

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 PATRICK T. TYRRELL IN SUPPORT OF WYOMING'S
RESPONSE TO MONTANA'S MOTION FOR SUMMARY JUDGEMENT
ON TONGUE RIVER RESERVOIR**

Patrick T. Tyrrell, being sworn states:

1. I am the current Wyoming State Engineer. I have held that position since January 16, 2001, when I was appointed by the Governor of Wyoming. I have personal knowledge of the facts stated herein and I am competent to make this affidavit.

2. Over the course of the winter of 2015-2016, Montana maintained the Tongue River Reservoir at an elevation corresponding to approximately 50,000 acre-feet of storage. Ex. A. In late February 2016, Montana began storing inflows and did so continuously for the next approximately six weeks. *Id.*

3. On April 18, 2016, Montana, through its Compact Commissioner, Tim Davis made a call on Wyoming post-1950 water rights in order to fill the Tongue River

Reservoir. Ex. B. Wyoming received that letter in electronic form by email on April 19, 2016. At that time, available inflow forecasts suggested that there was a reasonable possibility that the Tongue River Reservoir would not fill. *Id.*

4. On behalf of the State of Wyoming, I responded to Montana's call on April 22, 2016, and advised Mr. Davis that Wyoming would honor Montana's call. Ex. C. In response to Montana's call, Wyoming measured the contents of its reservoirs in the Tongue River Basin with post-1950 storage rights, and provided this information to Montana. *Id.* Wyoming also actively investigated whether Wyoming water users with post-1950 water rights were diverting, instructed Wyoming water users with post-1950 water rights not to begin diverting, proactively tagged diversions with significant post-1950 rights, and held a public meeting to inform water users of Montana's call and the resulting regulation by Wyoming. *Id.* In addition, I thanked Mr. Davis for operating Tongue River Reservoir in a manner that benefitted the water supply position of both states and asked that Montana continue to do so to the greatest extent possible given the current conditions. *Id.*


5. Mr. Davis acknowledged Wyoming's response on April 27, 2016, confirmed that Wyoming could continue to store water in its reservoirs with post-1950 rights until it was certain that Tongue River Reservoir would not fill, and advised that Montana continued to operate the reservoir to store water. Ex. D. In fact, Montana had been limiting outflows from the Tongue River Reservoir to eighty cfs for some time, effectively maximizing storage of the available inflows. *Id.*

6. Over the next several days, conditions in the Tongue River Basin improved substantially, and Montana determined that the Tongue River Reservoir would likely fill, although it had not yet done so at that time. On May 2, 2016, Mr. Davis advised me that Montana was removing its call on Wyoming. Ex. E. Montana reserved and continues to reserve its right to make a direct flow call on Wyoming during the irrigation season, but it has not yet done so. *Id.*

7. In addition to these formal communications between the states, Mr. Davis and I have had multiple informal personal communications about Compact administration that have been open and constructive. Written communications between the states have been accomplished in a timely manner by email.

8. The events of the current water year, coupled with those of last year, demonstrate that future disputes between the states over the Tongue River Reservoir are likely to be the exception rather than the rule.

Dated this 16 day of June, 2016.


Patrick T. Tyrrell

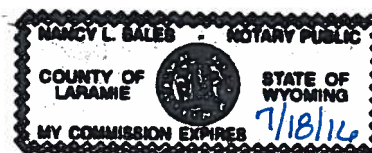
STATE OF WYOMING)
) SS
COUNTY OF LARAMIE)

The foregoing AFFIDAVIT OF PATRICK T. TYRRELL was subscribed and sworn to before me, a notary public, by Patrick T. Tyrrell this 16th day of June, 2016.

Witness my hand and official seal.


Notary Public

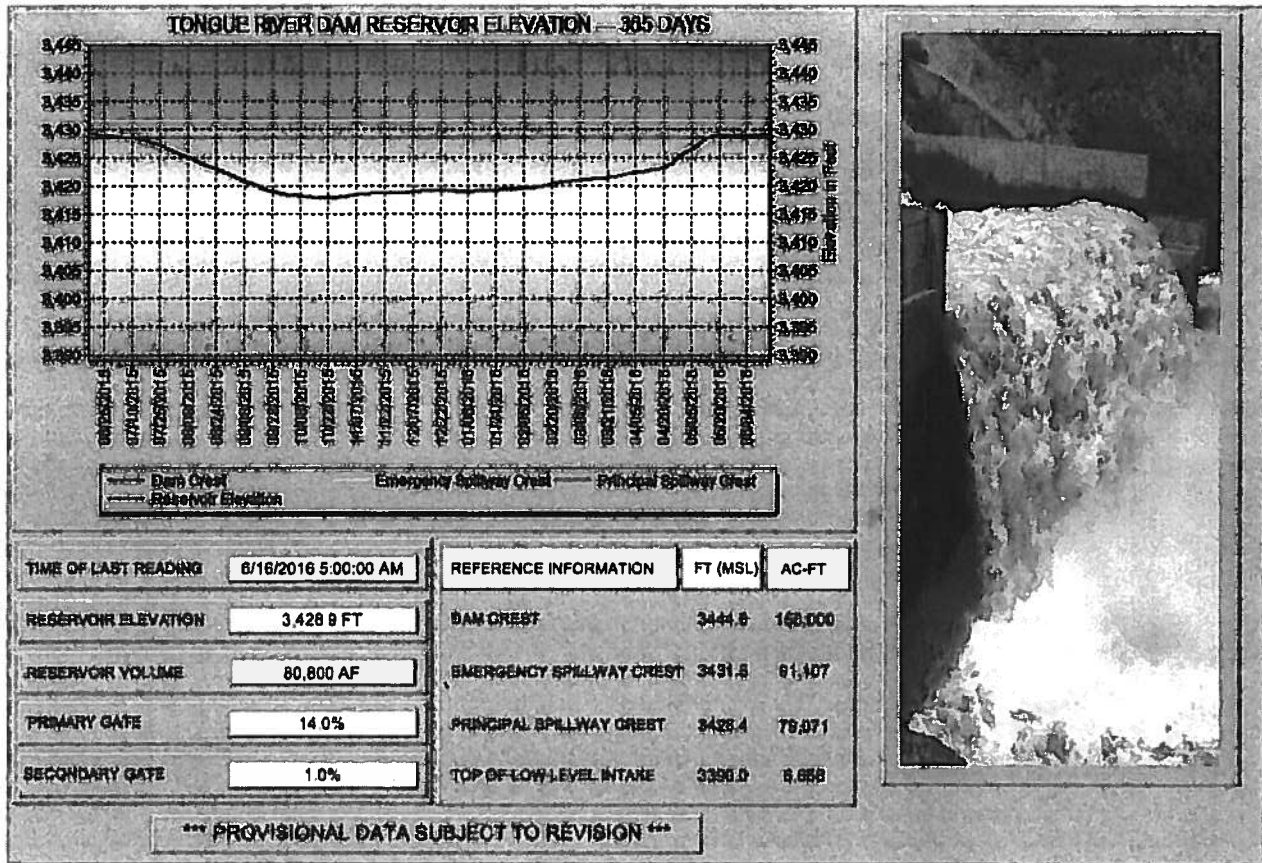
My Commission Expires: July 18, 2016





DNRC Headquarters
 1625 Eleventh Ave. Helena, MT 59601
 Phone: (406) 444-2074 | Fax: (406) 444-2684
 Questions? Email us

Tongue River





patrick tyrrell <patrick.tyrrell@wyo.gov>

Call letter

Davis, Tim <TimDavis@mt.gov>

Tue, Apr 19, 2016 at 10:05 AM

To: patrick tyrrell <patrick.tyrrell@wyo.gov>, sue lowry <sue.lowry@wyo.gov>

Pat and Sue:

I signed and mailed the attached call letter late yesterday, but had to run out of the office before I could email it to you.

I realize that it is raining/snowing in the Big Horns today. Hopefully conditions continue to improve.

Thanks,

Tim

Tim Davis

Water Resources Division Administrator

Montana DNRC

PO Box 201601, Helena, Montana 59620-1601

406.444.6605

timdavis@mt.gov

 4.18.2016 Notice of Call under YRCC.pdf
737K

Exhibit B

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



STEVE BULLOCK
GOVERNOR

DIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2684

STATE OF MONTANA

WATER RESOURCES DIVISION (406) 444-6601
TELEFAX NUMBERS (406) 444-0333 / (406) 444-5918
<http://www.dnrc.mt.gov>

1424 9TH AVENUE
PO BOX 201601
HELENA, MONTANA 59620-1601

April 18, 2016

Sue Lowry, Wyoming YRCC Commissioner
Pat Tyrrell, Wyoming State Engineer
Wyoming State Engineer's Office
122 West 25th Street
Cheyenne, Wyoming 82002

Re: Montana's Call on Wyoming under the Yellowstone River Compact

Dear Commissioner Lowry and State Engineer Tyrrell:

Montana is informing Wyoming that Montana is making a call under Article V(A) of the Yellowstone River Compact. Montana is placing a call on the Tongue River post-1950 water rights in order to exercise its right to fill the Tongue River Reservoir with a priority date of April 21, 1937. Montana anticipates the current call will continue until such time as the Tongue River Reservoir is full or other mitigating circumstances arise that Montana determines alleviates the need for this call. Montana will notify Wyoming in writing if it revokes its call.

As you know, the United States Supreme Court held and Wyoming agreed that Montana can make a call to Wyoming to curtail water rights with a priority date of January 1, 1950 and later for the benefit of Montana's pre-January 1, 1950 water rights under Article V(A). The Special Master has held that no particular format is required for Montana to exercise its right of call. The Special Master further held in the Second Interim Report (Report) that Montana need only provide notice to Wyoming that Montana's pre-1950 water rights are not being met. Once notice is provided, Wyoming is required to curtail.

Under current conditions, Montana anticipates that the Tongue River Reservoir will not fill absent a call. Montana is making this call at this time because, in Montana's judgment, a call is necessary and the Special Master has held that Montana is entitled only to that amount of water stored or curtailed after the date of the call. April 1, 2016 SWE for the Tongue Basin in Wyoming was 78% of the median; as of today, the median SWE had declined to 67% of the median. Inflows to the Tongue River Reservoir have remained near, or below, the 25th

STATE WATER PROJECTS
BUREAU
(406) 444-6646

WATER MANAGEMENT
BUREAU
(406) 444-6637

WATER OPERATIONS
BUREAU
(406) 444-0860

WATER RIGHTS
BUREAU
(406) 444-6610

Sue Lowry, Wyoming YRCC Commissioner
Pat Tyrrell, Wyoming State Engineer
Re: Montana's Call on Wyoming under the Yellowstone River Compact
April 18, 2016
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percentile for the past month. The April 1, 2016, the NRCS forecast (70th percentile) inflow to Tongue River Reservoir was 84,000 acre-feet. As of today, the forecast (NRCS daily, SWE-based, 70th percentile, forecast graph) inflow is about 60,000 acre-feet—a decline of 24,000 acre-feet (28%).

Montana requests that Wyoming regulate the appropriate water rights as soon as possible and confirm that regulation is underway in writing to Montana within five business days. The Department has made call on the upstream junior non-stock water rights on the Tongue River in Montana. As conditions warrant, Montana reserves the right to notify Wyoming that Montana in the future that it will be making a call for direct flow water rights in 2016 as well. Montana's direct flow call will be made in this same format and procedure should a future direct flow call be deemed necessary by Montana.

Sincerely,

A handwritten signature in black ink, appearing to read 'TD', followed by a long horizontal line extending to the right.

Tim Davis, Montana Commissioner
Yellowstone River Compact



james kaste <james.kaste@wyo.gov>

Response to call letter dated 4/18/16

1 message

patrick tyrrell <patrick.tyrrell@wyo.gov>

Fri, Apr 22, 2016 at 1:54 PM

To: Tim Davis <timdavis@mt.gov>

Cc: chris brown <chris.brown@wyo.gov>, sue lowry <sue.lowry@wyo.gov>, David Schroeder <d.schroeder@wyo.gov>

Bcc: james.kaste@wyo.gov

Tim, please see attached. A hard copy will be sent to you today by regular mail.

-
Patrick. T. Tyrrell
State Engineer
State Engineer's Office
State of Wyoming
office phone: 307-777-6150

Email to and from me, in connection with the transaction of public business, is subject to the Wyoming Public Records Act and may be disclosed to third parties.

E-Mail to and from me, in connection with the transaction of public business, is subject to the Wyoming Public Records Act and may be disclosed to third parties.

3 attachments

2016 MT call Regulation Book Label.pdf
302K

2016 Wy Response to MT call.pdf
668K

2016 WYO YRC Reservoirs_Davis letter_ 21-Apr-2016.pdf
190K



State Engineer's Office

HERSCHLER BUILDING, 4-E CHEYENNE, WYOMING 82002
(307) 777-6150 FAX (307) 777-5898

MATTHEW H. MEAD
GOVERNOR

PATRICK T. TYRRELL
STATE ENGINEER

April 22, 2016

Mr. Tim Davis, Montana Commissioner
Yellowstone River Compact Commission
Montana Department of Natural Resources and Conservation
1424 9th Avenue
P.O. Box 201601
Helena MT 59620-1601

Re: Response to Montana Call to Fill Tongue River Reservoir Dated April 18, 2016, and Received on April 19, 2016

Dear Commissioner Davis:

Wyoming is in receipt of your letter dated April 18, 2016, where you made a call under Article V(A) of the Yellowstone River Compact for the benefit of Tongue River Reservoir (TRR). You made the call because Montana anticipates that, due to poor hydrologic conditions in the Tongue River Basin, TRR will not fill absent a call. You requested that Wyoming regulate appropriate post-1950 water rights as soon as possible and confirm in writing that such regulation is underway.

As you know, both states have been closely watching the unfavorable conditions in the Tongue River Basin this year, including information regarding existing snowpack and forecasted water supply. While we are both actively working to improve our knowledge and ability to more accurately forecast yearly water supply in the Basin, currently available information indicates that there is a chance TRR will not fill. As such, Wyoming is honoring Montana's call. We too will continue to watch the circumstances closely, and we hope to collaborate with Montana as conditions develop.

With regard to storage, Wyoming measured contents of its reservoirs with post-1950 water rights during the first part of April, and I provided you a listing of those contents at the Compact Commission Technical Committee meeting on April 12 in Billings. Since your call, our field staff has gone out again and collected current measurements. Enclosed is a list which reflects the more current measurements. The list includes the same reservoirs we reported to you last year, which are those identified by Montana in the litigation. Your call letter does not explicitly state how Montana expects Wyoming to handle its post-1950 storage in response to the call. It is my understanding based upon past practice and our conversations earlier this year that we will continue to allow post-1950 Wyoming storage rights to store water after the call subject to potential release should TRR not ultimately fill. Please let me know if my understanding is incorrect.

Surface Water
(307) 777-6475

Ground Water
(307) 777-6163

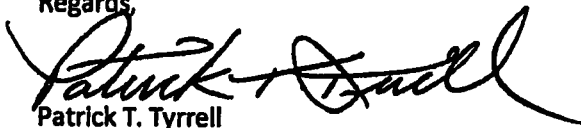
Board of Control
(307) 777-6178

With regard to direct flow diversions, upon receipt of your call letter and since, Wyoming's Hydrographers have been out in the field observing water use in the Basin, or lack thereof, and have been communicating with our post-1950 users regarding Montana's call. Those users have been instructed not to divert and, if they are found diverting, they will be shut off. Our Hydrographers are also proactively tagging diversions with significant post-1950 water rights, and those that they otherwise believe may attempt to divert in the near term. For your information, a copy of the tag form is included with this letter. To date, we are unaware of any post-1950 direct flow diversions in Wyoming, or any other direct flow diversions taking place without a water right or in excess of lawful pre-1950 quantities. Also, as I previously informed you, Wyoming held a public meeting last night in Sheridan to inform our water users of Montana's call and the resulting regulation by Wyoming.

Like last year, it appears that Montana DNRC and TRWUA have operated TRR in a fashion which puts both states in a better water supply position than we might otherwise be. Thank you for those efforts and Wyoming requests that those efforts continue to the greatest extent possible given the conditions. Further, we assume that one or more Montana water commissioners will be appointed for the Tongue River in Montana like past years, and we request that you keep us informed of any appointments and of any commissioner activities.

Please let me know if you need any additional information from Wyoming. Hopefully spring rains and/or snows will once again improve for storage and direct flow users in both of our States.

Regards,



Patrick T. Tyrrell

Wyoming State Engineer

Encl.

cc: Sue Lowry, Yellowstone River Compact Commissioner for Wyoming
James Kaste, Attorney General's Office
Chris Brown, Attorney General's Office

**Spring 2016 Storage: Wyoming Tongue River Basin
Storage Rights Greater Than 20 Acre Feet¹**

Reservoir	2016 Inspection Date	Carry Over From 2015 ³	Contents on Inspection Date (AF)
Allen	4/19/2016		30
Bear Claw Love #1	4/5/2016		248
Bracket No. 3	4/20/2016		33
Curtis "SE21"	4/6/2016		22
Decker	4/19/2016		42
Eisele-Rice	4/19/2016		33
Fletcher No. 1	4/6/2016		29
Fordyce Teepee	4/19/2016		70
Hanft	4/5/2016		26
Mock Bass	4/6/2016		58
P&P No. 1	4/19/2016		23
P&P No. 2	4/19/2016		45
Pit No. 3 ⁴	3/15/2016		330
Polo	4/19/2016		95
Powder Horn Pond No. 1	4/19/2016		63
Powder Horn Pond No. 14	4/19/2016		30
Purdy's Silver Lake	4/20/2016		45
Widener	4/20/2016		28
Windy Draw Enl.	4/21/2016		623
Five Mile	4/19/2016		536
Padlock Waste Water	4/19/2016		36
Wagner	4/19/2016		251
Dome Lake	4/21/2016	253	649
Big Horn	4/21/2016		1983
Park	4/21/2016	1365	3694
Sawmill	4/21/2016	749	807
Twin Lakes	4/21/2016	251	2230
Cross Creek	4/21/2016	379	258
Totals		2997	12317

¹ Table does not include Wyoming Reservoirs with only pre-1950 storage rights

² Pre and Post 1950 storage capacities taken from YRCC Annual Reports

³ Carryover applied to junior priorities within reservoir first, then to senior priorities

⁴ Alluvial level of Tongue River

NOTICE

NOTICE IS HEREBY GIVEN THAT THIS STRUCTURE HAS BEEN REGULATED IN ACCORDANCE WITH WYOMING WATER LAW, PROVIDING FOR THE REGULATION OF HEADGATES AND CONTROLLING WORKS, AND IS WHOLLY UNDER THE CONTROL OF THE WATER COMMISSIONER. W.S. 41-3-604.

Water Commissioner, Dist. _____, Div. No. _____

Dated _____ day of _____, 20_____

Commissioner's Phone No. _____

Attention is specifically called to W.S. 41-3-614, dealing with interference with headgates and W.S. 41-3-619, dealing with underground water. These statutes provide that it is a criminal offense for any person to willfully interfere with the regulation of a headgate or to use water when denied by the Water Commissioner or other competent authority. Any person who withdraws underground water in violation of an order of the State Engineer is guilty of a criminal offense. Conviction can result in fines up to 1250.00 per day of violation. The possession or use of water contrary to this notice shall be prima facie evidence of guilt of the person using it. W.S. 41-3-616.

Dates Regulated or Checked

Date	By	GH	CFS	Date	By	GH	CFS	Date	By	GH	CFS

_____ THE STATE OF MONTANA HAS MADE A CALL UNDER THE YELLOWSTONE RIVER
 COMPACT. W.S. 41-12-601. NO APPROPRIATOR OWNING A WATER RIGHT WITH
 A PRIORITY DATE JUNIOR TO JANUARY 1, 1950, AND CAPABLE OF RECEIVING
 WATER THROUGH THIS DIVERSION AND MEANS OF CONVEYANCE SHALL USE
 WATER UNDER SUCH RIGHT UNTIL FURTHER NOTICE FROM THE
 HYDROGRAPHER/COMMISSIONER OR THE DIVISION II SUPERINTENDENT. _____



patrick tyrrell <patrick.tyrrell@wyo.gov>

Call response

Davis, Tim <TimDavis@mt.gov>

Wed, Apr 27, 2016 at 1:13 PM

To: patrick tyrrell <patrick.tyrrell@wyo.gov>

Cc: sue lowry <sue.lowry@wyo.gov>, "Peterson, Kevin" <KevinPeterson@mt.gov>, "Joscelyn, Alan" <AlanJoscelyn@mt.gov>, "Overcast, Kim" <kovercast@mt.gov>, "Smith, Kevin (DNRC)" <ksmith@mt.gov>

Pat -

We are in receipt of your letter dated April 22, 2016. I am writing to thank you for your response honoring the call by Montana. We appreciate the steps Wyoming has taken to measure current contents of reservoirs and curtail direct flow diversions with post-1950 water rights in the Tongue River Basin in Wyoming. You are correct that Montana is allowing post-1950 Wyoming storage rights to store water after the call. However, if the Tongue River Reservoir does not fill then Montana expects that Wyoming will both release that stored water and take steps to protect it so that it reaches the state line.

Montana continues to operate the Tongue River Reservoir to store water. We have not changed the gates since setting them at 80 CFS. We will let you know when water commissioners are appointed.

I, too, hope that the spring rains and/or snows continue to improve storage and direct flow for water users in both Montana and Wyoming.

At this point, we don't need any additional information from Wyoming. Please let me know if you have any questions for Montana.

Thanks,

Tim

Tim Davis

Water Resources Division Administrator

Montana DNRC

PO Box 201601, Helena, Montana 59620-1601

406.444.6605

timdavis@mt.gov

Exhibit D



patrick tyrrell <patrick.tyrrell@wyo.gov>

Call removal

Davis, Tim <TimDavis@mt.gov>

Mon, May 2, 2016 at 6:21 PM

To: patrick tyrrell <patrick.tyrrell@wyo.gov>, sue lowry <sue.lowry@wyo.gov>

Cc: "Joscelyn, Alan" <AlanJoscelyn@mt.gov>, "Smith, Kevin (DNRC)" <ksmith@mt.gov>, "Peterson, Kevin" <KevinPeterson@mt.gov>, "Overcast, Kim" <kovercast@mt.gov>

Commissioner Lowry and Pat:

I am writing to confirm that Montana is removing its current call on Wyoming under the Yellowstone River Compact.

Happily for water users in both states, water conditions have improved significantly since the call was made on April 18, 2016. Montana now projects that the Tongue River Reservoir is likely to fill. We appreciate Wyoming's response to the call. Hopefully, this year sets an example of communication and cooperation between the two states for future water years.

Montana reserves the right to make a call based on our pre-1950 direct flow water rights should conditions worsen. I am hopeful that such a call will not be necessary. Regardless, we propose that we remain in close communication.

Please let me know if you have any questions and thank you again.

Sincerely,

Tim Davis, Commissioner
Yellowstone River Compact Commission

Sent from my iPad

Exhibit E