

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.



**MONTANA’S PROPOSED JUDGMENT AND DECREE
(March 13, 2017)**

JUDGMENT

Judgment is awarded against the State of Wyoming in favor of the State of Montana for violations of the Yellowstone River Compact caused by Wyoming’s reduction of the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1,300 acre-feet in 2004 and 56 acre-feet in 2006. Judgment is awarded in the amount \$20,340.00, together with prejudgment and postjudgment interest of seven percent (7%) per annum from the year of each violation until paid. Costs are awarded to Montana in the amount of \$_____. This Judgment amount, including interest and costs, shall be paid in full not later than 90 days from the date of entry of this Judgment.

Wyoming shall pay the sum of the monetary judgment and the costs awarded into an account specified by Montana to be used for improvements to the Tongue River Reservoir or related facilities in the State of Montana. The funds may be distributed to a state agency or program, a political subdivision of the State, a non-profit 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 the State of Montana.

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

DECREE

A. General Provisions

1. Article V of the Yellowstone River Compact ("Compact") requires the State of Wyoming to:

a. Protect pre-1950 appropriative surface water rights in the Tongue River Basin in Montana from diversions and withdrawals of surface water and groundwater in Wyoming pursuant to water rights with priority dates after January 1, 1950.

b. Protect pre-1950 appropriative surface water rights in the Tongue River Basin in Montana from storage in Wyoming pursuant to water rights priority dates after January 1, 1950.

- c. Protect pre-1950 appropriative surface water rights in the Tongue River Basin in Montana from irrigation of acreage in Wyoming not irrigated before January 1, 1950.
 - d. Ensure that diversions of water into storage in Wyoming initiated on or after January 1, 1950, for either beneficial uses on new land or “supplemental water supplies” on pre-1950 irrigated acreage come only from “unused and unappropriated” water available after protecting pre-1950 appropriations in the Tongue River Basin in Montana.
2. Montana cannot demand that Wyoming release water from its reservoirs in the Tongue River Basin to satisfy Montana’s pre-1950 uses if that water was stored at a time when a Montana call was not in effect.
3. Article V(A) of the Compact does not prohibit Wyoming or Montana from allowing its pre-1950 appropriators to conserve water through the adoption of improved irrigation techniques and then use that conserved water to irrigate the same lands that they were irrigating as of January 1, 1950, even when the increased consumption interferes with pre-1950 uses in Montana. Uses of conserved water for “beneficial use on new lands or for other purposes,” by contrast, fall under Article V(B) of the Compact and are subject to the same restrictions imposed above on post-January 1, 1950 water uses in Wyoming.
4. Montana’s pre-1950 water rights in the Tongue River Basin protected by the Compact are identified in Appendix A to this Decree.
5. Included among Montana’s pre-1950 water rights in the Tongue River Basin protected by the Compact is the Tongue River Reservoir right to store up to the

Reservoir's original capacity of 72,500 acre-feet each year, less carryover storage under the 72,500 acre-foot water right as of October 1.

6. Wyoming's post-January 1, 1950 water rights in the Tongue River Basin subject to the Compact are identified in Appendix B to this Decree.
7. Article V(A) of the Yellowstone River Compact apportions 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).
8. Article V(A) of the Yellowstone River Compact does not guarantee Montana any set flow of water at the Stateline; instead, it guarantees the continued enjoyment of pre-1950 appropriative rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.
9. Article V(A) does not limit Wyoming or Montana to the net volume of water that was actually being consumed prior to January 1, 1950, so long as the pre-1950 water rights remain unchanged with respect to irrigated acreage, type of use and location and capacity of diversion.
10. The Yellowstone River Compact assigned the same seniority level to all pre-1950 appropriative rights in Montana and Wyoming. Downstream pre-1950 appropriative rights in one State cannot stop upstream pre-1950 appropriative rights in the other State from being fully exercised.
11. Article V(A) of the Yellowstone River Compact protects pre-1950 appropriative rights in each State that change their water use efficiency, consumptive use, and return flow volumes and timing, so long as the

pre-1950 water rights remain unchanged with respect to irrigated acreage, type of use and location and capacity of diversion.

12. The place of use, type of use, and point of diversion of pre-1950 water rights in each State may be changed so long as consumptive use and return flow volumes and timing, as of January 1, 1950, are not changed.
13. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that post-January 1, 1950 diversions or withdrawals in Wyoming not interfere with pre-1950 appropriative rights in Montana. It shall be Wyoming's burden to establish that an appropriate intrastate remedy existed.

B. Special Provisions

1. In order for Montana to enjoy the protection of its pre-1950 water rights in the Tongue River Basin under Article V(A) of the Compact, Montana must place a call.
2. Montana may place a call at any time that any of its pre-1950 water rights are not being satisfied.
3. Whenever Montana places a call, Montana shall ensure that all pre-1950 water rights in the Tongue River Basin in Montana upstream of the unsatisfied pre-1950 rights are strictly regulated to their appropriate amounts and that all post-January 1, 1950 water rights in the Tongue River Basin in Montana upstream of the unsatisfied pre-1950 rights are regulated off.

4. Montana may place a call in the winter (between October 1 and April 1) of each year whenever the Tongue River Reservoir is not filled to its maximum winter capacity, presently 45,000 acre-feet of water in storage.
5. If, on or after April 1, Tongue River Reservoir is not filled to its maximum physical capacity, Montana may place a call, or continue an existing call, and maintain the call until such time as the Reservoir has filled to its maximum physical capacity, subject to the condition that Montana may not call for more than 72,500 acre-feet in any one Compact year, less carryover storage under the 72,500 acre-foot water right as of October 1.
6. If, on or after April 1, any pre-1950 direct-flow water rights in the Tongue River Basin in Montana are not being satisfied, Montana may place a call and maintain the call until such time as all pre-1950 direct-flow water rights in Montana are being satisfied. A call may be reinstated if any pre-1950 direct-flow water rights in Montana become unsatisfied later in the year.
7. Whenever a call by Montana is in effect, all pre-1950 surface water rights in the Tongue River Basin in Wyoming shall be strictly regulated to their adjudicated amounts, and all Wyoming rights identified in Appendix B shall be regulated off.
8. Communications initiating or lifting a call shall be made by Montana's Yellowstone River Compact Commissioner or his/her designee ("Montana's Commissioner") to Wyoming's Yellowstone River Compact Commissioner or his/her designee ("Wyoming's Commissioner"). When the communication is verbal, it shall be documented within (1) week. A call is effective as of the time

the initial communication of the call is received. A call continues in effect until it is lifted.

9. On the date of a call, Wyoming's Commissioner shall initiate action to ensure that all pre-1950 water rights in the Tongue River Basin in Wyoming have been strictly regulated to their adjudicated amounts and that all the rights listed in Appendix B have been regulated off. Wyoming's Commissioner shall confirm to Montana's Commissioner in writing within two business days of the initiation of a call that all pre-1950 water rights in the Tongue River Basin in Wyoming have been strictly regulated to their adjudicated amounts and that all the rights listed in Appendix B have been regulated off.
10. On request by Montana's Commissioner, Wyoming's Commissioner shall provide Montana's Commissioner such further documentation as Montana's Commissioner may reasonably request that all pre-1950 water rights in the Tongue River Basin in Wyoming have been strictly regulated to their adjudicated amounts and that all the rights listed in Appendix B have been regulated off. The further documentation requested may include records of reservoir operations, hydrographer reports and field notes, and other records of actions taken. Such documentation shall be provided within ten business days of the request.
11. When Montana's pre-1950 water rights in the Tongue River Basin have been satisfied, Montana's Commissioner shall lift the call within two business days by so notifying Wyoming's Commissioner.
12. Montana shall have significant discretion in Reservoir operations and in setting bypass flows from Tongue River Reservoir.

13. In order for Montana and Wyoming to enjoy the protection of their pre-1950 water rights in the Tongue River Basin under Article V(A) of the Compact, Montana and Wyoming shall substantially continue their present administration of water, avoiding waste to the extent reasonably possible. Such administration shall be presumed reasonable unless proven otherwise by the other State.
14. Any changes, additions or subtractions regarding the water rights listed in Appendices A or B by one State shall be promptly provided to the other State by the State's Commissioner.
15. Wyoming and Montana shall provide the other State annually, at the Yellowstone Compact Commission annual meeting, such data as may be available in the ordinary course of water administration in each State, showing the amount and location of groundwater pumping in the Tongue River and Powder River Basins.
16. Where Wyoming or Montana reservoirs have multiple storage rights with different priorities, those reservoirs fill their more senior storage rights first and then, once the senior rights are filled, those reservoirs fill their more junior rights.
17. Once Wyoming or Montana reservoirs with multiple storage rights with different priorities begin to release water for use, the accounting may be that those reservoirs release their senior water first, thus evacuating senior capacity.
18. Where water remaining in storage at the end of a water year is carried over to the following water year in Wyoming or Montana reservoirs that have multiple storage rights with different priorities, the carryover water may be accounted as junior water first and senior water only to the extent that the carryover exceeds the water remaining in storage under junior rights.

19. Sedimentation of reservoirs in Wyoming or Montana with multiple storage rights with different priorities may be accounted first against the more junior storage rights.
20. During a call, the reasonable range for winter outflows from the Tongue River Reservoir is 75 cubic feet per second (“cfs”) to 175 cfs. The appropriate outflow at any particular point of time varies within this range and depends on the specific conditions, including the needs of downstream senior water rights and risks such as ice jams and flooding. Under no circumstances shall Montana be expected to reduce winter bypass flows below 75 cfs. If there is any dispute, it shall be Wyoming’s burden to show that Montana’s operation of Tongue River Reservoir has been unreasonable or wasteful.
21. If Wyoming believes that Montana has engaged in wasteful practices so as to affect a call by Montana, or that there is otherwise a defect in a call or the basis for a call, Wyoming is free to challenge the call with specific evidence, but it shall be Wyoming’s burden to prove such allegations. Wyoming shall continue to honor the call in the meantime.
22. Wyoming’s Early-Fill Rule and Store-It-Or-Lose-It Rule are not Compact requirements for Montana reservoir operations to be protected by the Compact.

C. No Effect on Rights of Indian Tribes and Reservations

Nothing in this Decree shall affect the water rights or other rights of any Indian Tribe or any Indian reservation.

D. 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.

APPENDIX A: Montana's pre-1950 water rights in the Tongue River Basin [to be supplied]

APPENDIX B: Wyoming's post-January 1, 1950 water rights in the Tongue River Basin
[example supplied]