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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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**On Exceptions To The Second Interim Report  
Of The Special Master (Liability Issues)**

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**MONTANA'S REPLY BRIEF OPPOSING  
THE EXCEPTION OF WYOMING**

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## TABLE OF CONTENTS

	Page
Table of Authorities .....	ii
Introduction .....	1
Argument .....	3
Conclusion.....	19
Appendix: 2015 Call Letters .....	App. 1

# TABLE OF AUTHORITIES

	Page
CASES	
<i>Alabama v. North Carolina</i> , 560 U.S. 330 (2010).....	6
<i>Buckhannon Bd. &amp; Care Home, Inc. v. W. Va. Dep't of Health &amp; Human Res.</i> , 532 U.S. 598 (2001).....	15
<i>Iowa v. Illinois</i> , 151 U.S. 238 (1894).....	2
<i>Kansas v. Colorado</i> , 185 U.S. 125 (1902).....	7, 11
<i>Kansas v. Colorado</i> , 556 U.S. 98 (2009).....	9, 11, 14, 16
<i>Kansas v. Nebraska</i> , 135 S. Ct. 1042 (2015).....	<i>passim</i>
<i>Kentucky v. Indiana</i> , 281 U.S. 163 (1930).....	9
<i>Lefemine v. Wideman</i> , 133 S. Ct. 9 (2012) .....	17
<i>Montana v. Wyoming</i> , 131 S. Ct. 1765 (2011).....	16
<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923).....	5, 6
<i>North Dakota v. Minnesota</i> , 263 U.S. 583 (1924).....	15
<i>Oklahoma v. New Mexico</i> , 501 U.S. 221 (1991).....	9
<i>Porter v. Warner Holding Co.</i> , 328 U.S. 395 (1946).....	6
<i>Rhode Island v. Massachusetts</i> , 37 U.S. (12 Pet.) 657 (1838).....	11
<i>Texas v. New Mexico</i> , 482 U.S. 124 (1987).....	11, 12, 13
<i>Texas v. New Mexico</i> , 485 U.S. 388 (1988).....	12
<i>United States v. Texas</i> , 339 U.S. 707 (1950).....	7

## TABLE OF AUTHORITIES – Continued

	Page
<i>Virginia v. West Virginia</i> , 234 U.S. 117 (1914) .....	7
<i>Wyoming v. Colorado</i> , 309 U.S. 572 (1940).....	4

## STATUTES AND RULES

Arkansas River Compact.....	11, 15
Federal Rule of Civil Procedure 54(d)(1) .....	14, 15
Pecos River Compact .....	11
Supreme Court Rule 17.2 .....	14, 15
Yellowstone River Compact, Act of Oct. 30, 1951, 65 Stat. 663 .....	<i>passim</i>

## OTHER AUTHORITIES

Frankfurter & Landis, <i>The Compact Clause of the Constitution – A Study in Interstate Ad- justments</i> , 34 Yale L.J. 685 (1925).....	6
<i>Kansas v. Colorado</i> , No. 105, Orig., Third Report of the Special Master (Aug. 2000) .....	8
<i>Kansas v. Colorado</i> , No. 105, Orig., Fifth and Final Report of the Special Master (Jan. 2008) .....	14, 15, 18
Second Interim Report of the Special Master (Liability Issues) .....	<i>passim</i>



## INTRODUCTION

The State of Wyoming has excepted to the recommendation in the Second Interim Report of the Special Master (Liability Issues) (“Second Report”) that this Court return the case to the Special Master for the remedies phase. Wyoming’s Exception to the Second Interim Report of the Special Master (Liability Issues) and Brief in Support of Exception (“Wyo. Br.”). The State of Montana opposes Wyoming’s exception. Montana disagrees with Wyoming’s assumption that this action should be concluded peremptorily without further proceedings to determine a proper and complete remedy for Wyoming’s admitted breach of the Yellowstone River Compact, Act of Oct. 30, 1951, 65 Stat. 663 (the “Compact”).

Wyoming argues that a full remedy for its breach of the Compact amounts to no more than a payment of money damages and prejudgment interest for Wyoming’s underdeliveries of water in two years, 2004 and 2006. It entirely ignores Montana’s first and most important request for relief in the complaint in this action, a declaration of Montana’s rights under the Compact, including its rights to appropriate and store the waters of the Tongue River. Bill of Complaint 5, ¶ A. Wyoming likewise ignores this Court’s recent pronouncement that the essential role of the Court in an action such as this one is “to declare rights under the Compact and enforce its terms.” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015).

The result of sustaining Wyoming's exception would be to deny Montana's pleaded claim for declaratory relief, to deny Montana's pleaded claim for a decree commanding Wyoming to comply with the Compact, and to deny Montana's pleaded claim for the costs of suit payable to the prevailing party as a matter of course. Bill of Complaint 5, ¶¶ A, B, D. Wyoming would have the Court deny all of these remedies to Montana with no further hearing at all, based on no more than Wyoming's statements in its brief, or, insofar as Montana's claim for declaratory relief is concerned, based on nothing at all. Montana respectfully submits that this result would be wholly contrary to the tradition and practice in our law to provide notice and a hearing to the litigants before adjudicating their rights. *E.g.*, *Iowa v. Illinois*, 151 U.S. 238, 242 (1894) ("In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded.").

Wyoming's exception should be overruled. The case should be remanded to the Special Master with directions to conduct such proceedings as are necessary or appropriate to enable him to recommend a complete remedy for Wyoming's breach of the Compact, a remedy that includes a declaration of Montana's rights under the Compact to appropriate and store the waters of the Tongue River, including the



amount that Montana is entitled to store in the Tongue River Reservoir.

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## ARGUMENT

Wyoming urges “the immediate entry of a monetary judgment” to conclude this case without consideration of any other relief requested by Montana for Wyoming’s admitted breach of the Compact. Wyo. Br. 3. It acknowledges that “[i]n a typical case it would be inappropriate to forego a remedies phase and proceed directly to judgment when the potential remedy is significant and cannot be determined without further proceedings.” *Id.* at 7. It contends that the remedy here, however, is not significant but “*de minimis*,” and that no further proceedings are needed to ascertain that fact.<sup>1</sup> *Id.* It urges that “injunctive relief is

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<sup>1</sup> Montana brought this suit because Wyoming has never taken any action to comply with the Compact. Due to the lack of records in Wyoming, Second Report 199, 220, Montana only sought damages in a total of four years. *Id.* at 34. If the Court considers the amount of water important, the relevant amount is not the depletions in 2004 and 2006, but the potential violations that may occur in the future unless prevented by the Court. Such potential violations can be expected to be much greater than those in 2004 and 2006. Montana does not receive sufficient water for its pre-1950 rights almost every year. Transcript at 486-487 (available at the Special Master’s website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 427); Ex. M5 at 35. Post-Compact storage capacity in Wyoming is 13,300 acre-feet, *see id.*, Tables 6 and 9, and direct flow impacts would add to storage effects every year. Although Wyoming argues that the amount of water in any one year is small, it is important to

(Continued on following page)

not appropriate” because it has stated its readiness and willingness to comply with this Court’s rulings and the Special Master’s recommendations. *Id.* at 2. It urges that no costs should be awarded to Montana as the prevailing party. *Id.* at 16-20. It never quite mentions the first and most important request for relief in Montana’s complaint, namely, the request for a declaration of Montana’s rights under the Compact, including its rights to appropriate and store the waters of the Tongue River. But it states that the Special Master’s recommendations, if accepted by the Court, will resolve “all the major interpretive issues” raised by Montana in this action. *Id.* at 2. In short, Wyoming’s position is that “entering a money judgment against the State of Wyoming is the most expeditious and equitable method of resolving these proceedings.” *Id.*

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Montana water users. Transcript of Opening Argument at 12-13 (Docket No. 424). Obviously it is important to Wyoming as well, or the States would not have gone to trial. See Wyoming Motion for Summary Judgment at 40 (explaining that even though it accepted the Court’s rulings on Article V(A), it continued to believe that it had never violated the Compact) (Docket No. 333). The Special Master has considered the amount of water at issue, and has recommended returning the case to him for remedies. Second Report 227-231; cf. *Wyoming v. Colorado*, 309 U.S. 572, 581 (1940) (“Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights.”).

Wyoming's exception rests on the notion that this is a breach-of-contract case like any other, so that Montana's remedy should be limited to a money judgment determined by an ordinary breach-of-contract measure of damages. "As in other contract cases," Wyoming argues, "the appropriate measure of damages is limited to the cost to cover or the value of the replacement water no matter what additional evidence might be submitted during a remedies phase." Wyo. Br. 2. To be sure, compensation for Montana's losses due to Wyoming's breach undoubtedly is a proper *constituent* of a complete remedy. The Special Master recognized as much in his recommendation that the Court remand the case to him "to determine damages *and other appropriate relief*." Second Report 231, ¶ 5 (emphasis added). But Wyoming's exception boils down to the contention that no relief beyond an award of money is necessary to rectify past breaches as well as to prevent future breaches, and it would have the Court forego the remedies phase to reach that result. Wyo. Br. 2.

Wyoming's position might be defensible in "other contract cases," *id.*, and specifically, in some contract cases between private parties. But controversies between States within this Court's original jurisdiction are not comparable to "'suits between private parties.'" *Kansas v. Nebraska*, 135 S. Ct. 1042, 1051 (2015) (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923)). "When a 'controversy concerns two States we are at once in a world wholly different from that of a law-suit between John Doe and Richard Roe

over the metes and bounds of Blackacre.’” *Id.* at 1051-1052 (quoting Frankfurter & Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 705 (1925)). An action such as this one differs from a breach-of-contract action between private parties in at least three ways relevant here.

*First*, “an interstate compact is not just a contract; it is a federal statute enacted by Congress.” *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010). “[T]he Compact, having received Congress’s blessing, counts as federal law.” *Kansas v. Nebraska*, 135 S. Ct. at 1053. Where a “federal law is at issue and ‘the public interest is involved,’” the judicial role is not confined to awarding compensation against a party in breach of a private obligation. *Id.* (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Rather, “the Court may exercise its full authority,” within the limits set by the express terms of the Compact, “to remedy violations of *and promote compliance with* the [Compact], so as to give complete effect to public law.” *Id.* (emphasis added). A full remedy for Wyoming’s violations of a statute as well as a contract is one that “reminds [Wyoming] of its legal obligations, deters future violations, and promotes the Compact’s successful administration,” as well as compensating Montana for the injuries that Wyoming’s violations have caused it. *Id.* at 1057.

*Second*, a case within the Court’s original jurisdiction is particularly ill-suited to the summary disposition that Wyoming seeks. In controversies

between sovereigns, the Court has consistently emphasized the need for full development of the factual record before reaching a final adjudication in view of the matters of great public importance at stake. *E.g.*, *United States v. Texas*, 339 U.S. 707, 715 (1950) (“The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.”); *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914) (recognizing that “a controversy between states, involving grave questions of public law,” should be resolved only by “the largest justice, after the amplest opportunity to be heard”).

*Third*, the species of interstate compact involved here – one apportioning the waters of an interstate stream – presents special concerns flowing from a simple but ineluctable “consequence of geography.” *Kansas v. Nebraska*, 135 S. Ct. at 1052. “An upstream State can appropriate all water from a river, thus ‘wholly depriv[ing]’ a downstream State ‘of the benefit of water’ that ‘by nature’ would flow into its territory.” *Id.* (quoting *Kansas v. Colorado*, 185 U.S. 125, 145 (1902)). Because Wyoming “[p]ossess[es] the privilege of being upstream,” it “can (physically, though not legally) drain all the water it wants from the [Tongue] River.” *Id.* at 1057 (internal citation omitted). Wyoming “can take water that under the Compact should go to [Montana], pay [Montana] actual damages, and still come out ahead,” insofar as water users in Wyoming can realize a higher value from the

water than irrigators in Montana. *Id.* That geographical fact “is nearly a recipe for breach – for an upstream State to refuse to deliver to its downstream neighbor the water to which the latter is entitled.” *Id.*

As the Special Master observed in this case, geography puts Wyoming and Montana on “inherently unequal” footing. Second Report 43. If a judgment limited to actual damages is “nearly a recipe for breach,” it is surely not an adequate remedy to ensure Wyoming’s future compliance as well as to rectify its past breaches. *Kansas v. Nebraska*, 135 S. Ct. at 1057. The Court’s enforcement of the Compact thus properly extends beyond simple compensation “to the ability to provide the remedies necessary to prevent abuse” by reminding Wyoming of its legal obligations, deterring future violations, and promoting the Compact’s successful administration. *Id.* at 1052, 1057. None of these objectives is likely to be realized as long as the States remain uncertain or in disagreement about what those legal obligations are in the first place.

Wyoming takes for granted that a money judgment alone, without a further declaration of the State’s rights under the Compact, is the best method of “resolving these proceedings.” Wyo. Br. 2.<sup>2</sup> Far from

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<sup>2</sup> Contrary to Wyoming’s assertion, Wyo. Br. 7, the Court has never held that the breaching state may dictate a monetary remedy. *See, e.g., Kansas v. Colorado*, No. 105, Orig., Third Report of the Special Master 108-118 (Aug. 2000).

*resolving* the States' controversy, however, a money judgment alone will only *extend* it. The Court has recognized that "[w]here the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese*, and this Court must pass upon every question essential to such a determination.'" *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991) (quoting *Kentucky v. Indiana*, 281 U.S. 163, 176-177 (1930)). Unlike a typical private breach-of-contract dispute, the Compact will continue to govern the relationship between the States. The Court has played an important role over the years in translating the often broadly-stated principles of interstate water compacts into specific, quantitative requirements that guide future behavior. *See, e.g., Kansas v. Colorado*, 556 U.S. 98, 104-109 (2009) (Decree). Here, a full resolution of the States' controversy by a declaration of the States' respective rights to the waters of the Tongue River should be part of the remedy afforded Montana.

For example, as Montana has argued in support of its exception to the Second Report of the Special Master, a central question that is still unresolved is Montana's right to store water of the Tongue River in the Tongue River Reservoir. Montana's Exception and Brief. The issue was squarely joined at trial, with Montana contending that the Compact entitles it to fill the Reservoir to its full capacity but Wyoming

contending that Montana is entitled to store only 32,000 acre feet<sup>3</sup> or possibly even less in the Reservoir. Second Report 37. Both States urged the Special Master to resolve this ongoing controversy between the States: The Wyoming State Engineer testified at trial that the extent of Montana's right in the Reservoir "needs to be settled." 22 Transcript of Trial Proceedings 5273.<sup>4</sup> Wyoming's counsel likewise urged in closing argument that "[f]or the future we need to know the nature of that [Reservoir] right or then we will be right back here." Transcript of Post-Trial Hearing Proceedings of May 1, 2014, at 27-28.<sup>5</sup>

The Special Master nevertheless has opined that that question is inconsequential to this case and need not be resolved because an award of actual damages for Wyoming's underdeliveries of water in 2004 and 2006 can be calculated without a final determination of the question. Second Report 140-141. But if a remedy limited to actual damages is "nearly a recipe for breach," *Kansas v. Nebraska*, 135 S. Ct. at 1057, then a failure to decide the question of Montana's right to appropriate and store water of the Tongue River is tantamount to an open invitation to return to

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<sup>3</sup> One acre foot is 325,851 gallons. The volume of the Supreme Court Courtroom, within the pillars, from floor to ceiling, is approximately 3 1/3 acre feet.

<sup>4</sup> Available at the Special Master's website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 448.

<sup>5</sup> Available at the Special Master's website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 461.



this Court in future years when the question arises anew. That, after all, is “the only means left” to Montana “for stopping an inequitable taking of water.” *Id.* at 1052 (quoting *Kansas v. Colorado*, 185 U.S. at 144 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838))); see *id.* at 1057 (“From the time this Court began to apportion interstate rivers, it has recognized part of its role as guarding against upstream States’ inequitable takings of water.”).

A remedy sufficient to remind the upstream State of its legal obligations, to deter future violations, and to promote successful compact administration would be unnecessary if one could assume, as Wyoming does, that the say-so of the upstream State is all that is required to ensure its compliance with the Compact. See Wyo. Br. 15-16. The Court did not indulge that assumption, however, in *Kansas v. Nebraska*, where it recognized that “awarding actual damages for a compact’s infringement may be inadequate, because that remedy alone ‘would permit [an upstream State] to ignore its obligation to deliver water as long as it is willing’ to pay that amount.” *Id.* (quoting *Texas v. New Mexico*, 482 U.S. 124, 132 (1987)). Nor did the Court indulge that assumption in *Kansas v. Colorado*, where it entered a decree enjoining the upstream State to comply with the Arkansas River Compact. 556 U.S. 98, 104-106 (2009). And it did not indulge that assumption in *Texas v. New Mexico*, where it enjoined the upstream State to comply with the Pecos River Compact. 482 U.S. at

135, *decree amended*, 485 U.S. 388, 388-389 (1988) (per curiam).

Nor is this an appropriate first case in which to accept the upstream State's self-serving assurances at face value. In its exception filed with the Court on April 9, 2015, Wyoming stated its commitment to "abide by the rule of law established in these proceedings," including the Court's 2011 interpretation of the Compact and the Special Master's findings and conclusions to which it has not taken exception. Wyo. Br. 15-16. Days later, Wyoming cast substantial doubt on whether it will stand by its commitment. Montana made a call on Wyoming by letter on April 10, 2015, to protect its right to fill the Tongue River Reservoir pursuant to Article V(A) of the Compact. In a response by letter on April 14, 2015, Wyoming failed to commit to curtail post-Compact uses of water as required by the Compact, demanded that Montana certify curtailment of junior water uses in Montana before Wyoming would curtail its uses, and contended that Montana must appoint a water commissioner and reduce reservoir outflows as preconditions of Wyoming's obligation to honor Montana's call, all contrary to the Special Master's findings and conclusions in this case. (The States' correspondence is reprinted in the Appendix to this brief.)

Wyoming's demonstrated reluctance to meet its obligations under the Compact – even while assuring this Court that it is ready, willing, and able to comply – confirms that at the very least there are "major interpretive issues," Wyo. Br. 2, that remain to be

resolved in the remedies phase in this action. See *Texas v. New Mexico*, 482 U.S. at 134 (taking into account “[t]he natural propensity of these two States to disagree if an allocation formula leaves room to do so” in determining remedy for upstream State’s breach of compact). It may demonstrate more than that. It may be that a decree of this Court commanding Wyoming to deliver water of the Tongue River in accordance with the Compact is necessary to enforce Wyoming’s future compliance. The bifurcated proceedings in this action to date, and the Special Master’s Second Report on those proceedings, have addressed only the issue of liability. Second Report 26. As such, Montana has not yet had an opportunity to conduct discovery or present evidence in support of its request for injunctive relief, or, for that matter, to be heard on the proper standard for such relief in an action seeking enforcement of an interstate compact. The remedies phase is the proper time and place to decide whether the assurances made in Wyoming’s brief are a reliable basis for predicting that it will comply with the Compact going forward.

Finally, Wyoming argues that a remedies phase is unnecessary because the Court should outright deny an award of costs to either State based on Wyoming’s argument that both States prevailed in this action. Wyo. Br. 16-20. The Court should reject Wyoming’s premise as well as its conclusion. Montana is the prevailing party; Wyoming is mistaken that it “prevailed” in any significant respect in this action. But even insofar as there may be fair ground for

argument over which State was the prevailing party or to what extent it prevailed, the determination of awardable costs should not be made summarily. That question – along with the questions of what declaratory, injunctive, and compensatory remedies may be appropriate to rectify Wyoming’s past breaches and prevent future breaches – should be heard and decided in the remedies phase of this action.

There is nothing novel about an award of costs to the prevailing State in an interstate action. In *Kansas v. Colorado*, for example, the Court awarded costs to Kansas as the prevailing party. 556 U.S. at 103. The special master took guidance, in accordance with Supreme Court Rule 17.2, from Rule 54(d)(1) of the Federal Rules of Civil Procedure, under which “[a] presumption exists that the prevailing party is entitled to costs, and the losing party bears the burden of justifying a denial of costs.” *Kansas v. Colorado*, No. 105, Orig., Fifth and Final Report of the Special Master, vol. I, at App. 87 (Jan. 2008). The master observed that Kansas had prevailed on only one of three claims in its complaint, two of its claims having been dismissed, and that Colorado had substantially prevailed on various issues. *Id.* at App. 87-90. Indeed, the master acknowledged that, “over the lengthy trial, both sides have won and lost on specific issues.” *Id.* at App. 91. Nevertheless, he recognized, “[t]he law does not require . . . that a party prevail on every issue, or to the full extent of its claims in order to recover costs.” *Id.* at App. 90-91. He observed that a party may be deemed to have prevailed where it is

granted substantial relief even though it has not won on each of its claims. *Id.* at App. 87-88 (citing, among other authorities, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)). He found that “Kansas was the prevailing party on the principal issue in the case” – whether Colorado had violated the Arkansas River Compact by permitting post-compact well pumping resulting in underdeliveries of water to Kansas. *Id.* at 4 & App. 89. The master accordingly recommended an award of costs to Kansas in the amount of \$1,109,946.73, which included reallocation to Colorado of two-thirds of the special master’s fees and expenses. *Id.* at 4-5 & App. 88-92, App. 99-100. This Court approved the special master’s recommended award of costs. 556 U.S. at 103; *see also North Dakota v. Minnesota*, 263 U.S. 583, 584-586 (1924) (awarding costs to prevailing State and citing additional original cases).

Montana, like Kansas, is entitled as the prevailing party to recover its costs in this case, although a final determination of those costs should await the remedies phase. The Court takes guidance from Rule 54(d)(1) of the Federal Rules of Civil Procedure, which provides that costs other than attorneys’ fees “should be allowed to the prevailing party” unless a statute, rule, or court order provides otherwise. Fed. R. Civ. P. 54(d)(1); *see* S. Ct. R. 17.2. Montana, like Kansas, was the prevailing party on the principal issue in the case. As Kansas prevailed on the principal issue of whether Colorado had violated the Arkansas River Compact by permitting post-compact

depletions resulting in underdeliveries of water to Kansas, 556 U.S. at 99-100, so Montana prevailed on the principal issue of whether Wyoming had violated the Yellowstone River Compact by permitting post-compact depletions resulting in underdeliveries of water to Montana, *Montana v. Wyoming*, 131 S. Ct. 1765, 1770-1771 (2011).

Montana's success on the States' central dispute over the proper interpretation of the Compact is no insignificant matter; to the contrary, it has been the wellspring of controversy between the two States for three decades. *See, e.g.*, Ex. M69; Ex. J56 at x-xii and Attachment E; Ex. J70. Wyoming acknowledges Montana's success only grudgingly, making oblique reference to Wyoming's past "erroneous interpretation of the Compact." Wyo. Br. 20. Wyoming has been more direct in the past, however, conceding, "[Montana] won. . . . They already won this case on the big issue," Transcript of Motions Hearing of August 29, 2013, at 101;<sup>6</sup> that "[o]n the one thing that really matters, Montana's already prevailed," *id.*; that Wyoming's "initial theory" of Compact interpretation has "been taken care of and we've lost," Transcript of Status Hearing of July 29, 2011, at 31;<sup>7</sup> and that "[w]hen this case was filed there was a legitimate dispute about the interpretation of Article 5(A) of the Yellowstone

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<sup>6</sup> Available at the Special Master's website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 376.

<sup>7</sup> Available at the Special Master's website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 84.

River Compact,” but “[t]he rulings of the Court and the Special Master addressed this dispute predominantly in favor of Montana.” Wyoming’s Memorandum in Support of Motion for Summary Judgment at 39-40 (July 3, 2013).<sup>8</sup> The Court has held that a party prevails “when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (internal citation omitted). By that standard, Montana is the prevailing party because “the Compact has been interpreted by this Court” in Montana’s favor, and Wyoming has agreed that it “will abide by the rule of law established in these proceedings.” Wyo. Br. 15.

Montana emphatically disagrees with Wyoming’s claim to have “prevailed on nearly all of Montana’s claims.” *Id.* at 17. To the contrary, Montana prevailed on nearly every significant issue of water administration in the case. A casual review of the Special Master’s Second Report will confirm that on issue after issue, the Special Master accepted Montana’s position and rejected Wyoming’s. Compare, e.g., Wyoming’s Post-Trial Brief at 18-29,<sup>9</sup> with Second Report 144-157 (rejecting Wyoming’s argument that Montana’s operation of the Tongue River Reservoir was

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<sup>8</sup> Available at the Special Master’s website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 333.

<sup>9</sup> Available at the Special Master’s website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 454.

unreasonable); Wyoming's Post-Trial Brief at 29-36, *with* Second Report 185 (finding that Wyoming allowed post-1950 direct diversions in violation of the Compact); Wyoming's Post-Trial Brief at 57-61, *with* Second Report 199 (finding that Wyoming stored post-1950 water in violation of the Compact); Wyoming's Post-Trial Brief at 67, *with* Second Report 224-227 (rejecting Wyoming's argument that Montana's system of water administration was inadequate); and Wyoming's Post-Trial Brief at 67, *with* Second Report 222-224 (rejecting Wyoming's futile call defense). At this stage, however, it is beside the point to undertake an issue-by-issue tally or a point-by-point rebuttal of Wyoming's hollow claims of victory in this action. Suffice it to say, as the special master in *Kansas v. Colorado* did, that while "both sides have won and lost on specific issues" over the course of a lengthy trial in the liability phase, Montana need not "prevail on every issue, or to the full extent of its claims in order to recover costs." *Kansas v. Colorado*, No. 105, Orig., Fifth and Final Report of the Special Master, vol. I, at App. 90-91. Without attempting to predict what costs Montana should ultimately be awarded, its success on the principal issue of Compact interpretation in this case makes clear that the question of its entitlement to costs is one that should be heard and decided based on evidence and arguments to be presented in the remedies phase.





## CONCLUSION

Montana's complaint requests four basic forms of relief: (1) declaratory relief, (2) injunctive relief, (3) compensatory relief, and (4) costs. Bill of Complaint 5, ¶¶ A-D. Wyoming would have the Court enter judgment immediately awarding only the third form of relief, in the form of money damages and interest. It asks the Court to deny Montana's claims for injunctive relief and costs without affording Montana the opportunity to be heard in a remedies phase, and it altogether ignores Montana's claim for declaratory relief. Wyoming's position should be rejected because it would deny Montana a remedy sufficient both to rectify Wyoming's past breaches of the Compact and to enforce Wyoming's future compliance.

Wyoming's exception to the Special Master's Second Report should be overruled. The case should be remanded to the Special Master to recommend an appropriate remedy for Wyoming's breach of the Compact, including a declaration of Montana's right

to store the waters of the Tongue River in the Tongue River Reservoir.

Respectfully submitted,

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May 11, 2015

## **APPENDIX**



App. 1

**DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION**

STEVE BULLOCK                      DIRECTOR'S OFFICE (406) 444-2074  
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[SEAL]                      STATE OF MONTANA

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WATER RESOURCES DIVISION                      1424 9TH AVENUE  
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April 10, 2015

Sue Lowry, Wyoming Commissioner  
Yellowstone River Compact Commission  
Wyoming State Engineer's Office  
122 West 25th Street  
Cheyenne, Wyoming 82002

**Re: Call under the Yellowstone River Compact**

Dear Ms. Lowry,

The purpose of this letter is to provide notice to Wyoming that Montana is making a call under Article V(A) of the Yellowstone River Compact. Montana is placing a call to fill the Tongue River Reservoir with a priority date of April 21, 1937, and the call will continue until such time as the Reservoir is full. Under the call, Wyoming is required to curtail all unauthorized uses of water, "free river" water uses, and water rights with a priority date of January 1, 1950 and later on the Tongue River and its tributaries. Wyoming is to ensure that all pre-January 1, 1950 water

## App. 2

rights on the Tongue River and its tributaries use water only in accordance with the terms of their individual water rights. Montana expects Wyoming to measure the contents of all reservoirs with a water right priority date January 1, 1950, or later, on the Tongue River and its tributaries for water stored after today's date under an affected water right. This includes, but is not limited to, all reservoirs at issue in the litigation in *Montana v. Wyoming*.

As you know, the United States Supreme Court held and Wyoming agreed that Montana can make a call to Wyoming to curtail water rights with a priority date of January 1, 1950 and later for the benefit of Montana's pre-January 1, 1950 water rights under Article V(A). The Special Master further held in the Second Interim Report (Report) that Montana need only provide notice to Wyoming that Montana's pre-1950 water rights are not being met. Once notice is provided, Wyoming is required to curtail. With regard to the Tongue River Reservoir, the Special Master held that Montana is entitled to maintain a winter maximum level of 45,000 acre-feet and that operations allowing for a pass-through of the Tongue River in amount ranging from 75 cfs to 175 cfs is reasonable, as well as allowing for pass-through of decreed water rights. The Department has made call on the upstream junior non-stock water rights on the Tongue River in Montana.

Under current conditions, Montana anticipates that the Tongue River Reservoir will not fill absent a call. At the recent Yellowstone River Compact Commission

### App. 3

(YRCC) Technical meeting on April 7, the current and projected conditions were discussed at length. The current trend is drastically downward for water conditions.

The snow pack remained at median values through the end of February. By the end of March snow pack was at 76% of median and dropping. The NRCS projected runoff for March 1, was 195,000 acre-feet. The NRCS projected runoff for April 6 dropped to 125,000 acre-feet. No appreciable runoff has occurred warranting this large drop. Weather patterns appear to continue this dry trend and direct flow rights on the Tongue River in Montana senior to the Tongue River Reservoir will come on in the next few weeks. This will require the DNRC to pass the flows of those senior water rights through the Reservoir.

While this information is useful, it should be remembered that this is simply a forecast. For example, in 2001 and 2002 NRCS estimated on May 1 runoff of approximately 132,000 acre-feet and 174,000 acre-feet respectively, and the actual runoff was 46,000 acre-feet and 51,000 acre-feet, respectively. Consequently, actual runoff may be far worse than current predictions.

Montana has acted in accordance with the Special Master's holdings. Montana maintained a proposed winter maximum level at 50,000 acre-feet, higher than 45,000 acre-feet authorized by the Special Master as a winter maximum level in an attempt to carry-over more water while still operating the

#### App. 4

project safely, until the Department determined that it would be safe to begin increasing storage based on spring conditions and lack of snow pack. Starting in mid-March, outflows from the Tongue River Reservoir were reduced five times by April 6. Storage increased slightly and is now 56,326 acre-feet. Recent inflows into the State have dropped and current inflow is approximately 233 cfs. The outflow of the Reservoir is 95 cfs.

Montana is making this call now because the Special Master held in the Report that Montana is entitled only to that amount of water stored or curtailed after the date of the call. In the case of reservoir storage, as a concession, Montana is willing to allow Wyoming to store water under priority dates January 1, 1950 and later so long as Wyoming takes measurements of water stored after today's date. In the event that the Tongue River Reservoir does not fill, Montana will call for the release of that stored water at the end of the runoff period. As a condition of this concession, Wyoming must ensure that stored water is not released from these reservoirs during a call until such time as spring runoff is complete and Montana has notified Wyoming that it is not making a call for the water stored after today's date.

While no particular format is required for Montana to make a call, Montana provides the above information as a courtesy for Wyoming's benefit in understanding the situation. This Letter and the information herein contained should not be taken as a precedent for information required to be provided for making a call.



We request that Wyoming administer water rights as requested as soon as possible, but no later than two calendar days from today, and confirm administration to Montana in writing within three business days. Relevant information is available on the internet on the USGS and NRCS websites and additional information was distributed by the parties during the recent YRCC Technical meeting. Montana will cease this call as soon as the Tongue River Reservoir fills. However, given the worsening conditions, Montana anticipates making a call for direct flow water rights this year as well.

Sincerely,

/s/ Tim Davis

Tim Davis, Montana Commissioner  
Yellowstone River Compact

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App. 6

[SEAL] **State Engineer's Office**      MATTHEW H. MEAD  
GOVERNOR

HERSCHLER      CHEYENNE, WYOMING      PATRICK T. TYRRELL  
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April 14, 2015

Mr. Tim Davis, Montana Commissioner  
Yellowstone River Compact Commission  
Montana Department of Natural Resources and  
Conservation  
1424 9th Avenue  
P.O. Box 201601  
Helena MT 59620-1601

Re: Response to Montana Call to Fill Tongue River  
Reservoir Received on April 10, 2015

Dear Commissioner Davis:

Wyoming is in receipt of your letter of April 10, 2015, placing a call under the Yellowstone River Compact for the benefit of Tongue River Reservoir (TRR). Responding directly to your request, Wyoming has gathered elevation data for what are called the "compact reservoirs," and others, and Wyoming can use this information to assess our response should TRR not physically fill. To our field staff's knowledge, there are no direct flow irrigation users in our part of the Tongue River Basin diverting water at this early point in the season. Therefore, there are no post-compact uses to curtail and no free-river operations to affect. However, we will continue to monitor this situation.

## App. 7

As you know, Wyoming has long asked that Montana certify that its intrastate rights affecting any calling right are being regulated before we would curtail ours. Your letter mentioned that your Department (MDNRC) has placed a call on upstream junior non-stock water rights, but not whether those rights have actually been curtailed. Likewise, your letter does not mention whether a water commissioner has been appointed for the Tongue River in Montana. The appointment of a Montana water commissioner is necessary to assure that Montana post-compact uses, above or below TRR, are not taking water withheld from Wyoming post-compact rights in response to Montana's call.

We also note that TRR bypasses are recently in the range of 95 cubic feet per second (cfs), with flows at the Miles City gage in excess of 150 cfs. With the advent of warmer weather and lack of icing issues, it would be reasonable and prudent for Montana to reduce your reservoir bypasses to 75 cfs or less so that any water that may result from regulatory efforts in Wyoming is captured most effectively in TRR.

In reviewing the snowpack and forecast numbers, we agree this is not a stellar year. However, we also note there is a good chance that TRR will fill this season, given the amount in storage in the reservoir on April 10, the amount needed to be bypassed when your senior rights come on, and the forecasted runoff. Your letter points to a difficult decision we both face – how to operate so that TRR fills when appropriate without

## App. 8

curtailing uses in Wyoming unnecessarily. In that regard, it would be prudent for both of us to also keep an eye on the May 1, 2015 forecast to see if it leads to more certainty one way or the other. All this should be done with our focus on how to react, on both sides of the border, in years like this, to minimize impacts to any of our users. I sincerely hope this year can be the positive crucible out of which can come the more advanced planning we both can agree is appropriate in the future.

Given that this is a year when tribal storage water could be of value, we would also like to request that MDNRC facilitate discussions, to begin soon, with the Northern Cheyenne Tribe to ensure that the Tribe's Compact water is available for sale this year. These discussions would open the door for Wyoming or Montana to secure water we know is available and obtainable in the event that either state finds it necessary to do so.

I note that your letter, received last Friday, requested regulation "no later than two calendar days from today." Even though it was received on the cusp of a weekend, we were able to access reservoirs and obtain the needed information. Still, I think our relationship in the future can be advanced to the point where a last minute call on a Friday (with a 2-day notice) is unnecessary, given the gravity that should accompany how we place, and respond to, such an important request.

App. 9

Finally, we would like to compliment MDNRC and TRWUA on the operation of TRR since last year. Your fairly high carryover from last summer, combined with maintenance of a relatively high wintertime storage level, certainly has eased the situation entering the 2015 irrigation season.

Wyoming will continue to monitor its use of water, and we look forward to receiving Montana's certification that regulation has in fact occurred, and that a water commissioner has been appointed. We will also continue to monitor the water supply forecasting in the basin.

Sincerely,

/s/ Sue Lowry

Sue Lowry, Wyoming Commissioner  
Yellowstone River Compact Commission

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App. 10

**[SEAL] State Engineer's Office**     MATTHEW H. MEAD  
GOVERNOR

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April 21, 2015

Mr. Tim Davis, Montana Commissioner  
Yellowstone River Compact Commission  
Montana Department of Natural Resources and  
Conservation  
1424 9th Avenue  
P.O. Box 201601  
Helena MT 59620-1601

Re: Additional Information in Response to Montana's  
Call for Tongue River Reservoir (TRR)

Tim:

In follow-up to Wyoming's previous letter from Sue Lowry, and after our discussions in Tulsa, Wyoming offers Montana the following additional information. First, the results of the reservoir contents inspections that Montana requested are enclosed with this letter. Those inspections occurred from April 9 through April 13, 2015, with the great majority performed within the day after Montana's call.

In addition, Wyoming's Hydrographers have been out in the field and have observed water use in the Basin, or lack thereof, since Montana's April 10 call letter. Through yesterday, they have still observed no diversions by post-1950 water rights other than for storage.

App. 11

As you no doubt are aware, significant snow in the northern Big Horn Mountains last week improved the runoff forecast to where now there is a 5 in 10 chance of runoff in excess of nearly 15,000 AF for the April to July period (see the attached NRCS forecast, dated today). Supporting this, the Monday morning Snotel report, issued by the NRCS, showed the Tongue River Basin receiving an 11 percent increase in snow water equivalent, increasing from 76 to 87 percent of median in the past week.

I appreciate our talk in Tulsa, and hope you find this information useful.

/s/ Patrick T. Tyrrell

Patrick T. Tyrrell  
Wyoming State Engineer

cc: Sue Lowry, Yellowstone River Compact  
Commissioner for Wyoming  
James Kaste, Attorney General's Office  
Chris Brown, Attorney General's Office

Enclosures

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**DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION**

STEVE BULLOCK                      DIRECTOR'S OFFICE (406) 444-2074  
GOVERNOR                          TELEFAX NUMBER (406) 444-2684

[SEAL]                      STATE OF MONTANA

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WATER RESOURCES DIVISION                      1424 9TH AVENUE  
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TELEFAX NUMBERS                      HELENA, MONTANA 59620-1601  
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April 27, 2015

Sue Lowry, Wyoming Commissioner  
Yellowstone River Compact Commission  
Wyoming State Engineer's Office  
122 West 25th Street                      **VIA EMAIL AND**  
Cheyenne, Wyoming 82002                      **U.S. MAIL**

**Re: Call under the Yellowstone River Compact –  
Reply to Wyoming's April 14 Response**

Dear Ms. Lowry,

Thank you for your letter of April 14, 2015 and for Wyoming State Engineer Patrick T. Tyrrell's letter of April 21, 2015 which together provide Wyoming's response (Response) to Montana's call for water under Article V(A) of the Yellowstone River Compact (Compact). I also appreciated the recent discussions with you and Mr. Tyrrell at the Western States Water Council Meeting in Tulsa (April 15-17, 2015). I was glad to have the opportunity to discuss with you Wyoming's Response and Montana's call under the Compact to fill the Tongue River Reservoir. This call



is very important to Montana as it is the first call made under the Special Master's Second Interim Report (Report). Although we were not able reach a resolution of the differences between our two States, I believe that our Tulsa discussions were beneficial to our understanding of Wyoming's position.

Montana invested significant time and resources in *Montana v. Wyoming*, No. 137 Original, to resolve longstanding disputes and put in place a system for administering the Compact that ensures that Montana will receive its share of water. Montana prevailed in the Report on many of the important issues related to water administration, and Wyoming took no exception to those recommendations. As a result, the Report governs the States' Compact obligations. Montana appreciates Wyoming's initial efforts including measuring elevations in these reservoirs. However, as we discussed in Tulsa, we remain concerned that Wyoming's Response is contrary to the Report in a number of ways.

First, I am concerned that Wyoming is not taking adequate action to comply with its Compact obligations, to Montana's detriment. Specifically, your Response offered only to "monitor [Wyoming's] use of water." Unfortunately, that response is inconsistent with the decisions of the Court and the Special Master, Wyoming must refrain from using post-Compact water at a time when Montana's pre-Compact rights are unsatisfied in order to comply with the Compact. That is the situation we are in today. Montana's pre-Compact Tongue River Reservoir right is not yet

satisfied, and Montana has made a call for that right. The Report rejected a wait-and-see approach. Wyoming's obligation is to regulate and curtail all post-Compact water use in the Tongue River Basin in Wyoming, regardless of forecasts.

I appreciate Wyoming's observations that Wyoming's staff "have still observed no diversions by post-1950 water rights other than for storage" as of both the April 14 and April 21, 2015 letters. However, your Response does not explicitly state that Wyoming will regulate off any post-Compact and free river water uses or that you have notified post-Compact water users in Wyoming that they may not divert during the call from Montana. Montana requests that Wyoming provide written documentation, including copies of all Wyoming hydrographers' diaries for the Tongue River and tributaries from April 10th to the present, that Wyoming is regulating and curtailing all post-Compact water uses in Wyoming, including free river uses, during the call.

Second, in your Response, you suggest that "appointment of a Montana water commissioner is necessary" before Montana may enjoy its Compact rights, and you request that Montana "certify" that this step has been taken before Wyoming will honor the call. Wyoming's position that appointment of a water commissioner is a pre-requisite to a call was rejected by the Special Master. We request that Wyoming formally withdraw this condition.

Third, you suggest in your Letter that Montana must reduce the outflows from the Tongue River Reservoir to “75 cfs or less” as a precondition to regulation by Wyoming. Again, this is a position that was rejected in the Report, which found that Reservoir outflows between 75 cfs and 175 cfs are reasonable. As established at trial, reservoir operations are a complex endeavor involving a number of considerations. Complicating those considerations even further is the presence of senior rights downstream of the Tongue River Reservoir. Based on conditions at the time of Montana’s April 10, 2015 call letter, the outflows of 95 cfs were and remain reasonable and prudent. We request that you withdraw this precondition and comply with the Compact as interpreted in the Report.

Thank you for providing Montana with a list of elevations of post-1950 reservoirs greater than 20 acre-feet in size in Wyoming as of April 13, 2015. At trial Wyoming successfully argued that the principle of “highority,” as Wyoming terms it, is not embedded in the Compact. As a consequence, the Compact does not require Montana to allow Wyoming to store any water in post-Compact storage rights unless and until the Tongue River Reservoir fills. Nonetheless, to be a good partner and maximize the use of water in the basin, Montana is willing to allow water to be temporarily stored under post-1950 water rights in Wyoming so long as those reservoirs are measured and no post-1950 water is released until Montana notifies Wyoming that the Reservoir did not fill and that the

post-1950 water stored in Wyoming must be delivered to the state line, or that the Reservoir filled and the call is lifted.

I understand your concern that Wyoming's water users not be curtailed because the Reservoir might ultimately fill. As we discussed in Tulsa, and as noted in Wyoming's most recent letter, we agree that recent precipitation has improved the situation in the Tongue River Basin. However, it is still far from clear that the Tongue River Reservoir will fill. More importantly, pursuant to the Report, the date of the call controls, and Montana is entitled only to the post-Compact water used in Wyoming after that call date. Montana does not have the luxury under the Report of waiting to see if the Reservoir fills before making a call. Such an approach would cause Montana to forgo direct flows and post-1950 stored water to which Montana is entitled, and no such waiting period is suggested or supported by the Report. Montana delayed making a call as long as it considered prudent. Consistent with the doctrine of appropriation, Montana will lift the call if the Reservoir fills.

Moreover, given the propensity in the basin for conditions to change rapidly, Montana believes that it may be necessary to make an early call to protect its Reservoir right in a majority of years. Likewise, Montana anticipates that it will need to make a call to protect its pre-Compact direct flow rights almost every year. This year is no exception, and as I explained in my earlier letter, it is likely that Montana

will make a call for pre-Compact direct flow rights later in the irrigation season.

With regard to your suggestion that Montana contact the Northern Cheyenne Tribe (Tribe) to see if the Tribe is willing to sell water, Wyoming should contact the Tribe directly. The best contact for this issue is likely Charlene Alden, Director of the Environmental Protection Office for the Tribe (406) 477-6506. Montana is interested to know how Wyoming believes purchase of water from the Tribe might meet Wyoming's obligations, and Montana is willing to discuss this option. Notice provisions may apply to a water purchase, depending on the amount of water sought. It may take months or longer to arrange a purchase from the Tribe, if it is practical to do so at all. The potential option to purchase Tribal water at a later time, however, does not relieve Wyoming from honoring Montana's call as of April 10.

As demonstrated by our correspondence and discussions, many issues regarding the States' obligations under the Compact remain unresolved. I am encouraged by our ability to discuss challenging issues in Tulsa. Montana remains committed to pursuing settlement of these and other issues because we believe that the States are in the best position to address such issues. Unless a settlement is reached, however, Wyoming must comply with the Report.

App. 18

I look forward to hearing from you and request a response by April 30, 2015.

Sincerely,

/s/ Tim Davis

Tim Davis, Montana Commissioner  
Yellowstone River Compact Commission

CC: Patrick T. Tyrrell, Wyoming State Engineer

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App. 19

[SEAL] **State Engineer's Office**      MATTHEW H. MEAD  
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April 27, 2015

Mr. Tim Davis, Montana Commissioner  
Yellowstone River Compact Commission  
Montana Department of Natural Resources and  
Conservation  
1424 9th Avenue  
P.O. Box 201601  
Helena MT 59620-1601

Re: Updated Information in Response to Montana's  
Call for Tongue River Reservoir (TRR)

Tim:

I wish to update you on Wyoming's regulatory efforts in response to Montana's call to fill TRR. Last week, beginning April 21, Wyoming's monitoring resulted in our regulating off 18 post-50 water rights totaling a little over 2 cfs. These consisted of small diversions on Cat Creek, Little Goose Creek, Wolf Creek, and the Tongue River. We also shut down 13 Sheridan County Road and Bridge temporary water hauls.

At the same time, we note releases from TRR increased over the weekend, from 78 to 80 cfs. Will you please explain the need for this increased release? Wyoming again requests Montana to reduce its TRR reservoir bypasses to 75 cfs or less as it appears that

water currently made available through regulation in Wyoming is not benefitting TRR.

Wyoming's water commissioners continue to monitor water usage in the basin. With the recent cold weather and precipitation, we are only now seeing any large diversions becoming even partly active.

/s/ Patrick T. Tyrrell

Patrick T. Tyrrell  
Wyoming State Engineer

cc: Sue Lowry, Yellowstone River Compact  
Commissioner for Wyoming  
James Kaste, Attorney General's Office  
Chris Brown, Attorney General's Office

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