

**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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**Wyoming's Memorandum in Support of Motion for Summary Judgment**

GREGORY A. PHILLIPS  
Attorney General of Wyoming

PETER K. MICHAEL\*  
Chief Deputy Attorney General

JAY JERDE  
Deputy Attorney General  
JAMES KASTE  
Senior Assistant Attorney General  
CHRISTOPHER BROWN  
Senior Assistant Attorney General  
Andrew Kuhlmann  
Assistant Attorney General  
Matthias Sayer  
Assistant Attorney General  
123 Capitol Building  
Cheyenne, WY 82002  
(307) 777-6196  
*\*Counsel of Record*

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The State of Wyoming, through counsel, submits this brief in support of its motion for summary judgment.

## **INTRODUCTION**

After more than six years of litigation and over a year of extensive discovery, it has become clear that this case boils down to an attempt by Montana to force Wyoming to make up water allocated to the Northern Cheyenne Tribe in direct contravention of an existing agreement between the States. Historically, Montana water users on the Tongue River had access to an over abundance of water because they used the Tribe's rights as their own. However, after the Tribe's rights were determined in the Northern Cheyenne Compact and the Tongue River Reservoir was enlarged with these rights in place, this historic practice ended. Consequently, Montana water users were no longer permitted to use water that did not belong to them, and in dry years this decreased the amount of available water in Tongue River Reservoir. Montana now wants Wyoming to make up this difference. Fortunately for Wyoming it entered into an agreement with Montana in 1992 to protect itself from just such an attempt. When this agreement is given effect, Montana's already negligible claims are ripe for dismissal on summary judgment.

Montana's remaining claims in this litigation suffer from a host of additional deficiencies. During five of the nine years at issue, Montana has proffered no expert testimony supporting its claims. In the years where Montana does proffer some expert testimony, that testimony reveals that there are no water rights other than those in the Tongue River Reservoir at issue. Thus, there is not a single viable claim in this litigation

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that some action in Wyoming caused harm to a particular farmer in Montana. Instead, Montana reasserts the argument it has repeatedly lost in this litigation that the Yellowstone River Compact obligates Wyoming to regulate for a fixed quantity of water in Montana in disregard of the doctrine of appropriation. The claims that Montana does make—that actions in Wyoming caused harm to Tongue River Reservoir—are unsupported by any evidence showing when the alleged acts in Wyoming occurred in relation to the time calls were made. Finally, Montana's sole groundwater claim relates to the effects of coal bed methane production. While the Yellowstone River Compact may govern some hydrologically connected groundwater, where neither State treats these deep aquifer wells as hydrologically connected, the Compact cannot reach them.

In light of these deficiencies, Wyoming is entitled to judgment as a matter of law on what remains of the claims in Montana's original Bill of Complaint.

#### **MATERIAL FACTS NOT SUBJECT TO DISPUTE**

Rather than revisit certain background facts of which the Special Master is well aware, Wyoming incorporates as if fully set forth herein the facts and materials submitted with its prior motions for partial summary judgment. In particular, Wyoming specifically incorporates the Affidavit of Patrick T. Tyrrell in Support of Wyoming's Motion for Partial Summary Judgment filed with the Court on September 12, 2011. Attached to that Affidavit are two letters from Jack Stultz, the Division Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, calling for regulation in Wyoming on May 18, 2004, and July 28, 2006. (Tyrrell Aff. Ex. 1 and 2).

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## I. The Yellowstone River Compact

The Special Master and the Court are familiar with the history and provisions of the Yellowstone River Compact and they will not be needlessly repeated here. For purposes of this motion, the provisions of Article V(A) and V(B) merit restatement.

Article V(A) provides:

A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

While Article V(B) provides in pertinent part:

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows: [on the Tongue River forty percent to Wyoming and sixty percent to Montana].

Article V(A) does not guarantee Montana a set quantity of water. *Montana v. Wyoming*, 563 U.S. —, 131 S. Ct. 1765, 1777-79 (2011). Because of the equal status of pre-1950 rights in both states, Montana's pre-1950 water users cannot stop Wyoming's pre-1950 users from fully exercising their water rights. *Montana*, 131 S. Ct. at 1772. However, Article V(A) does protect pre-1950 appropriations in Montana from post-1950 uses in Wyoming. *First Interim Report of the Special Master* at 14-15 (Feb. 10, 2010).



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Where Montana can remedy water shortages for pre-1950 appropriations through purely intrastate means, however, those intrastate means are the appropriate solution. *Id.* at 15. Where shortages for pre-1950 appropriations persist after the application of intrastate means, Montana may make a call on Wyoming requesting that it regulate its post-1950 appropriations for the benefit of Montana's pre-1950 appropriations. *Mem. Op. of the Special Master on Wyoming's Mot. for Part. Sum. Judg. (Notice Requirement for Damages)* at 3-4 (Dec. 20, 2011). "Montana, however, cannot insist that Wyoming release storage water for the benefit of pre-1950 appropriations in Montana if the water was stored at a time when there was adequate water reaching Montana to satisfy those appropriations." *First Interim Report of the Special Master* at 15.

The drafters of the Yellowstone River Compact specifically declined to quantify or infringe upon the as yet unquantified water rights belonging to the various tribes with interests in the rivers subject to the Compact. Article VI provides, "[n]othing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." Accordingly, the States left for the future any determinations regarding the nature and extent of existing tribal rights.

## **II. The Northern Cheyenne Compact and Montana's Agreement to Protect Existing and Supplemental Water Rights in Wyoming**

In 1991, in conjunction with plans to rehabilitate and enlarge the Tongue River Reservoir, Montana, the Northern Cheyenne Tribe, and the United States of America

entered into a Compact "to settle for all time, any and all existing claims of or on behalf of the Northern Cheyenne Tribe to water within the State of Montana." Mont. Code Ann. § 85-20-301. As it relates to the Tongue River, Article II the Northern Cheyenne Compact recognizes the Tribal water right consists "of the right to divert or use or to permit the diversion or use of up to 32,500 acre-feet per year, from a combination of direct flow, storage, and exchange water." *Id.* at Article II(A)(2). The Tribal right in the Tongue River Reservoir was recognized to be 20,000 acre-feet per year, and the Northern Cheyenne Compact did not affect the Tribe's contract with the Tongue River Water Users Association for 7,500 acre-feet per year. *Id.* at Article II(A)(2)(b) and (e). Nothing in this Compact purported to alter or amend any provision of the Yellowstone River Compact. *Id.* at Article VI(10).

The Northern Cheyenne Compact was based upon a specific water allocation and reservoir operations model. The "Tongue River Water Model" is defined in Article I of that Compact, and

means the Tongue River Reservoir Operations computer model that is documented in: Tongue River Modeling Study, Final Report, submitted on July 20, 1990, to the Engineering Bureau of the Water Resources Division of the Montana Department of Natural Resources and Conservation, or any revision agreed to by the parties. The Final Report and any agreed revisions are incorporated herein by reference as though set forth in full.

Mont. Code Ann. § 85-20-301 Article I(20) (underline in original).

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The Tongue River Water Model was developed in anticipation of the rehabilitation of the Tongue River dam to ascertain the implications of various allocations of water between the States and the Tribe. (Second Fassett Aff. Ex. E at i).

The study employs two models—a water allocation model and a reservoir operations model. The water allocation model determines the inflows to the reservoir which are allocable to Montana under the terms of the Yellowstone Compact. The reservoir operations model determines the water supply capabilities of a new reservoir on the Tongue River and shows which users encounter shortages.

(Fassett Aff. Ex. E at i).

The resulting computer models were based on a number of important assumptions. First, the modelers recognized that Wyoming's supplemental water rights were protected pre-1950 appropriations but that those appropriations remained unquantified. (Second Fassett Aff. Ex. E at 4). To address this uncertainty, the modelers in consultation with representatives of both States created the following assumption:

Supplemental water rights (additional water for lands with a partial supply in 1950) are recognized by the Yellowstone Compact. To simplify interpretation of the compact for purposes of analysis representatives of Wyoming and Montana suggested considering any increase in water use since 1950 to have a pre-1950 priority date under the definition of supplemental water. Therefore, the model assumed the 1980 level of development for existing users to be non-allocable water. These level-of-development adjustments are only 500 acre-feet/year for Wyoming but average for Montana is 9,400 acre-feet/year for the period of record.

(Second Fassett Aff. Ex. E at 11). Thus, the States and the modelers agreed to treat all pre-1980 appropriations in Wyoming as if they were pre-1950 appropriations, and therefore, not allocable under Article V(B) of the Yellowstone River Compact. *See, e.g.,*

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*Tongue River Basin Project Final Environmental Impact Statement (FEIS)* at E-2 through E-3 (March 1996) (confirming agreement to treat pre-1980 rights as supplemental water rights). The resulting diversion quantities were then set as part of the model parameters used to determine the amount of water available to allocate between Montana and the Tribe. (Second Fassett Aff. Ex. E at 13).

The reservoir operations model allowed releases only for "existing agricultural users, existing tribal agricultural rights, instream rights, and new agricultural, municipal and industrial uses. All remaining water was stored." (Second Fassett Aff. Ex. E at 17; and FEIS at E-3). Consistent with this provision, the model does not contain a maximum winter storage limitation or a maximum carry-over amount. The modelers set Montana's winter pass-through requirement at the dam at 75 cfs from November through March. (Second Fassett Aff. Ex. E at 13). This winter pass-through did not vary through the winter months, and it was assumed that 75 cfs would keep the river free of ice. (Second Fassett Aff. Ex. E at 13 and 18). The modelers also considered the Department of Fish Wildlife and Parks's instream flow rights, but noted that "water was released for this right only when the Tongue River Reservoir storage right (taken to be 64,500 acre-feet/year) was satisfied for that water year." (Second Fassett Aff. Ex. E at 18-19). Similarly, the modelers acknowledged the Department of Natural Resources and Conservation's instream right of 75 cfs, but assumed that "[t]his release was only made if other releases were less than 75 cfs." (Second Fassett Aff. Ex. E at 19). Thus, the sum effect of these

various parameters was to limit releases from the dam for purposes other than to satisfy existing depletive uses to no more than 75 cfs during the winter months.<sup>1</sup>

As Montana and the Northern Cheyenne Tribe negotiated their Compact, Wyoming became concerned that it would be asked to bear the brunt of any resulting deal. (Second Fassett Aff. ¶ 2). Accordingly, the Wyoming State Engineer's Office and the Montana Department of Natural Resources and Conservation began a dialogue about the effects of the Compact and Wyoming's concerns. (Second Fassett Aff. ¶ 2). On May 6, 1991, then Wyoming State Engineer, Jeff Fassett, advised Wyoming's Congressional delegation about this dialogue, in anticipation of the reserved water rights Compact being submitted to Congress for ratification. (Second Fassett Aff. ¶ 2). Mr. Fassett explained that:

The Compact references and incorporates the Tongue River Water Model and the available water supplies available in the Basin were derived from the results of this model. In determining the flows at the Wyoming-Montana stateline, which are nearly identical to the inflow to the reservoir, the uses in Wyoming at the 1980 level of development, as well as the projected supplemental supply needs for Wyoming users were accounted for prior to subtracting the Tribal award. Wyoming feels that the model correctly places these demands ahead of determining the flows available for negotiation with the Northern Cheyenne. However, other than the reference to the model, this assumption is not clearly spelled out in the

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<sup>1</sup>Other contemporaneous draft modeling studies assumed that the winter pass-through requirement was limited to 75 cfs. See Tongue River Water Model Draft at 3-13 (GRI July 9, 1991); Tongue River Water Model Draft at 2-2 (GRI Sept. 27, 1991). Similarly, Mr. Hayes, the President of the Tongue River Water Users Association in Montana, testified that 75 cfs is the minimum flow necessary to preserve the fishery, fulfill stock watering rights, and keep the river from freezing solid. (Hayes Depo. 121-22).

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Compact itself. Montana states that it was always their intent, as well as the intent of the Tribes, that Wyoming users would be protected.

(Second Fassett Aff. Ex. A at 1-2). While Mr. Fassett believed that the States could reach agreement to ensure Wyoming's rights and interests under the Yellowstone River Compact were protected, he advised the delegation that "[i]f we can not get clarifying language added to the legislation from the Montana delegation, we may request that amendments be added as the legislation moved through Congress." (Second Fassett Aff. Ex. A at 2).

The possibility that Wyoming's Congressional delegation might seek such amendments and delay or halt the ratification of the proposed Compact Montana had reached with the Tribe was not acceptable to Montana. (Second Fassett Aff. ¶ 3). To prevent action in Congress Montana assured Wyoming that the Compact protected Wyoming's rights. In fact, in a May 21, 1991, letter from Gary Fritz, the Administrator of the Water Resources Division of Montana's Department of Natural Resources and Conservation and Montana's Yellowstone River Compact Commissioner, to Mr. Fassett, Mr. Fritz said:

I assure you, as did Glen McDonald and Jim Madden when they recently met with you, that the water allocated to the Tribe from the Tongue River is water available over and above Wyoming Uses. These uses include not only all of Wyoming's present uses, but also its rights to supplemental water in the basin as recognized in the 1951 Yellowstone River Compact.

The recognition of Wyoming's present and future uses, while not written into the Northern Cheyenne Compact itself, is a basic assumption of the water model used in negotiation the Compact. The Tribe, the United States, and Montana all have agreed to the model and its assumptions, and

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the model is legally incorporated into the Compact. The Compact expressly states that the availability of the Tribal right in the Tongue River must be determined by reference to the model. The Compact also provides that the model can only be changed by consent of all of the parties.

Consequently, recognition of Wyoming uses is as much a part of this Compact as any of its express provisions. The requirement of unanimous consent to model changes ensures that the Tribe's and Wyoming's water will be kept separate. If you feel that you need additional assurances, we propose entering into an interstate Memorandum of Understanding (MOU), in which Montana agrees not to consent to any change in the model that pertains to Wyoming without first consulting you or your successor.

(Second Fassett Aff. Ex. B at 1).

Wyoming took Mr. Fritz up on his offer, and the States negotiated an agreement binding them to the model. (Second Fassett Aff. ¶¶ 4-5). On February 20, 1992, Mr. Fassett wrote to advise Wyoming's Congressional delegation of the agreement:

[At the time of the earlier letter] I was concerned that Wyoming water rights holders in the Tongue River basin, as well as Wyoming's ability to develop water resources under the Yellowstone River Compact, could be impaired as a result of the enactment of the provisions under the Northern Cheyenne Compact.

A critical component of Montana's negotiations with the Tribe involved the development of a water model for estimating available water supplies at the state line. The model utilized estimates of use within Wyoming to determine supplies that may be available for storage in the Tongue River Reservoir.

After lengthy deliberations between my office and the Montana Department of Natural Resources and Conservation, an agreement has been successfully negotiated between the two states which assures that Montana will not make any changes to the model or to the Northern Cheyenne Compact without prior consultation with, and consent of, the State of Wyoming.

I feel comfortable that this agreement protects Wyoming's existing and future water users. In my earlier letters, I had mentioned that it may be desirable to add language aimed at the protection of Wyoming's interest directly in the ratification bill. I do not believe that is now necessary given the terms of this Governor-to-Governor Agreement. I am enclosing a copy of the final Agreement for your information.

(Second Fassett Aff. Ex. F at 1-2).

The final Agreement provides assurance to Wyoming that Montana would not solve its reserved water rights issues using Wyoming water by recognizing and removing existing and supplemental water uses and future Compact allocations in Wyoming before estimating the amount of water available to the reservoir and to satisfy the Tribe's negotiated reserved water rights. (Fassett Aff. ¶ 5 and Ex. D). The Agreement, dated February 20, 1992, was signed by the Governors of Montana and Wyoming and provides in pertinent part:

WHEREAS the Northern Cheyenne Compact's allocation of water to the Tribe from the Tongue River is based on a water model, which is incorporated in the Northern Cheyenne Compact and this agreement by reference, and the model contains the assumption that existing and supplemental water use in Wyoming is deducted from Tongue River flows prior to the allocation of flows between Montana and Wyoming under the Yellowstone River Compact and that Wyoming's entitlements under the Yellowstone River Compact are deducted prior to the model's simulation of Tongue River reservoir operations, and

WHEREAS Wyoming water use and allocations are accounted for in the water model and, as provided by the Northern Cheyenne Compact the model cannot be changed except by mutual consent of the Northern Cheyenne Tribe, the United States, and the State of Montana,

\* \* \*



1. The State of Montana will not consent to any change, amendment, or modification of the Tongue River Water Model [or the Northern Cheyenne Compact] that affects or may affect the right of Wyoming water users to exercise existing water rights in the Tongue River Basin or future use and development of Wyoming Tongue River Basin water rights as recognized and apportioned from the water allocated to Wyoming in the Yellowstone River Compact without prior consultation and written consent of the State of Wyoming.

\* \* \*

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

(Second Fassett Aff. Ex. D)(modified to merge sections 1 and 2 which are identical except one references the model and the other references the compact). Subsequently, during the following meeting of the Yellowstone River Compact Commission, Mr. Fritz reported that "Montana and Wyoming have agreed on operation of the enlarged reservoir." (Second Fassett Aff. ¶ 7 and Ex. G at VIII).<sup>2</sup>

Thus, as it relates to the allocation of water and the operation of the Tongue River Reservoir, the States agreed to abide by the parameters set forth in the model unless both

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<sup>2</sup> Since the execution of this Agreement, the State of Wyoming has relied on the terms of the Agreement, and in fact, when the Environmental Impact Study was being prepared by the Bureau of Reclamation for the rehabilitation of the Tongue River Reservoir, Wyoming submitted a copy of the Agreement with its comments to ensure that all parties to that analysis properly considered the effects of the Agreement on the reservoir. (Second Fassett Aff. ¶ 8 and Ex. H). In response to Wyoming's comment, the project sponsors, which included the Bureau of Reclamation and the Montana Department of Natural Resources and Conservation acknowledged that they were familiar with the provisions of the Agreement. (*Id.*).

agreed to a subsequent change. This has several important effects for purposes of this litigation. For example, winter pass-through is limited in the model to 75 cfs, and therefore, any actual pass-through in excess of 75 cfs is considered storage for purposes of determining whether the reservoir filled in any given year. In addition, the model treats "additional uses of water between 1950 and 1980 as existing supplemental uses of water. This has the effect of allocating only post-1980 water under Article V." Chuck Dalby, *The Yellowstone River Compact in the 1990's: Historic and Contemporary Water Uses in the Yellowstone River Basin and Need to Administer the Yellowstone River Compact*, Draft, at 36 (Sept. 1992). Thus, Montana's right to call the river for the benefit of the Tongue River Reservoir is limited to a call for regulation of post-1980 appropriations in Wyoming.

### **III. Depositions of Art Hayes and Roger Muggli**

During the course of discovery, Wyoming deposed many of the water users along the Tongue River, despite the fact that Montana has consistently refused to specify which of these people were harmed by acts in Wyoming. Two of these depositions are particularly important for purposes of the present motion. These depositions reveal two essential facts. First, before the Northern Cheyenne Compact, Montana water users used the Tribe's water as if it was their own. Second, Montana's method of regulating its water users does not reflect actual contemporaneous demand.

Art Hayes has been a Montana rancher for over fifty years and is the President of the Tongue River Water Users Association. (Hayes Depo. at 9 and 52-53). In his

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capacity as President of the Water Users Association he manages the Tongue River Reservoir and controls the gates and outflows from the reservoir. (Hayes Depo. at 54-55, 105). In his deposition, Mr. Hayes explained that before the Northern Cheyenne Compact the Tongue River water users used the Tribe's stored contract water to meet their shortfalls. He testified "[w]e didn't have a commissioner because we really could use the -- The tribal water was not watched as closely until the compact, the completion of the dam. They did not use their 7,500 [acre-feet] and we could use that as a cushion." (Hayes Depo. at 43).

Mr. Hayes went on to explain that he determines when the river is in regulation by reference to the inflows at the Tongue River Reservoir. When the inflows at the Tongue River Reservoir drop below 200 cfs, he assumes that only the two most senior rights on the river are in priority, and then he assumes that he is using stored water. (Hayes Depo. at 30-31). He testified to his belief that "everybody is on stored water when that river drops below 200 cfs." (Hayes Depo. at 40). Because Mr. Hayes and the other water users rely on this trigger to determine when the river is in regulation, they do not maintain a contemporaneous accounting of the actual demand for and the actual diversions of surface water.

This is true despite the fact that none of the water users irrigate to the full extent of their water right twenty four hours a day seven days a week during the entire irrigation season. For example, Mr. Hayes testified that on his ranch he will irrigate for fifteen to thirty days and then stop for up to two weeks to cut the hay. (Hayes Depo. at 21-22).

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After cutting, he will irrigate for another fifteen to thirty days and then stop for a similar period for the second cutting. (Hayes Depo. at 21-22). Typically, he can irrigate three times during the season. (Hayes Depo. at 22). Of course, his irrigation practices are influenced by many factors beyond supply, including both wet and dry weather and insects. (Hayes Depo. at 25). Accordingly, his actual use is significantly less than the full amount of his water right.

Roger Muggli is the Secretary of the T&Y Irrigation District, which is the managing position within the organization. (Muggli Depo. at 18). The T&Y has an 1886 priority date for 187.5 cfs from the Tongue River, making it the largest appropriator on the river in Montana. (Muggli Depo. at 24). Mr. Muggli also operates the family farm within the T&Y Irrigation District. (Muggli Depo. at 15-17). Like Mr. Hayes, he testified that his irrigation practices include about a ten day period when irrigation stops to allow for cutting, and he testified that this practice is common among farmers on the river. (Muggli Depo. at 48-49, 64). In addition, he irrigates different fields in a cycle such that it is impossible for him to take the full amount of water that he could take if he was capable of irrigating all his fields at once. (Muggli Depo. at 50). His irrigation practices can also be impacted by the weather. (Muggli Depo. at 50).

The available data confirms Mr. Muggli's testimony. For example, in 2005 there is no dispute that no call was made, and therefore, it is presumed that adequate water was available to meet Montana's needs. In fact, the USGS gauge on the Tongue River above the T&Y Canal showed that the monthly average flow above the canal consistently

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exceeded the 187.5 cfs the canal is permitted to take from the river. (Hinckley Aff. Ex. A at 15-16). During this year, the average actual diversions at the T&Y Canal were significantly below 187.5 cfs. (Hinckley Aff. Ex. A at 15-16). The canal took an average of 36 cfs in June, 147 cfs in July, 165 cfs in August, 128 cfs in September, and 25 cfs in October. (Hinckley Aff. Ex. A at 16). Accordingly, the assumption that any given water right in Montana is always taking its full permitted amount is false.

Mr. Hayes also testified about the water commissioners appointed by the district court in Montana. Mr. Hayes testified that "[i]n years there's no commissioners appointed, we usually have sufficient water to cover the water rights and -- to a certain extent, you know, early in the year and then we go on our stored water, and then we just let the stored water go; we don't try to waste any." (Hayes Depo. at 41). It is worth noting that no commissioner was appointed before 2001 or in 2003, and therefore, according to Mr. Hayes' reasoning there was sufficient water in 2000 and 2003.

### **III. Montana's Expert Opinions<sup>3</sup>**

While Montana submitted five expert reports, only the reports prepared by Steven Larson and Dale Book matter for purposes of the present motion.

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<sup>3</sup> Wyoming has significant disagreements with the methodologies employed by Montana's experts, but for purposes of this motion only, Wyoming takes them at face value as the Court must view them in the light most favorable to Montana under Fed. R. Civ. P. 56. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (if there is a genuine dispute as to the facts, the facts must be viewed in the light most favorable to the non-moving party).

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**A. Steven Larson and the States's Treatment of CBM Groundwater**

Mr. Larson is a civil engineer and a groundwater hydrologist retained by Montana to review the impacts of groundwater use in the Tongue River basin in Wyoming and Montana on stream flow conditions. (Larson Depo. Ex. 253 at 1 and App. A). Mr. Larson considered the effects of groundwater production associated with coal bed methane (CBM) development, and concluded that the deep aquifer units from which CBM water is produced have "some interconnection with the surface stream system." (Larson Depo. Ex. 253 at 4).

Using a model developed by the Bureau of Land Management for another purpose, Mr. Larson attempted to estimate the depletive effects on the Tongue River from CBM development in both States. (Larson Depo. Ex. 253 at 4). He concluded that CBM development in both States had and will continue to have depletive effects on the Tongue River, but that those depletions are very small. For example in 2006, he calculated that depletions to the river caused by development in Wyoming were 0.92 cfs and depletions caused by development in Montana were approximately 0.6 cfs. (Larson Depo. Ex. 253 at 12). Depletions from development in each State were less before 2006, and surface discharges from CBM development actually caused small accretions in some years including 2001 and 2002. (Larson Depo. Ex. 253 at 12).

While Mr. Larson has determined that there is a remote physical connection between the deep aquifers where CBM development occurs and the Tongue River, neither Wyoming nor Montana treat CBM water as if it is hydrologically connected to the

surface. Montana has determined that CBM groundwater production does not serve a beneficial use, and therefore, Montana does not require CBM wells to obtain a water right. (Levens Depo. at 82-83 and Ex. 170 p. 2).<sup>4</sup> Without a water right, CBM groundwater wells cannot be regulated in priority with existing beneficial uses, and in fact, these wells fall within the jurisdiction of the Montana Board of Oil and Gas. (Levens Depo. Ex. 170 p. 2). While the Department of Natural Resources and Conservation could theoretically petition the Montana Board of Oil and Gas if it found that CBM production was affecting existing water rights, it has never done so. (Levens Depo. at 84-85 and Ex. 170 p. 2).

The Montana Legislature also abstained from providing protection to surface water users from CBM production when it had the chance. Montana passed the Coal Bed Methane Production Offset Act in 2001 finding that the state had a compelling interest in the production of CBM. *See* Mont. Code Ann. §§ 82-11-172 through 174. In addition, the Legislature required CBM developers to notify and offer reasonable mitigation agreements to any appropriator of groundwater whose well was within one mile of a CBM well, or within one-half mile of another affected well. Mont. Code Ann. § 82-11-175(3)(a). These mitigation agreements had to address reduction or loss of water, and had to replace water of any natural spring or water well adversely affected by CBM

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<sup>4</sup> Russell Levens is a hydrologist and the Section Supervisor for the Hydro Sciences Section of the Water Management Bureau within the Water Resources Division of the Montana Department of Natural Resources and Conservation. (Levens Depo. at 15 and 20-21).

pumping. Mont. Code Ann. § 82-11-175(3)(b). Thus, Montana chose to provide some protection to its groundwater users from CBM pumping, but declined to offer the same protection to surface water users.

In Wyoming, the production of groundwater from CBM wells is considered a beneficial use. See *Wyoming State Engineer's Office Guidance: CMB/Groundwater Permits* at 1<sup>5</sup>; Second Tyrrell Aff. ¶ 6. Accordingly, the State Engineer issues groundwater permits for CBM wells, and these wells could be subject to priority regulation with surface water if the State Engineer determines that they are so interconnected as to constitute one source of supply. See Wyo. Stat. Ann. § 41-3-916<sup>6</sup>; Second Tyrrell Aff. ¶ 5.

The State Engineer has determined groundwater produced in association with CBM within the Tongue and Powder River Basins in Wyoming is not water so interconnected with the Tongue River or any surface stream as to constitute in fact one source of supply. (Second Tyrrell Aff. ¶ 7). The very hydrogeologic characteristic that traps gas in the coal formations – the fact they are semi-confined aquifers – provides a basis for this result in Wyoming. (*Id.*). Accordingly, CBM groundwater rights in

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<sup>5</sup> Available at <https://sites.google.com/a/wyo.gov/seo/regulations-instructions> under "SEO Policies and Memorandums" at the bottom of the page.

<sup>6</sup> Wyo. Stat. Ann. § 41-3-916 provides in pertinent part "[w]here ... underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply."



Wyoming are not regulated under a single schedule of priorities with any surface rights in accordance with the doctrine of appropriation. (*Id.*).

The superintendent, hydrographers, and commissioners responsible for the Tongue River Basin are not, and have not been, authorized by law, or the State Engineer, to regulate or administer CBM groundwater rights under a single schedule of priorities with any surface rights in accordance with the doctrine of appropriation. (Second Tyrrell Aff. ¶ 8). Of course, any Wyoming surface water appropriator may file a written complaint with the State Engineer's Office alleging interference with his water right by a junior groundwater right under Wyo. Stat. Ann. § 41-3-911(b). (Second Tyrell Aff. ¶ 9). Upon receipt of such complaints, the State Engineer must investigate to determine whether the alleged interference exists. (*Id.*). However, at no time has any surface water appropriator in Wyoming filed a written complaint with the State Engineer's Office alleging interference with his right by a CBM groundwater right. (*Id.* at ¶ 10).

#### **B. Dale Book and the Model**

Dale Book is a civil engineer with a specialty in Water Resources Planning and Management. (Book Depo. Ex. 245). He was asked to evaluate the effect of uses developed in Wyoming after January 1, 1950, on Montana's pre-1950 allocation under Article V(a) of the Yellowstone River Compact. (Book Depo. Ex. 246 at Rpt. pg. 1). Notably, Mr. Book's report fails to consider or even mention the 1992 Agreement binding the states to the model incorporated into the Northern Cheyenne Compact. Notwithstanding this critical deficiency, the overarching conclusion in his report is that in

2001, 2002, 2004, and 2006, the Tongue River Reservoir did not fill to its physical capacity of approximately 79,000 acre-feet and that certain identified post-1950 appropriations in Wyoming used water that otherwise would have ended up in the Tongue River Reservoir during these years. (Book Depo. at 68, 183, and Ex. 246 at Rpt. pg. 1). His conclusion that the reservoir did or did not fill in any given year was based on actual reservoir outflows which typically exceeded the 75 cfs winter pass-through used in the model. (Book Depo. Ex. 246 at Rpt. pg. 9).

Mr. Book did not quantify depletions to the Tongue River in 1987, 1988, or 1989, and he believes that the Tongue River Reservoir filled or nearly filled in 2000 and 2003. (Book Depo. at 68-70). Accordingly, he offers no opinions regarding breach or causation related to these five years.

Similarly, Mr. Book did not determine whether any of the depletions from post-1950 uses in Wyoming identified in his report caused injury to any water user in Montana other than the Tongue River Reservoir. (Book Depo. at 70-75 and Ex. 246 at Rpt. pg. 1). Essentially, he determined that there was a causal relationship between the post-1950 depletions in Wyoming identified in his report and the Tongue River Reservoir, but he did not make a similar determination for any of the other water rights along the river. (Book Depo. at 73-74). Thus, he concludes that curtailing those post-1950 rights in Wyoming identified in his report would have resulted in additional water in the reservoir, but he has not said the same is true for any other individual water right in Montana. (Book Depo. at 74-75). Accordingly, Mr. Book's report reflects claims made solely for

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the benefit of the Tongue River Reservoir which are subject to the water allocation and reservoir operations model.

Mr. Book identified several different kinds of post-1950 appropriations in Wyoming that, if curtailed, would have added water to the Tongue River Reservoir in years where it did not fill. First, he identified reservoirs in Wyoming with post-1950 storage capacity and divided them into two categories: Compact reservoirs or those for which Wyoming reports storage and releases to the Compact Commission, and reservoirs that Wyoming does not collect data concerning storage and releases. (Book Depo. Ex. 246 at Rpt. pg. 12).

The Compact reservoirs, their respective priority dates, and their permitted capacities are listed in Table 6 of Mr. Books' report. (Book Depo. Ex. 246 at Tbl. 6). Notably, only Twin Lakes and Sawmill reservoirs have any post-1980 storage at all, and Sawmill only has seventeen acre feet of post-1980 storage. (Book Depo. Ex. 246 at Tbl. 6). Mr. Book calculated actual post-1950 storage for each of the Compact reservoirs, and those results are summarized in Table 7 of his report. (Book Depo. Ex. 246 at Tbl. 7). Mr. Book properly indicated in his report that "[s]torage during the current year is assigned to the senior priority first." (Book Depo. Ex. 246 at Rpt. pg. 13). Application of this principle to the storage in Twin Lakes and Sawmill reservoirs shown on Table 7 reveals that in 2001, 2002, 2004, and 2006, only 17 acre-feet of storage in 2004 can be assigned to a post-1980 right. In the remaining years all the post-1950 storage identified in Table 7 for these two reservoirs is assigned to pre-1980 rights.

The remaining reservoirs with capacities greater than twenty acre-feet are listed in Table 9 of Mr. Book's Report. (Book Depo. Ex. 246 at Rpt. pg. 14). Because storage and release records for these reservoirs were not available, Mr. Book estimated depletions using evaporation as the lower limit of depletions. (Book Depo. Ex. 246 at Rpt. pg. 16). Of these nineteen reservoirs, only nine of them have any post-1980 storage. (Book Depo. Ex. 246 at Tbl. 9). For the Wagner, Fivemile, and Padlock Recovery reservoirs, however, Mr. Book had specific information regarding storage and releases, and he included that information in his calculation of depletions from those reservoirs. (Book Depo. Ex. 246 at Rpt. pg. 14-15). Of these three reservoirs, only the Padlock Recovery reservoir has any post-1980 storage, and that is limited to 52 acre-feet. (Book Depo. Ex. 246 at Tbl. 9).

Next, Mr. Book identified post-1950 irrigated acreage that was not regulated by Wyoming to fulfill pre-1950 rights in Wyoming, and therefore, could have added water to the Tongue River Reservoir. (Book Depo. Ex. 246 at Rpt. pg. 17-18). These rights are identified in Tables 11-A and 11-B of the report. (Book Depo. Ex. 246 at Tbls. 11-A and 11-B). None of the water rights on Table 11-B are post-1980, and only ten of the twenty-two water rights listed on Table 11-A are post-1980 water rights. (Book Depo. Ex. 246 at Tbls. 11-A, 11-B, and App. G-6 listing priority dates).

Mr. Book then attempted to ascertain if any groundwater pumping was causing depletions that would have added water to the Tongue River Reservoir in the four years he analyzed. (Book Depo. Ex. 246 at Rpt. pg. 19). He found only eighteen irrigation

permits with capacities exceeding fifty gallons per minute, and adopted the prevailing view in Wyoming that the effects of these water rights were small. (Book Depo. Ex. 246 at Rpt. pg. 19). Mr. Book concluded that these "have impacts largely to surface water users in Wyoming when being pumped for irrigation[,] and therefore, he did not include impacts from any of these wells in his conclusions. (Book Depo. Ex. 246 at Rpt. pg. 19).

Having identified the post-1950 rights at issue and their associated depletions, Mr. Book summarized his findings in Table 12 of his report.<sup>7</sup> (Book Depo. Ex. 246 at Tbl. 12). He added the post-1950 storage from the Compact reservoirs, storage from the Wagner, Fivemile, and Padlock Recovery reservoirs, evaporation from the remaining reservoirs, irrigation from post-1950 diversions, and the depletions from CBM development calculated by Mr. Larson for the four years in issue, and this total reflects the impacts at the stateline from post-1950 depletions in Wyoming. (Book Depo. Ex. 246 at Tbl. 12). According to Mr. Book's original report, "[t]he total of the depletions to the Stateline for the four years ranged from 1,810 to 3,970 ac-ft/year, averaging 2,850." (Book Depo. Ex. 246 at Rpt. pg. 21). This results in an average of 3.9 cfs per year.<sup>8</sup>

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<sup>7</sup> During Mr. Book's deposition, he notified the parties that he had made two small corrections to his calculations regarding return flows from post-1950 releases from Compact reservoirs. Those corrections are set forth in a Revised Table 12. (Book Depo. Ex. 243 excerpt pg. 6).

<sup>8</sup> This is a remarkably small amount of water for an interstate dispute, and the Court certainly would be justified if it chose to simply dismiss the entire case immediately under the maxim *de minimus non curat lex*. See, e.g., Restatement (Second) of Contracts § 235 cmt. a (1981) (noting that courts may ignore trifling departures).

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Interestingly, this conclusion does not take into account and does not depend on the particular date when Montana made calls on Wyoming for regulation. (Book Depo. 179-180). In fact, Mr. Book did not even attempt to determine when water was applied to lands identified as irrigated from post-1950 diversions. (Book Depo. at 159). Obviously, water applied to a particular field before a call on the river is made cannot be a proper part of a claim for damage, and yet, Montana has no idea how much water was applied to these lands before it made a call in any given year.

After Wyoming designated its experts and supplied Montana with their reports, Mr. Book took some of the information from those reports and revised his conclusions to reflect certain additional facts. (Book Rebuttal Rpt.). For example, in his Rebuttal Expert Report Mr. Book considered the effect of return flows from water imported into the Tongue River basin from the Powder River basin as suggested by Doyle Fritz, Wyoming's civil engineer. (Book Rebuttal Rpt. at 3-4). Similarly, Mr. Book adjusted the evaporation rate for the non-compact reservoirs to reflect background evapotranspiration as suggested by Mr. Fritz. (Book Rebuttal Rpt. at 5). Mr. Book further refined his conclusions regarding the extent of post-1950 irrigated acreage in some instances where he was convinced that Mr. Fritz's information about actual use or source of supply for those individual rights was correct. (Book Rebuttal Rpt. at 6-11). For those ten post-1980 rights identified on Table 11-A, this had the effect of reducing one right to zero, and reducing the calculated depletions from four of the remaining rights. (Book Rebuttal Rpt. Tbl. 2-A). Ultimately, incorporation of these additional facts reduced Mr. Book's

calculations of post-1950 impacts to the Stateline by more than 25% from an average of 2,850 acre feet per year during the four years at issue to an average of 2,030 acre feet per year. (Book Rebuttal Rpt. at Tbl. 3).

If the parameters of the water allocation and reservoir operations model are applied to Mr. Book's results, however, there are essentially no impacts at the Stateline from storage or surface depletions in Wyoming. First, if winter pass-through is properly limited to 75 cfs as set forth in the model, the Tongue River Reservoir would have filled to at least 79,000 acre-feet in every year except 2002 and 2004. (Hinckley Aff. Ex. A at Figure 5b). Mr. Book does not take issue with the math leading to this conclusion, but instead applies a winter storage limitation from an Operation and Maintenance Manual for the reservoir which results in the reservoir failing to fill in each of the four years at issue. (Book Rebuttal Rpt. at 20). Of course, the model contains no such limitation, and therefore, for purposes of accounting between the States, as opposed to actual reservoir operations, the reservoir filled in every year but 2002 and 2004.

Applying the model provision that treats pre-1980 water as supplemental supply which is deducted off the top of the accounting and treated as if it is pre-1950 water under the Yellowstone River Compact, substantially eliminates the remaining impacts outlined by Mr. Book.<sup>9</sup> Compact reservoir storage is eliminated in each of the four years except for 17 acre-feet less a negligible return flow in 2004. Storage in the Wagner,

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<sup>9</sup> Mr. Book concedes that it would be easy to exclude the pre-1980 rights from his analysis. (Book Depo. 180-83).

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Fivemile, and Padlock Recovery reservoirs is reduced to 44 acre-feet in 2002 and 2004 after applying Mr. Books' offset for return flows. Evaporation from the remaining reservoirs is limited to 112 acres of surface area which translates into 176 acre-feet at the stateline. (Book Rebuttal Rpt. at Tbl. 3). The post-1980 acreage identified by Mr. Book only produced 120 net acre-feet of depletions at the stateline in 2004 and 211 net acre-feet in 2006, which his method would average to estimate the net depletion in 2002 at 165 acre-feet at the stateline. The sum of these depletions is completely offset by return flows from Kearney Lake in 2002, and only 107 acre-feet remain in 2004. This equates to 0.15 cfs of water in 2004, or the amount of water necessary to irrigate *six* acres of land in Montana under its normal duty of water.<sup>10</sup>

In addition to calculating post-1950 depletions, Mr. Book also attempted to create a demand model reflecting the pre-1950 direct flow demand in Montana. (Book Rpt. at 9-11). Mr. Book took county surveys of irrigated and irrigable lands from 1949 to determine the acreage upstream of the T&Y Canal, and assumed that the T&Y Canal irrigated 9,908 acres. (Book Rpt. at 10). He then assumed that the demand on the river for these acres equals the flow rate for the peak diversion months of July and August adjusted for lower demand in other months, return flows and other variables. (Book Rpt. at 10). Interestingly Mr. Book assumed that the T&Y canal diverts "all available flow,

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<sup>10</sup> This would be a small amount of water among immediately adjacent farmers, between States it is imperceptible. On this point, notice how readily Montana shrugs off ten cfs of undivertable flow at the T&Y Canal as insignificant.



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less a *minor amount* passing the headgate. A flow of *10 cfs* was assumed to be undivertable at the headgate." (Book Rpt. at 10) (emphasis added).

Obviously, Mr. Book's demand model is not based on actual contemporaneous irrigation demand, but rather simply reflects the maximum continuous flow that could be attributed to the irrigated and irrigable acreage identified in the county surveys. (Book Depo. at 119-122). Of course, Mr. Book agrees that there could be a difference between the demand calculated from the county surveys and actual demand in the present day. (Book Depo. 132). Moreover, his analysis assumes demand equals the full extent of every water right as if they were actually being used every minute of every day throughout the irrigation season regardless of individual haying practices and other operational decisions that affect whether irrigation occurs in reality. (Book Depo. 126-28). Perhaps as a result of these problems, neither Mr. Book nor Montana assert that the demand model evidences a breach, cause, or harm in this case. In fact, in his rebuttal report, Mr. Book clarifies that the demand model only "estimate[s] the flow rate below which shortages are likely to be expected when users have a need for water." (Book Rebuttal Rpt. at 17).

### **STANDARD OF REVIEW**

In original actions, the Supreme Court is not bound by the Federal Rules of Civil Procedure, but uses Rule 56 of those rules as a guide. *Alabama v. North Carolina*, 569 U.S. —, 130 S. Ct. 2295, 2308 (2010) (citing Sup. Ct. Rule 17.2). The Court applies the same general test set forth in Rule 56: "[S]ummary judgment is appropriate where there

'is no genuine issue as to any material fact' and the moving party is 'entitled to judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56(c) (standard now contained in subsection (a) following 2010 amendments to Rule 56)). The substantive law governing the dispute determines what facts are material to the summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), *cited in Alabama*, 130 S. Ct. at 2308.

A genuine issue of material facts persists, and requires the court to deny the motion when a reasonable finder of fact could return a verdict for the non-moving party at trial. *Anderson*, 477 U.S. at 248-49. However, if the moving party supports its motion with sufficient materials that would prevent a reasonable fact finder from deciding in favor of the non-moving party, the latter can defeat the motion only by submitting materials showing sufficient facts to create a genuine issue for trial. *Id.* at 250.

## ARGUMENT

### **I. Wyoming is entitled to the benefit of its bargain with Montana to be bound by the parameters of the water allocation and reservoir operations model.**

Wyoming and Montana entered into an agreement in 1992 that supplements their rights and responsibilities under the Yellowstone River Compact. While not altering the Compact, as between the two States they have agreed to bind themselves to a particular water allocation and reservoir operations model. The Court should not allow Montana to breach that agreement in these proceedings.

The Agreement signed by the Governors of both states is a contract, and must be construed accordingly. When presented with a contract, the Court begins "by examining the express terms of the Compact as the best indication of the intent of the parties[.]" *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. —, 133 S. Ct. 2120, 2130 (2013). "Under ordinary principles of contract law, one would construe the contract in terms of the parties' intent, as revealed by language and circumstance." *United States v. Winstar Corp.*, 518 U.S. 839, 911, (1996) (citing *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51 (1866) ("All contracts are to be construed to accomplish the intention of the parties"); Restatement (Second) of Contracts § 202(1) (1979) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.").

Here, the plain language of the Agreement indicates the States's intention to bind themselves to the model. The model is explicitly incorporated into the Agreement and Montana is expressly prohibited from consenting to a change in the model without Wyoming's written consent. Thus, as it relates to accounting for the water going into and out of the Tongue River Reservoir, Montana, Wyoming, and the Tribe have agreed to a specific set of parameters. Of course, Montana can operate the reservoir in any manner it finds beneficial, but for accounting purposes with Wyoming and the Tribe, actual operations are irrelevant.

While the intent of the parties is clear from the plain language of the Agreement, assuming that the Agreement is ambiguous, all of the available extrinsic evidence

definitively demonstrates that the parties intended to be bound by the parameters of the model. See, e.g., *SVKV, L.L.C. v. Harding*, 148 P.3d 584, 593 (Mont. 2006) and *Lozier v. Blattland Invs., LLC*, 100 P.3d 380, 383 (Wyo. 2004) (both stating that if a contract is ambiguous, courts will look to extrinsic evidence to ascertain the parties' intent). Mr. Fritz could not have given a clearer statement of the parties's intentions with regard to this agreement. He assured Wyoming that the model and its parameters were incorporated into the Northern Cheyenne Compact and that "recognition of Wyoming uses is as much a part of this Compact as any of its express provisions." (Fassett Aff. Ex. B at 1). Wyoming expressly relied on these assurances, and they led Mr. Fassett to advise Wyoming's Congressional delegation that it was no longer necessary to add language to the Northern Cheyenne Compact protecting Wyoming's interests. (Fassett Aff. Ex. F at 1-2). Moreover, it is clear that the incorporation of the model into the Northern Cheyenne Compact and the interstate Agreement was more than a mere academic exercise. In fact, Mr. Fritz, Montana's Commissioner at the time, specifically told the Yellowstone River Compact Commission that "Montana and Wyoming have agreed on operation of the enlarged reservoir." (Fassett Aff. Ex. G at VIII).

Wyoming is entitled to the benefit of its bargain with Montana, and this means that it is entitled to apply the model parameters to the claims in this case. After doing so, there can be no dispute that the Tongue River Reservoir received enough storable flow to fill in all years except 2002 and 2004. When winter pass-through is limited to 75 cfs, even Mr. Book concedes that the reservoir would fill in every year but 2002 and 2004

~~absent application of a maximum winter carryover. There is no maximum winter~~  
carryover identified in the model, and instead the model provides for releases for specific purposes and states that "[a]ll remaining water was stored." (Fassett Aff. Ex. E at 17). Had the parties intended to bind themselves to a maximum winter carryover, they could have and would have done so in the model. Thus, Montana's subsequent decision to apply a maximum winter carryover for other purposes is irrelevant to the determination of whether the reservoir filled in any given year.

This determination is important, because Montana's claims are expressly premised upon whether the Tongue River Reservoir filled or not. If the reservoir received enough storable flow to fill in a given year, Montana cannot pursue a claim for injury to the reservoir right in that year. Here there can be no dispute that the reservoir received enough storable flow to fill in every year except 2002 and 2004, and therefore, Wyoming is entitled to summary judgment for every other year still at issue in this litigation.

Moreover, in 2002 and 2004, Montana cannot claim a right to water used by pre-1980 appropriations in Wyoming. The model expressly provides for and is premised upon the treatment of pre-1980 rights in Wyoming as if they were pre-1950 rights under Article V(A) of the Yellowstone River Compact. These rights were placed on equal footing with the pre-1950 reservoir rights in Montana, and therefore, Montana's pre-1950 reservoir rights cannot call on Wyoming's pre-1980 appropriators and demand that they refrain from fully exercising their water rights without violating the 1992 Agreement.

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Accordingly, Wyoming is entitled to summary judgment on all of Montana's claims for water from pre-1980 appropriators for the benefit of the Tongue River Reservoir.

Application of this provision of the model eliminates all of Montana's claims except for 107 acre-feet in 2004 and depletions caused by CBM development. Those claims are also ripe for judgment as a matter of law.

**II. The minimal amount of surface water at issue in 2004 after application of the model parameters is based on pure speculation, because Montana has no idea whether that water was used before or after the call date.**

Unlike many of the other years that have been in issue in these proceedings, the parties know exactly when Montana made a call on Wyoming in 2004. (Tyrell Aff. Ex. 1). What the parties do not know, and what is critical to the maintenance of Montana's claim, is when the water at issue was actually used or stored in Wyoming. Mr. Book did not attempt to determine when water was applied to the Wyoming lands identified as irrigated from post-1950 diversions. (Book Depo. at 159). Nor did he specify in his report whether any post-1980 storage occurred in Wyoming after the call was made on May 18, 2004. In the absence of this information, it would be pure speculation on the part of the Court to presume what portion, if any, of this water was available to Montana after the date of the call. *See, e.g., Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (restating the general rule that contingent and uncertain damages are not recoverable); *Tin Cup Cnty Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 200 P.3d 60, 68 (Mont. 2008) ("All damages for breach of

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contract are subject to limitations of causation, certainty, and foreseeability. The damages clearly must be ascertainable in their nature and origin.").

The Court cannot speculate about what portion of the trickle of water at issue in 2004 may have been used in Wyoming before or after May 18, 2004. It falls upon Montana to prove this fact. Montana has not designated any expert testimony or produced any documents or other evidence establishing when post-1980 water was used or stored in Wyoming. Accordingly, Wyoming is entitled to the entry of judgment as a matter of law not just for the remaining water in 2004, but also for all the alleged depletions in every year in issue, because Montana's experts have made no effort to correlate Wyoming's alleged violations with the alleged call dates.

**III. Where neither State treats CBM water as interconnected, the Compact cannot treat it as hydrologically connected.**

The Special Master has determined that "[t]he language of the Compact in this case is sufficiently broad and inclusive to encompass at least some forms of groundwater that are hydrologically connected to the surface waters of the Powder and Tongue Rivers." *First interim Report of the Special Master* at 44. Thus, not all hydrologically connected groundwater is necessarily governed by the Compact. Here, both States have implicitly and explicitly determined that the connection between CBM groundwater production and the surface waters is too tenuous to warrant regulation under the doctrine of appropriation. There is no basis for the Court to upset these determinations, and

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because the Compact applies the doctrine of appropriation, it cannot be construed to reach this water.

“[A] congressionally approved compact is both a contract and a statute.” *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991). See also *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (stating that “a compact when approved by Congress becomes a law of the United States, but “[a] Compact is, after all, a contract”) (citations omitted). It is a fundamental principle of contract interpretation that courts may rely on customary usage and practice when interpreting a contract. See *Tarrant Reg’l Water Dist.*, 133 S. Ct. at 2133 (“Looking to the customary practices employed . . . helps us to ascertain the intent of the parties to this Compact.”) (citing Restatement (Second) of Contracts §203(b)); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 n.4 (1988) (“It is standard contract law, however, that a party may be bound by a custom or usage even though he is unaware of it, and indeed even if he positively intended the contrary.”) (citation omitted); 5 Arthur L. Corbin et al., *Corbin on Contracts* § 24.16 (1993) (“In the process of interpreting a contract, the court can receive great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it.”). Thus, the customary practice of Montana and Wyoming as to the regulation of CBM groundwater is relevant to interpreting the Yellowstone River Compact. This is especially true when the Compact never mentions groundwater or provides any specific technical parameters for regulation of groundwater.



~~Here, there is no dispute that neither Montana nor Wyoming regulated CBM~~  
groundwater under the doctrine of appropriation as tributary to surface streams in any of the years at issue. Given this fact, the common practice of both contracting parties should weigh heavily in the Court's interpretation of the Yellowstone River Compact. In fact, based on the current record, the Court simply has no basis for upending these practices and implicit determinations by the contracting parties. Mr. Larson's determination that CBM groundwater is technically, although tenuously, connected to the Tongue River is interesting, but largely irrelevant in this regard. Both States recognize that this groundwater is connected to the surface to some degree, but neither have determined in practice that the level of connection is sufficient to warrant regulation under the doctrine of appropriation. Thus, whatever may be the reach of the Compact into the groundwater of the States, it does not reach this far.

In addition, Montana's complaints about Wyoming's past production are highly suspect because Montana does not even consider CBM production as a beneficial use of groundwater. Montana is obligated to engage in intrastate regulation before it calls on Wyoming to act. Where it does not even have an effective mechanism to regulate its own CBM groundwater production under the doctrine of appropriation, it can hardly make a good faith demand for such regulation on Wyoming. Thus, Montana's claims related to CBM also should be barred because it had no means to engage in intrastate regulatory measures commensurate with what it is asking of Wyoming.

~~Because both parties have determined that the production of the CBM~~  
groundwater at issue in this litigation does not have the requisite level of hydrologic connection to warrant regulation under the doctrine of appropriation, Montana cannot claim injury to the Tongue River Reservoir under Article V(A) of the Compact as a result of this production. Accordingly, Wyoming is entitled to summary judgment on all Montana's claims related to CBM production. When Montana's claims related to CBM production are eliminated from this litigation, nothing remains at issue with respect to groundwater, and in fact, the entirety of Montana's claims are resolved.

**IV. Notwithstanding the parties' agreement, in the absence of expert testimony showing a breach and causation, Wyoming is entitled to summary judgment for all claims related to years and rights that are not supported by expert testimony.**

Even if Wyoming had not had the foresight to protect its interests by entering into the 1992 Agreement, Wyoming would be entitled to summary judgment for each of the years and for every Montana water right that are not supported by expert testimony. Expert testimony is required where causation is sufficiently beyond the common experience of the trier of fact. *See, e.g., Tin Cup Cnty Water*, 200 P.3d at 69 (Mont. 2008) (requiring expert testimony when the issue of causation called for an understanding of dam's structural history, dam engineering, hydrology related to rock and earthen dam, and dam safety). In this case, the causal link between actions in Wyoming and individual water users in Montana in any given year is beyond the common experience of the Court. This is not the typical water rights case between adjacent landowners where an action

upstream has an easily ascertainable effect downstream. Montana acknowledges as much by proffering the testimony of Mr. Book to establish these causal links which are not perceptible to the layman's eye. Where Mr. Book has not offered these opinions, however, Wyoming is entitled to the entry of judgment as a matter of law. This includes the years 1987, 1988, 1989, 2000, and 2003, and all the individual water rights in Montana other than the reservoir right.

**V. While Montana's demand model appears to be apropos of nothing in particular, it is worth noting that it is indistinguishable from an obligation to deliver a quantity of water which was previously rejected by the Court.**

The Court has ruled unequivocally that the Yellowstone River Compact does not entitle Montana to a specific quantity of water. *Montana*, 131 S. Ct. at 1777-79. And yet, Montana's proffered demand model presents the flip side of the same coin. Instead of demanding that Wyoming deliver a specific quantity of water, Montana asserts that Wyoming must regulate for a specific quantity of water. According to Montana's theory, this quantity of water was set in stone in 1950, and it is entitled to this quantity of water regardless of actual demand in Montana. As Montana has been repeatedly informed, the Yellowstone River Compact does not work that way. Instead, Montana's pre-1950 appropriations may continue to be enjoyed under the doctrine of appropriation, which is by its very nature a system based on actual contemporaneous demand. *See, e.g., Worley v. U.S. Borax and Chem. Corp.*, 428 P.2d 651, 654 (N.M. 1967) (articulating the foundational principle of the doctrine that an appropriator's right is limited to his actual

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need). Accordingly, any demand model that seeks to act as a surrogate for the actual contemporaneous demand of Montana's pre-1950 appropriations offends the Compact.

The fact that Montana does not attempt to ascertain the actual contemporaneous demand from its pre-1950 appropriators may make great sense for Montana's internal operations, and in general, Wyoming has no cause to complain about this choice. When Montana seeks to make a call on Wyoming, however, it has a right to expect that the call will be based on actual, as opposed to theoretical, demand. As is apparent from the testimony of Mr. Hayes and Mr. Muggli, a model based on continuous flow to the maximum extent of the permitted right does not accurately reflect actual demand. Similarly, a model based on a quantification of lands that may or may not be irrigated in the present day or at any particular time is inherently flawed. Montana's attempts to revive its stateline delivery obligation in a different guise should be rejected by the Court, particularly where the theory bears no relationship to the injuries it claims in this litigation.

Thus, to the extent necessary given the disconnect between the demand model and Montana's alleged injuries, Wyoming is entitled to the entry of summary judgment dismissing any claim Montana has or might make based on Mr. Book's demand model.

### **CONCLUSION**

This case may have been about something important when it was filed, but that part of the case was decided long ago. When this case was filed there was a legitimate dispute about the interpretation of Article 5(A) of the Yellowstone River Compact. The

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rulings of the Court and the Special Master addressed this dispute predominantly in favor of Montana, although the Court rejected Montana's assertion that the Compact created a mass delivery obligation. Wyoming accepted these rulings, believing that while the Compact protects Montana's pre-1950 appropriations, Wyoming never violated the Compact. Discovery has proven that Wyoming's belief was well founded. Montana's claims are limited to injuries to the Tongue River Reservoir, and Wyoming is entitled to the benefit of its bargain in 1992 which binds the parties to the water allocation and reservoir operations model. Any claims not precluded by application of the model are speculative or based on CBM production which neither state regulates in conjunction with the surface of the Tongue River.

It seems clear that rather than vindicating its rights under the Yellowstone River Compact, Montana seeks to avoid the consequences of the deal it struck with the Northern Cheyenne Tribe. It is no coincidence that the core of Montana's claims arose *after* it enlarged the Tongue River Reservoir. The Court should not countenance Montana's attempt to avoid its obligations under the 1992 Agreement. Wyoming is entitled to judgment as a matter of law on all Montana's express or implied claims, and this result is particularly appropriate in the absence of any evidence showing that Wyoming's conduct caused harm to someone in Montana.

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WHEREFORE the State of Wyoming requests that all remaining claims in the State of Montana's Bill of Complaint be dismissed with prejudice.

Dated this 3rd day of July, 2013.

THE STATE OF WYOMING



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James Kaste  
Senior Assistant Attorney General  
123 State Capitol  
Cheyenne, WY 82002  
307-777-6946

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 3rd day of July, 2013.

Jeanne S. Whiteing  
Whiteing & Smith  
1628 5<sup>th</sup> Street  
Boulder, CO 80302  
[jwhiteing@whiteinglaw.com](mailto:jwhiteing@whiteinglaw.com)

John B. Draper  
Jeffrey Wechsler  
Montgomery & Andrews  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[jdraper@montand.com](mailto:jdraper@montand.com)  
[jwechsler@montand.com](mailto:jwechsler@montand.com)

James J. 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](mailto:James.dubois@usdoj.gov)

Michael Wigmore  
Bingham McCutchen, LLP  
2020 K Street NW  
Washington, DC 20006-1806  
[Michael.wigmore@bingham.com](mailto:Michael.wigmore@bingham.com)

Cory J. Swanson  
Montana Attorney General's Office  
P.O. Box 201401  
Helena, MT 59620-1401  
[coswanson@mt.gov](mailto:coswanson@mt.gov)

Jennifer Verleger  
North Dakota Attorney General's Office  
500 North Ninth Street  
Bismarck, ND 58501  
[jverleger@nd.gov](mailto:jverleger@nd.gov)

Solicitor General of the United States  
US Department of Justice  
950 Pennsylvania Avenue, Room 5614  
Washington, DC 20530-0001  
[SupremeCtBriefs@usdoj.gov](mailto:SupremeCtBriefs@usdoj.gov)

Barton H. Thompson Jr.  
Susan Carter, Assistant  
Jerry yang and Akiko Yamazaki  
Environment & Energy Building, MC-4205  
473 via Ortega  
Stanford, CA 94305-4205  
[Susan.carter@stanford.edu](mailto:Susan.carter@stanford.edu)

  
Wyoming Attorney General's Office