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 BRIEF IN OPPOSITION TO WYOMING'S MOTION FOR SUMMARY JUDGMENT

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MONTANA'S BRIEF IN OPPOSITION TO WYOMING'S MOTION FOR SUMMARY JUDGMENT

The State of Montana hereby responds in opposition to the State of Wyoming's Motion for Summary Judgment ("Wyo. Mot." or "Wyoming Motion").

INTRODUCTION

The State of Wyoming has filed a Motion for Summary Judgment that depends in large part on a radical interpretation of a new-found document. Some five years after Wyoming filed its Motion to Dismiss in this case and more than three years after the issuance of the First Interim Report of the Special Master, Wyoming has suddenly sought to challenge the Special Master's interpretation of Article V(A). Wyoming seeks nothing less than to change the Article V(A) allocation.

In addition to the fact that Wyoming's new position is directly at odds with the rulings of the Special Master on Article V(A), which have been approved by the Supreme Court, there is a host of other reasons why Wyoming's new position should be rejected. It would contravene the fundamental principle that a compact must be interpreted in accordance with its express terms; the parties to the agreement disclaimed any admission as to the correct interpretation of the Yellowstone River Compact; the wording of the agreement itself does not support the interpretation now advanced by Wyoming; and the fact that Wyoming has never raised this interpretation, from the early days after it was entered into until last month in any interactions between the two States, confirms that Wyoming's novel interpretation was not the original intention of the States.

Wyoming also argues that Montana's claims should be rejected because Montana's experts have made no effort to correlate Wyoming's alleged violations with the alleged call dates. In making this argument, Wyoming forgets that this is not the remedies phase of the trial.

The question of a call and how it relates to damages arises only in the remedies phase of the case where damages would be considered. Argument or evidence on the existence of calls and their relation to remedies is not appropriate in this phase of the case. Further, the Special Master has already ruled that, as long as Montana acts with diligence, the timing of a call is not critical for the determination of damages. Nevertheless, Montana has provided evidence of the timing Wyoming demands.

Wyoming argues that CBM pumping should be excluded as a matter of law under the Compact for the reason that neither State regulates such pumping. The Court's precedents concerning compacts governing interstate surface waters uniformly hold that depletion of the compacted surface waters by groundwater pumping must be accounted for under the Compact. This is true even where it has been argued that neither of the compacting States regulated groundwater pumping at the time of the Compact.

Finally, Wyoming argues that Montana has failed to show actual contemporaneous demand from its pre-1950 appropriators. Such a requirement would be misplaced for several reasons. Notably, Wyoming does not administer its own prior appropriation rights under such a contemporaneous demand scheme. Rather, it regulates to trigger flows. In a similar approach, Montana's expert analysis has determined the amount of flow in each month necessary to satisfy Montana's pre-1950 water rights. Wyoming has no obligation to deliver a set amount of water to the stateline, but it does have an obligation not to allow its post-January 1, 1950 uses to interfere with the enjoyment of Montana's pre-1950 rights. Wyoming allows such interference whenever it fails to regulate its post-January 1, 1950 rights when flows fall below the amount necessary at the stateline to supply Montana's pre-1950 rights. Wyoming's approach is impractical and inconsistent with its own internal state water administration.

STATEMENT OF MATERIAL FACTS

I. The Yellowstone River Compact

1. The Yellowstone River Compact ("Compact" or "YRC") "deals with the entitlements of the States of Montana and Wyoming to the waters of the . . . Tongue River[]." First Interim Report of the Special Master at 1 (Feb. 10, 2010) ("FIR").

2. "Article V allocates the waters of the Yellowstone River system among the three states and is the key substantive provision of the Compact for purposes of this action." *Id.*, at 10.

3. "Read together, Articles V(A) and V(B) of the Compact establish a three-level hierarchy.

> (1) First, pre-1950 appropriative rights are to 'continue to be enjoyed.' Compact, Art. V(A). These pre-1950 rights receive the highest priority under the Compact.
>
> (2) 'Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950,' water goes next to 'provide supplemental water supplies' for pre-1950 right holders. Compact, Art. V(B), 1st clause. These supplemental water rights, like pre-1950 rights, are to be 'enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.' Compact, Art. V(B), 2nd clause.
>
> (3) Finally, the 'remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes' according to the percentages for each tributary. Compact, Art. V(B), 3rd clause."

Id., at 18-19.

4. "The final Compact provides block protection for all existing, pre-1950 appropriations, without attempting to quantify the amounts of those appropriations, and then, after providing for supplemental appropriations for lands already under irrigation, apportions the amount that remains." *Id.*, at 22.

5. Article V(A), which is the primary focus of this case, "requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana." *Id.*, at 29.

6. The Compact makes clear that all water users in each State are subject to the Compact rights and obligations of their respective State, providing that

> "Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory State and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, shall be subject to the terms of this Compact." Compact, Art. I(B).

7. The Compact further provides that "[n]othing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." *Id.*, at Art. VI.

8. The historical record from the negotiations of the Yellowstone River Compact indicates that Wyoming and Montana meant for pre-Compact water rights in use as of January 1, 1950, to be defined, administered, and managed by each State in accordance with that State's laws and practices. See Doug Littlefield Rebuttal Report on Article V(A) of the 1950 Yellowstone River Compact (May 31, 2013), attached as Exhibit A to Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements and Brief in Support (July 3, 2013).

9. Consistent with this historical record, Article XVIII of the Compact states

> "No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or

officers of such States of the jurisdiction of the water or each State as apportioned in this Compact." Compact, Art. XVIII.

II. The Northern Cheyenne Compact

10. The Montana State Water Conservation Board initiated the storage right in Tongue River Reservoir in April 1937. The construction of the dam and reservoir was completed in 1940 with a capacity of 69,400 acre-feet at the spillway crest. The dam, reservoir, and control works are located on the Tongue River in the State of Montana near Decker, Montana. Expert Report of Kevin Smith (Jan. 4, 2013) ("Smith Report"), at 4-6, Attachments 1 & 2, attached hereto as Exhibit A.

11. The Northern Cheyenne Tribe ("NCT" or "Tribe"), the State of Montana and the United States agreed on a compact to quantify the Tribe's water rights in 1991, after several years of negotiations. The Northern Cheyenne Tribe Compact ("NCT Compact") establishes the Tribe's water rights in the Tongue River and Rosebud Creek basins. *Id.*, at Attachment 3.

12. Under the Compact and decree, the Tribe's water right in the Tongue River has two components. The first is a direct flow right in the amount of 12,500 acre-feet with a priority date of October 1, 1881. Mont. Code Ann. §85-20-301 (Art. II.A.2.a). The second is a storage right in the Tongue River Reservoir in the amount of 20,000 acre-feet, *id.*, Art. II.A.2.b, with a priority date "equal to the senior-most right for stored water in the Tongue River Reservoir[.]" State of Montana Water Court Order in Cause No. WC-93-1 at III.2.c. (Sept. 26, 1995), attached hereto as Exhibit B. The senior-most right for water stored in the Tongue River Reservoir is the right belonging to the Montana Department of Natural Resources and Conservation ("DNRC") denominated as water right claim number 42B 119280-00, which has a priority date of April 21, 1937. The Tribe also has a separate contract right for 7,500 acre-feet of Tongue River Reservoir water.

13. As part of the NCT Compact, the United States and the State of Montana funded the rehabilitation and enlargement of Tongue River Reservoir in order to secure the Tribe's storage right under the NCT Compact. See *id.*, Art. IX.A

14. As a result of the enlargement of Tongue River Dam and Reservoir, the normal operating pool now has a capacity of 79,071 acre-feet. See Smith Report, Attachment 2, ¶ 4.

15. Montana DNRC's water right for the Tongue River Reservoir is currently being adjudicated in Montana's state-wide adjudication in the Montana Water Court. A Stipulation, as amended, among Montana, the Tribe, and objector and appearing parties, regarding the State of Montana's storage right in Tongue River Reservoir was filed with the Water Court of Montana on August 10, 2012. *Id.,* at Attachment 2.

16. The NCT Compact provides for the creation of a five-member advisory committee comprised of representatives of the State of Montana, the Tongue River Water Users Association ("TRWUA"), the NCT, the United States, and a fifth member to be elected by the other four ("Advisory Committee"). The Advisory Committee was given the responsibility of creating an operating plan for the Tongue River Reservoir. See Smith Report, at Attachment 3, NCT Compact, Art. III.D.

17. The Advisory Committee adopted an Operating Plan for the Tongue River Reservoir, attached as Attachment 1 to the Smith Report ("Operating Plan"), and a Manual for Operation and Maintenance ("Operating Manual"). The Tongue River Dam Manual for Operation and Maintenance was originally adopted in June of 1995. See Smith Report, at Attachment 3, NCT Compact, Attachment 3, Art. III.D. The most recent revision for the Tongue River Dam Manual for Operation and Maintenance was adopted in January of 2004.

18. The storage water rights of the State of Montana and the Tribe are commingled and administered conjunctively in accordance with the NCT Compact, the Operating Plan and the Operating Manual. Both storage rights are dependent on the State of Montana's ability to fill the reservoir, subject to physical and legal water availability and capacity in the reservoir. See Smith Report, at Attachment 2, ¶ 6.

19. The NCT Compact provides that shortages in NCT's Tongue River water right shall not exceed 50% in any one year or 100 % in any ten-year period. Shortages in stored water are to be shared pro rata among all users of stored water:

> "Decreases in the amount of water stored in the Tongue River Reservoir that are caused by: (i) sedimentation; (ii) Reservoir inflows lower than those assumed in the Tongue River Water Model; (iii) normal and expected maintenance of the Tongue River Dam and associated structures; or (iv) normal and expected deterioration of the Tongue River Dam and associated structures shall not be considered a failure of the Tongue River Dam as that term is utilized in paragraph A.2.f of this Article. All such decreases in water availability shall be shared pro rata among all users of stored water including the Tribe." See Smith Declaration at NCT Compact, Attachment 3, Art. II.A.2.c.ii.

20. The NCT Compact further provides that "Nothing in this Compact shall be so construed or interpreted . . . [t]o alter or amend any provision of the Yellowstone River Compact." *Id.*, at Art. VI.A.10.

III. The Tongue River Model

21. To assist in planning and the negotiation of the NCT Compact, Montana developed and the Tribe agreed to the Tongue River Water Model ("Model") to predict the amount of water that was likely to be available to satisfy the NCT's water rights and to assess impacts of such water rights on Montana and the Tribe. Declaration of Karen Barclay-Fagg at ¶ 6 (August 2, 2013) ("Barclay-Fagg Declaration"), attached hereto as Exhibit C.

22. The Model is referenced in the NCT Compact as a means to identify shortage of water for purposes of the NCT Compact and the amount of excess water available to the Tribe. Smith Report, at Attachment 3, NCT Compact, Art. II.A.2.b - c.

23. As defined in the NCT Compact, the Tongue River Water Model is "the Tongue River Reservoir Operations computer model that is documented in: Tongue River Modeling Study, Final Report, submitted on July 20, 1990, to the Engineering Bureau of the Water Resources Division of the Montana Department of Natural Resources and Conservation, or any revision agreed to by the parties." *Id.*, at Art. I.20 ("1990 Modeling Report").

24. The Model was intentionally conservative so that it would not over-predict the amount of water available for NCT Compact purposes. Barclay-Fagg Declaration at ¶ 6.

25. The Model was not developed in connection with the Yellowstone River Compact, and was not intended to be used in connection with the Yellowstone River Compact. *Id.*, at ¶ 7.

26. The Model was not intended to quantify the entitlements of the two States under the YRC, and was not intended to alter or amend the Yellowstone River Compact. *Id.*

27. The 1990 Modeling Report recognized that supplemental water supplies under Article V(B) of the Yellowstone River Compact had not yet been quantified. Second Fassett Affidavit at Exh. E, pg. 4, attached as exhibit to Wyo.'s Motion. It further recognized additional issues related to Yellowstone River Compact that had not yet been settled. *Id.*

28. The 1990 Modeling Report defined "supplemental water rights" as "Under the Yellowstone Compact, rights to apply additional water to lands with a partial irrigation supply in 1950." *Id.*, at 58.

29. For purposes of the Model, Wyoming and Montana agreed to consider all increases in water use since 1950 to be "supplemental water" pursuant to Article V(B) of the Yellowstone River Compact. *Id.*, at 11.

30. "The Tribe's priority date was assumed to be 1900" for purposes of the Model. *Id.*, at 18, 54.

31. On July 9, 1991, a draft of an updated Tongue River Water Model documentation ("1991 Draft Model Documentation") was completed. The 1991 Draft Model Documentation is attached as an exhibit to Wyoming's Motion.

32. Like the 1990 Modeling Report, the 1991 Draft Model Documentation indicates that "Wyoming's rights to supplemental water have never been finally quantified under the Yellowstone Compact." 1991 Draft Model Documentation at 2-3. It recognizes that the Yellowstone River Compact had "never been administered," and identifies issues that had not been resolved regarding the Yellowstone River Compact. *Id.*

33. Like the 1990 Modeling Report, the 1991 Draft Model Documentation explains that "[t]he interpretation of the Yellowstone Compact which is incorporated in this model was developed for purposes of determining reservoir inflow to an enlarged Tongue River Reservoir and should not be construed as a binding interpretation of the compact for other purposes." *Id.*, at 3-8. With regard to Wyoming, the 1991 Draft Model Documentation states that "[a]lthough not all issues were completely resolved, Wyoming was informed as to all assumptions relating to the Yellowstone Compact that appear in this model." *Id.*

34. The 1991 Draft Model Documentation again specified that "Wyoming and Montana agreed to consider any increase in agricultural water use that has occurred since 1950

and before the present time to be supplemental water" under Article V(B) of the Yellowstone River Compact. *Id.*, at 3-8 to 3-9.

35. The 1991 Draft Model Documentation further treats the Tribal right as a pre-1950 right, and notes that "the Tribe's future contract water supply is dependent on an enlarged reservoir and the enlarged reservoir has also been included in the Water Allocation Model as part of the Tribe's pre-1950 water right." *Id.*, at 3-9.

IV. The 1992 Agreement

36. On June 24, 1991, Jeff Fassett, the State Engineer of Wyoming, wrote to Karen Barclay (now Karen Barclay Fagg), the Director of the Montana DNRC regarding Wyoming's concerns with the Model. Barclay-Fagg Declaration at Exh. 1. Mr. Fassett suggested inserting language in the proposed Congressional act to ratify the NCT Compact as follows:

> (e) Nothing in this Act shall be construed or interpreted to in any way limit or otherwise adversely affect all water rights, entitlements, vested interests, and apportionment of waters of the State of Wyoming, established, recognized and protected under law prior to the enactment of this Act, and as attained by Wyoming under the provisions of the Yellowstone River Compact (Act of October 30, 1951, 65 Stat. 663). *Id.*

37. This language was never included in the act ratifying the NCT Compact.

38. As an alternative, Mr. Fassett, requested that language be included in an agreement between the two States denoting that:

> The State of Montana, the Northern Cheyenne Tribe and the United States agree that the delivery, use administration and regulation of water under the terms of the Northern Cheyenne Compact will not injure, limit or otherwise adversely affect any current water rights and their associated rights for supplemental supply under Wyoming law existing as of the effective date of the Northern Cheyenne Compact, located within the Wyoming portion of the Tongue River basin.

Id., at attachment.

39. Mr. Fassett's June 24, 1991 letter was shared with the Tribe. In response, on July 12, 1991, the Tribe's attorney wrote to Ms. Barclay regarding the substance of Mr. Fassett's requests. *Id.*, at Exh. 2 (Letter from J. Whiteing to K. Barclay) (July 12, 1991). Ms. Whiteing explained as follows:

> "The premise for the language and the Agreement is incorrect. The Northern Cheyenne Tribe never agreed or intended to protect Wyoming water users. We did agree to accept the Tongue River Modeling Study, which takes those users into account for the purpose of calculating water available to satisfying the Tribe's rights under the Compact. Our acceptance of the tongue River Modeling Study does not mean that we accepted the legitimacy of all of Wyoming's rights as a factual or legal matter, or that we have agreed that the Tribe's rights will not ever affect Wyoming's rights as a factual or legal matter, or that we have agreed that the Tribe's rights will not ever affect Wyoming's rights." *Id.*

40. Montana generally agreed with the statements contained in Ms. Whiteing's letter, and Montana considered the views of the Tribe when it negotiated the 1992 Agreement with Wyoming. Barclay-Fagg Declaration at 11.

41. The final 1992 Agreement reflects the position of Montana and the Tribe, and simply provides that Montana agreed not to modify the Tongue River Model without Wyoming's consent. In executing the 1992 Agreement, Montana did not intend to affect the YRC in any way, or establish any interpretation of the YRC. The final language of the 1992 Agreement reflects this intention, as it explicitly provides that the use of the Tongue River Model in the NCT Compact will not serve as an admission by either state as to the proper interpretation of the YRC. *Id.*, at 17.

42. As explained in the fact section to Montana's Brief in Opposition to Wyoming's Renewed Motion for Partial Summary Judgment, which is attached hereto as Exhibit D, and hereby incorporated by reference, prior to the rulings of this Court, Wyoming's position on

Article V(A) was that the Compact did not afford any protection for Montana's pre-1950 rights. This was Wyoming's position at the time that the 1992 Agreement was negotiated.

43. Other areas of disagreement at the time of the 1992 Agreement included whether the water rights of the Northern Cheyenne Tribe should be part of Montana's percentage allocations, the proper level of winter bypass flows through the Tongue River Reservoir, and the level of post-Compact development in both States. Barclay-Fagg Declaration at 4.

44. In negotiating the NCT Compact, the Model, and the 1992 Agreement, Montana sought to avoid including any language that would be controversial, that would force either Montana or Wyoming to take a position on the Yellowstone River Compact, or that would re-open negotiations on the Yellowstone River Compact. *Id.*, at 5. The 1992 Agreement was specifically drafted in order to avoid forcing the States to take a position on any Yellowstone River Compact issues, including the validity of pre-1950 and post-1950 water uses in Wyoming. *Id.*

45. The 1992 Agreement did not include the language that was proposed by Mr. Fassett in his June 24, 1991 letter. Instead, the States simply agreed that Montana would not assent to modify the Tongue River Model used in the NCT Compact without Wyoming's consent. *Id.*, at 13.

46. The 1992 Agreement does not contain any language purporting to alter, amend, or apply to the Yellowstone River Compact, and does not contain any language purporting to govern the operations of the Tongue River Reservoir. See generally 1992 Agreement.

47. In executing the 1992 Agreement, Montana did not intend to affect the Yellowstone River Compact in any way, or establish any interpretation of the Yellowstone River Compact. The final language of the 1992 Agreement reflects this intention, as it explicitly

provides that the use of the Tongue River Model in the NCT Compact will not serve as an admission by either state as to the proper interpretation of the Yellowstone River Compact. Barclay-Fagg Declaration at 17.

48. Specifically, paragraph 4 of the 4 paragraph agreement provides:

> "The Parties hereby affirm their intent that use of the Tongue River Model incorporated in the Northern Cheyenne Compact, and Wyoming's assent to the use of that model, shall not be deemed an admission by either Party as to the correct interpretation of the Yellowstone River Compact." 1992 Agreement, ¶ 4.

49. Neither Mr. Fassett, nor anyone else on behalf of Wyoming, indicated to Ms. Barclay that Wyoming believed that the 1992 Agreement altered, amended, or changed the Yellowstone River Compact in any way. Barclay-Fagg Declaration at 14.

V. Ratification of the NCT Compact

50. On September 30, 1992, the NCT Compact was ratified by Congress in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 ("1992 Act"). 106 Stat. 1186 (Sept. 30, 1992). Enlargement of the reservoir was implemented by the 1992 Act.

51. In the 1992 Act, Congress specifically provided that nothing in the NCT Compact or the 1992 Act was intended to alter the Yellowstone River Compact. It stated:

> "EFFECT ON YELLOWSTONE RIVER COMPACT – Nothing in this Act shall be construed to alter or amend any provision of the Yellowstone River Compact, as consented to in the Act entitled 'An Act granting the consent of Congress to a Compact entered into by the States of Montana, North Dakotah, and Wyoming relating to the waters of the Yellowstone River", approved October 30, 1951 (65 Stat. 663)." *Id.*, at Sec. 11(b).

VI. The States' Course of Dealing with Respect to the 1992 Agreement

52. As explained above, prior to the Court's rulings in this case, Wyoming took the position that Article V(A) carved pre-1950 rights out of the Compact and that Wyoming had no obligation under the Compact to regulate post-1950 water users in Wyoming in order to ensure

that pre-1950 water rights in Montana were satisfied. See, *e.g*, Second Declaration of Jack Stults, at ¶ 5 (Aug. 1, 2013) ("Second Stults Declaration"), attached hereto as Exhibit E.

53. At the 1992 Compact Commission meeting, the same year that the 1992 Agreement was signed, the issue of sufficient water for Montana's pre-1950 rights was raised. Mr. Fritz expressed his frustration with "the absence of a methodology to administer the Compact." Fritz reported that his staff had compiled information on pre- and post-1950 water use in Wyoming. Based on that information, Fritz concluded that "pre-1950 use impacts Montana and evidence suggests that post-1950 use also affects Montana's utilization of water in the basin." Fritz noted that the impacts "do not occur every year but they do occur." Fritz was "skeptical" that the commission "would proactively establish an administrative method and process, and after years of attempting to have such a system adopted by the Commission, would no longer pursue such an action." 1992 Annual Report at 6.

54. Although the 1992 Agreement was signed only eight months prior to the 1992 Commission meeting, Wyoming did not respond to Mr. Fritz' concerns about the lack of water for pre-1950 Montana rights by reference to the 1992 Agreement.

55. As outlined in Montana's Opposition to Wyoming's Renewed Motion for Summary Judgment, and in Mr. Stults' first declaration in support of that motion, in the years from 2000 until 2006, Montana complained on numerous occasions to Wyoming that it was not receiving sufficient water to satisfy its pre-1950 water rights. At no time during those communications did Wyoming raise the 1992 Agreement. Second Stults Declaration, at ¶ 6.

56. During that period, the 1992 Agreement was not raised during any Compact Commission meeting. *Id.*, at ¶ 8.

57. In 2004, Mr. Stults, the Administrator of the Water Resource Division and Compact Commissioner sent a formal call letter to Pat Tyrrell to inform him that Montana was not receiving sufficient water for its pre-1950 water rights. In his response Mr. Tyrrell did not mention the 1992 Agreement. Second Stults Declaration at ¶ 7, at Exh. 1.

58. In 2006, Mr. Stults again sent a formal call letter to Pat Tyrrell to inform him that Montana was not receiving sufficient water for its pre-1950 water rights. In his response Mr. Tyrrell again failed to mention the 1992 Agreement. *Id.*

59. This litigation was initiated in January of 2007. Since that time, despite filing numerous motions, including a motion to dismiss and two motions for summary judgment, Wyoming has never previously mentioned the 1992 Agreement to Montana or the Special Master.

60. On September 15, 2009, Wyoming answered the Bill of Complaint. In its Answer, Wyoming asserted the defense that the Complaint failed to state a claim upon which relief may be granted. Although it did not identify additional affirmative defenses, Wyoming purported to reserve the right to assert additional defenses.

61. On July 20, 2011, Wyoming filed its List of Issues of Fact and Law for Resolution Under Case Management Order No. 6. A copy of Wyoming's List of Issues is attached hereto as Exhibit F. In its List of Issues, Wyoming did not identify any issue related to the 1992 Agreement. In fact, each of Wyoming's issues is identified in terms of pre-1950, as opposed to pre-1980 rights.

62. On May 4, 2012, Montana posed an interrogatory to Wyoming in which it asked Wyoming to "identify and describe in detail each and every affirmative defense that you may seek to raise in your defense of this matter." In response Wyoming identified the defenses of

laches, failure to mitigate damages, and estoppel. *See* Wyoming's Answer to Montana's First Set of Interrogatories, Response to Interrogatory No. 11, attached hereto as Exhibit G. Despite the obligation to supplement its responses to interrogatories, Case Management Plan No. 1 at § VIII.H (Dec. 20, 2011) ("CMP No. 1"), Wyoming has never identified the 1992 Agreement as a defense.

63. On June 15, 2012, Wyoming filed its Motion for Leave to Amend Its Answer to Include the Defenses of laches and Mitigation of Damages. Montana did not oppose Wyoming's motion.

64. On July 30, 2012, Wyoming filed its Amended Answer to Bill of Complaint, which included the additional defenses of laches and mitigation of damages.

65. Wyoming has never raised the 1992 Agreement as a defense in this proceeding.

66. At no point during discovery did Wyoming raise the 1992 Agreement.

67. Montana deposed Gordon W. Fassett on November 27, 2012. A complete copy of Mr. Fassett's deposition is attached hereto as Exhibit H. Despite numerous questions about Article V of the Compact and related issues, Mr. Fassett did not identify or discuss the 1992 Agreement at any point.

VII. The Tongue River Reservoir

68. The Tongue River Reservoir was constructed in the late 1930s and completed in 1940. Rebuttal Expert Report of Gordon L. Aycock at 5 (June 4, 2013) ("Aycock Rebuttal Report"), attached hereto as Exhibit I. The original full capacity of the Reservoir was between 69,400 acre feet and 72,500. *Id.*

69. The Reservoir is owned by the DNRC and is managed by the Montana State Water Projects Bureau ("SWPB"). The TRWUA operates and maintains the dam. Smith Report at Attachment 1, pg. 1.

70. As discussed above, the Reservoir was rehabilitated in 1999 as part of the NCT Compact and the Congressional Act ratifying the NCT Compact. At that time, the capacity of the Reservoir was increased to 79,071 acre feet. The additional storage was part of the NCT Compact, and was associated with a 20,000 storage right that was recognized for the Tribe.

71. Two water rights are associated with the water stored in the Tongue River Reservoir. These rights are held by the DNRC and the Tribe. The DNRC water right is identified in Montana's general water rights adjudication as Water Right No. 42B 119280-00. See Smith Report at Attachment 2.

72. Although the proceedings on Water Right No 42B 1119280-00 are not final, the objecting parties have entered and filed an amended stipulation. The stipulation is part of Attachment 2 to the Smith Report. The deadline for filing comments or objections on the stipulation has passed, and Wyoming did not participate. Smith Report at 5.

73. Under the Amended Stipulation for Cause 42B-62, the water right is commingled and administered in conjunction with water stored in Tongue River Reservoir that has been reserved for the Northern Cheyenne Tribe pursuant to the NCT Compact. Smith Report at Attachment 2.

74. Under the Amended Stipulation, the Tongue River Reservoir is authorized to provide up to 40,000 acre feet of stored water per year to the TRWUA, and 20,000 acre feet of stored water per year to the Tribe. *Id.*

75. The Amended Stipulation recognizes that water is diverted and released pursuant to the Operating Plan developed by the Advisory Committee. *Id.*

76. The priority date of the both the DNRC right and the Tribe right is April 21, 1937. *Id.*

77. The Operating Manual imposes a maintenance and safety restriction on winter storage for the Tongue River Reservoir. It provides as follows:

> "Maximum Winter Storage: The maximum reservoir elevation for winter storage is 3,417.5 feet with 45,000 acre-feet of storage. This maximum helps prevent damage to the riprap and embankment from wind-driven waves and ice." Smith Report at Attachment 2, pg. 21.

Similarly, the Operating Plan states:

> "The Advisory Committee recommends that the maximum preferred carry-over be 45,000 AF (elevation 3417.5) in order to minimize freeze-thaw damage to the dam by allowing water to remain at the bottom of the concrete walls." *Id.*, at A6.

78. The pre-1950 operating records for the Tongue River Reservoir show that the reservoir was consistently operated below a storage level of 45,000 acre-feet during the October through March season. Aycock Rebuttal Report at 11.

79. The Tongue River Reservoir relies primarily on spring runoff from April to June to fill to or near its normal full capacity. *Id.*, at 16-17. The Advisory Committee determined that the Tongue River Reservoir should be operated to fill the Reservoir during the spring runoff. Smith Report at Attachment 1, A4.

80. Winter bypass flows are necessary from Tongue River Reservoir for operational, safety, and water rights purposes. Smith Report at 14-15; Rebuttal Expert Report of Kevin Smith, P.E. at 14-17 (June 4, 2013), attached hereto as Exhibit J; Aycock Rebuttal Report at 3, 11-16.

81. Prior to 1950, minimum winter bypass flows were similar to the 175 cfs requirement established by the Advisory Committee. Smith Report at 14; Aycock Rebuttal Report at 12-13, 15-16. Long-term average monthly outflows during the non-irrigation season range from 168 cfs to 350 cfs over the period of 1939 through 2012. Smith Report at 14.

82. The Tongue River Reservoir did not fill in 2001, 2002, 2004, and 2006. Expert Report of Dale E. Book at 11, Tables 4-A through E, Table 12 (Jan. 4, 2013) ("Book Report"), attached hereto as Exhibit K.

83. When timing of storage is considered, the Tongue River Reservoir would not have filled to either the original or the rehabilitated capacity in 2001, 2002, 2004, and 2006, even if the winter bypass flow had been set at 75 cfs for the entire winter. Expert Rebuttal Report of Dale E. Book, P.E. at 20, Figure 9-A, Figure 9-B (June 4, 2013) ("Book Rebuttal Report"), attached hereto as Exhibit L; Aycock Rebuttal Report at 17-21, Table 3.

VIII. Pre-1950 Water Rights in Montana

84. The area irrigated by diversions from the mainstem of the Tongue River in Montana at the time of the Compact was documented in Water Resource Surveys completed in the Montana State Engineer's Office in 1947-1949. The irrigated area at the time of the Compact was 9,908 acres. Book Report at 8; Book Rebuttal Report at 14-16.

85. The T&Y Irrigation District ("T&Y") is located on the Tongue River in Montana near the confluence with the Yellowstone River. The T&Y has the second most senior water right on the Tongue River. That right entitles the T&Y to divert 187.5 cubic feet per second ("cfs"). Declaration Roger Muggli at ¶ 4 (Aug. 2, 2013) ("Muggli Declaration"); see also 1914 Miles City Decree, attached hereto as Exhibit M. Irrigated acreage for the T&Y water right in the current Montana adjudication is 9,589 acres. Book Rebuttal Report at 15.

86. Dale E. Book, P.E. tabulated the pre-1950 water right claims on the mainstem of the Tongue River from documents available as part of the ongoing Tongue River adjudication. Although the adjudication is not final, all of the pre-1950 claims have been recently examined by an examiner. Based on this examination, the acreage associated with pre-1950 water rights totals 11,600 acres between the stateline and the T&Y canal. The irrigation status of these rights for 2005, 2009, and 2001 was analyzed based on aerial photography. Book Rebuttal Report at 14-15, Table 4-A and 4-B; Book Report at 8, Table 2. Based on this analysis, it was concluded that the pre-1950 acreage is being irrigated. Book Rebuttal Report at 16, Table 4-A and 4-B; Book Report at Table 12, Appendix A.

87. Mr. Book then used this information concerning pre-1950 irrigated acreage to determine the amount of water that is necessary in Montana to satisfy all of Montana's pre-1950 rights. He determined that 195 cfs is necessary in May, 325 in June, 350 cfs in July, 335 cfs in August, and 280 cfs in September. Book Report at 9-11; Book Rebuttal Report at 16-19.

88. By July in most years, the flow in the river will not support the direct flow demands in Montana. *Id.*; see also Book Report at Table 5, page 35.

89. When the flow entering Montana drops below the levels shown on Table 5 of the Book Expert Report, Montana irrigators must resort to reservoir storage to supplement river flow. Book Report at 11.

90. Almost every year the large majority of the lands irrigated by the T&Y canal are irrigated. If there was sufficient water available every year, all of these lands would be irrigated every year. Muggli Declaration at ¶ 5.

91. At times during the irrigation season, the T&Y is diverting the maximum amount of its water right. *Id.*, at ¶ 6; Expert Report of Bern Hinckley at 15, Table 1 (Apr. 2, 2013), attached as an Exhibit to Wyoming's Motion.

92. As the second, and one of the largest, rights, the T&Y is typically the calling right on the Tongue River in Montana. Each year there has been a time during the irrigation season when there was insufficient water reaching the canal to fully satisfy the T&Y's direct flow right. When this condition exists, the T&Y is forced to switch to using stored water from the Tongue River Reservoir in order to obtain a full supply. Depending on various conditions, this can occur anytime between late May and August. The only time the T&Y switches to stored water is when there is insufficient water reaching the canal to satisfy T&Y's direct flow right. Muggli Declaration at ¶ 7.

93. When there is insufficient water reaching the T&Y canal to satisfy its direct flow right, other users on the Tongue River are informed that there is no longer water available for direct flow rights, and users junior to the T&Y must use stored water to continuing irrigating. This includes all of the irrigators on the Tongue River below the Reservoir, except for Jay Nance, who is the only water user with a right senior to the T&Y. Declaration of Art Hayes, Jr. at ¶ 10 (Aug. 2, 2013) ("Hayes Declaration"), attached hereto as Exhibit N.

94. If there is less than 200 cfs reaching the state line, the T&Y Irrigation District's direct flow right is not being fully satisfied, and all other users on the river, except for Jay Nance, are using stored water. *Id.*, at ¶ 11.

95. In years when there has been no water commissioner appointed, Mr. Hayes on behalf of the TRWUA is responsible for operating the Tongue River Reservoir. In years when a water commissioner has been appointed by the district court, Mr. Hayes provides information

and input to the water commissioners, but ultimately the water commissioners are responsible for regulating the water users on the Tongue River and the operations of the Tongue River Reservoir. There were water commissioners on the Tongue River in 2000, 2001, 2002, 2004 and 2006. *Id.*, at ¶¶ 6-13; Muggli Declaration at ¶¶ 9-10.

96. Insufficient water was reaching Montana at some point during the irrigation season to satisfy Montana's active pre-1950 water rights in all but three years since 1961. Book Report at 11, Table 5; Book Rebuttal Report at 17-19, Tables 5-A & B, Tables 6A, B, & C.

97. In 2001 the mean flows entering Montana were below 200 cfs in June, July, August and September; in 2002 the mean flows entering Montana were below 200 cfs in July, August and September; in 2004 the mean flows entering Montana were below 200 cfs in May, June, July, August and September; and in 2006 the mean flows entering Montana were below 200 cfs in August and September. Book Expert Report at Table 5. During these times, the T&Y was not receiving sufficient water to satisfy its direct flow right. Hayes Declaration at ¶ 11.

98. Insufficient water was reaching Montana to satisfy its pre-1950 water rights in Montana in every day of July, August, and September in 2001, 2002, 2004, and 2006. Book Rebuttal Report at Table 6-B; insufficient water was reaching Montana to satisfy its pre-1950 water rights in Montana in June on 30 days in 2001, 17 days in 2002, 30 days in 2004, and 14 days in 2006. *Id.*

IX. Groundwater Regulation in Montana

99. Through adoption of the Montana Ground Water Code of 1961, Montana created a unitary system for administering and regulating groundwater and surface water which remains in place today. Declaration of Tim Davis at ¶ 2 (Aug. 2, 2013) ("Davis Declaration"), attached hereto as Exhibit O.

100. Under Article IX, § 3 of the 1972 Montana Constitution all surface, underground, flood and atmospheric waters within the boundaries of the state are subject to appropriation for beneficial use. As such, virtually all sources of water fall within parameters of the Act. In fulfillment of its duties related to water resource management and permitting under the Act, the Water Resources Division has accepted the principle that, absent proof otherwise, all groundwater is ultimately connected to surface water and subject to surface water priorities. *Id.*, at ¶ 4.

101. The Montana Water Use Act only requires a new water use permit for an "appropriation", which means "to divert, impound, or withdraw . . . a quantity of water for a beneficial use . . . ." § 85-2-102, MCA. The Water Resources Division determined that while coalbed methane ("CBM") production results in the withdrawal of groundwater, unless the CBM producer intends to put the groundwater to a beneficial use, the withdrawal is not subject to the permitting requirements of the Act. If a CBM producer intends to put groundwater to beneficial use, the groundwater use is subject to analysis and all of the requisite proof, including analysis of the hydrological connection between the source groundwater aquifer and surface water. However, if the CBM producer does not intend to put the ground water to beneficial use, it is not subject to the permit criteria under the Act, and analysis of the hydrological connection between the source groundwater aquifer and surface water is not conducted. *Id.*, at ¶ 5.

102. The withdrawal of groundwater incidental to CMB production is not typically regulated by the Water Resources Division because the withdrawal is not associated with a beneficial use. This does not mean that groundwater withdrawn during CBM production is not connected to surface water or cannot adversely affect surface water users. *Id.*, at ¶ 6.

X. Post-1950 Water Use in Wyoming

103. Wyoming has six large reservoirs in the Tongue River Basin which have post-1950 storage capacity. The total post-1950 capacity for those six large reservoirs is 9,386 Acre-feet. Book Report at 12-13, Table 6.

104. These reservoirs store water that would otherwise be available for storage by the Tongue River Reservoir. Table 7 of the Book Report summarizes the post-1950 storage accrued in each of these large reservoirs for the years 1981 to 2008.

105. Detailed calculations of the post-1950 storage in Wyoming in 2001, 2002, 2004 and 2006 are located in Appendix F of the Book Report. Mr. Aycock evaluated the timing of post-1950 storage in Wyoming on a month by month basis for each of those same years. Aycock Rebuttal Report at 17-22, Appendix A.

106. Mr. Book analyzed the impacts on Montana of the post-1950 storage in Wyoming from these six large post-1950 reservoirs. Book Report at Table 8, Table 12; Book Rebuttal Report at Table 3.

107. Three additional reservoirs of significant size include the Five Mile, Wagner, and Padlock Recovery Reservoirs. These reservoirs have a total post-1950 capacity of 1,200 to 1,250 acre feet. The State of Wyoming does not regulate Five Mile, Wagner and Padlock Recovery Reservoirs. Book Report at 14-15.

108. The Five Mile, Wagner and Padlock Recovery Reservoirs are filled each year beginning in October with water diverted through the Wyoming and Five Mile Ditch. Five Mile Reservoir is filled first until March, and then water is stored in Wagner Reservoir until the irrigation season begins. The reservoirs are normally emptied every year. *Id.*, at 15.

109. Mr. Book analyzed the impacts of the post-1950 storage in Wyoming to Montana from these three post-1950 reservoirs. Book Report at 15, Table 12, Book Rebuttal Report at Table 3.

110. There are approximately 4,320 acres in Wyoming that are irrigated with post-1950 rights. Book Report at 17-19, Table 10, Figure 3. A list of post-1950 rights in Wyoming is provided in Appendix G-2 of the Book Report.

111. The mainstem of the lower Tongue River in Wyoming has not been subject to regulation for the years at issue. Book Report at 4; Deposition Transcript of Michael Whitaker at 50-52 (Nov. 2, 2013), attached hereto as Exhibit P; Deposition Transcript of Bill Knapp at 50-51 (Nov. 1, 2013), attached hereto as Exhibit Q; Deposition Transcript of Patrick Boyd at 63 (Nov. 14, 2013), attached hereto as Exhibit R; Deposition Transcript of Carmine LoGuidice, attached hereto as Exhibit S; Deposition Transcript of Patrick Tyrrell at 130-32 (Nov. 14, 2013), attached hereto as Exhibit T.

112. Without regulation in the lower reaches of Tongue River, water is diverted as available and needed, without being curtailed by priority date. There are post-1950 water rights in this reach that have used water and have not been regulated. Book Report at 5.

113. At times when Montana irrigators are utilizing stored water, there is insufficient water to satisfy Montana pre-1950 water rights. "During such times, post-1950 use in Wyoming reduces the river supply available and results in increased demand of storage beyond what it would have been without the post-1950 depletions. It is necessary for the protection of the direct flow water rights in Montana to prevent post-1950 uses in Wyoming as such times." Book Report at 11.

114. If Wyoming post-1950 diversions did not occur, approximately 90% of the water would arrive in Montana. See, *e.g.*, Book Expert Report at 14.

115. Mr. Book identified post-1950 lands that were irrigated in Wyoming in 2004 and 2006. Book Expert Report at 17—21, Figure 3; Book Rebuttal Report 4-12, Table 2-A & 2-B, Figures 1-7.

116. Mr. Doyl Fritz provided an expert report on behalf of Wyoming. Mr. Fritz criticized Mr. Book's evaluation of post-1950 irrigation in Wyoming. See Expert Report of Doyl M. Fritz, P.E. at 46 (Apr. 2, 2013) ("Fritz Report), attached hereto as Exhibit U. Through his analysis, Mr. Fritz acknowledges that there was post-1950 use on many of the lands identified by Mr. Book in 2004 and in 2006. See *id.*, at Attachment 7 (showing post-1950 rights that were irrigated in Wyoming on July 22, 2006).

117. In his report, Mr. Fritz provided information concerning the timing of regulation and water use, including post-1950 water use in Wyoming. Fritz Report at 14-61. The information provided by Mr. Fritz shows that Wyoming was allowing its water users to divert water at a time when Montana pre-1950 users where not receiving a sufficient supply. Book Rebuttal Report at 11-12.

118. Dr. Richard Allen prepared mapping of evapotranspiration of post-1950 acreage in Wyoming for the years 2004 and 2006. The results are based on sampling of field-averaged ET done on a monthly basis for April through October for 2004 and 2006. See Expert Report of Richard G. Allen, P.E. (Jan. 4, 2013) ("Allen Report"), attached hereto as Exhibit V. The METRIC mapping is displayed in Mr. Book's analysis at Figures 4 A through D.

119. Last, CBM development has resulted in a large amount of pumping in the basin. Mr. Larson concluded that the CBM pumping is hydrologically connected to the surface water.

He evaluated the impacts of the CBM pumping on the Tongue River in Montana. See generally Expert Report of Steve Larson (Jan. 4, 2013) ("Larson Report"), attached hereto as Exhibit W; and Expert Rebuttal Report of Steven Larson (June 4, 2013) ("Larson Rebuttal Report"), attached hereto as Exhibit X.

120. Mr. Larson concluded that "water production associated with CBM development has reduced and will continue to reduce groundwater levels and thus deplete groundwater storage." He further concluded that "the depletive effects of stream flow of water production associated with CBM development will continue for many decades after CBM water production has been ceased. Larson Report at 4.

121. Mr. Larson utilized a groundwater model developed by the Bureau of Land Management to estimate the depletive effects of CBM water production on the Tongue River. *Id.*

122. Wyoming does not contest that this pumping has some effect on the streamflow of the Tongue River in Montana.

123. The Wyoming office of the State Engineer has received a number of complaints alleging interference with water rights in the Tongue or Powder basins. See Deposition Transcript of Lisa Lindemann at 62-68 (Nov. 26, 2012), attached hereto as Exhibit Y.

124. After making appropriate adjustments based on the analysis of the Wyoming experts, Mr. Book calculated the post-1950 impacts to Montana in 2001, 2002, 2004 and 2006. In those four years, Mr. Book calculated that Wyoming's impacts were 8,120 acre feet. Book Rebuttal Report at 27, Table 3.

125. When the timing of impacts is taken into account the impacts to Montana in 2001, 2002, 2004 and 2006 totaled 10,160 acre feet. Aycock Rebuttal Report at 3, 20-22, Table 3.

XI. Water Administration

126. Wyoming water commissioners are instructed that "it is the duty of the Commissioner to regulate all upstream appropriations to the extent necessary to supply the requesting appropriation its full entitlement if available." Hand Book for Field Water Administrators (WYO37170 – WYO37182), attached hereto as Exhibit Z.

127. Wyoming water commissioners use trigger-flows to determine when junior rights should be regulated. See, *e.g.*, See Deposition Transcript of David Schroeder at 129:5-6 (June 27, 2013) ("Schroeder Deposition"), attached hereto as Exhibit AA. For example, Mr. Fritz explained the regulation on Piney Creek as follows:

> "Many years of regulation have shown that about 22 cfs must be flowing past the Kearney gage in order to satisfy approximately 32 cfs of senior (i.e. senior to the water rights in the Prairie Dog and Mead-Coffeen ditches) downstream rights before any water can be exported out of the Piney Creek drainage above this gage. When the flow drops below 22 cfs at this gage, these two ditches typically go into regulation." Fritz Report at 56.

128. Once a ditch in Wyoming is placed into regulation, regulation is not lifted based on the irrigation practices of the individual users, such as when those users are cutting hay. See, *e.g.*, Schroeder Deposition at 137:7-138:17; Boyd Deposition at 89.

129. In Montana, each district court supervises water use within its jurisdiction and is authorized to appoint water commissioners to measure, record, and distribute water rights on a watercourse pursuant to a decree of a court of competent jurisdiction, including any temporary preliminary, preliminary, or final decree of the water court. Fifteen percent (15%) of water users affected by the decree may petition their district court to appoint a water commissioner on a source. A water commissioner appointed for the purpose of distributing water has the authority to determine the appropriate quantity of water to which each water user on the source is entitled

according to their priority date and flow rate as established by the decree, permit, certificate, or change in appropriation right. Davis Declaration at ¶ 7.

130. In Montana, the Water Resources Division provides training for water commissioners regarding the legal requirements and best practices for administering water rights. Water commissioners are required to distribute water based upon the parameters of each water right according to the "first in time, first in right" principles of the prior appropriation doctrine. Because a senior appropriator is entitled to completely fulfill his/her water right before a junior appropriator is entitled to water, a commissioner is required to deliver the water to the most senior water user first based upon water availability in the source, priorities on the source, and the flow rate as established by the decree, permit, certificate, or change in appropriation right. As water supply diminishes over the course of the irrigation season, water distribution to junior water users may be curtailed or cut off in the order of priority to ensure that water is available to senior water users. *Id.*, at ¶ 8.

131. In Montana, a water commissioner is required to ensure that the amount of water set forth in a senior water user's water right is available to the senior water user when needed. Because a water user is legally entitled to take the decreed flow rate for his/her water right within the parameters of the period of use for the underlying water right, the amount of water delivered to a senior water user's point of diversion is based upon his/her decreed flow rate. Thus, the legal demands administered on the source at any given time is based upon the amount of water set forth in the decree, permit, certificate, or change in appropriation right, and it is not based upon the actual real time use by water users on the source. Administration of priorities based upon the real time contemporaneous needs of each irrigator would be an impractical method of

administration and exceed a water commissioner's authority, which is to ensure delivery of water as decreed. *Id.*, at ¶ 9.

132. Montana does not regulate water rights based on real time demand. This means that Montana does not adjust regulation based on haying or vacations of water users. *Id.* It would be impractical to regulate water rights based on the real time, hour-by-hour or day-by-day demand of water users. Muggli Declaration at ¶¶ 11-14.

STATEMENT OF MONTANA'S CLAIMS

The Special Master has held that "Wyoming has an obligation under Article V(A) of the Compact to reduce any post-1950 uses when necessary to meet the needs of pre-1950 appropriations in Montana." Mem. Op. of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirement for Damages) at 14 (Sept. 28, 2012) ("Sept. 28, 2012 Mem. Op."). Based on this requirement, Montana maintains two claims at this stage of the proceeding. First, Montana has quantified the impacts of post-1950 uses in Wyoming in 2001, 2002, 2004, and 2006. These impacts prevented Montana from receiving sufficient water to satisfy the pre-1950 Tongue River Reservoir right, and Montana's pre-1950 direct flow rights. Because Montana has quantified the impacts of these violations, if it is able to prove this claim, Montana will seek retrospective, as well as prospective relief in the next remedies phase of the litigation. Second, Montana claims that Wyoming violated the Compact in all but three years since 1961 by allowing post-1950 uses in Wyoming at a time that Montana was not receiving sufficient water to satisfy its pre-1950 direct flow rights. Because the Special Master has ruled that that Montana did not provide sufficient notice in the majority of those years, and because Montana has not quantified the impact from these violations, if Montana is able to prove this claim, Montana will seek only prospective relief based on this claim in the next phase of the litigation.

STANDARD OF DECISION

Rule 56 of the Federal Rules of Civil Procedure, although not strictly applicable, and the Supreme Court's precedents construing that Rule "serve as useful guides" in original actions. *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ibid.* "On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are [fact-finder] functions, not those of a judge [when] ruling on a motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Summary judgment . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable [fact-finder] could return a [finding] for the nonmoving party." *Anderson*, 477 U.S at 248. "If reasonable minds could differ as to the import of the evidence," summary judgment should not be granted. *Id.*, at 250. "[E]ven where there is no dispute as to the evidentiary facts but only as to the conclusions to be drawn therefrom," summary judgment should not be granted. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). "Disputed questions should not be resolved on conflicting affidavits, depositions and other extraneous material," because "these questions should only be resolved by trial." *Darby v. United States*, 496 F. Supp. 943, 945 (S.D. Ga. 1980).

ARGUMENT

I. Wyoming's Claim Based on the 1992 Agreement Has Not Been Pleaded and Should Not Be Considered

Wyoming's claim that the 1992 Agreement altered its obligations under the Compact is an affirmative defense to Montana's Compact violation claims that was not properly raised in Wyoming's Answer, or throughout these proceedings. "An affirmative defense is a defense that does not seek to negate the elements of the plaintiff's claim, but instead provides a basis for avoiding liability even if the elements of the plaintiff's claim are met." Commentary to Fed. R. Civ. P. 8. Thus, in a breach of contract action, the existence of a subsequent agreement modifying the contract that was allegedly breached is an affirmative defense because it does not seek to negate the claim that the contract was breached, but seeks to avoid liability based on the existence of a subsequent agreement that modified the earlier contract. See, *e.g.*, 17B C.J.S. *Contracts* § 891 (identifying affirmative defenses to be alleged to a breach of contract claim). In this case, Wyoming seeks to avoid liability for violating the terms of the Compact by asserting that those terms were modified by the 1992 Agreement. Thus, the 1992 Agreement, as it is interpreted by Wyoming to have altered the terms of the Compact, is a classic affirmative defense.

The policy underlying the requirement of Rule 8(c) that defendants plead their affirmative defenses is to afford plaintiffs adequate notice and an opportunity to meet the defense and show why the defense should not succeed. See Comments to Rule 8; *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1076 (10th Cir. 2009). Thus, the general rule is that unpleaded affirmative defenses are deemed waived. *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005). While some courts have liberalized the requirement that defendants raise affirmative defenses in their initial pleadings, and thus have allowed defendants to raise

affirmative defenses on summary judgment that were omitted from the answer, they have done so only where there is no prejudice to the non-moving party. See *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) ("A defendant may . . . raise an affirmative defense for the first time in a motion for judgment on the pleadings, but 'only if the delay does not prejudice the plaintiff.'" (quoting *Magana v. Commonwealth of the Northern Mariana Islands,* 107 F.3d 1436, 1446 (9th Cir.1997)) (holding that affirmative defense of statute of limitations may be raised for the first time at summary judgment where plaintiff was not prejudiced); *McGraw v. Matthaei*, 388 F.Supp. 84, 88–89 (E.D.Mich.1972) (untimely raising of limitations defense not allowed when extensive trial preparation and discovery had taken place).

Montana will be prejudiced if Wyoming is allowed to raise the 1992 Agreement as an affirmative defense in this case. More than six years into this litigation, Wyoming seeks summary disposition of Montana's claims based on a side agreement entered into between the Governors of Wyoming and Montana more than two decades ago. Wyoming claims that this agreement altered Wyoming's obligations under Article V(A) of the Compact, yet Wyoming not only failed to raise the agreement in its Answer or to identify it as an affirmative defense in response to Montana's discovery requests, it has never mentioned that agreement in any substantive way throughout the entire course of this litigation. Nor did Wyoming officials ever raise the 1992 Agreement in the years after 1992 when Montana complained that it was not receiving its water under the Compact. One would think that, if the 1992 Agreement means what Wyoming says it does, Wyoming would have been quick to point to that agreement when Montana notified Wyoming that it was using post-1950 water to the detriment of Montana's pre-1950 rights. But that was not the case.

Montana has prepared its case based upon the allegations and defenses in the pleadings filed by Wyoming, none of which ever mentioned the 1992 Agreement. This preparation has included identifying Montana witnesses to address Wyoming's defenses, developing ten expert reports, responding to Wyoming's discovery, and evaluating issues for pretrial motions. Additionally, Montana diligently pursued discovery on all of the issues raised by the allegations and defenses set forth in the pleadings in this case, including 324 interrogatories, not including individual subparts, 20 requests for production, 17 requests for admissions, and 32 depositions of Wyoming officials, employees, experts, and water users. Had Montana been aware of the significance Wyoming now attributes to the 1992 Agreement, Montana would have prepared its case and structured its discovery – both written and depositions – to address that agreement and its history. As one district court aptly explained:

> "Had the [affirmative defense] been put forward when it could and should have been, it would have been open to plaintiff to pursue at that time such discovery procedures as he considered appropriate, in order to develop the true state of facts. Discovery, including the remedy of depositions of persons concerned, if pursued at a reasonable point in the history of the alleged release could have gone far to develop whether this defense had been appropriately raised." *Garrison v. Baltimore & O.R. Co.*, 20 F.R.D. 190, 195 (W.D. Pa. 1957).

But Montana was afforded no such opportunity. Instead, Wyoming has come out of the blue with its Motion claiming that the 1992 Agreement is the key to the entire case, and is determinative of Montana's claims. It is difficult to imagine a clearer case of unfair surprise and lack of notice that the basic pleading requirements are designed to prevent. See *Haskell v. Washington Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988).

In sum, Montana will be significantly prejudiced if Wyoming is allowed to assert the 1992 Agreement as a defense in this matter. Discovery closed on July 30, 2013. Trial is scheduled for October 14, 2013, and, as the Special Master has acknowledged, the schedule of

this litigation is tight. Wyoming delayed disclosure of its theory that the 1992 Agreement controls the claims in this case until after the close of discovery. Accordingly, the Special Master should not consider Wyoming's arguments regarding that agreement. If, however, the Special Master determines that Wyoming should be permitted to raise the 1992 Agreement as an affirmative defense, Montana should be afforded an opportunity to conduct discovery, including taking depositions of relevant witnesses, and to put on witnesses at trial to address that issue.

II. The 1992 Agreement Did Not Modify the Yellowstone River Compact

A. Wyoming's Interpretation of the 1992 Agreement Is Inconsistent with the Compact

Wyoming claims that the 1992 Agreement "supplements" its and Montana's rights and responsibilities under the Compact. See Mot. at 29. Wyoming also claims that while Montana is bound by the water allocation model incorporated in the 1992 Agreement, the 1992 Agreement did not alter the Compact. See *id.* However, Wyoming's interpretation of the 1992 Agreement is inconsistent with the Compact in several respects.

First, Wyoming argues that in the 1992 Agreement, "the States and the modelers agreed to treat all pre-1980 appropriations in Wyoming as if they were pre-1950 appropriations, and therefore, not allocable under Article V(B)." Mot. at 6. Accepting this interpretation of the 1992 Agreement would effectively rewrite Article V(A) of the Compact to read:

> Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, **1980**, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

This is not filling in, or supplementing a missing or ambiguous term; it is fundamentally altering the meaning and obligations under one of the most important provisions of the Yellowstone River Compact.

Second, Wyoming's interpretation of the 1992 Agreement would convert supplemental rights with a priority date between 1950-1980, and which the Compact recognizes under Article V(B), into Article V(A) rights.

Third, Wyoming's interpretation of the 1992 Agreement is inconsistent with Article VI of the Compact. Article VI provides "[t]hat nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." Under Wyoming's view of the 1992 Agreement, Wyoming is entitled to divert all the water necessary to fulfill its pre-1980 rights before it is obligated to deliver any water to the Montana stateline. The Tribe withdraws its water under the NCT Compact out of the Tongue River Reservoir, and under the NCT Compact, Montana and the Tribe share water shortages on a pro rata basis. See NCT Compact, Article II.A.2. If Wyoming's view that the 1992 Agreement entitles it to satisfy all pre-1980 rights before delivering any water to Montana, it would reduce Montana's allocation of Yellowstone River Compact water, and in times of shortage, the Tribe would also share those shortages. Moreover, Wyoming's interpretation would put the Tribe in a position junior to Wyoming with respect to its Reservoir rights. Thus, adoption of Wyoming's position would adversely affect the Tribe's water rights in contravention of Article VI of the Compact.

Given these inconsistencies, to abide by Wyoming's interpretation would mean that the 1992 Agreement did not merely "supplement" the terms of the Compact, but rather altered them significantly.

B. An Interstate Compact Between Two States Cannot Be Modified By a Side Agreement

The significant modifications to the Compact that Wyoming claims resulted from the 1992 Agreement could not have been accomplished absent the consent of Congress. The Compact is an interstate agreement falling within the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3. As such, its negotiation was authorized by Congress, and the final Compact had to secure congressional approval following ratification by the legislatures of the signatory states. See *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *Cuyler v. Adams* 449 U.S. 433, 439 (1981) (stating that "[t]he requirement of congressional consent is at the heart of the Compact Clause"). Congressional approval transformed the Compact into a law of the United States. See *Cuyler*, 449 U.S. at 438-40.

Wyoming now suggests that a side agreement entered into between Wyoming and Montana with respect to an entirely different compact operated to fundamentally change key substantive provisions of the Compact. However, such changes, even if intended by Wyoming and Montana, could not have become effective without the consent of Congress. See *Texas v. New Mexico*, 462 U.S. at 564 ("unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.") Thus, any attempt to modify the Compact by way of the 1992 Agreement would be void *ab initio*.

Nor will the Court, in an original action involving an interstate compact, order relief inconsistent with the plain terms of that compact or read terms into the compact that are not expressly stated. Thus, the Court has previously held that as between a side agreement between signatory states and an interstate compact, it is the compact that controls in determining whether a compact violation has occurred. In *Kansas v. Colorado*, 514 U.S. 673 (1995), Kansas argued that Colorado's departure from agreed-upon operating principles for the Trinidad Reservoir

approved by the Arkansas River Compact Administration constituted a violation of the Arkansas River Compact. *Id.*, at 682. The Court, noting that the case was "an original action to enforce the terms of the [Arkansas River Compact]," rejected Kansas' claims based on violation of the operating principles, holding that Kansas' theory was inconsistent with provisions of the compact itself. *Id.*, at 682-83. Accordingly, the Court held that a violation of the operating principles, even though they were approved by the interstate body created to administer the compact, was not *ipso facto* a violation of the compact itself. *Ibid.*

The Court's refusal to allow a supplemental agreement between states to control the determination of whether a violation of an interstate compact has occurred is consistent with the well-established principle that the Court cannot order relief that is inconsistent with the express terms of an interstate compact. For instance, in *Texas v. New Mexico*, the Court declined to allow the United States commissioner to the Pecos River Compact Commission to provide a tie-breaking vote on the commission when the Pecos River Compact expressly provided that the United States commissioner "shall not have the right to vote in any of the deliberations of the Commission." 462 U.S. at 564. The Court thus refused to order relief that would have essentially reformed the Pecos River Compact to remove the word "not" from the phrase "shall not have the right to vote in any of the deliberations of the Commission."

Similarly, in *Alabama v. North Carolina*, 560 U.S. 330, 130 S. Ct. 2295 (2010), the Court refused to read into an interstate compact an implied duty of good faith and fair dealing. In so holding, the Court explained that

> "an interstate compact is not just a contract; it is a federal statute enacted by Congress. If courts were authorized to add a fairness requirement to the implementation of federal statutes, judges would be potent lawmakers indeed. We do not—we cannot—add provisions to a federal statute." *Id.*, at 2312.

Just as the Court in *Texas v. New Mexico* and *Alabama v. North Carolina* refused to reform or read absent terms into the interstate compacts at issue in those cases, the Special Master and the Court in the instant case should refuse to make rulings or order relief that would only be appropriate if the Compact were reformed to read as follows: (1) "1950" were changed to "1980" in Article V(A); (2) Article V(B) supplemental rights were converted into Article V(A) rights; and (3) Article VI was removed from the Compact. Wyoming's assertion that the terms of 1992 Agreement are controlling with respect to Montana's claims that Wyoming violated the Compact runs directly contrary to fundamental principles governing claims of interstate compact violations, and should be rejected accordingly.

C. By Its Terms, the 1992 Agreement Did Not Change the Yellowstone River Compact

Even if Montana and Wyoming could have altered the Compact by entering into the 1992 Agreement – a position to which Montana strenuously objects – the plain language of the 1992 Agreement, the Congressional Act that ratified the NCT Compact, and the negotiating history of the 1992 Agreement all demonstrate that the 1992 Agreement was not intended to modify or amend the Compact or the rights and obligations of its signatory states.

The language of the 1992 Agreement evidences only an agreement by Montana not to consent to any changes in Model or the NCT Compact that may affect Wyoming's rights without first consulting with, and obtaining consent from, Wyoming. Nowhere in the 1992 Agreement is there any indication that Montana agreed to any modification of the Compact. Indeed, paragraph four of the 1992 Agreement explicitly affirms that the States did not intend for the assumptions incorporated in the Tongue River Model and that model's use in connection with the NCT Compact to be "deemed an admission by either [State] as to the correct interpretation of the Yellowstone River Compact." Exhibit Z at ¶ 4. While Wyoming quotes this provision in its

brief in support of its Motion, it never directly addresses that provision or explains how the language squares with Wyoming's contention that the 1992 Agreement is determinative of Montana's claims for violations of the Compact. Wyoming's attempt to use the 1992 Agreement as a basis for contesting Montana's claims in this case runs in direct contradiction to the express terms of the 1992 Agreement itself.

The negotiating history of the 1992 Agreement provides further support that the parties did not intend to alter the rights and obligations set forth under the Compact. As discussed in the background section, Wyoming initially sought to include language in the Congressional act ratifying the NCT Compact, or in an agreement between the States, to the effect that Wyoming's rights existing as of the time of the NCT Compact would not be affected by that compact. That language was rejected by both Montana and the Tribe, and was never included in either the congressional approval of the NCT Compact or the 1992 Agreement. Instead, the language of the 1992 Agreement reflects only an agreement by Montana that it would not seek changes to the Model without Wyoming's consent.

Finally, in ratifying the NCT Compact, Congress considered whether that compact, which explicitly incorporates the Tongue River Reservoir Model, affected the YRC. Congress concluded that it did not. Thus, Section 11(b) of the act giving congressional consent to the NCT Compact specifically provides:

> "(b) EFFECT ON YELLOWSTONE RIVER COMPACT.—Nothing in this Act shall be construed to alter or amend any provision of the Yellowstone River Compact, as consented to in the Act entitled "An Act granting the consent of Congress to a Compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River", approved October 30, 1951 (65 Stat. 663)." Northern Cheyenne Indian Reserved Water Rights Act of 1992, PL 102–374, 106 Stat 1186 (September 30, 1992).

The plain language of the 1992 Agreement, along with the negotiating history of that agreement, and the intent of Congress in ratifying the NCT Compact demonstrate that Montana did not agree to the changes that Wyoming asserts were made to Wyoming's obligations under the YRC. Rather, as the 1992 Agreement explicitly states, Montana simply agreed that no changes would be made to the Model without Wyoming's consent. Montana has fully complied with that agreement, and Wyoming's attempt to use the 1992 Agreement to alter or avoid its obligations under the YRC should be rejected, as it is fundamentally at odds with the language of the 1992 Agreement, the intent of the parties to that agreement, and the intent of Congress in ratifying the NCT Compact.

D. Even If the 1992 Agreement Could Modify the Compact, It Did Not Purport to Do So

Assuming, *arguendo*, that the 1992 Agreement could alter Montana and Wyoming's rights and obligations under the Compact, Wyoming's proffered interpretation is incorrect and does not produce the results that Wyoming suggests.

Wyoming argues that the 1992 Agreement binds Montana to the water allocation of the Model such that "Montana's right to call the river for the benefit of the Tongue River Reservoir is limited to a call for regulation of post-1980 appropriations in Wyoming." Motion at 13. As the Special Master and the Court have explained, the Yellowstone River Compact establishes a three tier hierarchy of rights: First, pre-1950 appropriative rights in both Wyoming and Montana receive the highest priority under Article V(A); second, of the remaining "'unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, water goes next to provide supplemental water supplies for pre-1950 right holders'" under the first clause of Article V(B); third, with the lowest priority, the "'remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use

on new lands or for other purposes'" in accordance with the 60%-40% split set forth in Article V(B)(3). FIR at 18; *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011). Thus, pre-1950 rights in Wyoming and Montana receive the greatest protection under the Compact. For Wyoming to be correct, the 1992 Agreement must be interpreted as an Agreement to treat water rights with priorities ranging from 1950 to 1980 as Article V(A) rights.

It is not believable that in 1992 Wyoming would have agreed to treat water rights with priorities between 1950 and 1980 as falling under Article V(A) of the Yellowstone River Compact. This is so because at that time Wyoming took the position that Article V(A) did nothing more than carve the pre-1950 water rights out of the Compact such that neither State received any protection for those rights. See, *e.g.*, Barclay Fagg Declaration at ¶ 4; Stults Declaration at ¶ 6. Wyoming would not have agreed to this, and this interpretation is not supported by the Model itself.

1. The Plain Language of the Agreement Refutes Wyoming's Argument

The Agreement has four short paragraphs. The first provides that Montana will not consent to a change in the Model without prior consent of Wyoming. The second provides that Montana will not consent to a change in the NCT Compact without the consent of Wyoming. Paragraph 3 provides that the parties understand that the "future allocation of water in the Tongue River Basin provided to Wyoming under the provisions of the Yellowstone River Compact may be reduced as a result of the use of the water under the Northern Cheyenne Compact". The fourth paragraph makes clear the intention of the signatories that the Agreement should not be deemed an admission as to the correct interpretation of the Yellowstone River Compact.

These four short provisions cannot support an intent to change the Yellowstone River Compact. One of the four explicitly disclaims any such intent, even as to the interpretation of the Compact. The other three provisions have nothing in their express terms that would suggest an intention to change the allocations established by the Yellowstone River Compact.

2. The Model Documentation Refutes Wyoming's Argument

The 1992 Agreement provides that Montana will not agree to change the model without written consent from Wyoming. It is helpful to look to the model documentation, including the 1990 Modeling Report and the 1991 Draft Model Documentation, to understand the meaning of this arrangement.

As context, the 1990 Modeling Report explains under the heading "Yellowstone Compact" the problem the States sought to address in the 1992 Agreement:

> Although it clearly allocated the flows at the mouth of the river 60% to Montana and 40% to Wyoming, it clouded the situation by providing that the allocable amount did not include supplemental water for irrigation of lands with a partial supply at that time. This supplemental water has not been quantified.

Model at 4 (MT-07992). In order for the Model to accomplish its purpose of assessing availability of water to satisfy the Tribe's Tongue River Reservoir storage right, it was necessary to assign a value to the supplemental water rights.

The language on which Wyoming relies for its interpretation of the 1992 Agreement is found on page 11 of the 1990 Modeling Report, again under the heading "Yellowstone Compact." This section begins by explaining that "[s]upplemental water rights (additional water for lands with a partial supply in 1950) are recognized by the Yellowstone Compact." It continues that "to simplify interpretation of the [Yellowstone River Compact] for purposes of Wyoming and Montana suggested considering any increase in water use since 1950 to have a

pre-1950 date ***under the definition of supplemental water***." *Id.* (emphasis added). This provided a value for supplemental water rights, and allowed the Model to be run.

This understanding of the agreement between the two States is confirmed by the 1991 Draft Model Documentation. That document, which is attached to Wyoming's Motion, explains the same agreement as follows: "Wyoming and Montana agreed to consider any increase in agricultural water use that has occurred since 1950 and before the present time ***to be supplemental water***." 1991 Draft Model Documentation at 3-8. The 1991 Draft Model Documentation gives additional context to the agreement by explaining that the Wyoming "supplemental water rights" were quantified based on a letter from Sue Lowry. *Id.* That letter is attached to the 1991 Draft Model Documentation. It identifies the subject of the communication as "the estimates of supplemental supply needs for Wyoming." Letter from S. Lowry to G. McDonald (dated June 19, 1990), attached as Appendix B to the 1991 Draft Model Documentation (MT -04859 – MT-04864).[1] In her letter, Ms. Lowry references and attaches a previous letter from John Buyok of Wyoming to Rich Brasch of Montana. The Buyok letter is also addressing "further documentation of supplemental water supplies for Wyoming lands."

The inescapable conclusion from both the plain language of the 1990 Modeling Report and the 1991 Draft Model Documentation, as well as the extrinsic materials, is that the agreement between Montana and Wyoming had nothing to do with Article V(A) of the Yellowstone River Compact, and was not intended to treat the impacted rights as water rights that were existing and in use as of January 1, 1950, as Wyoming implies in its Motion. Instead, for purposes of the Model, the States agreed to treat all water rights developed between 1950 and 1980 as *supplemental supplies* pursuant to Article V(B), clause 1. This realization has important

[1] Ms. Lowry's June 19, 1990 letter is also referenced in the letter from attached to the FEIS that is attached as Exhibit H to the Second Affidavit of Gordon W. Fassett.

ramifications for Wyoming's summary judgment argument. Under the Yellowstone River Compact, Wyoming is only entitled to protection for its pre-1980 rights as it argues, if the agreement was to treat those rights as Article V(A) rights. As demonstrated above, that was not the agreement. As supplemental rights, Wyoming's pre-1980 rights would not be subject to the percentage allocations. But as held by the Special Master and the Court, supplemental rights form the second tier under the Yellowstone River Compact allocation scheme, and Wyoming may not use its Article V(B) supplemental rights until Montana has satisfied all of its pre-1950 Article V(A) rights.

In short, even if the 1992 Agreement somehow altered the allocation under the Yellowstone River Compact in contradiction of both black letter law and the plain language, Wyoming misunderstands the agreement and its impact. Montana has no Article V(B) claims, and an agreement to treat all pre-1980 rights as supplemental rights has no relevance to this case. Because supplemental rights under Article V(B) receive less protection than Article V(A) rights, Wyoming's suggestion that the 1992 Agreement effectively eliminates Article V(A)'s protection of pre-1950 rights in Montana is unsupportable and should be rejected.

E. The Course of Dealing Between the States Reinforces Montana's Interpretation of the 1992 Agreement

Montana's understanding of the 1992 Agreement's effect (or lack thereof) on the Compact is supported by the course of dealing between the states in the years following execution of the agreement. The Court has recognized that the course of dealing of the parties is relevant in original actions involving interstate compacts. For instance, in *Alabama v. North Carolina*, 130 S.Ct. 2295 (2010), the Court addressed whether North Carolina breached an interstate compact dealing with radioactive waste by failing to obtain a license to operate a waste storage facility. In deciding this question, the Court looked to the language of the Compact, as

well as the "course of performance" under the Compact, stating: "In determining whether, in terminating its efforts to obtain a license, North Carolina failed to take what the parties consider 'appropriate' steps, the parties' course of performance under the Compact is highly significant." *Id.*, at 2309, citing *New Jersey v. New York*, 523 U.S. 767 (1998); see also, Restatement (Second) of Contracts, §§ 202(4), 203. Thus, it is appropriate to look to the course of dealing between Montana and Wyoming prior to and after entering into the 1992 Agreement to determine whether that agreement modified the rights and obligations under the Compact in the manner that Wyoming claims it did.

Wyoming's Motion, filed more than six years into this litigation, is the first time that Wyoming has raised the 1992 Agreement as affecting its compact obligations since the execution of that agreement over 21 years ago. There were many instances over the course of those two decades when Wyoming could, and should, have referenced the 1992 Agreement, if that agreement does what Wyoming now claims it does. For instance, as early as eight months following execution of the 1992 Agreement, at the Compact Commission meeting in that same year, Mr. Fritz expressed frustration regarding the lack of a methodology for administering the compact and indicated that Wyoming's post-1950 uses were affecting Montana's compact rights. Wyoming did not raise the 1992 Agreement in response to Mr. Fritz's concerns, or explain that Wyoming understood the agreement to protect Wyoming's pre-1980 rights. See 1992 YRCC minutes, Second Fassett Affidavit at Exh. G. Nor did Wyoming raise the 1992 Agreement in response to Montana's numerous complaints that it was not receiving sufficient water to satisfy its pre-1950 rights in the years from 2000 to 2006, including the letters responding to Montana's formal call letters in 2004 and 2006. Second Stults Declaration, at 6. Nor has Wyoming even

once mentioned the 1992 Agreement in any of its pleadings, motions, or discovery responses in this litigation.

Wyoming's failure to raise the 1992 Agreement at several critical points in the years following the execution of that agreement, and throughout the course of this litigation, reflects that the States never viewed the 1992 Agreement as having the effect on the Compact that Wyoming argues in its Motion. Instead, the States have always framed their discussions and disputes regarding the Compact in terms of pre-1950 rights, as opposed to pre-1980 rights, and have regarded supplemental rights as part of Article V(B), not Article V(A). Based on the States' framing of the issues, the Special Master and the Court have already ruled that this case involves pre-1950 rights, not pre-1980 rights, and Wyoming has accepted those rulings. Further, the Special Master has held that Article V(B) rights are not at issue in this case. The Special Master should reject Wyoming's attempt to steer this case in an entirely new direction on the basis of a novel – and incorrect – interpretation of an agreement that it has never mentioned before.

III. The Timing of Wyoming's Post-1950 Use in 2004 or Otherwise Is Not Relevant

A. Issues Pertaining to Notice Go to the Remedies Phase of the Case, Not the Current Liability Phase

The current stage of the proceedings is concerned only with liability – i.e., whether Wyoming violated the Compact, and if so, the extent of the violation. See Case Management Plan No. 1 ("CMP No. 1") at 4 (Dec. 20, 2011) ("The case is hereby bifurcated into two phases, a liability phase and a remedies phase. The liability phase will include a determination of whether Wyoming has violated the Yellowstone River Compact and the amount of any such violation. Matters pertaining to retrospective or prospective remedies are hereby reserved for the later remedies phase."). In order to establish a Compact violation in any given year, Montana

must establish the following elements: (1) there was insufficient water entering Montana to satisfy Montana's pre-1950 appropriative rights; and (2) Wyoming provided water to its post-1950 users during times when Montana pre-1950 rights were not being satisfied. See, *e.g.*, FIR at 29 ("Protection of pre-1950 appropriations under Article V(A) . . . requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana"); Transcript of Telephonic Status Hearing Before Special Master Barton Thompson at 25:25-26:4 (July 29, 2011) ("Hearing Transcript").

Once the fact and quantity of the violation have been established in the liability phase, the remedy phase will be concerned with, among other issues, whether Montana can recover retrospective damages for the violation, and if so, whether it can recover for the entire amount, or only a part thereof. Pursuant to the Special Master's rulings, a finding that Wyoming did not receive sufficient notice, or have other reason to know, that pre-1950 rights in Montana were not being satisfied in a particular year could serve to reduce or eliminate the amount of damages to which Montana would be entitled for Wyoming's violation in that year. Thus, it is during the remedy phase that questions regarding whether Wyoming had sufficient notice that Montana was not receiving adequate water are appropriately considered.

That the issue of notice is relevant to damages is evident in Wyoming's framing of its previous summary judgment motions, and the Special Master's rulings on those motions. As noted previously, Wyoming's first motion sought a summary judgment ruling that Montana was "precluded from claiming damages or other relief for those days [in any year in which notice was provided] that preceded Montana's notification." See Wyo. MSJ at 1. In its Renewed Motion, Wyoming argued that "[t]o obtain damages, Montana must prove a specific date [that a call was

made in a given year]," and that retrospective damages "could vary greatly depending on the specific date of a call." Wyo. Renewed MSJ at 31.

Similarly, both of the Special Master's rulings on Wyoming's motions treat notice as an aspect of damages. Indeed, the title of both memorandum opinions contain a parenthetical with the phrase "Notice Requirements *for Damages*" (emphasis added). Moreover, the Special Master's rulings in both opinions are stated in terms of the availability of damages. See Dec. 20, 2011 Memo. Op. at 7 (stating conclusion that "Montana generally cannot seek damages for years in which it did not notify Wyoming that it was receiving inadequate water to meet its pre-1950 appropriative rights"); Sept. 28, 2012 Mem. Op. at 17.

In sum, to the extent that the timing of Montana's notice is relevant in this case, it is appropriately considered only in the context of determining damages, and cannot form the basis for summary judgment on Wyoming's liability for Montana's Compact violation claims.

B. The Special Master Has Already Held that the Timing of Notice During a Given Year is Not Necessarily Critical with Regard to Recovery of Damages

After using its interpretation of the 1992 Agreement to argue for summary judgment on all of Montana's claims for water from Wyoming pre-1980 appropriators, Wyoming attempts to dispose of Montana's remaining surface water claims by arguing that Montana has not established when post-1980 water was used or stored in Wyoming in relation to the dates that Montana made a "call" for its pre-1950 rights. According to Wyoming, it is entitled to judgment as a matter of law "not just for the remaining water in 2004, but also for all the alleged depletions in every year at issue, because Montana's experts have made no effort to correlate Wyoming's alleged violations with the alleged call dates." Wyo. Mot. at 34. This argument is premised on Wyoming's understanding of a valid "call" as having a critical timing component – an understanding Wyoming advanced both in its September 12, 2011 Motion for Partial Summary

Judgment and its June 15, 2012 Renewed Motion for Partial Summary Judgment. Specifically, Wyoming claimed that Montana is entitled to damages only to the extent Montana can show that it provided notice to Wyoming on a particular date during the irrigation season that Montana's pre-1950 rights were not being satisfied, and that Wyoming's post-1950 uses received water *after* that date. See, *e.g.*, Wyo. Brief in Support of Mot. for Partial Summ. J. at 1, 25 (Sept. 12, 2011) ("Wyo. MSJ"); Wyo. Renewed Mot. for Summ. J. at 31 (June 15, 2012) ("Wyo. Renewed MSJ").

Both times Wyoming has raised the notion that there is a timing requirement for notice, such a notion has been rejected by the Special Master. In its September 12, 2011 Motion, Wyoming sought partial summary judgment that Montana was "precluded from claiming damages or other relief for those days [in any year in which notice was provided] that preceded Montana's notification." Wyo. MSJ at 1. The Special Master disagreed, explaining as follows:

> [I]n many cases, pre-1950 users in Montana may not have immediately realized that they were receiving inadequate water because of Wyoming's failure to comply with Article V of the Compact, a general period of investigation might have been required to determine the nature of the shortage, and information cannot be expected to have travelled instantaneously from water users to Montana officials to Wyoming. So long as Montana acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies, the notice typically should permit Montana to seek damages for the entire year. Although this places Wyoming at risk of paying damages for periods in which it was not on notice of Montana's deficiency, neither party is knowingly at fault in this situation. Given that Wyoming enjoyed the use of the excess water during these periods and had the affirmative obligation under the Compact to avoid post-January 1, 1950 uses that denied Montana adequate water to meet its pre-1950 appropriations, it is appropriate that Wyoming should compensate Montana for the loss of such water when notice was diligently provided. Dec. 20, 2011 Mem. Op. at 8.

Despite this explicit ruling, Wyoming once again argued in its Renewed Motion that in order for Montana to be entitled to damages for Wyoming's over-use, Montana had to show that notice was given on a particular date during the irrigation season. See Wyo. Renewed MSJ at 30-31.

The Special Master again rejected Wyoming's argument, setting forth verbatim the above-quoted passage. Sept. 28, 2012 Mem. Op. at 16.

Thus, the Special Master has already twice ruled that Montana can recover damages for loss of water that occurred prior to when it provided notice to Wyoming, so long as it acted diligently in providing such notice. Wyoming's third attempt to preclude Montana's claims based on the timing of Montana's notice should once again be rejected.

C. Montana Has Provided Evidence On the Timing of Wyoming's Post-1950 Use

Assuming, *arguendo*, that the question of the timing of notice had not been previously decided and was relevant to the determination of Wyoming's liability, summary judgment in favor of Wyoming is not appropriate because, contrary to Wyoming's contention, Montana has provided evidence establishing the timing of Wyoming's post-1950 uses in relation to Montana's notice in the years for which Montana is seeking retrospective relief (2001, 2002, 2004, and 2006).

For instance, for the years 2004 and 2006, Montana provided notice to Wyoming that pre-1950 rights in Montana were not being satisfied on May 18, 2004 and July 28, 2006, respectively. Additionally, Montana has shown that when there is less than 200 cfs of water reaching the stateline, there is insufficient water to satisfy the T&Y's pre-1950 appropriative right. See Hayes Declaration at ¶ 11. The T&Y holds the second most senior appropriative right on the Tongue River. See Muggli Declaration at ¶ 4. Thus, when there is insufficient water to satisfy the T&Y's appropriative right, all rights junior to the T&Y also go unsatisfied. See Hayes Declaration at 10. Dale Book's expert reports establish that there was less than 200 cfs reaching the stateline during the months of June through September in 2004 and 2006. Book Rebuttal Report at 32 (Table 5-A). This evidence establishes that pre-1950 rights in Montana

were not being satisfied after Montana provided notice to Wyoming on May 18, 2004, and July 28, 2006. See Book Rebuttal Report at 32 (Table 5-A).

For those same years, the evidence also establishes that post-1950 appropriators in Wyoming were diverting water after Montana provided notice to Wyoming that Montana's pre-1950 rights were not being satisfied. See *e.g.*, Book Report at 41-42 (Tables 11-A, 11-B). For instance, the report of Wyoming's expert Doyl Fritz shows that until July 21, 2004, post-1950 appropriators were irrigating out of Big Goose Creek. See Fritz Report at 46. Thus, from July 1 through July 21, 2004, Wyoming was using post-1950 rights at the same time that Montana's pre-1950 rights were not being satisfied. Further, the expert report of Richard Allen shows evapotranspiration consistent with irrigation on post-1950 acreage in Wyoming from April to October in 2004 and 2006. See Allen Report at 9-10. Thus, the evidence indicates that in the months following Montana's notice to Wyoming in 2004 and 2006, Wyoming post-1950 uses were depleting the water flowing into Montana, while at the same time Montana pre-1950 rights were not being satisfied.

Likewise, Montana can show the timing of post-1950 storage in Wyoming after the dates that notice was provided that Montana pre-1950 rights were not being satisfied in the years at issue. *See* Aycock Rebuttal Report at 29-30.

The above evidence is at least sufficient to establish a genuine issue of fact regarding the timing of Wyoming's post-1950 uses with respect to Montana's notice.

IV. Wyoming Is Not Entitled to Summary Judgment on Montana's Groundwater Claims

A. Wyoming Ignores The Rulings of The Special Master

Wyoming is not entitled to summary judgment on Montana's claim that Wyoming violated the Compact by allowing groundwater pumping associated with coalbed methane

("CBM") production to deplete available surface flows on the Tongue River. Wyoming's claims on this issue should be barred by principles of finality. See *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) ("Although [the Court has] been reluctant to import wholesale law-of-the-case principles into original actions, prior rulings in such cases 'should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.'" (quoting *Arizona v. California*, 460 U.S. 605, 619 (1983)). In its Complaint, Montana explicitly pleaded that Wyoming "has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins." Compl. ¶ 11. Wyoming moved to dismiss this claim and argued that "the Compact drafters made it clear in plain language throughout Article V that they intended the Compact to govern surface water, not groundwater." See Wyo. Mot. to Dismiss Bill of Complaint at 59 (April 2008). The Special Master rejected Wyoming's argument and held that:

> The language of the Compact, as well as the general treatment of hydrologically interconnected groundwater under the doctrine of appropriation both at the time the Compact was negotiated and subsequently, demonstrates that the Compact protects pre-1950 uses in Montana from interference by at least some forms of groundwater pumping that date from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its surface tributaries.

FIR at 51. Wyoming did not take exception to this ruling. Thus, Wyoming's legal arguments regarding the Compact's protection of pre-1950 rights in Montana from post-1950 groundwater withdrawals in Wyoming have already been considered and rejected.

This case is similar to *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992), in which Oklahoma repeatedly challenged Wyoming's standing to bring its complaint. The Court twice rejected Oklahoma's standing argument, first when it granted Wyoming leave to file its complaint, and second when it denied Oklahoma's motion to dismiss. *Id.* The Court declined to

revisit its prior rulings on Oklahoma's standing argument raised for a third time in Oklahoma's motion for summary judgment "'absent changed circumstances or unforeseen issues not previously litigated.'" *Id.* (quoting *Arizona v. California*, 460 U.S. at 619). Here, Wyoming's Motion does not identify any changed circumstances or issues not previously litigated which would require the Special Master to revisit his ruling regarding post-1950 hydrologically connected groundwater production in Wyoming.

Wyoming's argument should also be rejected as it requires accepting the assumption that Montana and the Compact drafters intended to allow for the development of unforeseeable technologies that would detrimentally impact Montana's pre-1950 rights. The Special Master has already found that both the Compact's plain language and the history of Compact negotiations demonstrate that the Compact was intended to protect Montana's pre-1950 rights from post-1950 groundwater withdrawals in Wyoming. See FIR at 51, 89. Wyoming can point to no evidence which would suggest that Montana intended to allow Wyoming to accomplish through groundwater pumping what it could not accomplish through surface water diversions. As explained *infra*, Montana has provided evidence that post-1950 CBM groundwater production in Wyoming has depleted the amount of water available to satisfy Montana pre-1950 rights. Thus, the Special Master should deny the Motion as it relates to CBM groundwater production.

B. Neither Wyoming Nor Montana Has Determined That The Connection Between CBM Groundwater Production and Surface Flows is Tenuous

Wyoming erroneously claims that "both states have implicitly and explicitly determined that the connection between CBM groundwater production and the surface waters is too tenuous to warrant regulation under the doctrine of appropriation." Mot. at 34. In fact, neither Wyoming nor Montana has made a determination that the connection between CBM groundwater

production and surface flows is too tenuous to merit regulation. Montana's policy is to not require a new water use permit for groundwater that is produced as a byproduct of CBM production but that is not put to beneficial use. See Declaration of Tim Davis. However, a new water use permit *is* required for groundwater produced in connection with CBM production that is put to beneficial use. See *id.* Furthermore, Montana has made no determination that the connection between CBM groundwater production and surface flows is "tenuous." To the contrary, as Wyoming acknowledges in the Motion, Steve Larson's expert reports demonstrate a hydrologic connection between CBM groundwater production and surface flows. See Larson Report at 4; Wyo. Mot. at 36; Expert Report of Dale E. Book, P.E. at 43 (Table 12).

Wyoming has similarly made no determination that CBM groundwater production does not negatively affect surface flows in the Tongue. In fact, Wyoming acknowledges the impact of CBM groundwater production on Tongue River surface flows. See Wyo. Mot. at 36 (acknowledging that "[b]oth states recognize that this groundwater is connected to the surface to some degree"). Additionally, Pat Tyrrell's affidavit does not qualify as a determination on Wyoming's position regarding the connection between CBM groundwater production and surface water. Mr. Tyrrell's opinion at paragraph seven of his affidavit constitutes an improper expert opinion that is subject to a separate Motion to Strike. Thus, neither State has determined that the connection between CBM groundwater production and surface flows is tenuous.

C. Whether the States Regulate CBM Groundwater Production Is Irrelevant

Montana and Wyoming have established no customary practice regarding CBM groundwater production that would shed light on the States' intent in executing the Compact. Here, there is no course of dealing or customary practice to which reference can be made because there has been no administration under the Compact.

Additionally, Wyoming misconstrues the case law on customary practice in focusing on each State's internal treatment of CBM groundwater production. Instead, in determining the intent of the States the Court should look to "the customary practices employed *in other interstate compacts* . . . ." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013) (emphasis added). As explained by the Special Master, the customary practice in other interstate compacts that are silent on groundwater allocation is to include hydrologically connected groundwater within the compact's restrictions. See FIR at 44-47; *Kansas v. Colorado*, 206 U.S. 46, 114-15 (1907); First Report of the Special Master, *Kansas v. Nebraska*, No. 126 Orig. (Jan. 28, 2000); *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2000); *Kansas v. Colorado*, 543 U.S. 86, 91 (2004).

Moreover, the Court has previously rejected Wyoming's argument that a state's failure to regulate groundwater removes groundwater from a compact's protection. In *Kansas v. Nebraska and Colorado*, No. 126 Orig., Nebraska argued that the Republican River Compact did not govern groundwater because "[a]t the time the Compact became law, none of the Compact States had laws permitting regulation of groundwater for the protection of surface water. Legislative regulation of groundwater was not considered a possibility in Nebraska until late in the 1950s." See Nebraska's Mot. to Dismiss and Brief in Support of Mot. to Dismiss at 16, *State of Kansas v. State of Nebraska and State of Colorado*, No. 126 Orig. (Aug. 2, 1999). There, Special Master Vincent McKusick refused to accept Nebraska's argument, and on his recommendation, the Supreme Court denied the Motion to Dismiss, thereby rejecting Nebraska's arguments. See *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2000). The Special Master here should similarly reject Wyoming's argument that Montana's failure to regulate CBM groundwater production removes such groundwater from the Compact.

Finally, neither Montana nor Wyoming has the power to modify the Compact unilaterally. Just as a Montana statute declaring that CBM groundwater production is a beneficial use could not modify the Compact, so too does the lack of such a statute have no impact on the Compact. As explained above, Congressional approval is required for any Compact modification. See *Texas v. New Mexico*, 462 U.S. at 564-65. The Court has explained:

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies . . . is the function and duty of the Supreme Court of the Nation.

State ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951). Thus, Wyoming and Montana are unable to modify the Compact through legislative enactments, state court decisions or administrative actions, and Montana's decision to not treat groundwater associated with CBM production as a beneficial use has no impact on the Compact.

V. The Evidence Establishes that Wyoming Violated the Compact

A. Harm to Individual Users Is Not Required To Show a Compact Violation

Montana has provided evidence in its expert reports that in each of the years at issue pre-1950 water rights in Montana went unsatisfied at the same time that post-1950 water rights were diverting in Wyoming. See Book Rebuttal Report at 32 (Table 5-A); *id.*, at 27 (Table 3). Importantly, the Special Master has left open whether harm to individual water users is required to establish past compact violations. During the July 29, 2011 Telephonic Status Hearing, the Special Master explained that neither his First Interim Report nor the Supreme Court's May 2, 2011 decision resolved the issue of whether Montana had to prove harm to individual water users in order to establish a compact violation. The Special Master stated that "the Supreme Court's

decision in the first interim report doesn't necessarily resolve, for example . . . whether or not Montana would need to show damages by individual appropriators . . . ." See Hearing Transcript at 11:19-23 (July 29, 2011). Thus, because the Special Master has not decided this question, Wyoming is not entitled to summary judgment on its claim that Montana has failed to demonstrate harm to individual water users.

Furthermore, Montana is the real party in interest in this case and it is Montana that is harmed when Wyoming violates the Compact. See FIR at 99 (Feb. 10, 2010) ("Interstate water disputes such as the instant action by Montana inherently deal with sovereign interests that supersede the interests of individual water users."). The Compact is an agreement between two sovereigns, and the Compact's rights and obligations flow to and burden each signatory state, not its citizens. For instance, the Special Master has held that the obligation to notify Wyoming that Montana is not receiving sufficient water to satisfy its pre-1950 rights rests with Montana, not individual water users in Montana. See Sept. 28, 2012 Mem. Op. at 14 ("Nor must any particular Montana official have provided the notice, although the notice must have been provided by an official acting within his authority."). Similarly, the obligation to regulate post-1950 users rests with Wyoming, not individuals in Wyoming. See *id.* ("Wyoming has an obligation under Article V(A) of the Compact to reduce any post-1950 uses when necessary to meet the needs of pre-1950 appropriations in Montana.").

Additionally, the First Interim Report of the Special Master discusses "block protection" of pre-1950 water rights, not individual users. See FIR at 21 ("The final Compact provides block protection for all existing, pre-1950 appropriations . . . ."). The Supreme Court's May 2, 2011 decision speaks in terms of "tiers of priority," not harm to individual users. See *Montana v.*

Wyoming, 131 S. Ct. 1765, 1770 (2011) ("The Yellowstone River Compact divides water into three tiers of priority.").

Moreover, Montana would be barred under the Eleventh Amendment to the United States Constitution from recovering damages against Wyoming on behalf of individual water users. See *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) ("It is firmly established, and undisputed in this litigation, that the text of the Eleventh Amendment would bar a direct action against Colorado by citizens of Kansas. Moreover, we have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens."); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."). Thus, Montana should not be required to show injury to individual appropriators in order to establish past compact violations.

Finally, the common law of interstate water allocation enforcement teaches that Montana should not be required to show injury to enforce its rights under the Compact. See *Nebraska v. Wyoming*, 507 U.S. 584, 592, (1993) ("In an enforcement action, the plaintiff need not show injury."); *Wyoming v. Colorado*, 309 U.S. 572, 581 (1940) ("Colorado insists that Wyoming has not been injured. But such a defense is not admissible.").

B. Montana Has Provided Evidence of Harm to Individual Users

While damage to individual users is not required to demonstrate a Compact violation, Montana has provided evidence that post-1950 diversions in Wyoming caused pre-1950 water rights in Montana to be unsatisfied. In regard to its claims based on injury to the Tongue River Reservoir, Montana has only quantified violations for the years 2001, 2002, 2004, and 2006.

However, Montana has provided evidence of harm to individual pre-1950 appropriators on the Tongue River in each of the years at issue.

In order to establish a past Compact violation, the Special Master has stated that Montana must "show at a minimum both at least somepre-1950 appropriative rights are unsatisfied and that they went unsatisfied because Wyoming instead delivered that water to post-1950 appropriators." Hearing Transcript at 26:1-4 (July 29, 2011). In every year at issue the T&Y Irrigation District's pre-1950 appropriative right went unsatisfied. See Muggli Declaration at ¶ 7; Book Rebuttal Report at 32 (Table 5-A). The T&Y holds the second most senior appropriative right on the Tongue River. See Muggli Declaration at ¶4. Thus, when there is insufficient water to satisfy the T&Y's appropriative right, all rights junior to the T&Y also go unsatisfied. Hayes Declaration at ¶10. Montana has shown that when there is less than 200 cfs of water reaching the stateline, there is insufficient water to satisfy the T&Y's Irrigation District's pre-1950 appropriative right. See *id.*, ¶ 11. Dale Book's expert reports establish that there was less than 200 cfs reaching the stateline during the irrigation season in 1988, 1989, 2000, 2001, 2002, 2003, 2004, and 2006. See Book Rebuttal Report at 32 (Table 5-A).

In addition to establishing that the T&Y's pre-1950 appropriative right was unsatisfied in each of the years at issue, Montana has provided evidence that post-1950 appropriators in Wyoming were diverting during the irrigation season in each of the years at issue. See *e.g.*, Book Report at 41-42 (Tables 11-A, 11-B); Boyd Deposition at 63:2-7 (Wyoming did not regulate post-1950 users on the mainstem of the Tongue River prior to 2005). Wyoming's expert Doyl Fritz does not dispute the fact that post-1950 appropriators were diverting in 2004 and 2006. For example, Mr. Fritz's expert report shows that from July 1 to July 21st, 2004, post-1950 appropriators were irrigating out of Big Goose Creek. See Fritz Report at 46. Likewise,

Richard Allen's report shows evapotranspiration consistent with irrigation on post-1950 acreage in Wyoming from April to October in 2004 and 2006. See Allen Report at 9-10. At the same time, Montana has provided evidence that every day in July and August, in both 2004 and 2006, there was insufficient water reaching the stateline to satisfy the T&Y Irrigation District's pre-1950 right. See, *e.g.*, Book Rebuttal Report at 32-35 (Tables 5 and 6). Mr. Fritz's expert report sets forth at Table 12 his calculation of the total depletions from post-1950 irrigated acreage and storage in Wyoming in 2004 and 2006. See Fritz Report at Table 12 (WY043170). This evidence is sufficient to support a reasonable inference that pre-1950 rights in Montana went unsatisfied because of depletions by post-1950 appropriators in Wyoming.

Furthermore, Wyoming's water commissioners have acknowledged that Wyoming has traditionally conducted no regulation of post-1950 appropriators on the lower mainstem of the Tongue River just above the state line. See, *e.g.*, Boyd Deposition at 63:2-7 (Interstate Ditch has never been regulated); *id.*, at 105:20-22; *id.*, at 109:20-110:3; Whitaker Deposition at 51:13-22, 66:13-19 (no regulation of the lower Tongue River mainstem prior to his retirement in 2009).

Thus, Montana has provided evidence that in each of the years at issue, post-1950 appropriators in Wyoming depleted the stateline flow into Montana and reduced the supply available to pre-1950 appropriators in Montana to such an extent that the T&Y Irrigation District's pre-1950 right went unsatisfied in every year. While Montana and Wyoming's experts may disagree over the amount by which post-1950 appropriators in Montana depleted the flow at the stateline, Montana has presented a genuine issue of material fact on the issue of whether post-1950 appropriations in Wyoming harmed pre-1950 appropriators in Montana. Accordingly, Wyoming is not entitled to summary judgment on Montana's claims based on damages to individual water users for any of the years at issue.

VI. The Special Master Has Not Foreclosed the Use of Trigger Flows For Future Compact Administration.

Wyoming is not entitled to summary judgment as to the proper method of future Compact administration as the Special Master has explicitly reserved such issues for the second phase of these proceedings. See CMP No. 1 at 4 ("The case is hereby bifurcated into two phases, a liability phase and a remedies phase. . . . Matters pertaining to retrospective or prospective remedies are hereby reserved for the later remedies phase."). Furthermore, the Special Master has explicitly left open the possibility of using a demand model or "trigger flows" for future Compact administration. See Hearing Transcript at 12:16-23 (July 29, 2011) ("As to appropriate relief regarding future violations, Montana might be able to -- well, successfully argue that the appropriate approach in the future is for Montana to let Wyoming know what pre-1950 appropriative rights exist and the quantities needed to satisfy them and that that could then form the bases for state line deliveries, which is somewhat similar to, I think, what Montana might be arguing right now."); *id.*, at 28:22-29:7 ("the question of how the compact should be administered in the future in order to ensure that Montana's rights under Article 5(a) are met is a question that still needs to be resolved."); see also Dec. 20, 2011 Mem. Op. at 3 ("To allocate the second and third priorities, the Compact would seem to require knowledge of how much water is already protected under Article V(A). Therefore, if the necessary data is available and Article V is fully and effectively implemented, Montana may never need to call the river because the water necessary to meet Article V(A) obligations would be provided as part of the Compact's overall allocation scheme."); *id.*, at 10 ("As noted earlier, a call might not be necessary once all the data needed to implement and enforce the Compact is available."); Sept. 28, 2012 Mem. Op. at 9 ("This structure could be read to anticipate a mechanism in which the respective state's water

rights are determined based purely on existing flows and implemented without the need for notifications or calls.").

To be clear, Montana is not claiming that it is entitled to delivery of a set amount of water at the state line based on acreage irrigated as of January 1, 1950. To the contrary, as the Special Master has repeatedly suggested, Montana has quantified the amount of acreage with pre-1950 rights in Montana, and the amount of water needed to satisfy such acreage. See Book Report at 35 (Table 5). Montana has proposed using a trigger flow approach whereby once the flow at the stateline drops below a certain level, depending on the conditions of the river, Wyoming would be required to regulate post-1950 appropriators. As the Special Master has recognized, this would eliminate the need for notification or calls.

In fact, Wyoming uses this same trigger flow approach in administering its own intrastate waters. For instance, Wyoming's expert Doyl Fritz explained how this approach works with respect to regulation in the Piney Creek drainage:

> "Many years of regulation have shown that about 22 cfs must be flowing past the Kearney gage in order to satisfy approximately 32 cfs of senior (i.e., senior to the water rights in the Prairie Dog and Mead-Coffeen ditches) downstream rights before any water can be exported out of the Piney Creek drainage above this gage. When the flow drops below 22 cfs at this gage, these two ditches typically go into regulation. Normally when this happens, the water users on Prairie Dog Creek who have storage begin to call for releases. Storage releases are shrunk by at least 10% at the headgates." See Fritz Report at 56.

This approach was confirmed by David Schroeder, a Water Commissioner Hydrographer with Division II of the Wyoming State Engineer's Office. Mr. Schroeder stated that he uses a trigger flow of 22 cfs in deciding when to regulate for the benefit of senior water rights downstream of Prairie Dog Creek. See Schroeder Deposition at 129:5-6. See *id.*, at 130:17-20 ("So I'm constantly looking at my tabulation of water rights when I'm at the head gate, figuring out how

much water to put in there based on their priority date."). In addressing whether Wyoming accounts for reduced demand during times when farmers are haying, Mr. Schroder explained:

> "Q. After the river goes into regulation, does it tend to stay in regulation the remainder of the year?
>
> A. Yes.
>
> . . .
>
> Q. Do all of the irrigators cut hay at the same time?
>
> A. No.
>
> Q. Do they all inform you when they're cutting hay?
>
> A. No, they do not.
>
> Q. Have you ever taken the river or a head gate out of regulation because of haying?
>
> A. No.
>
> Q. Other than rain events or runoff, have you ever taken the river off of regulation for any other reason?
>
> A. No." *Id.*, at 137:7- 138:17.

Thus, Wyoming makes water available to senior water rights based on assumptions regarding the amount of water needed to satisfy those senior rights, and does not require users to demonstrate "actual contemporaneous demand" before making water available.

In administering the Compact, however, Wyoming proposes an unworkable "actual contemporaneous demand" model that Wyoming does not utilize in regulating water in Wyoming. Under Wyoming's proposal, Montana would be required to monitor in real time each field on each farm on the Tongue River to determine when Montana users are cutting hay and when they are irrigating. Based on this real time monitoring, Montana would then have to notify Wyoming up to seven days in advance of projected demand to account for the travel time from

the stateline. As explained in the Declarations of Roger Muggli and Art Hayes, Jr., conditions can change significantly over seven days, and the inability to irrigate when conditions demand would create severe logistical problems and hardship for Montana water users.

Because the Special Master has explicitly left open the possibility of a trigger flow approach to future Compact administration, and because resolution of this issue is unnecessary at this point, Wyoming's Motion should be denied.

VII. Genuine Issues of Material Fact Preclude Summary Judgment

As discussed above, even if you accept many of the legal premises advanced by Wyoming, numerous issues of genuine material fact preclude summary judgment, including:

1. Whether the 1992 Agreement was intended to alter, modify or supplement the Yellowstone River Compact;
2. The timing of post-1950 water use in Wyoming;
3. The level of connectivity of CBM produced groundwater to the Tongue River;
4. Whether, and which, individual water users in Montana were impacted by Wyoming's post-1950 use;
5. Whether there was an "actual demand" for water in Montana.

In addition, because Wyoming never raised the issue of the 1992 Agreement before, the States have not engaged in meaningful discovery on the issue, and there is no expert analysis. What is left is an absence of evidence on whether Wyoming has violated the Yellowstone River Compact as it was allegedly modified by the 1992 Agreement. The result is that Wyoming cannot meet its burden to show that it is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, Wyoming's Motion for Summary Judgment should be denied.

Respectfully submitted,

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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

CERTIFICATE OF SERVICE

I certify as Counsel of Record for the State of Montana that a copy of Montana's Response in Opposition to Wyoming's Motion for Summary Judgment is being served electronically and by placing the same in the U.S. mail on August 2, 2013, to the following:

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

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