

No. 137, Original

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In The  
Supreme Court Of The United States  
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STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

◆  
\_\_\_\_\_  
Before the Honorable Barton H. Thompson, Jr.  
Special Master  
◆  
\_\_\_\_\_

**MONTANA'S COMMENTS ON THE SPECIAL MASTER'S  
DISCUSSION DRAFT OF JUDGMENT AND DECREE**

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May 22, 2017

## **JUDGMENT<sup>1</sup>**

Judgment is awarded against the State of Wyoming and in favor of the State of Montana for violations of the Yellowstone River Compact resulting from Wyoming's reduction of the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1300 acre feet in 2004 and 56 acre feet in 2006. Judgment is awarded in the amount of \$20,340, together with pre-judgment and post-judgment interest of seven percent (7%) per annum from the year of each violation until paid. Costs are awarded to Montana in the amount of \$67,270.87.

Wyoming shall pay these damages, interest, and costs in full not later than 90 days from the date of entry of this Judgment. Wyoming shall make its payment into an account specified by Montana to be used for improvements to the Tongue River Reservoir or related facilities in Montana. Montana may distribute these funds to a state agency or program, a political subdivision of the State, a nonprofit corporation, association, and/or a charitable organization at the sole discretion of the Montana Attorney General in accordance with the laws of the State of Montana, with the express condition that the funds be used for improvements to the Tongue River Reservoir or related facilities in Montana.

Except as herein provided, all claims in Montana's Bill of Complaint are denied and dismissed with prejudice.

## **DECREE**

### **A. General Provisions**

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<sup>1</sup> Montana's comments are provided as redline suggested changes to the text of the Special Master's Discussion Draft of Judgment and Decree (May 15, 2017) and as footnotes, supported by the attached affidavits. The Special Master's explanatory footnotes and comments to the Discussion Draft have been removed to avoid confusion.

1. Article V(A) of the Yellowstone River Compact protects pre-1950 appropriative rights to the beneficial uses of water of the Yellowstone River system in Montana from diversions and withdrawals of surface water and groundwater in Wyoming, whether for direct use or storage, that are not made pursuant to appropriative rights in Wyoming existing as of January 1, 1950.

2. Article V(A) of the Compact apportions and regulates all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact).

3. Article V(A) of the Compact does not guarantee Montana a fixed flow of water, nor does it limit Wyoming to the net volume of water actually consumed in Wyoming prior to January 1, 1950.

4. Article V(A) of the Compact protects pre-1950 appropriative rights only to the extent they are for “beneficial uses,” as defined in Article II(H) of the Compact, and are otherwise consistent with the doctrine of appropriation. In particular, pre-1950 rights are not protected to the extent they are wasteful under the doctrine of appropriation.

5. Except as otherwise expressly provided in this Decree or the Compact, Montana’s and Wyoming’s state rules and regulations (including rules for reservoir accounting) govern the administration and management of each state’s respective water rights in the implementation of Article V(A) of the Compact.

**B. Calls**

1. To protect pre-1950 appropriative rights under Article V(A) of the Compact, Montana must place a call. Wyoming is not liable for flow impacts that take place when a call is not in effect.

2. Subject to paragraph B(3), Montana may place a call on the Tongue River whenever

(a) a pre-1950 direct flow right in Montana is not receiving the water to which it is entitled, or

(b) Montana reasonably believes, based on its sole discretion,<sup>2</sup> that the Tongue River Reservoir might not fill to capacity before the end of the water<sup>3</sup> year.

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3. Montana cannot place a call under Article V(A) when it can remedy shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact.

<sup>2</sup> The proposed modification conforms the provision to the prior appropriation doctrine as recognized by Wyoming, Montana and generally in the Western States. It would be best to remove any reference to what "Montana reasonably believes" in this provision, but the proposed change is acceptable to Montana. The reference to Montana's "sole discretion" restores the discretion that has always been accorded senior water rights under the prior appropriation doctrine.

This condition has no precedent under prior appropriation law. It has never been a condition applied to reservoir calls in the two States concerned, Montana and Wyoming, or in other States in the region. See the Affidavits of Kevin Smith, P.E., Gordon Aycock, P.E., and Dale Book, P.E. attached hereto. The footnote referred to by the Special Master in the Second Interim Report of the Special Master (Liability Issues) ("Second Report") offers no basis for the condition. See Second Report 78-79 n.20.

When the Special Master determined, as a matter of law, that the prior appropriation doctrine required Montana to make a call, he relied on two legal sources: A. Dan Tarlock, Law of Water Rights and Resources and *Worley v. United States Borax & Chemical Corp.*, 428 P2d 651 (NM 1967). See, Second Interim Report of the Special Master (Liability Issues) 49-50 ("Second Report"). Neither of these sources, however, mentions an exception for calls for the benefit of reservoirs under the prior appropriation doctrine. See A. Dan Tarlock Law of Water Rights and Resources §5:33 at 5-63 (2010) and *Worley v. United States Borax & Chemical Corp.*, 428 P2d 651, 654-55 (NM 1967).

This condition puts a new risk on a senior water right that is not a part of the prior appropriation doctrine. The Special Master has already determined that the prior appropriation doctrine with respect to reservoir calls must be applied strictly under the Compact. See Second Report 187-189.

The Special Master described the prior appropriation law that applies to calls by reservoirs as follows:

A storage right receives a priority date just like that of a direct-diversion right (although states differ in how they determine the priority date). If the holder of a storage right in a reservoir is not receiving the water needed to fill the reservoir, the holder can typically call the river and request that junior appropriators cease diverting water for direct use or storage until the senior reservoir is filled."

Second Report 112-113, citing Hutchins, Water Rights Laws in the Nineteen Western States. Thus, as stated by the Special Master here, there is no exception to the right of a reservoir to place a call if it has not filled its right.

In sum, Montana would prefer that this requirement be taken out altogether, but believes that it will suffice if the change recommended in the text is adopted.

<sup>3</sup> Montana believes that the correct reference is to "water" year rather than "calendar" year. The Compact operates on a water year basis, beginning on October 1. See Yellowstone River Compact, art. V(C). Later in the Discussion Draft, the Special Master uses the term "water year." See ¶ E.2, *infra*.

4. A call need not take any particular form, use any specific language, or be delivered by or to any particular official, but should be sufficient to place Wyoming on clear notice that Montana believes it needs additional water to satisfy its pre-1950 appropriative rights.

5. A call is effective upon receipt by Wyoming and continues in effect until Montana notifies Wyoming that Montana is lifting the call.

6. Montana shall promptly notify Wyoming that it is lifting a call when (a) pre-1950 direct flow rights in Montana are receiving the water to which they are entitled, and (b) Montana has reasonable grounds, based on its sole discretion<sup>4</sup> to believe that the Tongue River Reservoir will fill to capacity before the end of the water year.<sup>5</sup> Montana may initiate a new call at a later point if the conditions of paragraph B(2) are again met.

7. Upon receiving a call, Wyoming shall promptly initiate action to ensure, to the degree physically possible, that only pre-1950 appropriators in Wyoming are diverting, storing<sup>6</sup> or withdrawing water and only to the degree permitted by their appropriative rights and this Decree.

Where it is not physically possible initially to prevent post-1950 diversions, storage or withdrawals of water, Wyoming shall be required to deliver such water to Montana as soon as it is physically possible.<sup>7</sup> Wyoming shall notify Montana of the actions that it intends to take and has taken.<sup>8</sup> and, when requested, provide Montana with reasonable documentation of these actions (including records of reservoir operations, hydrographer reports, and field notes).

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<sup>4</sup> See discussion under footnote 2.

<sup>5</sup> See discussion under footnote 3.

<sup>6</sup> Montana recommends that an explicit reference to storage of water be included. Although storage, including storage in on-stream reservoirs, involves “diversion,” it is best to be clear that this provision covers storage of water.

<sup>7</sup> This additional language clarifies that Wyoming will be liable to deliver water, not just money for diversions or withdrawals for storage in violation of Article V(A). As the Supreme Court has said, in a recent compact enforcement case, “[i]t is important that water flows down the river, not just money.” *Kansas v. Nebraska*, 135 S.Ct. 1042, 1057 (2015). It also clarifies that the water will be delivered in a timely fashion.

<sup>8</sup> This change allows for advance notice, when appropriate, such as when withheld water is being delivered. It also relieves Wyoming of having to provide simultaneous notice when it is more appropriate to provide notice after the fact, such as confirmation that post-1950 rights have been shut off.

### C. Pre-1950 Appropriative Rights in Wyoming

1. The Compact assigns the same seniority level to all pre-1950 water users in Montana and Wyoming. Except as otherwise provided in this Decree, the exercise of pre-1950 appropriative rights in Wyoming does not violate the Compact rights of pre-1950 appropriative rights in Montana.

2. Article V(A) does not prohibit Montana or Wyoming from allowing a pre-1950 appropriator to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands to which the specific pre-1950 appropriative rights attaches, even when the increased consumption interferes with pre-1950 uses in Montana. Article V(A) protects pre-1950 appropriators in Montana from the use of such conserved water in Wyoming on new lands or for new purposes. Such uses fall within Article V(B) of the Compact and cannot interfere with pre-1950 appropriative rights in Montana.

3. Pre-1950 appropriators in Montana and Wyoming may change their place of use, type of use, and point of diversion pursuant to applicable state law, so long as any such changes in Wyoming do not injure<sup>9</sup> pre-1950 appropriative rights in Montana when those rights are unsatisfied.

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### D. Wyoming Storage Reservoirs

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<sup>9</sup> This suggested change conforms the decree to the prior appropriation doctrine. The current language is confusing. It seems to suggest that the futile call doctrine might be relevant, whereas, that doctrine is not relevant to water right changes, but only to calls. See, e.g., *Kelly v. Teton Prairie LLC*, 376 P3d 143 (MT 2016). Also, use of the word “sufficient” is unclear as to what effect it has on the injury rule under the prior appropriation doctrine. There is no *de minimus* rule for the degree to which surface water rights may be deprived of their water.

1. ~~Post-1950 appropriators in Wyoming may not store water when Montana has issued a call.~~<sup>10</sup> Post-1950 appropriators in Wyoming may store water during periods when ~~a call is not in effect.~~<sup>11</sup>

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2. Water stored under post-1950 appropriative rights in Wyoming when a call is not in effect has been legally stored under the Compact and can be subsequently used at any time, including when pre-1950 appropriative rights in Montana are unsatisfied. The Compact does not require Wyoming to release such water to Montana in response to a call.

**E. Tongue River Reservoir**

1. Article V(A) protects Montana’s right to store up to, but not more than, 72,500 acre feet of water in the Tongue River Reservoir, less carry-over storage in excess of 6,571 acre feet<sup>12</sup> as of October 1 of the water year. If the Tongue River Reservoir begins the water year on October 1 with over 6,571 acre feet of carryover water, Article V(A) protects Montana’s right to fill the Tongue River Reservoir to its current capacity of 79,071 acre feet.

2. Montana must avoid wasting water in its operation of the Tongue River Reservoir by not permitting outflows during winter months that are not dictated by good engineering practices. Any wasteful outflows reduce the amount of water storage protected under Article V(A) for that water year.

<sup>10</sup> The language recommended to be removed appears to be unnecessary and potentially confusing. The unnecessary language might be interpreted to require two conditions to be satisfied in order to stop the storage of post-1950 water in Wyoming, namely, a showing that water is needed to satisfy pre-1950 appropriative rights in Montana and that Montana has issued a call. It would appear that if Montana has issued a call, no further conditions need to be satisfied to require Wyoming to stop storing post-1950 water.

<sup>11</sup> This language includes not only when Montana has not made a call, but also when Montana has made a call and lifted that call.

<sup>12</sup> This proviso is necessary in order to carry out the Special Master’s ruling on the Tongue River Reservoir right. For example, if during a prior season, all of Montana’s 72,500 acre-foot right has been utilized, and in addition, some of the post-1950 storage right has been released, leaving, say, 1,000 acre-feet in the reservoir, without this language, Montana would not be able to store 72,500 acre-feet, but would be limited to 71,500 acre-feet even though there was no carryover under the 72,500 acre-foot right. This would not be consistent with the holding of the Special Master.

3. The reasonable range for winter outflows from the Tongue River Reservoir is 75 to 175 cubic feet per second. The appropriate outflow at any particular point of time varies within this range and depends on the specific conditions, including but not limited to<sup>13</sup> the needs of downstream senior water rights and risks such as ice jams and flooding. Montana enjoys significant discretion in setting the appropriate outflow within this range and in other reservoir operations.

**F. General Reservoir Rules**

1. Article V(A) of the Compact does not protect water stored exclusively for non-depletive purposes, such as hydroelectric generation and fish protection.

2. Montana and Wyoming must operate and regulate reservoirs on the Tongue River and its tributaries<sup>14</sup> in a fashion that is generally consistent with the appropriation laws and rules that govern similar reservoirs elsewhere in each respective state.

3. Reservoirs on the Tongue River and its tributaries in Montana or Wyoming cannot substantially change their operating procedures in a way that causes injury to appropriative rights in the other state.

**G. Information**

1. Appendix A to this Decree lists Montana’s pre-1950 water rights in the Tongue River basin that are protected by Article V(A) of the Compact.

2. Appendix B to this Decree lists Wyoming’s current post-1950 water rights in the Tongue River basin.

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<sup>13</sup> This clarifies that the list of conditions may not be exhaustive.

<sup>14</sup> This language clarifies that the provision applies to all reservoirs in the Tongue River Basin. A similar change is recommended for the following paragraph.



3. Montana and Wyoming shall exchange information, as reasonable and appropriate, relevant to the effective implementation of Article V(A) of the Compact. In particular, Montana and Wyoming will keep each other informed of any changes in the water rights listed in Appendices A and B. Montana and Wyoming also shall provide the other State annually with any data available in the ordinary course of water administration that shows the amount and location of groundwater pumping in the Tongue River and Powder River basins. The Yellowstone River Compact Commission remains free to modify or supplement the terms of this paragraph pursuant to its authority under the Compact.

**H. Rights of the Northern Cheyenne Tribe**

Nothing in this Decree addresses or determines the water rights of any Indian Tribe or Indian reservation or the status of such rights under the Yellowstone River Compact.

**I. Retention of Jurisdiction**

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that Montana's Comments on the Special Master's Discussion Draft of Judgment and Decree was served electronically and by U.S. Mail to the following on May 22, 2017, as indicated below:

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

/s/ John B. Draper  
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