

APR 9 - 2015

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**In The  
Supreme Court of the United States**

—◆—  
STATE OF MONTANA,

*Plaintiff,*

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

*Defendants.*

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

—◆—  
**MONTANA'S EXCEPTION AND BRIEF**

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April 9, 2015





**MONTANA'S EXCEPTION TO THE SECOND  
INTERIM REPORT OF THE SPECIAL MASTER  
(LIABILITY ISSUES)**

The State of Montana excepts to the recommendation of the Special Master that the Court should not decide whether Montana is entitled under the Yellowstone River Compact to store more than 32,000 acre-feet of water per year in the Tongue River Reservoir. The issue should be recommitted to the Special Master in the anticipated remedies phase of the case to recommend a complete determination of the extent to which the Yellowstone River Compact protects Montana's right to store water in the Tongue River Reservoir.

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No. 137, Original

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**BRIEF IN SUPPORT OF MONTANA'S EXCEPTION**

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## INTRODUCTION

Montana largely agrees with the Second Interim Report of the Special Master (Liability Issues) (“Second Report”). It nonetheless excepts to one portion of the Second Report which, if adopted, would frustrate a key purpose of this original action.

The first and most essential form of relief sought by Montana in its bill of complaint is a declaration of its rights under the Yellowstone River Compact (the “Compact”), specifically including its rights to appropriate and store the waters of the Tongue River, a major tributary of the Yellowstone River. Bill of Complaint 5, ¶ A. Similarly, this Court recently reaffirmed its essential role in an action arising under an interstate compact “to declare rights under the Compact and enforce its terms.” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015).

The Special Master has opined, however, that a complete determination of Montana’s right protected by the Compact to store waters of the Tongue River in the Tongue River Reservoir (“Reservoir”) is inconsequential to this case. Second Report 140. The Special Master has concluded that the Court need not make a full determination of the question. *Id.* Montana takes exception to that conclusion because the measure of its storage rights protected by the Compact is among the most important questions presented by this action. The Court’s resolution of that question is necessary to afford Montana an adequate remedy for Wyoming’s violation of the Compact, to ensure future

compliance, and to forestall further litigation in this Court.

The Court should sustain Montana's exception to the Special Master's conclusion that it is inconsequential to this case whether Montana is entitled under the Yellowstone River Compact to store more than 32,000 acre-feet ("af") of water per year in Montana's Tongue River Reservoir. The case should be remanded to the Special Master with directions to recommend a complete remedy that includes a declaration of Montana's rights to appropriate and store the waters of the Tongue River pursuant to the Compact, and specifically the amount to which Montana is entitled for the Tongue River Reservoir.

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## STATEMENT

### A. The Yellowstone River System

From its headwaters in Wyoming, the Yellowstone River flows northeast for nearly 700 miles through Montana and into North Dakota to its confluence with the Missouri River. *Montana v. Wyoming*, 131 S. Ct. 1765, 1769 (2011). One of its major tributaries is the Tongue River, which also flows northeast from Wyoming into Montana before merging into the main stem of the Yellowstone River. *Id.*; Second Report 4-5.

Storage of the waters of the Yellowstone River and its tributaries is vital to both Wyoming and

Montana. 131 S. Ct. at 1770; Second Report 5-8. The river system's flows depend largely on snow melt and thus vary widely from month to month and year to year. 131 S. Ct. at 1769-1770; Second Report 6-8. Water is stored in reservoirs as snow melts in the spring and is held for use later in the year when river flows drop and irrigation demands rise. Second Report 8.

On the Tongue River, water is stored in Montana in the Tongue River Reservoir, an onstream reservoir located 15 miles downstream from the Wyoming-Montana stateline. *Id.* at 5. "[T]he Tongue River Reservoir is the largest reservoir in the watershed and is a critical source of water for farmers and ranchers in the Tongue River valley of Montana." *Id.* The Reservoir also serves the Northern Cheyenne Tribe in Montana. *Id.* at 13-14. Downstream of the Reservoir, the Tongue River flows for another 180 miles through farms and ranch lands before joining the Yellowstone River. *Id.* Montana water users "are reliant almost entirely on the waters that flow over the border from Wyoming or are stored in the Tongue River Reservoir." *Id.* at 5.

The Tongue River Reservoir, constructed in the late 1930s, was one of several storage projects built in Montana with state and federal funding. *Id.* at 5, 12. Montana, through one of its agencies, filed a declaration of intention to store, control, and divert "all unappropriated waters" of the Tongue River and tributaries. *Id.* at 12, 100-101. The declaration initiated a right under Montana law with a priority

of April 21, 1937, the date of its filing, for appropriation of water to be stored in the Reservoir. *Id.* at 12, 100 n. 27 (citing Rev. Code Mont. § 89-121 (1947) (since repealed)). The Reservoir's original capacity was 72,510 af. *Id.* at 13. Montana perfected the Reservoir right by filling the Reservoir to its capacity prior to entering the Yellowstone River Compact. *Id.* at 103; *see also* Montana's Post-Trial Brief 31-37, 95-99, available at the Special Master's website (<http://web.stanford.edu/dept/law/mvn/>) at Docket No. 456. The Reservoir was enlarged in 1999 to 79,071 acre-feet in connection with the compact between Montana and the Northern Cheyenne Tribe. Second Report 13-14; Mont. Code Ann. § 85-20-301 (1991), ratified by Congress in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, 106 Stat. 1186.

## **B. The Yellowstone River Compact**

The importance of water storage in the Yellowstone River system is not solely a matter of hydrography. Water storage was the “‘compelling reason’” for the States to negotiate the Yellowstone River Compact in the first place. First Interim Report of the Special Master 6 (“First Report”) (quoting Sen. Rep. No. 883, 82d Cong., 1st Sess. 6 (1951)). “Before funding new water storage facilities, Congress sought agreement as to the allocation of the Yellowstone River system among Wyoming, Montana, and North Dakota.” 131 S. Ct. at 1770. Congress granted permission to the States to negotiate a compact in the



time leading up to the construction of the Tongue River Reservoir, in 1932 and again in 1937. Act of June 14, 1932, ch. 253, 47 Stat. 306; Act of Aug. 2, 1937, ch. 552, 50 Stat. 551. *See* First Report 6-9.

After several false starts, the Yellowstone River Compact was ratified by the three States and consented to by Congress in 1951. Act of Oct. 30, 1951, ch. 629, 65 Stat. 663. (The Compact is set forth in Appendix B to the Second Report.) The Compact's preamble states the desire of the three States to "remove all causes of present and future controversy between said States . . . with respect to the waters of the Yellowstone River and its tributaries," to "provide for an equitable division and apportionment of such waters," and to "encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized." Second Report B-1.

The Compact provision of central importance for purposes of Montana's present exception is Article V(A), which states:

"Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Second Report B-7.

As this Court has previously recognized, the rights protected by Article V(A) have the highest priority under the Compact. 131 S. Ct. at 1770. Appropriative rights in the second and third tiers of priority are addressed in Article V(B). *Id.*; see Second Report B-7 – B-8.

### **C. Events Leading to Filing of the Bill of Complaint**

The Yellowstone River Compact has never been administered. See Montana's Post-Trial Brief, Docket No. 456, and evidence cited therein. For decades leading up to the filing of the Bill of Complaint in this case, Wyoming took the position that it had no obligations to Montana under the Compact. Despite repeated efforts by Montana to work with Wyoming to develop a method for administering the Compact, and persistent requests by Montana for water, Wyoming refused to acknowledge that it had any obligation under Article V(A) of the Compact, and resisted all of Montana's attempts to administer the Compact. Nor has Wyoming ever taken a single action to provide any water for Montana's Compact rights.

The most common condition on the Tongue River in Montana is one of shortage. Water flow falls off precipitously after the spring runoff, causing the situation to shift rapidly from one where all rights are being satisfied, to one where even the most senior rights are not being met, usually within a matter of days. Second Report 6-7. As far back as the records

extend, pre-Compact direct flow uses in Montana have gone unsatisfied in all but three years, and the Reservoir did not fill in dry years such as 2001, 2002, 2004 and 2006. Ex. M5, at 8-11, Tables 4, 5; Second Report 106. Even after Montana sent formal call letters to Wyoming in 2004 and 2006, Wyoming delivered no water. Following decades of endeavoring to gain Wyoming's cooperation in administering Article V(A) of the Compact to ensure protection of Montana's pre-1950 rights, Montana sought relief in this Court.

#### **D. Montana's Claims for Relief**

Montana brought this original action against Wyoming to enforce the Yellowstone River Compact. The Court granted Montana leave to file a bill of complaint against Wyoming for breach of the Compact. 552 U.S. 1175 (2008). The complaint alleges that Wyoming has breached Article V of the Compact by consuming water of the Tongue River (as well as water of the Powder River, another major tributary of the Yellowstone River) in violation of Montana's appropriative rights existing as of January 1, 1950. Bill of Complaint 3-4, ¶¶ 8-13. Montana's prayer for relief requests first and foremost that the Court "[d]eclare the rights of the State of Montana to the waters of the Tongue and Powder Rivers pursuant to the Yellowstone River Compact." *Id.* at 5, ¶ A. Montana also requests a decree commanding Wyoming to deliver water in accordance with the Compact, as well as damages and other relief. *Id.* at 5, ¶¶ B-D.

### **E. The First Report**

Wyoming filed a motion to dismiss the complaint. After briefing and argument, the Special Master issued his First Report recommending that the Court deny Wyoming's motion on the basis that Article V of the Compact protects Montana's pre-1950 appropriate rights from new diversions in Wyoming. First Report 14-15. The Special Master rejected Wyoming's position that it had no obligation under the Compact to protect Montana's pre-1950 rights from new water uses in Wyoming. *See id.* at 14, 89. Wyoming filed no exception to the Special Master's recommendation. The Court denied Wyoming's motion to dismiss. 131 S. Ct. 497 (2010).

### **F. Pre-Trial and Trial Proceedings on Liability**

By agreement of the two States, pre-trial and trial proceedings were bifurcated into a liability phase and a remedies phase. Second Report 26. The States engaged in extensive discovery, pre-trial motion practice, and a trial at which the Special Master heard 25 days of testimony, all on the question of whether Wyoming is liable for breach of the Compact. *Id.* at 26-35.

### **G. The Second Report**

The Special Master's Second Report addresses the liability phase of this case and recommends that the Court find Wyoming liable for breach of the Compact. Second Report 231, ¶¶ 3-4. The Special

Master has recommended that Wyoming be held liable to Montana for under-deliveries of waters of the Tongue River at the Wyoming-Montana stateline in the amounts of 1,300 af in 2004 and 56 af in 2006. *Id.* He has further recommended that the case be remanded to him “to determine damages and other appropriate relief.” *Id.* at 231, ¶ 5.

Montana submits that the Court should adopt those recommendations. The Second Report, however, contains discussion which, if approved or adopted by the Court, would unfairly prejudice Montana in subsequent proceedings on an appropriate remedy for Wyoming’s breach of the Compact.

In order to determine that Wyoming’s water usage and storage had violated Montana’s appropriative rights existing as of January 1, 1950, it was necessary for the Special Master to address Montana’s appropriative rights existing as of that date, including in particular Montana’s appropriative right to store waters of the Tongue River. The Special Master took note of the agreement of the two States that Montana’s right to store water in the Reservoir is protected by Article V(A) of that Compact; he added, however, that “that is where the agreement ends.” Second Report 100. He observed that the two States “disagree on whether Montana was entitled to fully fill the Reservoir under Article V(A) and, if not, how much water Montana could store.” *Id.* at 37. He elaborated, “While Montana contends that the Compact entitles it to fully fill the Reservoir, Wyoming argues that Montana has a right to store a total of

only 32,000 acre feet, and perhaps less, under Article V(A).” *Id.*

The Special Master acknowledged the importance of the unresolved question:

“The Tongue River Reservoir is the major defining feature of the Tongue River basin in Montana. How to account for the Reservoir is therefore of major importance to both Montana and Wyoming. Unfortunately, the states fundamentally disagree on the rights that the Reservoir enjoys under the Compact. . . .” *Id.* at 99-100.

The Special Master proceeded to address, at considerable length, Montana’s right to store water in the Reservoir. *Id.* at 99-162. He summarized the extensive evidentiary record bearing on the question, the relevant provisions of the Compact, and the prior appropriation law incorporated into the Compact, including the principles of prior appropriation law in Montana and Wyoming under which storage rights are defined and administered. *Id.* at 100-128. He undertook an extensive analysis of this evidence and law, *id.* at 129-162, and ultimately determined that “Article V(A) of the Compact protects Montana’s storage of *at least* 32,000 af of water each year.” *Id.* at 129. The Special Master further acknowledged the evidence and argument supporting a determination that Montana is entitled to store “*more* than 32,000 af” per year. *Id.* at 138-141 (emphasis added). He recognized that Montana “perfect[ed] its water right by filling the Reservoir,” *id.* at 103, and that, cumulatively



(as distinguished from annual additions), Article V(A) “protects Montana’s right to store water up to the full original capacity of the Tongue River Reservoir of 72,500 af,” *id.* at 142. As the Special Master explained, this pre-Compact storage right resides in the upper part of the Reservoir. *Id.* at 143.

Nonetheless, the Special Master stopped short of a determination of whether Article V(A) entitles Montana to store up to the full capacity of the Reservoir every year, or whether it is limited to 32,000 af per year, or to some undefined amount in between. *Id.* at 140-141. “Ultimately,” he opined, “the Court need not resolve this question as part of this proceeding.” *Id.* at 140. The Special Master did not suggest that Montana had not properly presented the question, or that the evidentiary record before him was not adequate to permit the Court to decide it. Instead, he reasoned that Montana can be awarded damages for under-deliveries in two particular years, 2004 and 2006, whether or not the Compact entitles it to store more than 32,000 af per year, because in those two years Montana was unable to store even 32,000 af: “Because Montana was not able to store even 32,000 af in either year, it is inconsequential to this case whether it was entitled under Article V(A) to store more.” *Id.* at 140. He reiterated his view that, although the Compact may entitle Montana to store more than 32,000 af per year in the Reservoir, Montana’s inability to store 32,000 af in 2004 and 2006 renders such a right “irrelevant”: “Because Montana was unable to store 32,000 af in 2004 and 2006, . . .

the status of the additional water is irrelevant.” *Id.* at 141.

As previously stated, the Special Master has recommended that the case be remanded “to determine damages and other appropriate relief” for Wyoming’s breach of the Compact. *Id.* at 231, ¶ 5. If the Court adopts that recommendation, it will be necessary to determine whether Montana is entitled to a remedy that includes a declaration of its rights to the waters of the Tongue River pursuant to the Compact, as requested in the complaint. Bill of Complaint 5, ¶ A.



## SUMMARY OF ARGUMENT

The Court has recently reaffirmed that its role in an original action over an interstate compact is “to declare rights under the Compact and enforce its terms.” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). In this case, the Special Master has recognized that “[h]ow to account for the [Tongue River Reservoir] is . . . of major importance to Montana and Wyoming.” Second Report 99-100. Nonetheless, the Special Master has suggested that it is unnecessary for the Court to make a complete determination of the extent to which the Yellowstone River Compact protects Montana’s single most important right in this case. This recommendation is at odds with the Court’s firm commitment to completely adjudicate interstate controversies that are properly before it. If the Court does not completely resolve Montana’s

Compact right in the Tongue River Reservoir in the current proceeding, an interstate dispute will continue to exist between Montana and Wyoming. Montana's request in this exception is a simple one: remand to the Special Master to recommend a full determination of Montana's Tongue River Reservoir right as part of the upcoming remedies phase.



## ARGUMENT

### **A. The Court Should Adjudicate the Actual, Existing Controversy Before It**

The Court has recognized that it “‘does have a serious responsibility to adjudicate cases where there are actual, existing controversies’ between the States over the waters in interstate streams.” *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991) (quoting *Arizona v. California*, 373 U.S. 546, 564 (1963)). The responsibility to adjudicate controversies between the States where the Court’s original jurisdiction is properly invoked is not unlike the responsibility of federal courts to adjudicate other cases and controversies where federal jurisdiction exists. *E.g.*, *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (“Jurisdiction existing, this Court has cautioned, a federal court’s ‘obligation’ to hear and decide a case is ‘virtually unflagging.’”) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to

decline the exercise of jurisdiction which is given, than to usurp that which is not given.”).

In *Oklahoma v. New Mexico*, a special master had recommended against deciding the extent of New Mexico’s right to store the waters of the Canadian River; specifically, the question was whether certain water stored by New Mexico in a reservoir counted toward that State’s allotted “conservation storage” under the Canadian River Compact. *Oklahoma v. New Mexico*, 501 U.S. at 240. The master had acknowledged that the record developed in the case probably was sufficient to permit him to decide the question, but even so he recommended that, rather than decide the question, the Court should refer it to the Canadian River Compact Commission for settlement negotiations between the States. *Id.* at 241.

The Court rejected the master’s recommendation, noting that there was an existing dispute between the States, that the downstream States of Oklahoma and Texas had properly invoked the Court’s jurisdiction, and that the question of New Mexico’s storage right was properly presented. *Id.* Seeing “no legal basis” for the master to avoid deciding the question, the Court remanded the question to him for further proceedings and a recommendation on the merits. *Id.*

This case is materially similar to *Oklahoma v. New Mexico*. An actual, existing controversy persists between Montana and Wyoming concerning Montana’s Compact right to store waters of the Tongue

River. *See id.* The Special Master has acknowledged both the importance of the question and the sharp disagreement between the States as to how it should be resolved. Second Report 37, 99-100. Montana has properly invoked this Court's jurisdiction to decide the question. *See Oklahoma v. New Mexico*, 501 U.S. at 241. In granting Montana leave to file a bill of complaint, the Court implicitly determined that Montana's claims are of sufficient "seriousness and dignity" to warrant resort to the Court's original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal citation omitted). And there can be no doubt that the question of Montana's right to store waters of the Tongue River is properly presented in this action. *See Oklahoma v. New Mexico*, 501 U.S. at 241. Montana has pleaded a claim for a declaration of its rights to the waters of the Tongue River pursuant to the Yellowstone River Compact. Bill of Complaint 5, ¶ A. After the Court's denial of Wyoming's motion to dismiss the complaint, the Special Master conducted a full trial on liability. The Special Master has not suggested that the evidence and argument presented at trial was insufficient to permit the Court to decide the question of Montana's storage rights under the Compact. In these circumstances, the Court has a responsibility to decide the actual, existing controversy before it. *Oklahoma v. New Mexico*, 501 U.S. at 241. The case should be remanded to the Special Master for further proceedings and a recommendation on the merits of the question of Montana's right

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

**B. A Full Declaration of Montana's Rights to the Waters of the Tongue River Is Not Inconsequential to This Case**

The explicit premise of the Special Master's recommendation not to declare Montana's appropriative rights to the waters of the Tongue River is that the Court can grant relief for Wyoming's under-deliveries of water in 2004 and 2006 without deciding the measure of those rights. Second Report 140-141. The Special Master regarded the measure of Montana's rights as "inconsequential" and "irrelevant" because the damages award for the under-deliveries in 2004 and 2006 would be the same regardless of the full extent of Montana's rights. *Id.*

The Special Master's reasoning might have made sense if a damages award had been the only relief that Montana sought in this action. But a damages award has never been the primary relief, much less the only relief, requested by Montana.<sup>1</sup> From the outset, the first and most important remedy sought by Montana has been a declaration of its rights under

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<sup>1</sup> Damages may take the form of water or money. See *Texas v. New Mexico*, 482 U.S. 124, 129-132 (1987) (recognizing the Court's authority to order repayment in water or money for breach of an interstate compact).



the Yellowstone River Compact, specifically including its rights to the waters of the Tongue River. Bill of Complaint 5, ¶ A. Montana has devoted substantial time and resources to pursue this goal. *See generally* Docket No. 424, Tr. 12-13 (Oct. 16, 2013) (Montana Attorney General describing the importance of this case to the State of Montana).

A complete declaration of Montana’s right to store water under the Compact is not “inconsequential” or “irrelevant” to this case. Second Report 140-141. To the contrary, it is essential to a full remedy for Wyoming’s breach of the Compact. The Court recently reaffirmed the vital purpose of an original action where States have negotiated a compact to divide the waters of an interstate river and its tributaries: “[The Court’s role] is now *to declare rights under the Compact* and enforce its terms.” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015) (emphasis added). The Court’s enforcement authority in an original action “includes the ability to provide the remedies necessary to prevent abuse.” *Id.*

Moreover, the Court’s “remedial authority gains still greater force because the Compact, having received Congress’s blessing, counts as federal law.” *Id.* at 1053. Because a “federal law is at issue and ‘the public interest is involved,’” an injured State’s available remedies are not confined to relief in damages such as might be appropriate for a private suitor; rather, the Court’s “‘equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.’” *Id.* (quoting

*Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Within the limits set by the express terms of the Compact, the Court has “full authority” not only to “remedy violations of,” but also to “promote compliance with,” the States’ agreement “so as to give complete effect to public law.” *Id.*

The Court’s recent opinion in *Kansas v. Nebraska* also recognizes a “simple consequence of geography” which makes it crucial that the Court declare the States’ respective rights under the Compact rather than narrowly limit relief to damages. *Id.* at 1052. The geographical fact is this: “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)). “Possessing the privilege of being upstream, [Wyoming] can (physically, though not legally) drain all the water it wants from the [Tongue] River,” and, if Wyoming water users can realize a higher value than Montana farmers and ranchers can, Wyoming “can take water that under the Compact should go to [Montana], pay [Montana] actual damages, and still come out ahead.” *Id.* at 1057 (internal citation omitted). “That,” the Court has observed, “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.* The Court has ruled that a standard compensatory damages remedy is an inadequate remedy in such circumstances. *Id.* It has recognized that a full remedy is one that not only

compensates the injured downstream State, but that also “reminds [the upstream State] of its legal obligations, deters future violations, and promotes the Compact’s successful administration.” *Id.*

Geography is at work in this case as much as it was in *Kansas v. Nebraska*. The Special Master has specifically pointed out that the relationship of the compacting States is “inherently unequal” because “[u]pstream states, like Wyoming, can divert water to which they believe they are entitled without seeking judicial relief,” whereas “[d]ownstream states, like Montana, must bring and prosecute judicial actions.” Second Report 43. In this case, all efforts at conciliation having been unsuccessful, Montana *has* brought and prosecuted an action for a declaration of its rights under the Compact. The Special Master has found that “Montana has proven that Wyoming violated Article V(A) of the Compact and thereby injured Montana.” *Id.* at 229. A damages award alone will not address the “inherently unequal” positions occupied by Wyoming and Montana. *Id.* at 43. To the contrary, it may prove to be “a recipe for breach” all over again. *Kansas v. Nebraska*, 135 S. Ct. at 1057. For example, without further direction from the Court, Wyoming is in a position to simply reject a call by Montana as being invalid for any number of reasons. See, e.g., Testimony of Patrick Tyrrell, Docket No. 450, Tr. 5271, 5279, 5312, 5314, 5317-5329 (Dec. 3, 2013) (Wyoming State Engineer describing numerous conditions that would need to be satisfied before Wyoming would honor a call for water). Absent a

declaration of the extent to which Article V(A) protects Montana's right to fill the Tongue River Reservoir, a future dispute, requiring resolution by this Court, is likely. *See generally Texas v. New Mexico*, 482 U.S. at 134 (considering "[t]he natural propensity of these two States to disagree if an allocation formula leaves room to do so" in awarding appropriate relief).

An additional consideration also highlights the importance of Montana's claim for declaratory relief. The Special Master has pointedly questioned whether Montana can meet what he has characterized as "the high standard for injunctive relief set out in *Connecticut v. Massachusetts*," according to which the Court will "not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of *serious magnitude* and established by clear and convincing evidence.'" Second Report 228-229 (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931)) (Special Master's emphasis); *cf. Kansas v. Nebraska*, 135 S. Ct. at 1059 (stating that the downstream state was required to show "a 'cognizable danger of recurrent violation'" to obtain injunctive relief) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

Montana objects to this statement by the Special Master. Montana has not yet had an opportunity to be heard and present evidence in support of its request for a decree commanding Wyoming to deliver the water that the Compact apportions to Montana. Bill of Complaint 5, ¶ B. In the bifurcated proceedings before the Special Master, the States have thus

far litigated only the question of Wyoming's liability for breach of the Compact. Second Report 26. Prior to proceedings on a remedy for Wyoming's breach, it is premature to say what Montana must prove to justify its request for injunctive relief, let alone whether Montana will succeed in its proof. To be sure, in past original actions the Court has enjoined upstream States to comply with interstate compacts without the showing suggested by the Special Master. *E.g.*, *Kansas v. Colorado*, No. 105, Orig., Judgment and Decree, Sec. I, *approved and entered*, 556 U.S. 98, 99, 103-109 (2009); *Texas v. New Mexico*, 485 U.S. 388, 388-389 (1988) (per curiam). At this stage, however, suffice it to say that it remains uncertain whether Montana will ultimately enjoy the protection of a decree of the Court commanding Wyoming to comply with the Yellowstone River Compact.

In these circumstances, where a damages award alone will give Wyoming no meaningful incentive to comply with the Compact and the prospect of injunctive relief remains uncertain, a declaration of Montana's rights to the waters of the Tongue River is of singular importance. As discussed above, an actual, existing controversy persists between the States as to their respective rights under the Compact. The Special Master has found that "Wyoming has not rushed to help Montana in the past when Montana has needed water," even while "Wyoming state officials have seemed genuine in their willingness to abide by the decisions of this Court." Second Report 229. If Wyoming is indeed genuine in its willingness to abide

by the Court's decisions, then that is all the more reason for the Court squarely to resolve the question of the States' respective rights to the waters of the Tongue River.

A decision of the Court interpreting the Compact and declaring the States' rights under that legal document admits of no objection that the Court is exercising an "extraordinary power to control the conduct of one State at the suit of another." *Id.* at 228 (quoting *Connecticut v. Massachusetts*, 282 U.S. at 669). Rather, "to declare rights under the Compact and enforce its terms" is the Court's essential role in an action such as this one. *Kansas v. Nebraska*, 135 S. Ct. at 1052. A definitive declaration of Montana's rights is the bare minimum relief necessary to "remind[] [Wyoming] of its legal obligations," to "promote the Compact's successful administration," and, perhaps, to "deter[] future violations" of the Compact. *Id.* at 1057. "'Bound hand and foot by the prohibitions of the Constitution, . . . a resort to the judicial power is the only means left' for stopping an inequitable taking of water." *Id.* at 1052 (quoting *Kansas v. Colorado*, 185 U.S. at 144) (additional citation omitted). Montana's resort to the judicial power should not be rendered hollow by the mistaken view that a declaration of its rights under the Compact is inconsequential.





## CONCLUSION

The Court should reject the Special Master's conclusion that the Court need not decide the full extent of Montana's right under the Compact to store the waters of the Tongue River. Rather, the case should be remanded for a recommendation of appropriate remedies for Wyoming's breach of the Compact, including a declaration of Montana's full right to store the waters of the Tongue River in the Tongue River Reservoir.

Respectfully submitted,

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April 9, 2015







