

September 13, 2004

Ex. No. 28



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DAVE FREUDENTHAL  
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PATRICK T. TYRRELL  
STATE ENGINEER

May 24, 2004

Mr. Jack Stults  
Division Administrator  
Water Resources Division  
Department of Natural Resources and Conservation  
P. O. Box 201601  
Helena, Montana 59620-1601

Dear Jack:

As requested in your letter of May 18, I am providing Wyoming's initial response to the issues you raised within a week of receipt of your letter. I appreciate that this multi-year drought has caused unprecedented low streamflow in many areas of both of our states. The lack of water is taking its toll on our water users as well and we are experiencing similar conditions to those outlined in your letter. We too are regulating water rights back to the 1880's in the Tongue and Powder River basins, and have numerous pre-1950 rights going unfulfilled. But, that is the priority system—the right to make beneficial use of water, in priority, when it is available. Neither of our states can guarantee a water right will always be fulfilled just because it gets water in more normal years.

Let me begin by saying that there may be a misunderstanding of the Wyoming Reservoirs Capacity Report we gave you at the April 2004 technical meeting. What the Report intended to present in the first two columns is reservoir capacity, not the actual volume of stored water. The third column is the total of stored water in each reservoir as of October 1, 2003. For example, Park Reservoir has 7,347 acre-feet (a.f.) of pre-1950 and 3,015 a.f. of post-1950 priority water rights. On October 1, 2003, it held only 3,388 a.f., clearly within its pre-1950 priority capacity. I have requested that Mike Whitaker and his staff visit each of the reservoirs that have the potential to store Powder or Tongue River flows. He will be verifying the contents of each of the reservoirs and determining how much has been stored in the current water year under their various priority rights.

Our states have discussed in the past that the Yellowstone River Compact does not provide an explicit mechanism for administration as compared to some of our other compacts. In the mid-1980's, both states delved into the complexities of administration of the Compact, although in the end no formal system was adopted. Clearly, even then, it was understood to be far more complicated than simply releasing water when one party claimed a shortage. Because the Compact itself contains no provision describing how a "call" would occur, we find ourselves as the states' commissioners heading into

uncharted territory. While I understand the pressures that led to your sending your letter, it is not at all clear what Wyoming's obligations are in response. I want to be clear that Wyoming is committed to making the Compact work according to its terms, but I am not aware that Wyoming has stored any post-1950 water except when it has had a right to do so.

As I stated earlier, the Compact makes no provision for any state to make a call on a river. The Compact does not apportion direct flow at the state line, nor does it establish or direct the establishment of an interstate priority schedule. In your letter you call "for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 water on the Tongue and Powder Rivers." I am not sure what you are asking Wyoming to do. Wyoming does not read the Compact as an agreement to deliver any of Wyoming's pre-1950 direct flow water to Montana for Montana's pre-1950 rights. Instead, Article V, Section A, especially when read in conjunction with Article XVIII, simply expresses that the status quo of January 1, 1950 within each state is preserved.

What water is apportioned is specified in Article V Section B, which allocates between the states any water that was not used and not appropriated as of January 1, 1950. On the Tongue, Montana is to receive 60 percent of the post-1950 direct flow water and post-1950 storable water; and on the Powder, 58 percent of the same categories; both measured as provided in the Compact. Wyoming is allocated the remaining 40 and 42 percent which means that we, too, have a significant allocation of and right to the use of post-1950 water.

Once I have a report back from our field personnel (which should be within the next week), I suggest that we talk face-to-face about how to administer the Compact. Because Article V, Section B provides both states with a percentage of unused water, and Article V, Section C provides that the water subject to apportionment be calculated for the current water year only, our work will be of little value unless Montana also provides an accounting of its storage over the same period (since October 1, 2003). We request that you provide that accounting. Then, I look forward to sitting down with you and your staff to discuss how Article 5 Section B operates. At this meeting, we can explore whether we believe these discussions trigger the conflict resolution procedures outlined in the December 19, 1995 Rules for the Resolution of Disputes, Section II D:

'Either state can initiate the dispute resolution process defined in Sections IV, V, and VI, and the other state is obligated to participate in good faith. The states agree that the issues pursued under this dispute resolution process shall be both substantive and require timely resolution.'

I hope that we can come to an understanding about the operation of the Compact without having to invoke formal procedures or elevating the issue unnecessarily. Jack, I know you will be out of the office until June 7 and that Kevin is acting in your stead. Due to the seriousness of the matters outlined in your letter, I believe that we as commissioners need to first address some basic Compact concepts before we ask the Technical

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Committee to become involved. Without firm direction from the commission, it will be difficult for the Technical Committee to make progress. Kevin, or Jack, I look forward to hearing from you to set up a meeting to discuss how the Commission should respond to a call for regulation of this nature. As a start, I will suggest June 7, 8, or 9.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick T. Tyrrell", written over a horizontal line.

Patrick T. Tyrrell  
State Engineer  
Commissioner for Wyoming

cc: Governor Freudenthal  
Jim Kircher, Chairman and Federal Representative, Yellowstone River Compact  
Commission