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

WYOMING'S POST-TRIAL BRIEF

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Pursuant to Case Management Order No. 14, the State of Wyoming submits the following post-trial brief:

INTRODUCTION

At the outset of the trial Montana made it a point to criticize Wyoming's characterization of this case as "much ado about nothing." Tr. Vol. 1 at 13. Now that the evidence has been received, it is clear that this characterization precisely describes Montana's claims against Wyoming in these proceedings. Montana claims Wyoming wrongfully used a trickle of water, while in the same breath arguing that the Court must ignore the deluge that Montana intentionally failed to store. The evidence demonstrates beyond doubt that any water shortage in Montana was a product of its own profligate bypasses and its failure to use water that was readily available. Montana's actions demonstrate that its claims in this case are merely an attempt to shift the burden of the Northern Cheyenne Tribe Compact onto Wyoming in direct contravention of the explicit understanding of the Yellowstone River Compact negotiators. In short, Montana asserts that the Yellowstone River Compact is tantamount to an insurance contract protecting Montana from the consequences of its own decisions. Instead, the Compact protects Wyoming from Montana's wasteful actions by incorporating the doctrine of appropriation and requiring beneficial use.

SUMMARY OF ARGUMENT

Very little of the evidence received over the course of the trial makes any difference to the outcome of this case. Therefore, this brief will focus on the evidence that matters to Montana's breach of contract claims by discussing each element of

Montana's claims in turn. This review will reveal that each of the questions set forth in Case Management Order 14 should be resolved in Wyoming's favor.

Montana bears the burden of proof on all the essential elements of its claims, and it failed to prove any of them in either of the two years legitimately at issue. Montana failed to show: that its pre-1950 appropriations were unsatisfied at specific times, that at those specific times it engaged in intrastate regulation sufficient to ensure that no post-1950 appropriations in Montana were receiving water, that Montana then placed a call on Wyoming for regulation, or that Wyoming appropriators continued to divert water under post-1950 appropriations to the detriment of Montana's pre-1950 appropriations after calls were made.

With regard to Tongue River Reservoir, Montana's right under Article V(A) of the Yellowstone River Compact is limited to 32,000 acre-feet and the undisputed evidence shows that Montana had sufficient water to satisfy that right at all times. Moreover, the Compact requires Montana to store all available water except that which is necessary to satisfy downstream senior water rights. So for purposes of determining whether the Article V(A) right in the reservoir was satisfied, any available water that Montana failed to store must be treated as if it was actually stored. The undisputed evidence shows that Montana bypassed significant amounts of water in 2004 and 2006 for reasons other than satisfying downstream senior rights, and these bypasses are fatal to Montana's claims of injury to the reservoir.

With regard to direct flow diversions during the irrigation season, Montana failed to present evidence of an actual shortage at particular diversions at particular points in

time. Montana cannot rely on Mr. Book's demand model to circumvent its obligation to demonstrate that there was actual contemporaneous unmet demand in Montana at the time the calls were made in 2004 and 2006. Mr. Book's model was not created to approximate real demand and it does not do so. Moreover, Montana failed to show that any of the very few parcels at issue in Wyoming actually was irrigated with water appropriated under a post-1950 right after the two call dates. Montana also did not present evidence of causation connecting the alleged unmet demand in Montana with the alleged diversions in Wyoming. Similarly, it could not show that there was adequate intrastate regulation to ensure that no post-1950 rights in Montana were receiving water at the time calls were made.

With regard to coal-bed methane (CBM) production, both states treat CBM produced groundwater as de minimus withdrawals immaterially connected to Tongue River surface flow. The Compact should not be interpreted to ignore the common practices of the States. Montana's failure to regulate or account for its own CBM produced water under the doctrine of appropriation also bars its claims related to Wyoming's CBM produced water. In addition, use of the appropriate parameters in the 2002 BLM model reveals that CBM production in 2004 and 2006 had no discernible impact on Tongue River flows. Montana's attempt to create the appearance of substantial connection through the manipulation of an inapt model failed to produce a reliable result.

Accordingly, the Special Master should recommend that the Court enter judgment in Wyoming's favor and dismiss Montana's Bill of Complaint with prejudice.

LEGAL STANDARDS

I. The Compact.

The Special Master and the Court are familiar with the history and provisions of the Yellowstone River Compact so, they will not be needlessly repeated here. However, portions of the provisions of Article V(A), V(B), and V(C) 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].

In turn, Article V(C) provides in pertinent part:

> C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3 and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:
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> * * *

> 3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date; [.]

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. 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). Where Montana can remedy water shortages for those pre-1950 appropriations through purely intrastate means, 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. Summ. J. (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 Compact does not mandate that either state adopt specific regulations, but the regulation and administration of the waters allocated by the Compact "must comply with the requirements and obligations of the Compact--in particular, the 'beneficial use' and

prior-appropriation requirements for protection of pre-1950 water rights under Article V(A) of the Compact." *Mem. Op. of the Special Master on Montana's Mot. for Summ. J. on the Compact's Lack of Specific Intrastate Administration Requirements* at 5 (Sept. 16, 2013).

II. Elements of Montana's claims and the burden of proof.

"[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) ("a compact when approved by Congress becomes a law of the United States, but '[a] Compact is, after all, a contract' ") (citations omitted). Accordingly, Montana's claims are measured by the same standards that apply to any claim for breach of contract.

Breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract. *See* 23 *Williston on Contracts* § 63:1 (4th ed.). In the Compact, Montana and Wyoming promised to abide by the "laws governing the acquisition and use of water under the doctrine of appropriation." Article V(A). Therefore, the Court looks to the doctrine of appropriation to define Montana's rights and responsibilities under the Compact. *Montana*, 131 S.Ct. at 1771. The doctrine of appropriation, as set forth in the prior rulings of the Special Master in these proceedings, dictates that Montana has the burden of proving five essential elements.

> **1. That Montana's pre-1950 appropriations were unsatisfied at specific times.** *Mem. Op. of the Special Master on Wyoming's Mot. for Summ. J.* at 31 (Sept. 16, 2013) (Wyoming is not obligated to provide water unless Montana needs the water for actual beneficial use under pre-1950 appropriative rights). Proof of actual unmet demand on a specific date is

essential, because the call that must follow is by its very nature a present demand for water in response to the existing conditions and demands on the river and not an after the fact complaint for damage. *See Empire Lodge Homeowners' Ass'n v. Moyer,* 39 P.3d 1139, 1145 n.5 (Colo. 2001) (quoting *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 171 n.2 (Colo. 1997) (" 'A call is placed on a river when a senior appropriator forces upstream juniors to let sufficient water flow to meet the requirements of the senior priority.' "); *Worley v. U.S. Borax and Chem. Corp.*, 428 P.2d 651, 654 (N.M. 1967) (an appropriator's right is limited to his actual need).

2. **That at those specific times, Montana engaged in intrastate regulation sufficient to ensure that no post-1950 appropriations in Montana were receiving water.** *First Interim Report of the Special Master* at 89 (Feb. 10, 2010).

3. **That Montana then placed a call on Wyoming for regulation.** *Mem. Op. of the Special Master on Wyoming's Mot. for Part. Summ. J. (Notice Requirement for Damages)* at 7 (Dec. 20, 2011); *Mem. Op. of the Special Master on Wyoming's Renewed Mot. for Part. Summ. J. (Notice Requirement for Damages)* at 11 (Sept. 28, 2012) (noting that the "call requirement is intrinsic to the prior appropriation system"); Tr. Final Pretrial Hearing at 45-47 (restating that a call is a prerequisite to liability); *Worley,* 428 P.2d at 654-55 (the absence of such a demand by the downstream senior is decisive).

4. **That Wyoming appropriators continued to divert water under post-1950 appropriations after the call was made.** *Mem. Op. of the Special Master on Wyoming's Mot. for Part. Summ. J. (Notice Requirement for Damages)* at 2 (Dec. 20, 2011) (restating the general rule that "[o]nce the river is called, juniors have to reduce their diversions.").

5. **That post-1950 diversions in Wyoming caused harm to Montana's pre-1950 appropriations.** *Mem. Op. of the Special Master on Wyoming's Mot. for Summ. J.* at 27 (Sept. 16, 2013) ("Montana must also demonstrate a causal connection between [its unsatisfied pre-1950 appropriative rights and diversions by post-1950 appropriators in Wyoming]."). *See also Clarification Regarding Mem. Op. of Sept. 16, 2013 on Wyoming's Mot. for Summ. J.* at 1 (Montana must prove causal connection between post-1950 use in Wyoming and pre-1950 shortage in Montana).

Montana as "[t]he party alleging the breach has the burden of proof on all of its breach of contract claims." *See* 23 Richard A. Lord, *Williston on Contracts* § 63:14 (4th ed.). "A party seeking to enforce a contract containing a condition precedent bears the burden of proof as to the occurrence of the condition, and if there is no evidence of the occurrence of the condition, the duty of the defendant has not been triggered and his or her promise cannot be enforced." *Id.* Thus, with regard to proof that a call was made, "Montana bears the burden of proof at trial of proving that it provided adequate notice, the timing of that notice, and if relevant, that it acted with due diligence in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies." *Mem. Op. Regarding Wyoming's Mot. for Part. Summ. J. (Montana's Supplemental Evidence)* at 14 (Dec. 22, 2012).

With regard to the first essential element of Montana's claims, proof of the existence of a paper water right in and of itself is not sufficient to prove unmet demand under the doctrine of appropriation. *See, e.g., Quigley v. McIntosh,* 290 P. 266, 268 (Mont. 1930); *Cook v. Hudson*, 103 P.2d 137, 146 (Mont. 1940) (disapproved of on other grounds by *Grimsley v. Estate of Spencer*, 670 P.2d 85 (1983)); *McDonald v. State*, 722 P.2d 598, 602 and 605 (Mont. 1986); *Worley,* 428 P.2d at 654.

In fact, the Montana Supreme Court has squarely addressed this question and found "[i]n sustaining the burden of proof above referred to, it was therefore necessary that plaintiff prove **his need for the water as well as his right thereto** and his ability to use the same through his system of distribution[.]" *Tucker v. Missoula Light & Water Co.*, 250 P. 11, 15 (Mont. 1926) (emphasis added). In *Tucker*, the plaintiff proved that

"at all times complained of he had urgent need for that amount of water, with ample means for its use." *Id.* at 16. The plaintiff demonstrated his need with testimony showing that "plaintiff's crops were properly planted, cultivated, and irrigated up to July 1st of each of the years mentioned, and were then in good condition, and would have produced bountiful crops, provided they would have been properly irrigated during the month of July of each of said years." *Id.* The plaintiff went on to demonstrate that during the month of July "he went repeatedly to the agents and the manager of defendant company, and requested and demanded water for the irrigation of his crops, but each time was refused[.]" *Id. Tucker* aptly demonstrates the kind of evidence that could satisfy the burden of proving need and that such evidence must come from the plaintiff.

Moreover, assigning the burden of proof of actual unmet demand to Montana is consistent with the evidentiary principle that the party with access to information is commonly assigned the burden of proof with respect to that element of a claim. *See U.S. Bank Nat. Ass'n v. Safeguard Ins. Co.*, 422 F. Supp. 2d 698, 706 -707 (N.D. Tex. 2006) (citing *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 359 n. 45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof."). Here, only Montana can know whether there is an actual need for water within its boundaries.

The Special Master previously suggested that *Parshall v. Cowper* might dictate a contrary result. *Parshall v. Cowper*, 143 P. 302 (Wyo. 1914). It does not. The *Parshall* court did not hold that the junior appropriator has the burden of proof in a breach of

contract action brought by a calling senior appropriator with superior knowledge. In fact, the senior appropriator was not even a party to that action. Rather, that action was between an appropriator who had been regulated by the water commissioner and the water commissioner himself. *Id.* at 302. The court merely found that an adjudicated water right was conclusive proof of the irrigator's right until superseded in a proper proceeding, and therefore, the water commissioner had no right to deny that plaintiff had acquired a water right or to allege that the right had been forfeited or abandoned. *Id.* at 304. More importantly, the court went on to find that the "volume of water to which an appropriator is entitled at any particular time is that quantity, within the limits of the appropriation, which he can and does apply to the beneficial uses stated in his certificate of appropriation." *Id.* Thus, the water commissioner could assert as a defense to that action that, pursuant to his statutory duties, he allowed all the water that was being put to beneficial use through the ditch. *Id.* Accordingly, *Parshall* reinforces the proposition that beneficial use, not the paper water right, is the basis, the measure, and the limit of the right and that right is measured in the present. It is Montana's burden to prove actual unmet demand, and it cannot meet that burden merely be reference to a paper water right.

For purposes of assessing whether a breach occurred in any given year, the preponderance of the evidence standard applies. However, before the Court can impose any injunctive relief on Wyoming, Montana must demonstrate that the breach is of "serious magnitude and established by clear and convincing evidence." *See e.g., Connecticut v. Massachusetts*, 282 U.S. 660, 669 (U.S. 1931). Moreover, Montana must

prove that there is a real and immediate threat of repeated injury. *See, e.g., City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983).

UNMET PRE-1950 DEMAND IN THE TONGUE RIVER RESERVOIR

The rules governing the Article V(A) right and operations of the Tongue River Reservoir are the matters of predominant importance to the parties in this litigation. Montana's claims of injury to the reservoir are based entirely on the assertion that Wyoming is obligated to ensure that it fills to its current enlarged capacity regardless of Montana's management actions. Montana's claims are inconsistent with the plain language of the Compact and essential elements of the doctrine of appropriation. Accordingly, Montana's breach of contract claims related to the Tongue River Reservoir should be dismissed.

I. Water for Indian lands was allocated to each state by the Compact.

Montana wrongfully asserts that the Northern Cheyenne Tribe's water rights were excluded from the Compact, and therefore, Wyoming has an obligation to the Northern Cheyenne Tribe over and above its Compact obligations to Montana. The drafters of the Yellowstone River Compact specifically declined to quantify 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." During the final Compact negotiations, the parties specifically considered whether water for Indian lands would come from each state's allocation under the

Compact or whether this water was excluded from the Compact. Although Montana favored Compact language that would have excluded water for Indian lands from the Compact, it did not prevail on this point. Instead, the parties adopted language that they explicitly understood would require each state to supply water for Indian lands within that state out of its allocation under the Compact.

At the December 1950 meeting of the Yellowstone River Compact Commission, Mr. Bunston for Montana "asked whether water for Indian lands would be supplied from the allocation to each state or would be provided for prior to allocation. Mr. Lloyd [for Wyoming] said that he intended to propose with respect to Article VI that water for Indian lands should be charged to the states." Ex. J72 at 42. The parties discussed the issue, and Mr. Myers of the Bureau of Reclamation stated that "the percentage division provided for in the Compact draft was based on lands potentially irrigable whether Indian or non-Indian." *Id.* "It was pointed out that if use of water on Indian lands is to be provided for prior to allocation, the percentages would have to be changed." *Id.* The parties continued to discuss the issue, with Montana's Mr. Bunston advocating for the Compact to be changed to provide water for Indian lands prior to allocation and the Wyoming representatives favoring the alternative approach. *Id.*

When Article VI was read for approval in its present form, a motion was made to amend the language of Article VI "by deleting the period, adding a comma in the following: 'and such rights are excluded from this Compact.' " Ex. J72 at 45. "A vote was taken on the motion to amend which was declared lost." *Id.* The following day when Article VI was raised again, Montana's delegates indicated that they favored the

amendment, and therefore, they asserted that Article VI had not been adopted. *Id.* at 49. Mr. Leonard from Montana "stated that he had voted against Article VI in the form in which it did not exclude Indian rights. He did not object further if Messrs. Bunston and Manning were agreeable as it stands." *Id.* After some discussion, Article VI was unanimously approved in its final form. *Id.* at 50. The minutes of the December meeting strongly indicate that Montana's negotiators relented rather than reopening debate related to the percentage allocations, because as Mr. Manning of Montana stated they were "satisfied with percentages given in paragraph V B 2." *Id.* at 49.

As is apparent, at the time the Compact was adopted, the parties explicitly understood that water for Indian lands in each state would be supplied from the allocation made to each state under Article V(B) of the Compact.[1] Therefore, Article V(B) rather than Article V(A) governs the Northern Cheyenne Tribe's water right in the enlarged Tongue River Reservoir. Because Article V(B) of the Compact protects the Northern Cheyenne Tribe's right in the enlarged reservoir, neither the fact of enlargement in 1999, nor the existence of the Northern Cheyenne Tribe Compact alters the size of Montana's Article V(A) right in the reservoir.

II. The Tongue River Reservoir right is limited to its pre-Compact uses.

"From the very outset of the negotiations that led to the final Compact, two major themes emerged regarding existing water rights. The first theme was the importance of

[1] The clearly expressed intention of the parties comports with the rule expressed in *Arizona v. California* that all uses of mainstream water including uses by the United States are to be charged against that State's apportionment. *See Arizona v. California,* 373 U.S. 546, 601 (1963).

protecting existing water uses." *First Interim Report of the Special Master* at 30. The desire to protect existing water uses can be seen throughout the Compact and includes the protection of existing uses in existing reservoirs under Article V(A). New uses in existing reservoirs, however, did not receive the same protection, and those new uses are accounted for in the percentage allocations under Articles V(B) and V(C). *See* Article V(C)(3). Accordingly, only those portions of existing reservoirs put to beneficial use as of 1950 are protected under Article V(A).[2]

The existing beneficial uses in the Tongue River Reservoir as of 1950 were at most the 32,000 acre-feet of water per year that the Tongue River Water Users Association was authorized to sell. On July 7, 1937, the State Water Conservation Board of the State of Montana and the Tongue River Water Users Association entered into a Water Marketing Contract for the provision of Tongue River Reservoir water. Ex. M529-A. At that time, the parties anticipated the live capacity of the reservoir to be 32,000 acre-feet. *Id.* at 1. The contract authorized the Water Users Association to enter into water purchase contracts for the sale of 32,000 acre-feet of water annually and allowed for additional contracts if the live capacity of the project exceeded the parties' expectations. *Id.* at 3. The contract specified that the Water Users Association could only deliver the amount of water sold pursuant to the water purchase contracts. *Id.* Accordingly, the amount of water sold under the water purchase contracts reflects the amount of water beneficially used by the Water Users Association. The best available

[2] Wyoming acknowledges that the plain language of Article V(C)(3) applies equally to the reservoirs in Wyoming existing as of 1950.

evidence indicates that, as of 1961, only 11,638 acre-feet of water had been sold by water purchase contract. Ex. M280 at 14.

On March 13, 1969, the Montana Water Resources Board and the Water User's Association entered into an Amendatory, Supplemental and Clarifying Water Marketing Contract. Ex. M529-C. That contract confirmed that as of 1969 the parties had put less than 32,000 acre-feet of water to beneficial use. It provided:

> WHEREAS, **the Association has never been able to market, to the date hereof, as much as 32,000 acre feet of water annually, as was originally contemplated**, nor to pay the Board the sums of money required by the Association to be paid by Section 2 of the original Water Marketing Contract, as thereafter amended, but the parties hereto now contemplate that the Association may be able to beneficially use and market 40,000 acre feet of water annually, if the Association is allowed a three-year period in which to devote its efforts to the marketing of such 40,000 acre feet of water all to come from the Project, except as is in this contract otherwise specified;

Ex. M529-C at 3 (emphasis added). The new contract then authorized the Water Users Association the right to sell up to 40,000 acre-feet of water and prohibited the Board from marketing more than 40,000 acre-feet annually for all purposes. *Id.* at 6 and 10. In the new contract, the Board further "commit[ted] itself to permit a sufficient amount of water to flow out of the reservoir and down the river in the wintertime as and for water for livestock and to keep the river a live river." *Id.* at 15.

Donald D. Sullivan, an engineer with the Montana State Water Conservation Board, further confirmed that the existing beneficial use of reservoir water as of 1950 was limited. Tr. Vol. 5 at 1108. In an October 1967 memorandum entitled *Historical and Proposed Operation of Tongue River Reservoir*, Mr. Sullivan explained, "[a]s can be

verified by the records of storage published in the U. S. Geological Survey Reports, the reservoir was not operated at maximum capacity of 68,000 A.F., instead it was operated near 45,000 A.F., with the exception of 1944, 1959, 1964, 1965 and 1967." Ex. M309-A at 1. Based on the records attached to his memorandum, Mr. Sullivan concluded that as of 1967, "the reservoir was not operated at full capacity."[3] *Id.*

Operating at less than full capacity prior to 1950 allowed the reservoir to deliver water for water purchase contracts in amounts less than 32,000 acre-feet and to provide space for flood control. As noted by the Bureau of Reclamation in its August 1949 sedimentation survey, "[t]he dam, in addition to providing water for irrigation, is also used for flood control; the upper 7 feet of the reservoir from the spillway down is allocated for this purpose. The present flood control storage capacity as determined by this investigation is 21,089 acre-feet."[4] Ex. M557-E at 2. The sedimentation survey also confirmed that, while the reservoir had an original capacity of 72,510 acre-feet, by the time the parties entered the Compact in 1950, the capacity of the reservoir was only 69,439 acre-feet. *Id.* at 3. Of course, because the Compact differentiates between existing and new uses in existing reservoirs, the original capacity of the reservoir is irrelevant to a determination of the amount of water protected under Article V(A).

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[3] Mr. Sullivan's review of the historic operations of the reservoir is consistent with Mr. Book's review of the data. *See* Ex. M5 at Table 4-A (showing end of month contents typically below 45,000 acre-feet). *See also* Tr. Vol. 6 at 1289-90, 1294-96.

[4] Mr. Smith similarly reported to the technical committee in 2005 that "[d]uring times of more normal hydrology, the reservoir would be drafted during the winter to make room for flood control." Ex. J55 at XV.

Even if there was not compelling evidence demonstrating the limited beneficial use of water as of 1950, Mr. Hayes and Mr. Muggli confirmed that the existing contract rights, even at the expanded amount of 40,000 acre-feet, can be satisfied with less than the full capacity of the reservoir. Mr. Hayes testified that, even when the dam was damaged and not operated at full capacity, the Water Users Association was able to fulfill its contract deliveries. Tr. Vol. 7 at 1501. Mr. Muggli, whose experience on the river coincides with the period of disrepair, also testified that, before the reservoir was enlarged, there was typically enough water to meet the needs of the T & Y Irrigation District. Tr. Vol. 17 at 3950.

The evidence before the Court demonstrates that as of 1950 the existing uses in the existing Tongue River Reservoir were most likely limited to 11,638 acre-feet per year, but certainly no more than 32,000 acre-feet of water per year. The plain language of the Compact dictates that Montana's right under Article V(A) of the Compact is limited to this amount.[5] It is undisputed that Montana actually stored more than 32,000 acre-feet of water in both 2004 and 2006. Ex. W3 at 3-4. Thus, even without counting available water Montana failed to store, Montana's Article V(A) right in the Tongue River Reservoir was satisfied in both years.

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[5] Even if Montana's Article V(A) right were not defined by the existing uses as of 1950, the reservoir right is limited by Montana law to the amount which can be put to beneficial use in any given year. Currently, that amount is 60,000 acre-feet of water per year, and Montana received more than sufficient water from Wyoming in both 2004 and 2006 to store 60,000 acre-feet of water. *See* Ex. M526 at 4; Ex. W3 at fig. 5a-c. Montana cannot show injury as a result of not receiving water it had no ability to put to beneficial use.

Moreover, during both years, there was water available in the Tongue River Reservoir, either for use immediately by the Water Users Association or for sale by the Northern Cheyenne Tribe. Tr. Vol. 7 at 1499; Tr. Vol. 15 at 3426, 3429-30; Tr. Vol. 16 at 3661. In dry years, the water users voluntarily take a reduction in their shares if the reservoir does not fill to its current capacity, even though there may be adequate water in the reservoir to satisfy all contract deliveries. Tr. Vol. 7 at 1441. Montana can hardly complain about a shortage when it has voluntarily chosen not to use water available in its reservoir.[6]

III. Wyoming's Compact obligations do not include insuring Montana's discretionary operational decisions.

Wyoming does not dispute that Montana and the operators of the Tongue River Reservoir have great discretion in managing the reservoir. But when Montana invokes its rights under Article V(A) of the Compact, those rights are limited to the beneficial use of water under the doctrine of appropriation as beneficial use is defined in the Compact. These discretionary operational decisions, including significant portions of the winter bypasses, are not beneficial uses as defined by the Compact and are not made to satisfy actual water rights. Thus, they are not protected under Article V(A) of the Compact.

The doctrine of appropriation requires that the Tongue River Reservoir defer storage for the benefit of downstream senior water rights and only downstream senior

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[6] Similarly, individual irrigators should not be heard to complain when they failed to use water available to them. For example, in 2006, Mr. Hayes failed to use 286 acre-feet of water that he was entitled to use under his water contracts at no additional cost. Tr. Vol. 15 at 3420-22. Other water users failed to use water they were entitled to receive as well. Tr. Vol. 16 at 3559.

water rights. *See Arizona v. California*, 283 U.S. 423, 459 (1931) (noting that vested rights to the appropriation of water are "subject only to the right of prior appropriations"). Senior water rights for stock watering with winter periods of use do exist downstream of the Tongue River Reservoir, but they do not have to be filed with the Montana Department of Natural Resources and Conservation (DNRC) like irrigation rights. Tr. Vol. 6 at 1299-1302; Tr. Vol. 7 at 1424. The only quantification of these unfiled stock water rights downstream of the reservoir was prepared by Melvin McBeath of the Water Management Bureau of the DNRC.[7] Tr. Vol. 6 at 1302-05, Ex. W11. Mr. McBeath estimated "based on professional judgment that a flow of 50 cfs would be required to deliver the consumptive flow rate a minimum of 190 miles downstream from the dam." Ex. W11 at 4. Similarly, Mr. Smith reported to the technical committee that "if the releases out of the Reservoir are below 50 ft^3/s, stock access can be limited." Ex. J55 at XV. Every other evaluation of recommended winter flows included flows for irrelevant considerations beyond the needs of downstream senior rights, and consequently, these other evaluations overstated the appropriate winter flow. Exs. W3 at 7-8, M284.

Montana routinely bypasses significant amounts of water in excess of 50 cfs. *See* MT Dem. Ex. 3 at MT15218 (showing winter discharges in 2004 and 2006 often more than double 50 cfs). In fact, the average winter outflows from the Tongue River Reservoir between 2000 and 2006 were 124 cfs. Tr. Vol. 2 at 335. These excess outflows over the course of a winter quickly add up to fairly significant amounts of water. Between October 2003 and March 2004, the reservoir bypassed approximately 42,000

[7] Mr. Aycock made no attempt to quantify these stock rights. Tr. Vol. 9 at 1904.

acre-feet of water. Tr. Vol. 2 at 341-43; Ex. M5 Table 4-E. Similarly, between October 2005 and March 2006, the reservoir bypassed approximately 54,000 acre-feet of water. Tr. Vol. 2 at 343; Ex. M5 Table 4-E.[8] Had Montana limited its bypasses to only those amounts necessary to meet downstream senior water rights, the reservoir would have filled to its current capacity in both 2004 and 2006.[9] Tr. Vol. 24 at 5732; Ex. W3 fig. 5a. And, it is worth noting that Montana bypassed more water in each of these two winters than can be stored in all of the mountain reservoirs in Wyoming combined. Tr. Vol. 2 at 334.

Montana asserts that these bypasses are reasonable and necessary to provide a sufficient minimum winter flow and to adhere to a maximum winter storage limit. However, neither of these considerations create binding operational constraints on reservoir operations. Since 2006, the Tongue River Reservoir has been routinely maintained at levels well above the stated 45,000 acre-foot winter maximum. Tr. Vol. 2 at 337-39; Vol. 6 at 1191-94. Similarly, no one complained when winter outflows were reduced in response to the drought conditions of the 2000s, indicating that downstream

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[8] Montana also releases more water than necessary during the irrigation season. For example approximately 10,000 acre-feet of water flowed past the Miles City gauge into the Yellowstone River between June and September 2004. Tr. Vol. 2 at 341-43; Ex. M5 Table 4-E. Similarly, approximately 9,500 acre-feet of water flowed past the Miles City gauge into the Yellowstone River between June and September 2006. *Id.* These excess releases are more than double the amount of water at issue using Montana's most favorable assessment of post-1950 use in Wyoming. Ex. M6 at Table 3.

[9] A continuous flow of 50 cfs equals approximately 3,019 acre-feet per month. Subtracting this amount from the bypasses shown on Ex. M5 Table 4-E reveals the amount of water Montana could have, but failed to, store in any given winter month. For example, in January 2004, that amount was 4,282 acre-feet, and in January 2006, that amount was 7,585 acre-feet.

rights do not require such significant flows during the winter. Tr. Vol. 7 at 1368-69. These facts strongly indicate that the considerable winter bypasses during 2004 and 2006 were neither reasonable nor necessary, particularly in light of the persistent drought conditions prevailing at the time.

More importantly, the stated purposes for the minimum winter flow and maximum winter storage guidelines include uses that do not meet the Compact's definition of beneficial use, such as flood control, river de-icing, and instream flows for fish and wildlife. *See* Ex. M3 at 10-17. Because the doctrine of appropriation as incorporated by the Compact does not require the Tongue River Reservoir to deliver water for these purposes, the reservoir is effectively donating its water for these other purposes. While the reservoir's operators may have good policy reasons for making these donations, the Compact does not authorize Montana to pass the bill for its charitable contributions onto Wyoming.

Article V(A) only protects Montana's right to continue to enjoy pre-1950 rights for the beneficial use of water under the doctrine of appropriation. The Compact specifically defines "beneficial use" as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Article II(H). "A 'beneficial use' within the meaning of the Compact, therefore, is a *type* of use that depletes the water supply." *Montana*, 131 S. Ct. at 1778 (emphasis in original). Typically, these uses are evidenced by a water right authorizing the holder of the right to divert and consume a portion of the water in the river.

Storage in and of itself is not a beneficial use within the meaning of the Compact. Article V(C)(3) makes clear that only water in existing reservoirs which is "used for irrigation, municipal, and industrial purposes developed" before January 1, 1950, is protected by Article V(A). Thus, it is not the act of storage in an existing reservoir that establishes a right protected by the Compact, but rather the useful employment of that water by the activities of man that creates a cognizable right under the Compact.

Operating the Tongue River Reservoir specifically to prevent ice jams in the river is not a "beneficial use" because it is not depletive. In fact, de-icing adds water to the river to prevent ice buildup. Moreover, de-icing is not recognized under the doctrine of appropriation because it does not satisfy a downstream senior pre-1950 water right. Some amount of water is necessary to ensure that water is transported down to the pre-1950 stock watering rights. However, Article V(A) of the Compact does not protect any amount greater than the 50 cfs necessary to get water down the river to the place where the stock can consume it.

So too, operating the Tongue River Reservoir for flood control purposes is not a beneficial use under the Yellowstone River Compact. Managing the reservoir to ensure that there is enough vacant space during the runoff to prevent peak flows from causing flooding downstream is not a depletive use. Rather, it sends water downstream during the winter when it cannot be put to beneficial use by any appropriator prior to entering the Yellowstone River. Similarly, maintaining instream flows for fish or wildlife habitat, whether under a water right or not, is also not a "beneficial use" under the Compact because leaving or releasing water in the river for fish habitat is not depletive. See Tr.

Vol. 7 at 1500 (Mr. Hayes' operational decisions are motivated in part by fisheries considerations). Moreover, any instream flow rights in Montana are post-1950 water rights which are not protected by Article V(A) in any event.

The same result follows from application of the one-fill rule, which has been adopted by the Supreme Courts of both Montana and Wyoming. Tr. Final Pretrial Hearing at 58 and 65. That rule provides:

> [t]hat the reservoir having the priority right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor. But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.

Wheatland Irrig. Dist. v. Pioneer Canal Co., 464 P.2d 533, 540 (Wyo. 1970) (quoting 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights*, § 845, p. 1484 (2d ed. 1912)); *Fed. Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941). Thus, when the Tongue River Reservoir could have filled once, but voluntarily released or bypassed some portion of the available water, a call on Wyoming to fill the evacuated space of the Reservoir amounts to an unlawful attempt to refill the Reservoir.

While Montana asserts that it did not adopt the one-fill rule in *Federal Land Bank v. Morris*, the Court specifically explained that Mont. Rev. Code. § 7093 (1935) necessarily included a one-fill limitation on reservoirs. 116 P.2d at 1011. That statute, authorizing appropriations for reservoir water in Montana, persists in Mont. Code Ann. § 85-2-305, with the one-fill limitation still in place. Had the Montana legislature intended to overrule the limitation specifically set forth in *Federal Land Bank*, it certainly could

have done so at any time during the last seventy years, but it has not. In spite of the unambiguous ruling of its Supreme Court, Montana asserts that DNRC does not follow the one-fill rule. But the DNRC cannot change the law by ignoring it.

The doctrine of appropriation incorporated into the Compact also dictates that the one-fill rule applies to the Tongue River Reservoir. Recently, in the Snake River Basin Adjudication, an Idaho state district court explained how the doctrine of appropriation prohibits a storage right from refilling space vacated for flood control at the expense of junior appropriators. *See In re SRBA*, Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017, at 7-10 (5th Dist. Idaho Mar. 20, 2013). The Idaho court's analysis is particularly applicable here and worth quoting at length:

> The assertion that a senior storage right holder can "fill," or "satisfy," his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law. Idaho's prior appropriation doctrine provides protections to both senior and junior appropriators through a system of priority administration. A senior appropriator's water right is protected under the doctrine against interference from those whose rights are subsequent in priority. *See e.g.*, Idaho Const., Art XV, § 3 (providing "[p]riority of appropriations shall give the better right as between those using the water"); I.C. § 42-106 ("As between appropriators, the first in time is first in right"). At the same time, a junior appropriator's water right is protected against wrongful acts on the part of senior appropriators that would disturb the junior's rights to the use of water. *See e.g.*, *Van Camp v. Emery*, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (providing that a senior may divert the quantity to which he is entitled, but once he has done so he may not impede a junior from receiving the water to which the junior is entitled). One leading scholar sets forth the proposition in the following terms:
>
> > The junior appropriator . . . is entitled to protection not only against those whose rights are subsequent to his, but also against wrongful acts on the part of earlier appropriators. That is to say, while an appropriator may divert the quantity of

> water to which he is entitled, when he has once done so he may not so impede the flow of the remaining stream as to prevent it from reaching the junior appropriator's headgate.
>
> Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 50 (1968).
>
> Storage water rights are integrated into Idaho's prior appropriation doctrine on the basis of relative priority the same as other rights. *American Falls Reservoir Dist. No. 2*, 143 Idaho 878, 154 P.3d at 449; I.C. § 42-202. As soon as a senior storage right is filled it is no longer in priority. Allowing a storage right holder to refill his right under priority after his right is filled, but before affected junior right holders are satisfied, is impermissible as it would wrongfully disturb the junior appropriators' rights to the use of water, *Van Camp v. Emery*, 13 Idaho at 208, 89 P. at 754, and would diminish the junior right holders' priorities. *See e.g., Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (providing, "[p]riority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder"). Simply stated, under Idaho's doctrine of prior appropriation a senior storage holder may not fill or satisfy his water right multiple times, under priority, before rights held by affected junior appropriators are satisfied once. A remark authorizing such priority refill would be contrary to Idaho law. The fact that water diverted and stored pursuant to a valid storage water right is used by the reservoir operator for flood control purposes does not alter the above analysis, *assuming, as the term "refill" necessarily implies, the storage right has already been filled once during the period of use under priority.*

See In re SRBA, *supra*, at 9-10. (emphasis in original) (footnote omitted).

In re SRBA demonstrates that the one-fill rule is part of the doctrine of appropriation, and therefore, part of Article V(A) of the Compact. The one-fill rule limits Montana's ability to call for Wyoming post-1950 rights to provide water to refill space in the Tongue River Reservoir that Montana has voluntarily vacated for non-beneficial uses.

While agreeing that both parties follow the one-fill rule at the outset of the trial, the Special Master asked the parties to present evidence on what kind of bypasses count

towards that one-fill. Tr. Vol. 1 at 76-81. For its part, Montana essentially asserted that no bypasses count because Montana has no established rules governing reservoir accounting and because Montana officials have ignored *Federal Land Bank.* Tr. Vol. 3 at 543-44. By contrast, Wyoming demonstrated that in Wyoming a call triggers review of the calling reservoir's activities from the beginning of the water year. Tr. Vol. 18 at 4214. In this review, any water that was available to the reservoir prior to the call is counted against the reservoir's one-fill. Tr. Vol. 18 at 4214-15. This is true even if the reservoir released water for good reasons. Tr. Vol. 18 at 4216. Any other accounting method would allow the reservoir to refill at the expense of junior appropriators. Tr. Vol. 18 at 4215-17. As Mr. Fassett explained, "[i]f you choose to pass water, that's your choice. But that doesn't mean you get to put that pain on some junior." Tr. Vol. 18 at 4217.

Counting all voluntary bypasses against the reservoir storage right, as Wyoming does, is the only reasonable accounting method, because reservoir operators have exclusive control over reservoir operations. The party in control typically assumes the risk of loss in non-insurance and non-guarantee contracts. *See, e.g.,* Restatement (Second) of Contracts § 227(1) and cmt(b) (1981) (explaining that is unusual for a party to assume risk not within his control). "People are reluctant to guarantee things over which they have no control—to assume risk, in other words (unless, of course, . . . they happen to be in the insurance business)—and this observation warrants a presumption that can be used to decide cases . . . where the contract contains no indication that a guarantee was intended." *Fid. and Deposit Co. of Md. v. City of Sheboygan Falls,* 713

F.2d 1261, 1269 (7th Cir. 1983). It is true, "[a]s Holmes pointed out a century ago, you can bind yourself to perform acts over which you have no control. 'In the case of a binding promise that it shall rain to-morrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee.' " *Field Container Corp. v. ICC*, 712 F.2d 250, 257 (7th Cir. 1983) (quoting Oliver Wendell Holmes, Jr., *The Common Law* 300 (1881)). However, nothing in the Compact indicates that the parties agreed to shift the risk to Wyoming that Montana would fail to store water crossing the state line. Accordingly, that risk was assumed by Montana as the party in control of the reservoir.

Whether the Court looks to water law or contract law, the burden of Montana's discretionary operational decisions falls on Montana. As a result, a proper accounting of Tongue River Reservoir operations reveals that in both 2004 and 2006 more than adequate water was available to Montana to satisfy the reservoir's right under Article V(A). Tr. Vol. 24 at 5732, Ex. W3 at Fig. 5a.

IV. Montana cannot change its Article V(A) right through a pattern of non-use.

Montana claims that the Tongue River Reservoir water right, and therefore, its right under Article V(A), includes the right to bypass just as much water as it did prior to 1950. In support of this assertion, Montana claims that its water right is established by its pattern of use. Wyoming agrees. But bypasses are not use.

Montana's claim is based on the following statement in *McDonald v. State*:

> The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the

> provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use.

722 P.2d at 604. This statement is wholly unremarkable and consistent with the rule in both states that beneficial use is the basis the measure and the limit of all rights to the use of water. *Id.* at 605. The key feature of both of these statements of Montana law in *McDonald,* which Montana ignores, is that they limit every water right to the amount applied to a beneficial use.

Wyoming does not dispute that Montana has a right to continue using water it put to beneficial use prior to 1950. As it relates to the Tongue River Reservoir, that amount is something less than 32,000 acre-feet of water per year. However, Montana has no right to water which it failed to put to beneficial use by bypassing it through the reservoir. Bypasses are neither a beneficial use under the plain language of the Compact, nor a beneficial use under Montana law. *See* Mont. Code Ann. § 85-2-102(4) (defining "beneficial use"). A pattern of non-use cannot, and does not, create a right to those unused waters. Accordingly, Montana has no right to claim it is entitled to the delivery of water from Wyoming in excess of what it applied to beneficial use prior to 1950.

V. Montana's wasteful practices preclude any recovery in this case.

Wyoming has the burden of proving the affirmative defense of waste, although in this case waste is self-evident from Montana's practice of bypassing water for non-beneficial uses. *See Ready Mixed Concrete Co. in Adams Cnty. v. Farmers Res. and Irrig. Co.*, 115 P.3d 638, 645 n.4 (Colo. 2005) (en banc) ("Wasting water by diverting it

when not needed for beneficial use, or running more water than is reasonably needed for application to beneficial use, is 'waste.' "); *Lower Colo. River Auth. v. Texas Dept. of Water Res.*, 689 S.W.2d 873, 882 (Tex. 1985) ("No person is granted the right to waste water by not using it."). Montana wasted significant amounts of water in 2004 and 2006 during both the winter and summer months by bypassing and releasing excess amounts through the Tongue River Reservoir. Those amounts bypassed through the reservoir during the winter and those amounts passing the gauge at Miles City in the summer are not in dispute, and they dwarf the amounts claimed to have been used by post-1950 appropriators in Wyoming. *See* Ex. M6 at Table 3. Until Montana ceases these wasteful practices and puts the water available in the Tongue River to beneficial use, it cannot maintain an action against Wyoming. If, as it has in the past, Montana chooses not to put water to beneficial use, that is its right, but it cannot then turn to Wyoming and demand more water. Accordingly, the Court should dismiss Montana's claims, not only with respect to the Tongue River Reservoir, but in their entirety.

UNMET PRE-1950 DIRECT FLOW DEMAND IN MONTANA

I. Montana failed to show actual unmet direct flow demand after the call dates.

The Court has ruled unequivocally that the Compact does not entitle Montana to a specific quantity of water. *Montana,* 131 S. Ct. at 1777-79. Rather, the Compact provides that 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*, 428 at 654 (N.M. 1967) (articulating the foundational principle of the doctrine that an appropriator's right is limited to his actual

need); *Quigley*, 290 P. at 268 (Mont. 1930) ("Whenever the owners of the superior water rights . . . have no use for the water, or are not making use of it for a useful and beneficial purpose, it is the right of the [junior appropriator] to use the same by virtue of his junior appropriation."). Consistent with the doctrine of appropriation, "Wyoming does not need to provide water to Montana pursuant to Article V(A) of the Compact, and is therefore not liable under the Compact for failure to do so, if Montana did not need the water for actual beneficial use under pre-1950 appropriative rights." *Mem. Op. of the Special Master on Wyoming's Mot. for Summ. J.* at 31 (Sept. 16, 2013). *See also Tucker*, 250 P. at 15. Thus, when Montana makes a call on Wyoming, Wyoming has a right to expect that the call will be based on actual, as opposed to theoretical, demand.

Montana had both the burden and the opportunity to collect the necessary data to demonstrate a true shortage both before and after this suit was filed, and it failed to do so. Montana attempted to show shortage through the testimony of some of its farmers. However, none of these farmers testified about a specific shortage tied to the call dates. While Mr. Hamilton, Mr. Hirsch, Mr. Nance, Mr. Hayes, and Mr. Muggli testified generally about times of shortage during the 2000s, none of their testimony demonstrated that any one of them was short on the specific call dates or on any specific date thereafter. Nowhere in the testimony of these, or any other, witnesses presented at trial will the Court find a statement that on May 18, 2004, at a specific headgate, a specific irrigator, was short a specific amount of water. As *Tucker* aptly demonstrates, it is not impossible or unreasonable for the Court to expect that a plaintiff prove a shortage exists at his point

of diversion at a particular time and that he could have and would have put that water to beneficial use if it had been available. *Tucker*, 250 P. at 15.

Instead of presenting evidence that would prove an actual unmet contemporaneous demand, Montana relied on the assumption that showing a flow at the state line was good enough. In Montana, rather than making calls, irrigators along the Tongue River are simply informed that they have been switched to storage water without any interruption in diversions. Tr. Vol. 7 at 1439, 1504-5. However, the switch to storage water is not based on demonstrated unmet demand. Instead, the reservoir operator, Mr. Hayes assumes that when the flow at the state line drops below 200 cfs that only the first two direct flow rights are satisfied. Tr. Vol. 7 at 1438-39. He does so without attempting to ascertain the actual unmet demand of any particular water right. *Id.* This assumption is dubious at best because, for example, the T & Y Irrigation District often does not use its full appropriation. Ex. W3 at 15 (showing actual diversions substantially less than the paper right). While this practice is well established in Montana, reliance on the practice as proof in this case makes it impossible to determine when and where a true direct flow shortage occurred at any time in the past.

II. The water commissioners did not demonstrate actual unmet demand.

Unmet demand in Montana also cannot be gleaned from the available records or the activities of the Montana water commissioners. Before 2001, the Water Users Association did not keep good records of the water that it was delivering to its shareholders. Tr. Vol. 7 at 1501. And the records of the Water Users Association did not get any better after 2001. Instead, records were kept by the various individual water

commissioners. These records are incomplete, and quite frankly, a mess. Tr. Vol. 15 at 3407, 3410, 3413-14; Tr. Vol. 16 at 3611. It is impossible for Court to review these records and fairly reconstruct what was happening on the Tongue River in 2004 and 2006. What the Court can tell from the incomplete records of the water commissioners is that the natural flow of the Tongue River is chronically under-counted. Tr. Vol. 17 at 3952-60. And there are a number of important activities inherent in a properly functioning regulatory system that the water commissioners do not yet perform.

For example, the water commissioners did not regulate the tributaries for the benefit of the seniors on the mainstem. Tr. Vol. 15 at 3425; Tr. Vol. 16 at 3564, 3611. They also did not calculate the transit loss associated with direct flows between the state line and particular diversions. Tr. Vol. 15 at 3432. They have no responsibility for ensuring that water is put to beneficial use. Tr. Vol. 15 at 3295. While acknowledging that some irrigation occurs on the Northern Cheyenne Indian Reservation, they did not attempt to ascertain what water was being used there. Tr. Vol. 15 at 3425. Most importantly, they did not make any actual changes to diversions based on changes in the direct flow of the river. Tr. Vol. 16 at 3546. This is true even when the T & Y Canal was taking less than its full appropriation. Tr. Vol. 16 at 3565. In fact, they generally did not even measure changes in flow. Tr. Vol. 16 at 3557-58. Mr. Roberts, who is responsible for training the Montana water commissioners, agreed that because actual irrigation practices can affect who has the right to water at any given time, the water commissioners need to be aware of those practices to do their job properly. Tr. Vol. 15 at 3281. But the evidence shows that they were not.

While the water commissioners were charged with ensuring that specific amounts of water stored in the Tongue River Reservoir were delivered to specific irrigators, there are almost no records of reservoir orders. In fact, it appears from Mr. Muggli's testimony that calls ordering reservoir water are not made consistently, and often, Mr. Hayes calls irrigators and simply informs them they are using stored water. Tr. Vol. 17 at 3964-65. Those records that do exist make little sense as they show reservoir orders being made at times when the natural flow of the river is well above what is necessary to meet even the paper demands on the river. Tr. Vol. 16 at 3551-54.

The water commissioners also took no account of return flows which are likely to play an important role in such a long river system. Tr. Vol. 15 at 3424; Tr. Vol. 16 at 3563, 3610-11. And if Mr. Muggli's empirical test is any indication, return flows may be nearly immediate. Tr. Vol. 3992-95. Unfortunately, the water commissioner training manual in effect during the years in issue did not even address return flows. Tr. Vol. 15 at 3277. Mr. Roberts acknowledged that it would be important for the water commissioners to know how much water is returning to the stream as return flows in order to be in a position to assess how much water is available for appropriation at any point in the river. Tr. Vol. 15 at 3281-82, 3288-89. And yet the Court has no idea how return flows in the river affected demand after the call dates, because the water commissioners were not asked to undertake this task in the performance of their duties.

The water commissioners' records contain other inexplicable entries that undermine any confidence the Court could summon that their work reflects actual unmet demand. For example, in 2006 the water commissioner records indicate that the T & Y

Canal diverted 1,200 acre-feet of water in excess of the amount it had called for and in excess of its contracted amount. Tr. Vol. 16 at 3559-63, 3619-20; Ex. M394. If the water commissioners were performing their functions properly an excess of this magnitude should be impossible.

Wyoming has no doubt that the Montana water commissioners diligently performed the tasks assigned to them in the manner they were trained. As time goes on and they exert more comprehensive management over the river, the water commissioners will be in a position to certify that a present unmet demand exists at particular diversions in Montana. But they were not there in 2004 and 2006 and the evidence before the Court about the activities of the water commissioners is insufficient to establish that there was an actual shortage to a particular pre-1950 appropriation at the time the calls were made or at specific times thereafter.

III. Mr. Book's demand model is not an acceptable substitute for proof of actual unmet demand.

Recognizing that neither its presumption related to state line flows nor the activities of the water commissioners would satisfy its burden of proving an actual shortage to pre-1950 appropriations, Montana asked Mr. Book to create a demand model as a substitute for proof of actual unmet demand. As instructed, Mr. Book created a model in which he attempted to identify the flow necessary to supply Montana's pre-1950 direct flow demands during each month of the irrigation season if there was full demand. Tr. Vol. 1 at 120-21, 129; Ex. M5 at Table 5. However, Mr. Book's

methodology does not reliably predict actual unmet demand, and therefore, cannot satisfy Montana's burden of proof.

Mr. Book's demand model suffers from a host of deficiencies that impact its ability to reliably predict real shortages to pre-1950 appropriations in Montana. First, the demand model is based on acreage from county surveys conducted in the 1950s even though the acreage actually irrigated differs substantially from the amounts reported in the county surveys. Tr. Vol. 2 at 309-11; Ex. M6 App. A (difference between tan and stippled areas). Second, the model reflects demand as if every pre-1950 water right holder was at all times using as much water as the authorized flow rate in his water right. Tr. Vol. 2 at 313-14. At the same time the model attempts to show the amount of water that pre-1950 users in Montana can demand, it also makes an adjustment for what they might demand in each month. Tr. Vol. 2 at 372-73. Thus, the model shows neither the precise amount that could be demanded nor the precise amount actually being demanded at any point in time. Tr. Vol. 2 at 373. Moreover, Mr. Book's model estimated return flows in Montana at much slower rates than the rates published by other researchers and well slower than the rates he applied in Wyoming. Tr. Vol. 2 at 320-22 and Ex. W3 at 20. Other elements of the demand model that adversely affect its ability to accurately predict actual demand were outlined in detail by Mr. Hinckley in his report. Ex. W3 at 13-27. Accordingly, Mr. Book's demand model cannot serve as a surrogate for proof of actual unmet demand.

In fact, even Mr. Book agreed that there are better ways to assess demand. Tr. Vol. 2 at 319-20. Of course, "[t]he obvious alternative available to reconcile competing

water demand in a prior-appropriation environment is a contemporaneous call for priority regulation." Ex. W3 at 26. As Mr. Hinckley explained, "[t]hat is a real-time statement of shortage by the actual appropriators, integrating a host of significantly-variable factors related to water supply, irrigation-management, cropping patterns, crop status, weather, habits, labor availability, power costs, and water quality, to produce a clear statement of need and desire for direct flow diversion within the parameters of an accepted water right." *Id.* at 26-27.

IV. Montana failed to prove that its pre-1950 rights were short of water at the time the calls were made.

Montana did not prove the first element of its claim for breach of contract either at the reservoir or at any other diversion. As it relates to the alleged direct flow shortages, this failure is highlighted by the answer to the Special Master's question "what was the amount of the shortage?" CMO 14 at 4. The only answer Montana offers to this question is that all the irrigators in Montana were short to the extent of their entire paper water rights all the time. This plainly implausible answer is born of necessity as a result of Montana's failure to require, record, and respond to calls in conformity with the doctrine of appropriation. In the end, this answer is insufficient to establish that Montana's pre-1950 appropriations were actually unsatisfied at specific times. Absent such proof Montana's claims should be dismissed.

INTRASTATE REMEDIES

Requiring appropriate intrastate remedies in Montana before requiring regulation in Wyoming is consistent with the practical reality of a properly functioning regulatory

system. In fact, the first place a regulator must go is to the calling right to ensure that the right is actually short of water and is taking all available water. Tr. Vol. 8 at 1696-97, 1716. Once a true shortage is confirmed, then the regulator can proceed to curtail diversions in reverse order of priority. That did not happen in Montana in 2004 or 2006, and the Court can have no confidence that any water made available by regulation in Wyoming would not have gone to lands in Montana irrigating under post-1950 appropriations.

Instead of regulating based on actual demand in response to calls, Montana operated on assumptions based on paper rights. The water commissioners, as conscientious as they all appear to be, had little or no information about water rights other than the reservoir contract rights. There are approximately 4,000 acres of land irrigated with post-1950 water rights between the state line and the T&Y Canal, and there is no practical way for the Court to discern whether these acres were properly regulated in 2004 and 2006 at the time the calls were made. Tr. Vol. 2 at 302-3. For their part, water commissioners could not even explain why they recorded only 32 irrigators receiving contract water in 2004, but listed 42 irrigators in 2006. Tr. Vol. 15 at 3416-17. Mr. Book made no attempt to evaluate the effects of those post-1950 uses on pre-1950 uses in Montana. Tr. Vol. 2 at 302-4; Ex. M6 App. A (green polygons reflect lands irrigated under post-1950 water rights). Similarly, he could not say whether any of these parcels were or were not receiving water after the call dates in 2004 and 2006. Tr. Vol. 2 at 359.

The Court cannot presume that Montana could not have solved some or all of a pre-1950 shortage through regulation of its post-1950 rights. It falls on Montana to

provide evidence showing as much, and it did not do so. In the absence of such evidence, Montana's claims should be dismissed.

Wyoming does not contend that Montana's intrastate regulation must be perfect, but it must be such that the parties and the Court can be reasonably certain that any water entering Montana as a result of regulation in Wyoming will not end up on lands irrigated under post-1950 rights. Comprehensive regulation by a water commissioner fully empowered by a court, that correctly differentiates between natural flow and storage, and that is fully informed of the contract rights to storage water and the direct flow rights, even those that post-date the 1914 Miles City Decree, would satisfy this burden. And it would help if they kept an accurate record of their observations and actions.

NOTICE

I. Standards governing notice.

"Montana bears the burden of proof at trial of proving that it provided adequate notice, the timing of that notice, and if relevant, that it acted with due diligence in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies." *Mem. Op. Regarding Wyoming's Mot. for Part. Summ. J. (Montana's Supplemental Evidence)* at 14 (Dec. 22, 2012). Thus, Montana's evidence must show that "(1) an official with appropriate authority in the DNRC, (2) notified Wyoming that (3) pre-1950 appropriations in Montana were short of water **and** (4) requested Wyoming to take action to provide more water to Montana in compliance with its obligations under the compact." *Mem. Op. of the Special Master on Wyoming's Renewed Mot. for Part. Summ. J. (Notice Requirement for Damages)* at 18 (Sept. 28, 2012) (emphasis added). The key element of

any call is the demand that the junior appropriator curtail his diversions for the benefit of the senior. The absence of such a demand by the downstream senior is decisive. *Worley,* 428 P.2d at 654-55.

II. Mr. Fritz's inquiry to Mr. Christopulos in 1981 was not a call.

Between the execution of the Compact in 1950 and 1981, there is no record that Montana ever made a call on Wyoming. On April 30, 1981, Gary Fritz, the Administrator of Montana's Water Resource Division left a telephone message for Wyoming State Engineer, George Christopulos. Ex. M136 at 4. In it, he explained that the Tongue River Reservoir was low due to a safety problem, and he was "wondering if the junior to 1950 rights in Wyoming can be regulated to provide water to supply Tongue River Res[ervoir]." *Id.* On May 7, 1981, Mr. Christopulos spoke with Mr. Fritz, and they discussed whether pre-1950 water rights in Wyoming junior to the Tongue River Reservoir right could be regulated for the benefit of the reservoir. *Id.* at 11. They also discussed whether post-1950 rights in Wyoming could be regulated for the benefit of the reservoir. *Id.* Mr. Christopulos told Mr. Fritz he wanted to look into the matter and would get back with him the following week. *Id.*

On May 14, 1981, Mr. Fritz spoke with Mr. Buyok from the Wyoming State Engineer's office who explained that regulation of either post-1939 rights or post-1950 rights in Wyoming would not result in very much water for Montana. *Id.* at 7. "Mr. Fritz then asked if [Wyoming] would be willing to regulate the post 39 Wyoming rights and [Mr. Buyok] told him we probably wouldn't." *Id.* "[Mr. Fritz] also asked if [Wyoming's] position would be the same for the post 50 rights as it is for pre 50 rights."

Id. Mr. Buyok said that he thought it would but that Mr. Fritz should talk to Mr. Christopulos. *Id.* Mr. Buyok advised Mr. Fritz that Mr. Christopulos would call him to discuss the matter, but there is no written record of this conversation. *Id.*

Whatever the content of any subsequent discussions between Mr. Fritz and Mr. Christopulos, Montana's concern over the possibility that the reservoir might not fill in 1981 proved to be unfounded. The 1982 Annual Report of the Commission described the situation in the spring of 1981 as follows:

> Montana voiced its concern that during low-flow years Wyoming needs to regulate its post-1950 water rights more carefully so that Montana can use its pre-1950 water. Montana, in turn, must notify Wyoming when it is not able to obtain its pre-1950 water. A situation developed during the spring of 1981 in which Montana was **almost** unable to fill the Tongue River Reservoir even though it has a pre-1950 right.

Ex. J32 at IV (emphasis added). Thus, the injury Montana feared did not come to pass, and Montana acknowledged its duty to place a call on the river when its pre-1950 rights were not being satisfied. *Id.* Moreover, the 1982 Annual Report demonstrates that even when a call was contemplated, but not actually made, the event was memorialized in the Annual Report.

Mr. Fritz's hypothetical inquiry to Mr. Christopulos was not a call. Mr. Fritz did not request or demand that Wyoming take any action for the benefit of Montana; rather, he inquired if Wyoming would take action should the Tongue River Reservoir fail to fill. The reservoir filled and that was the end of it. As there was no call, there can be no liability for 1981. Moreover, there was no testimony establishing any of the other

essential elements of Montana's breach of contract claim for 1981. Accordingly, any claim related to 1981 should be dismissed.[10]

III. Montana did not make calls on Wyoming before 2004.

Montana claims that numerous officials made calls on Wyoming in 1987 through 1989 and 2000 through 2003. However, the testimony of Montana's witnesses reveals that, to the extent they communicated with Wyoming officials at all, they did so outside the irrigation season and they did not make a demand on Wyoming to take action. By contrast, Wyoming officials emphatically confirmed that no one from Montana ever made a call on Wyoming before 2004. Most compellingly, there are no documents evidencing these alleged calls, and they are not reflected in the Annual Reports of the Compact Commission. Montana's claims are simply incredible and should be rejected.

In addition to 1981, Montana asserts that Mr. Fritz was likely an individual who made calls on Wyoming in other years. Mr. Fritz does not recall calling on Wyoming for water in any year during his service as Administrator of the Water Resources Division from 1979 through 1996. Tr. Vol. 5 at 1063 and 1086. While Mr. Fritz's memory may be limited, he acknowledged it could be refreshed, but Montana could not show him a document evidencing that he made a call on Wyoming between 1982 and 1996.

Mr. Fritz was Montana's Compact Commissioner during the years 1987 through 1989, and had he made a call on Wyoming it would likely have been reflected in the

[10] Montana's claim of breach in 1981 should also be dismissed under the doctrine of laches, but in the interest of brevity, that straightforward argument will not be fully set forth herein. *See WY's Mot. for Leave to Amend its Answer to Include the Defenses of Laches and Mitigation of Damages* at 6-8 (June 15, 2012).

Annual Reports of the Compact Commission. However, those reports make no mention of calls by Montana on Wyoming. Exs. J37, J38 and J39. In fact, the 1987 Annual Report provided that "[n]o incidents during the year required administration of the water in accordance with the provisions of the Compact. At the present level of water-resources development, the Commission believes that a program of intensive water-use regulations is not necessary." Ex. J37 at 2. While the 1988 and 1989 Annual Reports provided that "[n]o diversions were regulated by the Commission during the year. The Commissioners considered the need to develop procedures to administer water in accordance with the provisions of the Compact." Ex. J38 at 2; Ex. J39 at 2.

Montana also identified Mr. Kerbel as a witness who may have made calls on Wyoming, but he admitted he never made a call on Wyoming. Mr. Kerbel's communications with Wyoming officials over the years were largely with his counterparts in Wyoming, Mr. Whitaker, Mr. LoGuidice, and Mr. Knapp. Tr. Vol. 4 at 950-954. Those conversations would often happen during Compact Commission annual meetings, although he would also speak with them at times during the summer months. *Id.* During these conversations, he never demanded that Wyoming take any action. Tr. Vol. 4 at 957. He did not really remember speaking with his counterparts prior to the 1990s, but if he did he would not have been asking them for more water. Tr. Vol. 4 at 957-959; 973. His communications with his counterparts in Wyoming were informal and largely consisted of both parties complaining to each other about how dry things were in each state. Tr. Vol. 4 at 959-60. He explained that he was not "making a call on behalf of anything" in his communications with officials from Wyoming. Tr. Vol. 4 at 960.

Ultimately, he agreed that things changed between the states in 2004 when Montana really made a call on Wyoming for water. Tr. Vol. 4 at 971.

Like Mr. Kerbel, Mr. Moy was identified as a person who made calls on Wyoming prior to 2004. Mr. Moy's communications with Wyoming officials generally were not made during the irrigation season. When not led by counsel, Mr. Moy testified fairly consistently that his conversations with Wyoming officials typically occurred during Commission and Technical meetings outside the irrigation season. Tr. Vol. 12 at 2657-63, 2700-01. Moreover, while Mr. Moy said that he orally requested water from Wyoming before 2004 and that these requests were no different than the subsequent written calls, he let slip during his testimony that he never actually made any such calls. Tr. Vol. 12 at 2627-28. In response to a question whether he had explained the situation to Wyoming in 2001 and 2002, he said "[y]es. But it got to a point -- yes. But it got to a point where asking Wyoming to provide Montana pre-'50 water was like pushing water uphill. It was -- they had no desire to do anything. **And it wasn't until we started making a call that we actually laid the foundation.**" Tr. Vol. 12 at 2576 (emphasis added). Similarly, when asked if calls were reflected in the Annual Reports, Mr. Moy said, "[t]hey were never actually reflected and put in minutes because a call at that time was felt -- a true call -- no, I do not believe they were in the minutes." Tr. Vol. 12 at 2643. Mr. Moy caught himself, but the import of his hesitation and pivot is clear. He understood perfectly well that his communications prior to 2004 would not and could not reasonably be construed by Wyoming officials as a call on the river. And he testified that he never used the word "call" in those communications. Tr. Vol. 12 at 2644, 2704. It

seems odd indeed that he would not use generally accepted terminology if he was attempting to make a call on Wyoming. And odder still that he never documented his alleged communications. Tr. Vol. 12 at 2676.

Finally, Mr. Stults was identified as person who made calls on Wyoming prior to 2004. Mr. Stults served as the Division Administrator for the Water Resources Division of the DNRC from 1997 through 2006. Tr. Vol. 3 at 653. He explained that he had concerns about water use in Wyoming between 2000 and 2004. Tr. Vol. 3 at 669. He would meet with Wyoming officials during various meetings and tours five or six times a year. Tr. Vol. 3 at 671. And he recalls talking about needing more water in Montana at compact commission meetings after the irrigation season. Tr. Vol. 3 at 685 and 781. These communications with Wyoming officials were in person, and he does not recall phone calls or emails with Wyoming officials. Tr. Vol. 3 at 691-92.

In his communications with Wyoming prior to 2004, Mr. Stults explained that he wanted to set up a new system where the states would manage the basin hydrologically rather than strictly through the doctrine of appropriation. Tr. Vol. 3 at 686 and Vol. 4 at 781-83. He acknowledged that the system he was interested in pursuing was different than a demand on Wyoming to take action under the Compact.[11] Tr. Vol. 4 at 783. Ultimately, Wyoming rejected Mr. Stults' offer to change the way the Compact works. Tr. Vol. 4 at 883; Ex. W67.

[11] Montana asserts without compunction that Mr. Stults' offer to create a new system of administration wholly at odds with the Compact is tantamount to a call under the doctrine of appropriation. Tr. Vol. 3 at 700.

Before 2004, Mr. Stults did not communicate to Wyoming that it should release more water to Montana in those terms or "in so many words." Tr. Vol. 3 at 687 and 713. He testified:

> Q. In your conversations with the folks from Wyoming, during this period of time before 2004, isn't it true that you were not seeking to enforce the Yellowstone River Compact but rather to work out a solution informally to maximize the resource?
>
> A. Broadly stated, yes.
>
> Q. Okay. And, in fact, you avoided using certain terms like "call" in your communications with Wyoming before 2004, didn't you?
>
> A. I -- I don't know if I ever used the word "call" in conversations saying I'd like to avoid a call or something like that. But I did -- I never explicitly said Montana is making a call for water.
>
> Q. And you never explicitly said Montana is demanding that you curtail your diversions, did you?
>
> A. Not that phrase.

Tr. Vol. 4 at 780-81.

As with the other Montana witnesses, Mr. Stults could point to no document evidencing that he had made a call on Wyoming for water prior to 2004. However, he did confirm that when he signed off on the annual reports of the Compact Commission, he made an attempt to ensure that they accurately reflected the proceedings of the Commission. Tr. Vol. 4 at 786. None of the reports created for the years 2000 through 2003 contain any reference to a call by Montana on Wyoming. Tr. Vol. 4 at 788-95, Exs. J50 through J53. By contrast, when Montana did make a call on Wyoming in 2004, Mr.

Stults made sure that the call was reflected in the annual report. Tr. Vol. 4 at 795; Ex. M161.

Montana's witnesses only testified that their communications with Wyoming officials resembled calls under the Compact in response to the leading questions of counsel. For example, when Mr. Dalby spontaneously testified that Wyoming had been unresponsive to Montana's two calls, counsel for Montana interrupted him and asked if he really meant four or more calls. Tr. Vol. 2 at 428. On cross examination, however, Mr. Dalby admitted that he was not personally aware of any calls made on Wyoming prior to 2004. Tr. Vol. 2 at 432. When "unfettered by the leading questions of . . . counsel" Mr. Stults, Mr. Moy, Mr. Kerbel, and Mr. Fritz failed to recount any communication with Wyoming officials prior to 2004 that can fairly be described as a call on the river. *See Kansas v. Nebraska*, No. 126 Original, Report of the Special Master at 31 (Nov. 15, 2013) (discounting credibility of testimony elicited through leading questions of counsel for Kansas).

By contrast, the testimony of the witnesses from Wyoming uniformly and unequivocally established that Montana made no calls on Wyoming prior to 2004. Mr. Whitaker served as the Division II Superintendent during every year in issue, and he flatly stated that he never received a call from anyone in Montana prior to 2004. Tr. Vol. 8 at 1773, 1786-88, 1795-1802. Similarly, the current Superintendent, Mr. LoGuidice, testified that he never once had a communication with anyone from Montana that he construed as a call. Tr. Vol. 9 at 2002-3. Both of these men are well equipped to recognize a call.

The former Wyoming State Engineer, Mr. Fassett, testified that no one from Montana ever made a call, request, or demand on Wyoming for water during his tenure as State Engineer. Tr. Vol. 18 at 4206-8, 4325-26, 4330. And he was adamant that he would remember if a call had been made during his tenure. *Id.* He explained that during his time as State Engineer, Wyoming and Montana were engaged on a number of issues related to the Compact, but the active administration of Article V(A) in response to calls was not one of them. Tr. Vol. 18 at 4180-98. His interactions with Montana officials typically occurred during meetings of the Compact Commission outside the irrigation season. Tr. Vol. 18 at 4201, 4331-32.

According to Mr. Fassett, if the State of Montana had made a call on Wyoming "[i]t would be a huge deal." Tr. Vol. 18 at 4205. Accordingly, he would expect the Annual Report of the Compact Commission to reflect that a call had been made. Tr. Vol. 18 at 4205-6. If a call had been made to one of his employees, like Mr. Whitaker or Ms. Lowry, he would expect that they would report that to him immediately. Tr. Vol. 18 at 4209. He received no such reports. *Id.* Because a call would have been "a huge deal," Mr. Fassett would expect that such event would have triggered meetings, investigations, and briefings to the Governor and legislators, and the event would have been memorialized in documentation by both states. Tr. Vol. 18 at 4210, 4334. Nothing of the sort occurred during his tenure.

The current State Engineer, Mr. Tyrrell, also testified unequivocally that no Montana water official made a request that Wyoming turn off any Wyoming water rights for the benefit of Montana before 2004. Tr. Vol. 22 at 5174-75, 5269-70. Mr. Tyrrell is

confident that, if Montana had made a call, it would have been reflected in the Annual Report of the Compact Commission. Tr. Vol. 22 at 5168-69.

Similarly, Ms. Lowry testified that Montana never made a call or demand for water on Wyoming before 2004. Tr. Vol. 24 at 4861, 4889, 4936. Her communications with Montana officials also tended to be during official meetings which were not during the irrigation season. Tr. Vol. 21 at 4853-54. Like Mr. Tyrrell and Mr. Fassett, she testified that the Annual Reports accurately reflected the proceedings of the Compact Commission, and if a call had been made it would have been reflected in those reports. Tr. Vol. 21 at 4855.

In addition to the Annual Reports of the Compact Commission, minutes of the meetings of the Technical Committee were kept, often by Ms. Lowry. Those minutes reflect that at the Technical Committee meeting on April 14, 2004, Mr. Kerbel "raised the issue of how the compact could be administered if Montana made a call for the 9369 acre-feet of post-1950 water, if Montana could not fill Tongue River Reservoir this Spring." Ex. M207. This was the first time Ms. Lowry had ever been asked that question by someone from Montana, and it was posed as a hypothetical not a request for action. Tr. Vol. 21 at 4883. Thus, a written record was made even when a Montana official just wondered what would happen if Montana made a call.

There can be no serious dispute that, for the years 1987 through 1989 and 2000 through 2003, there is not a single piece of paper reflecting that Montana made a call on Wyoming. Tr. Vol. 12 at 2643; 2676. There are no communications between the states or internal documents created by either state evidencing that Montana called on

Wyoming to regulate diversions for the benefit of Montana pre-1950 rights during the irrigation season or otherwise. It is more than just improbable that such an important event would not be memorialized by someone. Both the current and former Wyoming State Engineers testified that an interstate call would be a significant event that they would expect would generate a flood of documents. And Mr. Davis, Montana's current Compact Commissioner, testified that he would expect there to be communications and authorizations within the DNRC and writings reflecting that a call had been made. Tr. Vol. 3 at 555-56.

Faced with a similarly dubious claim, in which not a single piece of paper supported a claim made by Kansas, Special Master Kayatta's remarks in *Kansas v. Nebraska* are equally appropriate here: "Simply put, the contention is not credible. Indeed, this particular variant of the contention is belied by its provenance, having been raised at the very last minute, long after it would have repeatedly been raised had it truly reflected Kansas' state of mind." *Kansas v. Nebraska*, No. 126 Original, Report of the Special Master at 66 (Nov. 15, 2013) (noting that the lack of contemporaneous documents undermined the credibility of the claim). If truly made, calls would have been repeatedly raised and documented by both Montana and Wyoming. In fact, that is exactly what happened in 2004 and 2006 when calls were made, and it is worth looking in detail at the sequence of events surrounding Montana's two actual calls.

While Montana officials suspected that Wyoming was wrongfully using water, it was not until 2004 that Montana felt that it had gathered enough information to act. Tr.

Vol. 4 at 791-93, 842.[12] In preparation for making the first call on Wyoming, Governor Martz was briefed and she specifically authorized Mr. Stults to make a call on Wyoming. Ex. J64 at 2. Mr. Stults had never received similar authorization before 2004. Tr. Vol. 4 at 816. Mr. Stults and his staff also prepared talking points for Governor Martz about the call. Tr. Vol. 4 at 813-814; Ex. W310. No similar talking points were prepared prior to 2004. Tr. Vol. 4 at 814. Mr. Stults also called Mr. Tyrrell and advised him that Montana would be sending a letter "clarifying its perspective" on the Compact. Tr. Vol. 4 at 818-19.

On May 18, 2004, Montana sent Wyoming a letter calling for Wyoming to regulate its water use under the Compact. Ex. J64. Mr. Stults agreed that this communication was different in kind from the statements he had made to Wyoming in prior years. Tr. Vol. 4 at 820. Instead of trying to explore an alternative scheme for management of the basin, Montana was now calling for water "under the terms of the compact." Ex. J64 at 2. Even so, Montana misconstrued its rights under Compact, and demanded that Wyoming curtail "pre-1950 junior water in Wyoming to satisfy our senior pre-1950 water on the Tongue and Powder Rivers." *Id.* Similarly, Montana called on Wyoming to release water stored under post-1950 priorities regardless of whether the water had been stored in priority. *Id.* Wyoming was not obligated to take either of these actions, and it was not obligated to take a different action that Montana had not requested.

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[12] Montana's information, even at that time, indicated that there were only a very small number of post-1950 rights in Wyoming at issue. Ex. M434 at 4 (showing approximately 241 irrigated acres with post-Compact rights in Wyoming).

Mr. Stults's letter was accompanied by an affidavit from Mr. Hayes. Ex. J64 at 4. The letter was not supported by an affidavit from a water commissioner or any other official with responsibility for ensuring that post-1950 rights were appropriately regulated.[13] Moreover, while Mr. Stults talked in the letter about rights not being met, he provided no evidence of an actual contemporaneous shortage of water for any particular right. Instead, the letter simply assumed a constant full demand by all paper water rights on the river. *Id.* at 1.

On May 24, 2004, Mr. Tyrrell responded to the call letter. Ex. J65. Mr. Tyrrell explained that, at that time, Wyoming had regulated many of its own pre-1950 rights for the benefit of a few very early rights. *Id.* at 1. Nevertheless, he requested that Mr. Whitaker and his staff visit each reservoir in both basins and verify the contents of each to determine how much had been stored in the current water year under their various priority dates. *Id.* Mr. Tyrrell requested similar information from Montana and suggested that he and Mr. Stults meet to discuss the situation. *Id.* at 2. Both parties recognized that they needed more information about the other's water use and each requested data from the other. *See, e.g.*, Exs. J66 and J67. The parties met on June 10, 2004, and held a conference call on June 30, 2004, to discuss the situation and how to proceed. Tr. Vol. 21 at 4890, 4902-3; Tr. Vol. 22 at 5194; Ex. W324. The parties planned for the Governors of both states to meet and they made plans for Montana officials to meet with Wyoming officials on August 2, 2004, although that meeting did

[13] In fact, it appears from Mr. Hayes' affidavit that he had recently refused to provide water that rightfully should have gone to the T&Y Irrigation District under its 1887 priority for the benefit of the 1939 Tongue River Reservoir right. Ex. J64 at 6 ¶11.

not occur. Tr. Vol. 21 at 4906-07; Tr. Vol. 22 at 5232. Mr. Tyrrell briefed the Governor of Wyoming after the June 10th meeting about the call and the status of discussions. Tr. Vol. 22 at 5194-95; Ex. M170.

There were a host of other actions, discussions, and documents created by both states after the call, and those were discussed in detail by Mr. Tyrrell. Tr. Vol. 21 at 5181-5240. Ms. Lowry also detailed her involvement in multiple meetings and phone calls with Mr. Tyrrell, Mr. Whitaker, and the water commissioners, including Mr. Knapp, after the 2004 call letter was received. Tr. Vol. 21 at 4886-87. She explained that activity related to the Compact was much more complicated and involved than it had ever been before 2004. Tr. Vol. 21 at 4921.

Unlike every prior year, the 2004 Annual Report of the Compact Commission reflected Montana's May 18, 2004, call. The Annual Report provided: "Montana specifically requested that Wyoming release post-1950 stored water so that pre-1950 users in Montana could satisfy their water rights." Ex. J54 at VIII. The Report also memorialized Wyoming's concern with the excessive releases from Tongue River Reservoir. *Id.* "Wyoming questioned the accounting of Tongue River Reservoir releases toward the filling of the reservoir. The point was made that, in Wyoming, if an appropriator chooses to release water from a reservoir during the normal storage period, that amount of water is accounted against the fill of that reservoir." *Id.* at IX.

Even after the end of the 2004 water year, documentation evidencing Montana's call was still being created. As a result of the call, Mr. Tyrrell submitted a budget request in 2005 for $200,000.00 to fund a joint water use study with the State of Montana to help

assess how to properly allocate water under the Compact. Tr. Vol. 22 at 5246-5249; Ex. W145. The Wyoming legislature approved the budget request during the 2006 legislative session. Tr. Vol. 22 at 5249. However, as a result of Montana's decision to file suit, the joint study was never initiated. Tr. Vol. 22 at 5257-58.

A similar series of events occurred when Montana made its second call in 2006. On July 28, 2006, Montana, through Mr. Stults, sent its second call letter to Wyoming. Ex. J68. Since 2004, Montana's understanding of its rights under the Compact had evolved, and this time Montana requested that Wyoming curtail its post-1950 diversions for the benefit of Montana's pre-1950 users. *Id.* at 1. Montana also attached the affidavit of Mr. Kepper, one of the water commissioners appointed on the Tongue River. *Id.* at 10.

On August 9, 2006, Mr. Tyrrell responded to Montana's second call letter. Ex. J69. He again explained that many pre-1950 rights in Wyoming were already being curtailed for the benefit of the earliest rights on the river. *Id.* at 1. In addition, Mr. Tyrrell again expressed his concerns about the operation of Tongue River Reservoir which led to its failure to fill to its physical capacity. Mr. Tyrrell stated:

> I find your claimed inability to fill Tongue River Reservoir confusing, as records show Montana released excess amounts from the reservoir during the winter months that would have easily provided the necessary water to fill it. Your own website records show that Tongue River Reservoir was filled to 97 percent of capacity as recently as July 9, 2006. The additional 2,000 (+/-) acre feet of water needed to completely fill would have been there had Montana judiciously managed the reservoir. Wyoming cannot manage the water once it crosses the state line; only Montana can.

Ex. J69 at 2.[14] In response to Mr. Tyrrell's concerns, Ms. Sexton, the new Montana Compact Commissioner, replied "you need not concern yourself with Montana's administration of the water to which it is entitled under the Yellowstone River Compact." Ex. J70 at 2.

There was a similar amount of activity in each state after the call in 2006, and those meetings, briefings, correspondence, and other documents were described in detail by Mr. Tyrrell. Tr. Vol. 22 at 5259-69. Of particular note, Montana's call was recorded in the Annual Report of the Compact Commission. In fact, at the December 2006 Commission meeting Ms. Sexton acknowledged that "[t]his was the second time that Montana made a call for water on Wyoming. A previous call was made in 2004." Ex. J56 at X; Tr. Vol. 1 at 52.

The flurry of well documented activity after Montana made its calls in 2004 and 2006 stands in stark contrast to the events of the preceding years. The complete absence of documentation, the admissions of Montana's witnesses, and the unequivocal testimony of Wyoming's witnesses make clear that the claims that calls were made before 2004 are little more than post hoc creations of this litigation belied by their provenance. It is readily apparent after the trial of this matter that no notice was given prior to 2004, and therefore, Montana's claims prior to 2004 should be dismissed.

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[14] Mr. Smith reported that the reservoir was about 6,000 acre-feet short of filling. Ex. J56 at X. The discrepancy does not detract from Mr. Tyrrell's point as Mr. Book acknowledges that Montana bypassed approximately 54,000 acre-feet of water between October 2005 and March 2006. Tr. Vol. 2 at 343; Ex. M5 Table 4-E.

There is no dispute that Montana did provide adequate notice to Wyoming on May 18, 2004, and July 28, 2006, but until those calls were made, Wyoming's post-1950 appropriators, like all junior appropriators, had a right to beneficially use water. *See, e.g., Quigley*, 290 P. 266 at 268. Calls are "intrinsic to the prior appropriation system" and a prerequisite to liability, and therefore, Wyoming cannot be held liable for any use under post-1950 appropriations before these dates. *See Mem. Op. of the Special Master on Wyoming's Renewed Mot. for Part. Summ. J. (Notice Requirement for Damages)* at 11 (Sept. 28, 2012); Tr. Final Pretrial Hearing at 45-47; *Worley,* 428 P.2d at 654-55 (the absence of such a demand by the downstream senior is decisive). Similarly, because calls are intrinsic to the prior appropriation system incorporated into the Compact, Montana cannot be excused from providing notice. Nor should it be. Montana acknowledged its obligation to call the river in 1982, and it did not to do so until 2004. That is the long and short of the notice issue.

IV. The Special Master's ruling regarding the form of notice should be reconsidered in light of the evidence introduced at trial.

When the Special Master first considered and confirmed that a call was a necessary part of a functioning prior appropriation system, he stated that "there is no reason (other than ease of proof) that oral notice would not have been adequate." *Mem. Op. of the Special Master on Wyoming's Mot. for Part. Summ. J. (Notice Requirement for Damages)* at 7 (Dec. 20, 2011). Because this ruling was made prior to trial, the Special Master did not have the benefit of the testimony of individuals with experience related to the form of interstate calls. Now that these individuals have testified, this ruling should

be reconsidered. Calls on the Yellowstone River system need to be in writing like other interstate calls between sovereigns.

While the Compact incorporates the doctrine of appropriation, a call between states is different than a call between two farmers. Tr. Vol. 18 at 4334. The only witnesses testifying at this trial with experience related to interstate calls, Mr. Fassett, Ms. Lowry, and Mr. Tyrrell, testified that such calls are typically and should be in writing. Mr. Fassett has received an interstate call on the North Platte River system, and it was in writing, as he would have expected. Tr. Vol. 18 at 4223-24. Ms. Lowry has considerable experience with interstate regulation, and she expects interstate calls to be made in writing at the highest levels, and not "over a cup of coffee." Tr. Vol. 21 at 4937-38. As she explained, "[t]he level of sophistication that occurs between, again, two sovereigns, two states, is very different than a water commissioner who has an ongoing relationship with their farmers and knows year to year when regulation might be called for. I think it's very different. And to expect that written documentation from one state to another seems the minimal that one would expect from one state to another." Tr. Vol. 21 at 5093. Mr. Tyrrell, who also has extensive experience on interstate streams is of the same opinion that a call between two sovereigns should be in writing. Tr. Vol. 22 at 5311-14.

Both states have allowed informal calls between irrigators and to hydrographers and water commissioners. An intrastate conversation among these individuals is often sufficient to initiate regulation. The same is not true of communications between states. Having given Montana the benefit of the doubt and every opportunity to show that it

made oral calls, now is the appropriate time to set the bar on notice at a level commensurate with the seriousness of the event. Calls between states ought to be in writing, the Compact surely demands at least this much, and the prior ruling allowing for oral notice ought to be revisited at this stage of the proceedings to eliminate disputes about the form of future calls.

POST-1950 USE IN WYOMING

I. Mr. Book's conclusions about post-1950 use in Wyoming are significantly overstated.

If the Court finds that Montana had established the first three elements of its claims, then Montana must prove that Wyoming appropriators continued to divert water under post-1950 appropriations after the calls were made. Accordingly, Wyoming's potential liability is necessarily limited to that portion of the year following the call. As with all the other elements of its case, Montana bears the burden of proving the amount of post-1950 use in Wyoming after the call dates. Absent specific proof of post-1950 use in Wyoming, Montana's claim must fail. *See, e.g.,* Restatement (Second) of Contracts § 352 (1981) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty."); *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 contract are subject to limitations of causation, certainty, and foreseeability. The damages clearly must be ascertainable in their nature and origin.").

Mr. Book attempts in his analysis to calculate depletions at the state line without regard to when that water was used in relation to the call dates. Exs. M5 at Table 12, M6 at Table 3, W2 at 7. Mr. Book made no attempt to differentiate between water used or stored after either call date. Tr. Vol. 2 at 361. As a result, Montana provided no evidence quantifying any alleged depletions after May 18, 2004, or July 28, 2006. Tr. Vol. 23 at 5411-13. Rather, the only limited evidence segregating pre- and post-call use came from Wyoming.

While Mr. Book did not ascertain when storage occurred in the Wyoming reservoirs, Mr. Knapp inspected the mountain reservoirs the day after the call in 2004. Tr. Vol. 2 at 286. Based on his observations, all reservoirs in Wyoming in the Cross Creek watershed were done storing by May 24, 2004. Tr. Vol. at 2128. After May 18, 2004, the only reservoirs in the Tongue River Basin in Wyoming that were storing water that would not have been consumed by senior downstream rights were Dome and Sawmill reservoirs. Tr. Vol. 10 at 2123, 2126-27, 2215-16; Ex. W40, W175, J61 pgs. 116 and 118; Tr. Vol. 15 at 3508-09. Because those reservoirs later filled, comparing the total capacity of those reservoirs to the amounts recorded by Mr. Knapp on May 19, 2004, reveals that Dome and Sawmill reservoirs stored 688 acre-feet of water after the date of Montana's call in 2004. Tr. Vol. 10 at 2218; Ex. W175. As for 2006, the observations of Mr. Knapp and Mr. Benzel reveal that no reservoir in the Tongue River Basin in Wyoming was storing after July 28, 2006. Tr. Vol. 10 at 2103, Ex. W41; Tr. Vol. 15 at 3509.

Turning to the claims that Wyoming irrigated post-1950 acreage during 2004 and 2006, there was no evidence from which the Court could fairly determine that the lands identified by Mr. Book were irrigated from the Tongue River after the call dates. After the call in 2006, Mr. Knapp did look for post-1950 rights diverting along the mainstem of the Tongue River, and he found none. Tr. Vol. 10 at 2161-62. He specifically looked at the Interstate Ditch and found the ditch to be receiving less than its pre-1950 appropriation. *Id.* For his part, Dr. Allen did not attempt to determine whether any of the specific parcels identified by Mr. Book were in fact irrigated during 2004 or 2006. Tr. Vol. 14 at 3164. And his work only indicates whether evapostranspiration (ET) took place at a particular location. Tr. Vol. 14 at 3165. METRIC does not distinguish between irrigation and other sources of ET, and accordingly, Dr. Allen had no opinion regarding whether any particular parcel of land had been irrigated at any given time. Tr. Vol. 14 at 3165-67. Similarly, Mr. Fritz offered no opinion regarding whether any of the parcels identified by Mr. Book had been irrigated after the call dates. Tr. Vol. 23 at 5412.

Mr. Fritz did take a hard look at the parcels identified by Mr. Book as irrigated during 2004 and 2006 and found that Mr. Book had a number of things wrong. Mr. Fritz found that a number of parcels Mr. Book originally identified as irrigated were not irrigated at all in either year. Ex. W2 at 73-88, Attach. 6 and 7. Mr. Fritz determined that several others were irrigated during those years but with CBM produced water and not water from the Tongue River. *Id.* Mr. Koltiska confirmed that the Koltiska and Koltiska/KN pump parcels received their water from the Powder River. Tr. Vol. 11 at 2497-2503. Ms. Ankney confirmed that her parcel, identified as the DeLapp parcel, was

irrigated with CBM water in 2004 and 2006. Tr. Vol. 20 at 4656-59. Mr. Pilch also confirmed that his parcels were irrigated with CBM water in 2004 and 2006. Tr. Vol. 18 at 4579-4598; 4541-47. For his part, Mr. Fisher explained that he only irrigated a small portion of the Addleman parcel in 2004 and did not irrigate at all in 2006. Tr. Vol. 20 at 4701-03. Mr. Fritz identified other disagreements with Mr. Book's analysis, and in his rebuttal report, Mr. Book agreed with and incorporated a number of Mr. Fritz's changes. Ex. M6. Accordingly, Mr. Fritz's revised calculation of depletions using Mr. Book's methodology more closely resembles reality but still remains untethered to the call dates, and therefore, is inherently speculative.

Mr. Book's total calculated depletions are reduced by well over half in 2004 and 2006 when the amounts he allocated to post-1950 storage and the Wagner and Fivemile reservoirs are removed, except for the 688 acre-feet stored in Dome and Sawmill in 2004. *See* Ex. M6 at Table 3. Depletions calculated by Mr. Book for evaporation, post-1950 acreage, and CBM effects must also be reduced to reflect only those amounts arising after the call date. Unfortunately, unlike the larger reservoirs, there is no easy way to do so, and Montana presented no evidence showing what those amounts would be. In the absence of any such evidence, the Court should dismiss as speculative Montana's claims for every claimed depletion except the 688 acre-feet in 2004 attributable to storage in Dome and Sawmill reservoirs.[15]

[15] Applying Mr. Book's methodology for calculating depletions at the state line would further reduce this amount.

II. Where neither state regulates coal bed methane wells in priority with the surface, the Compact does not reach these wells.

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, rather only groundwater materially connected to the surface waters should be subject to the provisions of the Compact.[16] Here, both States have determined that the connection between CBM groundwater production and the surface waters is too tenuous to warrant intrastate regulation under the doctrine of appropriation. There is no basis for the Court to upset these determinations that CBM production has an immaterial effect on surface waters.

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. v. Herrmann*, 569 U.S. —, 133 S. Ct. 2120, 2133 (2013) ("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

[16] The Special Master need not specify for all time a specific measure of materiality, because the depletions alleged by Montana in this case fall so far short of any reasonable line that could be drawn in the future. This is particularly true when a proper offset is applied for depletions caused by CBM production in Montana, since the already insignificant effects of pumping in both states nearly cancel each other out.

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 Compact. This is especially true, because the Compact does not mention groundwater or provide any specific technical parameters for groundwater regulation.

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. Montana has determined that CBM groundwater production does not serve a beneficial use, and therefore, Montana does not even require that CBM wells obtain a water right. Tr. Vol. 3 at 542, Ex. W204 at 2. Because CBM wells in Montana do not have a water right, water commissioners are not empowered to regulate CBM wells in priority with decreed water rights. Tr. Vol. 3 at 542. Similarly, while Montana analyzes hydrologic connectivity between surface waters and new ground water wells, and can require mitigation of the impacts from these wells, CBM wells are exempt from this process.[17] Tr. Vol. 3 at 638-39; Tr. Vol. 17 at 4017-19.

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

[17] Prior to 2006, Montana only considered there to be a hydrologic connection where groundwater pumping resulting in the pumping of streamflow. Tr. Vol. 3 at 639-40.

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 pumping. Mont. Code Ann. § 82-11-175(3)(b); Ex. W69-1. 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.

Similarly, Wyoming has not found it necessary to protect surface water users in the Tongue River Basin from CBM groundwater production. No CBM wells have been regulated for the benefit of a surface water user anywhere in Wyoming. Tr. Vol. 22 at 5145. With regard to the river basin at issue, the State Engineer has not determined that the waters of the Tongue River and nearby CBM wells constitute a single source of supply such that they must be regulated together in priority pursuant to Wyo. Stat. Ann. § 41-3-916.[18] Tr. Vol. 22 at 5147-49.

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[18] Wyo. Stat. Ann. § 41-3-916 provides: "Where underground waters in different aquifers are so interconnected as to constitute in fact one source of supply, or where 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. The state engineer may by order adopt any of the corrective controls specified in W.S. 41-3-915."

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 record, the Court has no basis for upending these practices and 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, and Montana's claims related to CBM production should be dismissed.

In addition, Montana's complaints about Wyoming's past production are highly suspect because Montana does not even consider CBM production to be 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.

III. Mr. Larson's results are unreliable.

Mr. Larson's analysis concluding that CBM groundwater production in Wyoming depleted the Tongue River by less than a single cubic foot per second in 2004 and 2006

suffers from a host of deficiencies.[19] Mr. Larson's analysis is based on the 2002 BLM Model (Ex. M38), and therefore, is subject to the limitations of that regional model. Tr. Vol. 13 at 2830-31, 2834, 2925-26. As Dr. Schreüder explained in detail, the 2002 BLM Model is not reliable for the purpose of predicting depletions to the Tongue River from CMB pumping in Wyoming. Tr. Vol. 13 beginning at 2923; Ex. W15. Among other deficiencies outlined by Dr. Schreüder, the model was not designed for this purpose. Ex. W15 at 20. Even the BLM modelers admit "[t]he model is limited and potentially skewed by the data that are available[,]" away from the established areas in the eastern portion of the basin. Tr. Vol. 13 at 2828. Moreover, the model was not well calibrated to heads near the Tongue River, and it does not factor in the effect of ET salvage on surface flows. Tr. Vol. 13 at 2842; Ex. W15 at 6-9, 20.

Perhaps most importantly, there is no basis for Mr. Larson's adjustment of the storage parameters in the BLM model, and the recharge fraction chosen by Mr. Larson is well below the rate supported by the existing data. Tr. Vol. 13 at 2924; Ex. W15 at 14-15. Adjusting the storage parameter to reflect a lower return flow rate significantly increases Mr. Larson's calculated depletions. Tr. Vol. 13 at 2836-38. Rather than use the parameters in the BLM Model, he decided to make an adjustment based on a flawed understanding of how containment impoundments were constructed by CBM operators.

Mr. Larson incorrectly understood that discharge to a full containment impoundment meant discharge to a lined impoundment that precluded or limited

[19] Wyoming incorporates herein as if set forth in full the contents of the pending *Motion in Limine to Exclude Expert Testimony by Steven Larson.*

infiltration. Tr. Vol. 13 at 2838-39. David Schroeder has inspected between 1,500 and 2,000 CBM impoundments in the Tongue and Powder River basins, and only about five percent of them are lined. Tr. Vol. 10 at 2267-69. Similarly, Mr. Stier from Storm Cat Energy explained that the whole point of a CBM impoundment is to allow the water to infiltrate and evaporate. Tr. Vol. 19 at 4531-32. Although five of Storm Cat's reservoirs are lined, the company does not use the lined reservoirs because they do not allow for infiltration. Tr. Vol. 19 at 4533. Mr. Stier went on to explain that if a CBM impoundment does not infiltrate fast enough, it is considered broken, and Storm Cat pumps the water from that impoundment to one that will infiltrate. Tr. Vol. 19 at 4531-32. As a result, flocculation in CBM impoundments is a transient impediment to infiltration and not a sound basis for adjusting the storage parameters of the BLM model.

In addition, Mr. Larson did not consider a wealth of data that was otherwise available and would have affected his conclusions. For example, Mr. Larson did not account for known direct discharges of CBM produced water into the Tongue River. Tr. Vol. 13 at 2835-36. Moreover, the State of Montana compiled significant amounts of data relating to CMB production in the basin which Mr. Larson did not review. Tr. Vol. 18 at 4049-72, 4074-4127. Nor did he consult with Mr. Wheaton, who is likely the most knowledgeable person in Montana related to the effects of CBM groundwater production, the insignificant level of interconnectivity between such production and surface waters, and the significant amount of infiltration that occurs from impoundments. Tr. Vol. 18 at 4074-4127.

As a result of the deficiencies in the 2002 BLM Model and Mr. Larson's unfounded adjustments, the depletions he describes in his report are dramatically overstated. Ex. W15 at 18-20. In fact, "[w]hile it is probable that CBM operations in Wyoming caused some impact to Tongue River Flows, it is uncertain whether these impacts are depletions or accretions, and the magnitude of those impacts are de minimus." Ex. W15 at 21. Thus, any impact on the Tongue River from CBM production is indistinguishable from zero. Ex. W15 at 2. Accordingly, Mr. Larson's unreliable results should be removed from Mr. Book's calculated depletions.

CAUSATION

If the Court were to find that Montana has proven the first four elements of its claim for breach of contract, Montana then must prove that post-1950 diversions in Wyoming caused harm to Montana's pre-1950 appropriations. In essence, the Court must find that had the specific post-1950 diversions at issue been curtailed in Wyoming, water would have been made available for the benefit of the calling pre-1950 right in Montana. To do this, the Court needs expert testimony, because causation is sufficiently beyond the common experience of the trier of fact. *See, e.g., Tin Cup Cnty Water and/or Sewer Dist.*, 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. The Special Master has acknowledged as much by granting Wyoming partial summary judgment for all years except 2001, 2002, 2004, and 2006 on the size of any Compact violation on the grounds that Montana had not produced sufficient evidence of causation between alleged shortages in Montana and use in Wyoming. *Mem. Op. of the Special Master on Wyoming's Mot. for Summ. J.* at 28 (Sept. 16, 2013).

Mr. Book was the likely witness to provide evidence establishing the causal link, but he did not attempt to do so. In fact, Mr. Book advised the Court in his original expert report that "[t]he investigation conducted for this report does not include quantification of damages to Montana water users. An assessment of the effects of the depletions in Wyoming on deliveries to water users in Montana would require further analysis." Ex. M5 at 1. Similarly, Mr. Book testified at trial that his opinions were "specific to the stateline" not to particular water users in Montana. Tr. Vol. 2 at 301-2. Thus, he could not and did not testify that curtailment of a specific post-1950 water right would have resulted in water for a specific pre-1950 water user in Montana except the Tongue River Reservoir during the winter months. Without expert testimony linking specific actions in Wyoming with specific effects in Montana, Montana's claims must be dismissed.[20]

MATERIALITY

No matter how the Court does the math, there is a remarkably small amount of water at issue for an interstate dispute. Dan Ashenberg, from the Water Resources

[20] Case Management Order 14 asks about futility separately from causation, but in many ways futility is the flip side of causation, and therefore, it does not necessarily play an independent role in the resolution of this case.

Division of the DNRC, correctly observed in 1983 that "[b]ecause agricultural and industrial development since 1950 has been minimal, the need to regulate post-1950 appropriations in Wyoming for the purpose of satisfying pre-1950 appropriations in Montana would also be minimal." Ex. M97 at 1. Wyoming previously argued that the Court would be justified if it chose to dismiss the case 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). And the parties and the Special Master thoroughly explored whether the Court should continue to exert jurisdiction over this matter in light of the almost trivial amount of water at issue. Out of an abundance of caution, trial proceeded. Now that the evidence is in and Montana has been fully heard, dismissal on either of these two grounds would be warranted, but obviously is not likely, nor probably desirable, at this stage of the proceedings.

Instead, in the event that the Court determines that Montana has proven all five elements of its claims, and that Wyoming violated the Compact in some small measure in either 2004 or 2006, then the Court should consider the materiality of Wyoming's liability in determining whether proceeding to the remedies phase of this litigation makes any sense at all. In *Wyoming v. Colorado*, the Court found that it did not make sense to award damages where Colorado's violation was preceded by a period of uncertainty and room for misunderstanding, but that "[i]n the future there will be no ground for any possible misapprehension" as a result of the Court's decision. *Wyoming v. Colorado*, 309 U.S. 572, 582 (1940). The same reasoning should govern in this case where there is even less water at issue. Once the Special Master and the Court fix the parties' obligations in

this phase of the litigation, in light of the testimony of the Wyoming witnesses that they will respond to future valid calls differently, the case should end without proceeding to a needlessly wasteful remedies phase. *See, e.g.*, Tr. Vol. 22 at 5278-79.

CONCLUSION

Wyoming has previously acknowledged that 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 V(A) of the Yellowstone River Compact. The rulings of the Court and the Special Master addressed this dispute predominantly in favor of Montana, although the Court rejected Montana's assertions that the Compact created a mass delivery obligation and limited Wyoming pre-1950 diversions to the amounts of water historically consumed. Wyoming accepted these rulings, believing that, while the Compact protects Montana's pre-1950 appropriations, Wyoming never violated the Compact. Trial has proven that Wyoming's belief was well founded, and the Special Master should recommend that Montana's Bill of Complaint be dismissed with prejudice.

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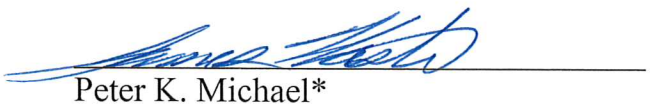
WHEREFORE the State of Wyoming requests that the Special Master recommend that Montana's Bill of Complaint be dismissed with prejudice.

Dated this 31st day of March, 2014.

Respectfully submitted,

THE STATE OF WYOMING



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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 31st day of March, 2014.

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