

In The
Supreme Court of the United States

—◆—
STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING
AND
STATE OF NORTH DAKOTA,

Defendants.

—◆—
**WYOMING'S SUR-REPLY
IN SUPPORT OF EXCEPTION**
—◆—

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ARGUMENT

Montana has failed to show that a remedies phase is necessary.

Montana does not contest that, as a matter of blackletter contract law, Montana's actual damages are limited to the cost to cover plus prejudgment interest. Nor does it take issue with the value ascribed to those damages by Wyoming. Montana proclaims that Wyoming's word is an inadequate assurance of compliance; however, it offers no evidence demonstrating that there is a cognizable danger of a recurrent violation entitling it to injunctive relief. Finally, Montana does not argue that it is entitled to any extraordinary relief, including disgorgement. Thus, it concedes that further proceedings will not change the substantive result in this case.

Nevertheless, Montana asks the Court to continue this litigation so that it can seek an advisory opinion on at least one issue. In its Exception and its Reply to Montana's Exception, Wyoming fully explained why no further declaratory, injunctive, or other relief is necessary or warranted. For its part, Montana's Reply offers no good rationale for proceeding to a remedies phase in this case, and only three points in the Reply warrant any response.

First, while it is probably not proper for either State to offer evidence to the Court that was not

presented to the Special Master at trial, Wyoming also believes the course of conduct of the States this year is telling and important.¹ Montana called the river for the benefit of the Tongue River Reservoir on April 10, 2015, the day after the parties filed their exceptions to the Second Interim Report. MT Reply at App. 1. As it has repeatedly committed to do, Wyoming immediately measured the contents of its reservoirs and after a diligent search found no irrigation occurring at that time under a post-1950 water right. MT Reply at App. 6. Thus, no regulation or curtailment in Wyoming was required at that time, and Wyoming so advised Montana. *Id.*

When Montana called the river, it had no water commissioner in place to regulate its own post-1950 rights. *Id.* at App. 7. At that time, Montana was releasing significant quantities of water from the reservoir without putting that water to beneficial use resulting in significant waste at the mouth of the river. *Id.* Wyoming reasonably questioned these decisions but did not refuse to honor Montana's call. *Id.*; *see also* Second Interim Report at 156-57 (explaining that Wyoming is free to challenge Montana's wasteful operational practices with specific evidence).

¹ For the Court's convenience, the correspondence exchanged by the parties subsequent to the filing of Montana's Reply Brief is attached hereto but without the accompanying maps, photos, charts, and memos.

Over the next two weeks, as Wyoming irrigators began to need water, Wyoming's hydrographer commissioners regulated those diversions with post-1950 rights and Wyoming informed Montana of those regulatory activities on April 27, 2015. MT Reply at App. 19. By that time, rather than capturing as much water as possible in the reservoir for which it had called the river, Montana had actually increased the amount of water it was releasing from the reservoir. *Id.* This situation continued over the course of the next several weeks. App. 1-13. Wyoming effectively regulated all post-1950 use within its borders in response to the call for the benefit of the Tongue River Reservoir, while Montana steadily increased the amounts it released from the reservoir and wasted at the mouth of the river. *Id.* On May 21, 2015, Tongue River Reservoir filled in spite of Montana's profligate releases, and Montana cancelled the call. App. 14-16.

This course of conduct does not demonstrate that further proceedings before the Special Master are necessary to accord Montana complete relief in this case. Instead, Montana's successful call for regulation this year demonstrates that the opposite is true. In response to Montana's call, Wyoming altered its behavior from that of 2004 and 2006 and did exactly what it was required to do under the Compact according to the decisions issued in these proceedings. It regulated first and asked questions later. Those questions about Montana's wasteful practices and

lack of transparency are important, but Wyoming has not presented them to the Court in these proceedings, and it may never do so. The speculative possibility that there may be future discord between the States that they cannot resolve themselves does not present “a case of actual controversy” sufficient to satisfy the requirements of the Declaratory Judgment Act. *See* 28 U.S.C. § 2201(a); WY’s Reply to MT’s Exception at 6.

Second, in its efforts to obtain additional declaratory relief, Montana mistakes the Court’s willingness to provide relief designed to deter future breaches for a willingness to offer advisory opinions. MT Reply at 7-9. In appropriate cases “awarding actual damages for a compact’s infringement may be inadequate, because that remedy alone ‘would permit [an upstream state] to ignore its obligation to deliver water as long as it is willing’ to pay that amount.” *Kansas v. Nebraska*, 574 U.S. ___, 135 S. Ct. 1042, 1057 (2015) (citing *Texas v. New Mexico*, 482 U.S. 124, 132 (1987)). Wyoming does not question the Court’s broad discretion to craft a “fair and equitable remedy” where the circumstances indicate that actual damages will not suffice to deter future breaches. *Id.* However, the Court has never held that such extraordinary relief is available in every interstate compact case. And, unlike *Kansas v. Nebraska*, where there was significant evidence that Nebraska knowingly “took full advantage of its favorable position,” *id.*, there is no evidence that Wyoming did so in this case.

Even assuming that such evidence had been presented, however, it would not free the Court to enter further declaratory relief in the absence of “a case of actual controversy[.]” 28 U.S.C. § 2201(a). No such controversy remains here, and therefore, no further proceedings are necessary. *See* WY’s Reply to MT’s Exception.

Finally, with regard to costs, Montana asserts that it is the prevailing party, that it is entitled to costs as a matter of course, and that the issue of costs should not be determined summarily. MT Reply at 13-18. Wyoming does not deny that Montana prevailed in some measure in this case, although not to the extent Wyoming did. *See* WY’s Exception at 16-20. In such circumstances, however, courts appropriately exercise their discretion to refuse costs “when the prevailing party was only partially successful, when damages were only nominal, when costs were unreasonably high or unnecessary, when recovery was insignificant, or when the issues were close or difficult[.]” *See, e.g., Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 722 (10th Cir. 2000); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir. 1986). Each of these considerations counsels against awarding costs to Montana in this case. As set forth in Wyoming’s Exception, Montana was only partially successful, its damages are nominal and insignificant, particularly when compared to the unreasonably high and unnecessary costs incurred, and while many of the issues were trivial in effect,

they were close and difficult to determine as evidenced by the Second Interim Report. *See* WY's Exception at 16-20. These facts will not change with further proceedings, and therefore, the appropriate allocation of costs is well suited to disposition at this time. Moreover, these facts demonstrate that Montana should bear at least its share of the burden of this litigation where the utility of the claims it chose to prosecute was overwhelmed by the cost of the proceedings.



CONCLUSION

Further proceedings in this case will not serve the interests of justice and judicial economy. Montana has obtained a complete and fair adjudication of the claims it brought before the Court. No more is necessary to resolve this case and proceeding to a remedies phase would be needlessly wasteful. 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 plus \$15,537.06 in prejudgment interest.

Dated this 3rd day of June 2015.

Respectfully submitted,

THE STATE OF WYOMING

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[SEAL] **MATTHEW H. MEAD**
GOVERNOR

PATRICK T. TYRRELL
STATE ENGINEER

May 5, 2015

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1424 9th Avenue
P.O. Box 201601
Helena MT 59620-1601

Re: Updated Information in Response to Montana's
Call for Tongue River Reservoir (TRR)

Tim:

This is a continuing update for you on Wyoming's regulatory efforts in response to Montana's call to fill TRR. Since April 28, Wyoming has had no need to regulate additional post-50 water rights, because to our knowledge no post-50 rights in addition to those regulated off last week are diverting (and those regulated previously are still off). Furthermore, our information indicates that knowing post-50 diversions will be curtailed is effectively precluding their coming on in the first place. Wyoming also has no knowledge of any diversions in this basin diverting in

excess of their pre-50 Wyoming water right, or any diverting without a water right.

We continue to note bypasses through TRR are increasing and its contents have increased to 66,940 AF. As of today, flows below the reservoir are in excess of 240 cfs. Will you please explain and describe the need for this increased bypass? Specifically, I am interested in knowing whether this is due to a request or call from T&Y Canal or any other valid pre-50 water rights in Montana and whether or not they would be satisfied absent the current level of bypass.

Wyoming's water commissioners continue to monitor water usage in the basin daily. We are seeing pre-50 rights coming on more frequently.

Regards,

/s/ Patrick T. Tyrrell

Patrick T. Tyrrell
Wyoming State Engineer

cc: Sue Lowry, Yellowstone River Compact
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May 13, 2015

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Re: Current Information in Response to Montana's
Call for Tongue River Reservoir (TRR)

Tim:

I wanted to continue to update you on Wyoming's regulatory efforts in response to Montana's call to fill TRR. Since my May 5, 2015 letter, Wyoming has continued to regulate post-50 water rights, and to our knowledge no post-50 rights in Wyoming are diverting. Those regulated previously are still off. Once again, my information is our curtailment efforts are resulting in post-50 diversions not coming on in the first place. Wyoming also has no knowledge of any other diversions in this basin diverting in excess of

their pre-50 Wyoming water right, nor knowledge of any diversions being made without a water right.

I note in your last letter the result of what you call “windshield surveys,” and evaluations of Landsat imagery. You allege post-50 water rights in Wyoming are diverting. Unfortunately, you provided no indication of where you believe those rights to be located, so our efforts have been unable to confirm your allegations. Please send us the locations of where you believe such use to be occurring so we can assess the situation.

In your letter you identify water rights senior to the reservoir’s 1937 water right as calling water past TRR dam. Please identify those rights so we can confirm the calling party and please confirm that they in fact demand water. Once again, we assume that to deliver water to pre-1937 rights below TRR you have regulated off any and all post-50 water rights in Montana between TRR and the calling water rights. However, we have yet to hear that a water commissioner has been appointed in Montana to do the required regulation. Please confirm that a commissioner has been appointed so Wyoming can be assured our regulation to benefit TRR is effective. This includes your confirmation that not only have junior water rights along Tongue River been curtailed, but on your Tongue River tributaries also. Obviously, diversions or use by post-50 water rights along Montana tributaries would reduce flows in the Tongue River and improperly increase the amount of

water you seek from Wyoming, and we want assurances this is not occurring.

We continue to follow releases from TRR and note that its content has increased to 71,235 AF, a gain of over 4,000 AF in the last week. Flows below the reservoir have fluctuated between 242 and 245 cfs since about May 4th. I also note flows at the Tongue River near Miles City gage have increased from about 23 cfs to 50-70 cfs just since May 7. We are concerned about water curtailed in Wyoming, or bypassed through TRR, resulting in a waste of water at the mouth, and seek an explanation as to the lack of diversion in this reach. So, I would ask that Montana please explain why, as the amount released from TRR increases, so has the amount of water wasted at the Miles City gage.

Wyoming's water commissioners continue to monitor water usage in the basin and curtail post-50 uses. We are still seeing pre-50 rights coming on more frequently. I would note that while I still await answers to previous questions, such as who is demanding water past TRR, and evidence thereof, and that a water commissioner be appointed and post-50 water rights in Montana are confirmed as being curtailed, failure to receive any affirmative response to those questions has not stopped us from continuing to curtail water uses in Wyoming.

Regards,

/s/ Patrick T. Tyrrell

Patrick T. Tyrrell
Wyoming State Engineer

cc: Sue Lowry, Yellowstone River Compact
Commissioner for Wyoming
James Kaste, Attorney General's Office
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PATRICK T. TYRRELL
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May 19, 2015

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and Conservation
1424 9th Avenue
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Helena MT 59620-1601

Re: Additional Observations Regarding Montana's
Call for Tongue River Reservoir (TRR)

Tim:

I wanted to continue to update you on Wyoming's regulatory efforts in response to Montana's call to fill TRR. Since my May 13, 2015 letter, Wyoming has continued to disallow post-1950 water rights from diverting. Those regulated previously are still off. The attached table shows those rights we actively regulated off as of April 27, 2015, and based on our field reports, no others have required regulation since then because our efforts have deterred additional post-1950 rights from diverting. Wyoming still has no knowledge of any other diversions in this basin

diverting in excess of their pre-1950 Wyoming water right, nor knowledge of any diversions being made without a water right.

You have asked about what Wyoming has done in response to Montana's call. I have described some of our efforts previously, but to be clear the following is a more comprehensive summary of what we have done:

1. Upon receipt of Montana's call on April 10, as we previously informed you, and based on information we had at the time, no post-1950 rights were diverting in Wyoming because of the early date. As you know, and as the Special Master recognized, Wyoming's hydrographer's pay close attention to their water districts so we had a good understanding of Wyoming's water use at the time of Montana's call.
2. We immediately gathered information on post-1950 reservoir storage. We provided this information to you on April 21.
3. On April 22 we held a publicly advertised meeting in Sheridan, Wyoming. All of the post-1950 appropriators identified by the Special Master as having diverted in violation of the Compact in 2004 or 2006, as well as others, were individually invited. At that meeting we informed those appropriators, and all in attendance, that post-1950 diversions would be regulated off as a result of Montana's call. We also informed post-1950 storage appropriators about the potential

need to release water stored after the call date.

4. On April 27, I sent you a letter and informed you that we had regulated off a number of post-1950 rights we found diverting.
5. Since the date of the call and after, our hydrographers have routinely inspected their districts and have received multiple inquiries about the ability of post-1950 rights to divert in Wyoming. They have responded that such diversions cannot occur until TRR fills. To our knowledge, those rights have not begun diverting. When we receive requests for post-1950 diversions to become active, they are rebuffed.
6. Ditches which possess both pre-1950 and post-1950 rights are monitored and will be regulated to their maximum pre-1950 water right limit. To date, no such ditch has diverted more than its pre-1950 appropriation. Similarly, we have monitored ditches with only pre-1950 rights and they will also be limited to the maximum extent of their right.
7. Our monitoring has not revealed any post-1950 rights that are diverting. If they are found to be doing so, or if they are otherwise identified, they will be regulated off. So far our field visits show compliance. Our actions are analogous to how we respond to automatic calls on the North Platte River under an Allocation Year Administration.

In your last letter you reported the result of what you called “windshield surveys,” and evaluations of Landsat imagery. And as I mentioned in my last letter, you provided no indication of where you believe those rights to be located, and we have not been able to confirm your allegations. I still seek the locations of where you believe such use to be occurring so we can assess the situation and regulate as necessary. Please send the data in your possession as soon as possible.

In my last letter, and previous letters, we also requested confirmation that post-1950 rights were off in Montana. You have not provided this requested confirmation, nor have you let us know that a water commissioner has been appointed for the Tongue River in Montana. Therefore, Wyoming must assume that no regulation is taking place in Montana. As a result, we were compelled to travel the Tongue River in Montana to assess water use, much as you say Montana did in Wyoming. We believe that at least 10 post-1950 rights were and are actively diverting below TRR in Montana. We came to that conclusion based on our inspection as applied to Montana’s description of pre-1950 and post-1950 water rights as mapped and presented to the Special Master during trial. The attached memorandum, table and maps show the water rights Montana described to be post-1950 (or at least not pre-1950) water rights that were actively diverting on May 14, 2015. Some may not have water rights at all, based upon your mapping. The total amount of land receiving water downstream of TRR in Montana under either post-1950 priorities

or no water right at all is approximately 740 acres, or about 18.5 cfs using Montana's 1 cfs per 40 acre duty of water. Please explain why these rights are being permitted to divert at this time.

We continue to follow releases from TRR and note that its content has increased to 76,307 AF. We are also following flows at the state line, below TRR, and at the Miles City gage. Recent hydrographs for those gages are enclosed with this letter. Recent rains have increased the TRR inflow to 800 – 1,000 cfs, water bypassing the T&Y Diversion is now over 100 cfs, and flows out of TRR were increased yesterday to approximately 290 cfs and again today to 334 cfs for no reason we can discern. Montana has previously described its May irrigation demand below TRR, for pre-1950 water rights, at 195 cfs. The Special Master found that this demand amount was inflated. Accordingly, please explain why Montana is currently bypassing through TRR approximately 140 cfs more than the inflated amount you claimed was needed to satisfy downstream pre-1950 rights in May.

Absent a satisfactory explanation from Montana, we are left to conclude either that you are making space for anticipated flood waters, or that you believe there is water available for diversion by post-1950 rights in Montana (Article V(B) water). In neither event is Wyoming required to regulate its post-1950 rights under the Compact. But, we still are. As I mentioned above, I am enclosing the list of rights we regulated off prior to April 27, 2015. There has been no new regulatory activity to report, because as I mentioned

above my field staff indicates other post-1950 rights desiring to come on have been told not to divert or those rights have declined to divert assuming they would quickly be regulated off. At any rate, their demands are not being met or felt by the system all while Montana continues to increase its bypasses through TRR, allow its post-1950 rights to divert, and waste water to the Yellowstone River.

We are not only concerned about water curtailed in Wyoming, or bypassed through TRR resulting in a waste of water at the mouth, but Wyoming is particularly troubled by the fact that so many post-1950 water rights in Montana appear to be active as shown in our attachments. It appears that water made available through Wyoming's curtailment efforts is being wasted by Montana. The amount of water resulting from Wyoming's efforts is now exceeded by a larger amount of water use by post-1950 water rights (or lands with no water rights) in Montana. Moreover, a significant amount of water is flowing past the T&Y canal into the Yellowstone River without being put to beneficial use, and to make matters worse, we see that flows just yesterday and today increased out of TRR. Thus, it is clear that water made available by regulation in Wyoming is not being used to fill TRR, but rather is being used by Montana's post-1950 rights or simply being wasted at the mouth of the river.

Current streamflows, with more expected rains in the basin, indicate TRR will fill this week, unless Montana overtly chooses to release water at rates that

prevent it from filling. We trust that will not occur. Similarly, we trust that in future years Montana will take appropriate steps to avoid or rescind a call unless supported by significant evidence as required by the Special Master, that Montana will adequately police its post-1950 rights if a call is necessary, and that it will not waste significant amounts of storable water at the mouth. We look forward to receiving the information we requested at your earliest convenience.

Regards,

/s/ Patrick T. Tyrrell

Patrick T. Tyrrell
Wyoming State Engineer

cc: Sue Lowry, Yellowstone River Compact
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May 21, 2015

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Pat Tyrrell, Wyoming State Engineer
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122 West 25th Street
Cheyenne, Wyoming 82002

**Re: Cancel of the call under the Yellowstone
River Compact**

Dear Sue and Pat,

This purpose of this letter is to notify you that as of today Montana has cancelled the call on Wyoming under the Yellowstone River Compact for the Tongue River Reservoir.

Additionally, I want to thank you for your Letter of May 19, 2015 (Letter). Montana is providing you a

limited response to your Letter today and will provide a more detailed response next week.

While we appreciate your explanation of the steps that Wyoming has taken to honor Montana's call, it would have been beneficial to Montana to learn the details of Wyoming's response earlier than May 19. In particular, information relative to the April 22, 2015 public meeting regarding post-1950 water use and the accompanying detail could have been conveyed in one of your April 27, May 5, or May 13 letters, and would have alleviated some of Montana's concerns with implementation of the call.

Your Letter requests additional information concerning Montana's review of potential irrigation of post-1950 acreage in Wyoming. For your information we have attached the April 30, 2015 Report of Chuck Dalby which summarizes Montana's observations. This report was not intended to be a comprehensive review. The post-1950 acreage at issue is on the Padlock Ranch and along Prairie Dog Creek. Given your explanation of curtailment actions, please reconcile the observed irrigation on the parcels at issue.

Your Letter further requests significant information from Montana. Montana does not believe that this information is required by the Special Master's Second Interim Report and the very request for this information indicates why the obligations of the Parties relative to a call must be declared by the Court.

Nevertheless, in the spirit of cooperation, Montana provides the following information. Montana Commissioners are regulating the River. Montana held a meeting on May 1 with water users discussing the call and the use of contract water. Montana has since begun releasing contract water from the Tongue River Reservoir due to the dry conditions, in addition to passing through water for senior water rights downstream. This water was/is tracked for the purposes of the call. As you know the travel time down the 200-mile Tongue River can be as much as seven days for the delivery of contract water and pass through multiple gages.

Sincerely,

/s/ Tim Davis

Tim Davis, Montana Commissioner
Yellowstone River Compact

State Engineer's Office

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[SEAL] **MATTHEW H. MEAD**
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May 22, 2015

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Helena MT 59620-1601

Re: Montana's Cancellation of Call for Tongue River
Reservoir (TRR)

Dear Tim,

I want to thank you for your letter dated yesterday, May 21, 2015, where you cancelled the April 10 call Montana made under the Yellowstone River Compact to fill TRR. We were pleased to see water rising to TRR's principal spillway yesterday. For the benefit of water users in both of our states, I hope we continue to see significant rain as we move into summer.

I also want to thank you for the additional information you provided with regard to the recent increased bypasses through TRR, and Water use by post-1950 rights in Montana. I look forward to your

more detailed response next week. While the Special Master's Second Interim Report may not explicitly require either state to supply the other with specific information, the common duty we have to our respective water users, as well as our perpetual common use of Tongue River water, compels information sharing into the future. In that regard, I want to respond to the inquiries you made in yesterday's letter.

Along with your letter you provided a report from Chuck Dalby which summarized Montana's observations with regard to potential post-1950 irrigation in Wyoming during the call period. You asked that, given my previous explanation of curtailment actions in Wyoming, we reconcile Montana's "observed irrigation" on the parcels at issue. I first note that the report only indicates that Montana believes some irrigation occurred on the identified parcels prior to April 14. Notwithstanding the fact that irrigation that early in the year would be very unusual, any irrigation which took place prior to April 13 would not have been contrary to Montana's call because it would have taken place prior to the call and the date Montana requested regulation. Furthermore, our information indicates that no such irrigation took place.

The majority of Mr. Dalby's report focuses on the Padlock Ranch pivots. Many of these pivots benefit from pre-1950 water rights, a fact referenced by Mr. Dalby although not entirely accurately (for example, pivots P9-P11 do have associated pre-1950 water rights, just as the map he references indicates). We

contacted Padlock Ranch the day Montana made its call. At that time, Five Mile reservoir was full as indicated by the information we provided to you on April 21. As such, that water was stored in priority and could have been used by Padlock Ranch. However, they have engaged in no irrigation so far this season out of Five Mile or Wagner reservoirs. In fact, they have been conducting maintenance on their conveyance system out of Five Mile reservoir and, due to suspended electrical service, have been physically unable to irrigate from either reservoir so far this year. Furthermore, a Wyoming Hydrographer has observed operations at Padlock Ranch no less than every other day since April 10 and has never observed irrigation though [sic] any of the Padlock Ranch pivots.

The Prairie Dog Creek parcels identified in Mr. Dalby's report were all at issue in the litigation. Accordingly, as with all of the rights identified in the litigation, our Hydrographers were certainly monitoring these rights. The northernmost parcel on Prairie Dog Creek identified in Mr. Dalby's report is the Trembath right. The Trembath farm is for sale and our information indicates that it is currently vacant with no farming activity taking place. The pivot does not appear to have moved since the end of last irrigation season. Furthermore, the appropriator successfully petitioned the Wyoming Board of Control and transferred an active, pre-1950 water right to the identified parcel. That parcel now benefits from a water right with an 1886 priority date. The other parcels identified on Prairie Dog Creek all appear

associated with various Pilch water rights. A Wyoming Hydrographer also contacted this appropriator immediately after Montana's call. Since then, that Hydrographer has continually monitored water use on these lands and the only activity he has observed was the result of irrigation with CBM produced water, not a post-1950 diversion from Prairie Dog Creek. When we informed this appropriator yesterday that Montana had cancelled its call, they asked if they could now turn on their Prairie Dog Creek pumps indicating that those pumps had not previously been on. We do not understand the relevance of Mr. Dalby's photograph which indicates it was taken near the confluence of Prairie Dog Creek and Dutch Creek, as that confluence is significantly south of the parcels identified in his report.

I hope you find this information useful, and I look forward to continuing this dialog as we work together through this process.

Regards,

/s/ Patrick T. Tyrrell

Patrick T. Tyrrell
Wyoming State Engineer

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June 1, 2015

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Re: Tyrrell Letters of May 19 and 22, 2015

Dear Sue and Pat,

Thank you for your Letter of May 22, 2015. As I had previously promised, we are providing a more detailed response to your Letter of May 19, 2015 (Letter). As you noted in your May 22, 2015 letter, we agree that this information is not required to be provided for a call under the terms of the Special Master's Second Interim Report. However, we hope that by sharing this information during this first year after the

Second Interim Report was issued that both states can begin to develop the processes that will enable us to implement the provisions of the Yellowstone River compact more smoothly.

At the outset, I do need to note that your reliance on average flow numbers in Dale Book's analysis ("inflated amount" claimed to "satisfy downstream pre-1950 rights in May") as a hard calculation of Montana needs in every year is misplaced. Mr. Book's calculations were for the purpose of assessing damages in years where specific records were incomplete. Releases at the dam in 2015 reflect real-time releases to meet calls for both pre-1950 direct flow and contract water rights as a result of dry conditions in the Basin.

As I relayed to you in my May 21, 2015 letter, water commissioners are on the Tongue River and the Tongue River Reservoir has begun contract deliveries because of the dry weather. Additionally, as I indicated previously, Montana curtailed all post-1950 rights above the dam before making the call on Wyoming including Wiltrout Family Trust 40B 6176-00, and Cloud Peak Energy 42B 20059-00. Regarding the 10 parcels identified in your letter that you believe are or have been actively diverting post-1950 rights or are diverting without any water right, allow me to provide the following information. Parcels 2 through 10 of your Letter received contract water. Land receiving contract water is not required to have a water right, but only the right to use water from the Reservoir. Additionally, Parcel 1 has 1911 and 1930 water rights. Flows below the dam reflect both

decreed water rights and contract water releases. Montana accounted for its contract water in its calculations for the call. Additionally, Montana canceled the call prior to the Reservoir reaching full pool.

On May 1, 2015, T&Y began calling for their decreed water to be passed through the dam. As you know, water right holders are entitled to their flow rate at their headgate. T&Y is approximately 190 miles downstream from the dam, which requires substantial carriage water to have the required flowrate arrive at the T&Y headgate. In addition, when a system like the Tongue River downstream of the Reservoir is run at such low flows, as has been the case this year resulting from Montana restricting outflows in order to store water in the Reservoir, for any length of time then after the first time flows are increased a substantial volume of water is lost to bank storage until the system reaches equilibrium.

Wyoming references the flows at the Miles City gage. The Miles City gage is approximately 200 miles downstream of the Reservoir. Indeed, the travel time for water released from the dam to reach the T&Y Diversion (above the Miles City gage) is approximately seven days, sometimes longer or shorter depending on climate conditions and flow rates. Along a river of that length, a multitude of factors can affect the source. These factors include tributaries, bank storage, and isolated microclimate precipitation, and weather events, just to name a few.

As our exchange of letters indicates, making a call and honoring a call can be complicated. For example, it would have been beneficial for Montana to know what steps Wyoming had taken to inform and curtail post-1950 water rights in response to the call earlier than your May 19, 2015 letter. Similarly, it would have been beneficial for Montana to know that Wyoming was moving pre-1950 water rights (1886) on Prairie Dog to post-1950 acreage and the identity of the acreage that is no longer covered by the pre-1950 water rights. Likewise, Wyoming was not aware that Montana was using contract water to irrigate post-1950 acres.

I hope this answers your questions. While the recent precipitation events have granted the Basin a reprieve, Montana anticipates making a call for pre-1950 direct flow rights late June/early July.

Sincerely,

/s/ Tim Davis

Tim Davis,
Montana Commissioner
Yellowstone Compact Commission
