

No. 137, Original

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In The  
Supreme Court Of The United States

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STATE OF MONTANA,  
Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

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

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**MONTANA'S PRETRIAL BRIEF**

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Pursuant to Case Management Orders Nos. 11 and 12, Montana submits the following Pretrial Brief. This brief does not present comprehensive argument on the myriad factual and legal matters at issue in this case, but rather is intended to present a broad-level “road map” of the case and what the evidence adduced at trial will demonstrate.

**I. Evidence Pertaining to All Years**

From the outset, the Yellowstone River Compact (“YRC” or “Compact”) faltered due to Wyoming’s refusal to recognize its Article V(A) obligations, and its advantageous resistance to administration of the Compact as the upstream state in control of the resource. In 1952, a mere two years after the adoption of the Compact and despite the Compact’s stated intent to “remove all causes of present and future controversy” between the States “with respect to the Waters of the Yellowstone River and its tributaries,” YRC Preamble, the Wyoming State Engineer made the following statement regarding Article V: “The compact only divided the unappropriated waters, and left the division of the appropriated waters for later settlement by the Courts.” Letter from D. Ewart to F. Buck (April 15, 1952), attached as Exhibit H to Montana’s Brief in Opposition to Wyoming’s Renewed Motion for Partial Summary Judgment (July 13, 2012) (“July 13, 2012 Opposition Brief”). Wyoming steadfastly adhered to this view for decades, ultimately forcing Montana to institute this litigation to ensure that Montana’s rights under Article V(A) of the Compact are protected.

For years Montana pressed the need to administer Article V(A) of the Compact, and attempted to gain Wyoming’s cooperation in developing a method of administration that would protect pre-1950 rights in both States. But these attempts repeatedly failed due to Wyoming’s insistence that the Compact did not protect pre-1950 uses in Montana. Additionally, Wyoming rebuffed all attempts to quantify water availability for administration of Article V(A), focusing instead on post-1950 development contemplated in Article V(B). Thus, up until the Special

Master issued his First Interim Report in this case, Wyoming effectively foreclosed administration of Article V for purposes of protecting pre-1950 uses in Montana. See July 13, 2012 Opposition Brief, at 6-19.

Not surprisingly, then, as far back as the records extend, pre-1950 direct flow uses in Montana have gone unsatisfied in all but three years; these shortages occurred during periods when Wyoming post-1950 rights were not being regulated for the benefit of Montana's Article V(A) rights. The evidence, if allowed, will show that in the early years of the Compact, Montana provided Wyoming with sufficient information to understand and protect Montana's pre-1950 rights, but this information was ignored based on Wyoming's interpretation of the Compact. Beginning in the early 1980s, Montana began expressly notifying Wyoming that pre-1950 rights in Montana were not being satisfied. These notifications came from all levels of Montana authorities, from staff of the State of Montana Department of Natural Resources and Conservation ("DNRC") to the Compact Commissioner. All attempts at notification, including formal verbal and written calls, were ignored or rejected outright based on Wyoming's insistence that the Compact did not protect pre-1950 rights in Montana. Following decades of endeavoring to gain Wyoming's cooperation in administering Article V(A) of the Compact to ensure protection of Montana's pre-1950 rights, Montana filed the instant suit.

## **II. Water Use in Montana in 2001, 2002, 2004 and 2006**

Montana has quantified shortages to Montana's pre-1950 rights in the years 2001, 2002, 2004, and 2006. The evidence at trial will show that in each of those years, Montana's pre-1950 rights were short the entire year apart for a brief period in the winter in 2001, 2004 and 2006 when the winter storage level in Tongue River Reservoir was reached.

Montana's pre-1950 rights are established and administered pursuant to the doctrine of appropriation, and consist of both storage and direct flow rights. Tongue River Reservoir begins

storing in the fall up to the winter storage level of 45,000 acre-feet, and continues or resumes storing during the spring fill period to its full capacity or until such time during the irrigation season when the flow in the river will no longer support direct flow demands. Storage rights are distinct from direct flow rights, such that when the Tongue River Reservoir does not fill in a given year, the amount of water each shareholder receives is reduced in proportion to their pro rata share in the Reservoir. This forces Montana irrigators to use less water, reduce their irrigated acreage, grow different crops, and make difficult decision regarding how and when to use their stored water. Thus, all those contracting for storage in the Reservoir suffer the impacts of the Reservoir's failure to fill. The evidence will show that in each of the years at issue, Tongue River Reservoir never filled, indicating that pre-1950 storage rights were not satisfied.

With respect to direct flow rights, the T&Y Canal is the second, and by far the largest right on the Tongue River in Montana. When flows at the stateline drop below 200 cfs, there is insufficient water reaching the canal to fully satisfy the T&Y's direct flow right, and 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. 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. The evidence will show that in every year at issue, there has been a time during the irrigation season when there was insufficient water reaching the canal to satisfy T&Y's direct flow right. This means that every pre-1950 right junior to T&Y was not being satisfied in those years. See

Montana's Brief in Opposition to Wyoming's Motion for Summary Judgment, at 19-22 (August 2, 2013) ("August 2, 2013 Opposition Brief").

Viewing the storage rights and direct flow rights together, pre-1950 rights in Montana were short virtually the entire year in each of the years at issue. Thus, post-1950 uses in Wyoming at any time during those years, apart from the short period in the winter in three of the years when Tongue River Reservoir had reached its winter level, would constitute a violation of Article V(A) of the Compact unless Wyoming could show that the shortages to Montana's pre-1950 rights were not attributable to Wyoming's post-1950 uses, or that Montana pre-1950 uses did not need the water. See Memorandum Opinion of the Special Master on Wyoming's Motion for Partial Summary Judgment at 8 (Dec. 20, 2011) (Wyoming's burden to determine whether insufficiency was the result of post-1950 use in Wyoming); Reply in Support of Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements, at 5 (August 16, 2013) (discussing and citing cases re Wyoming bears the burden to establish that Montana did not need water).

**A. Issues Specific to Storage Rights**

**1. Priority of Storage Rights in Tongue River Reservoir**

The Tongue River Reservoir is a pre-1950 reservoir that is owned by the State of Montana/DNRC and managed by the Montana State Water Projects Bureau. The Tongue River Water Users Association ("TRWUA") operates and maintains the dam. The original full capacity of the Reservoir was 72,500 acre-feet. The Reservoir was rehabilitated in 1999 as part of the Northern Cheyenne Tribe Compact ("NCT Compact"), at which time the capacity was increased to 79,071 acre-feet. The additional storage was part of the NCT Compact and was associated with a 20,000 acre-foot storage right that was recognized for the Tribe under Article II.A.2.b of the NCT Compact. The Tribal right is recognized and protected under the Article VI

of the Yellowstone River Compact. DNRC's water right in the Reservoir is commingled and administered in conjunction with stored water reserved for the Tribe under the NCT Compact. Both storage rights have a priority date of April 21, 1937, as recognized in the Montana water right awarded to the Northern Cheyenne Tribe. Thus, the entire Reservoir capacity is protected as a pre-1950 right under Article V(A) of the Compact.

Moreover, the priority of the enlargement need not be decided in this case. The releases and refills relevant to this case are only from and into the pre-enlargement space in the Reservoir.

## **2. Tongue River Reservoir Operations**

Operations of the Tongue River Reservoir include a maintenance and safety restriction on winter storage, as well as winter bypass flows for operational, safety, and water rights purposes. Montana does not recognize the Wyoming "one fill rule," the concept of which forms the basis for Wyoming's expert analysis regarding alleged foregone storage opportunities at the Reservoir, during times outside of the Reservoir's historic, primary fill pattern. Instead, as it was historically, the Reservoir is operated to rely primarily on spring runoff from April through June to fill to its normal full capacity, and to allow winter bypass flows between 75 and 175 cfs (or more depending on river flows) during the October through March season. These operations are carried out pursuant to an Operating Plan and Operating Manual, which were developed by an advisory committee created pursuant to the NCT Compact, and which reflect historic pre-Compact operations. See August 2, 2013 Opposition Brief, at 16-19.

Operating records for the Reservoir, which was constructed beginning in 1937, further show that, prior to 1950, the Reservoir was consistently operated below a storage level of 45,000 acre-feet during the October through March season, and that winter bypass flows have historically ranged from 75 to 175 cfs, and, in some cases more, depending on conditions. See

*ibid.* Thus, these historical operational practices are part of the storage right under the doctrine of appropriation. See *McDonald v. State*, 722 P.2d 598, 609 (Mont. 1986) (noting that calculation of reservoir carryover turns “on the physical facts and historical use patterns unique to each water right”); *Town of Minturn v. Tucker*, 293 P.3d 581, 592 (Colo. 2013) (“Established practice in water adjudication proceedings makes historical use a significant or controlling factor in the determination of parties' water rights.”).

The Special Master has ruled that Montana law applies to intrastate administration of Montana’s water rights, so long as that law complies with the doctrine of appropriation. See Memorandum Opinion of the Special Master on Montana’s Motion for Summary Judgment on the Compact’s Lack of Specific Intrastate Administration Requirements, at 4 (Sept. 16, 2013) (“Sept. 16, 2013 Opinion on MT SJ Motion”). The Master further stated that Montana’s existing regulation and administration is presumed to be consistent with the doctrine of appropriation and acceptable under the Compact. *Ibid.* Wyoming thus bears the burden to establish that Montana’s reservoir operations, which are conducted pursuant to Montana’s existing regulation and administration of water rights, amount to a waste of water. *Ibid.* Montana will present two experts with actual experience in reservoir operations who will testify that the operations of the Tongue River Reservoir are reasonable and are consistent with the doctrine of appropriation as it is incorporated into Montana law. Evidence will also be presented demonstrating that Wyoming has reservoirs whose operations include winter bypass flows and restrictions on winter storage. Flows that are bypassed for legitimate operational reasons cannot be classified as “waste” under the doctrine of appropriation. Nor is it the case that uses such as bypass flows for safety and maintenance purposes, and instream flows for fish and wildlife are never recognized as “beneficial uses” under the doctrine of appropriation. See *In the Matter of the Missouri River Drainage Area*, 311 Mont. 327, 55 P3d 396 (2002) (holding that instream flow is a beneficial



use). For its part, Wyoming has offered no expert testimony on reservoir operations, and cannot carry its burden to show that Montana's reservoir operations, which include winter bypass flows and storage restrictions, amount to waste and are therefore inconsistent with the doctrine of appropriation.

#### **B. Issues Specific to Direct Flow Rights**

The evidence will establish that in each of the four years for which Montana has quantified damages, a water commissioner was appointed in Montana to oversee water use and ensure that appropriators were not taking more water than they were entitled to. The duty of the water commissioner was to ensure that appropriators confined their water use to their decreed and contract storage rights. Thus, the water commissioners ensured that there was essentially no out-of-priority post-1950 use in Montana in the years at issue. Accordingly, in each year at issue, water use in Montana was being diligently tracked and administered. The evidence will also show that in each year, as soon as Montana became aware that its pre-1950 rights were not being satisfied, it investigated the shortages and notified Wyoming accordingly. Wyoming bears the burden to establish that shortages to pre-1950 rights in Montana were not caused by post-1950 use in Wyoming.

#### **III. Wyoming's Water Use in 2001, 2002, 2004, and 2006**

As discussed above, Montana pre-1950 rights were short in each of the four years for which Montana has quantified violations, and thus post-1950 uses in Wyoming at most times during those years constitute a violation under Article V(A) of the Compact. The evidence will show that post-1950 storage and direct flow uses occurred in Wyoming in every year at issue, as described below. As stated previously, Wyoming bears the burden to establish that such post-1950 uses in Wyoming were not the cause of shortages to Montana pre-1950 rights.

**A. Wyoming Post-1950 Reservoir Storage**

Montana has quantified storage in Wyoming post-1950 reservoirs for 2001, 2002, 2004 and 2006. The evidence will establish that Wyoming stored water in those reservoirs during times when Montana pre-1950 storage and direct flow rights were not being satisfied. Wyoming has advanced the position that regulation to curtail junior uses can only be accomplished after a call, not before, and thus, post-1950 storage in Wyoming reservoirs prior to a call by Montana is permissible and would not be subject to release for Compact compliance purposes. However, Wyoming has acknowledged that water stored out of priority can be released at a later time to satisfy downstream senior rights.

The alternative, of course, would be much harsher for Wyoming. Montana could put on a standing call on October 1st of each year, notifying Wyoming that no post-1950 storage can occur until the winter storage level in Tongue River Reservoir is achieved, which in 2002 never happened. Then, once the spring runoff began, Wyoming would be prohibited from any post-1950 storage or direct flow uses until Tongue River Reservoir reached its full capacity.

**B. Wyoming Post-1950 Direct Flow Rights**

There is no dispute that post-1950 direct flow rights in Wyoming were used in the years at issue; the disagreements center on the extent of such uses, whether they caused shortages to Montana pre-1950 rights, and the timing of the uses with respect to Montana's calls. The evidence will show that post-1950 water use occurred in Wyoming in every year at issue during times when Montana pre-1950 rights were unsatisfied. Montana has quantified the post-1950 direct flow rights on the mainstem of the Tongue River in Wyoming. No regulation occurred on this part of the river in Wyoming in the years at issue. It is presumed that water rights that are not under regulation are being put to use to the full extent of their right at times when water is

available. See, *e.g.*, Expert Report of Doyle Fritz, “Water Regulation in Wyoming’s Tongue River Basin 2004-2006,” at 13 (Apr. 2, 2013) (explaining that when flow rates exceed certain set amounts at gages on major streams, “it is assumed that all active water rights are being satisfied”). Thus, it is Wyoming’s burden to show that the post-1950 direct flow rights on the mainstem of the Tongue were not being put to use to their full extent, or were not otherwise the cause of shortages in Montana.

### **C. Coal Bed Methane Groundwater**

The Special Master has ruled that CBM groundwater production in Wyoming is not exempt from Wyoming’s Article V(A) obligations under the Compact. See Memorandum Opinion of the Special Master on Wyoming’s Motion for Summary Judgment, at 22-27 (Sept. 16, 2013). Thus, streamflow depletions caused by CBM operations are properly accounted for in determining whether and to what extent Wyoming has violated Article V(A) of the Compact. Montana’s expert will testify that CBM groundwater production in Wyoming has depleted and will continue to deplete streamflows, thereby interfering with Montana pre-1950 appropriations. Wyoming does not dispute that there is a hydrologic connection between the aquifers being pumped for CBM operations and streamflows. The dispute centers on the extent of the impacts of CBM pumping on streamflows. Montana will present the expert testimony of Steven P. Larson, a highly qualified groundwater expert with over 40 years of experience in the field of hydrology, including nearly a decade with the Water Resources Division of the United States Geological Survey. Mr. Larson has extensive experience with mathematical models used to evaluate surface water and groundwater conditions and impacts on those conditions associated with water use, and has testified on similar issues in the original jurisdiction. Mr. Larson’s analysis employs a model developed by the United States Bureau of Land Management that is appropriate for calculating effects of groundwater pumping on streamflows. Mr. Larson will

testify that this model has been appropriately adapted for use in determining impacts of CBM pumping on streamflows in the Yellowstone River Basin for purposes of this case.

#### **IV. “Contemporaneous Demand” Issue Raised By Wyoming**

Wyoming asserts that Montana cannot show that its pre-1950 rights went unsatisfied in any given year without showing “actual contemporaneous demand.” Wyoming’s Pretrial Memorandum at 5 (Sept. 23, 2013). Wyoming views such “actual contemporaneous demand” as a stand-in for the notion that water rights under the doctrine of appropriation are limited by the amount put to beneficial use. Montana does not take issue with the fundamental principle that beneficial use is the basis, the measure, and the limit of a water right. However, the concept of beneficial use is not equivalent to the notion of “actual contemporaneous demand” as envisioned by Wyoming. Indeed, the Special Master has ruled that the two concepts are distinct and that “the beneficial use doctrine [must] be applied in a practical and implementable fashion, designed to ensure that senior appropriators receive the water to which they are entitled and have a need without unreasonably wasting water that could be used elsewhere.” Sept. 16, 2013 Opinion on MT SJ Motion at 31. Montana’s evidence fully meets the standard to show that its pre-1950 rights were not satisfied in the years at issue, and Wyoming bears the burden to show that Montana pre-1950 water users were wasting water.

#### **V. Conclusion**

In sum, the evidence will show that Wyoming violated the Compact in specified quantities in 2001, 2002, 2004, and 2006, by interfering with Montana’s pre-1950 storage rights in those years. In addition, the evidence will also show that Wyoming violated the Compact in all but three years since 1961 by interfering with Montana’s pre-1950 direct flow rights.

Respectfully submitted,

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Special Master

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**CERTIFICATE OF SERVICE**

I certify that a copy of *Montana's Pretrial Brief* was served electronically, and by U.S. Mail on October 4, 2013, to the following:

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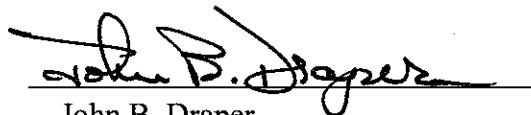
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I further certify that all parties required to be served have been served.

  
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