No. 137, Original

In The
Supreme Court Of The United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

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

MONTANA'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON TONGUE RIVER RESERVOIR

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July 11, 2016

Table of Contents

Table of Authorities

Page No.

CASES

STATUTES

OTHER

MONTANA'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON TONGUE RIVER RESERVOIR

Montana, in its Motion for Partial Summary Judgment on Tongue River Reservoir and Brief in Support ("Mont. Br."), argued that (1) the question of Montana's Reservoir right under the Compact is squarely before the Court as an actual, well-drawn controversy between two adverse parties, (2) the Court considers itself to have a duty to decide such disputes; (3) the Court routinely does so by declaring interstate compact rights; (4) in this case, uncontested historical records show that in 93 percent of the years for which data has been presented, Montana would have required more than 32,000 acre-feet ("af") of water to fill Montana's precompact Reservoir right; (5) a future dispute over Montana's reservoir right is inevitable; (6) the Court should declare Montana's Reservoir Right in order to prevent such future disputes; and (7) the proper measure of Montana's precompact Reservoir right is the right to store inflows of 72,500 af, less carryover storage, each year. In support of its motion, Montana offered 21 Uncontested Material Facts.

Wyoming's Response ("Wyo. Resp.") does not take issue with Montana's first four arguments, and disputes none of its Uncontested Material Facts. While Wyoming argues that future disputes will "likely be the exception rather than the rule," it concedes that in dry years – precisely when Montana will need the water the most – the basis for a dispute will exist. Wyo. Resp. 4. Thus, while the Special Master had reason to decline to decide Montana's full Reservoir right in the backward-looking liabilities phase of this case, Wyoming's Response serves to further underline the need for the Court to now declare that right in full in this remedies phase.[1]

[1] Wyoming's confusion about various factual matters is addressed in the Affidavit of Kevin Smith, P.E., ¶¶ 4, 5, attached hereto.

I. Wyoming Does Not Seriously Contest the Fact that Montana's Full Reservoir Right is an Actual, Existing Controversy in Need of Adjudication

Montana's consistent position ever since filing its Bill of Complaint has been that its Reservoir right under the Compact is an actual, existing controversy that needs to be resolved. Mont. Br. 10-12; *see also* Second Interim Report ("SIR") 99-100 ("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.* 37 ("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).").

Wyoming does not dispute this state of affairs. Indeed, it points out that the States have "vigorously argued about the nature and extent of Montana's right to fill the Tongue Reservoir." Wyo. Resp. 2. Wyoming has not abandoned its consistent position that under Article V(A) Montana is not entitled to store more than 32,000 af of water each year in the Reservoir. For Wyoming to assert in its Response, therefore, that between the States "there has been substantial agreement since the Second Interim Report" misses the point. Wyo. Resp. 4. At no time before or since the issuance of the SIR have the States agreed on the extent of Montana's full Reservoir right. The States' inability to agree on settlement despite the Court's pointed urging shows that there is a strong potential for these two States to disagree on the issues now before the Court. *See* Joint Status Report (Docket No. 485); *Montana v. Wyoming*, 135 S.Ct. 1479 (2/23/15 Order).

The Special Master found that Montana had a Reservoir right of "at least 32,000 af," SIR 136, but concluded that the Court "need not resolve" the question of the full Reservoir right because in neither of the years that Wyoming violated the Compact did Montana store more than

32,000 af of water. SIR 140. That Montana now seeks a declaration of its full Reservoir right as part of this phase of the case "pertaining to … prospective remedies," Case Management Plan No. 1, § II, does not represent "a second bite at the same apple." Wyo. Resp. 2. Rather, a decision that the Court rightly declined to make in the liabilities phase must now be made if the Court is to fulfill its "role … to declare rights under the Compact and enforce its terms." *Kansas v. Nebraska* 135 S. Ct. 1042, 1052 (2015).

It should be noted that Wyoming, to a significant degree, misunderstands the issue on the Tongue River Reservoir right. Wyoming suggests that, with a "winter carryover of 50,000 acre feet, the reservoir can be filled to its physical capacity during the spring runoff with less than 32,000 acre feet of water." Wyo. Resp. 4. The issue so far undecided by the Special Master is whether Montana can store, from the beginning of the water year on October 1, more than 32,000 acre-feet of inflows. Wyoming seems to think that the 32,000 acre-foot limit applies only to the spring runoff season. The Special Master, however, made clear that this is not the case. The Special Master states, "In 2006, Montana stored less than 32,000 af." SIR 140. He explains this statement in a footnote: "In 2004, the Reservoir started with 39,760 af of carryover. Ex. M-5, p. 30 tbl 4-A." *Id.*¸ at 140 n.46 . Table 4-A in Ex. M-5, in turn, shows the 39,760 amount as the end-of-month storage for September 2003, which is the beginning of the 2004 water year. Thus, Wyoming's understanding of the issue is flawed in a significant way, and it is therefore, difficult to credit anything that Wyoming says about the reservoir right issue.

II. Wyoming's Behavior While the Court Has Been Looking Over Its Shoulder Does Not Make Future Disputes Any Less Likely

Wyoming implicitly concedes that Wyoming and Montana will likely have disputes in dry years. Wyo. Resp. 4 ("in all but the driest or successively dry years ... the reservoir can be filled…"). Such disputes may arise, Wyoming implicitly concedes, because the Court's determinations to date may not be sufficient to prevent them:

> How the Court's ruling will affect future actions of the parties in response to specific hydrologic conditions in any given year has yet to be seen. It may be that the existing rulings will not prevent future disagreements… .

Wyoming Reply to Montana's Exception Br. 9 (Docket No. 474) ("Wyo. Reply"). Declaration of rights under varying hydrologic conditions in the future is at the center of the Court's role in enforcing interstate compacts. *See, e.g.*, *Kansas v. Nebraska*, 135 S.Ct. at 1052 (relying on computer model to determine compliance under varying hydrologic conditions).

In short, Wyoming's position is that future disputes *will* occur, but will "likely be the exception rather than the rule." Wyo. Resp. 4 (*quoting* Tyrrell Aff. ¶ 8.). The fact that both States agree that a future dispute will occur is more than sufficient evidence of the sort of actual, existing controversy that the Court has repeatedly said it has an obligation to adjudicate. *See* Mont. Br. 10-12; *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991); *Kansas v. Nebraska*, 135 S. Ct. at 1052. *See also* Declaration of Timothy K. Davis ¶5 ("If clear guidelines are not established in this case, those issues are likely to result in disputes in the near future".).

Moreover, Wyoming's position that the basis for disputes will occur *only* in dry years is simply not credible. Montana demonstrated with uncontested trial data summarized in the Book Affidavit (Attached to the initial Montana Brief) ("Book Aff.") that for 93 percent of the years during the period of record, Montana would have needed more than 32,000 af to fill Montana's

precompact Reservoir right. Mont. Br. 12; Book Aff. ¶ 5. Montana further showed that the average amount that would have been required to fill the Reservoir was 48,110 af – 50 percent greater than the 32,000 af that Wyoming contends is the upper limit of Montana's right. *Id.*; Book Aff. ¶ 6. In response to Wyoming's complaint that Mr. Book's earlier comparison to the precompact capacity of the Reservoir was not "an accurate representation," the actual historic storage of inflows is tabulated in Mr. Book's Second Affidavit ("2d Aff.") attached hereto. It shows that more than 32,000 acre-feet of inflows were actually stored in Tongue River Reservoir ever single year of full operation before 1950. 2d Aff. ¶6.

The inescapable consequence of Mr. Book's analysis is that a future dispute each year is not only likely, but a virtual certainty. Mont. Br. 12-14. Wyoming concedes that the Book Affidavit creates no "genuine issue of material fact" and "[t]he historic amount of water carried over in the [Reservoir] each year is … not subject to dispute." Wyo. Resp. 3. Just as Wyoming cannot and does not challenge the facts set forth in the Book Affidavit, it cannot avoid that this means disputes are inevitable.

Mr. Book is quite clear that his analysis simply identifies historically the amount of water each year that would have been required to fill Montana's precompact Reservoir right, and points out that this amount exceeded 32,000 af 93 percent of the years. Thus, it is extremely likely that the fill amount will exceed 32,000 af and a dispute will ensue between the parties as to whether Montana is entitled to only 32,000 af or to the full fill amount of 72,500, less carryover storage.

Wyoming's statement that "between 1950 and 1999 Montana could not fill the Reservoir to capacity," *id.* 3, is irrelevant. The only relevant question is the one answered by the data contained in Mr. Book's Affidavit: Will a dispute likely occur in the future over whether Montana

is entitled to divert and store more than 32,000 af per year in the Reservoir? The uncontroverted evidence establishes that the answer to that question is almost certainly "Yes." Mr. Davis's Declaration bears this out, based on recent experience. Davis Decl. ¶¶ 5-8.

In effect, Wyoming seems to be claiming that "a comparison of historic carryover to paper capacity is not an accurate representation" of the chances of future disputes. Wyo. Resp. 4. On the contrary, the relevant consideration is whether, in the future, disputes may arise if the full extent of Montana's precompact Reservoir right has not been declared by the Court. It is necessary, therefore, to compare the actual, historical fill quantities with Montana's claimed precompact Reservoir right. Moreover, as the attached Second Affidavit of Mr. Book shows, as a historical matter, more than 32,000 af was actually stored in 85 percent of the years from 1941 to 2008. 2d Book Aff, ¶5. And it is possible that storage drawdowns, and thus the need to refill, will be even greater in the future. *See* Smith Aff. ¶ 6.

While it is true that over the past two years the States have not required the Court's intervention to administer the Tongue River, their deeply-held disagreement about Montana's Reservoir right is unchanged. It is not at all surprising that Wyoming has avoided generating new Compact disputes at a time when the Court has jurisdiction over Wyoming and has found it violated the Compact in the past. With the Special Master and Court looking over its shoulder, Wyoming has a powerful incentive to avoid a dispute. Moreover, no matter how well-meaning Wyoming and its current water officials are, internal State politics and water officials will inevitably change. The Compact, on the other hand, is perpetual. The Court cannot rely, therefore, on the current personalities of State officials to determine whether there will be disputes in the future.

The Court recognizes that in compact enforcement cases it must take steps in its decree and judgment to "adequately guard against [an upstream State] repeating its former practices" once the Court has relinquished jurisdiction. *Kansas v. Nebraska*, 135 S. Ct. at 1059 (awarding disgorgement damages and warning of disgorgement of gains from future violations). In *Kansas v. Nebraska*, for example, the Court took such steps even though the upstream State had a water management plan that "if implemented in good faith, will be effective to maintain compliance even in extraordinarily dry years." *Id.* (quotation omitted). Here, by contrast, Wyoming only agrees to honor "valid" calls, Wyo. Reply 9, and readily admits that the basis for disputes will occur in dry years. As a result, declaratory relief is appropriate and necessary in this case.

III. Wyoming Has No Support for Its Suggestion that the Court Only Issues Declaratory Relief to Resolve Past Violations

Montana provided three detailed examples of the Court's declaration of compact rights in order to ensure future compact compliance. Mont. Br. 14-16. Wyoming's wishful thinking to the contrary, in each of the cases cited by Montana – *Texas v. New Mexico*, No. 65 Orig., *Kansas v. Colorado*, No. 105 Orig., and *Kansas v. Nebraska*, No. 126, Orig. – the Court issued decrees declaring the parties' rights under the respective compacts. That in *Texas v. New Mexico* and *Kansas v. Colorado* the Court declared those rights and at the same time enjoined the parties from violating them, Wyo. Resp. 5, is a distinction without a difference. Further, Wyoming's claim that in *Kansas v. Nebraska* "the Court provided no relief at all," *id.*, is simply wrong. The Court approved as a decree of the Court the States' settlement agreement, which declared rights under the Republican River Compact. *Kansas v. Nebraska*, 538 U.S. 720 (2003) (Decree granting Parties' Joint Motion for Approval of Final Settlement Stipulation). Thus, Wyoming is confused when it states that "The Court did not declare the rights of one state or the other to prevent proactively a possible future dispute in any of these cases." Wyo. Resp. 5. To the contrary, the

Court did precisely that on each occasion. The Court's issuance of declaratory relief was squarely within its established authority "to enforce [one State's rights under a] compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983).

Wyoming further argues that the Court should not declare the rights of Montana under the Compact because to do so would invoke the judicial power "to give 'an opinion advising what the law would be upon a hypothetical state of facts.'" Wyo. Resp. 6 (*quoting MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)). *MedImmune* concerned the application of the Declaratory Judgments Act, and so is not applicable here.[2] But even if it were, the test for the Court to declare Montana's full Reservoir right is easily met. *See* Montana's Response to Wyoming's Motion 25-28. There is nothing "hypothetical" about the facts that (1) Wyoming maintains that Montana's full Reservoir right is limited to 32,000 af per year, and (2) in 93 percent of the years Montana will likely require more than 32,000 af to fill its precompact Reservoir right. This is the very definition of a dispute that is "definite and concrete, touching the legal relations of parties having adverse legal interests" and that is "real and substantial" and "admi[ts] of specific relief through a decree of a conclusive character." Wyo. Reply 7-8 (*quoting MedImmune*, 549 U.S. at 127 (*quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937))).[3]

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[2] For the reasons set forth in Montana's Response to Wyoming's Motion for Summary Judgment, the Declaratory Judgment Act is an act of Congress and therefore does not apply in the Court's original jurisdiction. Montana's Response 20-21. Rather, in interstate compact disputes, the Court simply issues declaratory relief as a matter of course. *Id.* 21-25.

[3] Wyoming's suggestion that it is Montana's position that advisory opinions are "only" inappropriate when it implicates separation of powers concerns is incorrect. Wyo. Resp. 5-6. Montana quoted *Flast v. Cohen*, 392 U.S. 83 (1968) for the propositions that the "Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers *and which are traditionally thought to be capable of resolution through the judicial process*." Mont. Br. 12 n.2 (quoting *Flast*, 392 U.S. at 97) (emphasis added). Montana went on to specifically state that "Separation of powers concerns are not present in this case." *Id.*

IV. Wyoming Officials Have Not Recanted Their Sworn Testimony That This Dispute Must Be Resolved for the Sake of Future Compact Administration

Wyoming does not contest in its Response that Montana has consistently pursued a declaration of its Reservoir rights in its Bill of Complaint, at trial, in its Post-Trial Brief and in its exception to the SIR. Mont. Br. 16. Nor does it offer any affidavit recanting the earlier position of the Wyoming State Engineer that the extent of Montana's right in the Reservoir "needs to be settled." *Id.* (*quoting* 22 Transcript of Trial Proceedings 5273 (Docket No. 448)). The Wyoming State Engineer's latest affidavit implies that, while "future disputes between the states over the Tongue River Reservoir" *will* occur, those disputes "are likely to be the exception rather than the rule." Wyo. Resp. 4 (*quoting* Tyrrell Aff. ¶ 8).[4] If anything, this supports his earlier testimony that the Court needs to declare the Reservoir right. Moreover, the Declaration of Timothy K. Davis attached hereto states the opposite, that unless the Court acts, "future disputes are inevitable." Davis Decl., ¶ 8.

V. Wyoming Disputes No Material Fact Establishing Montana's Article V(A) Right to Store Up to 72,500 Acre-Feet of Water Each Year in the Reservoir, Less Carryover Storage

Wyoming does not contest in its Response *any* of the Material Facts posited by Montana in its Brief. *See* Mont. Br. 4-8; 17-18. In particular, Wyoming concedes:

- The Compact, Article V(A), protects water rights in both States as they existed in 1950 under each state's own law. (Undisputed Facts #1, #12)
- The Reservoir's applied-for right under Montana law was for all of the unappropriated waters of the Tongue River and tributaries, including return flows. (Undisputed Fact #4)
- Montana's water right in the Tongue River Reservoir was perfected before 1950.

Montana also argued, as it has consistently throughout these proceedings, that the States' dispute over the Reservoir "is a real one between adverse parties." *Id.*

[4] As noted *supra* in Section II, the suggestion that disputes will be infrequent is also thoroughly discredited by the Book Affidavit, which the Tyrrell Affidavit does not contradict.

(Undisputed Facts #8 and #14)

- The Reservoir's pre-1950 capacity was 72,500 acre-feet. (Undisputed Fact #6)
- Montana's doctrine of prior appropriation provides that the right to fill the Reservoir each year is 72,500 acre-feet, less any carryover from the previous year. (Undisputed Facts #11, #13); *see also* Wyo. Reply, p. 3 n.1 ("The Special Master also determined that Article V(A) of the Compact only protects the pre-1950 reservoir capacity of 72,500 acre feet…").

Nor does Wyoming contest in its Response that these Undisputed Facts entitle Montana to partial summary judgment that the Compact protects a Reservoir right to fill 72,500 af, less carry over storage, each year.

VI. Conclusion

Wyoming's Response confirms the likelihood of future disputes, does nothing to dispel the States' disagreement over Montana's full precompact Reservoir right, and identifies no disputed material fact. The Court's established jurisprudence clearly recognizes that, under these facts, an actual, existing controversy exists, and that the Court will exercise its authority to resolve such controversies. On these facts, therefore, Montana is entitled to judgment as a matter of law declaring Montana's full precompact Reservoir right to store 72,500 af of inflows, less carryover storage, each year.

Respectfully Submitted,

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AFFIDAVIT OF KEVIN SMITH, P.E.

Comes now Kevin Smith, P.E., and declares under oath as follows:

1. I am over 18 years of age and a registered professional engineer in the State of Montana.

2. I am Chief of the State Water Projects Bureau of the Water Resources Division of the Montana Department of Natural Resources and Conservation. In that capacity I have responsibility for, and personal knowledge of, the operation of Montana's Tongue River Reservoir.

3. I have appeared in this proceeding on behalf of the State of Montana and have provided testimony as an expert in reservoir operations.

4. Wyoming's Response to Montana's Motion For Summary Judgment on Tongue River Reservoir ("Response") refers on page 4 to Tongue River Reservoir's "expanded winter carryover of 50,000 acre feet." "Winter carryover" is not a

term found in the Tongue River Dam Manual for Operation and Maintenance ("Manual"), admitted into evidence as Ex. M 524. Wyoming should be referring to the "Maximum Winter Storage" defined and quantified in Ex. M 524. The Maximum Winter Storage is quantified at 45,000 acre-feet in the Manual. *Id.*, p. 21. The Maximum Winter Storage has not changed since trial.

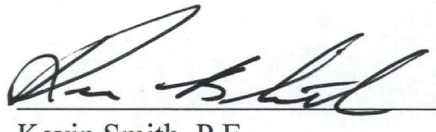
5. The possibility of adjusting the Maximum Winter Storage in the Manual is under consideration. Consideration of such an adjustment is likely to require the next 5-10 years.

6. The State of Montana shares storage in Tongue River Reservoir with the Northern Cheyenne Tribe. If the Tribe begins to utilize its storage right of 20,000 acre-feet to a greater degree than in the past, especially in dry years when the Tongue River Water Users Association members typically use all of their 40,000 acre-feet of stored water, the need to store more than 32,000 acre-feet each year will be even greater than it has been in the past.

Further Sayeth Affiant Not.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 11, 2016.



Kevin Smith, P.E.

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STATE OF MONTANA,

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STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

_____♦_____

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

_____♦_____

DECLARATION OF TIMOTHY K. DAVIS IN SUPPORT OF MONTANA'S MOTION FOR SUMMARY JUDGMENT

Comes now Timothy K. Davis, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am over 18 years of age and have personal knowledge of the facts stated herein. I have been employed by the Montana Department of Natural Resources and Conservation (DNRC) as the Water Resources Division Administrator since 2010. The Water Resources Division serves as the primary agency overseeing water rights and water use in the State of Montana. I also serve as the Yellowstone River Compact Commissioner for Montana.

2. I provided trial testimony during the liability phase of this case on behalf of the State of Montana on the subject of water use in Montana.

3. The purpose of my Declaration is to address issues raised by Patrick T. Tyrrell in his Affidavit dated June 16, 2016.

4. Throughout this case, Montana has stressed that the primary purpose for bringing this lawsuit was to establish clear rules for Compact compliance. Clear rules for Compact compliance are important for both States to avoid future disputes and promote interstate relations.

5. Montana and Wyoming have worked for many years to agree upon the rules for Compact compliance, but have never been able to do so. Based on my recent discussions with Wyoming, I am aware of numerous issues on which the States currently disagree, including the extent to which the Compact protects the Tongue River Reservoir. If clear guidelines are not established in this case, those issues are likely to result in disputes in the near future.

6. Following the liability trial, while the case was still pending before the Court, Montana made a call on Wyoming for water to satisfy the Tongue River Reservoir. The relevant correspondence was included in the Appendix to Montana's Reply Brief Opposing the Exception of Wyoming. That correspondence raised questions about how both states interpret the principles identified in the Second Interim Report of the Special Master (Liability Issues).

7. Mr. Tyrrell points to our communications in 2016 as proof that future disputes "are likely to be the exception rather than the rule." While I hope that is the case, our discussions in 2016, took significant effort from both sides, and were aided by the personal relationship that Mr. Tyrrell and I have developed. More importantly, those discussions did not establish rules for Compact compliance, and there is nothing to ensure that the States will be able to work through their differences in the future.

8. In short, if the Court does not establish clear rules for Compact compliance, including establishing the extent to which the Compact protects the Tongue River Reservoir, future disputes are inevitable.

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

Executed on July 11, 2016.

/s/Timothy K. Davis
Timothy K. Davis

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Defendants.

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

SECOND AFFIDAVIT OF DALE E. BOOK, P.E.

Comes now Dale E. Book, P.E., and declares under penalty of perjury as follows:

1. I am over 18 years of age and a registered professional engineer in the States of Montana, Colorado, Kansas, Idaho, Oregon and New Mexico.

2. I have appeared in this proceeding on behalf of the State of Montana and have been accepted by the Special Master as an expert in the fields of water resources engineering, water rights, hydrology and hydrologic modeling.

3. I provided trial testimony during the liability phase of this case.

4. Based on data in Table 4-A on pages 29 and 30 of my expert report of January 4, 2013, which was admitted into evidence as Ex. M5, I have tabulated the inflows historically stored in Tongue River Reservoir for the period 1941-2008. That tabulation and a graph of the tabulation are attached to this affidavit.

5. The attached tabulation and graph of inflows stored in Tongue River Reservoir show that there was actual storage of more than 32,000 acre-feet in 58 years during the 68-year period 1941-2008, which is 85% of the years.

6. The attached tabulation and graph show that, in each and every year before 1950, more than 32,000 acre-feet of inflows were stored in Tongue River Reservoir, and that the maximum amount of inflows stored in a single year before 1950 was 65,260 acre-feet in 1944.

Further Sayeth Affiant Not.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 11, 2016.

Dale E. Book

Dale E. Book, P.E.

Tongue River Reservoir

Inflows Stored

1941 - 2008

(af)

Year	Total	Year	Total
1941	***58,200***	1975	***50,556***
1942	***45,740***	1976	***46,690***
1943	***46,470***	1977	***40,410***
1944	***65,260***	1978	***46,664***
1945	***35,210***	1979	***58,040***
1946	***36,760***	1980	***45,980***
1947	***44,000***	1981	***59,650***
1948	***40,340***	1982	***50,040***
1949	***34,310***	1983	***42,410***
1950	***33,140***	1984	***37,500***
1951	29,670	1985	***42,470***
1952	***33,020***	1986	***52,190***
1953	***33,940***	1987	***45,100***
1954	24,510	1988	***34,540***
1955	***34,210***	1989	***32,510***
1956	***48,290***	1990	***55,140***
1957	***33,770***	1991	***51,160***
1958	30,500	1992	***59,610***
1959	***54,270***	1993	***33,510***
1960	22,874	1994	***33,190***
1961	***54,974***	1995	***54,480***
1962	***38,050***	1996	***49,660***
1963	14,178	1997	***46,190***
1964	1,681	1998	***45,610***
1965	***69,584***	1999	***66,550***
1966	***35,720***	2000	***43,780***
1967	***40,495***	2001	11,820
1968	***50,520***	2002	27,130
1969	***37,760***	2003	***53,420***
1970	***45,980***	2004	9,920
1971	***39,850***	2005	***52,120***
1972	***49,470***	2006	31,414
1973	***41,080***	2007	***39,735***
1974	***33,210***	2008	***46,170***

Average	41,653
Median	42,440

Notes:

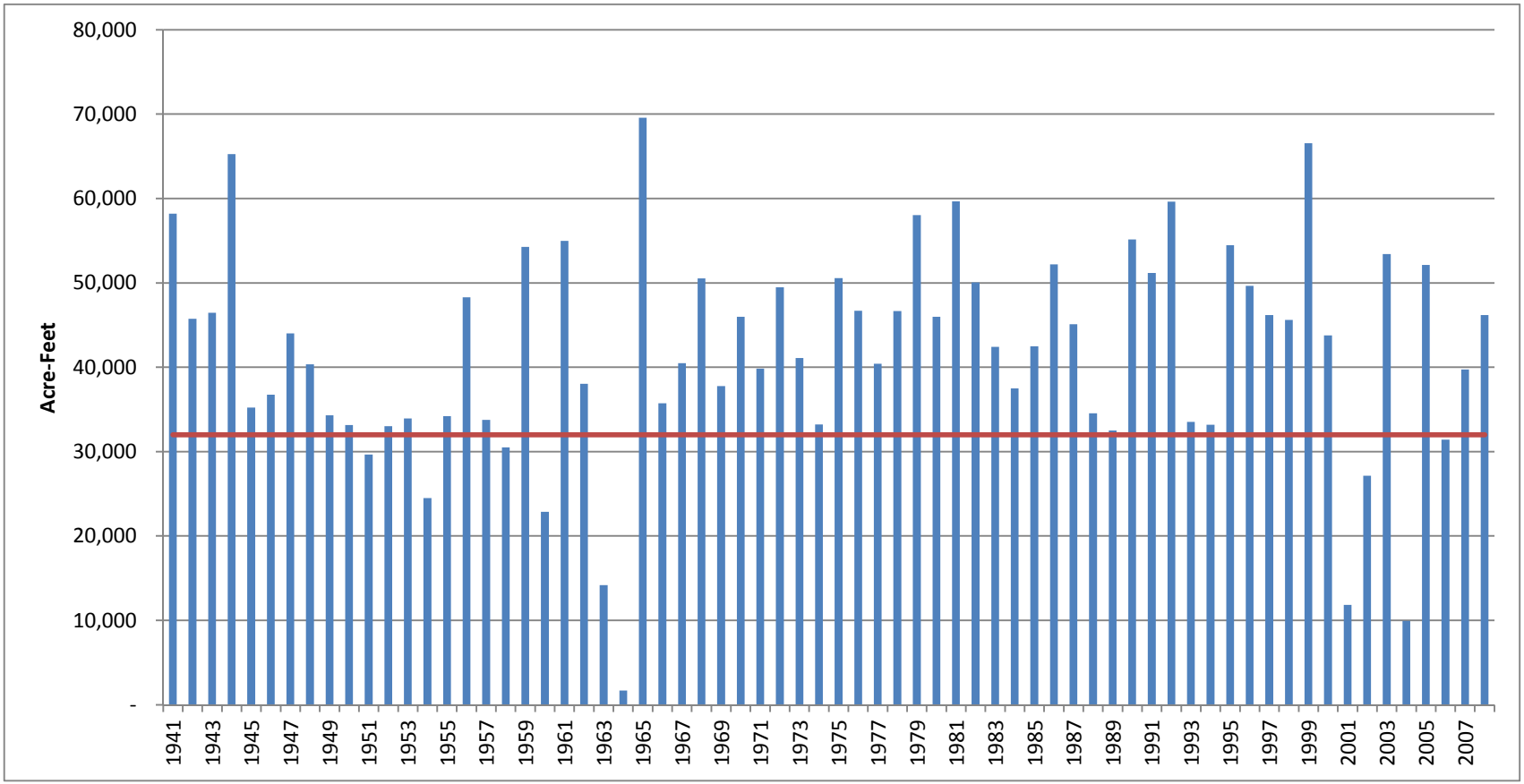
Inflows calculated as monthly storage accrual from Table 4-A from Exhibit M5

Stored inflows greater than 32,000 acre-feet displayed in ***bold italics*** and shaded gray

Tongue River Reservoir

Historical Inflows Stored

1941 - 2008



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♦

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

♦

CERTIFICATE OF SERVICE

I certify that copies of Montana's Reply In Support of Motion for Summary Judgment on Tongue River Reservoir was served electronically and by U.S. Mail to the following on July 11, 2016, as indicated below:

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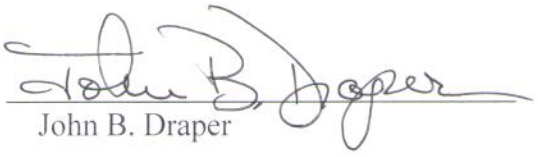
I further certify that all parties required to be served have been served.



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