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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

In response to Wyoming's request that it receive the benefit of its bargain with Montana, Montana feigns surprise and claims that the 1992 Agreement does exactly what the parties agreed it did not do. Namely, modify the Yellowstone River Compact. Having freely entered into the agreement with Wyoming to ensure passage of the Northern Cheyenne Compact in Congress, Montana now claims that the agreement has no force and effect, does not mean what it says, and was rendered ineffective through nonuse. None of these arguments provide a viable avenue for Montana to evade the obligations it undertook when it entered into the 1992 Agreement with Wyoming.

Moreover, Montana acknowledges that it does not even try to regulate its share of the waters of the Tongue River based on the ability of its water users to put that water to beneficial use. MT Response Statement of Facts ¶¶ 131-32. This failure is wholly incompatible with the Compact's express provision that pre-1950 rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Art. V(A). This acknowledgment in and of itself should result in the dismissal of Montana's entire Complaint because Montana cannot claim harm to its pre-1950 rights where it makes no effort to limit the enjoyment of those rights in accord with the doctrine of appropriation. Where Montana makes no attempt to comply with the Yellowstone River Compact, it should find no remedy in this Court.

Montana's noncompliance with both of the agreements at issue in this litigation and its unclean hands should be anathema to this Court. More importantly, the evidence in this case clearly demonstrates that Wyoming is entitled to judgment as a matter of law and the immediate dismissal of Montana's Bill of Complaint.

ERRORS IN MONTANA'S STATEMENT OF FACTS

Montana's statement of material facts is at times askew and at other times simply wrong. However, nothing in Montana's recitation of the facts, even if taken as true, presents a bar to granting Wyoming's Motion for Summary Judgment. Wyoming will only point out two egregious errors here.

First, Montana asserts that Wyoming hydrographers use trigger-flows to determine when junior rights should be regulated and wrongfully implies that the hydrographers do not verify that there is an actual demand for the water when regulation begins. MT Response Statement of Facts ¶ 127. This is incorrect. Mr. Fritz, Wyoming's expert engineer explained that:

> After years of experience regulating these streams, each hydrographer has one or more key locations on major streams that are used to note when there is a need for regulation. These locations are generally equipped with recording gages, and when the flow at these locations exceeds a certain amount, it is assumed that all active water rights are being satisfied and no one is likely to call for regulation. These key flow rates are less than the sum of the active water rights downstream from those points because of return flows, tributary inflows, and other factors. Examples are provided in subsequent sections of this report. As the spring runoff period passes its peak and streamflows begin their typically steep declines, the hydrographers watch the flow rates at these key locations and can accurately predict when it will become necessary to begin regulation. At that point, they will notify junior appropriators along the stream that they will have to either begin to curtail their diversions or call for storage (if they have it) and begin to replace their direct-flow diversions with storage

> water. This type of regulation, which is not necessarily triggered by a formal request for regulation, is commonly practiced and has come about through years of regulatory experience on each stream. If rainfall events cause streamflows to increase temporarily, it is not unusual for the stream to go off regulation and then back on as the streamflows recede.

(MT Response Ex. U at 13).

Thus, these key flow rates are merely an indication that it is time for the hydrographer commissioners to get to work. As Mr. Knapp explains in the attached affidavit:

> The Hydrographer Commissioners within Division II do not use trigger-flows to determine when junior water rights should be regulated without regard to actual demand by senior water rights. Instead, and after years of experience, we know that certain flow amounts likely indicate that regulation is imminent, although these flow amounts may change over time. Once these flows occur we know that we need to begin communicating with the water users within our Districts to ensure that senior appropriators are receiving the direct flow water they can put to beneficial use and to ensure that junior appropriators receive the stored water they have ordered if any. We know that there is an actual demand for the available direct flow water at the various headgates at all times after the streams go into regulation, and that the appropriators are receiving that water in priority, through constant communications with our appropriators and personal observations. These constant communications often preempt the need for appropriators to make formal calls because the appropriators are generally assured that the stream is being regulated in priority and that their neighbors are not receiving water that they are not entitled to or have no intention to use. Division II Hydrographer Commissioners would not and do not shepherd water to appropriators that are out of priority or that do not have a present intention and actual ability to put the water to beneficial use.

(Knapp Aff. ¶ 2; see also Boyd Aff. ¶ 2 and Schroeder Aff. ¶¶ 2-4).

In fact, contrary to Montana's assertions, Mr. Schroeder specifically explained in his deposition that he does not regulate based on trigger flows, but instead verifies that

there is an actual contemporaneous demand from the senior rights holders receiving water. Mr. Schroeder testified:

> Q. Do you do anything to verify that the folks who have senior rights actually are wanting that water?
>
> A. Absolutely.
>
> Q. How did you go about doing that?
>
> A. I speak to them personally. I have denied calls for regulation because they're not using the water. There has to be use before I'll shut off a junior right.

(MT Response Ex. AA at 132).

Second, Montana asserts that once a stream goes into regulation in Wyoming, the hydrographer does not react to changes in demand. MT Response Statement of Fact ¶ 128. This is also incorrect, and Montana has to significantly misinterpret the testimony of Mr. Schroeder and Mr. Boyd to make this assertion. Montana reads Mr. Schroeder and Mr. Boyd's statements that the streams typically stay in regulation until the end of the water year as evidence of a static system. *Id.* (citing MT Response Ex. AA at 137-38 and Ex. R at 89). Mr. Schroeder and Mr. Boyd's answers instead reflect that the State remains in control of the diversion-works on the stream until the end of the year. Again, as Mr. Knapp explains:

> When the Hydrographer Commissioners within Division II indicate that a stream typically remains in regulation until the end of the water year that just means that the stream remains within our control. The exact distribution of water made by the Hydrographer Commissioner to the various appropriators while the stream is in regulation may change frequently depending on demand and the available water supply. Stating that the stream remains in regulation does not mean that we deliver water to

certain senior water rights regardless of their intent and ability to put the water to beneficial use.

(Knapp Aff. ¶ 3; see also Boyd Aff. ¶ 3 and Schroeder Aff. ¶¶ 5-6).

In contrast to Wyoming's demonstrated fidelity to the doctrine of appropriation, Mr. Book's demand model does not reflect actual contemporaneous demand. Instead his model reflects paper rights as if they were all continuously diverting at the maximum permitted rate over the entire irrigation season. *See* MT Response Statement of Facts ¶¶ 84 through 98. As such, Mr. Book's demand model is not an accurate predictor of demand for water in Montana, and he acknowledges as much. (Book Depo. Vol. II at 202-03). A demand model that admittedly does not accurately predict demand cannot form the basis of a claim that pre-1950 rights went unsatisfied during any given period.

MONTANA'S (NON)ADMISSION THAT THERE ARE ONLY FOUR YEARS IN ISSUE

In its Statement of Montana's Claims, Montana seems to both admit and deny that its claims are limited to those years and rights supported by some expert testimony. MT Response at 30. While Wyoming is confused by these conflicting assertions, the fact remains that Montana's Response does not attempt to rebut Wyoming's motion for summary judgment related to those years and water users for which no expert testimony has been offered. Accordingly, Wyoming is entitled to summary judgment for all claims related to years and rights that are not supported by expert testimony. This is true both because expert testimony is required to proceed with these claims, and because a non-movant's failure to address claims in response to a motion for summary judgment waives those claims. *See, e.g., Palmer v. Marion Cnty.*, 327 F.3d 588, 597 (7th Cir. 2003)

(holding that claims not addressed in a summary judgment opposition brief are deemed abandoned); *Laborers Int'l Union of N. Amer. v. Caruso,* 197 F.3d 1195, 1197 (7th Cir. 1999) (stating that arguments not presented to the district court in response to summary judgment motions are waived); *Resolution Trust Corp. v. Dunmar Corp.,* 43 F.3d 587, 599 (11th Cir. 1995) ("grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned"). Accordingly, Wyoming is entitled to summary judgment for all claims made related to the years 1987, 1988, 1989, 2000, and 2003, and all the individual water rights in Montana other than the reservoir right.

ARGUMENT

I. Wyoming raised the effect of the 1992 Agreement at the appropriate time.

Montana claims to be shocked to see an agreement it signed presented in these proceedings. MT Response 32-35. Notwithstanding the absurdity of this position, the course of proceedings in this case demonstrates that Wyoming raised the effect of the 1992 Agreement at the appropriate time.

The 1992 Agreement is not an affirmative defense in the nature of an accord and satisfaction because it does not purport to or in fact modify the Compact. Instead, the 1992 Agreement merely supplements the Compact as it relates to the accounting for one water right. However, even if the 1992 Agreement constitutes an affirmative defense, its omission from Wyoming's responsive pleadings is not a bar to its assertion at this time. While Fed. R. Civ. P. 8(c) is unequivocal on its face, courts have uniformly recognized that discovery almost invariably leads to new affirmative defenses, and that these defenses are properly preserved so long as the plaintiff is not prejudiced. *See* 5 Charles

Alan Wright, et al., *Fed. Prac. & Proc. Civ.* § 1278 n. 24 (3d ed. April 2013) (listing numerous cases waiving strict compliance with Rule 8(c)). Courts routinely find that a defense raised in a dispositive motion is not prejudicial, particularly where the plaintiff could reasonably anticipate the defense and has had an opportunity to respond. *Id.* at n. 25 (listing numerous cases holding that defense properly raised on summary judgment). The opportunity to respond is typically provided in the form of a response to the dispositive motion. *Id.*

As the Special Master is well aware, and as recently recounted in detail in Wyoming's Proposed Motion to Compel filed on June 30, 2013, Montana has been less than forthcoming about the substance of its claims. While this litigation has gone on for some time, it was not until January 4, 2013, when Montana designated its experts, that Wyoming was finally given a glimpse of the specifics of Montana's claims. With this new information in hand, for the first time in the long history of this case Wyoming was able to start researching specific defenses, including the effect of the 1992 Agreement. Of course, it would seem to go without saying that "[a] party cannot reasonably be expected to raise an affirmative defense to a claim that is not presented in the complaint." *Varela v. Perez*, 2011 WL 1118991 *2 (D. Ariz. March 28, 2011). Nor can a party be expected to raise defenses when the claims presented in the complaint are so general and vague that they cannot be fairly ascertained. Even so, Montana actually produced copies of the 1992 Agreement, the Model, the 1996 Final Environmental Impact Statement, and

Mr. Dalby's 1992 report to Wyoming on April 9, 2012.[1] Montana can hardly claim to be surprised by documents it handed to Wyoming during the course of discovery.

Moreover, Wyoming began questioning witnesses about the 1992 Agreement almost immediately after Montana designated its experts. For example, on January 29, 2013, when Wyoming deposed Mr. Dalby, he was questioned about the 1992 Agreement and his report. (Dalby Depo. at 120-22). Wyoming continued with this line of inquiry during the deposition of Mr. Book on February 11, 2013. (Book Depo. Vol. I at 180-83). Given the late date when Montana actually told Wyoming something about its claims in this case, Wyoming raised the 1992 Agreement in discovery in a remarkably timely manner. Under these circumstances Montana could and should have anticipated that issues related to the 1992 Agreement would be litigated in these proceedings.

Montana also claims that Wyoming never asserted or relied upon the 1992 Agreement in the past. MT Response at 13-16. However, on the only occasion where it was necessary to assert the 1992 Agreement, Wyoming did so. In 1996, in its comments on the Final Environmental Impact Statement, Wyoming specifically asserted and provided a copy of the Agreement to the agencies conducting the analysis, including the Montana DNRC. (Second Fassett Aff. ¶ 8 and Ex. H).

Montana further claims that Mr. Fassett never mentioned the 1992 Agreement in his deposition. MT Response at 16. Of course, Mr. Fassett was deposed on November

[1] The dates documents were produced are not reflected in the Bates number on the document but Wyoming logged the date of receipt of every document received from Montana, and Wyoming's spreadsheet reflecting these dates can be produced, if necessary.

27, 2012, before Montana designated its experts, and before Montana made it clear that its claims would include an attempt to renege on the 1992 Agreement. It is also worth noting that, with full knowledge of the existence of its own agreement, Montana never asked Mr. Fassett about the 1992 Agreement during his deposition. *See* MT Response Ex. H. Wyoming cannot be held responsible for Montana's decisions about what to ask during a deposition.

Not only could Montana reasonably anticipate litigation related to the 1992 Agreement from the course of these proceedings, but it has had a fair opportunity to respond. Montana's Response contains twelve pages of arguments about why Montana should not have to live up to its agreement with Wyoming. While Montana complains that it could have done more discovery related to the 1992 Agreement, it points to no specific information that it needs but does not have related to the agreement. In fact, Montana was able to procure an affidavit for its response from one of the signatories to the agreement, although much of her testimony is likely barred by the parol evidence rule. *See, e.g., Oklahoma v. New Mexico*, 501 U.S. 221, 247 (1991) (Rehnquist, J., concurring and dissenting) (recognizing the parol evidence rule). Under these circumstances, Montana cannot reasonably claim that it has not had a fair opportunity to respond.

Accordingly, Montana's complaints about the manner in which the 1992 Agreement was raised are unfounded and should be disregarded.

II. The 1992 Agreement does not modify or conflict with the Yellowstone River Compact.

Montana argues, and Wyoming agrees, that the 1992 Agreement did not modify the Compact. MT Response at 35. In the next breath, however, Montana argues that the 1992 Agreement does modify the Compact by converting Article V(B) water into Article V(A) water. MT Response at 35-36. The 1992 Agreement does no such thing.

The 1992 Agreement merely reflects an agreement by the two States about how they will account for water stored in the Tongue River Reservoir. And while how the parties count matters, it does not create or diminish rights established by the Yellowstone River Compact. In this regard, it is worth noting that the Northern Cheyenne Compact does not alter the Yellowstone River Compact either, *see* Mont. Code Ann. § 85-20-301 Article VI(10), but both Montana and the Tribe believe that this subsequent Compact that Wyoming was not a party to may affect Wyoming's rights. *See* MT Response at 11; NCT Amicus Br. Ex. B. Wyoming fails to see a distinction between these two agreements and their relationship to the Yellowstone River Compact.

The reality that Wyoming, Montana, and the modelers recognized in the early nineties is that Wyoming's present and future supplemental water supplies are largely held in reservoirs, and this water, when stored in priority, is not available to Montana under the Compact. First Interim Report (FIR) at 42-43. Accordingly, this water was appropriately excluded from the amount of water available to fill the Tongue River Reservoir in the model and in the 1992 Agreement. And it is not subject to a call by Montana now. The fact that Wyoming and Montana found it was easier for

administrative purposes to treat all development between 1950 and 1980 as supplemental water supplies rather than go through the painstaking process of quantifying those rights, reservoir by reservoir, does not create a conflict with the Compact and does not change Article V(B) water into V(A) water. Nothing in the Compact prohibits the parties from agreeing that a certain quantity of water falls into one tier or the other, where they find it expedient to do so.

It is very important for the Court and the Special Master to take note, that if the 1992 Agreement does not apply as set forth in Wyoming's motion, then it cannot be true that both the DNRC right and the Tribe's right in the Tongue River Reservoir have an April 21, 1937, priority date. *See* MT Response Statement of Facts ¶ 76. The model treats those rights as pre-1950 rights, and Wyoming assented to that treatment as part of the consideration received by Montana for the 1992 Agreement. Absent that agreement, however, Wyoming does not assent to the fiction that the enlargement of the reservoir is entitled to a pre-1950 right. Rather, for purposes of the Yellowstone River Compact, the new storage is part of Montana's right[2] and has a 1999 priority date, as nothing in the Compact permits Montana to create new pre-1950 rights out of whole cloth. Moreover, absent the 1992 Agreement, the doctrine of appropriation limits winter by-passes to the amount necessary to fulfill actual downstream water rights, which are less than 50 cfs. *See* Hinckley Aff. Ex. A at 7 through 12. Thus, Montana can store more water and by-

[2] The Tribe's right, although unquantified, was already in the reservoir when it was originally built, so the enlargement must belong to Montana.

pass more water without consequence under the 1992 Agreement than would otherwise be permitted under the doctrine of appropriation.

Accordingly, if the 1992 Agreement has no force or effect, the math is much more favorable to Wyoming. With the 50 cfs limitation imposed by the doctrine of appropriation to prevent waste, the Tongue River Reservoir filled to its *real* pre-1950 capacity in every year at issue in these proceedings. *See* Hinckley Aff. Figure 5a. Thus, even if the 1992 Agreement does not apply, this case is also ripe for summary judgment, since the predicate to all of Montana's claims is that the reservoir did not fill in the four years at issue.

Montana would argue in response that instead of the 50 cfs necessary to fulfill downstream rights, it should be permitted to bypass that quantity of water that it determines to be necessary for reasons unrelated to the beneficial use of water by senior appropriators. *See* MT Response Ex. I and J (arguing that reasonable reservoir operations take into account more than maximizing storage). Wyoming agrees that neither the 1992 Agreement nor the doctrine of appropriation limits the actual operations of the Tongue River Reservoir. Montana is free to operate the reservoir in any manner it finds safe and advantageous, but the Compact and the 1992 agreement protect Wyoming from the consequences of Montana's discretionary operational decisions. Montana cannot spend its water according to its whim and expect Wyoming to pick up the tab.

The 1992 Agreement was designed to protect the status quo in Wyoming from the deal struck between Montana and the Northern Cheyenne Tribe, which is based on the fictional proposition that the 1999 enlargement has a 1937 priority date. Wyoming was

willing to play along with the fiction, so long as Montana recognized the reality that Wyoming's pre-1950 and supplemental rights come off the top. If Montana now wants to renege on this deal to its detriment, so be it. However, either way the evidence in this case clearly shows that Wyoming has never violated the Compact, and it is entitled to summary judgment.

III. Montana conflates damages with breach, and it cannot show a breach occurred in this case.

Montana acknowledges that to establish a violation of the Compact, it must offer evidence that a Wyoming post-1950 water right was being exercised **at a time when** a Montana pre-1950 water right was not receiving sufficient water to meet its needs.[3] MT Response at 60. This temporal nexus establishes a breach, not damages. Accordingly, the date of the call is relevant to establishing a breach, although not necessarily dispositive of Montana's entitlement to a remedy because Montana still must show that the breach caused some injury.[4] In addition, the dates when post-1950 water was applied to lands in Wyoming is also relevant to establishing a breach. Wyoming's motion for summary judgment showed that Montana has not come forward with evidence showing when in relation to the call dates any post-1950 water was applied to lands in Wyoming,

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[3] For purposes of this argument, Wyoming even assumes that Montana has regulated off any intervening post-1950 rights in Montana, although there is no evidence that Montana has ever done so.

[4] Even assuming Montana could prove a breach, it cannot prove that any such breach caused a compensable injury. The only water right in issue is the right in the Tongue River Reservoir, and Mr. Book's report makes clear that the reservoir at all times material to this dispute had water in it that could have been used to fulfill contract rights downstream. (Book Depo. Vol. I at Rpt. Tbl. 4-A). If the reservoir is never out of water at a time when it needs more to fulfill its purpose, then it has never been injured.

and absent evidence correlating the two events, Montana cannot establish that Wyoming breached the Compact.

In response, Montana relies on the wholly unreliable demand model prepared by Mr. Book, the report of Mr. Allen, a sentence out of Mr. Fritz's report that only relates to a few days in 2004, and the rebuttal opinions of Mr. Aycock. MT Response at 52. As noted above, while Mr. Book's demand model is not an accurate predictor of demand in Montana it must be accepted as true at this stage of the proceedings. But acceptance of this model only goes to one side of the necessary temporal nexus. The other side is whether there is sufficient evidence showing contemporaneous use in Wyoming. There is not.

First, Mr. Allen specifically explained during his deposition that his calculations of evapotranspiration in Wyoming using the METRIC analysis do not show the dates during the irrigation season when water was applied to any given parcel.[5] Mr. Allen testified:

> Q. And so in my example, let's assume that a particular field was entitled under the doctrine of appropriation to receive irrigation water, say, on May 18. Could METRIC determine whether or not -- well, let me back up. And then on May 19, it may not have been entitled to receive water. Could METRIC determine whether it was receiving water on May 19?
>
> A. No.
>
> Q. My understanding is, is that the ET that results from irrigation water can sometimes be reflected for weeks after that irrigation water is applied.
>
> A. Yes.

[5] Mr. Allen's analysis is limited to the years 2004 and 2006. (Allen Depo. at 17).

Q. With regard to the parcels that you supplied actual ET estimates for to Mr. Book, do you have an opinion with regard to when those parcels received irrigation water?

A. No. Not without studying the data.

Q. And what data would you have to study to determine when they received irrigation water?

A. Well, I would study the monthly ETrF values by parcel and compare those amongst other parcels to look at the relative amount of ET.

Q. So you might be able to determine if it received water in one month as opposed to another?

A. I think that would provide some indication.

Q. And how precise could you be with regard to when exactly that field received water?

A. Oh, I don't think there would be a high level of precision.

(Allen Depo. at 133-34). Because Mr. Allen admits that he did not make a determination about when water was applied to the lands at issue in Wyoming, his analysis does not establish that Wyoming ever breached the Compact.

Second, Montana points to page 46 of Mr. Fritz's report where he describes that Big Goose Creek went into regulation on May 10, 2004, but came out of regulation when the spring runoff began. MT Response Ex. U at 46. According to Mr. Fritz, regulation on Big Goose Creek did not resume until July 21, 2004, "when streamflows had declined and releases from Park Reservoir began." *Id.* These facts do not establish that a post-1950 right on Big Goose Creek actually used water during this period. At most, it shows that the lack of regulation might have permitted such use, not that such use actually occurred. In fact, there is no testimony or evidence indicating that a specific post-1950

water right on Big Goose Creek used water during this period of time. Rather, Mr. Book noted in his analysis that he did not review specific diversions in the Goose Creek Basin because it is generally so heavily regulated. (Book Depo. Vol. I, Ex. 246 at Rpt. pg. 18). In fact, he did not identify in his report any surface rights located on Big Goose Creek. (Book Depo. Vol. I, Ex. 246 at Rpt. Tables 11-A and 11-B). Without any evidence of actual use by a post-1950 water user on Big Goose Creek during this limited window of time in one year, the fact that the stream was not in regulation, standing alone, does not establish that Wyoming breached the Compact, or that any shortage suffered by a Montana pre-1950 right on the Tongue River was caused by a diversion by a Wyoming post-1950 right on Big Goose Creek.

Finally, Montana points to the rebuttal opinions of Mr. Aycock and claims that they show times when post-1950 storage occurred in Wyoming. This is incorrect. As he explains on page 19 of his report, Mr. Aycock attempted to estimate "the seasonal distribution of inflow to Wyoming Post-1950 Reservoirs for the years 2001, 2002, 2004 and 2006." (MT Response Ex. I at 19). Using a complicated formula that he made up on his own for purposes of this litigation, Mr. Aycock attempted to determine the natural stream levels for Goose Creek, and then assumed those levels reflect what might have been stored month by month. (Aycock Depo. at 82-84). Of course, attempting to break the storage down month by month places nearly all the storage in the winter months when no call could conceivably have been in place. Anything that remains is at best speculation offered in the absence of any evidence showing when water was actually stored. Such speculation is insufficient to create a genuine question of material fact. *See,*

e.g., George v. Reisdorf Bros., Inc., 410 Fed. Appx. 382, 385 (2d Cir. 2011) (hypothesized chain of events, offered in the absence of any evidence of pesticides or fertilizer actually in the creek at issue, is wholly speculative and, even at the summary judgment stage, it cannot create a question of material fact as to whether defendant had in fact discharged pollutants in the hypothesized fashion).

Montana's efforts to establish breach in these proceedings fall short when the testimony of these experts is examined with any rigor. In the utter absence of evidence connecting actual post-1950 use in Wyoming with legitimate and actual unsatisfied pre-1950 demand in Montana, Wyoming is entitled to summary judgment on all claims remaining in these proceedings.

IV. Whether the States regulate CBM groundwater under the doctrine of appropriation is highly relevant.

Montana admits it does not regulate coal bed methane (CBM) produced groundwater under the doctrine of appropriation. MT Response Statement of Facts ¶ 102. Ignoring this fact, Montana falsely asserts that the Special Master has already decided that the Compact covers groundwater associated with CBM production. MT Response at 52-54. Of course, the Special Master has never decided that the Compact covers all groundwater, and certainly not groundwater specifically associated with CBM production. Instead, the Special Master determined that the Compact "covers at least some groundwater withdrawals" but he did not determine "exactly what groundwater is covered or the exact circumstances under which groundwater pumping violates Article V(A)." FIR at 53-54. Finding that this subsidiary issue would likely be fact specific, it

was left for subsequent proceedings in this case. *Id.* Thus, the facts inform the extent of the Compact's groundwater coverage.

Montana asks the Special Master and the Court to employ the doctrine of appropriation as incorporated into Article V(A) to protect its pre-1950 rights from CBM groundwater production in Wyoming. In doing so, Montana retreats to its familiar position that the Court has interpreted other interstate compacts to cover hydrologically connected groundwater. MT Response at 55-57. But Montana fails to acknowledge that the Yellowstone River Compact is not those compacts, and the doctrine of appropriation dictates its coverage. If the doctrine of appropriation does not cover CBM produced groundwater, neither does the Compact.

When rendering his initial groundwater ruling, the Special Master examined the language of Article V(A) to determine that the Compact covers "some" groundwater withdrawals. FIR at 44. He first determined that the language of Article V(A) did not preclude groundwater coverage, and then turned to the treatment of groundwater under the doctrine of appropriation. *Id.* at 46. He noted that appropriation law initially treated groundwater labeled as "percolations tributary to surface waterways" as separate from surface channels, but that later understanding treated them as linked. *Id.* (citing 2 Samuel C. Wiel, *Water Rights in the Western States*, § 1082 at 1022-23 (3d ed. 1911) ("If, on the proof, the percolations are shown to be tributary to the spring or watercourse in a material degree, the loss of them causing a substantial diminution of the spring or watercourse, they are now treated as a component part of the watercourse, and follow rights on the watercourse, and rights therein are not regarded as underground rights separate

therefrom."). Accordingly, under the general doctrine of appropriation as incorporated in Article V(A), sufficiently interconnected groundwater, the loss of which would cause substantial diminution of the watercourse, is treated as a component part of the watercourse.

The Special Master also observed that the laws of both Montana and Wyoming appropriation provide for the legal integration of some hydrologically interconnected groundwater and surface water. FIR at 49-51. Montana applies its permit system for appropriative rights to both surface and groundwater, and junior uses may not impair or adversely affect senior rights. *Id.* at 49-50. Similarly, Wyoming regulates ground and surface waters which are so interconnected as to constitute in fact one source of supply under a single schedule of priorities. *Id.* at 50. Thus, the Special Master concluded that the Compact and the doctrine of appropriation protect pre-1950 uses in Montana from "some" forms of groundwater pumping. *Id.* at 51.

Wyoming's motion simply invites the Special Master to apply the same reasoning specifically to CBM produced groundwater. Thankfully, as with the doctrine of recapture, the laws of Montana and Wyoming do not directly disagree. *See* FIR at 39. Montana has determined that CBM groundwater production is not a beneficial use, and therefore, Montana does not require CBM wells to obtain a water right. MT Response Statement of Facts ¶ 102. Without a water right, Montana does not regulate CBM groundwater in priority with existing beneficial uses. MT Response Ex. O, ¶ 6. Accordingly, the doctrine of appropriation does not reach CBM produced groundwater in Montana.

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

Both States, through their prior appropriation laws, have the ability regulate groundwater withdrawals in priority with surface rights. But neither State has chosen to protect its senior surface rights from the adverse effects, if any, of CBM groundwater pumping under the doctrine of appropriation. Because the doctrine as applied by Montana and Wyoming provides no such protection, neither can the doctrine of appropriation as agreed to by the States under the Compact. *See Tarrant Reg'l Water Dist. v. Herrmann,* 133 S. Ct. 2120, 2135 (2013) (stating that a State's conduct under the Compact is highly significant evidence of its understanding of Compact terms) (citing *Alabama v. North Carolina,* 130 S. Ct. 2295, 2309 (2010)).[6] As a result, and as a matter of law, Montana's remaining groundwater claim must fail.

[6] It is worth noting that, when it suits Montana, it claims that the conduct of the States is relevant to determining the meaning of the Compact. For example, Montana's false assertion that Wyoming regulates to trigger flows is offered in these proceedings as proof that the Compact does not require the States to regulate based on actual contemporaneous demand under the doctrine of appropriation. *See* MT Response at 63-64.

V. Montana cannot establish a violation of the Compact.

On pages 57 through 59 of its Response, Montana again conflates the issue of damages with the issue of breach. To establish a violation of a compact that incorporates the doctrine of appropriation, the complaining party has to show a temporal nexus between the senior appropriator's need and the junior appropriator's use. This is self evident where beneficial use provides the basis, the measure, and the limit of the rights on both sides of the border. Under the doctrine of appropriation where rights are limited to beneficial use, timing matters and reality matters. Use by a post-1950 right in Wyoming standing alone, or a certain flow at the stateline without evidence of actual demand prove nothing under the doctrine of appropriation. As explained above, Montana has no evidence correlating use in Wyoming by post-1950 rights at times when pre-1950 water rights in Montana had the need and ability to put that water to beneficial use.[7]

VI. Montana is not entitled to prospective relief in the absence of a violation.

In its last argument, Montana asserts the novel proposition that it would be entitled to prospective injunctive relief in these proceedings even if it cannot prove that Wyoming violated the Compact. MT Response at 62-65. This approach is remarkably novel, given that actual success on the merits is a prerequisite to permanent injunctive relief.[8]

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[7] It bears repeating here that the Tongue River Reservoir right is the only right at issue in these proceedings for which Montana has provided any expert testimony at all.

[8] To obtain a permanent injunction, courts uniformly require the moving party to show: (1) its actual success on the merits; (2) that it faces irreparable harm; (3) that the harm to it outweighs any possible harm to others; and (4) that an injunction serves the public interest. *Southwest Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009); *Cmty. of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's*

Moreover, even if Montana prevails in proving a violation it is not necessarily entitled to prospective injunctive relief. *See, e.g., City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (Although past wrongs may serve as "evidence bearing on 'whether there is a real and immediate threat of repeated injury,' " such evidence " 'does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' ") (quoting *O'Shea v. Littleton,* 414 U.S. 488, 495–96 (1974).

Montana essentially asserts that the Special Master and the Court could impose a trigger on Wyoming, which deviates substantially from the plain language of the Compact, without any evidence that Wyoming had previously violated the Compact or that any offending conduct would be repeated.[9] This assertion is wholly unsupportable at law or in fact. What Montana proposes is for the Special Master and the Court to act as mediator in this dispute rather than as a court of law. Wyoming objects to this proposal. In the absence of proof that Wyoming violated the Compact, this case ends without a remedy for Montana as every other case does when summary judgment is granted in favor of the defendant.

Church, 634 F.3d 1005, 1012 (8th Cir. 2011); *Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001); *Caddell Constr. Co., Inc. v. United States*, 111 Fed. Cl. 49, 113 -114 (Fed. Cl. 2013) (collecting cases).

[9] Wyoming does not concede that the Special Master could impose a trigger on the parties to a Compact that plainly incorporates the doctrine of appropriation, as that doctrine is fundamentally concerned with actual supply and demand.

CONCLUSION

The summary judgment pleadings of the parties make clear that the appropriate course of action is to end this litigation before trial through several simple rulings. First, the 1992 Agreement of the parties applies and limits Montana's claims now and in the future related to the Tongue River Reservoir. Second, the Yellowstone River Compact does not reach CBM groundwater because, as the conduct of both States demonstrates, any connection with the surface waters is too inconsequential to warrant conjunctive management. Third, any portion of Montana's claims that might remain after these first two rulings are too trivial to merit a trial. Fourth, the Special Master could ask the Court to reiterate, if he feels it necessary, that the relationship of the parties under Article V(A) is measured "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation," and not necessarily the laws of either State. Fifth, as a consequence of the doctrine of appropriation, in future years if Montana makes a call on Wyoming, it must show a present need for the water by a senior appropriator, the ability of that appropriator to put that water to beneficial use, and that the senior, rather than some other junior appropriator, will actually benefit from the call. With these few strokes this case will be over, and the parties will have a clear understanding of their rights and responsibilities under the Compact.

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

Dated this 16th day of August, 2013.

Respectfully submitted,

THE STATE OF WYOMING

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served by electronic mail and by placing the same in the United States mail, postage paid, this 16th day of August, 2013.

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