

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 PROPOSED JUDGMENT AND DECREE AND BRIEF IN SUPPORT

TIMOTHY C. FOX
Attorney General of Montana

ALAN L. JOSCELYN
Chief Deputy Attorney General
215 North Sanders
Helena, Montana 59620-1401

JEFFREY J. WECHSLER
Special Assistant Attorney General
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87501
jwechsler@montand.com

JOHN B. DRAPER*
Special Assistant Attorney General
MATTHEW DRAPER
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, New Mexico 87501
john.draper@draperllc.com
**Counsel of Record*

February 10, 2017

PROPOSED JUDGMENT AND DECREE

JUDGMENT

Judgment is awarded against the State of Wyoming in favor of the State of Montana for violations of the Yellowstone River Compact caused by Wyoming's reduction of the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1,300 acre-feet in 2004 and 56 acre-feet in 2006. Judgment is awarded in the amount \$20,340.00, together with prejudgment and postjudgment interest compounded at seven percent (7%) per annum from the year of each violation until paid. Costs are awarded to Montana in the amount of \$_____. This Judgment amount, including interest and costs, shall be paid in full not later than 90 days from the date of entry of this Judgment.

Wyoming shall pay the sum of the monetary judgment and the costs awarded into an account specified by Montana to be used for improvements to the Tongue River Reservoir or related facilities in the State of Montana. The funds may be distributed to a state agency or program, a political subdivision of the State, a non-profit corporation, association, and/or a charitable organization, at the sole discretion of the Montana Attorney General in accordance with the laws of the State of Montana, with the express condition that the funds be used for improvements to the Tongue River Reservoir or related facilities in the State of Montana.

Montana's claim regarding the Powder River Basin is hereby dismissed.

DECREE

A. General Provisions

1. Article V of the Yellowstone River Compact (“Compact”) requires the State of Wyoming to:
 - a. Protect pre-1950 appropriative surface water rights in the Tongue River Basin in Montana from diversions and withdrawals of surface water and groundwater in Wyoming pursuant to water rights with priority dates after January 1, 1950.
 - b. Protect pre-1950 appropriative surface water rights in the Tongue River Basin in Montana from storage in Wyoming pursuant to water rights priority dates after January 1, 1950.
 - c. Protect pre-1950 appropriative surface water rights in the Tongue River Basin in Montana from irrigation of acreage in Wyoming not irrigated before January 1, 1950.
 - d. Ensure that diversions of water into storage in Wyoming for either beneficial uses on new land or “supplemental water supplies” on existing acreage come only from “unused and unappropriated” water available after protecting pre-1950 appropriations in the Tongue River Basin in Montana.
2. Montana cannot demand that Wyoming release water from its reservoirs in the Tongue River Basin to satisfy Montana’s pre-1950 uses if that water was stored at a time when a Montana call was not in effect.

3. Article V(A) of the Compact does not prohibit Wyoming from allowing its pre-1950 appropriators in the Tongue River Basin to conserve water through the adoption of improved irrigation techniques and then use that conserved water to irrigate the same lands that they were irrigating as of January 1, 1950, even when the increased consumption interferes with pre-1950 uses in Montana. Uses of conserved water for “beneficial use on new lands or for other purposes,” by contrast, fall under Article V(B) of the Compact and are subject to the same restrictions imposed above on post-January 1, 1950 water uses in Wyoming.
4. Montana’s pre-1950 water rights in the Tongue River Basin protected by the Compact are identified in Appendix A to this Decree.
5. Included among Montana’s pre-1950 water rights in the Tongue River Basin protected by the Compact is the Tongue River Reservoir right to store up to the Reservoir’s original capacity of 72,500 acre-feet each year, less carryover storage under the 72,500 acre-foot water right as of October 1.
6. Wyoming’s post-January 1, 1950 water rights in the Tongue River Basin are identified in Appendix B to this Decree.

B. Special Provisions

1. In order for Montana to enjoy the protection of its pre-1950 water rights in the Tongue River Basin under Article V(A) of the Compact, Montana must place a call.
2. Montana may place a call at any time that any of its pre-1950 water rights are not being satisfied. Whenever Montana places a call, Montana shall ensure that all post-January 1, 1950 water rights in the Tongue River Basin in Montana upstream of the unsatisfied pre-1950 rights are regulated off.

3. Montana may place a call between October 1 and April 1 of each year whenever the Tongue River Reservoir is not filled to its maximum winter capacity, presently 45,000 acre-feet of water in storage.
4. If, from October 1 through March 31, a call is in place and the Tongue River Reservoir fills to its winter capacity, Montana shall lift the call.
5. From October 1 through March 31, bypass flows from Tongue River Reservoir between 75 cfs and 175 cfs, when a call is on, shall not be counted against the Reservoir storage right protected under the Compact, subject to Paragraph 13 below. From October 1 through March 31, bypass flows at Tongue River Reservoir in excess of 175 cfs, when a call is on, shall be counted against the Reservoir storage right protected under the Compact up to the amount by which the winter fill failed to reach the maximum winter capacity.
6. If, on or after April 1, Tongue River Reservoir is not filled to its maximum physical capacity, Montana may place a call, or continue an existing call, and maintain the call until such time as the Reservoir has filled to its maximum physical capacity, subject to the condition that Montana may not call for more than 72,500 acre-feet in any one Compact year, less carryover storage under the 72,500 acre-foot water right as of October 1.
7. If, on or after April 1, any pre-1950 direct-flow water rights in the Tongue River Basin in Montana are not being satisfied, Montana may place a call and maintain the call until such time as all pre-1950 direct-flow water rights in Montana are being satisfied. A call may be reinstated if any pre-1950 direct-flow water rights in Montana become unsatisfied later in the year.

8. Whenever a call by Montana is in effect, all pre-1950 water rights in the Tongue River Basin in Wyoming shall be strictly regulated to their adjudicated amounts, and all Wyoming rights identified in Appendix B shall be regulated off.
9. Communications initiating or lifting a call shall be made by letter, email or telephone by Montana's Yellowstone River Compact Commissioner or his/her designee ("Montana's Commissioner") to Wyoming's Yellowstone River Compact Commissioner or his/her designee ("Wyoming's Commissioner"). When the communication is by telephone, it shall be confirmed immediately by letter or email. A call is effective as of the time the initial communication of the call is received. A call continues in effect until it is lifted.
10. On the date of the initiation of a call, Wyoming's Commissioner shall take immediate action to ensure that all pre-1950 water rights in the Tongue River Basin in Wyoming have been strictly regulated to their adjudicated amounts and that all the rights listed in Appendix B have been regulated off.
11. Wyoming's Commissioner shall confirm to Montana's Commissioner in writing within two business days of the initiation of a call that all pre-1950 water rights in the Tongue River Basin in Wyoming have been strictly regulated to their adjudicated amounts and that all the rights listed in Appendix B have been regulated off.
12. Within ten business days of a call being placed, Wyoming's Commissioner shall provide to Montana's Commissioner documentation that all pre-1950 water rights in the Tongue River Basin in Wyoming have been strictly regulated to their adjudicated amounts and that all the rights listed in Appendix B have been regulated

off. When Montana's pre-1950 water rights in the Tongue River Basin have been satisfied, Montana's Commissioner shall lift the call within two business days by so notifying Wyoming's Commissioner.

13. Montana shall have complete discretion in setting the winter bypass flows from Tongue River Reservoir. For purposes of determining whether bypass flows shall be counted against Montana's Tongue River Reservoir right protected by the Compact, Montana shall be accorded significant discretion to respond to specific conditions, including the needs of downstream water rights and risks such as ice jams and flooding. Under no circumstances shall Montana be expected to reduce winter bypass flows below 75 cfs. If there is any dispute, it shall be Wyoming's burden to show that Montana's operation of Tongue River Reservoir has been unreasonable or wasteful.
14. In order for Montana to enjoy the protection of its pre-1950 water rights in the Tongue River Basin under Article V(A) of the Compact, Montana shall substantially continue its present administration of water, avoiding waste to the extent reasonably possible. Such administration shall be presumed unless proven otherwise by Wyoming.
15. Any changes, additions or subtractions regarding the water rights listed in Appendices A or B by one State shall be promptly provided to the other State by the State's Commissioner.
16. Wyoming shall provide Montana annually, at the Yellowstone Compact Commission annual meeting, such data as may be available in the ordinary course

of water administration in Wyoming showing the amount and location of groundwater pumping in the Tongue River and Powder River Basins.

C. No Effect on Rights of Indian Tribes and Reservations

Nothing in this Decree shall affect the water rights or other rights of any Indian Tribe or any Indian reservation.

D. Retention of Jurisdiction

Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree.

APPENDIX A [to be supplied]

APPENDIX B [to be supplied]

MONTANA'S BRIEF IN SUPPORT OF PROPOSED JUDGMENT AND DECREE

Comes now the State of Montana and submits this Brief in support of the foregoing Proposed Judgment and Decree, as required by the Opinion of the Special Master on Remedies, dated December 19, 2016 ("Opinion").

I. Introduction

The Opinion contained the Special Master's rulings on damages, interest, declaratory and injunctive relief, and costs, and required Montana and Wyoming to confer with respect to (1) whether damages should be paid by Wyoming in water or money, and (2) the form of a decree. If the States were not able to fully agree, Montana was directed to submit by today's date the result of the conferral of the States, together with Montana's separate proposals and brief supporting those proposals. Opinion at 11, 31. Also, the Special Master stated that Montana was free to propose an alternative level of prejudgment interest to the one proposed by Wyoming. *Id.* at 19. Wyoming was then allowed until March 3, 2017 to respond. *Id.* at 11, 31. No reply opportunity was offered to Montana- but such an opportunity is requested below.

In accordance with the Special Master's Opinion, Montana provided a draft decree to Wyoming on January 20, 2017, and requested comments. Wyoming did not provide any comments on the Montana draft, but did provide on January 24, 2017 its own alternative version of a decree. On February 8, 2017, Montana provided Wyoming with a revised draft decree, incorporating some of the elements of the Wyoming alternative. Wyoming has not provided Montana with an explicit response as to which parts of the draft Montana decree that Wyoming agrees with and which it does not agree with. As a result, Montana is unable to identify points of

agreement and points of disagreement. As explained below, this requires that Montana be accorded an opportunity to reply to whatever Wyoming chooses to file on March 3, 2017.

II. Form of Judgment

A. Montana Will Accept Damages in Money

The Special Master has stated that, if Montana accepts payment in the form of money, the principal amount of the repayment will be \$20,340.00 and a prejudgment interest amount of \$15,537.06. Opinion at 6. Although Montana does not agree with how the Special Master has treated monetary damages, given the amount of damages likely to be proven even if quantified properly, Montana is willing to accept money repayment for the violations of the Yellowstone River Compact (“Compact”) by Wyoming. Montana therefore accepts the Special Master’s determination of the principal amount of those damages in the amount of \$20,340.00.

The payment by Wyoming is proposed to be paid into an account specified by the Attorney General of Montana, to be used for “improvements to the Tongue River Reservoir or related facilities in the State of Montana.” It is Montana’s understanding that Wyoming has no objection to this provision.

B. Interest

The Special Master noted that Wyoming offered on April 9, 2015 to pay Montana prejudgment interest of \$15,537.06, which is interest at a rate of 7% from the dates of the violations. *See* Opinion at 6, *citing* Wyoming’s Exception Brief at 12-13, 21. This interest is calculated to run from the dates of the Montana calls recognized by the Special Master until the time of the filing of Wyoming’s Exception Brief on April 9, 2015. *See* Wyoming’s Exception Brief at 13 n.4.

The purpose of awarding prejudgment interest is to achieve full compensation for the injury incurred. *E.g., Kansas v. Colorado*, 533 U.S. 1, 10-11 (2001) (“The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss.”). Therefore, interest should continue to run on the principal amount of the loss recognized by the Special Master until the principal is paid.

The calculation of interest by Wyoming is of simple interest, *i.e.*, without compounding. Compounding interest has been the standard for computing prejudgment interest in interstate compact enforcement cases. *See, e.g., Kansas v. Nebraska*, No. 126, Orig., Ex. K105, at 18 (“A fundamental principle of economics is that past events have a present value which is calculable through an appropriate rate of *compounding* representing the time value of money.”), Table 48 (“*Compounding* Factors for Past Kansas Losses”) (emphasis added). Therefore, the calculation of interest by Wyoming should be adjusted from calculation of *simple* interest to *compound* interest.

III. Costs

The Special Master determined that “Montana should not recover costs for any portion of this action to date subsequent to the filing of my First Interim Report. At an appropriate time, however, both Montana and Wyoming will be able to address the question of what, if any, costs Montana should be able to recover in connection with the first phase of these proceedings.” Opinion at 64-65. Accordingly, a placeholder has been inserted in the proposed Judgment, in anticipation that the Special Master will direct the parties to address the subject of costs in due course.

IV. Form of Decree

The Special Master directed the parties to keep in mind five guidelines in formulating the proposed decree: (1) not too much, not too little, but just the right amount, of detail (the “Goldilocks test”); (2) they should be based on rulings in the case; (3) other rights and obligations may be included, however, if they “are critical to effective implementation of Article V(A)” of the Compact; (4) “procedures for ensuring future compliance that are not required by the Compact or jointly agreed upon by the parties” will not be considered; and (5) “the parties are welcome to *jointly* propose processes that would enable clearer or simpler enforcement of Article V(A) in the future.” Opinion at 31-33 (emphasis in the Opinion).

With those guidelines in mind, Montana is proposing the foregoing Decree, which makes up most of the proposed Judgment and Decree. Since Wyoming’s position is unknown, the source of each part of the Decree will be identified, but argument on provisions that are actually in dispute between the States will necessarily have to await Montana’s requested reply, once Wyoming has made its position known.

The proposed Decree is organized in four sections, entitled A. General Provisions, B. Special Provisions, C. No Effect on Rights of Indian Tribes and Reservations, and D. Retention of Jurisdiction. Sources for each of the paragraphs are as follows:

- A.1 First Interim Report, pp. 89-90; Second Interim Report, p. 211.
- A.2 First Interim Report, pp. 89-90, ¶ 6.
- A.3 First Interim Report, p. 90, ¶ 8.
- A.4 Appendix A to be supplied

- A.5 Second Interim Report, p. 143; Opinion, p. 56.
- A.6 Appendix B to be supplied.
- B.1 Second Interim Report, p. 49.
- B.2 Second Interim Report, p. 49.
- B.3 Second Interim Report, pp. 49, 157.
- B.4 Second Interim Report, pp. 49, 157.
- B.5 Second Interim Report, p. 156.
- B.6 Second Interim Report, pp. 49, 143; Opinion, p. 56.
- B.7 First Interim Report, p. 89, ¶¶ 1, 2; Second Interim Report, pp. 49, 162.
- B.8 First Interim Report, p. 89, ¶¶ 1, 2.
- B.9 Second Interim Report, pp. 58-62.
- B.10 First Interim Report, p. 89, ¶¶ 1, 2.
- B.11 First Interim Report, p. 89, ¶¶ 1, 2.
- B.12 Second Interim Report, pp. 144-157.
- B.13 Second Interim Report, pp. 144-157, 222-223.
- B.14 Updates for Appendices A and B by each State in the future.
- B.15 Second Interim Report, p. 211; Compact, Article III (C).
- C. Compact, Article VI.

D. *Kansas v. Colorado*, 556 U.S. 98, 107 ¶ C (2009); *Kansas v. Nebraska & Colorado*, 135 S. Ct. 1255 ¶ 9 (2015).

V. Request for Reply Opportunity

As referenced above, Montana has not been made aware of which provisions of Montana's Proposed Judgment and Decree may be acceptable to Wyoming and which are not. Montana submitted two drafts of the Proposed Judgment and Decree to Wyoming. Wyoming did not specifically respond to either of the two drafts, but instead provided its own form of judgment and decree that differed in many respects from Montana's. Under these circumstances, it is essential that Montana be accorded an opportunity to reply to any proposals or arguments Wyoming submits on March 3, 2017.

VI. Conclusion

For the foregoing reasons, Montana requests approval of Montana's Proposed Judgment and Decree. Montana also requests an opportunity to reply to any proposals or arguments that Wyoming may submit on March 3, 2017.

Respectfully Submitted,

TIMOTHY C. FOX
Attorney General of Montana

ALAN L. JOSCELYN
Chief Deputy Attorney General
215 North Sanders
Helena, Montana 59620-1401

JEFFREY J. WECHSLER
Special Assistant Attorney General
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87501
jwechsler@montand.com

BY:



JOHN B. DRAPER*

Special Assistant Attorney General
MATTHEW DRAPER
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, New Mexico 87501
john.draper@draperllc.com

**Counsel of Record*

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 that copies of Montana's Proposed Judgment and Decree and Brief in Support were served electronically and by U.S. Mail to the following on July 11, 2016, as indicated below:

Peter K. Michael
Attorney General of Wyoming
Jay Jerde
Christopher M. Brown
Andrew Kuhlmann
James C. Kaste
The State of Wyoming

Jennifer L. Verleger
Assistant Attorney General
North Dakota Attorney General's Office
500 North 9th Street
Bismarck, ND 58501-4509
jverleger@nd.gov

123 Capitol Building
Cheyenne, WY 82002
peter.michael@wyo.gov
jjerde@wyo.gov
chris.brown@wyo.gov
andrew.kuhlmann@wyo.gov
james.kaste@wyo.gov

Jeanne S. Whiteing
Attorney at Law
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

Solicitor General of the United States
U. S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov

Michael B. Wigmore
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
mwigmore@velaw.com

James DuBois
United States Department of Justice
Environmental and Natural Resources
Division of Natural Resources Section
999 18th St. #370 South Terrace
Denver, CO 80202
james.dubois@usdoj.gov

Barton H. Thompson, Jr., Special Master
Laurita Wheeler, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 Via Ortega
Stanford, CA 94305-4205
(Original and 3 copies by U.S. Mail)
lauritaw@stanford.edu

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



John B. Draper