.g., answer to Interrogatory No. 2, at 10. Thereafter, Wyoming identifies as "vague and undefined" a number of everyday terms commonly used in discovery requests, such as "in detail," "supports," "relates to or refers to," and "legal authorities." Montana uses the foregoing terms and others in their ordinary sense, just as Wyoming used very similar terms in its interrogatories to Montana. See, e.g., Wyoming's Interrogatory No. 5 (requesting "all facts supporting this claim"); Wyoming's Interrogatory No. 26 (requesting a "detailed description of the facts, observations, documents, or items of evidence"); Wyoming's Interrogatory No. 39 (requesting the identity of those "with personal knowledge related to the installation of the devices or fixtures"); see also Wyoming's First Set of Interrogatories at 2 (defining "[t]he terms 'regarding,' 'referring,' or 'relating' [to] mean comprising, reflecting, containing, pertaining, indicating, showing, evidencing, describing, disclosing, mentioning, or bearing upon"). Montana is happy to clarify any terms that Wyoming is unclear about. Otherwise, we will anticipate full answers to the interrogatories.

In sum, Wyoming's objections on the foregoing bases do not excuse its failure to provide full and complete answers. I explain in further detail below the deficiencies of categories of objections and responses that Wyoming repeatedly makes in its answers.

### 1. Relevance

Wyoming objects to a number of interrogatories on the basis of relevance. See, e.g., answers to Interrogatory Nos. 2, 31, 77, 78, 80, 81, 82, 95, 105 (citing *Montana v*



Peter K. Michael  
November 2, 2012  
Page 3

*Wyoming*, 131 S. Ct. 1765 (2011) and Memorandum Opinion of Special Master on Montana's claims under Article V(B) (Dec. 20, 2012) ("Memo. Op."); see Answers to Interrogatory Nos. 34, 39(o) & (p), 40(o) & (p), 43, 52; 56(c), 67, 71; see also Wyoming's Objections to Montana's First Set of Interrogatories and First Set of Requests for Production to Wyoming at 3, ¶ 4. This objection is unsupported.

Federal Rule of Civil Procedure 26(b)(1) provides that a party may obtain discovery that is relevant to any party's claim or defense. Relevant information need not be admissible at trial; such information is discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Rule 26(b)(1) further provides that for good cause, a party may obtain discovery "of any matter relevant to the subject matter involved in the action." Under this standard, Montana believes that Wyoming's objections to relevance cannot be sustained.

For example, Interrogatory No. 34 requests information regarding Wyoming's practices with reservoirs throughout the state. This information comes within the Rule 26(b) standard—it is relevant to a party's claim or defense. In fact, Interrogatory No. 34 concerns a contention that Wyoming has indicated in discovery that it may make in this case. In other words, Wyoming's litigation position put this information at issue with respect to Montana's claims.

Moreover, some of Wyoming's relevance objections appear to be based on the Special Master's determination that the case as pled concerns only pre-1950's rights. See, e.g., Answer to Interrogatory No. 2 at 9-10. However, the Special Master expressly recognized that "information relevant to portions of the Compact other than Article V(A) will often be relevant to a resolution of Montana's allegations regarding pre-1950 uses." Memo. Op. at 18. The Special Master noted examples of Article V(B) issues that could be relevant to Montana's pre-1950 rights, such as the measure of "unused and unappropriated" water as that term is used in Article V(B), whether taking water that was either "used" or "appropriated" pre-1950 is a violation of Article V(B), and the nature and extent of post-1950 rights in Wyoming. *Id.* at 3-4. Accordingly, the Special Master instructed that "Montana's current Complaint should not be used to try to unduly limit Montana's discovery. *Id.*

Using Interrogatory No. 95 as an example, Montana requests information concerning water that was delivered by Wyoming to satisfy Articles V(B) and V(C). This information is relevant because, as the Special Master has recognized, Article V represents an integrated delivery scheme for all of the waters of the Tongue and Powder Rivers, and shows the position of the States on relevant issues and the streamflow in the rivers. Interrogatory No. 95 is reasonably calculated to lead to the discovery of admissible evidence regarding the apportionment of the Tongue and Powder Rivers, including to provide supplemental water supplies for pre-1950 uses. Thus, Interrogatory No. 95 is clearly within the scope of discovery, as set forth by the

Special Master, and Wyoming's answer is insufficient. The same holds true for the remaining interrogatories in which Wyoming asserts this same objection.

## 2. Final Position

In response to numerous interrogatories, Wyoming refused to answer in part on grounds that "it continues to investigate its case and therefore has not taken a final position with regard to the question posed." See, e.g., answers to Interrogatory Nos. 3, 4, 7, 9, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 57, 61, 69, 71, 86, 87, 88, 89, 90, 92, 93, 96, 97, 98, 99, 103, 105. This objection has no basis in the rules of civil procedure.

Answers to interrogatories are similar to initial disclosures. A party is not excused from making disclosures on the basis that it has not fully investigated the case. Fed. R. Civ. Proc. 26(a)(1)(E); see also *id.* Advisory Committee Notes, 1993 Amendments at Paragraph (1) (stating that a party has the obligation to make a reasonable inquiry under the circumstances, focusing on the facts that are alleged with particularity). Rather, a party must respond based on the pleadings and the information reasonably available to it *at that time*. Rule 26(a)(1)(E), Advisory Committee Notes, 1993 Amendments at Paragraph (1).

An example of Wyoming's improper objections based on a lack of "final position" is its response to Interrogatory No. 3. Notably, Interrogatory No. 3 is directly related to paragraph 5 of Wyoming's Answer, in which it denies "that all 'waters' of the Tongue and Powder River Basins are part of the Yellowstone River System." Interrogatory No. 3 simply requests Wyoming to provide the factual, documentary, and legal basis for its assertion. Like initial disclosures, an answer to an interrogatory regarding specific factual and legal assertions must be provided based on the information reasonably available to Wyoming. In other words, Wyoming is required to provide the factual basis and legal authority that support its allegations and cannot be excused from responding simply because it has not completed its investigation.

## 3. Legal Conclusion

Wyoming also object to an extraordinary number of interrogatories on the basis that an answer would constitute a legal conclusion. See answers to Interrogatory Nos. 3, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43, 52, 53, 55, 56(1st ¶ and subparts (b) and (c)), 61, 63, 69, 70, 72, 73, 79, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105. This objection is contrary to well-established principles of discovery.

"An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]" Fed. R. Civ. P. 33; see

also Advisory Committee Notes, 1970 Amendment, Subdivision (b) ("As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery."). Many of the interrogatories for which Wyoming raises this objection are directly related to language found in Wyoming's Answer and in its List of Issues. Each interrogatory requests that Wyoming identify the factual basis for its contention and the legal authorities upon which it relies. Thus, each interrogatory relates to fact and the application of law to fact. Rule 33 requires a party to respond to these type of interrogatories, in order to assist in narrowing the issues.

#### **4. Reliance on Briefs**

In Wyoming's responses to Interrogatory Nos. 3, 8, 9, and 10, it relies on its briefing and other filings submitted in this case. This is an improper objection, and Wyoming cannot be excused from providing a full and complete answer on this basis. *See, e.g., Equal Rights Ctr. v. Post Properties, Inc.*, 246 F.R.D. 29, 35 (D.D.C. 2007) ("Because Rule 33(b)(1) requires a party to answer each interrogatory 'fully,' it is technically improper and unresponsive for an answer to an interrogatory to refer to outside material, such as pleadings, depositions, or other interrogatories." (citing *inter alia* 7-33 Moore's Federal Practice-Civil § 33.103)).

#### **5. Requiring Extensive Investigation of Information Not Readily Available to Wyoming**

Wyoming also objects to a number of interrogatories on the basis that an answer "would require Wyoming to enter into extensive independent research or investigations to acquire, organize, compile, or evaluate information not readily available to Wyoming or in the form required by the interrogatory, and which would effectively require Wyoming to prepare its opponent's case." *See, e.g.,* answer to Interrogatory No. 12, at 22. *See generally* answers to Interrogatory Nos. 12, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 58, 59, 62, 64, 65, 66, 67, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 89, 93, 94, 100, 102. Interrogatory No. 13 illustrates the inappropriate nature of this objection.

In Interrogatory No. 13, Montana requests that Wyoming provide an answer to Wyoming's Issue of Law No. 2, including identification of the facts, documents, and legal authority that support Wyoming's position in this regard, and the persons with knowledge relating to such answer. Wyoming's Issue of Law No. 2 relates to its assertion that Montana is required to undertake certain "intrastate means" prior to asserting its rights under the Compact.

In effect, Wyoming's position in this regard is an affirmative defense. Thus, Montana is asking Wyoming about *Wyoming's* position with regard to an issue

affirmatively asserted by Wyoming. Montana is not asking Wyoming to prepare Montana's case; rather, Montana is asking Wyoming to explain how it will support its claim that a call is required by identifying the applicable facts, documents, persons, and law. Wyoming has the burden to prepare and establish its position in this regard, and Montana is entitled to discover the information supporting Wyoming's position, based on Wyoming's knowledge at the time the interrogatories are answered. Cf. Rule 26(a)(1)(E).

#### **6. Requiring Wyoming to Make Pleadings**

Wyoming also inappropriately objects to numerous interrogatories on the basis that an answer "requires . . . Wyoming to make pleadings . . . that are not required." See, e.g., answer to Interrogatory No. 12, at 22. See generally 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 (all of the foregoing re WY's List of Issues); 86, 100, 103. Like Wyoming's other objections, this objection is unsupported.

Again, Interrogatory No. 13 illustrates the unacceptable nature of Wyoming's objection. As discussed, Interrogatory No. 13 requests that Wyoming provide the basis for its affirmative assertion. Montana is entitled to learn the basis for Wyoming's position, including the facts, documents, and law upon which it will rely. See, e.g. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 281 F.R.D. 1, 4 (D.D.C. 2011) ("I can find nothing in the wording of the rule or its interpretation that could possibly bar asking a party what it contends and why.").

#### **7. Reliance on Documents Already Produced**

Wyoming answers many interrogatories by relying on Federal Rule of Civil Procedure 33(d) and referring to broad ranges of documents in support. See answers to Interrogatory Nos. 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 89, 91, 94, 100. This practice violates Rule 33(d).

Rule 33(d) requires Wyoming to specify business records in sufficient detail to enable Montana to locate and identify them as readily as the responding party. Wyoming has failed to satisfy this requirement.

For example, in its answer to Interrogatory No. 39, Wyoming states that the information "may be, but is not necessarily, found in" more than one hundred thousand pages of records and documents broadly referenced "or other documents disclosed in Wyoming's Response to the Joint Document Production Order." Such an answer is at best elusive and simply serves to delay discovery to which Montana is entitled.

Moreover, Rule 33(d) requires that the burden of deriving or ascertaining the answer must "be substantially the same for either party." Wyoming fails to assert that the burden of deriving or ascertaining the answer from hundreds of thousands of records and documents is substantially the same for either party, much less establish that this is the case.

To the extent that the answers to any interrogatories can be derived from Wyoming's databases, Montana requests that Wyoming allow Montana access to Wyoming's internal database systems with each State's respective information technologists who have familiarity with the operations and capabilities of such databases. Otherwise, Wyoming is required to provide full and complete narrative answers or to fully comply with Rule 33(d).

## 8. Bifurcation

Wyoming objects to numerous interrogatories on the basis that they seek information and documents pertaining to remedies. See answers to Interrogatory Nos. 25, 39, 40, 41, 42, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 58, 59, 70, 75, 76, 77, 78, 83, 84, 85, 87, 90, 95, 100. In doing so, Wyoming mischaracterizes the substance of the interrogatories and the narrow scope of the bifurcation.

Case Management Order No. 1 ("CMP No. 1") bifurcates this case into a "liability phase and a remedies phase." *Id.* at 4, § II. CMP No. 1 defines the "liability phase" to "include a determination of whether Wyoming has violated the Yellowstone River Compact and the amount of such violation." *Ibid.* Consequently, facts related to remedies are discoverable from another State only after a determination has been made as to liability for violating the Compact and as to the amount of such a violation. *Id.* § VIII.A.

Wyoming advocated for the narrow scope of the bifurcation's impact on discovery, stating *inter alia* that discovery allowable during the first phase should include "evidence on all of the issues of fact and law that the Court must ultimately decide, except for the amount of any compensation due Montana." Wy.'s Letter Brief Under CMO No. 6 at 4 (June 28, 2011); see also *id.* at 2 (stating that the second phase of discovery should be postponed only on the issue of "money or other future consideration that might be ordered by the Court to compensate Montana for the actual physical shortage of water that its pre-1950 water rights have sustained"); *ibid.* (stating that Wyoming does not oppose staging discovery "so long as Montana does not postpone Wyoming's ability to discover Montana's evidence of the violation, causation, and damages elements of its case").

Interrogatory No. 25 illustrates that the interrogatories to which Wyoming states this objection are not directed toward obtaining evidence related to "the amount of any

compensation due Montana," but rather evidence related to the issues of fact and law that the Court must ultimately decide. Interrogatory No. 25 requests that Wyoming state its position and the basis for its position regarding Wyoming's Issue of Law No. 10—that is, the "measure of damages for a proven Wyoming violation of Article V(A) that caused harm to Montana pre-1950 rights." This issue relates to issues of fact and law that the Court must ultimately decide, including whether Wyoming has violated the Compact and the amount of any violation. It is therefore a proper subject of discovery in the liability phase of this case.

#### **9. Cumulative/Duplicative**

Wyoming also complains that several interrogatories are unreasonably cumulative or duplicative and that the information can be obtained from another more convenient, less burdensome, or less expensive source. See answers to Interrogatory Nos. 3, 32, 89, 93, 98, 100, 102, 103. Notably, Wyoming fails to point to any other source from which the information can be obtained. See, e.g., answer to Interrogatory No. 32, at 56. Interrogatory No. 32 illustrates that Wyoming's objection cannot be sustained.

Interrogatory No. 32 asks whether Wyoming contends that Montana did not satisfy its intrastate administration requirements in 2004 or 2006 and asks Montana to identify the factual and legal support for any such contention. As explained above, Montana is entitled to discovery regarding Montana's contentions and the facts and application of facts to the law that provide support for a particular contention. Further, Wyoming's answer to Interrogatory No. 32 is a prime example of Wyoming's failure to provide any response at all, other than objections, with respect to an extraordinary number of interrogatories.

#### **10. Knowledge at Time of Answer or Time of Interrogatory**

Wyoming objects to at least two interrogatories on the basis that it is unclear whether the interrogatory calls for Wyoming's knowledge at the time of answer or at the time the interrogatory was propounded. It is a fundamental principle that Wyoming is required to fully respond to any answer with the knowledge that it has at the time the interrogatory is propounded. See Rule 26(a)(1)(E), Advisory Committee Notes, 1993 Amendments at Paragraph (1).

For example, Interrogatory No. 10 is a contention interrogatory, asking Wyoming to identify the facts, documents, and authority that support its denial of the Complaint's allegation that Wyoming has violated Montana's rights under Article V by allowing new acreage to be put under irrigation in the Tongue and Powder River Basins. Nothing in Interrogatory No. 10 limits the request to Wyoming's knowledge at the time of its answer to the complaint. Rather, Interrogatory No. 10 is strikingly similar to other contention

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interrogatories regarding the complaint, to which Wyoming does not make this same objection. See, e.g., answers to Interrogatory Nos. 3, 5, 6, 7, 8, & 9.

#### **REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION**

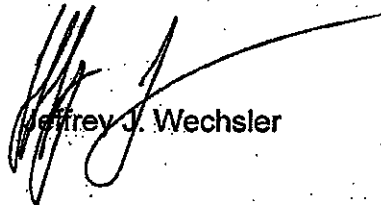
For all of the foregoing reasons, Wyoming's objections to Montana's Requests for Admission and Requests for Production are likewise unavailing. Montana requests that Wyoming provide a full and complete response to the RFAs and RFPs, as well as the interrogatories. Also, please confirm that Wyoming is not withholding any answer to an RFA or withholding any documents, data, or other information on the basis of the objections discussed above, other than those documents identified on the February 1, 2012 and July 3, 2012 privilege logs.

#### **SUMMARY**

In conclusion, for all of the foregoing reasons, Montana must insist that Wyoming supplement its answers to Montana's First Set of Interrogatories to provide full and complete substantive responses to the following interrogatories: 3-4, 8-10, 12-14, 16-17, 19-26, 28, 30-35, 39, 40-42, 44-51, 54-56, 60, 74-76, 81, 86-89, 91-95, 97-99, and 103.

I look forward to discussing these issues with you further.

Very truly yours,



Jeffrey J. Wechsler

JJW:

Cc: John Draper, Esq.  
Jennifer Anders, Esq.  
James Kaste, Esq.  
David Willms, Esq.  
Christopher Brown, Esq.

**Exhibit A to November 2, 2012 Discovery Letter:**

**Concerns with Wyoming's Responses to Interrogatories**

<b>Int. Number</b>	<b>Concern</b>
3	Wyoming's response to Interrogatory No. 3 is non-responsive. In its Answer, Wyoming took the position that not all waters of the Tongue and Powder Basins are part of the Yellowstone System. Montana is entitled to discover the factual and legal basis for this denial. To the extent that Wyoming contends that its answer to Interrogatory No. 3 is contained in briefs, please identify the brief and relevant pages.
4	In its Answer, Wyoming indicated that it lacked sufficient information to answer Paragraph 5 of the Complaint. Montana is entitled to discover the documents or information in Wyoming's possession that is relevant to Interrogatory No. 4. Please provide copies of those documents, or specifically identify them by bates number.
8	In its Answer, Wyoming took the position that its use of new and expanded water storage facilities was not in violation of the Compact. Montana is entitled to discover the basis for this position. Wyoming refers generally to "briefs submitted in this case" that support its Answer. Please supplement this response by identifying the specific briefs to which this response refers, including the pages relied upon. To the extent the briefs do not list all facts which support this paragraph in Wyoming's Answer, the response should be supplemented accordingly.
9	In its Answer, Wyoming took the position that allowing water to be irrigated on post-1950 acreage was not in violation of the Compact. Montana is entitled to discover the basis for this position. Wyoming refers generally to "briefs submitted in this case" that support its Answer. Please supplement this response by identifying the specific briefs to which this response refers, including the pages relied upon. To the extent the briefs do not list all facts which support this paragraph in Wyoming's Answer, the response should be supplemented accordingly.
10	In its Answer, Wyoming took the position that its use of groundwater was not in violation of the Compact. Montana is entitled to discover the basis for this position. Wyoming refers generally to "briefs submitted in this case" that support its Answer. Please supplement this response by identifying the specific briefs to which this response refers, including the pages referenced. To the extent the briefs do not list all facts which support this paragraph in Wyoming's Answer, the response should be supplemented accordingly.
12	Issue of Law No. 1.e on Wyoming's issues of Fact and Law remains an open question following the Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirement for Damages). Wyoming has identified Issue of Law 1.e as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana is entitled to a response to Interrogatory No. 12 so that it may prepare for trial in this matter.
13	Wyoming has identified Issue of Law No. 2 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that it is currently available. Montana requires



	a response to Interrogatory No. 13 so that it may prepare for trial in this matter.
14	Wyoming has identified Issue of Law No. 3 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 14 so that it may prepare for trial in this matter.
16	Wyoming's answer to Interrogatory No. 16 is unresponsive. Interrogatory No. 16 does not inquire as to whether the 2004 Request was a "valid" call, but rather whether Wyoming contends that the 2004 Request was "futile" as Wyoming defines the term in Interrogatory No. 15. The Special Master has found that the 2004 Request was a "valid" call, and Wyoming is obligated to answer Interrogatory No. 16, including all of its sub-parts.
17	Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 17 so that it may prepare for trial in this matter.
19	Wyoming has identified Issue of Law No. 4 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 19 so that it may prepare for trial in this matter.
20	Wyoming has identified Issue of Law No. 5 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 20 so that it may prepare for trial in this matter.
21	Wyoming has identified Issue of Law No. 6 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 21 so that it may prepare for trial in this matter.
22	Wyoming has identified Issue of Law No. 7 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 22 so that it may prepare for trial in this matter.
23	Wyoming has identified Issue of Law No. 8 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 22 so that it may prepare for trial in this matter.
24	Wyoming has identified Issue of Law No. 9 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 24 so that it may prepare for trial in this matter.
25	Wyoming has identified Issue of Law No. 10 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 25 so that it may prepare for trial in this matter.
26	Wyoming has identified Issue of Law No. 11 as relevant to this proceeding, and there is no principled basis to withhold a response. Wyoming is obligated to respond to this interrogatory with the information that is currently available. Montana requires a response to Interrogatory No. 26 so that it may prepare for trial in this matter.

28	Wyoming has identified Issue of Fact No. 2 as relevant to this proceeding, and there is no principled basis to withhold a response. Interrogatory No. 28 requests information that is necessary for one or more of Montana's claims in this case. In light of the Special Master's recent ruling, however, Montana will voluntarily limit this interrogatory to the years 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004 and 2006. For these years, Wyoming is obligated to respond to the extent that it is currently aware of facts or possesses documents that are relevant to Interrogatory No. 28.
30	Wyoming has identified Issue of Fact No. 4 as relevant to this proceeding, and there is no principled basis to withhold a response. Interrogatory No. 30 requests information that is necessary for one or more of Montana's claims in this case. In light of the Special Master's recent ruling, however, Montana will voluntarily limit this interrogatory to the years 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004 and 2006. For these years, Wyoming is obligated to respond to the extent that it is currently aware of facts or possesses documents that are relevant to Interrogatory No. 30.
31	Wyoming has not responded to Interrogatory No. 31(b), which seeks information about the intrastate administration that Wyoming contends is necessary under the Compact. If Wyoming intends to raise this issue as part of its defense in this case, Montana is entitled to understand Wyoming's contention. On the other hand, if Wyoming is not contending that intrastate administration is an issue that is relevant to this case, then it should indicate that position in a supplemental response. Otherwise, Montana must insist on a complete answer to Interrogatory No. 31(b) based on the information currently available to Wyoming.
32	Wyoming has not responded to Interrogatory No. 32, which seeks information about the intrastate administration that Wyoming contends is necessary under the Compact. If Wyoming intends to raise this issue as part of its defense in this case, Montana is entitled to understand Wyoming's contention. On the other hand, if Wyoming is not contending that intrastate administration is an issue that is relevant to this case, then it should indicate that position in a supplemental response. Otherwise, Montana must insist on a complete answer to Interrogatory No. 32 based on the information currently available to Wyoming.
33	Wyoming has not responded to Interrogatory No. 33, which seeks information about the intrastate administration that Wyoming contends is necessary under the Compact. If Wyoming intends to raise this issue as part of its defense in this case, Montana is entitled to understand Wyoming's contention. On the other hand, if Wyoming is not contending that releasing water from reservoirs in Montana is an issue that is relevant to this case, then it should indicate that position in a supplemental response. Otherwise, Montana must insist on a complete answer to Interrogatory No. 33 based on the information currently available to Wyoming.
34	Wyoming's answer to Interrogatory No. 34 is not fully responsive because Wyoming limited its answer to reservoirs in the Tongue or Powder River system. Interrogatory No. 34 seeks a response regarding the State of Wyoming as a whole. Wyoming's state-wide practices are relevant for impeachment purposes in the event that Wyoming has a positive response to Interrogatory No. 33.
35	In Interrogatory No. 35(b), Montana requests the name or names of the individual or

	<p>individuals "who are most familiar with the e-Permit database." Montana requires the names of 1 or 2 individuals so that it can conduct a deposition if necessary. It is unresponsive for Wyoming to list "any persons identified in Wyoming's Initial Disclosures," and this interrogatory should be supplemented.</p>
39	<p>In response to subparts (a) through (g) and (k), Wyoming suggests that the information sought by Montana "may" be found in approximately 7,815 pages of documents. This response is insufficient. In response to a similar request from Wyoming, Montana produced a data-base run. At a minimum, Wyoming should respond in kind, and provide a list of water rights that it claims are pre-1950 water rights. Likewise, with regard to subparts (h) through (j) and (l) through (p), Wyoming indicates that the answer "may be, but is not necessarily found" in a series of approximately 39,239 documents. This does not satisfy Rule 33(d) of the Federal Rules of Civil Procedure and must be supplemented so that Montana can ascertain the answer to Interrogatory No. 39. In particular, with regard to subparts (n) through (p), in response to the Joint Document Production Order, Montana was shown a series of maps in the Sheridan Office of the Wyoming State Engineer that depicted irrigated acreage. Those maps were not listed on Wyoming's privilege logs, and Montana has requested copies.</p>
40	<p>In response to subparts (a) through (g) and (k), Wyoming suggests that the information sought by Montana "may" be found in approximately 7,815 pages of documents. This response is insufficient. In response to a similar request from Wyoming, Montana produced a data-base run. At a minimum, Wyoming should respond in kind, and provide a list of water rights that it claims are pre-1950 water rights. Likewise, with regard to subparts (h) through (j) and (l) through (p), Wyoming indicates that the answer "may be, but is not necessarily found" in a series of approximately 39,239 documents. This does not satisfy Rule 33(d) of the Federal Rules of Civil Procedure and must be supplemented so that Montana can ascertain the answer to Interrogatory No. 40. In particular, with regard to subparts (n) through (p), in response to the Joint Document Production Order, Montana was shown a series of maps in the Sheridan Office of the Wyoming State Engineer that depicted irrigated acreage. Those maps were not listed on Wyoming's privilege logs, and Montana has requested copies.</p>
41	<p>Wyoming's response to Interrogatory 41 does not satisfy Rule 33(d). In response to a similar request from Wyoming, Montana produced a data-base run. At a minimum, Wyoming should respond in kind, and provide a list of groundwater rights in the Tongue River Basin.</p>
42	<p>Wyoming's response to Interrogatory 42 does not satisfy Rule 33(d). In response to a similar request from Wyoming, Montana produced a data-base run. At a minimum, Wyoming should respond in kind, and provide a list of groundwater rights in the Powder River Basin.</p>
44	<p>Wyoming's response to Interrogatory 44 does not satisfy Rule 33(d). In response to a similar request from Wyoming, Montana produced a data-base run. At a minimum, Wyoming should respond in kind, and provide a list of rights in the Tongue River Basin that have been abandoned since 1950.</p>
45	<p>Wyoming's response to Interrogatory 45 does not satisfy Rule 33(d). In response to a similar request from Wyoming, Montana produced a data-base run. At a minimum,</p>

	Wyoming should respond in kind, and provide a list of rights in the Powder River Basin that have been abandoned since 1950.
46 through 51	Wyoming's responses to Interrogatories Nos. 46 through 51 does not satisfy Rule 33(d). Many of the documents identified are unresponsive, the burden is much greater for Montana to identify the appropriate documents, and the records are not specified with sufficient detail. In response to a similar request from Wyoming, Montana produced a data-base run. <i>See</i> Montana's supplemental response to Interrogatory No. 61 of Wyoming's First Set of Interrogatories. At a minimum, Wyoming should respond in kind, and provide a list of rights that have changed the place or purpose of use or the point of diversion in the Tongue or Powder River Basins since 1950.
54 - 55	Wyoming's responses to Interrogatory Nos. 54 and 55 state that the answer "may" but "is not necessarily found" in a collection of over 30,000 documents. This does not satisfy Rule 33(d). Montana is willing to limit Interrogatory No. 54 to a response for the years 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. For example, when Montana was in Sheridan, viewing documents that were responsive to the Joint Document Production Order, Wyoming disclosed an 11 page document that indicated the dates that certain water rights had been regulated in either 2004 or 2006. <i>See</i> Email from P. Michael to J. Draper et al. (March 29, 2012). Wyoming subsequently claimed work product for this document (although it was not listed on any privilege log). While the document itself may or may not be work product, the underlying information clearly is not, and Wyoming should immediately provide the underlying information to Montana. The water rights that were regulated by Wyoming in the years at issue are central to this case, and Montana requires this information.
56	Wyoming's response to Interrogatory No. 56 states that the answer "may" but "is not necessarily found" in a collection of over 30,000 documents. It is not even clear from Wyoming's response whether there has ever been an instance of an employee of Wyoming refusing to act upon a call for regulation.
60	Wyoming's response to Interrogatory No. 60 states that the answer "may" but "is not necessarily found" in a collection of over 30,000 documents. Most, if not all, of the listed documents are unresponsive to Interrogatory No. 50. This response does not satisfy Rule 33(d). Wyoming is responsible for identifying with reasonable specificity, the documents that represent studies or reports addressing conveyance losses.
74	Wyoming's response to Interrogatory No. 74 states that the answer "may" but "is not necessarily found" in a collection of over 30,000 documents. Most, if not all, of the listed documents are unresponsive to Interrogatory No. 74. This response does not satisfy Rule 33(d). Wyoming should supplement this response by providing information concerning the wells that are responsive to Interrogatory No. 74. Montana will voluntarily limit this response to the years 1987, 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006.
75	Wyoming's response to Interrogatory No. 75 states that the answer "may" but "is not necessarily found" in a collection of over 30,000 documents. Most, if not all, of the listed documents are unresponsive to Interrogatory No. 75. This response does not satisfy Rule 33(d). At a minimum, Wyoming should provide a list of responsive wells.

76	Wyoming's response to Interrogatory No. 76 states that the answer "may" but "is not necessarily found" in a collection of over 30,000 documents. Most, if not all, of the listed documents are unresponsive to Interrogatory No. 76. This response does not satisfy Rule 33(d). At a minimum, Wyoming should provide a list of known measuring devices.
81	Wyoming's response to Interrogatory No. 81 states that the answer "may" but "is not necessarily found" in a collection of over 30,000 documents. Most, if not all, of the listed documents are unresponsive to Interrogatory No. 81. This response does not satisfy Rule 33(d). At a minimum, Wyoming should provide a list of responsive water rights.
86 -89	Interrogatory Nos. 86-89 seek information that is relevant to this proceeding. It is not an adequate response to state that Wyoming has not taken a "final position." Wyoming is obligated to answer the Interrogatories to the best of its ability at this time.
91	Wyoming is obligated to either (A) answer Interrogatory No. 91; or (B) provide documents showing the organizational structures requested. It is not sufficient to state that the information "may" but "is not necessarily" found in documents that are not provided.
92 - 93	Interrogatory Nos. 92-93 seek information that is relevant to this proceeding. It is not an adequate response to state that Wyoming has not taken a "final position." Wyoming is obligated to answer the Interrogatories to the best of its ability at this time. If Wyoming does not supplement these interrogatories, then Montana will assume that Wyoming is not making the contentions identified in these interrogatories.
94	Wyoming's response to Interrogatory No. 94 states that the answer "may" but "is not necessarily found" in a collection of over 20,000 documents. Most, if not all, of the listed documents are unresponsive to Interrogatory No. 94. This response does not satisfy Rule 33(d). At a minimum, Wyoming should provide a list of responsive water rights.
97-99	Interrogatory Nos. 97-99 seeks information that is relevant to this proceeding. It is not an adequate response to state that Wyoming has not taken a "final position." Wyoming is obligated to answer the Interrogatories to the best of its ability at this time.
103	Interrogatory Nos. 103 seeks information that is relevant to this proceeding. It is not an adequate response to state that Wyoming has not taken a "final position." Wyoming is obligated to answer the Interrogatory to the best of its ability at this time.



# *Office of the Attorney General*

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November 13, 2012

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Via U.S. Mail and Electronic Mail

Re: Response to your letter of November 2, 2012

John,

I have received and reviewed your letter of November 9, 2012, related to Montana's inadequate discovery responses. In light of Montana's assurance that it is not intentionally avoiding providing substantive responses to these simple contention interrogatories, I can only assume that Montana cannot articulate the basic facts underlying its claims because no such facts exist. Montana seems to admit as much when it proclaims that it cannot ascertain its own contentions without further information from Wyoming. I could not disagree with the characterization of the course of discovery more. All of the necessary data from which Montana could determine whether it had a viable claim for damages has been publicly available since before the suit was filed and/or provided in discovery. Montana has had access to every water right in Wyoming, the tab books, the Hydrographer reports, the Commissioner diaries, and every other document from which it could reasonably ascertain whether Montana's farmers had been shortchanged by Wyoming water users. Complaints to the contrary seem calculated merely to justify an extension of the expert designation deadline rather than a genuine attempt to identify additional facts of consequence.

Having reviewed Montana's interrogatories referenced in the letter of November 9th, it appears that Montana is largely asking Wyoming either to pontificate on legal questions or to engage in a data analysis of the facts already provided to Montana. While we endeavor to be helpful, Wyoming will not provide Montana's expert analysis for Montana. Wyoming will respond to the specific criticisms in Montana's letter outlining its concerns with Wyoming's discovery responses by November 21st. In the meantime, I think it would be worthwhile to get the fundamental informational deficiencies related to Montana's claims for damage before the

Special Master during the next status conference. Accordingly, in conformity with Section VIII, G. 1(b) of CMP No. 1, I intend to e-mail Ms. Carter regarding Montana's discovery responses, and request that we discuss them during the next status conference.

Thank you for your attention to these matters.

Sincerely,



James Kaste  
Senior Assistant Attorney General

cc via email:

Jeffrey Wechsler  
Jennifer Anders  
Jeanne S. Whiteing  
Jennifer Verleger  
James Dubois  
Solicitor General of the United States  
Michael Wigmore