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 MOTION AND BRIEF FOR SUMMARY JUDGMENT ON TONGUE RIVER RESERVOIR

♦

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May 27, 2016

MONTANA'S MOTION FOR SUMMARY JUDGMENT ON TONGUE RIVER RESERVOIR

COMES NOW, Plaintiff State of Montana, and moves, pursuant to Case Management Order No. 17, for partial summary judgment declaring that the Yellowstone River Compact protects Montana's water right in the Tongue River Reservoir to fill 72,500 acre-feet, less carryover storage, each year. As more fully stated in the accompanying brief in support, the grounds for this motion are as follows:

1. The Court has affirmed that it will declare rights of states under interstate water compacts.
2. Here, a fundamental dispute between Montana and Wyoming is the extent of the Compact's protection of Montana's water right in the Tongue River Reservoir.
3. The Compact, Article V(A), protects water rights in both states as they existed in 1950 under each states' own law.
4. There is no genuine dispute of material fact that:
    a) Montana's water right in the Tongue River Reservoir was perfected before 1950;
    b) The Reservoir's pre-1950 capacity was 72,500 acre-feet;
    c) The available capacity of the Reservoir each year has been more than 32,000 acre-feet in 63 of the 68 years of record, beginning in 1941; and
    d) On average, the available capacity of the Reservoir has been 48,110 acre-feet between 1941-2008.
5. The doctrine of prior appropriation provides that the right to fill the Reservoir each year is 72,500 acre-feet, less any carryover from the previous year.

WHEREFORE, Montana requests partial summary judgment declaring that the Yellowstone River Compact protects Montana's water right in the Tongue River Reservoir to fill 72,500 acre-feet, less carryover storage, each year.

Respectfully submitted,

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MONTANA'S BRIEF FOR SUMMARY JUDGMENT ON TONGUE RIVER RESERVOIR

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I. Introduction

During the now-concluded liability phase of this case, the Special Master narrowed the liability analysis to 2004 and 2006, the years in which he found that the State of Wyoming had ignored the State of Montana's properly-made calls for water on the Tongue River. As it turned out, 2004 and 2006 were low-water years, so the Special Master did not determine the full measure of Montana's right in the Tongue River Reservoir ("Reservoir") under the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) ("Compact"). Now that this case has entered the remedies phase, however, the full measure of Montana's Reservoir right — a question that sparked this hard-fought dispute in the first place — is now squarely before the Special Master and the Court.

Montana and Wyoming disagree sharply over the quantity of the full Reservoir right, but agree that good Compact administration requires that it be determined and declared. The uncontested facts in this case demonstrate that Montana will require more than 32,000 acre-feet ("af") of water to fill the Reservoir in virtually every year going forward. This means that a new dispute over a Montana call on the Tongue River to fulfill its Reservoir right will be inevitable if the Court leaves the states without a determination of the quantity of Montana's Reservoir right. This question is fully justiciable now because the dispute is an actual, well-drawn controversy between two adverse parties.

The Compact protects pre-1950 water rights established under the prior appropriation laws of each state. In the case of the Reservoir, Montana law recognizes a pre-1950 right equal to its

original capacity, which the Special Master has already determined is 72,500 af. Montana therefore requests partial summary judgment declaring that the Compact protects Montana's water right in the Reservoir to fill 72,500 af, less carryover storage, each year.

II. Background

A. Procedural Background

From the outset of this case, Montana has sought, *inter alia*, a declaration of its full water right in the Reservoir. In 2007, Montana initiated these proceedings complaining of increased consumption and storage of water by Wyoming in the Tongue and Powder River basins. Montana's Motion for Leave to File Bill of Complaint ("Cmplt."), ¶¶ 8-12. Montana pled that "the State of Wyoming has depleted and *is threatening further to deplete* the waters of the Tongue and Powder Rivers allocated to the State of Montana under Article V of the Compact." *Id.*, ¶ 13 (emphasis added).

Montana further pled that "[u]nless relief is granted by this Court, water use in the State of Wyoming in excess of its equitable share of the waters of the Tongue and Powder Rivers *will continue and increase*, resulting in substantial and irreparable injury to the State of Montana and its water users." *Id.* para 15 (emphasis added). The Court granted Montana's Motion for Leave to File Bill of Complaint on February 19, 2008. 55 U.S. 1175 (2008).

The Special Master and the Parties agreed to Case Management Plan No. 1, which bifurcated the case into two phases: the liability phase and the remedies phase. Case Management Plan No. 1, July 27, 2011, § II. The Plan limited the liability phase to a backward looking determination of "whether Wyoming has violated the Yellowstone River Compact and the amount of any such

violation." *Id.*. The Case Management Plan went on to provide that "Matters pertaining to retrospective *or prospective remedies* are hereby reserved for the later remedies phase." *Id.* (emphasis added).

The Special Master subsequently framed this case as a determination of the parties' rights under the Compact:

> The issue in this case is when, if at all, the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (the "Compact"), protects the holders of pre-1950 appropriative rights in Montana on the Powder and Tongue Rivers from diversions, storage, and consumption of water in Wyoming that date from after January 1, 1950.

Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint (June 2, 2009), at 1. The Court itself has likewise stated that this case concerns the meaning of the Compact, not simply whether Wyoming violated the Compact in the past. 563 U.S. 368, 377 n.5 (2011) ("Our original jurisdiction over cases between States brings us this dispute between Montana and Wyoming about the *meaning* of their congressionally approved Yellowstone River Compact") (*citing* U.S. Const., Art. III, § 2, cl. 2; 28 U.S.C. § 1251(a)) (emphasis added).

After discovery, trial was held, arguments were heard, and the Special Master issued his Second Interim Report ("Second Report"). The Special Master found Wyoming liable for Compact violations in 2004 and 2006. He also found that "Article V(A) therefore protects Montana's right to store water up to the full original capacity of the Tongue River Reservoir of 72,500 af." Second Report 142. However, the Special Master stopped short of a determination of whether Article V(A) entitles Montana to store up to the full capacity of the Reservoir every year, or whether it is limited to 32,000 af per year, or to some undefined amount in between. *Id.* at 140-142. Both Montana and Wyoming filed exceptions. Montana stated in its Exception to the Second Report:

> the Special Master has recommended that the case be remanded "to determine damages and other appropriate relief" for Wyoming's breach of the Compact. [Second Report] at 231, ¶ 5. If the Court adopts that recommendation, it will be necessary to determine whether Montana is entitled to a remedy that includes a declaration of its rights to the waters of the Tongue River pursuant to the Compact, as requested in the complaint. Bill of Complaint 5, para A.

Montana's Exception 12. The Court, without ruling on either state's exceptions, adopted the Special Master's findings on Wyoming's liability, and remanded the case to the Special Master, as he suggested, "for determination of damages and *other appropriate relief*." 136 S. Ct. 1034 (Mar. 21, 2016) (emphasis added). Thus the "liability phase" of this case concluded, and the "remedies phase," addressing "[m]atters pertaining to retrospective or *prospective remedies,*" began. Case Management Plan No. 1, § II (emphasis added). In accordance with the Court's Order and Judgment, the Special Master initiated the remedies phase of the case with Case Management Order No. 17 (April 27, 2016). The Order authorized Montana to file summary judgment motions on the question of remedies, including the declaratory relief sought herein. *Id.*, ¶ 2.

B. Statement of Undisputed Material Facts

The following facts are undisputed between the parties:

1. "Both [States] agree that Article V(A) protects the right to store water in the Reservoir…" Second Report 100.

2. A "fundamental" and "important" dispute exists between Montana and Wyoming over the measure of Montana's water right in the Reservoir that is protected by the Compact. Second Report 99-100 ("How to account for the Reservoir under Article V is therefore of major importance to both Montana and Wyoming. Unfortunately, the states fundamentally disagree on the rights that the Reservoir enjoys under the Compact.").

3. "1937: Pursuant to state law, the Montana Conservation Board files a Declaration of Intention to Store, Control and Divert River Water ('Storage Declaration') on April 21, 1937. Ex. M-

558A. The Conservation Board declares its intent to store, control and divert 'all unappropriated waters' of the Tongue River and tributaries, 'together with the return flow of all waters furnished or supplied.'" *Id.* at 100-101.

4. "1937: Three months after filing its Storage Declaration, and prior to construction of the Reservoir, the Conservation Board enters into a contract with the Tongue River Water Users' Association ('TRWUA') to market water from the Reservoir. Ex. M-529A. Under that contract, all 'right, title, and interest' in the waters stored in the Reservoir remain with the Conservation Board. *Id.* § 5. The Conservation Board agrees to furnish to TRWUA "the total available yield of storage water" from the Reservoir, which the board estimates will be 32,000 af during the irrigation season. *Id.* § 1. The TRWUA, in turn, commits to sell 32,000 af annually to its members. *Id.* § 4. If the available annual yield of the Reservoir turns out to be more than 32,000 af, the TRWUA agrees to promptly enter into more contracts for the remaining water. *Id.* The explicit goal of the contract is to market all the available water. See Mont. Rev. Code § 89-121 (1947) (since repealed); 7 Tr. 1377:12-16 (Kevin Smith)." *Id.* at 101-102.

5. "1939: The Conservation Board completes construction of the dam and Reservoir." *Id.* at 102.

6. Reservoir's original capacity was 72,500 af. *Id.* at 102-103 n.29 ("Based on all the evidence presented, I agree that [72,500 af] is the best estimate of the Reservoir's original capacity").

7. "1940-1950: The Reservoir begins to store water in March 1940. 5 Tr. 1055:20-22 (Smith); Ex. M-5, p. 29 (Book expert report). In the Reservoir's ten years of operation before the Compact, the peak quantity of water stored each year averages slightly less than 48,500 af. See Ex. M-5, p. 29 tbl. 4-A. In most years, peak storage does not exceed about 40,000 af. *Id.* Peak storage,

however, varies significantly—from a low of 36,390 af in July 1950 to a maximum of 75,760 af in June 1944. *Id." Id.* 103.

8. "The Conservation Board perfects its water right by filling the Reservoir. 5 Tr. 1057:25-1058:8 (Smith)." *Id.* at 103.

9. The protection of pre-Compact rights was the subject of considerable discussion among the States and the United States before the Compact was entered. *See generally* Ex. M12. Montana made it clear that "Montana is interested in preserving as far as possible vested and present uses, and obviously any compact which might seriously interfere with such uses would be difficult of ratification." *Id*. at 17; Tr. 2409:4-17 (Littlefield). This interest was particularly strong for the Reservoir, which all of the States understood was an essential facility for Montana irrigation. Tr. 2441:2-18 (Littlefield). *See* Montana's Post-Trial Brief ("PTB") at ¶ 112.

10. The States were aware of the Tongue River Reservoir when negotiating the Compact. For example, the Federal Power Commission in its Preliminary Report on Yellowstone River Basin: Compilation of Factual Data for use of Yellowstone River Compact Commission included multiple references to the Tongue River Reservoir. Ex. J72; Tr. 2412:13 - 2413:3 (Littlefield). The Montana County Water Resources Surveys, which were considered valuable "in negotiating the Yellowstone River Compact," Tr. 2427:17-23 (Littlefield) (quoting Ex. M16 at 3), identified the Reservoir as "the main feature on the Tongue River." Ex. Ml6 at 30. *See* PTB at ¶ 113.

11. The Compact Engineering Committee identified the protected capacity of the Reservoir as 69,440 af. Tr. 2433:5 - 2435:17 (Littlefield); *see also* Ex. W266. In Dr. Littlefield's uncontested expert opinion, the negotiators understood that the Reservoir had established a water right for all the unappropriated waters of the Tongue River. Tr. 2430:4 - 2431:16 (Littlefield). *See* PTB at ¶ 114.

12. According to Dr. Littlefield, the negotiators agreed to retain the laws of each State in defining the water rights protected by the Compact, including the laws defining reservoir water rights. Ex. M12 at l-5; Tr. 2441:2-18 (Littlefield). Thus, the Montana rules for the definition of the water right and the operation of the Reservoir apply. *Id*. *See* PTB at ¶ 115.

13. Both the 1889 and subsequent 1972 Montana Constitutions recognize "sale" as a beneficial17. use of water. Mont. Const. art. IX, §3. In Montana, a State Project water right is perfected after the reservoir is built, the water offered for sale, and the reservoir is filled. Tr. 1057.2 - 1058:8 (Smith); Tr. 1131:10-21 Smith). *See* PTB at ¶ 122.

14. The water right for the Reservoir was fully perfected for the firm annual yield no later than 1944 when the Reservoir filled. Ex. M3l9 at 3; Ex. M5294 (intent was "[t]o obtain sufficient waters so that the project may be operated at its full capacity"); Ex. M539 at 5; Tr. 1058:6-8 (Smith); Tr. 1215:21 - 1216:7 (Smith); Tr. 1385:19 - 1386:12 (Smith). *See* PTB at ¶ 125.

15. The Special Master has concluded that Montana possesses a pre-1950 water right in Reservoir of "at least 32,500 af". Second Report at 136-37.

16. The Reservoir storage content for the period 1941-2008 is shown in Table 4-A of Exhibit M-5, pp. 29-30.

17. A condition of the full ratification and implementation (state and federal) of the Northern Cheyenne Tribe Compact was the adoption of a decree in the Montana Water Court. Tr. 1147:18-20 (Smith); Mont. 85-20-301, Art V, 106 STAT. 1186, Sec. 4. Since the rehabilitation, two water rights are associated with the water stored in the 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 Claim No. 428 119290-00. *See* Ex.M526. *See* PTB at ¶ 129.

18. Montana DNRC's water right for the 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 the Reservoir was filed with the Water Court of Montana on August 10, 2012. Ex. M526. *See* PTB at ¶ 130.

19. Montana completed an expansion of the Reservoir in 1999, expanding its capacity to 79,071 af. Second Report 105-106.

20. Between 1941 and 2008, more than 32,000 af of new water was required to be stored in the Reservoir in 63 of the 68 years of record, 93 percent of the years of record. Affidavit of Dale Book, P.E., dated May 27, 2016, ("Book Affidavit") ¶ 5, and the attached table.

21. Between 1941 and 2008, the average amount of water required to be stored in Tongue River Reservoir, in order to fill the reservoir, was 48,110 af per year. *Id*. at ¶ 6.

III. Argument

A. Standards of Decision

1. The Supreme Court Will Decide Actual, Existing Disputes Between States Over Compact Rights

The Court's role is to resolve controversies on their merits whenever possible. *Church v. Hubbart*, 6 U.S. 187, 232 (1804) (Marshall, J.) ("it is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so"). This principle is applicable in interstate disputes. *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991) (the Court has "a serious responsibility to adjudicate cases where there are actual, existing controversies between the States over the waters in interstate streams") (internal quotation omitted).

The Court has a particular responsibility to resolve interstate water disputes because it is the only arbiter available:

> The downstream State lacks the sovereign's usual power to respond—the capacity to make war, grant letters of marque and reprisal, or even enter into agreements without the consent of Congress. Bound hand and foot by the prohibitions of the Constitution, ... a resort to the judicial power is the only means left for stopping an inequitable taking of water.

Kansas v. Nebraska, 135 S. Ct. 1042, 1052 (2015) (internal quotations and citations omitted). In the context of a dispute arising out of an interstate compact, the Court's exercise of this responsibility means it may be required to render declaratory judgments concerning compact rights. "Where the States have negotiated a Compact [o]ur role … is … to declare rights under the Compact and enforce its terms." *Id.*; *see also Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (the Court's jurisdiction to resolve controversies between two states "extends to a suit by one State to enforce its compact with another State or *to declare rights under a compact*") (internal citations omitted) (emphasis added). When issuing decrees that declare and enforce compact rights between States, the Court has considerable flexibility. This means the Court "may 'mould each decree to the necessities of the particular case' and 'accord full justice' to all parties." *Kansas v. Nebraska*, 135 S. Ct. at 1053 (*quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Kentucky v. Dennison*, 65 U.S. 66, 98 (1860)).

2. Summary Judgment Standard in This Case

"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." *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Federal Rule of Civil Procedure 56 and the Supreme Court's precedents construing that Rule "serve as useful guides" in original actions. *Id.*; Sup. Ct. R. 17.2.; Case Management Order No. 17 (April 27, 2016) ¶¶ 2, 5.

B. The Court Can and Should Resolve the Dispute Over Montana's Full Reservoir Right To Avoid Further Litigation

During the April 27 Status Conference with the parties, the Special Master posed this question about the justiciability of Montana's water right in the Reservoir: "Is Montana entitled to declaratory relief on an issue that did not need to be resolved for purposes of liability in 2004 and 2006 through declaratory relief?" Status Conf. (April 27, 2016) Tr. 17:15-18:4.

The answer is "yes" for at least four reasons. First, the Court's original jurisdiction jurisprudence makes clear that declaring states' compact rights for prospective compact compliance is a core function of the Court. Second, if Montana's water right is not determined now, the States will soon will be back before the Court disputing a Montana call on the Tongue River. Third, the Court routinely declares states' compact rights in other interstate water disputes even where those declarations are aimed at future administration rather than past violations. Finally, the record demonstrates that the Court, the Special Master, and the parties have always understood that this case calls for a determination of Montana's rights under the Compact.

1. The Measure of Montana's Full Reservoir Right Is an Actual, Existing Controversy that the Court Has a Serious Responsibility to Adjudicate

The Court "'does have a serious responsibility to adjudicate cases where there are actual, existing controversies' between the States over the waters in interstate streams." *Oklahoma v. New Mexico,* 501 U.S. 221, 241 (1991) (*quoting Arizona v. California,* 373 U.S. 546, 564 (1963).[1]

[1] Montana hereby adopts and incorporates its argument that the Court must decide actual disputes over the rights created by the Compact from its Exceptions and Brief to the Second Interim Report of the Special Master (Liability Issues), April 9, 2015, pp. 13-22.

Here, an actual, existing controversy concerning Montana's rights under the Compact is ready for judicial resolution. 563 U.S. 368, 377 n.5 (2011) (this case is a "dispute between Montana and Wyoming about *the meaning* of" the Compact) (emphasis added); *see also* Cmplt. 5, ¶ A. As the Special Master has explained, "*[t]he issue* in this case is when, if at all [the Compact] protects the holders of pre-1950 appropriative rights in Montana on the" Tongue River. Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint (June 2, 2009), at 1 (emphasis added). The Special Master accurately describes Montana's Reservoir right as the subject of a concrete and immediate dispute:

> The Tongue River Reservoir is the major defining feature of the Tongue River basin in Montana. How to account for the Reservoir is therefore of major importance to both Montana and Wyoming. Unfortunately, the states fundamentally disagree on the rights that the Reservoir enjoys under the Compact….

Second Report 99-100. Specifically, "[w]hile Montana contends that the Compact entitles it to fully fill the Reservoir, Wyoming argues that Montana has a right to store a total of only 32,000 acre feet, and perhaps less, under Article V(A)." Second Report 37.

When confronted with a fundamental disagreement, such as this one, the Court has affirmed that it will act because its role is to "to declare rights under the Compact and enforce its terms." *Kansas v. Nebraska*, 135 S. Ct. at 1052; *Texas v. New Mexico*, 462 U.S. at 567 (the Court's original jurisdiction includes the power "to declare rights under a compact"). In short, adjudication of Montana and Wyoming's dispute over the meaning of the Compact and the nature of their rights under the Compact is a core function of the Court.

The unique nature of interstate disputes means that the Court's enforcement authority in an original action is broader than in a dispute between private parties. Specifically, it "includes the ability to provide the remedies necessary to prevent abuse." *Kansas v. Nebraska*, 135 S. Ct. at 1052. In this context, the Court has recognized that a full remedy is one that not only compensates

the injured downstream state, but that also "reminds [the upstream state] of its legal obligations, deters future violations, and promotes the Compact's successful administration." *Id.* at 1057.

The Court has the authority to declare Montana's Compact rights, and it should exercise that authority in this case because "a resort to the judicial power is the only means left [to Montana] for stopping an inequitable taking of water." *Id.* If the Court does not act to ensure future Compact compliance, then Montana possesses no remedy (other than initiating a new litigation every time Wyoming violates the Compact). Only by declaring Montana's full Reservoir right under the Compact can the Court deter future violations and promote successful Compact administration.[2]

2. Disputes Will Likely Arise Almost Every Year If Montana's Full Reservoir Right Is Not Declared

The Special Master found that Montana is entitled to a Reservoir right of "*at least* 32,000 af." Second Report 136-137 (emphasis added). The Book Affidavit uses uncontested data submitted at trial to demonstrate that in 63 of 68 years Montana needed more than 32,000 af to fill the Reservoir — *i.e.*, more than 93 percent of the time. Book Affidavit, ¶ 5. If history is any guide, therefore, conflict is a near certainty. Moreover, the average required amount to fill the Reservoir was 48,110 af — 50 percent greater than the 32,000 af amount protected by the Special Master. *Id.* at ¶ 6.

[2] The Special Master characterized Wyoming's opposition to this Motion as being on the ground that "Montana is effectively seeking … an advisory opinion" because Montana's full Reservoir right "wasn't an issue of liability in phase 1." Status Conf. (April 27, 2016) Tr. 19:22-25. On the contrary, an advisory opinion seeks to "pass upon the validity of actions by the Legislative and Executive Branches of the Government." *Flast v. Cohen*, 392 U.S. 83, 97 (1968). The Constitution prohibits the Court from issuing advisory opinions because the "Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id*. Separation of powers concerns are not present in this case and the dispute is a real one between adverse parties. Likewise, in other instances where the Court has declared rights under a compact solely for the purpose of future compliance (*see* cases cited in Section III(B)(3), *infra*), the Court has never evidenced a concern that its decrees might constitute advisory opinions.

A dispute is almost certain to arise each year, as follows: The water year starts on October 1 with the Reservoir less than full, so Montana issues a call. If the Reservoir fills to the winter limit during the winter, the call would come off until April 1, at which time it would be reinstated. At some point in almost all water years, the Reservoir will have stored 32,000 af before the Reservoir is full. These are the shaded years in the table in the Book Affidavit. At that point, in each of those years, the question will arise: Is Montana entitled to continue the call, so as to fill the Reservoir, or are post-1950 rights in Wyoming allowed to start diverting and/or storing again? These will be disputes of a most urgent nature. They can only be avoided if the Court declares whether Montana is entitled to continue the call and fill the Reservoir.

Even putting aside the specifics of this case, it is the nature of interstate water disputes that ambiguity of rights lead to litigation. *Cf. Texas v. New Mexico*, 482 U.S. at 134 (identifying "[t]he natural propensity of these two States to disagree if an allocation formula leaves room to do so" as a factor when fashioning appropriate relief).

The history of this particular dispute also underlines the concern that further litigation will result if the Court does not declare Montana's Reservoir right in this proceeding. Over the life of the Compact, Wyoming refused to acknowledge that it had any obligation under Article V(A) of the Compact, and never took a single action to provide water for Montana's Compact rights. Even after Montana sent formal call letters in 2004 and 2006, Wyoming delivered no water to Montana. While the Court now has found Wyoming liable for those years, a damages award for past violations gives Wyoming no meaningful incentive to comply with the Compact in the future.

Perhaps most importantly, however, Wyoming agrees that future disputes are inevitable if Montana's Reservoir right is not declared. Wyoming's counsel stated in closing argument that

"[f]or the future we need to know the nature of that [Reservoir] right or then we will be right back here." Transcript of Post-Trial Hearing Proceedings of May 1, 2014, at 27-28 (Dkt. 461).

3. The Court Routinely Declares Compact Rights When Necessary to Resolve Disputes and Avoid Future Suits

Montana is requesting a remedy commonly dispensed by the Court in interstate compact disputes. The Court has repeatedly awarded the sort of declaratory relief Montana seeks here: judicial determination of a state's rights under a compact that goes beyond the specifics of previous violations. As the following examples demonstrate, the Court understands that when exercising its original jurisdiction, it must adequately declare compact rights such that orderly compact administration will be possible in the future.

In *Texas v. New Mexico*, No. 65, Orig., the Court found Texas liable for violating the Pecos River Compact. The Court then entered a Decree requiring New Mexico, the upstream State, to comply with the compact in accordance with certain equations. *See Texas v. New Mexico*, 482 U.S. 124, 127, 135 (1987). The Court also determined that a River Master should be appointed to apply the equations provided for in the decree. *Id*., at 134. The Court subsequently adopted an Amended Decree that included a manual setting out how compact compliance would be determined in the future. *Texas v. New Mexico*, 485 U.S. 388 (1988). Thus, the Court adopted formulas for quantifying and ensuring future compliance after the determination of liability had already been made. The prospective remedy was not tied to the specific conditions under which liability was found.

Another good example is the Judgment and Decree in *Kansas v. Colorado*, No. 105, Orig., 556 U.S. 98 (2009). There, the Court entered judgment specifying Colorado's past violations of the Arkansas River Compact and the remedy for those violations. *Id.* 103. The quantification of

past violations was based on annual accounting of compact compliance. *Id.*, at 103. The Decree contained, however, an injunction requiring annual compliance based on moving 10-year accounting periods. *See* 556 U.S. at 104-105. Thus, the Court signaled that it was not bound by its rulings during the liability phase of that case, which was, like this case, bifurcated into liability and remedies phases. *See Kansas v. Nebraska*, 135 S.Ct 1042, 1061-62 (2015) (describing the rejection by the Court in No. 105, Orig., of arguments that it was bound in the remedies phase by the results of the liability phase). Instead, the Court adopted a methodology that it thought best suited to guide future compliance. *Id.*

Similarly, in *Kansas v. Nebraska*, No. 126, Orig., the Court in 2003 adopted a basinwide groundwater model and accounting procedure to govern future compliance, without tethering the rules for future compliance to any particular year's hydrologic conditions. In fact, there had been no antecedent finding of violation of the Republican River Compact. Rather, the Court's 2003 Decree was the result of a settlement agreement by the States. Nonetheless, the Court undoubtedly would have refused to enter a decree approving the settlement if it lacked jurisdiction to do so under the case and controversy principles governing its powers.

In each of these examples, the Court declared the states' compact rights purely for the purpose of future compact administration. The remedies set forth in the decrees were not limited by whether, or the degree to which, the Court had found past violations. Rather, they simply reflect the Court's exercise of its oft-stated power to "enforce [one State's rights under a] compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. at 567.

4. Montana and Wyoming Agree That this Case Calls For a Determination of Montana's Rights Under the Compact

Finally, the suggestion that "the Court need not resolve" the question of Montana's Reservoir right in these proceedings (Second Report 140) runs contrary to the stated understandings and expectations of the parties.

Montana's first prayer for relief asks for a declaration of its rights under the Compact, including the rights to the waters of the Tongue River. Cmplt. 5, ¶ A (requesting the Court "[d]eclare the rights of the State of Montana to the waters of the Tongue and Powder Rivers pursuant to the Yellowstone River Compact") *see also id.*, at paras. B-D (requesting a decree commanding Wyoming to deliver water in accordance with the Compact). The Court granted Montana's leave to file for this relief. 552 U.S. 1175. Montana has devoted substantial time and resources to this goal. *Cf.* Docket No. 424, Tr. 12-13 (Oct. 16, 2013) (Montana Attorney General describing the importance of this case to the State of Montana). Montana consistently pursued a declaration of its Reservoir rights at trial, in its Post-Trial Brief (Docket No. 456) ("PTB"), and in its exception to the Second Report. Docket No. 472.

Wyoming agrees that the extent of Montana's right in the Reservoir "needs to be settled." 22 Transcript of Trial Proceedings 5273 (Docket No. 448) (Wyoming State Engineer). As noted, Wyoming's counsel has stated that "[f]or the future we need to know the nature of that [Reservoir] right." Transcript of Post-Trial Hearing Proceedings of May 1, 2014, at 27-28 (Docket No. 461).

Thus, for the Court to stop short of declaring when the Compact protects Montana's pre-1950 Reservoir right would sidestep a dispute in this case that the parties have long considered fundamental.

C. Article V(A) Protects Montana's Pre-1950 Water Right to Store Up To 72,500 Acre-Feet Each Year in the Reservoir

Montana is entitled to partial summary judgment declaring that the Compact protects Montana's water right in the Reservoir to store 72,500 af, less carryover storage, each year. Such a finding is amply supported by the Compact and the uncontested material facts. Fed. R. Civ. P. 56.

While the Special Master was capable of declaring the Reservoir right based on the evidence, he said that determining the precise amount of water protected by Article V(A) of the Compact was inconsequential for assessing liability in 2004 and 2006, and therefore declined to do so. Second Report 140. But for the reasons set forth above, Montana submits that determination of the right is essential and required to avert future disputes. *Supra* Sections III (A) and (B).

The Special Master concluded in his First Interim Report that Article V(A) of the Compact protects each state's pre-1950 water rights. First Interim Report 37. In the Second Report, the Special Master concluded that the Reservoir was built and filled before 1950; therefore the rights in the Reservoir were perfected before 1950. *Id*. at 103. The Special Master further concluded that 72,500 af is the pre-1950 capacity of the Reservoir that is protected by the Compact. *Id*. at 143 ("Of the 79,071 af of current storage capacity, 72,500 af is therefore the pre-1950 capacity protected by Article V(A), while the remaining 6,571 af is post-1950 capacity covered by Article V(B).")

As the Special Master points out, "Prior appropriation law generally does not recognize rights beyond the original intent of the appropriator." *Id.* at 139. As the Special Master also recognizes, "It is difficult to imagine that Montana intended that the Compact would limit its right to store at least 32,000 af." *Id*., at 136. Indeed, it is difficult to imagine that Montana intended not to fully use its Tongue River Reservoir. Perhaps this is the reason that the Special Master found that Montana caselaw "suggests that Montana might have the right to fill the Reservoir each year

to capacity, no matter how much water Montana contracted with the TRWUA to deliver." *Id*., at 138. In fact, to conclude otherwise is to disregard common sense. States do not build reservoirs unless they intend to use them.

In short, Montana's doctrine of prior appropriation provides that the right to fill the Reservoir each year is 72,500 af, less any carryover from the previous year. *Id*.; *see also* PTB at 95-99. For the foregoing reasons, Montana is entitled to a declaration that the Compact protects a Reservoir right to fill 72,500 af, less carryover storage, each year.

IV. Conclusion

The Court is the sole and final arbiter of interstate disputes. The Court says that it took on this case to determine the "meaning" of the Compact, and now, for the sake of the Compact's orderly administration, the Court should determine and declare Montana's Reservoir right. The evidence and law necessary to make just a determination have already been adduced in these proceedings. The Special Master should declare that the Compact protects Montana's Reservoir right to fill 72,500 af, less carryover storage, each year.

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

AFFIDAVIT OF DALE E. BOOK, P.E.

Comes now Dale E. Book, P.E., and declares under oath as follows:

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

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

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

4. I have tabulated and analyzed the available capacity to store water in Tongue River Reservoir each year for the period of record, 1941-2008, based on my expert report, Exhibit M-5. My analysis assumes the original capacity of 72,500 acre-feet for the years 1941-1999, and it assumes the expanded capacity of 79,071 acre-feet for the years 2000-2008. The table, with the analysis, is attached hereto.

5. As shown by the attached analysis, more than 32,000 acre-feet of new water was required to be stored in Tongue River Reservoir in order to fill the reservoir to its original or expanded capacity in 63 of the 68 years of record, 93% of the years of record.

6. The attached analysis shows that, for the period of record, the average amount of water required to be stored in Tongue River Reservoir, in order to fill the reservoir to its original or expanded capacity, was 48,110 acre-feet per year.

Further Sayeth Affiant Not.

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

Executed on May 26, 2016.

Dale E. Book

Dale E. Book, P.E.

Tongue River Reservoir Available Capacity

(Acre-Feet)

Year	Beginning of Year Storage Content	Original & Expanded Capacity	Available Capacity
(1)	(2)	(3)	(4)
1941	1,800	72,500	**70,700**
1942	42,000	72,500	30,500
1943	26,490	72,500	**46,010**
1944	38,450	72,500	**34,050**
1945	37,120	72,500	**35,380**
1946	42,090	72,500	30,410
1947	30,920	72,500	**41,580**
1948	25,350	72,500	**47,150**
1949	28,890	72,500	**43,610**
1950	32,100	72,500	**40,400**
1951	18,470	72,500	**54,030**
1952	27,000	72,500	**45,500**
1953	23,620	72,500	**48,880**
1954	32,810	72,500	**39,690**
1955	15,370	72,500	**57,130**
1956	13,360	72,500	**59,140**
1957	20,910	72,500	**51,590**
1958	8,290	72,500	**64,210**
1959	24,730	72,500	**47,770**
1960	14,960	72,500	**57,540**
1961	140	72,500	**72,360**
1962	22,502	72,500	**49,998**
1963	31,740	72,500	**40,760**
1964	39,402	72,500	**33,098**
1965	29,398	72,500	**43,102**
1966	37,143	72,500	**35,357**
1967	10,235	72,500	**62,265**
1968	26,550	72,500	**45,950**
1969	40,000	72,500	**32,500**
1970	20,500	72,500	**52,000**
1971	27,230	72,500	**45,270**
1972	23,500	72,500	**49,000**
1973	32,800	72,500	**39,700**
1974	41,790	72,500	30,710
1975	30,900	72,500	**41,600**
1976	13,100	72,500	**59,400**
1977	25,540	72,500	**46,960**
1978	20,080	72,500	**52,420**
1979	20,640	72,500	**51,860**
1980	14,780	72,500	**57,720**

Tongue River Reservoir Available Capacity

(Acre-Feet)

Year	Beginning of Year Storage Content	Original & Expanded Capacity	Available Capacity
(1)	(2)	(3)	(4)
1981	9,060	72,500	**63,440**
1982	21,340	72,500	**51,160**
1983	31,280	72,500	**41,220**
1984	10,500	72,500	**62,000**
1985	15,880	72,500	**56,620**
1986	12,500	72,500	**60,000**
1987	15,000	72,500	**57,500**
1988	31,115	72,500	**41,385**
1989	21,900	72,500	**50,600**
1990	22,207	72,500	**50,293**
1991	52,223	72,500	20,277
1992	20,050	72,500	**52,450**
1993	24,440	72,500	**48,060**
1994	24,440	72,500	**48,060**
1995	14,490	72,500	**58,010**
1996	22,400	72,500	**50,100**
1997	17,700	72,500	**54,800**
1998	6,650	72,500	**65,850**
1999	6,600	72,500	**65,900**
2000	38,160	79,071	**40,911**
2001	40,420	79,071	**38,651**
2002	17,210	79,071	**61,861**
2003	26,790	79,071	**52,281**
2004	39,760	79,071	**39,311**
2005	27,330	79,071	**51,741**
2006	44,470	79,071	**34,601**
2007	43,432	79,071	**35,639**
2008	47,598	79,071	31,473
Average	25,260	73,370	48,110

NOTES:

Col. 2: Beginning of Compact Water Year Storage Content = End-of-September Content from Ex. M-5, pp. 29-30, Table 4-A.

Col. 3: Original Physical Capacity = 72,500 Ac-Ft (1941 - 1999).
Expanded Physical Capacity = 79,071 Ac-Ft (2000 - 2008).

Col. 4: Available Capacity = Col. 3 - Col. 2. Shading indicates available capacity greater than 32,000 Ac-Ft.

No. 137, Original

♦

In The
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STATE OF MONTANA,

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Defendants.

♦

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

♦

CERTIFICATE OF SERVICE

I certify that a copy of Montana's Motion and Brief for Summary Judgment on Tongue River Reservoir was served electronically, and by U.S. Mail as indicated below on May 27, 2016, to the following:

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

/s/ John B. Draper