Office of the Attorney General

Governor
Matthew H. Mead

Attorney General
Gregory A. Phillips

Administration
123 State Capitol
Cheyenne, Wyoming 82002
307-777-7841 Telephone
307-777-6869 Fax

Chief Deputy Attorney General
Peter K. Michael

November 10, 2011

Barton H. Thompson, Jr.
Special Master
Woods Institute
Jerry Yang and Akiko Yamazaki Environment
& Energy Building – MC 4205
473 Via Ortega
Stanford, California 94305

RE: *Montana v. Wyoming & North Dakota*
No. 137, Original, U.S. Supreme Court

Dear Special Master Thompson:

Wyoming submits this letter with its proposed clarifications and corrections to your draft memorandum opinion on Wyoming's motion for partial summary judgment, as you requested from the parties in Case Management Order No. 9. Wyoming has no proposed clarifications or corrections to your draft memorandum opinion on Montana's claims under Article V(B).

Wyoming's first proposed corrections involve your discussion on page 2 of your draft of how various western states require calls from water users to implement the doctrine of appropriation. On page 11 of the draft, you have correctly used the past tense when referring to past notifications by Montana in 2004 and 2006. However, you also use the past tense in the first full paragraph on page 2 when discussing the general rule that senior appropriators give notice when they run short of water. This use of the past tense could imply that while such call requirements were part of the law of appropriation in the past, they are no longer part of the doctrine. Wyoming does not believe this implication is accurate, but instead, that the call requirement remains firmly embedded in the general doctrine of appropriation. The continued vitality of the call requirement is shown by current statutes, rules, and practices that Wyoming

cited in its brief in support of partial summary judgment. Wyoming therefore suggests that when generally discussing the law of calls on page 2 of the memorandum opinion you change the verb tenses from past to present.

Wyoming's other proposed corrections all arise from your frequent reference to an obligation by Wyoming ensure that sufficient water passes the state line to satisfy pre-1950 Montana rights. We believe that a characterization of Wyoming's obligations under Article V(A), or even under Article V(B), as obligations measured by any quantity of water at the state line contradicts the law of the case that you and the Court have established by rejecting the concept of a mass delivery obligation. Although on page 10 of your draft you write that "[t]he Compact in this case does not specify a pre-quantified amount of water to be delivered at the state line," you state in the succeeding sentence, and elsewhere in the draft, that Wyoming must ensure sufficient deliveries at the state line.

There are several problems with this language. First, since Montana's first brief in support of its motion for leave to file, it has been established that Wyoming need not curtail diversions or storage for its pre-1950 rights in order to free up water for Montana pre-1950 rights that are unsatisfied, regardless of the relative priority dates of the pre-1950 rights in each state. Therefore, *unqualified* statements that Wyoming must "ensure" satisfaction of pre-1950 rights in Montana are contrary to Article V(A) as interpreted by the parties, by you , and by the Court. *See Montana v. Wyoming*, 131 S. Ct. 1765, 1772 (2011) ("But as Montana concedes, precisely because of this equal seniority, its downstream pre-1950 users cannot stop Wyoming's upstream pre-1950 users from fully exercising their water rights. Thus, when the rivers are low, Montana's downstream pre-1950 uses might get no water at all because the equally senior users upstream in Wyoming may lawfully consume all of the water.").

Second, even with respect to the interaction of Montana pre-1950 rights and Wyoming post-1950 rights under Article V(A), it is not accurate to characterize Wyoming's obligations as state line delivery obligations. While the state line is important under Article V(B) as the dividing line that allows Montana and Wyoming to identify diversions and uses as being in one state or the other for purposes of Article V(B) calculations, it is much less important under Article V(A). In fact, the state line's primary relevance under Article V(A) is to establish which state regulators have authority to exercise police power over particular diversions and uses.

Under Article V(A) as you and the Court have interpreted it, a doctrine of appropriation applies between the states with seniority established based on one date, January 1, 1950. If on a particular date, a pre-1950 diversion anywhere in Montana between the state line and the mouth of the particular river receives insufficient water to satisfy the right, Wyoming post-1950 rights someplace upstream of the state line must be curtailed under most circumstances. Two exceptions to this obligation are: (1) when Montana could solve the insufficiency on its own consistent with its rights under the compact, or (2) when curtailment of the particular post-1950 diversion in Wyoming would be futile with respect to supplying any water to the pre-1950 right in Montana suffering the shortage. Wyoming's obligation is not to provide a particular quantity of water at the state line, but instead to curtail post-1950 rights as necessary to alleviate the shortage at the specific pre-1950 diversion or diversions in Montana, which diversions may be

well downstream of the state line. If Wyoming has curtailed all of its active post-1950 rights, and yet the Montana pre-1950 rights are still not fully satisfied, then Wyoming's obligation is nevertheless fulfilled. The quantity of water passing the state line is irrelevant.

Also, if on a particular date Wyoming is diverting water to post-1950 rights, but Montana's pre-1950 rights on that river are fully satisfied, Wyoming would not be in violation even if the river were dry at the state line. While this is an extreme example which would probably occur only when heavy rains or return flows in Montana filled the river despite no augmentation from above the state line, it nevertheless illustrates the point that Article V(A) as interpreted by you and the Court creates a prior appropriation scheme, not a mass delivery scheme. In most cases, when the Tongue and Powder Rivers are low enough such that pre-1950 rights in Montana are unsatisfied, Wyoming has curtailed post-1950 rights as well as many pre-1950 rights by operation of its own water law, thereby precluding any violation of Article V(A).

Wyoming therefore takes issue with a characterization of its Article V(A) obligation as a state line delivery obligation and suggests that the draft be clarified to confirm that Wyoming's obligation is to curtail post-1950 diversions based on what is happening at pre-1950 Montana diversions, however far the Montana diversions may be from the state line, and regardless of the extent to which Wyoming is enjoying its pre-1950 rights. This proposed clarification applies to various places in the draft where the terms "delivery" or "state line" appear, including pages 1, 3, 4, 5, 6, 7, 9, and 10.

Sincerely,

Peter K. Michael
Chief Deputy Attorney General

PKM:cc

c: Jeane S. Whiteing
John B. Draper
Jennifer Anders
Jennifer Verleger
James J. Dubois
William M. Jay
Michael Wigmore