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.

WYOMING'S EXCEPTION TO THE SECOND INTERIM REPORT OF THE SPECIAL MASTER (LIABILITY ISSUES) AND BRIEF IN SUPPORT OF EXCEPTION

PETER K. MICHAEL*
Attorney General of Wyoming

JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
ANDREW KUHLMANN
Senior Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
307-777-6946
peter.michael@wyo.gov

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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WYOMING'S EXCEPTION

The State of Wyoming takes exception to the Special Master's recommendation that this Court return the case to him for a remedies phase.

Respectfully submitted,

PETER K. MICHAEL*
Attorney General of Wyoming

JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
ANDREW KUHLMANN
Senior Assistant Attorney General
123 State Capitol
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BRIEF IN SUPPORT OF WYOMING'S EXCEPTION TO THE SECOND INTERIM REPORT OF THE SPECIAL MASTER (LIABILITY ISSUES)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

In this original action the State of Montana claimed that the State of Wyoming had repeatedly violated the terms of the Yellowstone River Compact resulting in "substantial and irreparable injury to the State of Montana and its water users." Bill of Complaint ¶¶ 13-15. After an initial decision by this Court, extensive discovery, and a lengthy trial, the Special Master found that in just two of the many years in issue, Wyoming violated the Compact when it did not prevent ten irrigators, and twenty-two small reservoir owners on the Tongue River from diverting water that otherwise would have flowed into Montana. Second Interim Report at Table D-1, 187-99. Specifically, he found that in 2004 Wyoming wrongfully diverted 1,300 acre feet, and in 2006, even less, 56 acre feet. Second Interim Report at 231. To put this in perspective, the average annual flow of the Tongue River at the state line from 1961 through 2007 was 313,000 acre feet, although the two years at issue were years of historic drought in the basin, so the flows were substantially lower than average. *Id.* at 7-8. Thus, the Special Master correctly observed that in this current case "there is a remarkably small amount of water at issue for an interstate dispute." *Id.* at 228. Nevertheless, he has recommended that the Court remand this case to him "to determine damages and other appropriate relief." *Id.* at 231.

The Court should reject this recommendation. The testimony at trial established that Montana had access to additional water that it, or its water users,

could have purchased in 2004 and 2006. As in other contract cases, the appropriate measure of damages is limited to the cost to cover or the value of the replacement water no matter what additional evidence might be submitted during a remedies phase. Thus, any further proceedings would invariably result in the same ultimate judgment and would be unnecessarily wasteful for both states. Moreover, the evidence at trial demonstrates that injunctive relief is not appropriate as Wyoming has committed that it is willing to comply with the rulings of this Court, including all of the pre- and post-trial recommendations of the Special Master, and Wyoming has shown that it is ready and able to so comply through its robust and permanent program of water rights regulation. Accordingly, the Court should end these proceedings now by entering a monetary judgment against Wyoming.

Wyoming is mindful of the Court's recent admonition that the parties should make every effort to reach a settlement and avoid continuing to invoke the Court's jurisdiction. *See* Misc. Order List (Feb. 23, 2015). To date, the parties have been unable to reach such an accord. In the absence of an agreement, entering a money judgment against the State of Wyoming is the most expeditious and equitable method of resolving these proceedings. Moreover, because the earlier decision of this Court, and the current recommendations of the Special Master, if accepted by this Court, will resolve all the major interpretive issues that were raised by Montana in its

Bill of Complaint, the immediate entry of a monetary judgment in no way impairs the parties' ability to administer the Compact within the now-established parameters through the Yellowstone River Compact Commission. *See* Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663, Art. III (1951) (establishing the Commission to administer the provisions of the Compact as between Montana and Wyoming).

STATEMENT OF THE CASE NECESSARY TO DECIDE THIS EXCEPTION

Because Wyoming accedes to all of the Special Master's other findings and recommendations, there are very few facts necessary for the Court to decide Wyoming's exception.

Fifteen miles after crossing the border into Montana, the Tongue River flows into the Tongue River Reservoir. Second Interim Report at 5. That reservoir is the largest reservoir in the watershed and supplies water to the farmers and ranchers in the Tongue River Valley of Montana during the irrigation season when the natural flow of the river is inadequate to meet their needs. *Id.* The reservoir has a present capacity of 79,071 acre feet. *Id.* at 105-06.

Under the 1991 Northern Cheyenne Compact between the Montana and the Northern Cheyenne Tribe, the tribe has a right to store up to 20,000 acre feet of water in the reservoir. *Id.* at 105; Mont. Code Ann. § 85-20-301, Art. II(A)(2)(b). The remainder of

the reservoir's storage space belongs to Montana which provides stored water to the Tongue River Water Users Association under a water marketing contract.[1] Second Interim Report at 12. The water rights of Montana and the Northern Cheyenne Tribe are legally separate, but physically commingled and administered conjunctively. *Id.* at 105. Both parties share shortages and divide excess water pursuant to the terms of the Northern Cheyenne Compact. Mont. Code Ann. § 85-20-301, Art. II(A)(2)(c) and (d). Historically the tribe has not used any of its compact water. Second Interim Report at 160. Instead, that water is generally available for sale to non-tribal members for use in the Tongue River basin off the reservation. *See, e.g.,* Mont. Code Ann. § 85-20-301, Art. III(B); Ex. W73 (letter from the Northern Cheyenne Tribe to the Montana Department of Natural Resources and Conservation notifying Montana of the Tribe's intent to sell compact water to individual water users in 2004).

The Special Master concluded that it was "unnecessary to decide how the [Yellowstone River] Compact treats Indian rights in order to resolve the current dispute," because Montana did not assert that Wyoming was interfering with the Northern Cheyenne Tribe's right in its suit. Second Interim

[1] The Northern Cheyenne Tribe also has a separate contract with the Tongue River Water Users Association and the State of Montana for 7,500 acre feet per year. Second Interim Report at 24.

Report at 160. Instead, Montana brought suit only for interference with Montana's own rights. *Id.* Thus, because there are two distinct pools of water in the reservoir, Montana could have purchased water held in the reservoir by the Northern Cheyenne Tribe, a separate sovereign, to cover any deficiency resulting from Wyoming's breach of the Yellowstone River Compact. In fact, during both 2004 and 2006, the Northern Cheyenne Tribe had water available in the Tongue River Reservoir for sale to Montana or its irrigators. *See, e.g.,* Tr. Vol. 7 at 1499; Vol. 8 at 1667; Vol. 15 at 3426, 3429-30; Vol. 16 at 3661, Ex. M387, Ex. M399 at 5.

A number of Montana irrigators took advantage of this opportunity, and several witnesses testified about the sales price of this water during the drought years of the 2000s. Jason Whiteman, the former Director of the Natural Resource Department for the Northern Cheyenne Tribe, testified that the Tribe sold its Compact water during this period for between $7 and $9 an acre foot. Tr. Vol. 8 at 1627, 1666-67. Montana irrigators Raymond Harwood and Maurice Felton testified that during the drought years they paid $10 per acre foot to the Northern Cheyenne Tribe for stored water. Tr. Vol. 19 at 4424, 4500. Another Montana irrigator, John Hamilton, testified that he paid between $12 and $15 an acre foot for water from Tongue River Reservoir that he purchased from the Northern Cheyenne Tribe. Tr. Vol. 16 at 3663. Thus, Montana, or any of its water users, could have purchased replacement water to cover Wyoming's

breach for an amount between $9,492.00 at the low price and $20,340.00 at the high price.

SUMMARY OF ARGUMENT

In this original action case, the Court has the authority to proceed directly to the entry of judgment in Montana's favor, and in the interests of justice and judicial economy it should do so. The Court has in its possession all of the evidence necessary to enter an appropriate judgment. Regardless of what additional evidence the parties might submit during a remedies phase, an appropriate judgment will be limited to the known cost of available replacement water. By contrast, injunctive relief is not warranted because there is no danger that Wyoming will repeat the conduct giving rise to liability. Nor should the judgment include an award of costs where both parties substantially prevailed on some issues.

ARGUMENT

Because the extent of Wyoming's liability is clear, further proceedings would be futile, and the Court should enter judgment against Wyoming.

An original action is "basically equitable in nature." *Ohio v. Kentucky*, 410 U.S. 641, 648 (1987). The Court's aim is to find "a fair equitable solution that is consistent with the Compact terms." *Texas v.*

New Mexico, 428 U.S. 124, 134 (1987). "In this singular sphere, 'the court may regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.'" *Kansas v. Nebraska*, 574 U.S. ___, 135 S.Ct. 1042, 1052 (2015) (quoting *Kentucky v. Dennison*, 24 How. 66, 98 (1861)). It may also "'mould each decree to the necessities of the particular case' and 'accord full justice' to the parties." *Id.* at 1053 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). The Court has considerable "flexibility" to craft a remedy "with reference to the facts of the particular case." *Id.* at 1058 (citations omitted).

In a dispute related to an interstate water compact, the Court may order "a suitable remedy, whether in water or money." *Texas v. New Mexico*, 428 U.S. at 130. And the Court has suggested that the breaching state may be allowed to elect the monetary remedy. *Id.* at 132.

Wyoming submits that it is within the Court's broad equitable powers to craft a just monetary remedy in this action immediately by entering a money judgment in Montana's favor based on the evidence submitted at trial and the straightforward application of basic contract principles. In a typical case it would be inappropriate to forego a remedies phase and proceed directly to judgment when the potential remedy is significant and cannot be determined without further proceedings. However, where the remedy can be accurately ascertained from evidence adduced in the liability phase and the size of the remedy is *de minimis* when compared to the time and

resources that would be expended in the remedies proceeding, the reverse is true. Here, the Court should craft the simple remedy of a money judgment against Wyoming because the same outcome would emerge from a remedies proceeding.

A. Montana's damages are limited to the cost of the readily available replacement water.

"[A] congressionally approved compact is both a contract and a statute[.]" *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (internal citation omitted); *see also Texas v. New Mexico,* 482 U.S. at 128 ("[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 damages should be measured by the same standards that apply to any contract. *See, e.g., Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. ___, 133 S.Ct. 2120, 2130 (2013) ("Interstate compacts are construed as contracts under the principles of contract law."). The Court has relied on the Restatement (Second) of Contracts as needed when interpreting interstate water compacts. *See, e.g., id.*; *Texas v. New Mexico*, 482 U.S. at 129; *Kansas v. Colorado*, 533 U.S. 1, 14 (2001). And the Restatement concisely sets forth the general principles of contract law applicable to the determination of damages in this case.

Contract damages are typically based upon the injured party's "expectation interest" as measured by

> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts § 347 (1981). Such damages are intended to give the injured party "the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." *Id.* at cmt. a.

In turn, an injured party has a duty to mitigate its damages. Restatement (Second) of Contracts § 350 (1981).[2] The obligation to mitigate damages arises "[o]nce a party has reason to know that performance by the other party will not be forthcoming[.]" *Id.* cmt. b. When mitigating damages arising from a breach, the non-breaching party "is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise." *Id.*; *see also* Uniform Commercial Code § 2-712 (1997) (One way for a non-breaching party to reasonably mitigate his damages

[2] Citing the Restatement (Second) of Contracts § 350, the law of both Montana and Wyoming requires injured parties to attempt to mitigate their damages. *See, e.g., Bitterroot Int'l Sys., Ltd. v. W. Star Trucks, Inc.*, 153 P.3d 627, 640 (Mont. 2007); *Moore v. Cont'l Ins. Co.*, 813 P.2d 1296, 1301 (Wyo. 1991).

is to enter into a transaction to obtain substitute goods, or to "cover."). "If he does not do so, the amount of loss that he could have avoided by doing so is subtracted in calculating his damages." Restatement (Second) of Contracts § 350, cmt. c (1981). This principle applies where "a substitute transaction can be arranged, even if there is no well-established market for the type of performance." *Id.* "[T]he burden is generally put on the party in breach to show that a substitute transaction was available[.]" *Id.*

Water from a different source can be substituted to cover a breach. *See Stockton East Water Dist. v. United States*, 109 Fed. Cl. 760, 814 (Fed. Cl. 2013) (awarding mitigation damages for difference between the cost to purchase water from a different source and the amount plaintiff would have paid the party in breach). That this dispute is between two sovereigns should make no difference. Here, the evidence at trial established that substitute water was available from the Northern Cheyenne Tribe in 2004 and 2006 at a cost between $7 and $15 an acre foot. For purposes of this exception, Wyoming is willing to accept the highest price as the appropriate cost to cover for the simple reason that the quantities of water withheld in 2004 and 2006 are so small, that when those quantities are multiplied by the high and low prices per acre foot, the difference in the products is negligible. Because substitute water was readily available, Montana had both the reasonable opportunity and the legal obligation to mitigate its damages by purchasing substitute water after April 14, 2004, and

July 28, 2006. Second Interim Report at 98-99. Having failed to do so, secondary or other damages are neither appropriate nor available to Montana as those damages could have been avoided. *See* Restatement (Second) of Contracts § 350, Illustration 5 (1981).

In particular, disgorgement damages of the type awarded in *Kansas v. Nebraska*, 574 U.S. ___, 135 S.Ct. 1042 (2015), are not available here because Wyoming's breach was not done "knowingly." Wyoming did not ignore Montana's calls in 2004 and 2006 or understand its actions to be in violation of the Compact but instead expressed its view to Montana that the Yellowstone River Compact simply did not provide for an interstate call for the benefit of Montana's pre-1950 water rights. Exs. J65, J69. While this view has support in the text and the history of the Compact, the Special Master ultimately rejected Wyoming's interpretation. *See* First Interim Report at 13-37; Wyoming's Motion to Dismiss Bill of Complaint (April 2008). Wyoming did not take exception to the Special Master's recommendation in this regard. As a result, this case is more like *Wyoming v. Colorado* where the Court found that it did not make sense to award any damages at all to Wyoming 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. 309 U.S. 572, 582 (1940). Similarly, the period of uncertainty between the parties that preceded this

action is over, and therefore, the deterrent of disgorgement is neither necessary nor warranted.

Wyoming acknowledges that substitute water may often not be available to a downstream state to cover a shortfall that it later asserts in interstate compact litigation. But, due to the unique nature of the Yellowstone River Compact, the geography of the river basin, the location of the Tongue River Reservoir, and the availability of water held out for sale by a third party, it was here. Consequently, Montana's damages will properly be limited by the cost of the available replacement water, and the Special Master's recommendation to proceed to a remedies phase to determine the appropriate award of damages would be a futile act. The extent of Wyoming's liability is clear, and the Court should simply enter judgment.

In addition to the principal amount of the proposed judgment, Wyoming acknowledges that the Court has previously found that prejudgment interest may be appropriate in an interstate compact case. *See Kansas v. Colorado*, 533 U.S. at 11. For purposes of this exception, Wyoming does not object if the Court chooses to award prejudgment interest. However, rather than remand this matter for further proceedings to ascertain the amount of prejudgment interest due Montana, Wyoming would propose to apply the generous interest rate provided by Wyoming law. In Wyoming, when there is no agreement, interest is assessed at a rate of seven percent per annum. *See*

Wyo. Stat. Ann. § 40-14-106(e).[3] If the Court simply applies the Wyoming rate to the principal amount of the proposed judgment from the date of the calls in 2004 and 2006 to the present, it will conclude that $15,537.06 in prejudgment interest should be added to the judgment.[4]

B. Injunctive relief is not appropriate because there is no cognizable danger of a recurrent violation by Wyoming.

An injunction is an equitable remedy that does not issue as a matter of course. *Wienberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). "The historic injunctive process was designed to deter, not to punish." *Hecht v. Bowles*, 321 U.S. 321, 329 (1944). "An injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Wienberger*, 456 U.S. at 312 (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)).

> According to well established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before

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[3] Montana has no similar statutory provision.

[4] This figure is calculated as follows: $19,500 in principal for 2004 times a daily interest rate of 0.0192% (seven percent per annum) times 4,013 days between Montana's April 14, 2004 call and the present; plus $840 in principal for 2006 times a daily interest rate of 0.0192% times 3,177 days between Montana's July 28, 2006 call and the present.

> a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

To obtain injunctive relief, Montana must demonstrate that Wyoming's breach is of "serious magnitude and established by clear and convincing evidence." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931). Moreover, and more importantly, Montana must prove that there is a "cognizable danger of recurrent violation." *Kansas v. Nebraska*, 135 S.Ct. at 1059 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). *See also 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)). There is no such danger here.

Wyoming accedes to the conclusion of the Special Master in the Second Interim Report that Wyoming violated the Compact when it did not curtail its use under post-1950 water rights in response to Montana's 2004 and 2006 calls for the benefit of Montana's pre-1950 water rights. During those years, Wyoming's longstanding interpretation of the Compact was that no such obligation existed. *See* supra p. 11. Now that the Compact has been interpreted by this Court, Wyoming will abide by the rule of law established in these proceedings. Wyoming officials made this commitment during their testimony at trial, and the Special Master concluded that they were "genuine in their willingness to abide by the decisions of this Court." Second Interim Report at 229; *see also, e.g.,* Tr. Vol. 22 at 5278-79; Tr. Vol. 25 at 5986.

Not only is Wyoming willing and obligated to comply, but it has the means to do so. Ex. W2 at 9-13. Since territorial days, Wyoming has employed full-time state officials who regularly curtail diversions in accord with the doctrine of appropriation. *Id.* These employees continuously monitor stream conditions and reservoir levels, and regulate water use in response to calls by senior appropriators. *See, e.g.*, Ex. J61 (2004 Hydrographers Annual Report). The Special Master heard a great deal of evidence about the efficacy of Wyoming's system of water rights administration and concluded that "Wyoming carefully regulates its water rights system to ensure that senior water users receive the amounts of water to which they are entitled." Second Interim Report at

178; *see also* Ex. M5 at 4. "As a result, by the time water flow drops sufficiently to threaten the rights of pre-1950 users in Montana, Wyoming regulators are likely already to have shut off post-1950 water users in Wyoming." *Id.* at 178-79. This was true in the extreme drought years of 2004 and 2006. Ex. J65 (noting in response to Montana's call that Wyoming had already curtailed use by nearly all of its water users with rights after the 1880s). And this explains why the Special Master found there was so little post-1950 water use in Wyoming after Montana made its calls in 2004 and 2006. When such droughts recur, Wyoming regulators will have little difficulty curtailing the few post-1950 water rights that they have not already curtailed in response to intrastate conditions.

In sum, Wyoming continues to stand ready, willing, and able to comply with the Court's 2011 interpretation of the Compact. By not taking exception to the merits of the Special Master's recommendations in his Second Interim Report, Wyoming makes the same commitment as to the findings and conclusions therein. Thus, as in *Kansas v. Nebraska*, injunctive relief is neither necessary nor appropriate. 135 S.Ct. at 1059.

C. Costs should not be awarded to either party when each state prevailed on some issues.

The only other element of a final judgment in this case, besides money damages and prejudgment

interest, would be an award of costs. The Court should exercise its discretion to decline an award of costs to either state, because both states prevailed, albeit to substantially different degrees.

Federal Rule of Civil Procedure 54(d) gives courts the discretion to award costs to prevailing parties. The rule "codifies a venerable presumption that prevailing parties are entitled to costs. Notwithstanding this presumption, the word 'should' makes clear that the decision whether to award costs ultimately lies within the sound discretion of the district court." *Marx v. Gen. Revenue Corp.*, 133 S.Ct. 1166, 1172 (2013) (footnote omitted). Where a mixed result is obtained, courts often decline to award costs to either party. *See, e.g.,* 10 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2668 (3d ed.) ("This result has been considered appropriate when neither side entirely prevailed or when both sides prevailed.").

In this case, while it is true that Montana will obtain a money judgment against Wyoming, it is also true that Wyoming prevailed on nearly all of Montana's claims. First, Wyoming prevailed on the most important issue in the case when this Court ruled that "Montana's allegation that Wyoming has breached Article V(A) of the Compact by allowing its pre-1950 water users to increase their irrigation efficiency thus fails to state a claim." *Montana v. Wyoming*, 563 U.S. ___, 131 S.Ct. 1775, 1779 (2011).

Measured in the volume of water at stake, this was by far the predominant issue in the case.[5]

Wyoming also prevailed on all of Montana's claims related to the Powder River basin when Montana voluntarily dismissed those claims. *See, e.g., Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990) ("[T]he dismissal of most of plaintiffs' claims makes defendants the prevailing party on those issues."). The Powder River basin is actually larger in geographic area than is the Tongue River Basin. And the storage capacity on the Powder River basin far exceeds the storage capacity in the Tongue River basin because of the large Wyoming reservoir on the Powder River. Ex. J61 at 8 (Lake DeSmet has a capacity of 234,987 acre feet). When it made its call in 2004, Montana demanded that Wyoming release a great deal of water from that reservoir. Ex. J64. In Montana's Bill of Complaint, it alleged that Wyoming's irrigation and storage from the Powder River and its tributaries, reservoirs, and groundwater sources violated the Yellowstone River Compact. *See generally*

[5] Montana's claims based on increased irrigation efficiency implicated Wyoming's pre-1950 water rights, which make up the vast majority of the water rights in the Tongue River basin in Wyoming. Of the 70,400 acres of irrigated land in the Tongue River basin in Wyoming only 4,320 acres are irrigated under post-1950 rights. Ex. M5 at 6, 17. Had a consumptive restriction been placed on Wyoming's pre-1950 water rights, it would have had a much more significant effect on Wyoming than will the curtailment of irrigation on the limited amount of post-1950 acreage in response to future calls from Montana.

Bill of Complaint. Montana did not announce that it was dropping its claims related to that basin until a scheduling conference on December 13, 2012, five years later. Status Conf. Tr. at 8 (Dec. 13, 2012); *see also* Second Interim Report at 30. During these five years, Wyoming had to defend against Montana's Powder River claims in its pleadings and in early depositions of key Montana witnesses. *See, e.g.,* Deposition Transcripts attached to Wyoming's Renewed Motion for Partial Summary Judgment (June 14, 2012). Of course, to prepare for its motions and these depositions, Wyoming had to internally investigate the facts surrounding its Powder River basin water uses for the many years that Montana claimed that Wyoming violated the compact. In sum, when Montana dropped the Powder River basin from its case, this was no small victory for Wyoming, and it was not a victory that came to Wyoming without cost.

Similarly, with respect to the Tongue River, the only basin that remained at issue at trial, Wyoming prevailed on all of Montana's claims related to the years 1981, 1982, 1985, 1987, 1988, 1989, 1992, 1994, 2000, 2001, 2002, and 2003. Second Interim Report at 231. And Wyoming's liability for 2004 and 2006 is significantly less than Montana claimed. *Compare* 1,356 acre feet *with* the quantification prepared by Montana's expert in Ex. M6, Table 3. Finally, Wyoming prevailed on all of Montana's claims that groundwater pumping in Wyoming adversely affected the flows in the Tongue River. Second Interim Report at 219.

At the end of the day, Wyoming's liability is limited to what it admitted early in these proceedings following the Special Master's First Interim Report – Wyoming did not honor Montana's calls in 2004 and 2006 because of its erroneous interpretation of the Compact. Every other claim or allegation of consequence was decided in Wyoming's favor. Under these circumstances, the Court should not find any merit in any claim that Montana might assert for costs. Further, Wyoming will absorb the costs that it has expended which include its one-half share of the most significant item: the fees of the Special Master. *See* Orders entered October 5, 2009, October 12, 2010, October 21, 2013, and February 23, 2015 (each dividing the Special Master's fees equally between the states).

CONCLUSION

Wyoming asks this Court to exercise its authority to end this litigation immediately to avoid the needless expense associated with further proceedings. At the same time, Montana has a right to receive compensation for Wyoming's errors in 2004 and 2006. The immediate entry of judgment in Montana's favor accomplishes both justice and judicial economy. Accordingly, Wyoming requests that the Court adopt all but that portion of the Second Interim Report recommending that this matter return to the Special Master for a remedies phase and enter judgment

against the State of Wyoming in the amount of $20,340.00 plus $15,537.06 in prejudgment interest.

Dated this 9th day of April, 2015.

Respectfully submitted,

THE STATE OF WYOMING

PETER K. MICHAEL*
Attorney General of Wyoming
JAY JERDE
Special Assistant Attorney General
JAMES KASTE
Deputy Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
ANDREW KUHLMANN
Senior Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
307-777-6946

**Counsel of Record*