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.

FINAL REPORT OF THE SPECIAL MASTER

BARTON H. THOMPSON, JR.
Special Master
Crown Quadrangle
Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-2518
(650) 723-2518
buzzt@stanford.edu

January 10, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
LIST OF ABBREVIATIONS	xvii
FINAL REPORT OF THE SPECIAL MASTER	1
I. INTRODUCTION	1
II. THE RECORD	4
III. BACKGROUND	5
A. Prior Proceedings	5
B. Proceedings in the Remedies Phase	9
C. Settlement Prospects	13
D. Factual Background	14
E. Legal Background	18
1. The Yellowstone River Compact	18
2. The western doctrine of prior appropriation	21
3. Northern Cheyenne water rights	23
IV. SUMMARY OF THE ISSUES	24
A. Damages	24
B. Declaratory Relief	24
C. Injunctive Relief	25
D. Costs	26
V. ANALYSIS	26
A. Remedies in Original Jurisdiction Cases	26
B. Damages	29

TABLE OF CONTENTS—Continued

Page

1. Type of damages 30
2. The appropriate amount of monetary damages 34
   a) Montana's failure to mitigate ... 35
   b) The appropriate pre-judgment interest rate 45
   c) Montana is not entitled to disgorgement damages 45
   d) Summary of recommendations. 48

C. Declaratory Relief..... 48

1. The appropriate form of declaratory relief..... 50
2. Montana's storage rights in the Tongue River Reservoir 56
   a) Appropriateness of declaratory relief..... 56
   b) Resolution of the storage issue.. 70
      1) Basic legal principles..... 75
      2) Montana storage rights 78
      3) Compact provisions 85
      4) Recommendations..... 87
3. Other appropriate declaratory relief..... 88
   a) Groundwater (¶¶ A(1), B(7), G(2))..... 91

TABLE OF CONTENTS—Continued

Page

b) Conditions requisite to a call by Montana (¶ B(2)) 96

c) Form and lifting of calls (¶¶ B(4)-(6)) 106

d) Information requirements (¶ G) ... 107

e) Rights of the Northern Cheyenne Tribe (¶ H) 111

f) Retention of jurisdiction (¶ I) ... 112

4. Summary of recommendations 113

D. Injunctive Relief 114

E. Costs 121

VI. RECOMMENDATIONS 126

APPENDICES

APPENDICES TABLE OF CONTENTS

APPENDIX A: Proposed Judgment and Decree A-1

APPENDIX B: Yellowstone River Compact B-1

APPENDIX C: Storage in the Tongue River Reservoir: 2000-2008 ..... C-1

APPENDIX D: Storage in the Tongue River Reservoir: 1941-1950 ..... D-1

APPENDIX E: Docket Sheet for the Remedies Phase E-1

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

Aetna Casualty & Surety Co. v. Quarles,
92 F.2d 321 (4th Cir. 1937)..... 58

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937)..... 59, 60, 61, 63

Alabama v. North Carolina,
560 U.S. 330 (2010)..... 27

Arizona v. California,
298 U.S. 558 (1936)..... 21
373 U.S. 546 (1963)..... 13, 27, 68, 89
376 U.S. 340 (1964)..... 50, 52, 116

Bliss v. Franco,
446 F.3d 1036 (10th Cir. 2006)..... 37, 38

Brown v. Plata,
563 U.S. 493 (2011)..... 27

Buckhannon Home v. West Va. Dept.,
532 U.S. 598 (2001)..... 123

Buras v. Shell Oil Co.,
666 F. Supp. 919 (S.D. Miss. 1987) 43

Casitas Muni. Water Dist. v. United States,
102 Fed. Cl. 443 (2011)..... 35

City of Los Angeles v. Lyons,
461 U.S. 95 (1983)..... 63, 117

Claytor v. Computer Assoc. Int'l, Inc.,
262 F. Supp. 2d 1188 (D. Kan. 2003) 38

TABLE OF AUTHORITIES—Continued

Page(s)

Connecticut v. Massachusetts,
282 U.S. 660 (1931)..... 114, 120, 121

Consolidated Edison Co. v. NLRB,
305 U.S. 197 (1938)..... 104

Consolo v. Federal Maritime Comm'n,
383 U.S. 607 (1966)..... 104

Crawford Fitting v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987)..... 122

Dow Jones & Co. v. Harrods, Ltd.,
237 F. Supp. 2d 394
(S.D.N.Y. 2002) 58, 59

Elliott v. Murphy Timber Co.,
244 P. 91 (Ore. 1926) 109

Fairmont Creamery Co. v. Minnesota,
275 U.S. 70 (1927)..... 121

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976)..... 26, 28

Golden v. Zwickler,
394 U.S. 103 (1969) 59, 61-62, 66

Harrisonville v. W.S. Dickey Clay Mfg. Co.,
289 U.S. 334 (1933)..... 116

Hinderlider v. La Plata River & Cherry Creek Ditch Co.,
304 U.S. 92 (1938)..... 21

Holton v. City of Thomasville School Dist.,
425 F.3d 1325 (11th Cir. 2005)..... 122

TABLE OF AUTHORITIES—Continued

Page(s)

Kansas v. Colorado,
514 U.S. 673 (1995)..... 92
533 U.S. 1 (2001)..... 29, 31, 75
543 U.S. 86 (2004)..... 68, 74
556 U.S. 98 (2009).....*passim*

Kansas v. Nebraska,
538 U.S. 702 (2003)..... 50
574 U.S. ___, 135 S. Ct. 1042 (2015) .....*passim*
574 U.S. ___, 135 S. Ct. 1255 (2015) 52, 113

Kentucky v. Indiana,
281 U.S. 163 (1930)..... 68

Maryland v. Louisiana,
451 U.S. 725 (1981)..... 50

Maryland Casualty Co. v. Pacific Coal & Oil Co.,
312 U.S. 270 (1941)..... 59, 60, 62

Marx v. General Rev. Corp.,
568 U.S. 371 (2013)..... 122

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007)..... 58, 62-63

Missouri v. Illinois,
200 U.S. 496 (1906)..... 120

Missouri v. Jenkins,
515 U.S. 70 (1995)..... 27

Montana v. Wyoming,
135 S. Ct. 1479 (2015)..... 13
136 S. Ct. 289 (2015)..... 9, 14

TABLE OF AUTHORITIES—Continued

Page(s)

136 S. Ct. 1034 (2016)..... 2, 9, 13
552 U.S. 1175 (2008)..... 5
563 U.S. 368 (2011).....*passim*

Nebraska v. Wyoming,
515 U.S. 1 (1995)..... 66
534 U.S. 40 (2001)..... 109, 113, 116

Nelson v. Abraham,
177 P.2d 931 (Cal. 1947)..... 108, 109

New Hampshire v. Maine,
434 U.S. 1 (1977)..... 50, 52

New Jersey v. Delaware,
552 U.S. 597 (2008)..... 50, 52, 122

New Jersey v. New York,
347 U.S. 995 (1954)..... 50, 52

New York v. New Jersey,
256 U.S. 296 (1921)..... 120

North Dakota v. Minnesota,
263 U.S. 365 (1924)..... 120, 121

O'Shea v. Littleton,
414 U.S. 488 (1974)..... 117

Ohio v. Kentucky,
410 U.S. 641 (1973)..... 26

Oklahoma v. New Mexico,
501 U.S. 221 (1991)..... 35, 50, 68, 76
510 U.S. 126 (1993).....*passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Petty v. Tennessee-Missouri Bridge Comm'n,
359 U.S. 275 (1959) 35

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 29

Public Serv. Comm'n v. Wycoff Co.,
344 U.S. 237 (1952) 59, 60, 61, 69

S.J. Groves & Sons, Co. v. Warner Co.,
576 F.2d 524 (3d Cir. 1978) 42-43, 44

Shea-S&M Ball v. Massman-Kewit-Early,
606 F.2d 1245 (D.C. Cir. 1979) 42

Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 58

Southern Railway Co. v. Clift,
260 U.S. 316 (1922) 99

Stockton East Water Dist. v. United States,
109 Fed. Cl. 760 (2013) 35

Tarrant Regional Water Dist. V. Herrmann,
569 U.S. 614 (2013) 75

Texas v. New Mexico,
462 U.S. 554 (1983) 27
482 U.S. 124 (1987) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

485 U.S. 388 (1988)..... 50, 52, 116
494 U.S. 111 (1990)..... 32

Toyota Industrial Trucks U.S.A., Inc. v. Citizens National Bank, 611 F.2d 465, 471 (3d Cir. 1979) 44

United States v. Oregon State Med. Society, 343 U.S. 326 (1952)..... 115

United States v. Smelting Refining & Mining Co., 339 U.S. 186 (1950)..... 99

United States v. Texas, 339 U.S. 707 (1950)..... 38

United States v. W.T. Grant Co., 345 U.S. 629 (1953)..... 114, 117

Virginia v. Maryland, 540 U.S. 56 (2003) 50, 52, 75, 122

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)..... 116

Wesley v. Eells, 177 U.S. 370 (1900)..... 32

Wyoming v. Colorado, 298 U.S. 573 (1936)..... 116, 120
309 U.S. 572 (1940)..... 119

Zwickler v. Koota, 389 U.S. 241 (1967) 62

TABLE OF AUTHORITIES—Continued

REPORTS OF SUPREME COURT SPECIAL MASTERS — Page(s)

Kansas v. Colorado, (No. 105 Orig.), Fifth and Final Report of the Special Master, Feb. 4, 2008 ..... 115-116, 122

Third Report of the Special Master, Aug. 31, 2000..... 32-33, 35, 43

Second Report of the Special Master, Sept. 9, 1997..... 46

Kansas v. Nebraska, (No. 126 Orig.), Report of the Special Master, Nov. 15, 2013 ..... 31, 33, 117, 118

Second Report of the Special Master (Subject: Final Settlement Stipulation), Apr. 15, 2003 33

Montana v. Wyoming, (No. 137 Orig.), Second Interim Report of the Special Master (Liability Issues), Dec. 29, 2014, Dkt. 467 .....*passim*

First Interim Report of the Special Master, Feb. 10, 2010, Dkt. 55 .....*passim*

STATE CASES AND DECREES

Anaconda Nat'l Bank v. Johnson, 244 P. 141 (Mont. 1926)..... 78

Bailey v. Tintinger, 122 P. 575 (Mont. 1912)..... 78-79

Cook v. Hudson, 103 P.2d 137 (Mont. 1937)..... 101-102

Donich v. Johnson, 250 P. 965 (Mont. 1926)..... 16, 78

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Land Bank v. Morris, 116 P.2d 1007 (Mont. 1941) 78, 82

Findings of Fact & Conclusions of Law for the Preliminary Decree of the Tongue River Above & Including Hanging Woman Creek, Basin 42B (Mont. Water Ct., Feb. 28, 2008) 76

Grimseley v. Estate of Spencer, 670 P.2d 85 (Mont. 1983) 102

Hanson v. South Side Canal Users' Ass'n, 537 P.2d 325 (1975) 71

In the Matter of the Adjudication of the Bitterroot Drainage Area, Case No. 76HE-166 (Mont. Water Ct., March 9, 2000) 77

In the Matter of the Flint Creek Drainage Area, Case No. 76E-W-119723-00 (Mont. Water Ct., May 9, 1980) 77, 79

Order re: Teton Co-Op Reservoir Co. Water Right Claims, Case No. 41O-84 (Mont. Water Ct., April 27, 2016) 79, 82

State Dept. of Ecology v. Grimes, 852 P.2d 1044 (Wash. 1993) 22

State ex rel. Intake Water Co. v. Board of Natural Resources & Conservation, 645 P.2d 383 (1982) 76

Strickler v. City of Colorado Springs, 26 P. 313 (Colo. 1891) 101

TABLE OF AUTHORITIES—Continued

Page(s)

Wheat v. Cameron,
210 P. 761 (Mont. 1922) 80

Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.,
98 P. 729 (Colo. 1908) 78

CONSTITUTION

U.S. Const. art. III ..... *passim*

U.S. Const. art. III, § 2, cl. 1 58

FEDERAL STATUTES, REGULATIONS & COMPACTS

Act of Oct. 30, 1951, 65 Stat. 663 18

Declaratory Relief Judgment Act, 28 U.S.C. § 2201(a) 58, 59, 89

Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, 106 Stat. 1186 (1992) 23

Yellowstone River Compact, Pub. L. No. 82-261, 65 Stat. 663 (1951) ..... *passim*

Preamble 1, 4, 103

Art. II(H) 22

Art. III(A) 20

Art. III(E) 20, 103

Art. III(F) 21

Art. V 20, 70, 124

Art. V(A) ..... *passim*

Art. V(B) 19, 20

Art. V(B)(3) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Art. V(C) 20
Art. VI 21
Art. XVIII 21

INDIAN WATER COMPACTS

Northern Cheyenne Compact 23, 73
Art. II(A)(2)(b) 23, 73
Art. III(2)(c) 23

STATE STATUTES & REGULATIONS

Colo. Rev. Stat. § 37-90-103(10.5) 92
N.M. Stat. § 72-3-3 102
1973 Mont. Laws, ch. 452 72
Mont. Code Ann. § 85-2-406(3) 102
Mont. Code Ann. §§ 85-20-301 et seq. 18, 23
Mont. Code Ann., tit. 3, ch. 7 76
Rev. Code Mont. § 89-121 (repealed, 1933) 70-71, 79
Wyo. Stat. § 40-14-106(e) 45
Wyo. Stat. § 41-3-603 103
Wyo. State Bd. of Control Regulations., ch. I, § 7(b) 103

CONGRESSIONAL MATERIAL

S. Rep. No. 7005, 73d Cong., 2d Sess., May 10, 1934 60

TABLE OF AUTHORITIES—Continued

RULES Page(s)

Fed. R. Civ. P. 54(d)(1) 26, 122, 123

Fed. R. Civ. P. 56(d)..... 37

Fed. R. Civ. P. 56(f) 37

Fed. R. Civ. P. 68 13

Sup. Ct. R. 17(2) 38

OTHER HISTORICAL MATERIAL

Montana State Water Conservation Board, Declaration of Intention to Store, Control, and Divert River Water, 1937 .... 70, 71, 80

Yellowstone River Compact Commission:
1st Annual Report, 1952..... 86
35th Annual Report, 1986, ... 69
40th Annual Report, 1991 69
53rd Annual Report, 2004 87
55th Annual Report, 2006 69
64th Annual Report, 2015 16
Report of the Engineering Committee, Jan. 19, 1950 86
Rules for the Resolution of Disputes over the Administration of the Yellowstone River Compact, Dec. 19, 1995..... 69

BOOKS, TREATISES, & ARTICLES

James M. Fischer, Understanding Remedies (2d ed. 2006) 40, 42, 115

Michael B. Kelly, *Defendant's Responsibility to Mitigate Plaintiff's Loss: A Curious Exception to the Avoidable Consequences Doctrine*, 47 S.C. L. Rev. 391 (1996)..... 43, 44

TABLE OF AUTHORITIES—Continued

Page(s)

1 C. Kinney, Law of Irrigation and Water Rights (2d ed. 1912) 22

Mark D. O'Keefe, Protecting Montana's Water Rights for Future Use: Water Reservation History, Status, and Alternatives, March 4, 1992..... 71

Restatement (Second) of Contracts (1981) .. 29

Restatement (Third) of Restitution and Unjust Enrichment (2010)..... 46

A. Dan Tarlock, Law of Water Rights and Resources (1988) 101, 102

Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources (5th ed. 2013)..... 2, 22

6 Waters and Water Rights (Robert E. Beck ed., 1994 repl. vol.)..... 22

Russell Weaver, Elaine W. Shoben, & Michael B. Kelly, Principles of Remedies Law (2007)..... 44

1 Wells A. Hutchins, Water Rights in the Nineteen Western States (1971) 81

23 Williston on Contracts (4th ed. 2017)..... 109

10 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (3d ed. 1998)..... 121

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS Page(s)

Black's Law Dictionary (7th ed. 1999)..... 123

U.S. Bureau of Reclamation, Library: Glossary (https://www.usbr.gov/library/glossary/) 71, 72

LIST OF ABBREVIATIONS

Abbreviation	Term
af	Acre foot (see definition on p. 2, n.2)
Compact	Yellowstone River Compact, Pub. L No. 82-261, 65 Stat. 663 (1951)
Compact Commission	Yellowstone River Compact Commission
Conservation Board	Montana State Water Conservation Board
DNRC	Montana Department of Natural Resources & Conservation
Northern Cheyenne Compact	Northern Cheyenne-Montana Compact, quantifying the Northern Cheyenne Tribe's federal water rights in the Tongue River (approved by Congress in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, 106 Stat. 1186 (1992))
Reservoir	Tongue River Reservoir
Stateline	The line dividing the Tongue River between Montana and Wyoming (a USGS gauge measures flow at this point)

Tribe	Northern Cheyenne Indian Tribe
TRWUA	Tongue River Water Users Association
Water Projects Bureau	Montana State Water Projects Bureau

FINAL REPORT
OF THE SPECIAL MASTER

I. INTRODUCTION

Montana brought this case to resolve disagreements with Wyoming over the protections provided to pre-1950 appropriative rights in Montana under the Yellowstone River Compact, 65 Stat. 663 (1951) (the "Compact").[1] Montana and Wyoming had long disagreed as to the meaning of key provisions of the Compact. As a result, the Compact had failed to accomplish its principal goal to "remove all causes of present and future controversy between the States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries." *Id.*, preamble.

This case has focused on the Tongue River, an interstate tributary of the Yellowstone River. Montana brought the action to protect its appropriative rights existing as of January 1, 1950 ("pre-1950" rights) pursuant to the Compact. Article V(A) provides for the continued enjoyment of those rights and protects them against interference by rights in Wyoming that postdate January 1, 1950 ("post-1950" rights). *See Montana v. Wyoming,* 563 U.S. 368 (2011) ("the Compact protects '[a]ppropriative rights to the beneficial uses of [water]' as of 1950 'in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation'") (quoting the Compact).

In 2016, the Court determined that Wyoming violated the Compact in 2004 and 2006 by withdrawing water from the Tongue River that should have gone to

[1] Appendix B to this Report sets out the Compact in full.

pre-1950 water right holders in Montana. *Montana v. Wyoming*, 136 S. Ct. 1034 (2016). The amount of liability that the Court found for these two years is relatively small: 1,300 acre-feet ("af") in 2004, and 56 af in 2006.[2] *Id*. The size of Wyoming's liability, however, is an indicator of neither the importance of this case to the two states nor the depth of their legal disagreements.[3] Montana and Wyoming have disagreed over the requirements of the Compact almost since the date that they signed the Compact in 1950, and those disagreements continue today.

This Report deals with the remedies that the Court should provide to Montana. For the reasons explained below, I recommend that the Court award Montana monetary damages of $20,340.00, together with pre-judgment and post-judgment interest of seven percent per annum from the year of each violation until paid. I also recommend that the Court provide Montana

---

[2] An af is the common measure of large water volumes in the United States. One af is enough water to cover one acre of land to a depth of one foot and is the equivalent of 325,851 gallons. To give a better perspective on the size of an af, farmers in the West "usually apply between two and six AF per year to each acre of irrigated crops (although the exact amount applied varies considerably among regions, soil types, and crops). Many municipal water suppliers estimate that they must provide one acre foot of water per year for every five persons in their service area." Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources 26-27 (5th ed. 2013).

[3] Montana also contended that Wyoming violated Article V(A) in other years. Montana was unable to establish liability in these years because it failed to prove that it had provided timely notice to Wyoming of its shortages. *See* Second Interim Report of the Special Master (Liability Issues), Dec. 29, 2014, Dkt. No. 467, at 97-98, 227-228. As a result, I did not determine for these years whether post-1950 Wyoming appropriators diverted or stored water when pre-1950 Montana appropriators were short of water.

with declaratory relief addressing, with particularity, the major legal issues raised by Montana's lawsuit and separating the parties. Declaratory relief will provide the parties with critical guidelines for their future management of the Tongue River and hopefully help avoid future disputes. I recommend against injunctive relief. Wyoming has repeatedly stated that it will comply with the Court's orders and rulings and, although there is little history of cooperation between Montana and Wyoming in managing the Tongue River, the record fails to show a significant chance of repeat violations in the future. Finally, I recommend that the Court award Montana costs in the amount of $67,270.87, covering the first phase of this action up to the issuance of the First Interim Report. However, I recommend that each party cover its own costs for the proceedings after that report.

These remedies will provide Montana with adequate and appropriate relief for Wyoming's violations of the Compact in 2004 and 2006. By setting out the rights and obligations of the parties, the recommended declaratory relief also should reduce the chances of future violations. However, the nature of the Compact makes it difficult to avoid all future disputes. The Compact does not guarantee Montana a fixed quantity or flow of water, nor does it set out clear procedures for protecting Montana's rights. Instead, Article V(A) of the Compact provides merely for the continued enjoyment of pre-1950 rights "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." The prior appropriation doctrine, in turn, often does not provide clear, crystalline rules for the states to follow. As discussed at length in both of my prior reports, the "doctrine of appropriation" is sometimes unclear and often employs broad, vague concepts such as "reasonableness." While

declaratory relief from the Court will help the parties reduce the "causes of present and future controversy" (Compact, *supra*, preamble), effective implementation of the Compact and avoidance of future disputes will depend on both Montana's and Wyoming's good-faith cooperation.

II. THE RECORD

The docket sheet for the remedies phase is attached as Appendix E to this Report. The docket sheet for the prior proceedings was attached as Appendix I to my Second Interim Report, and the complete docket sheet can be found at http://web.stanford.edu/dept/law/mvn/. All motions, supporting papers, orders, and memorandum opinions can be downloaded electronically at that website. Citations in this Report to motions and papers list the title, date, and docket number of each document.

Portions of this Report refer to testimony and exhibits from the liability trial in late 2014. I previously filed USB flash drives that contain copies of all the transcripts and exhibits from the trial.[4] In this Report, citations to exhibits admitted at the trial are indicated by "Ex." and the number of the exhibit. Numbers beginning with the letter "J" are joint exhibits; numbers beginning with the letter "M" were offered by Montana; and numbers beginning with the letter "W" were offered by Wyoming. Citations to trial testimony are indicated by the volume of the transcript, followed by "Trial Tr." and the relevant page and line numbers in the transcript. Citations to other hearings are indicated by the date of the hearing, followed by the

[4] Montana and Wyoming jointly assembled the admitted trial exhibits and prepared the flash drives.

relevant page and line numbers in the hearing transcript.

A list of common abbreviations and acronyms is found at page xxii, immediately following the Table of Authorities.

III. BACKGROUND

The Tongue River is part of the Yellowstone River system. It begins in Wyoming and flows north into Montana before merging with the main stem of the Yellowstone River. In 1951, Montana, Wyoming, and North Dakota agreed in the Compact on how the waters of the Yellowstone River system, including the Tongue River, should be allocated. Although the specific factual dispute in this case concerns the Tongue River, the Compact covers all of the Yellowstone River and its tributaries. Resolution of many of the legal issues therefore could also affect other portions of the Yellowstone River system. Indeed, the case initially dealt with both the Tongue River and the Powder River, another tributary to the Yellowstone. Montana, however, dismissed its claims regarding the Powder River prior to trial. Stipulated Dismissal with Prejudice of Montana's Powder River Basin Claims, June 28, 2013, Dkt. 330.

A. Prior Proceedings

The Supreme Court granted Montana leave to file its Bill of Complaint in 2008. 552 U.S. 1175 (2008). Although Montana listed both Wyoming and North Dakota as defendants, Montana has never sought relief against North Dakota and included it as a defendant only because North Dakota is a signatory to the Compact. Bill of Complaint, Jan. 2017, Dkt. 1, ¶ 4, at 2 ("Complaint"). Counsel for North Dakota has been present for all proceedings in this case, but the

State has never played an active role in the proceedings. The Northern Cheyenne Tribe, which holds water rights in the Tongue River, has participated as *amicus curiae* throughout the case, including the remedies phase. Both the United States and Anadarko Petroleum (which operates coal-bed methane wells in the Yellowstone River basin) participated as *amicus* in earlier phases of this case, but did not formally appear in the hearings on remedies.

Montana alleged in its Complaint that Wyoming violated Article V(A) of the Compact, which provides that "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." According to Montana, Wyoming diverted and stored water for uses that did not enjoy pre-1950 rights when pre-1950 rights in Montana went unmet. Bill of Complaint, Dkt. 1, ¶ 8, at 3.

The initial proceedings in this case focused on Wyoming's motion to dismiss. In my First Interim Report, I agreed with Montana that the Compact prevents Wyoming, in at least some settings, from using water for (1) post-1950 irrigation, (2) post-1950 storage, and (3) post-1950 groundwater withdrawals when the water is needed to meet pre-1950 uses in Montana. First Interim Report of the Special Master, Feb. 10, 2010, Dkt. 55, at 14-15 ("First Interim Report"). However, I agreed with Wyoming that "efficiency improvements by pre-1950 appropriators in Wyoming" do not violate the Compact even if such improvements reduce the water available for pre-1950 Montana uses. *Id*. at 15. Montana filed an exception to this latter recommendation, which this Court overruled in *Montana*

v. Wyoming, 563 U.S. 368 (2011). Wyoming did not except to the report.

Following the Supreme Court's decision, Montana and Wyoming agreed to bifurcate this action into two phases: (1) a liability phase (examining whether Wyoming violated the Compact and, if so, the size of any violation), and (2) a remedies phase (determining what, if any, retrospective or prospective remedies are appropriate). Final Case Management Plan, Dec. 20, 2011, Dkt. 118, ¶ II, at 4. Matters pertaining to retrospective or prospective remedies were explicitly reserved for the remedies phase. *Id*. The Plan stayed discovery on remedy issues "until further order, provided that, in the course of discovery undertaken solely for purposes of determining liability, the States are allowed to discover from the same source, other than another State, facts related to remedies." *Id*. ¶ VIII.A, at 6.

My Second Interim Report dealt with the liability phase of the case, which included multiple summary judgment motions and a trial. In that report, I concluded that, to trigger Wyoming's responsibilities under Article V(A) of the Compact, Montana must typically notify Wyoming that it is not receiving sufficient water to enjoy its pre-1950 rights. Second Interim Report of the Special Master (Liability Issues), Dec. 29, 2014, Dkt. 467, at 47 ("Second Interim Report").[5] I also concluded that Montana had supplied effective notice during the irrigation season in 1981, 2004, and 2006, but that Montana had not suffered

[5] Although the Compact Commission presumably would have the authority under the Compact to adopt a different procedure for triggering Wyoming's responsibilities under Article V(A), the Commission has not done so. Second Interim Report, *supra*, at 48-49.

any injury in 1981. *Id.* at 97-99. I recommended that the Court find Wyoming liable in the amount of 1,300 af for 2004 and 56 af for 2006. *Id.* at 231. While the Compact might have entitled Montana to more water than it received in other years, Montana was unable to prove that it provided Wyoming with timely notice of the deficiency. *Id.* at 66-87. I also recommended that the Court, after determining liability, remand this matter to me for a determination of damages and other appropriate relief in accordance with the Case Management Plan. *Id*. at 230. Given the limited size of liability and the narrowed focus of the case, I assured the Court that the remedies proceedings would not be complicated. *Id*.

Both States filed limited exceptions to the Second Interim Report. Montana sought additional findings regarding its pre-1950 storage rights in the Tongue River Reservoir. *See* Montana's Exception to the Second Interim Report of the Special Master (Liability Issues), April 9, 2015, Dkt. 472. In my Second Interim Report, I concluded that "Montana was entitled under Article V(A) of the Compact to store *at least* 32,000 af of water in the Tongue River Reservoir." Second Interim Report, *supra*, at 161 (emphasis added). Although Montana claimed the right to store more than this amount, I concluded that the Court need not address Montana's larger claim because Montana had not stored more than 32,000 af in either 2004 or 2006. *Id.* at 140 (noting that the question was "irrelevant to this case"). In its exception, Montana urged the Court to recommit the issue to me to resolve what pre-1950 storage rights, if any, Montana enjoys in the Tongue River Reservoir beyond 32,000 af per year.

Wyoming, by contrast, sought to end the case without remanding the case to me for remedies proceedings.

Given the small amount of liability, Wyoming urged the Court to award a limited amount of damages, based on testimony at the liability trial regarding the price of mitigation water, and to deny all other relief. *See* Wyoming's Exception to the Second Interim Report of the Special Master (Liability Issues), April 9, 2015, Dkt. 471 ("Wyoming's Exception Brief").

The Supreme Court did not explicitly rule on these exceptions. Instead, after deferring its consideration of the exceptions to see whether the States might be able to settle their dispute (136 S. Ct. 289 (2015)), the Court issued an Order and Judgment adopting my recommendations as to liability and remanding the case to me to "determine damages and other appropriate relief." *Montana v. Wyoming*, 136 S. Ct. 1034 (2016). By remanding the case to me to determine the appropriate remedies, the Supreme Court implicitly rejected Wyoming's request that the Court resolve remedies without further proceedings. The Court's Order and Judgment, however, did not address Montana's exception or the appropriateness of addressing Montana's claim to greater storage rights as part of the remedies phase.

B. Proceedings in the Remedies Phase

Montana and Wyoming agree that the remedies phase should address (1) the amount of Montana's damages, (2) the appropriate prospective relief, if any, and (3) how costs should be allocated. Joint Memorandum Regarding Issues, Procedure, and Proposed Schedule for Remedies Phase, April 25, 2016, Dkt. 487. In an effort to expedite the resolution of these questions, I encouraged the parties during a conference call on April 27, 2016 to file separate summary judgment motions on the appropriate remedies. Wyoming immediately refiled the motion that it had

previously presented to the Supreme Court, seeking to limit damages to "the cost of the readily available replacement water," and to deny all other relief, including injunctive relief, "further declaratory relief," and any award of costs to either party. Wyoming's Motion for Summary Judgment as to Remedies, April 27, 2016, Dkt. 489, at 2. Montana filed a motion for summary judgment seeking declaratory relief that the "Yellowstone River Compact protects Montana's water right in the Tongue River Reservoir to fill 72,500 af, less carryover storage, each year." Montana's Motion & Brief for Summary Judgment on Tongue River Reservoir, May 27, 2016, Dkt. 490, at 1 ("Montana's Summary Judgment Brief"). In short, both parties sought the results that they did not get in their exceptions to the Second Interim Report.

I held a hearing on the two motions in Denver, Colorado, on July 27, 2016. In a subsequent memorandum opinion, I addressed both motions. Opinion of the Special Master on Remedies, December 19, 2016, Dkt. 499. On Montana's motion regarding Tongue River Reservoir storage, I concluded that Montana was entitled, as part of its request for declaratory relief, to a determination of its rights to store more than 32,000 af in the Reservoir. *Id*. at 33. I also concluded that Montana holds an appropriative right, protected by Article V(A) of the Compact, to store water up to the pre-1950 capacity of the Tongue River Reservoir (72,500 af). *Id*. at 56.

On Wyoming's motion, I reached four conclusions. First, Montana could ask for either monetary damages or water damages, but any monetary damages would be limited to $20,340.00—the cost of the readily available replacement water that Montana water users could have purchased to avoid greater damages.

Id. at 24. Second, Montana is entitled to declaratory relief, and the Court's declaration should be sufficiently detailed to provide the States with adequate guidance moving forward. *Id*. at 26. Third, injunctive relief is inappropriate on the facts of this case. *Id*. at 62. Finally, Montana is entitled to costs but only for those proceedings leading up to the First Interim Report. *Id*. at 64-65.

In order to finalize damages and costs, I asked Montana to (1) determine whether it wished to pursue monetary or water damages and (2) submit a Statement of Costs for the initial stage of proceedings. *Id*. at 24. On February 10, 2017, Montana announced that it wished to seek monetary damages. Montana's Proposed Judgment and Decree and Brief in Support, February 10, 2017, Dkt. 500, at 9 ("Montana's Proposed Judgment & Decree"). Although Montana disagreed with my conclusion that compensatory damages could not exceed $20,340.00 plus interest, Montana agreed to accept my determination of damages "given the amount of damages likely to be proven even if quantified properly." *Id*. On April 10, 2017, Montana also filed an Amended Bill of Costs and Declaration, stating that its total costs through the First Interim Report were $67,270.87. *See* Montana's Amended Bill of Costs and Declaration, April 10, 2017, Dkt. 509, at 2. Wyoming subsequently filed a Notice of Non-Opposition to these costs. *See* Wyoming's Notice of Non-Opposition to Montana's Amended Bill of Costs, April 11, 2017, Dkt. 510 ("Wyoming Non-Opposition to Costs").

I also requested the States to confer and determine whether they could agree on the form of a decree, including the particulars of declaratory relief. Despite exchanging drafts, the States were unable to agree

on a decree. *See* Montana's Proposed Judgment & Decree, *supra*, at 8-9. Montana and Wyoming therefore submitted separate proposed decrees, along with briefs supporting their respective proposals. *See* Montana's Proposed Judgment & Decree, *supra*; Wyoming's Proposed Decree and Brief in Support, February 27, 2017, Dkt. 501; Montana's Response to Wyoming's Proposed Decree and Brief, March 13, 2017, Dkt. 504; Montana's Proposed Judgment & Decree, March 13, 2017, Dkt. 505 ("Montana's March 2017 Proposed Decree").

On May 1, 2017, I held a hearing in Denver, Colorado, to try to resolve the States' disagreements. Subsequent to that hearing, I circulated a proposed Judgment and Decree and invited the States to submit comments. *See* Discussion Draft of Judgment and Decree, May 15, 2017, Dkt. 512. Each State submitted proposed changes, along with explanations for its suggestions, and subsequently commented on the suggestions of the other. See Montana's Comments on the Special Master's Discussion Draft of Judgment and Decree, May 22, 2017, Dkt. 513 ("Montana's Comments on the Draft Decree"); WY Comments on the Discussion Draft Decree, May 22, 2017, Dkt. 514; Montana's Response to Wyoming's Comments on the Special Master's Discussion Draft of Judgment and Decree, May 30, 2017, Dkt. 515; WY Comments on the Discussion Draft Decree, May 30, 2017, Dkt. 516.

After reviewing the record, I concluded that there are no disputed material facts that need to be addressed and resolved in order to determine the appropriate declaratory relief in this case. I therefore prepared a draft of my Final Report, including the proposed decree, and circulated it to the parties. After reviewing this draft, Montana and Wyoming both

offered additional thoughts at my invitation on the appropriate provisions and language of the decree. The final version of my Proposed Judgment and Decree, attached to this Report as Appendix A, is based on this Court's opinion in *Montana v. Wyoming*, 563 U.S. 368 (2011), my First and Second Interim Reports, the Court's Order & Judgment of March 21, 2016 (*Montana v. Wyoming*, 136 S. Ct. 1034 (2016)), Montana's and Wyoming's various submissions in the remedies phase of this case, my December 19, 2016 memorandum opinion, and my May 1, 2017 hearing on the appropriate declaratory relief.

C. Settlement Prospects

The Supreme Court has often expressed its "preference that, where possible, States settle their controversies by mutual accommodation and agreement." *Arizona v. California*, 373 U.S. 546, 564 (1963). Unfortunately, the States appear unable to voluntarily settle any portion of their dispute over the waters of the Tongue River, requiring the Court to resolve it instead.

While considering the States' exceptions to the Second Interim Report, the Court encouraged me to "facilitate efforts to resolve the parties' dispute without need for a damages proceeding, including by revisiting the arrangements for division of fees and expenses." *Montana v. Wyoming*, 135 S. Ct. 1479 (2015). In response, I held four telephonic conference calls with the parties and adopted a modified version of Federal Rule of Civil Procedure 68. Case Management Order No. 16, May 18, 2015, Dkt. 477. The parties, however, were ultimately unable to resolve their dispute. On October 25, 2015, the Court agreed to defer its consideration of the States' exceptions at the request of Montana to allow the States more time

to reach a settlement. *Montana v. Wyoming,* 136 S. Ct. 289 (2015). Once again, however, the States were unable to settle their dispute, despite "good faith and diligent efforts on behalf of both States." Joint Status Report, Dec. 23, 2015, Dkt. 485, at 2.

At the beginning of the remedies phase, I again encouraged the States to make every effort to settle. *See* Transcript of March 28, 2016 Status Conference, Dkt. 486, at 10:5-13. At the hearing of July 27, 2016, I explicitly asked the parties why they had not been able to settle even the damages question. Counsel for Wyoming responded that the ultimate problem is that this dispute is "about water in the west, and compromise with regard to water in the west is near impossible." Transcript of July 27, 2016 Hearing, Dkt. 496, at 20:20-21. According to counsel, the parties took the Court's "admonition . . . very seriously." *Id*. at 21:3-4. "We all got the message. But like I say, this is water in the west, and it is – it is too controversial and too important to the people in both states for decision makers to compromise." *Id*. at 21:5-9.

On August 11, 2016, Montana notified me that it had made a confidential settlement offer to Wyoming regarding its damages claim. Montana's Notice of Settlement Offer, Aug. 11, 2016, Dkt. 497. The offer, however, ultimately "did not result in a resolution of any part of the case." Montana's Update on its Settlement Offer to Wyoming, Aug. 31, 2016, Dkt. 498. To my knowledge, no significant settlement discussions have taken place since then, and settlement seems highly unlikely.

D. Factual Background

My Second Interim Report sets out detailed background information on the Tongue River, the uses of

Tongue River water in both Montana and Wyoming, and the Tongue River Reservoir. Second Interim Report, *supra*, at 4-14. In this Report, I highlight only those facts of most relevance to the selection of remedies.

The Tongue River is one of four major tributaries to the Yellowstone River and is used in both Montana and Wyoming primarily for agricultural irrigation. Ex. W-2, p. 9 (expert report of Doyl Fritz) (agriculture consumes 97%). The Tongue begins in Wyoming, where its waters irrigate over 57,000 acres of land, and then flows north into Montana. Ex. M-5, p. 2-3 (expert report of Dale Book); Ex. W-2, pp. 7-8 (Fritz expert report). Fifteen miles after crossing the Montana-Wyoming border, the river flows into the Tongue River Reservoir, an on-stream reservoir of great importance to local Montana water users. 12 Trial Tr. 2679:5-23 (testimony of Richard May). After leaving the Reservoir, the river flows for another 180 miles through Montana farms and ranch lands before it reaches the main stem of the Yellowstone River in Miles City, Montana. 1 *id*. at 65:11-14 (testimony of Dale Book). The Yellowstone in turn crosses over into North Dakota near Sidney, Montana, and merges into the Missouri River only 16 miles further.

Like many western rivers, the Tongue River relies largely on snowmelt in the late spring of each year. Ex. W-2, p. 8 (Fritz expert report). Flows in the Tongue River peak sharply in May and June and decline significantly in the fall. *Id*., p. 8; Ex. M-5, p. 26 (Book expert report). Water flows in the Tongue River also vary significantly from year to year, as they do in most western rivers. Ex. M-5, p. 26 (Book expert report) (flow varies by factor of six). A long-term drought in the first decade of this century reduced

flows by more than 75 percent (*id*.) and helped trigger this lawsuit.

The extreme variation in flows makes water storage critical in both Montana and Wyoming, and both States have constructed significant storage capacity. Ex. M-5, pp. 2-3 (Book expert report) (describing Montana's and Wyoming's Tongue River reservoirs); *see also Donich v. Johnson,* 250 P. 965 (Mont. 1926) (noting importance of water storage). Storage allows water users to capture water during the winter and early spring, when water is available, and store it for use later in the year when the flow of water drops and irrigation demands often peak. "Carry-over storage" from one water year to the next also permits water users to store water in wet years for use in drought years. (Both Montana and Wyoming define a water year as October 1 to September 30, which better reflects the local hydrologic cycle.)

The Tongue River Reservoir is the largest reservoir in the watershed, a critical source of water for Montana farmers and ranchers, and a central focus of this case. *See* Yellowstone River Compact Comm'n, Sixty-Fourth Annual Report: 2015, p. 22 tbl. 10 (listing key Tongue River reservoirs and their water rights). The Montana State Water Conservation Board (the "Conservation Board"), which built the Reservoir, was one of the many institutions created during the Great Depression to develop new public works and rebuild the economy. 5 Trial Tr. 991:12-993:10 (testimony of Kevin Smith). Using a combination of state and federal funds, the Conservation Board built large storage projects throughout Montana in aid of local farming communities. Ex. M-280, p. 6 (Conservation Board Summary of Activities, 1934-1980); 5 Trial Tr. 1005:1-6 (Smith testimony). Montana completed the

Reservoir and began to fill it in 1940. 5 Trial Tr. 1055:20-22 (Book testimony). The Reservoir holds an April 21, 1937 appropriative right. Ex. M-526, p. 2, ¶ 2 (Amended Stipulation regarding the Reservoir's water rights).

The Montana Department of Natural Resources and Conservation ("DNRC") is the successor in interest to the Conservation Board and holds title to the water in the Tongue River Reservoir. Ex. M-3, p. 4 (expert report of Kevin Smith). The State Water Projects Bureau ("Water Projects Bureau"), in turn, is the proprietor of the Reservoir on behalf of the DNRC. Ex. M-3, p. 4 (Smith expert report). The Water Projects Bureau provides the stored water to the Tongue River Water Users Association (TRWUA) under a water marketing contract. *See* Ex. M-529C (March 1969 Marketing Contract). The TRWUA in turn sells the water to its members. Ex. M-3, pp. 9-10 (Smith expert report).

The Reservoir fills primarily during the spring months of April, May, and June. 6 Tr. 1185:6-10 (testimony of Kevin Smith). Farmers then rely on water from the Reservoir to irrigate their crops during the low river-flow months of July, August, September, and October. 1 *id*. at 113:12-16 (Book testimony); Ex. M-5, p.8 (Book expert report). The Reservoir typically carries over water remaining at the end of the irrigation season for use in future water years, although it sometimes releases some of that water for operational or flood-control purposes. *See* Ex. M-5, pp. 29-30 tbl. 4-A (Book expert report) (summarizing historical end-of-month contents of the Reservoir).

The original storage capacity of the Tongue River Reservoir was approximately 72,500 af. Second Interim Report, *supra*, at 102; *see* Ex. M-557E, p. 3 (August

1949 Bureau of Reclamation report).[6] Over time, the Reservoir lost several thousand acre feet of capacity due to the accumulation of sediment. 5 Trial Tr. 1034:17-1035:6 (Smith testimony). In the late 1990's, however, the State Water Projects Bureau rehabilitated and enlarged the Reservoir to its current capacity of 79,071 af. 6 *id*. at 1132:2-1133:1 (Smith testimony). Two events led to the enlargement: (1) flood damage in 1978 that left the dam unsafe (*id*. at 1133:17-20, 1137:14-16 (Smith testimony)), and (2) a 1991 compact among Montana, the Northern Cheyenne Indian Tribe, and the United States that awarded the Tribe an allocation of 20,000 af of storage in the Reservoir in partial settlement of the Tribe's claim to Indian reserved water rights (Mont. Code Ann. §§ 85-20-301 et seq.; 8 Trial Tr. 1599:25-1600:8 (testimony of Christian Tweeten)).[7]

E. Legal Background

1. The Yellowstone River Compact.

The Yellowstone River Compact governs the allocation of the Tongue River water among Montana, North Dakota, and Wyoming. The three states ratified the Yellowstone River Compact in 1951. Congress promptly consented to it. Act of Oct. 30, 1951, 65 Stat. 663. Appendix B sets out the Compact.

---

[6] The original storage capacity of the Reservoir was an issue during the liability trial (with various pieces of evidence differing in their estimates by as much as 4,500 af of water). *See* Second Interim Report, *supra*, at 102-103 n.29. I ultimately concluded that the original capacity had been 72,500 af. *See id*.

[7] The 1991 compact and the Northern Cheyenne's federal reserved water rights are discussed further at p. 23 *infra*.

Unfortunately, the Compact is not exemplary legal writing. Some of its provisions are vague and ambiguous, and it fails entirely to address many important issues. As a result, Montana and Wyoming have argued over the meaning of various provisions of the Compact since its ratification.

The key provision of the Compact is Article V(A), which protects pre-1950 appropriative rights. As quoted earlier, Article V(A) provides that pre-1950 appropriative rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."

As this Court observed in its first opinion in this case, the Compact allocates the waters of the Tongue River and the other tributaries to the Yellowstone River System under a three-tier structure. 563 U.S. at 372. The top tier consists of pre-1950 appropriative rights, protected by Article V(A). Pre-1950 rights are thus the "senior" rights in the Tongue River. Of the remaining water, the Compact next allocates to each State the "quantity of that water as shall be necessary to provide supplemental water supplies" for the pre-1950 uses protected by Article V(A). Compact, *supra*, art. V(B). Finally, "the remainder of the unused and unappropriated water" of each tributary is divided between Montana and Wyoming by percentages that differ from tributary to tributary. *Id*. In the case of the Tongue River, Montana receives 60 percent of the remaining water, while Wyoming receives 40 percent. *Id.*, art. V(B)(3). The Compact thus divides the water of each tributary into three categories, which are, in order of priority: (1) pre-1950 appropriative rights, (2) supplemental water supplies, and (3) all other water.

In the 65-year history of the Compact, Montana and Wyoming have never been able to agree on how to administer the allocation provisions of Article V, despite frequent attempts to do so. *See* 3 Trial Tr. 580:16-581:1 (testimony of Timothy Davis). The States have disagreed not only on the protection of pre-1950 water rights under Article V(A), but also on the apportionment provisions for the third tier of water under Articles V(B) and (C). *See, e.g.,* 2 *id*. at 433:2-5 (testimony of Charles Dalby).

Article V(A), as noted, provides that pre-1950 rights are to be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." This language is important because the Compact is often silent on the specifics of how to define, protect, and enforce pre-1950 rights. Where the Compact is otherwise silent, the Compact explicitly looks to the doctrine of prior appropriation to fill the gap. *See Montana v. Wyoming,* 563 U.S. at 375.

The Compact does not establish a specific procedure for enforcing pre-1950 rights under Article V(A). The Compact creates a Commission to administer the provisions of the Compact between Montana and Wyoming. Compact, art. III(A). The Commission consists of three representatives – one representative from Montana, one from Wyoming, and one member selected by the Director of the United States Geological Survey. *Id*. The members of the Commission have "the power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions" of the Compact. *Id.*, art. III(E). If the Montana and Wyoming representatives cannot "agree on any matter necessary to the proper administration of [the] Compact, then the member selected by the Director of the United States Geological

Survey" can vote. *Id.*, art. III(F). The Commission, however, has never exercised this authority to resolve a disagreement between the States as to the proper interpretation of the Compact.

Two other provisions of the Compact are also relevant to this case. First, Article VI provides that nothing in the Compact "shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." Second, Article XVIII provides that no provision or phrase in the Compact "shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact."

2. The western doctrine of prior appropriation.

As noted, the Compact explicitly incorporates prior appropriation law into the administration of Article V(A). *Montana v. Wyoming*, 563 U.S. at 374, *quoting* Compact, art. V(A). The prior appropriation doctrine has governed water in Montana, Wyoming, and all other western continental states since the 19th century. *Id*. at 375. Under prior appropriation, older "senior" rights have priority over more recent "junior" rights. When water is scarce, senior rights are entitled to water before junior rights. Junior appropriators must reduce or even cease their water diversions to the degree necessary to ensure that there is enough water to meet senior water rights. *Id., citing Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 98 (1938); *Arizona v. California*, 298 U.S. 558, 565-566 (1936). When water flows are insufficient to meet everyone's rights and senior appropriators want to

reduce or shut off junior diversions, the seniors "call" the river by notifying state authorities that they are not receiving the water to which they are entitled. *See* Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources 1197 (5th ed. 2013).

As this Court has emphasized, the scope of a prior appropriation right "is limited by the concept of 'beneficial use.' That concept restricts a farmer 'to the amount of water that is necessary to irrigate his land by making a reasonable use of the water.'" *Montana v. Wyoming*, 563 U.S. at 376, *quoting* 1 C. Kinney, Law of Irrigation and Water Rights § 586, pp. 1007-1008 (2d ed. 1912). No one is entitled to more water than he or she can place to beneficial use. *See State Dept. of Ecology v. Grimes*, 852 P.2d 1044, 1049-1052 (Wash. 1993). Article V(A) incorporates this principle and explicitly protects only pre-1950 "beneficial uses" of water.[8]

Although the general contours of the prior appropriation system are the same in all western states, the specific details of each state's system can differ, sometimes substantially, from those of other states. For example, states have adopted very different systems for administering appropriative rights. Wyoming closely polices the water use of prior appropriators (*see* 6 Waters and Water Rights 865-866 (Robert E. Beck ed., 1994 repl. vol.)), while Montana relies more on judicial enforcement and oversight. Montana and Wyoming also follow very different rules with respect to water storage, leading to quite different views on

[8] Article II(H) of the Compact defines "beneficial use" as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man."

how the Compact handles reservoirs. *See* Second Interim Report, *supra*, at 114-123. Neither Wyoming's nor Montana's procedures and rules are inherently better, nor are they outliers in the western United States.

3. Northern Cheyenne water rights.

A portion of the Tongue River in Montana forms the eastern border of the Northern Cheyenne Indian Reservation and provides the main source of water for the reservation. Brief of Amicus Curiae Northern Cheyenne Tribe in Support of Montana's Exceptions, May 20, 2010, at 3. In 1975, the Tribe and the United States, acting on behalf of the Tribe, filed lawsuits in federal district court claiming federal reserved water rights in the Tongue River. In 1991, the Tribe, Montana, and the United States agreed to a compact that quantifies the Tribe's federal reserved water rights, including the Tribe's rights in the Tongue River. Mont. Code § 85-20-301 (the "Northern Cheyenne Compact"). Congress subsequently ratified the Northern Cheyenne Compact in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, 106 Stat. 1186 (1992).

Under the Northern Cheyenne Compact, the Tribe holds several water rights in the Tongue River, including a "right to divert or deplete, or permit the diversion or depletion of, up to 20,000 acre-feet per year from a combination of water stored in the Tongue River Reservoir and exchange water." Northern Cheyenne Compact, Mont. Code § 85-20-301, art. II(A)(2)(b). The priority date for this right is "equal to the senior-most right for stored water in the Tongue River Reservoir," which is April 21, 1937. *Id.*, art. III(2)(c).

IV. SUMMARY OF THE ISSUES

In its Complaint, Montana sought four types of relief: (1) a declaration of its rights under the Compact, (2) an injunction "commanding" the State of Wyoming to deliver water "in accordance with the provisions of the Yellowstone River Compact," (3) damages, including pre- and post-judgment interest, and (4) "such costs and other relief as the Court deems just and proper." Bill of Complaint, Dkt. 1, ¶¶ A-D. This phase of the proceedings raises the appropriateness of each of these types of relief and, where relief is appropriate, the exact relief to which Montana is entitled.

A. Damages

Wyoming seeks summary judgment that Montana should receive compensatory damages of only $20,340 plus interest. Wyoming argues that Montana appropriators failed to mitigate their damages and that, if they had taken reasonable steps to mitigate, Montana's damages would not exceed this amount. At the hearing on Wyoming's motion for summary judgment, Montana argued that summary judgment was inappropriate on the amount of Montana's compensatory damages and that Montana should not be precluded from seeking disgorgement damages. I agree with Wyoming and recommend that the Court award Montana $20,340 in compensatory damages, together with pre-judgment and post-judgment interest of seven percent per annum from the year of each violation until paid.

B. Declaratory Relief

Both parties agree that declaratory relief is appropriate. In its summary judgment motion, however, Wyoming argues that the Court's declaratory relief should simply adopt, without particularity, the

contents of my First and Second Interim Reports. Montana argues that declaratory relief should set out the specific rights and obligations of the parties. I agree with Montana and recommend that the Court adopt particularized declaratory relief consistent with the approach it has taken to declaratory relief in previous interstate river disputes.

In its motion for summary judgment, Montana argues that the Court should go beyond my conclusion in the Second Interim Report that Montana is entitled to store *at least* 32,000 af each year in the Tongue River Reservoir and hold that Montana is entitled to store up to the original capacity of the Reservoir. Wyoming urges the Court to leave the issue open for a future lawsuit if and when Montana seeks to store more than 32,000 af over Wyoming's objection. I agree with Montana that its question presents a current case or controversy that should be resolved and recommend that the Court hold that Montana is entitled to store up to the original capacity of the Reservoir.

Finally, the parties are unable to agree on the substance of the declaratory relief that Montana should receive. Based on the parties' submissions and my hearing on declaratory relief, I recommend that the Court adopt the Proposed Judgment and Decree set out in Appendix A to this Report.

C. Injunctive Relief

Wyoming seeks summary judgment that Montana is not entitled to injunctive relief. Montana opposes this motion. I conclude that Montana has not shown a "cognizable danger of recurrent violation" and therefore recommend that the Court grant Wyoming's motion and deny injunctive relief.

D. Costs

Wyoming seeks summary judgment that both sides should bear their own costs. Montana opposes this motion. I conclude that Montana is a prevailing party, as that term is used in Federal Rule of Civil Procedure 54(d), and that Montana should receive the costs that it incurred during the first phase of this case in defeating Wyoming's motion to dismiss. However, I also conclude that both sides should bear their own costs for the liability and remedies phases of the case, including the liability trial, because both sides prevailed on significant issues. I therefore recommend that the Court award Montana costs of $67,270.87, which both sides agree were Montana's costs during the first phase of the litigation dealing with Wyoming's motion to dismiss.

V. ANALYSIS

A. Remedies in Original Jurisdiction Cases

The remedial recommendations in this Report build on the general guidance that the Supreme Court has set out for determining the appropriate remedies when exercising its original jurisdiction. First and foremost, original actions are "basically equitable in nature," *Ohio v. Kentucky,* 410 U.S. 641, 648 (1973), and the goal in the remedies phase is therefore to shape a "fair and equitable solution that is consistent with the Compact terms," *Texas v. New Mexico,* 482 U.S. 124, 134 (1987). *See also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 790 (1976) ("equitable remedies are a special blend of what is necessary, what is fair, and what is workable"). In shaping such a solution, the Court has often exercised significant discretion. As

the Court has noted, "flexibility [is] inherent in equitable remedies." *Kansas v. Nebraska,* 574 U.S. ___, 135 S. Ct. 1042, 1057 (2015), *quoting Brown v. Plata*, 563 U.S. 493, 538 (2011).

The Court, however, has recognized limits to when it will exercise its equitable discretion. The Court, for example, has held that it will not use its equitable authority to modify the terms of an interstate compact or to add additional provisions not found in a compact. An interstate compact is a "legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. at 128. *See also Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (the Court is "especially reluctant to read absent terms into an interstate compact"). And the Court has "no power to substitute [its] own notion[] of an 'equitable apportionment' for the apportionment" embodied in a compact. *Texas v. New Mexico*, 462 U.S. 554, 568 (1983), *quoting Arizona v. California,* 373 U.S. 546, 565-566 (1963).

The importance of adhering to compact terms led three members of the Court to dissent from the award of disgorgement damages in *Kansas v. Nebraska.* 135 S. Ct. at 1064-1070 (Thomas, J., dissenting). The dissenters argued that the Court should adhere strictly to clear principles of contract law and "*reject* loose equitable powers." *Id.* at 1065 (emphasis in original). In the view of the dissenters, the "use of unbounded equitable power against States … threatens 'to violate principles of state sovereignty and of the separation of powers.'" *Id.* at 1067, *quoting Missouri v. Jenkins*, 515 U.S. 70, 130 (1995). The dissenters accordingly urged the Court to "exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use." *Id.* at 1067, *quoting Jenkins,* 515 U.S. at 131.

While a majority of the Court found that disgorgement was appropriate in *Kansas v. Nebraska,* the Court has frequently balanced the desire to protect and compensate downstream states against concerns for state sovereignty and the mutually agreed-upon terms of the underlying compact.

Second, in determining the appropriate remedies, the Court focuses on the "facts of the particular case." *Kansas v. Nebraska,* 135 S. Ct. at 1058, *quoting Texas v. New Mexico*, 482 U.S. at 131. What is an appropriate remedy in one case may not be appropriate in another. The Court looks in each case at the "practical realities and necessities inescapably involved in reconciling competing interests." *Franks v. Bowman Transp. Co.,* 424 U.S. at 790.

Finally, the Court has frequently emphasized the importance of awarding relief that will not only make a downstream state whole for an upstream state's compact violations but also deter future violations. In its most recent opinion on interstate water disputes, the Court started by highlighting the inherent disadvantage that downstream states suffer in enforcing their rights. *Kansas v. Nebraska*, 135 S. Ct. at 1052. The Court then went on to emphasize that its "enforcement authority includes the ability to provide the remedy necessary to prevent abuse. We may invoke equitable principles, so long as consistent with the compact itself, to devise 'fair . . . solution[s]' to the state-parties' disputes and provide effective relief for their violations." *Id*. at 1053, *quoting Texas v. New Mexico,* 482 U.S. at 134. The Court's remedial authority, moreover, "gains still greater force" in interstate compact cases since a compact, "having received Congress's blessing, counts as federal law." 135 S. Ct. at 1053. The Court, in short, enjoys "broad

remedial authority to enforce [a compact's] terms and deter future violations." *Id.* at 1052 n.4. This authority assumes an "even broader and more flexible character than when only a private controversy is at stake." *Id.* at 1053, *quoting Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946).

B. Damages

Wyoming seeks summary judgment that Montana is entitled to only $20,340 in monetary damages. Wyoming's argument is simple and straight-forward. Montana had an obligation to mitigate damages, if reasonable, in both 2004 and 2006. *See* Restatement (Second) of Contracts § 350 (1981). The Northern Cheyenne Tribe was willing to sell Tongue River water to interested purchasers in both years. Testimony during the liability trial indicated that the Northern Cheyenne Tribe was charging somewhere between $7 and $15 per af for its water during this time period. *See* 8 Trial Tr. 1666:15-18 (testimony of Jason Whiteman); 16 *id*. at 3662:25-3663:3 (testimony of John Hamilton); 19 *id*. at 4423:24-4424:10 (testimony of Raymond Harwood); *id*. at 4499:24-4500:7 (testimony of Maurice Felton). According to Wyoming, Montana's damages therefore cannot exceed $15 per af – or $20,340 in total. Wyoming is willing to pay this sum to Montana, along with prejudgment interest based on either federal law or its own more generous interest rate for prejudgment interest.[9] Wyoming's Exception Brief, Dkt. 471, at 12-13. Wyoming offers to pay Montana $20,340 in damages plus prejudgment

[9] The Supreme Court has concluded that "considerations of fairness" can sometimes call for an award of prejudgment interest. *See Kansas v. Colorado,* 533 U.S. 1, 13 (2001). As noted, Wyoming is willing to pay such interest.

interest, rather than spending far more money in trial seeking to establish a lower award of damages. Wyoming therefore seeks summary judgment that this sum is sufficient. *Id.* at 21.

1. Type of damages.

An initial question is whether Montana's damages should take the form of monetary compensation or a future delivery of water. As discussed below, I conclude that monetary compensation is appropriate in this case. Both Montana and Wyoming prefer monetary compensation.

Prior cases suggest that either monetary compensation or water can be an appropriate remedy when a state has violated an interstate water compact, depending on the specific circumstances of the case. The first case to explicitly address the choice of remedy for past violations of an interstate water compact was *Texas v. New Mexico.* In that case, the special master recommended a remedy in water because he believed that monetary relief was outside the terms of the compact. 482 U.S. at 130. The Court disagreed and held that the lack of a specific provision in a compact providing for monetary damages "does not . . . mandate repayment in water and preclude damages." *Id.* Theoretically, both are options. The choice between monetary damages and water requires "attention to the relative benefits and burdens that the parties may enjoy or suffer" under the alternative approaches. *Id.* at 131.

Water relief could provide several advantages in this case. First, an award of water would provide Montana with relief equivalent to what it lost in 2004 and 2006 through Wyoming's breaches. A state's loss of water is difficult if not impossible to translate into

a dollar value; particularly in the West, water is of incalculable value to those whose livelihoods depend on it. The determination of appropriate monetary damages, moreover, is almost inherently open to uncertainty. Injured states therefore may prefer specific relief in the form of water, rather than money.

Second, a water remedy would require Wyoming to give up what it received as a result of its breach, providing a rough equivalent of restitution. *See* Report of the Special Master, *Kansas v. Nebraska*, No. 126 Orig., Nov. 15, 2013, at 128 (water award "might both disgorge the fruits of Nebraska's breach while simultaneously restoring to Kansas only the loss caused by that breach"). By ensuring that Wyoming does not benefit from its breach, a water award could better promote equity. A water award also would help ensure that Wyoming is not tempted to breach the compact in the future if the water is worth more economically to it than to Montana. As Justice Thomas has noted, "the way this Court has always discouraged gambling with this scarce resource is to require delivery of water, not money." *Kansas v. Nebraska,* 135 S. Ct. at 1070 (Thomas, J., dissenting). Indeed, before *Texas v. New Mexico,* the Court "had never even suggested that monetary damages could be recovered from a State as a remedy for its violation of an interstate compact apportioning the flow of an interstate stream." *Id., quoting Kansas v. Colorado*, 533 U.S. at 23 (O'Connor, J., concurring in part and dissenting in part)

An award of water, however, would raise both substantive and logistical challenges – in particular, the need to determine *when* Wyoming would need to deliver water to Montana, and to design a process for triggering and implementing delivery that would not

simply generate another lawsuit. While the delivery of water enjoys multiple advantages as a remedy, "for various reasons, a remedy in the form of water is not always feasible." *Kansas v. Nebraska,* 135 S. Ct. at 1070. For this reason, a water remedy "rests entirely in [the Supreme Court's] judicial discretion" and "requires some attention to the relative benefits and burdens that the parties may enjoy or suffer as compared with a legal remedy in damages." *Texas v. New Mexico,* 482 U.S. at 131. A water award is "an equitable remedy," *id*., and should never be awarded "if under all the circumstances it would be inequitable to do so," *id., quoting Wesley v. Eells*, 177 U.S. 370, 376 (1900).

To date, the Supreme Court has considered the appropriate remedy for the violation of an interstate water compact in four different cases. In *Oklahoma v. New Mexico,* 510 U.S. 126 (1993), the parties stipulated that New Mexico would release water and pay a set amount for attorney fees. In the other three cases, however, concerns about the practicability of a water remedy ultimately led either the Court to award monetary damages or the parties to stipulate to monetary relief. An award of water, rather than monetary damages, would not have benefitted the plaintiff in any of the cases. In *Texas v. New Mexico,* 494 U.S. 111 (1990), the parties stipulated to a $14 million monetary settlement, after the special master indicated that "damages might be best for both parties." *Id*. at 129. In *Kansas v. Colorado,* the special master decided that monetary relief was preferable because "successful implementation of the water repayment program [was] too uncertain to be relied upon in a judgment" and because the defendant ultimately did not argue strongly for monetary relief. Third Report of the Special Master, *Kansas v. Colorado*,

No. 105 Orig., Aug. 31, 2000, at 109-110, 118. Finally, in *Kansas v. Nebraska,* the parties initially agreed to waive all damage claims as part of a comprehensive settlement. Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska,* No. 126 Orig., Apr. 15, 2003, at 31-36. When Nebraska subsequently violated the settlement agreement, "both States concurred that using water as the remedial currency would lead to difficult questions about the proper timing and location of delivery." 135 S. Ct. at 1057 n.8.[10] The Supreme Court, moreover, found that the special master had "appropriately found another way of preventing knowing misbehavior" – viz., traditional monetary damages plus disgorgement. *Id.*

As other special masters have noted, the timing of a compensatory water delivery is the "most problematic detail" in awarding water relief. *See* Report of the Special Master, *Kansas v. Nebraska*, No. 126 Orig., Nov. 15, 2013, at 129 (also observing that water "in a water-short year when clear skies persist and crop prices are high is hardly the same as a gallon delivered in the fall of an ideal year with bumper crops"). Timing is particularly tricky in the current case because the Compact does not require Wyoming to provide a set amount of water each year but instead to

---

[10] All three states involved in *Kansas v. Nebraska* agreed that "the remedy should be in dollars, not water." Report of the Special Master, *Kansas v. Nebraska,* No. 126 Orig., Nov. 15, 2013, at 129. According to the special master, it was likely that all of the states feared "the unintended and collateral effects of any attempt to specify in an order the details of a remedial allocation." While concluding that a water award would carry various advantages, the special master ultimately saw "no reason for the Court to reject the states' joint election that any award be in the form of money rather than water." *Id.* at 129-130.

ensure that the needs of pre-1950 appropriations in Montana are met. Montana might not need additional water for two years, 10 years, 20 years, or longer, preventing immediate remediation of Montana's injury.

Because of these multiple considerations, I concluded after hearing Wyoming's summary judgment motion that Montana should have an opportunity to decide whether it would prefer an award of water or monetary damages. If Montana preferred water relief, Wyoming would then have an opportunity to explain why monetary damages nonetheless are preferable. Montana, however, responded that it prefers monetary damages. Both Montana and Wyoming therefore agree that monetary damages are preferable in this case. Because of the difficult logistical issues involved in implementing a water award, I agree that a water award would be inappropriate in this case and would not provide Montana with fair compensation for its injury. I therefore recommend that the Court award Montana monetary damages.

2. The appropriate amount of monetary damages.

The next question is the appropriate amount of compensatory damages. As discussed below, Montana water users had a reasonable opportunity to mitigate any damages that they suffered by purchasing replacement water from the Northern Cheyenne Tribe, but failed to do so. As a result, Montana's damages should be limited to the cost of that water. The evidence also shows that disgorgement damages are inappropriate in this case.

a) Montana's failure to mitigate.

The Supreme Court has never applied the doctrine of mitigation to limit damages from the violation of an interstate compact. An interstate compact, however, is "essentially a contract between the signatory States." *Oklahoma v. New Mexico*, 501 U.S. 221, 242 (1991) (Rehnquist, C.J., concurring in part and dissenting in part). *See also Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (a "Compact is, after all, a contract"). The Court accordingly has looked in part to contract law in determining appropriate remedies. And contract law "requires a party harmed by the action of another to undertake 'reasonable' efforts to mitigate the harm likely to be sustained." *Casitas Muni. Water Dist. v. United States*, 102 Fed. Cl. 443, 475 (2011). The special master in *Kansas v. Colorado* recognized the applicability of mitigation rules to monetary damages in an interstate compact case, but ultimately concluded that Colorado had failed to prove that Kansas had unreasonably failed to mitigate its damages. *See* Third Report of the Special Master, *Kansas v. Colorado,* at App. 68 (Order Re Kansas' Objection to Evidence on Mitigation).[11]

Wyoming has carried its burden of proving that Montana failed to mitigate its damages in both 2004

[11] I have been unable to find a case, even outside the interstate context, requiring mitigation for a failure to supply water. In the one case cited by Wyoming, the water district actually mitigated injury by purchasing alternative water when the United States failed to supply water under its contract with the district. The court therefore did not face the issue of whether reasonable mitigation was required, nor did it hold that mitigation was required. *See Stockton East Water Dist. v. United States*, 109 Fed. Cl. 760, 814 (2013). There is no reason, however, why a different rule should apply in water cases.

and 2006. As noted earlier, testimony during the liability trial revealed that the Northern Cheyenne Tribe was willing to sell water to Tongue River water users in Montana in both years. Testimony also established that the price of the water was no more than $15 per af (and perhaps significantly less). Given the failure of local water users to purchase this water, Montana should not be able to claim that its damages were more than $15 per af.

Montana did not present any evidence in its opposition to Wyoming's motion for summary judgment that would indicate that water was not available from the Tribe during 2004 and 2006, that the water would have cost more than $15 per af, or that purchase of the water would have been infeasible or unreasonable. Instead, Montana primarily argues that it has not yet had an opportunity to conduct discovery into the damages issue, making it premature for the Court to rule on Wyoming's motion. As noted earlier, after the Supreme Court's 2011 decision in *Montana v. Wyoming*, the parties agreed to bifurcate proceedings into separate liability and remedies phases. *See* Final Case Management Plan, Dkt. 118, ¶ II. The evidence on which Wyoming relies for summary judgment arose tangentially in testimony in the liability trial. In its opposition papers, Montana therefore urges that it had no reason to cross-examine witnesses during the liability trial regarding potential mitigation options; indeed, Montana notes that it even may not have had the right to do so. Montana's Response in Opposition to Wyoming's Motion for Summary Judgment as to Remedies, June 27, 2016, Dkt. 493, at 18 ("Montana Opposition"). The only discovery permitted prior to Wyoming's motion for summary judgment was primarily on the question of liability. The Case Management Plan anticipated that discovery on damage issues

would take place after liability was determined. *See* Final Case Management Plan, Dkt. 118, ¶ VIII.A.

Montana, however, cannot defeat Wyoming's summary judgment motion simply by arguing that it did not have an opportunity to conduct discovery or that discovery might theoretically turn up conflicting evidence. Montana, at a minimum, had to present affidavits or other documents demonstrating that discovery could lead to evidence, otherwise not readily obtainable, showing that Montana is entitled to damages of more than $20,340 plus interest. *See Bliss v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006) (party opposing summary judgment must explain how additional time for discovery would produce relevant evidence demonstrating a genuine issue of material fact);[12] Federal Rule Civ. Proc. 56(d) ("If a nonmovant *shows by affidavit or declaration* that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . (2) allow time to obtain affidavits or declarations *or to take discovery*") (empha-

[12] *Bliss* relied on former Rule of Civil Procedure 56(f), which provided that if a party opposing a motion for summary judgment presented affidavits showing why it could not obtain "facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken *or discovery to be had* or may make such other order as is just" (emphasis added). Rule 56(f) has been rewritten as Rule 56(d), cited and discussed in the text. The textual differences between current Rule of Civil Procedure 56(d) and former Rule 56(f) do not provide any rationale for departing from the holding of *Bliss* in this case.

sis added).[13] In *Bliss,* the court denied a request for additional discovery because the affidavit filed in support of a discovery request lacked "specificity." 446 F.3d at 1042. In this case, Montana filed *no* affidavit at all showing why it needed additional discovery in order to show a genuine issue of material fact or how additional discovery would provide the needed evidence.

Most of the evidence relevant to the appropriate amount of monetary damages, moreover, was either in the hands of Montana or readily accessible to Montana without the need for further discovery. If replacement water was unavailable in 2004 or 2006 from the Northern Cheyenne Tribe, or if the water would have cost more than $15 per af, Montana presumably could have submitted evidence or affidavits from its water users or the Northern Cheyenne Tribe to that effect. *See Claytor v. Computer Assoc. Int'l, Inc.*, 262 F. Supp. 2d 1188, 1200 (D. Kan. 2003) (extension of discovery is not required where a party could have obtained affidavits from relevant witnesses without discovery). Absent such a demonstration, Montana cannot insist that the states engage in costly discovery on monetary damages and mitigation.

Montana is correct that, as it has noted at frequent points throughout this matter, the Supreme Court in cases under its original jurisdiction, "passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950). For this reason, the Court has often avoided summary

---

[13] Although not binding in original actions, the Federal Rules of Civil Procedure may be used as a "guide." U.S. Supreme Court Rule 17(2).

resolutions of interstate disputes where more complete proceedings were justified. I therefore have continuously avoided resolving issues where I concluded that discovery might be productive. Here, however, there is no evidence that discovery would lead to a different conclusion regarding Montana's mitigation options or otherwise be useful.

Montana also argues in its opposition papers that the testimony and evidence cited by Wyoming fails to show that mitigation water was available in 2004 and 2006. *See* Montana Opposition, Dkt. 493, at 13, 17-19. The evidence is clear, however, that mitigation water was available from the Northern Cheyenne Tribe in 2004. In that year, at least six Tongue River water users purchased water, totaling some 1,300 af. *See* Ex. M-387 (record of water purchases). John Hamilton explicitly testified that he leased water that year. 16 Trial Tr. 3670:22-25. Although testimony was less specific regarding the availability of water in 2006 (when Wyoming's total liability was 56 af), the evidence as a whole is more than sufficient to establish that mitigation water again was available. *See, e.g.*, Ex. M-399, pp. MT-015542, MT-015549 (showing purchases from Northern Cheyenne Tribe by at least two water users); 16 Trial Tr. 3661:10-19, 3666:14-3668:3 (Hamilton testimony) (water available in 2001, 2002, 2004, and 2006, with possible exception of one year when Tribe did not apply to sell water, although "later in the irrigation season, it did become available").

Montana in its opposition also questions whether water was available "in sufficient quantity" from the Northern Cheyenne Tribe to provide mitigation. *See* Montana Opposition, Dkt. 493, at 13. However, the Tribe held storage rights to 20,000 af, *see* Ex. M-3, p. 6 (expert report of Kevin Smith), and the Tribe used

little if any of this water itself during the years in question, see 7 Trial Tr. 1390:4-6 (testimony of Kevin Smith), 1502:14-16 (testimony of Art Hayes).

Montana also argues that the evidence cited by Wyoming does not establish the price at which Northern Cheyenne water was available. *See* Montana Opposition, Dkt. 493, at 17-18. Although testimony varied on the price of the Tribe's water, the range of prices to which witnesses testified was $7 to $15 per af. *See* 8 Trial Tr. 1666:15-18 (testimony of Jason Whiteman) ($7-9/af); 16 *id*. at 3662:25-3663:3 (Hamilton testimony) ($12-15/af); 19 *id*. at 4423:24-4424:10 (testimony of Raymond Harwood) ($10/af); *id*. at 4499:24-4500:7 (testimony of Maurice Felton) (same). There is no suggestion anywhere in the record that the water cost more than $15. Water from the TRWUA cost only about $6 per af, 16 *id*. at 3662:21-24 (Hamilton testimony), providing rough confirmation of the range of prices that the Northern Cheyenne Tribe would have charged. Given the range of prices that the Tribe might have charged, Wyoming offers to compensate Montana at the highest price.

Of greater significance, some Montana water users indicated at trial that they did not have the financial means to purchase water from the Northern Cheyenne Tribe. Art Hayes, for example, testified that he "didn't have enough money" to purchase water from the Tribe in 2004. 7 *id*. at 1499:9-11. John Hamilton testified that he did not purchase water from the Tribe in 2006; perhaps because his "operating line" was "at the end," he did not "have any money for that." 16 *id*. 3668:24-3669:22. A plaintiff who is financially unable to mitigate is under no obligation to do so; the law does not require the impossible. *See* James M. Fischer, Understanding Remedies § 13.2 at 124 (2d ed. 2006)

("A plaintiff, who is financially unable to mitigate, need not do what he cannot do").

The evidence as a whole, however, shows that water was reasonably available as mitigation to water users whose crop value justified paying $15 an af for the Northern Cheyenne Tribe's water. Some Montana water users in the Tongue River valley did purchase water from the Tribe in 2004 or 2006 when they realized that they would be short of water. *See, e.g.,* 19 Trial Tr. 4423:24-4424:10 (Harwood testimony). While Mr. Hamilton did not purchase water in 2006, he did in 2004. *See* 16 *id*. at 3670:22-25 (Hamilton testimony). And his testimony regarding 2006 suggests that the Tribe's water was simply too expensive given his operations, not that he lacked the ability to purchase the water if he thought it cost justified. *See id*. at 3668:9-10 ("I just felt [the water] was too expensive for the kind of crops I had"), 3669:4-6 ("well, you know, if I look at that price, I just couldn't make a profit if I paid that much for that water"). Mr. Hamilton testified that he stayed close to his banker and, "if there was a way to save money, you certainly did it." *Id*. at 3669:21-22.[14]

---

[14] Wyoming argues in its motion papers that, even if Montana water users did not have the resources needed to mitigate, Montana had an obligation to and should have mitigated damages by purchasing water for its water users from the Northern Cheyenne. Montana, not its water users, is the plaintiff in this action. Just as Montana brought this suit on behalf of itself and its citizens, Wyoming argues, Montana had an obligation to mitigate injury to its citizens. Transcript of July 27, 2016 Hearing, Dkt. 496, at 30-36. There are several problems with this argument. To start, Montana did not know the extent of Wyoming's breach of the Compact from the dates it called the Tongue River in 2004 and 2006 until the end of those water years. Indeed, the exact extent of the breach was not known until the

Finally, Wyoming's mitigation argument raises a curious line of cases that suggest that Montana water users did not have an obligation to purchase water in mitigation of Wyoming's breach if Wyoming could have mitigated the breach just as easily by purchasing the water itself for the Montana water users. According to one treatise on remedies, it is "consistently held that the plaintiff need not mitigate when the ability to lessen damages is equally available to both the plaintiff and the defendant." J. Fischer, *supra*, § 13.3 at 131. *See, e.g., Shea-S&M Ball v. Massman-Kewit-Early,* 606 F.2d 1245, 1249-1250 (D.C. Cir. 1979); *S.J.*

---

end of the liability phase of this case when the Supreme Court entered its Order and Judgment finding the amounts of the breach in each year. While it might be reasonable to require Montana to provide mitigation water to its water users when it knows exactly how much water Wyoming is improperly using, it does not seem reasonable to require Montana to provide water that may or may not be owed by Wyoming. To require mitigation in the latter setting would require Montana to become an insurer of water in drought years – an arguably unfair burden unrelated to Wyoming's Compact obligation.

More generally, it is not clear that a state has an obligation to mitigate the losses of its water users when illegal diversions by upstream states cause the losses. The Compact does not explicitly require states themselves to mitigate, nor has the Supreme Court ever held that states have such an obligation. While contract law generally requires one party to a contract to mitigate for breaches by another party, interstate water compacts are not normal contracts. Even though states are the ultimate signatories to compacts and must bring any enforcement action, water users are the actual beneficiaries and typically are in the best position to know whether and how to mitigate. To determine appropriate mitigation measures, Montana presumably would need to contact its individual water users to determine how they are using their water, what damages they are suffering, and how those damages might best be mitigated, if they can be reasonably mitigated at all.

Groves & Sons, Co. v. Warner Co., 576 F.2d 524, 530 (3d Cir. 1978); *Buras v. Shell Oil Co.,* 666 F. Supp. 919, 924-925 (S.D. Miss. 1987). In *Kansas v. Colorado,* the special master relied in part on this principle in concluding that Kansas had no obligation to mitigate its damages by pumping groundwater. Third Report of the Special Master, *Kansas v. Colorado,* at App. 68, 70 (Order Re Kansas' Objection to Evidence on Mitigation) ("A damage award will not be reduced on account of damages which the defendant could have avoided as easily as the plaintiff"). Here, Wyoming presumably could have purchased water from the Northern Cheyenne Tribe and made it available to pre-1950 users in Montana. *See, e.g.,* April 14, 2015 Letter of Patrick T. Tyrrell, Wyoming State Engineer, attached to Montana's Reply Brief Opposing the Exception of Wyoming, May 11, 2015, Dkt. 475, at App. 6, 8 (urging Montana to facilitate discussions to ensure that Northern Cheyenne water is available for purchase, which "would open the door for *Wyoming or* Montana to secure water we know is available and obtainable in the event either state finds it necessary to do so") (emphasis added).

While a number of courts have adopted this "equal opportunity" principle, I conclude that the Court should not use it to reject Wyoming's mitigation claim. As counsel for Wyoming noted during oral argument, excusing a plaintiff's duty to mitigate when the defendant had an "equal opportunity" to mitigate is an odd principle that threatens to largely eviscerate the doctrine of mitigation. Transcript of July 27, 2016 Hearing, Dkt. 496, at 26-28. *See* Michael B. Kelly, *Defendant's Responsibility to Mitigate Plaintiff's Loss: A Curious Exception to the Avoidable Consequences Doctrine*, 47 S.C. L. Rev. 391, 395 (1996) (exception "could work serious mischief in the application of

relatively settled remedies"). By requiring both plaintiff and defendant to mitigate, the principle also could lead to duplication of effort. *See* Russell Weaver, Elaine W. Shoben, & Michael B. Kelly, Principles of Remedies Law 214-215 (2007) (concluding that the principle would "create odd incentives for wasteful duplication of efforts to mitigate the same loss").

Perhaps for these reasons, the exception appears to be more a curiosity than a regularly applied and established doctrine. While one treatise states that the doctrine has been "consistently" applied, only a few courts have actually adopted it. *See id.* at 214 ("[s]ome courts" have adopted). Indeed, the "exception is almost entirely a creature of dicta" and, even when cited, "never drives the result." Kelly, *supra*, at 395, 401. A comprehensive study of the exception has concluded that the doctrine has a "rather questionable pedigree," "serves no discernible purpose in the law," and should be abolished. *Id.* at 394-395.

It also is not clear exactly when the "equal opportunity" principle, if it truly is a principle, should apply. The principle would seem most sensible where a defendant knowingly breaches a contract, not where a defendant breaches because it did not believe it had an obligation. According to the Third Circuit Court of Appeals, the principle applies only where there is an equal opportunity and "it is *equally* reasonable to expect a defendant to mitigate damages." *Toyota Industrial Trucks U.S.A., Inc. v. Citizens National Bank*, 611 F.2d 465, 471 (3d Cir. 1979), *quoting S.J. Groves & Sons, Co.,* 576 F.2d at 430 (emphasis added). *See also* Weaver et al, *supra*, at 214-215 ("it would be risky to urge application of this exception in any case where plaintiff really was unreasonable in failing to minimize the loss").

For all of these reasons, I recommend that the Court grant Wyoming's motion for summary judgment and award Montana compensatory damages of $20,340 plus interest.

b) The appropriate pre-judgment interest rate.

Wyoming has offered to pay interest on Montana's damage award, using a seven percent per annum interest rate as determined by section 40-14-106(e) of the Wyoming Statutes. Wyoming's Exception Brief, Dkt. 471, at 12-13. As Wyoming notes, this interest rate is greater than the rate to which Montana would be entitled under federal statute. *Id*. at 12. Montana does not object to this interest rate. While Montana initially urged that the interest be compounded annually, both Montana and Wyoming now agree that an award of simple interest is acceptable. I therefore recommend that the Court award Montana pre-judgment and post-judgment interest on its compensatory damages at a rate of seven percent per annum from the year each violation of the Compact occurred until the damages are paid.

c) Montana is not entitled to disgorgement damages.

Montana also argues in its opposition to Wyoming's summary judgment motion that it should have the right to pursue disgorgement damages, as the Supreme Court recently awarded in *Kansas v. Nebraska,* 135 S.Ct. 1042 (2015). *See* Montana Opposition, Dkt. 493, at 17. I conclude that Wyoming has adequately shown for purposes of summary judgment that the standard for disgorgement damages is not met in this case and therefore recommend against their award in this case.

Disgorgement damages are an uncommon remedy reserved for exceptional cases. As the Restatement emphasizes, disgorgement damages are appropriate only in the case of a "deliberate breach of contract." Restatement (Third) of Restitution and Unjust Enrichment § 39(a) (2010). *Kansas v. Nebraska* is the only interstate water case in which the Supreme Court has awarded disgorgement damages. Even in that case, moreover, three justices dissented, noting that disgorgement damages should seldom be awarded. *See Kansas v. Nebraska, supra*, 135 S. Ct. at 1070 (Thomas, J., dissenting) (disgorgement is "strong medicine" and should be imposed "only sparingly"). According to the majority of the Supreme Court in *Kansas v. Nebraska,* disgorgement damages are appropriate only where a state has "knowingly" violated its obligations under a compact or decree or "recklessly disregard[ed]" another state's rights "under that instrument." *Id.* at 1057. *See also* Second Report of the Special Master, *Kansas v. Colorado,* No. 126 Original, Sept. 9, 1997, at 80 (disgorgement should not be awarded where there is no "willfulness" behind the compact violation).[15]

The liability trial extensively probed the motivations behind Wyoming's refusal to comply with its Compact obligations. The resulting evidence does not suggest that Wyoming "knowingly" violated the Compact (although Wyoming may have had little incentive to seriously consider Montana's interpretation of the Compact or agree to furnish more water to pre-1950 appropriators in Montana). Nor does the evidence

[15] The special master in *Kansas v. Colorado* also suggested that disgorgement damages can raise equity concerns. As the special master noted, disgorgement damages can generate an undeserved windfall for the plaintiff. Second Report of the Special Master, *Kansas v. Colorado,* at 80

suggest that Wyoming "recklessly" disregarded Montana's rights under the Compact. Instead, the dispute between Montana and Wyoming over Compact terms appears to have resulted from good-faith differences in interpretation.

Although it is conceivable that undiscovered emails or memos in Wyoming's records would show that Wyoming thoughtlessly ignored Montana's legitimate concerns, the evidence in the record would still preclude a finding of willful breach or reckless disregard of Montana's rights under the Compact. *Kansas v. Nebraska*, the only case in which the Court has awarded disgorgement damages, involved a blatant disregard by Nebraska of Kansas' rights under the Republican River Compact. Earlier proceedings between the two states had led to a settlement, establishing a detailed process for complying with the compact and requiring Nebraska to reduce its water use. Yet Nebraska's "efforts to reduce its use of Republican River water came at a snail-like pace." 135 S. Ct. at 1054. Nebraska's efforts were not only "too late" but "also too little." *Id.* at 1055. And Nebraska "had created no way to enforce even the paltry goal the plans set." *Id.*

Disgorgement damages might be appropriate in future cases if Wyoming willfully or recklessly ignores the rulings of the Supreme Court in this case. Such violations would demonstrate that Wyoming is not seriously seeking to meet its obligations under the Compact and would more closely resemble the violations at issue in *Kansas v. Nebraska*. In that situation, disgorgement damages also would play a valuable role in deterring future violations without improperly penalizing Wyoming or providing a windfall to Montana. *See id.* at 1052 (disgorgement may be necessary to

ensure that an upstream state cannot ignore its Compact obligations in return for paying merely the monetary cost of its actions). The Court, however, need not decide that issue now. There is no indication–either in the evidence presented at the liability trial or in any of the papers submitted by Montana since trial–that disgorgement damages are appropriate for the Compact violations to date. I therefore recommend that the Court not award Montana disgorgement damages for Wyoming's violations of the Compact in 2004 and 2006.

d) Summary of recommendations.

For the reasons discussed above, I recommend that the Court grant Wyoming's motion for summary judgment and hold that:

- Montana is entitled to compensatory damages of $20,340, together with pre-judgment and post-judgment interest of seven percent per annum from each year of Wyoming's Compact violation until the damages are paid.
- Montana is not entitled to any disgorgement damages for Wyoming's 2004 and 2006 violations of the Compact.

C. Declaratory Relief

At the top of the remedial requests in its Bill of Complaint, Montana requests a declaration of "the rights of the State of Montana in the waters of the Tongue . . . River[] pursuant to the Yellowstone River Compact." *See* Bill of Complaint, Dkt. 1, ¶ A. According to Montana, future relief has always been its principal goal in this litigation. Transcript of July 27, 2016 Hearing, *supra*, at 73 (argument of Attorney General Timothy Fox). Montana seeks not only to

remedy Wyoming's previous breaches of the Compact but also to clarify the States' rights and obligations under the Compact in order to minimize the chances of future breaches.

All parties agree that Montana should receive some form of declaratory relief.[16] Montana's and Wyoming's separate motions for summary judgment, however, raise three groups of issues regarding that relief. First, what form of declaratory relief should the Supreme Court grant? While Montana argues that the Court should set out the specific rights and obligations of the States under the Compact, Wyoming contends that the Court should simply adopt by reference the contents of my first and second interim reports to the Court. Second, should the Supreme Court resolve Montana's right to store more than 32,000 af of water in the Tongue River Reservoir as part of the remedies phase of this case? If the Court reaches this issue, what is Montana's storage right, if any, beyond 32,000 af? Montana urges the Court to address the question now and to hold that Montana has the right to fill the Tongue River Reservoir each year. Wyoming, by contrast, argues that the Court should leave the issue open for a future lawsuit if and

---

[16] In its exception to the Second Interim Report, Wyoming argued that no "*additional* declaratory relief" was appropriate in this case. Wyoming's Sur-Reply in Support of Exception, June 3, 2015, Dkt. 478, at 4 (emphasis added). Wyoming apparently believed that the Court had already entered declaratory relief (or would be doing so after it ruled on the exceptions to the Second Interim Report). In fact, the Court has not yet awarded any declaratory relief in this action. Nor has the Court provided any explicit guidance regarding the rights and obligations of the States in the future except for its opinion in *Montana v. Wyoming*, 563 U.S. 368 (2011), which dealt only with the right of pre-1950 Wyoming appropriators to increase their irrigation efficiency.

when it becomes an issue in a future "call." Wyoming also contends that Montana does not hold a pre-1950 right to store more than 32,000 af. Finally, what should be the other provisions of the declaration of rights in this case? As explained below, the parties disagree on a variety of the provisions.

1. The appropriate form of declaratory relief.

Declaratory relief has been central to the Supreme Court's resolution of most interstate disputes. The Court has regularly granted declaratory relief in cases within its original jurisdiction. *See, e.g., Kansas v. Colorado*, 556 U.S. 98, 103-108 (2009); *New Jersey v. Delaware,* 552 U.S. 597, 623-624 (2008); *Virginia v. Maryland*, 540 U.S. 56, 79-80 (2003); *Kansas v. Nebraska,* 538 U.S. 720 (2003); *Oklahoma v. New Mexico*, 510 U.S. 126 (1993); *Texas v. New Mexico*, 485 U.S. 388, 389 (1988); *Maryland v. Louisiana*, 451 U.S. 725, 734, 760 (1981); *New Hampshire v. Maine*, 434 U.S. 1 (1977); *Arizona v. California*, 376 U.S. 340 (1964); *New Jersey v. New York*, 347 U.S. 995 (1954). Indeed, declaratory relief appears to be the most common form of relief granted—far more common than damages. In many interstate cases, such as those involving border disputes, future relief has been the *only* type of relief sought and granted. In compact cases, the Court has often emphasized that its role is to "declare rights under the Compact and enforce its terms." *Kansas v. Nebraska,* 135 S. Ct. at 1052.

While all parties agree that declaratory relief is appropriate in this case, Wyoming argues that a declaration of rights should be short and simple. In Wyoming's view, the Court can and should enter a declaratory order merely adopting the contents of my two interim reports without attempting to spell out

the specific rights and obligations of the parties in the order itself. *See* Transcript of July 27, 2016 Hearing, Dkt. 496, at 48-49 (argument of counsel for Wyoming). Montana, by contrast, argues that the Court should adopt a detailed declaratory order that clearly and specifically sets out the States' rights and obligations. *See* Montana Opposition, Dkt. 493, at 19-20 ("the Court should follow recent practice, and enter a decree distilling these principles in a decree").

Montana is entitled to declaratory relief that specifies the future rights and obligations of the States that are parties to the Compact, rather than simply adopting by reference the contents of my first and second interim reports. There are at least three reasons why an order merely adopting my reports is both inappropriate and insufficient. First, as special master, I am merely an advisor to the Court, and my reports reflect only my recommendations to the Court. The reports do not constitute decisions of the Court and are not precedent. The Court itself is the decision maker in this case under Article III of the Constitution, and it is therefore important that the Court set out for the States the Court's own conclusions regarding the parties' rights and obligations. Although the Court's March 21, 2016 Order and Judgment adopted the primary recommendations in my second interim report regarding liability, its Order and Judgment does not mean that the Court agreed with all of the details and nuances in the 231-page report. My two reports may provide useful guidance to the States moving forward, but the reports are not a substitute for a Supreme Court decree that specifies the States' particular rights and obligations.

Not surprisingly, the practice of the Supreme Court in prior cases has been to enter decrees that specify

the relevant rights and obligations of the parties rather than simply adopting the reports of its special masters. *See, e.g., Kansas v. Nebraska,* 574 U.S. ___, 135 S. Ct. 1255 (2015); *Kansas v. Colorado*, 556 U.S. at 103-108 (2009); *New Jersey v. Delaware,* 552 U.S. at 623-624 (2008); *Virginia v. Maryland*, 540 U.S. at 79-80 (2003); *Oklahoma v. New Mexico*, 510 U.S. 126 (1993); *Texas v. New Mexico*, 485 U.S. at 389; *New Hampshire v. Maine*, 434 U.S. 1 (1977); *Arizona v. California*, 376 U.S. 340 (1964); *New Jersey v. New York*, 347 U.S. 995 (1954). Some of these decrees have been purely declaratory, while others have been injunctive.

Second, the parties have shown that they are not always clear or in agreement as to what rights and responsibilities they have under the Court's opinion and orders to date in this case. As a result, the parties can benefit from a concise decree setting out those rights and responsibilities. Most of the disagreements concern the appropriate procedures for "calling the river" and then responding to a call.

The States' efforts to resolve shortages on the Tongue River in 2015 and 2016 highlight these disagreements and the value of setting out the rights and responsibilities of Montana and Wyoming as specifically as possible. On April 10, 2015, Montana notified Wyoming that it was receiving insufficient water from the Tongue River and formally "called" for Wyoming to reduce its post-1950 diversions. *See* Letter of Tim Davis, Montana Commissioner, to Sue Lowry, Wyoming Commissioner, April 10, 2015 (attached to Montana's Reply Brief Opposing the Exception of Wyoming, Dkt. 475, at App. 1). Wyoming promptly took steps to ensure that post-1950 appropriators in Wyoming were not diverting water. While

Wyoming did not cease storing water in pre-1950 Wyoming reservoirs, it determined storage levels in those reservoirs (presumably so that any additional storage during the period of the "call" could ultimately be delivered to Montana if needed). *See* Letter of Patrick T. Tyrrell, Wyoming State Engineer, to Tim Davis, April 14, 2015 (attached to Montana's Reply Brief Opposing the Exception of Wyoming, Dkt. 475, at App. 10). However, Wyoming also (1) asked that Montana certify that it was regulating its own pre-1950 appropriators, (2) inquired whether Montana had appointed water commissioners who could "assure that Montana post-compact uses . . . are not taking water withheld from Wyoming post-compact rights," (3) suggested that Montana reduce its water bypass flows, (4) requested that Montana begin discussions with the Northern Cheyenne Tribe to ensure that the Tribe's water would be available for purchase if needed, and (5) complained (politely) of the short 2-day notice provided by Montana's call letter. *Id*. In a reply letter, Montana rejected these various "conditions." Letter of Tim Davis to Sue Lowry, April 27, 2015 (attached to Montana's Reply Brief Opposing the Exception of Wyoming, Dkt. 475, at App. 12). Montana also suggested that it had the right to demand that post-1950 reservoirs in Wyoming immediately cease storage, but was willing to allow Wyoming to continue storing as "a good partner and [to] maximize the use of water in the basin." *Id.* at App. 15.

Correspondence regarding these issues continued up and until Montana cancelled the call in late May. On May 5, Wyoming asked for more information regarding Montana's bypass flows. Letter of Patrick T. Tyrrell to Tim Davis, May 5, 2015 (attached to Wyoming's Sur-Reply in Support of Exception, Dkt. 478, at App. 1). A week later, Wyoming asked for

information regarding which Montana appropriators were demanding water and inquired once again whether Montana was regulating post-1950 users and had appointed water commissioners. Letter of Patrick T. Tyrrell to Tim Davis, May 13, 2015 (attached to Wyoming's Sur-Reply in Support of Exception, Dkt. 478, at App. 3). A week after that, Wyoming again raised concerns regarding post-1950 appropriations in Montana and bypass flows from the Tongue River Reservoir. Letter of Patrick T. Tyrrell to Tim Davis, May 19, 2015 (attached to Wyoming's Sur-Reply in Support of Exception, Dkt. 478, at App. 7). When Montana cancelled its call on May 21, it took the opportunity to again object to some of the information that Wyoming had requested in response to Montana's call. Letter of Tim Davis to Sue Lowry and Patrick T. Tyrrell, May 21, 2015 (attached to Wyoming's Sur-Reply in Support of Exception, Dkt. 478, at App. 14, 15-16). This lengthy exchange of letters highlights that Montana and Wyoming still disagree over what the Compact requires and does not require regarding the subjects of this litigation. The Court cannot eliminate all the sources of disagreement between the two States. Nevertheless, a declaration of the States' specific rights and obligations will help to reduce the incidents of disagreement.

Montana's 2016 call on the Tongue River involved fewer questions and process disagreements, possibly because the call lasted only two weeks and the parties had developed a better working relationship. *See* Affidavit of Patrick T. Tyrrell in Support of Wyoming's Response to Montana's Motion for Summary Judgement on Tongue River Reservoir, June 27, 2016, Dkt. 492, ¶¶ 3, 6 ("Tyrrell Affidavit"). Both States made a commendable effort to work cooperatively. Indeed, Wyoming thanked Montana for tightening its storage

practices in the Tongue River Reservoir. *See* Letter of Patrick T. Tyrrell, April 22, 2016, at 2, Exhibit C to the Tyrrell Affidavit, Dkt. 492. When Montana ended its call, it expressed the hope that "this year sets an example of communication and cooperation between the two states for future water years." E-mail of Tim Davis, May 2, 2016, Exhibit E to the Tyrrell Affidavit, Dkt. 492. Shadows of the prior year's disagreements, however, remained. In responding to Montana's call, for example, Wyoming noted that it "assume[d] that one or more Montana water commissioners" would be appointed "like past years," and asked Montana to keep Wyoming "informed of any appointments and of any commissioner activities." Letter of Patrick T. Tyrrell, April 22, 2016, *supra*, at 2. In short, despite improved cooperation, Montana's 2016 call again illustrates the advantage of providing the States with particularized guidance regarding their rights and responsibilities.

Third, specific declaratory relief will better enable Montana to defend its rights under the Compact in the future and deter prospective violations. As discussed earlier in Part V(A) of this Report, the Court has often emphasized the importance of awarding relief that will help deter future violations. *See* pp. 28-29 *supra*. Downstream states are at an inherent disadvantage in interstate water disputes because their only effective remedy for a violation of their water rights is to sue the offending upstream state in the Supreme Court – an uncertain, time-consuming, and expensive process, as this case has shown. By issuing clear and specific declaratory relief, the Court makes it easier for a state to demonstrate liability in the future if an upstream state violates rights established in a prior case. Clear guidance makes it easier for a state to seek disgorgement damages for compact violations, thereby deterring

such violations. *See* pp. 46-47 *supra* (discussing the standards for disgorgement damages). A clear and specific decree also can reduce any uncertainty that an upstream state has regarding its obligations, decreasing the chances that the upstream state will violate the compact again by mistake.

For all of these reasons, particularity is important in protecting a downstream state like Montana from future violations of its sovereign rights. I therefore recommend that the Court grant declaratory relief that is as clear and specific as possible regarding the rights and responsibilities of Montana and Wyoming.

2. Montana's storage rights in the Tongue River Reservoir.

The next question is whether, in granting declaratory relief to Montana, the Court should address Montana's rights to store more than 32,000 af of water per year in the Tongue River Reservoir. For the reasons discussed below, I recommend that the Court reach the issue and hold that Montana has the right to store up to the original capacity of the Reservoir.

a) Appropriateness of declaratory relief.

In my Second Interim Report, I concluded that Montana has the right "under Article V(A) of the Compact to store at least 32,000 af of water in the Tongue River Reservoir, in addition to any carryover with which it entered the water year." Second Interim Report, *supra*, at 161. I also concluded that the Court did not need to decide whether Montana could store more than that amount in any water year because it was inconsequential to Wyoming's liability. *Id.* at 140-141. In 2004 and 2006, the only two years in which Montana both proved adequate notice and suffered a

shortage, Montana stored less than 32,000 af. As a result, Montana's right to store more than 32,000 af per year was irrelevant to Wyoming's liability. *Id.* at 141.

Montana argues that the Court now should address Montana's right to store more than 32,000 af per year as part of Montana's request for declaratory relief. As Montana notes, the parties disagree "sharply" over the extent of Montana's right to fill the Tongue River Reservoir. Montana's Summary Judgment Brief, Dkt. 490, at 1. According to Montana, moreover, "a new dispute over a Montana call on the Tongue River to fulfill its Reservoir right will be inevitable if the Court leaves the states without a determination of the quantity of Montana's Reservoir Right." *Id*.

Wyoming argues in response that the Court should not consider Montana's rights beyond 32,000 af for a trio of related reasons. First, and foremost, Wyoming argues that Montana's rights beyond 32,000 af are not a justiciable issue because future disputes over the issue are not inevitable, particularly if Montana continues to store more water during the winter than it historically stored. Wyoming's Response to Montana's Motion for Summary Judgment on Tongue River Reservoir, June 27, 2016, Dkt. 491, at 3-4. In Wyoming's view, there is no "case or controversy" for purposes of Article III of the Constitution. Second, Wyoming argues that declaratory relief should not be granted in the "absence of absolute necessity" and that the parties could ask the Yellowstone River Compact Commission to resolve the issue. Wyoming's Reply to Montana's Exception, May 7, 2015, Dkt. 474, at 13. Finally, Wyoming argues that the issue is best left in the first instance to the parties and their experts to try to resolve. *Id*. at 15.

Under the federal Declaratory Relief Judgment Act, courts can declare the rights of parties "whether or not further relief is *or could be* sought." 28 U.S.C. § 2201(a) (emphasis added). The mere fact that an issue did not need to be addressed in determining liability and damages thus does not mean that declaratory relief on the issue is inappropriate. Declaratory relief, moreover, is a "means to facilitate early and effective adjudication of disputes at a time when a controversy, though actual, *may still be incipient*," and before the controversy "expands into larger conflict." *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 405 (S.D.N.Y. 2002) (emphasis added). Declaratory relief "permits the court in one action to define the legal relationships and adjust the attendant rights and obligations at issue between the parties *as to avoid the dispute escalating into additional wrongful conduct*. In this manner, [declaratory relief] can avert greater damages and multiple actions and collateral issues . . . ." *Id.* (emphasis added). By resolving disputes in their early stages, declaratory relief reduces "uncertainty, insecurity, and controversy." *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937).

The right to seek declaratory relief, however, is not unlimited. No principle is "more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction" under Article III, § 2, clause 1 of the Constitution to "actual cases or controversies." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). Federal courts should not, will not, and constitutionally cannot provide purely advisory opinions. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-127 (2007) (courts will not give "an opinion advising what the law would be upon a hypothetical

state of facts"); *Public Serv. Comm'n v. Wycoff Co.,* 344 U.S. 237, 243 (1952) (courts "must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (courts will not consider "hypothetical," "abstract," or "academic" controversies); *Dow Jones & Co.,* 237 F. Supp. 2d at 405 (courts can grant declaratory relief only in a "case of actual controversy"). Because this principle is embedded in the Constitution itself, it applies fully to those "Controversies between two or more states" that lie within the Court's original jurisdiction.[17]

According to the Court, whether a particular issue is constitutionally justiciable is "necessarily one of degree." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The "propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness, informed by the teachings and experience concerning the functions and extent of federal judicial power." *Public Serv. Comm'n,* 344 U.S. at 243. In short, the justiciability of an issue is a highly fact-specific inquiry.

The Court's opinions discussing the justiciability of declaratory relief since passage of the federal Declaratory Judgment Act suggest that the inquiry into

---

[17] Because this case arises under the Supreme Court's original jurisdiction, the federal Declaratory Judgment Act does not govern the appropriate extent of declaratory relief that Montana can seek. The Act's express restriction of jurisdiction to cases of "actual controversy" (28 U.S.C. § 2201(a)), however, is an "explicit recognition" that federal courts cannot constitutionally issue advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). For this reason, the Court's opinions in cases arising under the Declaratory Judgment Act are relevant in understanding the extent of appropriate declaratory relief in this case.

justiciability involves four closely related questions. First, is there an actual dispute between the parties regarding present legal rights and obligations? Second, are the facts underlying the dispute sufficiently clear and concrete that the court can understand the issues it is deciding and issue a meaningful legal decision? Third, can declaratory relief conclusively resolve the dispute? And finally, what is the likelihood that the dispute, if left unresolved, will impact the parties?[18]

The Court first addressed the case-or-controversy question under the federal Declaratory Judgment Act in two insurance cases – *Maryland Casualty Co.* and *Aetna Life Ins. Co.* In both cases, an insurance company sought declaratory relief regarding its liability to an insured (and, in *Maryland Casualty Co.,* someone injured by the insured), even though no one had filed a suit to recover under the insurance company's policy. The Supreme Court readily found a justiciable controversy in each case, because there were potential claims outstanding that could result in suits against the insurer. According to the Supreme Court, the test for a justiciable controversy is "whether there is a substantial controversy between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.,* 312 U.S. at

---

[18] A report of the Senate Judiciary Committee on the justiciability of requests for declaratory relief, prepared while the committee was drafting the federal Declaratory Judgment Act and based on a review of the "1,200 American decisions theretofore rendered on the subject," similarly found that courts had insisted that "'the issue must be real, the question practical and not academic, and the decision must finally settle and determine the controversy.'" *Public Serv. Comm'n,* 344 U.S. at 244, *quoting* S. Rep. No.7005, 73d Cong., 2d Sess., May 10, 1934.

273 (emphasis added). There must be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.,* 300 U.S. at 241.

In *Public Serv. Comm'n v. Wycoff Co.,* the plaintiff sought "a declaratory judgment that [its] carriage of motion picture film and newsreels between points in Utah constitute[d] interstate commerce," and was thus free from state interference. 344 U.S. at 239. The Court, with only Justice Douglas dissenting, found that declaratory relief was inappropriate. As the Court emphasized, the plaintiff was "not request[ing] an adjudication that it has a right to do, or to have, anything in particular," *id*. at 244, nor had the dispute "matured to a point where we can see what, if any, concrete controversy will develop," *id*. at 245. To be justiciable, legal issues "must not be nebulous or contingent, but must have taken on fixed and final shape, so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Id*. at 244. Moreover, because relevant facts could have changed by the time Utah took action to restrict the plaintiff's actions, it was not "apparent that the [declaratory] proceeding would serve a useful purpose." *Id*. at 246.

In *Golden v. Zwickler,* 394 U.S. 103 (1969), the plaintiff sought declaratory relief from a state statute that criminalized the distribution of anonymous handbills. The plaintiff had been convicted of distributing anonymous handbills criticizing a member of Congress running for reelection, and alleged that he planned to distribute similar handbills when the

congressman ran for office again two years later. The Court initially reversed the decision of a three-judge court that had abstained from deciding whether the plaintiff was entitled to declaratory relief, and remanded the case to the lower court for a consideration of the constitutionality of the state law. *See Zwickler v. Koota*, 389 U.S. 241 (1967). However, learning that the Congressman had left the House of Representatives for a seat on the state supreme court, the Court also directed the plaintiff on remand to show whether he met the "elements governing the issuance of a declaratory judgment." *Id.* at 252 n.15. When the case again reached the Court, it decided that the case was not justiciable. Quoting *Maryland Casualty Co.,* the Court concluded that "under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' here." 394 U.S. at 118. Given that the Congressman was unlikely ever to run again, "it was *wholly conjectural* that another occasion might arise when Zwickler might be prosecuted for distributing handbills referred to in the complaint." *Id*. (emphasis added).

Most recently, in *MedImmune, Inc. v. Genentech, Inc.,* a patent licensee sought a declaratory judgment that the underlying patent was invalid or unenforceable, or alternatively that the licensee was not infringing on the patent, even though the licensee was paying to use the patent and therefore could not have been sued. The Court decided that the licensee should not have to put itself at risk by stopping its payments in order to determine the validity, enforceability, and scope of the patent, and therefore held that the dispute was justiciable. 549 U.S. at 128-129. The Court started by conceding that its prior cases had "not

draw[n] the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirements and those that do not." *Id.* at 127. The Court went on to emphasize that declaratory judgments can be sought on matters that could "be addressed in a future case of actual controversy." *Id.* at 127 n.7. And the Court repeated *Aetna*'s conclusion that a dispute must be "definite and concrete, touching the legal relations of parties having adverse legal interests," "real and substantial," and admitting of "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* at 127, *quoting Aetna Life Ins. Co., supra*, 300 U.S. at 140-241.

The question is whether the dispute over Montana's right to fill the Tongue River Reservoir beyond 32,000 af meets the standards for declaratory relief set out in these prior Supreme Court cases. While Montana suggests that the Supreme Court already resolved the justiciability of this issue when it accepted jurisdiction over this dispute (Montana Opposition, Dkt. 493, at 23), Montana's argument conflates the justiciability of the case with justiciability of specific claims for relief. In accepting jurisdiction of this case, the Court may have concluded, as Montana claims, that the overall dispute presents a "serious and dignified claim in need of resolution," *id*., but that does not mean that all the issues on which Montana might seek declaratory relief are appropriate for consideration. The Court therefore must decide whether the extent of Montana's storage right beyond 32,000 af each year presents an appropriate controversy for resolution. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 101-110 (1983) (even though a complaint presents a case or controversy for purposes of damages, a plaintiff also must establish

that a request for injunctive relief presents an actual case or controversy).

As noted earlier, there are four criteria that must be met to consider Montana's request for declaratory relief on its storage rights: (1) a present legal dispute, (2) clear and concrete facts, (3) the ability to provide conclusive legal relief, and (4) immediacy. The extent of Montana's storage right is clearly a source of present legal controversy between Montana and Wyoming involving the States' rights and obligations under the Compact. As I noted in my Second Interim Report, Montana's right under the Compact to store water in the Tongue River Reservoir has been one of the major sources of contention between Montana and Wyoming. Second Interim Report, *supra,* at 99-100. And the "biggest question" with respect to those rights, according to the Wyoming State Engineer, is the "extent" of Montana's storage right. "So that needs to be settled." 22 Trial Tr. 5273:7-24 (testimony of Patrick Tyrrell).

The dispute, moreover, is sufficiently clear and concrete to permit the Court to evaluate and resolve the dispute. Waiting for a future year when Montana seeks, over Wyoming's objection, to store more than 32,000 af in the Reservoir will not provide a better factual setting in which to resolve the question of Montana's storage rights. The facts underlying this issue are already clear. Nor are other facts needed to address the issue. This is not an appropriate case, of course, to resolve all future storage issues (e.g., whether Montana could empty its Reservoir in March for repairs and then insist on sufficient water to fill the Reservoir during the remainder of the spring, *see* pp. 87-88 *infra*); the exact storage practices that Montana may follow are purely hypothetical and should be

addressed in future disputes if and when they arise. The question of Montana's basic right to store more than 32,000 af, however, is sufficiently clear and concrete to support declaratory relief.

The Court also can conclusively resolve the dispute in the current action. The extent of Montana's right to store water in the Tongue River Reservoir is determined by Montana law and the provisions of the Compact and does not depend on future facts. By resolving the matter at this stage, moreover, declaratory relief will play a useful role in eliminating uncertainty over Montana's storage rights and reducing the chances of future conflict over the issue and a replay of the current lawsuit.

Finally, Montana's right to fill the Reservoir is an issue that is almost certain to arise in the future. Since increasing the size of the Tongue River Reservoir in 1998, Montana has frequently stored more than 32,000 af of water in the Reservoir during the winter and spring months. As shown in Appendix C, Montana has stored more than 32,000 af in almost half of the water years from 2000 to 2008 (the last year for which data has been provided in this case). Storage exceeded 32,000 af in 2000, 2003, 2005, and 2007. Storage also came close to 32,000 af in 2008.

Not surprisingly, storage amounts tend to be less in dry years (when a call is most likely to occur). Montana, however, stored almost 29,000 af of water in 2006, one of the two years in which Montana made a formal call before filing this litigation, and its storage would have been even higher if it had not started the year with significant storage water in the Reservoir. In 2006, Montana actually stored approximately 31,500 af after the Reservoir reached its low point of

storage at the end of December. Second Interim Report, *supra*, at 140 n.46.

Given the high percentage of years when Montana has stored more than 32,000 af of water in recent years, there is a real and substantial probability that Montana will seek to store more than 32,000 af in a future year when it has called the River. While it is not certain that Montana will seek to store more than 32,000 af in a year when it is forced to call the Tongue River, prior cases have not required absolute certainty. This case is unlike *Golden* where it was "most unlikely" and "wholly conjectural" that the factual dispute would arise again. 394 U.S. at 109. Here there is a specific and live dispute over the extent of Montana's storage rights that could readily influence how Wyoming responds to a call in the future.

The Court in the past has adjudicated the rights of states to interstate waters even where those rights were subject only to potential future threats, not past or present actions. For example, in *Nebraska v. Wyoming*, 515 U.S. 1 (1995), Nebraska sought relief from the Court, "alleging that Wyoming was threatening its equitable apportionment, primarily by *planning* water projects on tributaries that [had] historically added significant flows to the pivotal reach." *Id*. at 5 (emphasis added). Although the water projects were merely "proposed" and there was no certainty that they would ultimately be built, the Supreme Court permitted Nebraska to seek an injunction. *Id*. at 11-13.

Montana's yearly storage right beyond 32,000 af, moreover, is relevant to the implementation of Article V(A) even if Montana is never able to store more than 32,000 af in a future "call" year. As discussed later in this Report, Montana can call the River only when it

reasonably believes, based on substantial evidence, that there otherwise might not be a sufficient flow of water over the course of the water year to meet its storage right. *See* pp. 96-106 *infra*. In order to call the River, Montana therefore needs to know how much water it is entitled to store under Article V(A). Information in the early spring, for example, might show that there will be enough water to store 32,000 af, but potentially not enough to fill the Reservoir. Unless the Court determines Montana's right to store more than 32,000 af, Montana therefore will not know whether it can issue a call in such years. Again, although it is not certain that Montana will be confronted by this question, Montana had the capacity to store more than 32,000 af in every water year, but one, from 2000 to 2008—suggesting a high likelihood that the question will arise.[19]

The Court's assumption of jurisdiction in this case, while not conclusive on the justiciability of Montana's claim to store water beyond 32,000 af, *see* pp. 63-64 *supra*, also militates in favor of resolving the claim. As noted, the issue was a central element of the dispute that gave rise to the current action. Failing to resolve it now is likely to lead to future disputes and piecemeal determination of Montana's storage right. According to the Supreme Court, it has a "'serious responsibility

[19] Montana had the capacity to store more than 32,000 af of water in the Reservoir "in 63 of the 68 years of record, 93% of the years of record." *See* Affidavit of Dale E. Book, May 26, 2016, ¶ 5 & tbl., attached to Montana's Summary Judgment Brief, *supra*. Montana expanded the Reservoir, however, in 1998, so the years after this expansion are more relevant in evaluating the likelihood that Montana will need to know its storage rights beyond 32,000 af to determine whether it can make a call on the River. From 2000 to 2008, Montana had the capacity to store more than 32,000 in every year except 2008. *Id.*, tbl.

to adjudicate cases where there are *actual, existing controversies'* between the States over the waters in interstate streams." *Oklahoma v. New Mexico*, 501 U.S. at 241 (emphasis added), *quoting Arizona v. California*, 373 US. 546, 564 (1963). The Court also has emphasized that the adjudication of such controversies "must pass upon every question essential to" a resolution of the controversy. *Id., quoting Kentucky v. Indiana*, 281 U.S. 163, 176-177 (1930).[20]

As noted, Wyoming also argues that the Court should refuse to address Montana's right to store more than 32,000 af of water in the Tongue River Reservoir because the issue could be resolved either by the Yellowstone River Compact Commission or by the parties and their experts. While the Court has emphasized that federal declaratory relief should not "preempt and prejudice issues that are committed for

---

[20] Wyoming urges that *Kansas v. Colorado*, 543 U.S. 86 (2004), illustrates the wisdom of not resolving the full extent of Montana's storage right. In that case, Kansas asked the special master to address 15 unresolved questions involving (1) the calibration of a groundwater model, (2) disputed accounting issues from 1997 through 1999, and (3) "[d]isputed [f]uture [c]ompliance [i]ssues." *Id.* at 104-105. The special master recommended that the Court not address the questions, and the Supreme Court agreed. The issues in *Kansas v. Colorado,* however, were quite different from Montana's storage issue. According to the Court, the issues in the second category were irrelevant and "mostly moot." *Id.* at 105. The "passage of time" and greater experience with the groundwater model would help inform the other issues and "produce more accurate resolution of disputes." *Id*. Here, as noted, the passage of time will not help inform or better crystalize the storage issue. Even in *Kansas v. Colorado*, moreover, the special master recommended that the Court retain jurisdiction so that the Court could take up the "lingering issues at a future date." *Id.* at 105-106.

initial decision" to another body, *Public Serv. Comm'n,* 344 U.S. at 246, Montana's reservoir rights are not committed for initial decision to the Compact Commission. Moreover, to date, the Commission has not played a significant role in resolving any of the major disagreements regarding the rights and responsibilities of the States under the Compact, nor is it likely to do so in the future given its current voting structure. As noted earlier, Montana and Wyoming each get one vote. If the two states disagree, a federal representative can vote (but is not compelled to do so). *See* pp. 20-21 *supra*. Although the States have frequently encouraged the federal representative to vote when needed to break a tie, the federal government has maintained a consistent policy of not allowing the federal representative to vote. *See, e.g.,* Yellowstone River Compact Comm'n, Thirty-Fifth Annual Report, 1986, p. V; Yellowstone River Compact Comm'n, Fortieth Annual Report, 1991, pp. II, V; Yellowstone River Compact Comm'n, Fifty-Fifth Annual Report, 2006, p. XIII. While the States have agreed to a dispute resolution process under the Compact, the process appears never to have been used to resolve a dispute over the meaning of the Compact. *See* Yellowstone River Compact Comm'n, Rules for the Resolution of Disputes over the Administration of the Yellowstone River Compact, Dec. 19, 1995; Yellowstone River Compact Comm'n, Fifty-Fifth Annual Report, 2006, p. XIII (suggesting that the purpose of the dispute resolution process is to resolve administrative questions, not to interpret the Compact).

The States also have proven singularly unable to settle disputes between themselves regarding the Compact without judicial intervention. In the 65 years since the Compact was negotiated, "Montana and Wyoming have never been able to agree on how to

administer the allocation provisions of Article V." Second Interim Report, *supra*, at 18. Montana's and Wyoming's inability to settle this matter even after the issuance of my Second Interim Report, and despite explicit encouragement from the Court, is further evidence of the need for a judicial declaration of Montana's storage right.

b) Resolution of the storage issue.

Having decided that the storage issue presents a case or controversy that the Court should resolve in its declaratory relief, I turn to the question of what pre-1950 storage rights Montana enjoys under the Compact beyond the 32,000 af right recognized in the Second Interim Report. That report detailed the history of Montana's storage right in the Tongue River Reservoir. *See* Second Interim Report, *supra*, at 100-107. The Montana Conservation Board filed a Declaration of Intention to Store, Control, and Divert River Water (the "Storage Declaration") in 1937. Ex. M-558A. In the Storage Declaration, the Conservation Board stated its intent to store "*all unappropriated waters*" of the Tongue River and its tributaries, "together with the return flows of all waters furnished or supplied," needed for the reservoir. *Id.* (emphasis added).

Nothing on the surface of the Storage Declaration limited the Conservation Board to the storage of any particular amount of water. The Board's express intent to store "*all* unappropriated waters," moreover, was consistent with Montana legislation authorizing the Conservation Board to initiate a storage right to the "unappropriated waters of a particular body, stream or source" by filing a storage declaration "describing in general terms such waters claimed, means of appropriation, and location of use." Rev.

Code Mont. § 89-121 (1947). The Storage Declaration was also consistent with storage declarations for other contemporaneous storage projects in Montana that also called for the storage of "all unappropriated waters" in other waterways. *See, e.g., Hanson v. South Side Canal Users' Ass'n*, 537 P.2d 325, 325 (1975) (quoting the Conservation Board's declaration of storage for the South Side Reservoir). *See also* Mark D. O'Keefe, Protecting Montana's Water Rights for Future Use: Water Reservation History, Status, and Alternatives, March 4, 1992, ch. 2, p. 4 (noting the Conservation Board's policy of appropriating all the waters of a waterway).

In a contemporaneous 1937 contract to sell water to the Tongue River Water Users' Association ("TRWUA"), the Conservation Board estimated that the Tongue River Reservoir would have a "live capacity of *at least* 32,000 acre feet of water annually" and would be "at least sufficient" to deliver that amount of water each year to the TRWUA.[21] Ex. M-529A, p. 1 (emphasis added). Because the contract was negotiated prior to construction of the Reservoir, the contract recognized that the Reservoir might ultimately have a greater live capacity and be able to deliver more than 32,000 af annually. Id., § 4, at p. 3. When completed in 1939, the Reservoir had a total capacity of approximately 72,500 af. Ex. M-557E, p. 3. *See also* p. 18 n.6 *supra*

[21] According to the United States Bureau of Reclamation, the "live capacity" of a reservoir is the "part of the total reservoir capacity which can be withdrawn by gravity. This capacity is equal to the total capacity less the dead capacity." U.S. Bureau of Reclamation, Library: Glossary (https://www.usbr.gov/library/glossary/). The "live capacity," in short, is the portion of the storage that is above the point at which water is released from the reservoir and thus represents the storage that can be released and used.

(explaining the dispute during the liability phase of this case regarding the original storage capacity of the Reservoir).

In 1969, the Conservation Board amended the contract to provide for the sale of 40,000 af of water annually to the TRWUA. Ex. M-529C. According to the amendment, 40,000 af was the "approximate firm yield" of the reservoir.[22] Ex. M-529C, p. 4. Following flood damage in 1978 and settlement of an Indian water-right claim with the Northern Cheyenne Indian Tribe, Montana rehabilitated and expanded the dam in 1998. Second Interim Report, *supra*, at 104-106.

Montana is currently adjudicating all pre-1973 rights in the State, including the 1937 appropriative right of the Tongue River Reservoir. *See* 1973 Mont. Laws, ch. 452 (providing for the statewide adjudication).[23] The United States objected to Montana's initial description of the storage right of the Tongue

---

[22] According to the federal Bureau of Reclamation, the "firm yield" of a reservoir is the "maximum quantity of water that can be guaranteed with some specified degree of confidence during a specific critical period. The critical period is that period in a sequential record that requires the largest volume from storage to provide a specified yield." U.S. Bureau of Reclamation, Library: Glossary (https://www.usbr.gov/library/glossary/). At the time of the 1969 amendment to the contract, therefore, the Montana Conservation Board apparently believed that 40,000 af was the "maximum quantity of water" that could be furnished to the TRWUA on an annual basis "with some specified degree of confidence."

[23] Montana did not create a permit system for water rights until 1973. To determine pre-existing water rights and manage its water system, Montana therefore established an adjudication process to determine the amounts and priorities of pre-1973 water rights. *See* Ex. M-230, p. 5 (explaining Montana's water-right system).

River Reservoir, which included a "volume guideline" of 127,324 af—equivalent, according to Montana, to "one complete fill, [a] partial refill for carryover storage, and evaporative losses." *See* Second Interim Report, *supra*, at 106-107, *quoting* Ex. M-526, p. 4, ¶ 8. To address that objection, Montana, the United States, the Northern Cheyenne Tribe and the TRWUA stipulated that the storage right for the Tongue River Reservoir "is not administered according to any specific numerical volume defining or limiting the amount of water that can be diverted into storage in a year." Ex. M-526, ¶ 12, at 4. The stipulation notes that the Reservoir "is filled and refilled and water carried over from year to year in order to reliably provide up to a maximum of" 60,000 af per year.[24] The deliveries of 60,000 af "define the amounts to be delivered in any one year." *Id*. They "do not define the amount of water that can be diverted into storage in any year." *Id*.

This stipulation supports Montana's view that the 1937 Reservoir storage right is not limited to 32,000 af per year. For at least three reasons, however, the stipulation is not conclusive as to Montana's storage rights under either Montana law or the Compact, requiring a deeper dive into Montana storage and appropriation law and the terms of the Compact. First, the stipulation does not constitute a final

---

[24] The 60,000 af consists of both water delivered under the 1969 amended TRWUA contract (40,000 af) and the Northern Cheyenne Tribe's federal reserved water right in the Tongue River Reservoir (20,000 af). *See* Ex. M-526, at 12, ¶4 (Amended Stipulation regarding the Reservoir's water rights); Ex. M-529C (1969 TRWUA amended contract); Northern Cheyenne Compact, *supra*, art. II(A)(2)(b) (providing the Tribe with the "right to divert or deplete . . . up to 20,000 acre-feet per year" from Tongue River Reservoir storage).

judicial determination of Montana's storage rights. The Montana Water Court has not yet entered a final adjudication of the Tongue River Reservoir's water rights, and the stipulation is explicitly "conditioned upon the Water Court's accepting the terms of the Stipulation." *Id*. ¶ 15, at 5. The Stipulation is expressly "null and void" if the Water Court does not accept its terms. *Id*. Second, the question before the Supreme Court is the extent of Montana's rights under the Compact, not under Montana state law. Even if Montana's adjudication process had already determined that Montana has a right to store up to the original capacity of the Reservoir, a decision of the Montana courts does not mean that the Compact protects that right. Finally, where state decisions affect the rights of other states under an interstate compact, the availability of judicial review is essential to ensure against local state bias. *See, e.g., Kansas v. Colorado*, 543 U.S. at 103-104.

For the reasons discussed below, however, I conclude that Montana indeed has a right protected by Article V(A) of the Compact to store up to the original capacity of the Reservoir, subject to the various restrictions and conditions set out below and in my Second Interim Report. *See, e.g.,* Second Interim Report, *supra*, at 141-144 (discussing the post-1950 storage capacity resulting from the Reservoir's expansion), 144-157 (discussing the Reservoir's operating rules).[25]

---

[25] As in my Second Interim Report, I explicitly do not address the nature or extent of the Northern Cheyenne Indian Tribe's water rights in the Tongue River Reservoir nor the status of those rights under the Yellowstone River Compact. *See* Second Interim Report, *supra*, at 157-160. Because neither the Tribe nor the United States is a party to this case, nor have they waived their

(1) Basic legal principles.

In determining Montana's storage rights under the Compact, the initial question is the extent of those rights under Montana law. The Compact does not explicitly spell out the storage rights of the parties but looks instead to the "laws governing the acquisition and use of water under the doctrine of appropriation." Compact, art. V(A). And the most relevant appropriation law in determining the scope of Montana's pre-1950 rights is that of Montana.[26] As explained in the Second Interim Report, the parties to the Compact understood that each state would enjoy "continued authority to manage its own pre-1950 rights, subject only to explicit provisions and obligations established by the Compact." Second Interim Report, *supra*, at 46. As the Supreme Court has concluded, moreover, the most appropriate inference where a compact is silent on a particular issue "is that each State was left to regulate the activity of her citizens." *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 632 (2013), *quoting Virginia v. Maryland*, 540 U.S. at 67.

---

sovereign immunity, this "case is neither an appropriate nor permissible vehicle for deciding the nature of the Tribe's water rights or the status of its rights under the Yellowstone River Compact." *Id*. at 160.

[26] To the degree that Montana law has changed over time, moreover, the most relevant Montana law is the law existing at the time the Compact was negotiated and signed, because that law would have informed the understanding of the parties to the Compact. *See* First Interim Report, *supra*, at 39-40; *Kansas v. Colorado,* 533 U.S. at 89 (O'Connor, J. dissenting) ("It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made.").

Montana law, however, is not the end of the inquiry. Once Montana's storage rights are determined as a matter of state law, the next question is whether the Compact restricts or expands those rights. Where explicit Compact provisions override state law, the Court must follow those provisions in determining Montana's storage rights under the Compact. *See State ex rel. Intake Water Co. v. Board of Natural Resources & Conservation*, 645 P.2d 383, 387 (1982) (recognizing that Montana law is "subordinate to Compact provisions"). Official documents surrounding the negotiation, adoption, and implementation of the Compact also may shed light on the parties' understanding of Montana's storage rights and thus the intent of the Compact in protecting those rights. *See Oklahoma v. New Mexico*, 501 US. 221, 235 n.5 (1991) ("appropriate to look to extrinsic evidence of the negotiation history" of a compact, as well as its "legislative history and other extrinsic material"). As with state law, documents contemporaneous to the negotiation and adoption of the Compact are of greatest relevance because they can provide evidence of the parties' understanding of Montana's storage rights at the time the Compact was negotiated and signed.

Determining Montana's storage rights in the Tongue River Reservoir is not the simplest task. As the Montana Water Court itself has recognized, Montana law is not always clear as to the exact nature and extent of storage rights.[27] *See, e.g.*, *Findings of Fact & Conclusions of Law for the Preliminary Decree of the Tongue River Above & Including Hanging*

[27] Created in 1979, the Montana Water Court has jurisdiction over the adjudication of water rights in the State. *See* Mont. Code Ann., tit. 3, ch. 7 (setting out the procedures and jurisdiction of the Montana Water Court).

Woman Creek, *Basin 42B*, at 8 (Mont. Water Ct., Feb. 28, 2008) ("Disagreements exist in Montana over the precise nature of reservoir storage"); *In the Matter of the Flint Creek Drainage Area,* Case No. 76E-W-119723-00 (Mont. Water Ct., May 9, 1980) (attached letter of Sarah Bond, p. 2) ("*Flint Creek Drainage Area*") ("The nature of a storage right in Montana has been the subject of much debate"). As discussed below, little relevant case law existed on Montana storage rights at the time that the Compact was negotiated and signed.

The Tongue River Reservoir, moreover, is not a typical reservoir—complicating the task of determining its rights under state law. First, the Reservoir was "one of 141 state storage projects that apparently enjoy broader authority under state law than private reservoirs." Second Interim Report, *supra*, at 124. The Montana Conservation Board built the projects during the Great Depression to "stimulate the economy, provide jobs, and create stable and consistent water supplies for future development." *In the Matter of the Adjudication of the Bitterroot Drainage Area*, Case No. 76HE-166, at 3 (Mont. Water Ct., March 9, 2000) (introduced at trial as Ex. M-319). According to the Montana Water Court, these state storage projects "occupy a unique place in Montana water law." *Id*. Second, the Tongue River Reservoir is an on-stream reservoir, and Montana intended to use the Reservoir for both storage and flood-control purposes, leading to different storage patterns than one might find for an off-stream reservoir intended only for storage purposes. *See* Ex. M-529A (noting that Montana intended to construct an "irrigation and flood control project").

(2) Montana storage rights.

As noted, Montana case law on storage rights was sparse prior to the signing of the Compact. Most of that case law emphasized the importance of storage in Montana and recognized the existence of storage rights under Montana law, without addressing the extent of those rights. *See, e.g., Donich v. Johnson,* 250 P. at 965, *quoting Anaconda Nat'l Bank v. Johnson*, 244 P. 141, 144 (Mont. 1926) ("it is in the interest of the public that water be conserved for use rather than be permitted to go to waste").

The Montana Supreme Court's opinion in *Federal Land Bank v. Morris*, 116 P.2d 1007 (Mont. 1941) provides the greatest guidance on the nature of storage rights in the State at the time. Two passages in the opinion are of particular relevance to the rights of the Tongue River Reservoir. First, quoting the Colorado Supreme Court, *Morris* observed that the "appropriation for a reservoir, in the nature of things, is measured *by the quantity of water which it will hold at one filling*." *Id.* at 1011, *quoting Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 98 P. 729, 733 (Colo. 1908). According to *Morris*, in short, capacity is the measure of a storage right. Second, the Montana Supreme Court noted that the holder of a reservoir right is entitled, "in any year, to store for use in that or succeeding years what he has a right to use, and also any additional amounts that others would not have the right to use, and that would otherwise go to waste." *Id.* at 1012.

In determining storage rights in Montana, two other legal principles are also important. First, all water rights, including storage rights, are limited to the amount of water that a user intends to appropriate and put to a useful or beneficial purpose. *See Bailey v.*

Tintinger, 122 P. 575, 583 (Mont. 1912). Second, the volume of water that a reservoir is permitted to store is informed by historical practice. *See, e.g., Order re: Teton Co-Op Reservoir Co. Water Right Claims*, Case No. 41O-84, ¶ 22, at 50 (Mont. Water Ct., April 27, 2016) ("*Teton Co-Op*"); *Flint Creek Drainage Area, supra*. A major purpose of both limitations is to prevent someone from appropriating water for which they do not have an intended use. "The law will not encourage anyone to play the part of a dog in the manger, and therefore the intention must be *bona fide* and not a mere afterthought." *Bailey,* 122 P. at 583. By looking to the historical operation of a reservoir to determine storage rights, moreover, courts ensure that storage cannot be expanded at a distant point in the future to the disadvantage of junior appropriators who have established appropriative rights in the meantime.

The degree to which these general rules of Montana water law apply to the Tongue River Reservoir is not precisely clear. As noted, Montana appropriated water for the reservoir pursuant to special legislation providing that, in acquiring water rights and administering the State's program of water storage, the Conservation Board "shall not be limited to the terms of the statutes of the state of Montana relating to water rights heretofore enacted." Rev. Code Mont. § 89-121 (repealed in 1933). The Montana Water Court, however, has used general appropriative principles to determine the storage rights in other reservoirs constructed pursuant to this statutory program. *See, e.g., Flint Creek Drainage Area* (looking to the historic operation of a reservoir constructed under former section 89-121 to determine its water right). While former section 89-121 clearly indicated the legislature's intent to give broad discretion to state

storage projects built under its authority, moreover, both intent and the historical operations of a water project are central considerations in determining the scope of a water right. The Compact's explicit adoption of appropriative law in Article V(A) therefore suggests the importance of considering these factors in determining the storage rights of the Tongue River Reservoir.

The intent of an appropriator is "demonstrated by acts and surrounding circumstances." *Wheat v. Cameron*, 210 P. 761, 763 (Mont. 1922). In its original Storage Declaration for the Tongue River Reservoir, the Montana Conservation Board explicitly declared its intent to "*store*, control, and/or divert *all* unappropriated waters of [the] Tongue River and tributaries." Ex. M-558A (emphasis added). These waters would be "appropriated by means of a storage dam and reservoir" and ultimately used for "Irrigation, Domestic, and Stock Water." *Id.* Montana's original intent therefore was clear and exceptionally expansive. Montana intended to appropriate all of the unappropriated water of the Tongue River needed to store water in the Tongue River Reservoir for irrigation, domestic use, and stock watering.

My conclusion in the Second Interim Report that Montana could store *at least* 32,000 af of water annually was based in part on the Conservation Board's 1937 contract with the TRWUA, described earlier, which estimated two years prior to constructing the Reservoir that the "total available yield" would be at least 32,000 af. *See* Ex. M-529A, p. 1. The 1937 contract, however, does not indicate that the Board intended to store *only* 32,000 af of water each year. Indeed, the opposite is true. As just noted, the contract shows that the Board expected that the "live

capacity" of the reservoir would be *a minimum of* 32,000 af. *Id.* Moreover, the Board intended to make use of all of the reservoir's live capacity, whatever volume that might end up being. The contract explicitly provided for the possibly that the "live capacity" would be more than 32,000. Under the contract, the association agreed to purchase more than 32,000 af "in the event that the live capacity of the project, when completed, is greater than that estimated, and the amount of water available from the project will permit the furnishing of more than 32,000 acre feet of water annually." *Id.* § 4, p. 3. The Board further agreed to provide the association with the "total available yield of storage water." *Id.* § 1, p. 2. Based on operating experience with the reservoir, the Board ultimately amended the contract in 1969 to provide for the delivery of 40,000 af of water after concluding that this was the "approximate firm yield" of the Reservoir. *See* Ex. M-529C.

The amount of water expected to be delivered each year from a reservoir, moreover, is often less than the total amount of water intended to be stored in the reservoir. While one purpose of a reservoir can be to store water during the season of a year when it rains or snows for later use in the dry season of the year, another purpose can be to store water in normal or wet years for use in the inevitable dry years. The latter form of storage can be extremely important in parts of the country with high year-to-year variation in precipitation. At the time the Compact was negotiated and signed, therefore, storage of "water in one year for use in a later year [was] common practice" in the western United States. 1 Wells A. Hutchins, Water Rights in the Nineteen Western States 363 (1971). The Tongue River Reservoir, like many other reservoirs in Montana at the time, consistently finished one water

year with unused water that the operators carried over to the next year. *See* Ex. M-5, p. 29 tbl. 4-A, (expert report of Dale Book) (showing carryover amounts from 1941 through 1950 ranging from 18,470 af to 42,090 af).

Many reservoirs in Montana appear to store more water than needed in one year for use in future years, thereby providing a more assured supply of water in dry years. For example, in *Morris,* water users constructed and maintained a reservoir "with the intention of holding more water than required for irrigation in any one year" in order "to provide for an extra supply during the wet years for use in the dry years." 116 P.2d at 1011. The Montana Supreme Court had no problem finding that such storage was permissible. *Id.* at 1011-1012. The Montana Water Court also has concluded that carryover water is "an acceptable part of a diversion" for storage purposes and should be reflected in the water right. *See Teton Co-Op*, at 50, ¶ 22 (involving carry-over of 20,000 af of water).

Operations of the Tongue River Reservoir in the decade between the completion of the Reservoir and the signing of the Compact are consistent with the conclusion that Montana intended to make full use of the Reservoir's capacity and to store more than 32,000 af each year. Then, as now, the primary storage period for the Tongue River Reservoir was during spring runoff.[28] *See* Ex. M-5, p. 29 tbl. 4-A (Book expert report). As shown in Appendix D, between the end of

[28] Unlike today, however, Montana generally reduced storage in the Reservoir during the late fall and winter before storing water in the spring. *See* Ex. M-5, p. 29 tbl. 4-A (Book expert report). The record provides no information regarding the reasons for these late-year reductions.

February and late spring or early summer, Montana generally added far more than 32,000 af of water to storage each year during the decade prior to the Compact's signing. Indeed, Montana added more than 32,000 af to storage 80 percent of the time and added more than 40,000 af to storage almost a third of the time. On average, Montana added almost 39,000 af of storage each spring during the ten year period ending in 1950.

Montana also completely filled the Reservoir in both 1941 and 1944, when the State was perfecting its appropriative right as a matter of state law, and came close to filling the Reservoir in 1942. *See id*; Ex. M-557E, p. 2.[29] The failure of the Reservoir to fill in other years is not evidence that Montana intended to stop storing water after reaching any set volume or after the Reservoir reached some specific capacity level. First, the record contains little evidence regarding precipitation in the Tongue River watershed during this period, which could have affected how much water was stored. Second, Montana would have found it difficult to completely fill the Reservoir during this period given the low amounts of water stored in the winter. The record, however, shows that, during the first ten complete years of the Reservoir's operation, Montana filled the Reservoir to capacity or close to capacity almost one third of the time.

In its post-trial argument, Wyoming suggested that a contemporaneous Bureau of Reclamation study showed that Montana's intent was to store only 32,000 af of water in the Reservoir and to use the remainder

---

[29] The monthly contents of the Tongue River Reservoir show the maximum capacity reaching only 58,000 af of water in 1941. However, the reservoir apparently reached capacity and actually spilled in that year. *See* Ex. M-557E, p. 2.

of the Reservoir's storage capacity for flood control purposes. According to an August 1949 sedimentation survey, the "dam, in addition to providing water for irrigation, is also used for flood control; the upper 7 feet of the reservoir from the spillway down *is allocated for this purpose.* The present flood control storage capacity as determined by this investigation is 21,089 acre-feet." Ex. M-557E, p. 2 (emphasis added). Having reviewed the survey and related portions of the record, however, I agree with Mr. Gordon Aycock's expert testimony at the liability trial that Montana's intent was to use the top 20,000 af or so of capacity *jointly* for both flood control and storage, depending on the needs at any point in time. *See* 9 Trial Tr. 1914:1-2 (Aycock testimony). While reserving a portion of the Reservoir's capacity for flood control during flood-prone months might reduce the total amount that ultimately could be stored in any year, the joint use of the storage space does not mean that Montana's intent was to use only 32,000 af of the Reservoir for storage.

Montana today continues to fill the Tongue River Reservoir primarily during spring runoff. Average spring storage today is actually less than the average spring storage maintained during the ten years prior to the Compact. See Ex. M-5, tbl. 4-A, at p. 30 (Book expert report). However, because Montana stores more water in the Reservoir during the winter, when water is not limited, rather than releasing water during the early winter as it did in the 1940's, the Reservoir is far more likely today to fill near or to its capacity. *See id.*; App. C, *infra* (Reservoir filled in five of the years from 2000 to 2008). Overall, Montana's current storage operations are consistent with historical operations and, as noted, demand less water during the key spring months. *See* Second Interim Report, *supra*, at 155 (Montana's current winter

operations of the Reservoir "are reasonably consistent with its historic operations"); Ex. M-5, pp. 29-30 tbl. 4-A (Book expert report) (showing the Reservoir's month-by-month contents from 1940 to 2008).

For all of these reasons, I conclude that Montana enjoys a state appropriative right to store up to the original capacity of the Tongue River Reservoir.

(3) Compact provisions.

Compact provisions do not require limiting Montana's storage right to less than the original capacity of the Tongue River Reservoir. Article V(A) of the Compact provides for the protection of "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950 . . . in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." As discussed in the last section, Montana enjoys a pre-1950 appropriative right under Montana law to store up to the original capacity of the Tongue River Reservoir. Although Article V(A) does not explicitly mention storage rights, it clearly protects pre-1950 storage rights recognized under state law. *See* Second Interim Report, *supra*, at 108-109. Water stored pursuant to Article V(A) must be used for a beneficial purpose, but otherwise storage rights are treated like all other appropriative rights for purposes of Article V(A)'s protection. *See id.* at 111 (Article V(A) protects storage rights "where the water will be put to a beneficial use *at some future point*").

There is no direct evidence of what the Compact negotiators believed to be Montana's storage right, if they held a specific view at all on this particular water right. In early 1950, however, an engineering committee for the Compact negotiators produced a list

of existing reservoirs and their capacities. *See* Yellowstone River Compact Comm'n, Report of the Engineering Committee, Jan. 19, 1950, *attached to* M-12 (expert report of Douglas R. Littlefield), at M-18226. The list included the Tongue River Reservoir and identified its capacity as 69,400 af (the sediment-reduced capacity of the Reservoir at the time).[30] *Id.* While the exhibit does not state or imply that the capacities shown are the pre-1950 storage rights of each reservoir, nothing in the Engineering Committee's report suggests that the Tongue River Reservoir held a more restricted storage right.

Annual reports of the Yellowstone River Compact Commission further support the view that Montana has a pre-1950 right to fill the Reservoir. None of the annual reports suggests that Montana's pre-1950 storage right in the Tongue River Reservoir was less than the capacity of the Reservoir. Whenever an annual report listed the storage quantity for the Tongue River Reservoir, it consistently listed the sediment-reduced capacity of 69,400 af. *See, e.g.,* Yellowstone River Compact Comm'n, 1st Annual Report, 1952, Ex. J-2, p. 18. In the 2004 Annual Report, moreover, the Commission provided a table of Yellowstone River "Compact Reservoirs." The table lists the Tongue River Reservoir as having a "Pre-Compact 1950 Water Right" of 68,000 af (based presumably on the assumed capacity of the Reservoir prior to its 1999 expansion) and a "Post-Compact 1950 Water Right" of 11,070 af (the capacity assumed to have been added by the 1999

[30] While the Reservoir originally had a capacity of 72,500 acre feet, accumulation of sediment in the Reservoir had reduced the Reservoir's capacity by 1950 to only 69,400 acre feet. *See* Second Interim Report, *supra*, at 103, 141; 5 Trial Tr. 1034:17-1035:7 (testimony of Kevin Smith).

expansion).[31] Yellowstone River Compact Comm'n, 53rd Annual Report, 2004, Ex. J-54, p. 20.

(4) Recommendations.

For the reasons discussed above, I recommend that the Court rule that Montana holds an appropriative right, protected by Article V(A) of the Compact, to store water in the Tongue River Reservoir each year up to the Reservoir's original capacity of 72,500 af.

This recommendation addresses only the total amount of water that Montana can store in the Reservoir, which is the issue that Montana raises in its motion for summary judgment. I do not address, nor need the Court address, the legitimacy of particular filling practices other than those addressed in the liability phase of the case. *See* Second Interim Report, *supra*, at 144-157 (addressing the Tongue River Reservoir's current operating rules and practices). During the hearing on Montana's summary judgment motion, counsel for Montana raised a hypothetical in which Montana might drain the Reservoir

---

[31] As noted in my Second Interim Report, there have been varying estimates of the original 1939 capacity of the Reservoir. See Second Interim Report, *supra*, at 102 n.29. The authors of the Commission's 2004 Annual Report apparently believed the 1939 capacity was 68,000 acre feet (rather than either its actual 1939 capacity of 72,500 acre feet or its sediment-reduced capacity in 1950 of 69,400 acre feet). As explained earlier, Montana expanded the capacity of the Reservoir in 1999 to 79,071 acre feet. Ex. M-3, p. 4 (expert report of Kevin Smith). Only the original capacity of the Reservoir enjoys a 1937 appropriative right. The excess of the new capacity of the Reservoir over its original capacity holds a post-1950 water right. Because the Commission's 2004 Annual Report incorrectly believed that the Reservoir's original capacity was only 68,000 acre feet, it calculated that the Reservoir's post-1950 water right is 11,071 acre feet. The Reservoir's actual post-1950 water right is 6,571 acre feet.

for repairs and then fill it back "from zero." Transcript of July 27, 2016 Hearing, Dkt. 496, at 137:7-12. Such a factual situation could raise a variety of issues depending on how implemented, including consistency with Montana's historical practices. *See* 5 Trial Tr. 1018:8-16 (testimony of Kevin Smith) (a reservoir's "historical pattern" of operation "defines your water right"); 3 *id*. at 633:16-23 (Millicent Heffner).

The Court should not address such hypotheticals because they are insufficiently definite to support Article III jurisdiction. As counsel for Montana noted in setting out the hypothetical, it would involve "very unusual circumstances." Transcript of July 27, 2016 Hearing, Dkt. 496, at 137:11-12. In recent years, Montana has tried to store as much water as possible during the winter months, subject to operating rules that maintain outflows adequate to "meet [downstream winter] stock watering needs while minimizing ice damages" (Ex. M-3, p. 16 (expert report of Kevin Smith)) and that maintain a maximum reservoir level to avoid damage to the reservoir. *See* Second Interim Report, *supra*, at 144-146. As I concluded in the Second Interim Report, these operating rules are consistent with historical practices and pose no problems under the Compact. *Id.* at 157. This case is not an appropriate vehicle for considering the degree to which the Compact would protect significantly different storage situations.

3. Other appropriate declaratory relief.

Appendix A sets out my proposed Judgment and Decree, including my recommended declaratory relief. Most of the declaratory provisions in the Judgment and Decree set out legal principles established in *Montana v. Wyoming*, 563 U.S. 368 (2011), the First

Interim Report, and the Second Interim Report. Wyoming argues that the Court's declaratory relief should not go beyond these provisions. In Wyoming's view, remedies, including declaratory relief, must "flow[] from the liability phase of the case." Transcript of May 1, 2017 Hearing, Dkt. 511, at 43:17-18.

Wyoming is wrong for two principal reasons. First, the main purpose of declaratory relief is to avoid future injuries and disputes, not to remedy past injuries. *See* 28 U.S.C. § 2201(a) (declaratory relief appropriate "whether or not further relief is or could be sought"). So long as a case or controversy existed for purposes of Article III of the United States Constitution, Montana could have brought an action for declaratory relief, seeking to establish its rights under the Compact, even if it had not sought any damages from Wyoming. Indeed, many interstate disputes have sought declaratory or injunctive relief without ever alleging past liability or seeking damages for prior violations. *See, e.g., Arizona v. California,* 373 U.S. 546 (1963). Montana's decision to seek damages for prior violations of the Compact should not limit the declaratory relief that it otherwise could seek. Montana is free to seek declaratory relief regarding its and Wyoming's future rights and obligations in implementing Article V(A) of the Compact as long as a current case or controversy exists.

Second, as discussed earlier, one of the purposes of remedies in interstate compact disputes is to enforce the terms of the compact and avoid future violations. *Kansas v. Nebraska,* 135 S. Ct. at 1052 n.4. The Supreme Court could scarcely ensure future compliance with a compact if its remedial authority were limited to those issues involved in resolving past violations. In this case, for example, liability focused

primarily on (i) whether and when Montana notified Wyoming that it needed more water, (ii) whether, during these notice periods, post-1950 appropriators in Wyoming diverted water needed by pre-1950 appropriators in Montana, and (iii) whether those diversions injured the Montana pre-1950 appropriators. Although the parties have frequently disagreed over what information they need to provide each other in implementing Article V(A) of the Compact, liability did not require the Court to resolve this disagreement. As explained below, however, determination of the States' obligations to provide or share information can help avoid future controversies and reduce the chances of future disagreements ending up before the Court again. For similar reasons, as explained above, the Court should resolve Montana's right to store more than 32,000 af in the Tongue River Reservoir.

For these reasons, the proposed Judgment and Decree also addresses rights and obligations under Article V(A) that were not fully addressed in the liability phase or in either of my interim reports to the Court. In each such instance, I have concluded that there is a controversy between Montana and Wyoming over the requirements of Article V(A) of the Compact, sufficient to meet Article III constitutional requirements, and that declaratory relief will help avoid future disputes and lawsuits. These rights and obligations include:

- The conditions when Montana can place a call and should lift a call (Proposed Judgment & Decree ¶¶ B(2), B(6), *infra* pp. A-3 to A-4)
- Wyoming's response to calls (Proposed Judgment & Decree ¶ B(7), *infra* p. A-4)

- Changes in use of water rights (Proposed Judgment & Decree ¶ C(3), *infra* p. A-5)
- Montana's right to store more than 32,000 af of water in the Tongue River Reservoir (Proposed Judgment & Decree ¶ E(1), *infra* p. A-6)
- Provision and exchange of information (Proposed Judgment & Decree ¶ G, *infra* pp. A-7 to A-8)

For most of the provisions in the Proposed Judgment & Decree, Montana and Wyoming do not significantly disagree regarding the appropriate substance and wording. The Proposed Judgment & Decree uses the terminology of the Supreme Court's opinions and orders and of the first two interim reports, except where clarity or context suggests that alternative language would be beneficial.

The remainder of this section discusses the major provisions where (1) Montana and Wyoming significantly disagree on the appropriateness of the provision, its substance, or both, or (2) the provision could be of particular relevance to the Court and therefore should be highlighted.

a) Groundwater (¶¶ A(1), B(7), G(2)).

Montana and Wyoming disagree on how the Court's decree should treat groundwater. Montana proposes to treat groundwater the same as surface water for purposes of the provisions setting out (1) Article V(A)'s protection of pre-1950 appropriative rights (Proposed Judgment and Decree ¶ A(1), *infra* p. A-2), and (2) Wyoming's responsibilities in case of a call (*id*. ¶ B(7), *infra* p. A-4). Wyoming, by contrast, argues that these provisions should emphasize that groundwater withdrawals violate Article V(A) only to the degree

that they "interfere with the continued enjoyment" of pre-1950 rights.

The circumstances under which groundwater withdrawals could violate Article V(A) of the Compact were an issue during the liability phase. As noted in my Second Interim Report, states and interstate water compacts take different positions as to when groundwater withdrawals violate surface-water rights or protections. *See, e.g., Kansas v. Colorado*, 514 U.S. 673, 685 (1995) (groundwater withdrawals must result in "material depletions of 'usable' river flows"); Colo. Rev. Stat. § 37-90-103(10.5) (withdrawals must, "within one hundred years, deplete the flow of a natural stream . . . at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal"). Based on the language of the Compact, I previously concluded that "Wyoming must ensure that post-1950 groundwater pumping does not interfere with the continued enjoyment of pre-1950 surface rights in Montana. If Montana shows that . . . groundwater pumping in Wyoming has depleted Stateline flows at a time when the water was needed for pre-1950 appropriative rights in Montana, Montana has established a violation of the Compact." Second Interim Report, *supra*, at 211.

One of the challenges in managing groundwater, as the Colorado rule suggests, is that the surface impact of groundwater withdrawals can lag the actual withdrawals by months or even years. Where groundwater is withdrawn in the immediate vicinity of a river, the impact on river flow can be almost immediate. Withdrawals from wells that are hydrologically connected to a river but a significant distance away, by contrast, are more likely to be delayed. *See* Ex. M-9, pp. 6, 8-10 (expert report of Steven Larson) (groundwater model

shows coal-bed methane wells have a lagged impact on stream flow); Ex. W-15, p. 16 (expert report of William Schreüder) (noting that the groundwater model "predicts stream depletions to the Tongue River within a few years of when the pumping occurs"). If Montana calls the Tongue River, shutting down a close well may provide Montana with additional water during the period of its call, while shutting down a distant well may make little, if any, immediate difference to the available surface water. Yet if Montana can object to groundwater withdrawals only during a call, it may not be able to effectively address the impact of distant withdrawals on its rights under Article V(A) of the Compact. By the time it is able to object, the injury is inevitable. Damages or the subsequent delivery of replacement water may be the only options.

The provisions of the Proposed Judgment & Decree reflect these complexities. Paragraph B(7) provides that Wyoming shall respond to a call by ensuring, "to the degree physically possible," that "any groundwater withdrawals under post-January 1, 1950 appropriative rights are not interfering with the continued enjoyment of pre-1950 surface water rights in Montana." P. A-4 *infra*. At the same time, Paragraph B(7) makes clear that "Wyoming shall be liable for . . . withdrawals [of groundwater] in violation of Article V(A) of the Compact even if it was not physically possible for Wyoming to prevent the . . . withdrawals during a call (including depletions caused by groundwater withdrawals occurring before the call)." *Id.* Paragraph A(1) also declares that Article V(A) of the Compact "protects pre-1950 appropriative rights . . . from . . . withdrawals of . . . groundwater in Wyoming . . . that are not made pursuant to appropriative rights in Wyoming existing as of January 1, 1950," without any

distinction as to when the withdrawals occur. P. A-2 *infra*.

These provisions do not require Wyoming to do the impossible or to shut down wells during a call that will make no difference during the period of the call to the amount of water available in the Tongue River. At the same time, the provisions make clear that, during a call, Wyoming must regulate wells that are in close enough hydrological connection to the River (e.g., a well that is drawing water out of the alluvium) to affect surface flow during the potential period of the call. Wyoming also is liable to Montana for any shortfalls in water during a call that result from withdrawals that occurred prior to the call, even if the lag in impact is lengthy. As in this case, Montana would have the burden of proving the injury resulting from such previous withdrawals. *See* Second Interim Report, *supra*, at 211-219 (concluding that Montana's evidence was "not sufficient to prove that Montana was injured by CBM groundwater production in 2004 or 2006").

The provisions leave open whether Montana might have other rights or relief against significant groundwater withdrawals, prior to a call, if Montana can demonstrate that the withdrawals are likely to interfere with the continued enjoyment in the future of its pre-1950 rights in violation of Article V(A) of the Compact. Because there has been no showing that any current or anticipated groundwater withdrawals in Wyoming are likely to reduce stream flows into Montana in the future, the question is purely hypothetical and therefore need not be addressed at this time. *See* Second Interim Report, *supra*, at 219 (concluding that, while there is an apparent hydrologic connection between Tongue River flows and groundwater

withdrawals by Wyoming coal-bed methane operations, Montana did not prove any injury).

The effective enforcement of Article V(A) against groundwater withdrawals depends on the States being aware of groundwater withdrawals that might have hydrologic impacts on surface water flows. Paragraph G(2) of the Proposed Judgment & Decree therefore provides that the States will exchange information that is available in the ordinary course of water administration that shows the amount of groundwater pumping in the Tongue and Powder River basins. P. A-7 *infra*. *See* pp. 107-111 *infra* (dealing with information exchange under the Compact).

In comments on my draft report, Montana proposed that the Decree also provide that, where prior withdrawals lead to a delayed Compact violation, Wyoming deliver water of "equivalent . . . quantity and quality, to Montana as soon as it is physically possible to do so after a request from Montana." Montana Comment Letter, Nov. 27, 2017, Dkt. 521, at 2-3. Absent agreement between Montana and Wyoming, however, determining the amount of any surface-water depletion resulting from such groundwater withdrawals is likely to be contentious and time-consuming. To be workable, Montana's proposed provision would require the Court to design a process for determining the "equivalent quantity" of water that Wyoming would need to deliver at Montana's request—not a simple task on the current record.[32]

---

[32] Wyoming sometimes may be unable to prevent surface storage during a call in winter or spring if snow makes it difficult to get to a reservoir. *See* Second Interim Report, *supra*, at 188 (noting the difficulty of access when snow levels are high). Paragraph B(7) of the Proposed Judgment & Decree therefore provides that, where Wyoming cannot prevent surface storage

If Montana were faced with a significant risk that groundwater withdrawals in Wyoming would have a delayed impact on Tongue River flows in the near future, that risk might justify developing and mandating a workable process. As noted, however, the risk of a delayed impact from groundwater withdrawals is currently hypothetical. If Montana identifies an actual risk in the future, the States hopefully will be able to agree on how best to resolve it. The Proposed Judgment & Decree makes clear that Wyoming is liable for groundwater withdrawals that interfere with the continued enjoyment of Montana's pre-1950 appropriative rights, so the only issue is how to remedy it. If the parties cannot agree on a process for remedying delayed groundwater impacts on Montana's Article V(A) rights, Montana at that point can seek further relief from this Court, including damages and equitable relief.

b) Conditions requisite to a call by Montana (¶ B(2)).

Another major disagreement between Montana and Wyoming concerns the conditions under which Montana can call the Tongue River to protect its pre-1950 rights in the Tongue River Reservoir. Montana

---

while a call is in effect, it "shall deliver such water to Montana as soon as it is physically possible to do so after a request from Montana." P. A-4 *infra*. Determining the amount of such water, however, requires only that Wyoming note the level of storage at the start of the call—a relatively simple task compared to the difficulty of determining the delayed impact of groundwater pumping on surface flows. *See* Letter of Patrick T. Tyrrell, Wyoming State Engineer, to Tim Davis, April 14, 2015, *supra* (noting that Wyoming had determined storage levels in its Tongue River reservoirs in response to Montana's April 10, 2015 call on the Tongue River).

believes it should have the right to call the River whenever the Reservoir has failed to reach specific storage levels. In particular, Montana argues that it should be able to call the River if (1) in the winter months, the Reservoir has not reached its "maximum winter capacity" (currently 45,000 af), or (2) after April 1, the Reservoir has "not filled to its maximum physical capacity." Montana's March 2017 Proposed Decree, *supra*, ¶¶ B(4)-(5), at 6. Wyoming, by contrast, argues that Montana's right to call the River should hinge on evidence that the Reservoir might not fill absent more water. According to Wyoming, Montana should be able to call the River "when it wishes to fill" the Reservoir and "there is significant evidence showing that, without more water, the Reservoir might not fill to that capacity." Wyoming's Proposed Decree and Brief in Support, Dkt. 501, ¶ J(i).

From a practical standpoint, the disagreement between the States boils down to which State will bear the risk that hydrologic forecasts of water runoff early in a water year prove incorrect. Because the Tongue River basin "is prone to spring rains," forecasting runoff in the basin has proven difficult in the past. 6 Tr. 1210:3-12 (testimony of Kevin Smith). If Montana makes a call early in the water year that in hindsight turns out to be unnecessary, post-1950 appropriators in Wyoming might go without water that they otherwise could have diverted or stored during the period of the call. Wyoming therefore seeks to preclude Montana from making a call unless there is significant evidence that a call is needed. However, if Montana fails to make a call because water looks plentiful early in the year, but runoff later turns out to be less than expected, Montana might not be able to fill its Reservoir. Montana therefore seeks the right to store water in its Reservoir whenever it can, even if

early hydrologic forecasts suggest that the Reservoir will easily fill before the end of the spring runoff.

The actual risk of loss may be less than either side fears. As hydrologic studies improve, the ability to predict the need for calls should similarly improve—although hydrologic forecasts never will be perfect and thus inevitably will leave a residual risk. If Montana makes an early call that proves unnecessary, moreover, Wyoming might not ultimately lose much water. As I noted in my Second Interim Report, if Montana stores more water early in a season, it presumably will need less water for storage later in the season. "In short, the total amount of water to which Montana is entitled would not change, although the timing of storage and calls might differ." Second Interim Report, *supra*, at 79 n.20. Finally, because Montana's Reservoir right includes water for carryover into future years, Montana might be able to meet the needs of its Reservoir users in a drought year from the carryover, even if it is not able to fill the Reservoir in that year.[33] None of these points eliminates the risk that the States fear, but the points suggest that the risk to either State might not be as significant as a first glance would suggest.

Wyoming notes that I previously addressed this issue in a footnote in my Second Interim Report. Montana notified Wyoming in April 1981 that it needed more water for its Reservoir, yet Wyoming did not regulate its post-1950 water use. Because the Reservoir ultimately filled, however, Montana suf-

[33] Montana's inability to fill the Reservoir, however, might reduce the cushion available for the following year, increasing the risk of a future shortage, particularly when the Tongue River is faced with a multi-year drought.

fered no injury. *See* Second Interim Report, *supra*, at 78. In a footnote, I observed that Montana's 1981 call "shows one of the challenges that storage can pose under the prior appropriation system"—predictions of future water conditions can be very uncertain. *Id.* at 78 n.20.[34] I went on to observe that "Montana should be entitled to call post-1950 uses and storage in Wyoming when it wishes to fill the Tongue River Reservoir *and there is significant evidence showing that, without more water, the Reservoir might not fill*." *Id.* at 78-79 n.20 (emphasis added).

Montana did not file an exception to this footnote. However, Montana's failure should not preclude the State from disagreeing with the principle now, nor should the Court be bound by the principle. The "law of the case" rule is "only a *discretionary* rule of practice," designed to avoid the relitigation of issues once considered and decided. *United States v. Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) (emphasis added); *see also Southern Railway Co. v. Clift*, 260 U.S. 316, 319 (1922). The statement on which Wyoming relies constituted one sentence in a footnote, the parties did not present any arguments on the issue during the liability phase, and the statement was unnecessary to my conclusions and recommendations to the Court.

Considering the issue anew, however, I still conclude that Montana should be entitled to call the River only if it reasonably believes, based on substantial

---

[34] While flows were abnormally low in April 1981 when Montana notified Wyoming that it needed more water, flows in May and June were above average. Ex. M-5, p. 26 tbl. 1 (expert report of Dale Book).

evidence, that the Reservoir might not fill.[35] The issue is what the Compact requires, and the relevant provision is again Article V(A), which protects pre-1950 appropriative rights, including that of the Tongue River Reservoir, "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Neither State cites any legal opinions or statutes providing guidance on what the prior appropriation doctrine would require in this setting.[36] As with many of the questions presented by

---

[35] While I used the term "significant evidence" in the Second Interim Report, the term "substantial evidence" would seem more appropriate for the Court's decree. As explained in the text, the purpose of requiring "significant" or "substantial" evidence is simply to emphasize that Montana must have sufficient evidence on which to base a reasonable belief that the Reservoir might not fill. Because "substantial" evidence is the more common legal term and Supreme Court opinions have elaborated on its meaning, I recommend that the Court use the term "substantial" evidence in its decree.

[36] In its comments on my Discussion Draft of Judgment and Decree, Montana included Affidavits from three reservoir experts who testified for Montana at trial. All of the experts state that (1) they have never seen a "call for the benefit of a reservoir that was subjected to the requirement that the reservoir water right owner must reasonably believe, based on significant evidence, that the reservoir might not fill to the capacity allowed by its water right before the end of the water year or calendar year," and (2) "the operations of reservoirs under the prior appropriation doctrine in Montana, including the Tongue River Reservoir," as well as in Wyoming and five other states, are not subject to any such requirement. *See* Affidavit of Kevin B. Smith, May 22, 2017, attached to Montana's Comments on the Draft Decree, Dkt. 513; Affidavit of Gordon Aycock, May 22, 2017, attached to *id.*; Affidavit of Dale E. Book, May 22, 2017, attached to *id.* None of the experts state how Montana or other states would handle calls by reservoirs in a river basin similar to the Tongue River basin. As discussed in the text, moreover, the Compact presents a unique situation unlike those confronted in a typical state call.

this case, specific judicial opinions and statutes would appear to be sparse, if not non-existent. Instead, calls by reservoirs would appear to be governed more by general principles of prior appropriation and shaped by the discretion of state and local water administrators.

Where an appropriator is diverting water for direct use, the appropriator generally can call the river whenever he or she is not receiving sufficient water to satisfy his or her right. Observance of priority is central to the prior appropriation doctrine, and "to deprive a person of his priority is to deprive him of a most valuable property right." *Strickler v. City of Colorado Springs*, 26 P. 313, 316 (Colo. 1891). Where a reservoir holds a senior right to divert a specific flow over a particular period of time for storage, the reservoir presumably can insist on its prior right to divert that specified flow during its fill season. The right of the Tongue River Reservoir, however, is quite different. The Reservoir holds a right, not to a particular flow, but to fill the Reservoir over the course of an entire water year. The Reservoir can and does vary its storage over the course of the water year.

The concept of need is also central to the prior appropriation doctrine. A senior water right holder cannot assert his or her priority if the senior does not need water. "If an appropriator does not need the water, priority is temporarily suspended and the right goes to the next right in order of priority until the senior again makes the call." A. Dan Tarlock, Law of Water Rights and Resources § 5:32, at 5-60 (1988), *citing Cook v. Hudson*, 103 P.2d 137, 146 (Mont. 1937),

---

For these reasons, I do not find the views of Montana's experts ultimately helpful in determining what the Compact requires.

overruled on other grounds, *Grimseley v. Estate of Spencer*, 670 P.2d 85 (Mont. 1983). The prior appropriation doctrine abhors waste, and allowing a senior to call the river when it does not need water would be inherently wasteful. *Cf.* Mont. Code § 85-2-406(3) (permitting district courts to alter a water right established by final decree based upon waste). A direct user of water cannot shut off a junior appropriator if the senior has no need for the water at the time of the call. The principle is equally applicable to the Tongue River Reservoir, even though the determination of the Reservoir's need for water at any point in time may be less certain. If Montana believes, based on the available evidence, that the Reservoir will fill, calling the River would be wasteful. Montana therefore has a right to call the River only where it reasonably believes, based on substantial evidence, that the Reservoir might not fill.

It is particularly important under the Compact that Montana reasonably believe that the Reservoir might not fill because there is no watermaster or state administrator to evaluate and implement calls. In almost all states today, watermasters or other administrators receive calls on a river, evaluate whether the call is appropriate, and if it is, enforce the call. The watermaster or administrator, moreover, generally has the discretion to avoid waste in the enforcement of a call. *See* Tarlock, *supra*, § 5:32, p. 5-60 (noting that, although the duties of administrators "have been described as ministerial because they are limited to the enforcement of prior rights, . . . in fact they have great discretion to allocate water"); N.M. Stat. § 72-3-3 (authorizing water masters to "appropriate, regulate and control the waters of the district as will prevent waste"). Given the structure of the Compact, there is no entity that can currently play this admin-

istrative role.[37] It therefore is incumbent on parties to the Compact to assume the responsibility of ensuring that they call for water only when they need the water and there is thus no waste.

As discussed in the Second Interim Report, Wyoming gives its water commissioners the authority to control when a reservoir fills in order to avoid interference with direct-flow appropriators and "thereby prevent a waste of water." *See* Wyo. Stat. § 41-3-603; Wyoming State Board of Control Regulations, ch. I, § 7(b); Second Interim Report, *supra*, at 115. Montana does not have a similar rule, and the Compact therefore does not require Montana to fill at any particular time of the year. *See* Second Interim Report, *supra*, at 147-149. Wyoming's rule, however, emphasizes the importance of not calling the River when there is no apparent need for additional water. The Compact itself emphasizes the need to avoid waste. As the preamble to the Compact notes, its purpose is not only to "provide for an equitable division and apportionment" of the waters of the Yellowstone River system, but also "to encourage the beneficial development and use thereof." Compact, Preamble.

Paragraph B(2) of the Proposed Judgment & Decree therefore provides that Montana has a right to call the Tongue River when it reasonably believes, based on substantial evidence, that the Reservoir

---

[37] The Yellowstone River Commission has the power "to perform any act which they may find necessary to carry out the provisions of [the] Compact." Compact, art. III(E). However, the Commission has not to date enacted any rules or regulations for the enforcement of Article V(A). 21 Trial Tr. 5068:5:5-7 (testimony of Sue Lowry). As explained earlier, moreover, the Commission is not structured to easily resolve disputes between Montana and Wyoming. *See* pp. 20-21 *supra*.

might not fill absent the call. P. A-3 *infra*. Several points regarding Paragraph B(2) deserve emphasis. First, the provision does not require Montana and Wyoming to agree on whether the Reservoir might not fill prior to Montana's call. The Proposed Judgment & Decree is designed to avoid the types of disagreements and delays that prevented Montana from promptly receiving water in response to its calls in 1981, 2004, and 2006. Montana must make a reasonable and good-faith determination based on the evidence. Once Montana calls the River, however, Wyoming has an obligation to respond and, if it ignores Montana's call, is liable for any resulting shortage in Reservoir storage.

Second, Montana must believe that the Reservoir *might not* fill absent a call. Montana need not conclude that the Reservoir *will not* fill. The *risk*, rather than the *certainty*, of shortage entitles Montana to call the River.

Finally, Montana must make a reasonable and good-faith determination based on substantial evidence. The provision's reference to "substantial evidence" merely emphasizes that Montana's determination must be fact-based and reasonable. Substantial evidence means "more than a mere scintilla"—that is "such relevant evidence as a *reasonable mind* might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). There is "substantial evidence," however, even if the evidence is susceptible to "drawing the inconsistent conclusion." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

The record suggests that Montana should have ready access to information from which it can make a reasoned determination, based on "substantial evi-

dence," whether the Reservoir might not fill absent a call. Montana typically starts to evaluate the likely prospects for filling the Reservoir in late December or the first of January, when it begins to monitor snowpack (based on SNOTEL information from the National Water and Climate Center) and look at "running averages." 6 Trial Tr. 1209:19-1210:2 (testimony of Kevin Smith). The Operating Plan for the Reservoir provides that the DNRC will "evaluate reservoir storage, snowpack, streamflow, streamflow forecast, soil moisture, and the extended weather forecast/ outlook" by March 1 of each water year. Operating Plan for the Tongue River Reservoir, p. A-5, ¶ 4 (attached to Ex. M-3 (expert report of Kevin Smith)). The DNRC then presents the results of its evaluation at the next meeting of the Reservoir Advisory Council in order to determine how to operate the Reservoir going forward. *Id*. In making operational decisions for the Reservoir, DNRC and TRWUA "rely on runoff projections from the National Weather Service, the Natural Resources and Conservation Service, and past operational experience." Ex. M-3, p. 13 (Smith expert report). *See also* Tongue River Dam: Manual for Operations and Maintenance, p. 30 (June 2004) (attached to *id.*) (noting access to "snow water equivalent and total precipitation . . . at seven SNOTEL sites located above the reservoir," as well as "information about historical snowpack, precipitation, maps and graphs").

In summary, the Proposed Judgment & Decree allows Montana to call the River if it needs water to fill the Reservoir. Montana, however, must reasonably believe the Reservoir otherwise might not fill, based on the type of evidence it already uses to manage the Reservoir. Montana cannot waste water by calling the River if it does not reasonably believe,

based on substantial evidence, that the Reservoir might not fill.

c) Form and lifting of calls (¶¶ B(4)-(6)).

Montana proposes that the Court's decree include specific, detailed provisions regarding the form that calls should take, how long they last, how quickly Wyoming should respond, and when Montana is obligated to lift a call. *See, e.g.,* Montana's March 2017 Proposed Decree, Dkt. 505, ¶ 8, at 6-7 (requiring that calls be from Montana's Yellowstone River Compact Commissioner to Wyoming's Commissioner and either in writing or documented within a week); *id*. ¶ 9 (requiring Wyoming to initiate action on the date of a call and confirm its actions within two business days); *id.* ¶ 11, at 7 (requiring Montana to lift calls within two business days after its water rights have sufficient water). Such provisions would have the benefit of reducing uncertainty and therefore disagreement regarding the validity of calls, how long they may last, and how rapidly Wyoming must respond. Wyoming, however, objects to such provisions, noting that they are not set out in any prior opinion or report in this case. Wyoming's Proposed Decree & Brief in Support, Dkt. 501, at 6-7.

As noted in my Second Interim Report, "nothing in the Compact or the general law of prior appropriation mandates that [a call] take any particular form." Second Interim Report, *supra*, at 59. Different states employ different forms of calls, "and nothing in the Compact favors one form of call over another." *Id*. For this reason, I recommend that the call provisions in the Court's Decree focus on general principles and not specify particular procedures. Paragraph B(4) of the Proposed Judgment & Decree provides that calls need

not take any particular form, use any specific language, or be sent by or to any particular official, so long as the calls are "sufficient to place Wyoming on clear notice." P. A-3 *infra*. While communications between Compact Commissioners would clearly meet this requirement, and written documentation would provide clear evidence of a call, the proposed decree does not require these specific procedures. Paragraphs B(5) and B(6) also provide that calls continue in effect until lifted, and that Montana should "promptly" lift a call when the conditions for a call cease to exist. P. A-4 *infra*. Finally, Paragraph B(7) provides that, when Montana makes a call, Wyoming must "promptly" initiate action to avoid a violation of Article V(A), but does not specify a set period of time within which Wyoming must act, recognizing that how fast action can be taken often depends on the circumstances. *Id.*

d) Information requirements (¶ G)

Montana and Wyoming strongly disagree on whether the Compact requires the provision or exchange of any particular information. Montana argues that the Court's Decree should require both States to provide information regarding their water rights and that Wyoming should provide Montana with information regarding its actions in response to a call. Montana, in particular, suggests that the decree should include appendices listing Montana's pre-1950 water rights and Wyoming's post-1950 water rights in the Tongue River basin. Montana's March 2017 Proposed Decree, Dkt. 505, at 10. Montana also argues that Wyoming should have an obligation, within 10 days of a reasonable request from Montana, to furnish Montana with "documentation" showing that it has regulated its water users in response to a call (including "records of

reservoir operations, hydrographer reports and field notes, and other records of actions taken"). *Id.*, ¶ 10, at 7. Finally, Montana suggests including a provision that would require both states annually to share "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." *Id.*, ¶ 15, at 8. Wyoming objects to all of these suggestions as burdensome and unnecessary. Wyoming's Proposed Decree & Brief in Support, Dkt. 501, at 6-8. *See also* WY Comments on the Discussion Draft Decree, May 22, 2017, Dkt. 514, at 9 cmt. KJ21 (requirements regarding the listing and updating of water rights "would [be] graft[ed] onto the Compact" and are "onerous, duplicative of existing resources, and serve[] no useful purpose").

To effectively implement Article V(A) of the Compact, both Montana and Wyoming need significant information about water rights and actions in the other State. Both need to know what pre-1950 and post-1950 rights exist in the other State. When Montana places a call, it also needs information on what Wyoming has done in response. And Wyoming needs information by which it can determine that Montana is complying with its obligations, including that Montana is appropriately regulating post-1950 uses in Montana when necessary and is not releasing water from the Reservoir at a wasteful rate.

Compacts, like contracts, implicitly require that the parties to the Compact operate in good faith to promote the achievement of the Compact's goals. *See Nelson v. Abraham*, 177 P.2d 931, 934 (Cal. 1947) ("every contract calls for the highest degree of good faith and honest dealing between the parties");

23 Williston on Contracts ¶¶ 63:21-22 (4th ed. 2017) (discussing the implied covenant of good faith and fair dealing in contracts). For this reason, courts have long held that parties to a contract have an obligation to exchange information when necessary to the effective performance of the contract. *See Nelson,* 177 P. 2d at 934; *Elliott v. Murphy Timber Co.*, 244 P. 91, 92 (Ore. 1926) (holding that, for profit sharing contracts, "it is the duty of the one receiving such profits to account to the other, for otherwise, there would be no way by which [the other party] could determine whether there were any profits"). For the same reason, the Yellowstone River Compact implicitly requires both Montana and Wyoming to provide available information that is important to the full and effective implementation of Article V(A)'s protections. Not surprisingly, decrees in other interstate water disputes sometimes have contained provisions requiring the sharing—and even development—of information relevant to the decrees' implementation. *See, e.g., Nebraska v. Wyoming,* 534 U.S. 40, 52-53 (2001) (requiring the states to "prepare and maintain complete and accurate records," "available for inspection at all reasonable times," on irrigated acreage, storage and exportation of water, and consumption of irrigation water); *Oklahoma v. New Mexico*, 510 U.S. at 130 ¶ 9 (requiring sediment surveys of the Ute Reservoir at least every ten years).

Paragraph G therefore requires Montana and Wyoming to exchange information relevant to the implementation of Article V(A). This information includes (1) surface water rights in the Tongue River basin, and (2) available information regarding groundwater pumping in the basin. Proposed Judgment &

Decree, ¶ G(1)-(2), *infra* p. A-7.[38] The States also must "exchange information, as reasonable and appropriate," regarding their implementation of Article V(A). Id., ¶ G(3), *infra* pp. A-7 to A-8. Wyoming must notify Montana of the actions that it takes in response to calls and provide reasonable assurances or documentation when requested. *Id*. When making a call, Montana similarly must inform Wyoming whether it is regulating post-1950 Montana uses and provide reasonable assurances or documentation when requested. *Id.*

These requirements inevitably will require both States to engage in greater efforts than they would if they were not party to the Compact. However, the Proposed Judgment & Decree does not require either State to provide information that is not readily available (or, in some cases, information that should be readily available). *See, e.g.,* Proposed Judgment & Decree, ¶ G(2), *infra* p. A-7 (requiring the exchange of information regarding groundwater pumping only when "available in the ordinary course of water administration"). The burden on either State of complying with the information-exchange provisions of the decree therefore should be minor. Neither State

[38] Montana proposes that the lists of each State's current surface water rights in the Tongue River basin be included as appendices to the Decree. Montana's Proposed March 2017 Decree, Dkt. 505, at 3-4 ¶¶ A(4), A(6). There seems little reason, however, to incorporate the lists into the Court's Decree itself. After exchanging the lists, the States will be able to access and use them in their implementation of the Decree and in any future dispute over the Decree and each State's actions thereunder. In providing its list to the other State, each State will be certifying its current accuracy for purposes of any future litigation. Because surface water rights change over time, moreover, any appendix would soon be out of date.

has shown that it would be otherwise. To comply in good faith with the Compact and avoid future disputes, moreover, both States must be willing to engage in the type of useful information exchange required by the Proposed Judgment & Decree. Calling an interstate river, and responding to an interstate call, are not matters to be taken lightly and therefore require both states to exchange information more willingly and readily than they sometimes have in the past.

e) Rights of the Northern Cheyenne Tribe (¶ H).

The parties to this action, as well as amicus Northern Cheyenne Tribe, also disagree whether the Proposed Judgment & Decree should say anything regarding the impact of the judgment and decree on the rights of the Tribe and, if so, what it should say. As noted in my Second Interim Report, neither the Tribe nor the United States are parties to this case, so this is "neither an appropriate nor permissible vehicle for deciding the nature of the Tribe's water rights or the status of its rights under the Yellowstone River Compact." Second Interim Report, *supra*, at 159. Throughout the proceedings, I therefore have been careful to avoid making any recommendation that might affect the Tribe's water rights.

To reflect this, Montana suggests that the Court's decree explicitly state that nothing in the decree "shall affect the water rights or other rights of any Indian Tribe or any Indian reservation." Montana's March 2017 Proposed Decree, Dkt. 505, ¶ C. The Northern Cheyenne Tribe, as *amicus*, supports this proposal. Transcript of May 1, 2017 Hearing, Dkt. 511, at 132:4-133:16 (comments of counsel for the Northern Cheyenne Tribe). However, Wyoming, supported by North Dakota,

objects to Montana's proposed language, in part because it varies from the language that I used in my Second Interim Report. Wyoming's Proposed Decree & Brief in Support, Dkt. 501, at 11-12; Transcript of May 1, 2017 Hearing, Dkt. 511, at 130:8-16 (comments of counsel for North Dakota) (arguing against addressing the issue in the Court's decree).

I recommend that the Court's decree explicitly note that it does not affect the Tribe's rights but that the Court use the language of the Second Interim Report. Paragraph H therefore provides, "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." P. A-8 *infra*. *See* Second Interim Report, *supra*, at 159-160.

f) Retention of jurisdiction (¶ I).

Montana and Wyoming also disagree over the value of having the Court retain jurisdiction after entering its decree. Montana argues that the Court should retain jurisdiction, noting that the Court has retained jurisdiction in other recent cases. Montana's Response to Wyoming's Proposed Decree & Brief, Dkt. 504, at 21-22. Wyoming, by contrast, argues that retention of jurisdiction is unnecessary because "Montana's existing Bill of Complaint has been fully and finally addressed" and "there is no injunction or other prospective relief for the Court to enforce." Wyoming's Proposed Decree and Brief in Support, Dkt. 501, p. 12.[39]

Retention of jurisdiction is both appropriate and useful. As discussed earlier, one of Montana's major

[39] As discussed in the next section, I recommend that the Court deny injunctive relief. Pp. 114-121 *infra*.

purposes in bringing this action was to achieve *future* compliance with the Compact. Montana's Bill of Complaint therefore has not been fully addressed. *See* pp. 48-49 *supra*. Recent calls by Montana, moreover, demonstrate that disagreements between Montana and Wyoming still exist. *See* pp. 52-55 *infra*. Although I am hopeful that the Court's decree and the State's renewed commitment to cooperation will avoid future issues coming before the Court, Montana should have the right to return to this Court if needed to ensure that this decree is given "proper force and effect." As Montana notes, the Court has typically retained jurisdiction in other interstate water disputes, including cases that did not award injunctive relief. *See, e.g., Kansas v. Nebraska,* 135 S. Ct. at 1255 ¶ 9 (no injunction); *Kansas v. Colorado,* 556 U.S. at 107 ¶ C; *Nebraska v. Wyoming*, 534 U.S. at 55-56 ¶ XIII (2001); *Oklahoma v. New Mexico*, 510 U.S. at 131 ¶ 11 (1993) (no injunction); *Texas v. New Mexico*, 482 U.S. at 136 (1987). Retention of jurisdiction will be useful until the parties see whether the guidance that the Court provides in this action is sufficient to ensure effective implementation of Article V(A).

4. Summary of recommendations.

For the reasons discussed above, I recommend that the Court award Montana particularized declaratory relief in the form of the provisions of the Proposed Judgment & Decree attached to this Report as Appendix A. I also recommend that the Court reach the question of whether Montana has a right to store more than 32,000 af of water per year in the Tongue River Reservoir and hold that Montana has the right to store in each water year up to, but not more than, 72,500 af of water in the Reservoir, less carry-over storage in excess of 6,571 af.

D. Injunctive Relief

As both Montana and Wyoming recognize, injunctive relief is appropriate in this action only if 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). Wyoming argues that there is no such danger because (1) Wyoming is "willing and obligated to comply" with the "rule of law established in these proceedings" (Wyoming's Exception Brief, Dkt. 471, at 15), (2) Wyoming's officials are "genuine in their willingness to abide" by that law (*id.*, *quoting* Second Interim Report, *supra*, at 229), and (3) Wyoming has a well-honed regulatory system for water and therefore has "the means" to comply (*id.* at 15). Wyoming also argues that injunctive relief is inappropriate unless Montana establishes by "clear and convincing evidence" that Wyoming's breach was of "serious magnitude." *Id*. at 14, *quoting Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931).

Montana makes a strong case that, despite Wyoming's arguments, injunctive relief would be valuable and appropriate in this case. If past predicts future, the likelihood of future disputes between Montana and Wyoming over Article V(A) deliveries is high. Montana has already called the Tongue River twice since the Second Interim Report. *See* Montana's Reply Brief Opposing the Exception of Wyoming, Dkt. 475, at App. 1 ("call" letter of April 10, 2015); Tyrrell Affidavit, Dkt. 492, ¶ 3 (discussing "call" of April 18, 2016). Furthermore, Wyoming's response to Montana's 2015 call raised various concerns, although Wyoming took appropriate steps to ensure that post-1950 diversions were not occurring in Wyoming and recorded elevation data levels for its post-1950 reservoirs. *See* pp. 52-54

supra. As Montana notes, one also would expect that all parties would be on their best behavior while this case is still active.

In Montana's view, injunctive relief is important to deter Wyoming from again violating the Compact. According to Montana, "an injunction will remind Wyoming 'of its legal obligations, deter[] future violations, and promote[] the Compact's successful administration.'" Montana Opposition, Dkt. 493, at 33, *quoting Kansas v. Nebraska,* 135 S. Ct. at 1057. While Wyoming officials have testified that they will comply with the rulings of the Court, Montana quotes the Court for the proposition that one should "beware of efforts to defeat injunctive relief by protestations of repentance and reform." *United States v. Oregon State Med. Society*, 343 U.S. 326, 333 (1952). Montana argues that the Court instead should recognize the "natural propensity of these two States to disagree." *Texas v. New Mexico,* 482 U.S. at 134. While declaratory relief will establish the parties' rights and obligations under the Compact, it "does not compel an immediate, specific obligation to do something." James M. Fischer, *supra*, § 2.6, at 6. Montana, not surprisingly, wants some form of relief that will cause Wyoming to think twice before violating Montana's Compact rights in the future.

Special masters have recommended that the Court issue an injunction in similar cases involving the violation of an interstate water compact. In *Kansas v. Colorado*, for example, the special master concluded that, although Colorado officials attested in good faith that they would not engage in future violations, "both States would benefit from a clear injunction," which would help "assure[] continued and proper implementations" of the resolution of the case. Fifth and Final

Report of the Special Master, *Kansas v. Colorado*, No. 105 Orig., Feb. 4, 2008, Vol. I, Ex. 8, at App. 101, 104 (Order re Decree Issues – Injunction). In the view of the special master, "Judicial precedent more than amply support[ed his] determination." *Id.* The Court agreed with the special master and issued an injunction. *Kansas v. Colorado,* 556 U.S. at 103-106. As Montana notes, the Court has often issued injunctions in interstate water cases involving either a compact or equitable apportionment. *See, e.g., Nebraska v. Wyoming*, 534 U.S. 40 (2001) (equitable apportionment); *Texas v. New Mexico*, 482 U.S. 124, 133, 135 (1987) & 485 U.S. 388 (1988) (Pecos River Compact); *Arizona v. California,* 376 U.S. 340 (1964) (equitable apportionment); *Wyoming v. Colorado,* 298 U.S. 573, 586 (1936) (equitable apportionment).[40]

Despite the Court's frequent issuance of an injunction in the past, however, an injunction "is not a remedy which issues as of course." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982); *Harrisonville v. W.S. Dickey Clay Mfg. Co*., 289 U.S. 334, 337-338 (1933). The Supreme Court's recent decision in *Kansas v. Nebraska*, moreover, argues strongly against issuing an injunction in this case. Kansas sought an injunction ordering Nebraska to comply with both an interstate compact and the parties' previous settlement agreement. 135 S. Ct. at 1059. The special master concluded that Kansas had failed to prove the appropriateness of an injunction, even though Nebraska had knowingly violated the compact, and the Supreme Court agreed. *Id.* Accord-

[40] Although Montana suggests that the Court also issued an injunction in *Oklahoma v. New Mexico*, 510 U.S. 126 (1993), the decree is unclear as to whether it is injunctive or merely declaratory.

ing to the Supreme Court, Kansas had "failed to show, as it must to obtain an injunction, a 'cognizable danger of recurrent violation.'" *Id., quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).[41] Such a danger must be more than a "mere possibility" (*W.T. Grant Co.,* 345 U.S. at 633) or "speculation" (*City of Los Angeles v. Lyons,* 461 U.S. at 108). And the party seeking the injunction has the burden of proof in showing that there is a "cognizable danger." *Id.*

The facts of this case differ from *Kansas v. Nebraska* in some respects. During the proceedings in *Kansas v. Nebraska*, for example, Nebraska had adopted new compliance measures that, "so long as followed, [were] up to the task of keeping the State within its [water] allotment." 135 S. Ct. at 1059. The special master, moreover, had awarded disgorgement damages that provided a deterrent against future violations much as the fear of contempt sanctions might have provided if an injunction had issued. *Id.* As the special master noted in his report, "recognition of the Court's broad equitable discretion in fashioning a remedy reduces the need for a proscriptive injunction." Report of the Special Master, *Kansas v. Nebraska,* at 183.

Yet a comparison of *Kansas v. Nebraska* and this case shows that the two cases are also similar in many important respects. In both cases, the defendant expressed its intent to comply with the Compact in the future. While Kansas was skeptical of Nebraska's

---

[41] In civil disputes outside its original jurisdiction, the Supreme Court has expressed the required showing for injunctive relief in even stronger terms. According to *O'Shea v. Littleton,* 414 U.S. 488, 502 (1974), injunctions require a "likelihood of substantial and immediate irreparable injury." *Accord City of Los Angeles v. Lyons,* 461 U.S. at 103.

actual willingness to comply and the special master did not entirely "discount[] that skepticism" (a skepticism, which he observed, was "born of experience"), the special master "nevertheless found Nebraska's officials who testified at the hearing credible and earnest in their expression of commitment to complying with the Compact." Report of the Special Master, *Kansas v. Nebraska,* at 183. As I noted in the Second Interim Report*,* Wyoming water officials similarly "testified at trial that they are now ready and willing to regulate post-1950 uses whenever Montana issues an appropriate call for more water under Article V(A)." Second Interim Report, *supra*, at 229. Like the special master in *Kansas v. Nebraska,* moreover, I found the Wyoming officials to be "genuine in their willingness to abide by the decisions of this Court." *Id*.

In *Kansas v. Nebraska,* Nebraska's recent compliance with the Compact and its development of new Integrated Development Plans supported the assurances of the State's officials. *See* Report of the Special Master, *Kansas v. Nebraska,* at 183 (noting Nebraska's "recent record of strong compliance"). Similarly, Wyoming has been responsive to Montana's two most recent calls, promptly checking in both instances to ensure that there were no direct post-1950 diversions of water occurring in Wyoming and recording the water levels in post-1950 storage facilities. Wyoming, moreover, has the administrative apparatus needed to respond effectively to a call. *See* Second Interim Report, *supra*, at 20 (describing Wyoming's administrative water system). Montana is correct that Wyoming's actions are short of the type of procedural changes undertaken by Nebraska on the Republican River and that Wyoming might not be as responsive once the Supreme Court issues its final

judgment and decree in this case. But this risk is not significant enough to justify the issuance of an injunction.

Finally, the Supreme Court's recognition of disgorgement damages in *Kansas v. Nebraska* reduces the need for an injunction in this case. While I recommend that the Supreme Court not award disgorgement damages for Wyoming's 2004 and 2006 violations (*see* pp. 45-48 *supra*), disgorgement damages are still an option in the future and thus an active deterrent, particularly when paired with a clear and detailed declaratory decree. It is the threat that Wyoming could face disgorgement damages for future violations, rather than an award of disgorgement damages for past violations, that reduces the need for an injunction. Wyoming's "incentive to extend its recent record of strong compliance should be increased by its knowledge that, in the event of a relapse after this date, [Wyoming] will have a difficult time parrying a request for disgorgement even in the absence of a deliberate breach." *Id.*[42]

Most of the cases in which the Supreme Court has issued an injunction, by contrast, are distinguishable. In many of the cases, for example, the defendant was continuing to divert water in violation of the rights of the downstream state while the case was pending. *See, e.g., Texas v. New Mexico*, 482 U.S. at 133; *Wyoming v. Colorado*, 309 U.S. 572, 578 (1940). An

---

[42] The award of disgorgement damages, moreover, was not critical to the Supreme Court's decision to reject injunctive relief in *Kansas v. Nebraska*. The three justices who dissented from the award of disgorgement damages still agreed with the majority that there was "no need to enter an injunction ordering Nebraska to comply with the Compact." 135 S. Ct. at 1065 (Thomas, J., dissenting).

injunction makes sense in such cases because injury to the plaintiff is immediate and certain. By contrast, here, as in *Kansas v. Nebraska*, the compact violation is in the past, so the question becomes whether there is a cognizable danger that the upstream state will again take more water than it is entitled to withdraw under the compact despite clear declaratory guidance. In yet other cases involving an injunction, the defendant had diverted water contrary to prior decrees, raising a true specter of continued repeat violations. *See, e.g., Wyoming v. Colorado*, 298 U.S. 573, 582-583 (1936).

The Supreme Court also has suggested that it will not issue an injunction in an interstate dispute unless, as Wyoming emphasizes, the threatened invasion of a state's rights "is of serious magnitude and established by *clear and convincing* evidence." *Connecticut v. Massachusetts*, 292 U.S. 660, 669 (1931) (emphasis added), *citing New York v. New Jersey*, 256 U.S. 296, 309 (1921) & *Missouri v. Illinois*, 200 U.S. 496, 521 (1906). As the Court noted in *Connecticut*, the "power to control the conduct of one State at the suit of another" is "extraordinary." *Id*. The burden of proof when seeking an injunction against another state "is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties." *Id., citing North Dakota v. Minnesota*, 263 U.S. 365, 374 (1924).

Montana argues that the Court has never required a higher burden of proof in issuing an injunction where a state has established a compact violation. Because I conclude that Montana has not shown a "cognizable danger of recurrent violation" even utilizing a standard preponderance-of-the-evidence standard, the Court need not resolve the applicability of

Connecticut v. Massachusetts to the instant case. *Connecticut v. Massachusetts*, however, properly warns of the serious character of injunctive relief, particularly when directed against a sovereign state.

For the reasons discussed above, I recommend that the Court reject injunctive relief and grant summary judgment to Wyoming on this issue.

E. Costs

Wyoming also argues in its motion for summary judgment that the Court "should exercise its discretion to decline an award of costs to either state, because both states prevailed, albeit to substantially different degrees." Wyoming's Exception Brief, Dkt. 471, at 17. Wyoming acknowledges that the Court has discretion to award costs in an interstate dispute. *Id*. Wyoming, however, notes that lower courts often decline to award costs to either party where both parties have prevailed. *Id.*, *citing* 10 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2668 (3d ed. 1998). Although Montana has established that Wyoming violated the Compact in 2004 and 2006, Wyoming claims that it prevailed "on nearly all of Montana's claims," including the right of water users in Wyoming to increase their irrigation efficiency, Montana's Powder River claims, Wyoming's liability on the Tongue River in years other than 2004 and 2006, and Wyoming's liability for groundwater withdrawals. Wyoming's Exception Brief, Dkt. 471, at 17-19.

The Supreme Court has long awarded costs where appropriate in interstate litigation before the Court. *See, e.g., Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70 (1927) (noting history of awarding costs in interstate cases before the Supreme Court); *North Dakota v. Minnesota* (appropriateness of cost awards

in cases that are litigious). However, in recent interstate disputes, including water disputes, the parties have more typically split costs, either by judicial order or stipulation. *See, e.g., New Jersey v. Delaware,* 552 U.S. at 624 (judicial order); *Virginia v. Maryland,* 540 U.S. at 80 (judicial order); *Oklahoma v. New Mexico,* 510 U.S. at 127 (stipulated judgment). The principal exception is *Kansas v. Colorado,* where the special master recommended that costs be awarded to Kansas as the "prevailing party." *See Kansas v. Colorado,* 556 U.S. at 100, 103 (awarding $1,109,946 in costs to Kansas as the prevailing party); Fifth and Final Report, *Kansas v. Colorado*, No. 105 Orig., Feb. 4, 2008, Vol. I, Ex. 6, at App. 86 (Order Regarding an Award of Costs).

All parties agree that the Supreme Court enjoys considerable discretion in deciding whether to award costs. In making its decision, the Court often looks to Federal Rule of Civil Procedure 54(d)(1), which provides that "costs–other than attorney's fees–should be allowed to the prevailing party." The Court has held that this language gives courts significant discretion in deciding whether to award costs to a prevailing party. As the Court noted in *Marx v. General Rev. Corp.*, 568 U.S. 371, 377 (2013), "the word 'should' makes clear that the decision whether to award costs ultimately lies within the sound discretion of the district court." *See also Crawford Fitting v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-442 (1987). Lower federal courts, nonetheless, employ a "venerable presumption" that a prevailing party is entitled to costs. *Marx,* 568 U.S. at 377. As a result, the losing party bears the burden of justifying a denial of costs. *See Holton v. City of Thomasville School Dist.,* 425 F.3d 1325, 1355 (11th Cir. 2005).

The first question is whether Montana is a prevailing party for purposes of Rule 54(d)(1). Although Montana has not won all of its claims and contentions, the Supreme Court has held that a party who receives substantial relief can still be considered a prevailing party. *See Buckhannon Home v. West Va. Dept.,* 532 U.S. 598, 603 (2001). As the Court noted in *Buckhannon Home*, a "prevailing party" is a "party in whose favor a judgment is rendered, *regardless of the amount of damages awarded*." *Id.* at 603, *quoting* Black's Law Dictionary 1145 (7th ed. 1999) (emphasis added). Montana brought this action to protect its pre-1950 appropriators under Article V(A) of the Compact. While Montana's ultimate damages are small, it successfully established that Article V(A) protects Montana's pre-1950 appropriators against the exercise of post-1950 appropriative rights in Wyoming (which Wyoming had long denied) and obtained significant protection moving forward both for the Tongue River Reservoir and individual pre-1950 appropriators. I therefore conclude that Montana is a prevailing party for purposes of seeking an award of costs.

The second question is which, if any, costs Montana should receive as a prevailing party in this litigation. Montana, not surprisingly, argues that it should receive all of its costs; Wyoming, by contrast, argues that Montana still should not receive any costs. In determining which, if any, costs Montana should receive, I find it useful to divide costs into those incurred for two separate phases of this action: (1) the proceedings leading up to and including the filing of the First Interim Report (which dealt primarily with Wyoming's motion to dismiss), and (2) all subsequent proceedings, including the trial in the liability phase of the case.

Through its opposition to Wyoming's motion to dismiss, Montana helped to clarify the meaning of the Compact and the Compact's protections of its appropriators. Prior to this action, Wyoming argued that the Compact did not require Wyoming to provide sufficient water at the statelines of Yellowstone River tributaries to satisfy Montana's pre-1950 water uses—even when the water was not needed to satisfy Wyoming's pre-1950 water uses. Montana brought its action in large part to establish that Article V of the Compact protects pre-1950 appropriative rights. As a result of its efforts in the initial phase of the case, Montana established that the Compact protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950 (including for storage purposes). First Interim Report, *supra*, at 89. Montana also established that Article V(A) applies to at least some forms of groundwater use in Wyoming. *Id.*, at 90. Although the Supreme Court concluded that the Compact does not protect Montana against increased irrigation efficiency by pre-1950 users in Wyoming (*Montana v. Wyoming,* 563 U.S. at 389), the overarching issue in the first phase of the case was whether Article V(A) protects pre-1950 Montana appropriations at all. As the prevailing party in the litigation, Montana therefore should recover the costs it incurred in this initial phase.

By contrast, Montana and Wyoming should each bear their own costs for both the liability and remedies phases of the case. Both sides prevailed on major issues during the liability phase. Montana proved liability against Wyoming for 2004 and 2006 (although the amount of liability was relatively small). Second Interim Report, *supra*, at 231. Montana also established that the Tongue River Reservoir is entitled to

store at least 32,000 af of water each year (*id.* at 161) and that post-1950 groundwater pumping in Wyoming cannot interfere with the continued enjoyment of pre-1950 surface rights in Montana (*id.* at 211). Wyoming, on the other hand, established that Montana must notify Wyoming when it needs water for pre-1950 appropriative rights under Article V(A). *Id*. at 49. Because Montana was unable to prove if and when it furnished such notice in many of the years at issue, Montana failed to establish liability for over a dozen of those years. *Id.* at 97-98. Montana also failed to prove liability for groundwater withdrawals. *Id.* at 218-219. Both Montana and Wyoming, in short, prevailed on important issues in the liability phase of the case, so it is appropriate that each State bear its own costs for the liability phase of the proceedings.

As discussed in this Report, I also conclude that each State should prevail on particular elements of Montana's claim for remedies. Montana has proven that it suffered minor damages, established that it is entitled to store up to the original capacity of the Tongue River Reservoir, and successfully shown the need for particularized declaratory relief. Wyoming, on the other hand, has avoided greater damages by showing Montana's failure to mitigate and has shown that Montana should not receive injunctive relief. If the Court agrees with me on these issues, it again is appropriate that each State bear its own costs for the remedies phase of the proceedings.

I therefore recommend that Montana receive costs for the first phase of the proceedings (up to the issuance of my First Interim Report), but that the parties each bear their own costs for the remainder of the proceedings. The parties have agreed that Montana's costs during the first phase totaled

$67,270.87. Montana's Amended Bill of Costs and Declaration, Dkt. 509, at 2; Wyoming Non-Opposition to Costs, Dkt. 510, at 2 (acknowledging that all requested costs were appropriate). Wyoming, moreover, has stated that it does not oppose the award of these costs (although it reserves the right to object to any other costs that Montana might request in an exception to this Report). Wyoming Non-Opposition to Costs, Dkt. 510, at 2.

VI. RECOMMENDATIONS

In summary, I recommend that the Court take the following actions:

1. Award monetary damages to Montana 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. The Court should deny Montana any disgorgement damages.

2. Grant Montana the particularized declaratory relief set out in Appendix A to this report. This declaratory relief provides, among other things, that Montana holds an appropriative right, protected by Article V(A) of the Compact, to store up to the original capacity of the Tongue River Reservoir each water year.

3. Deny Montana any injunctive relief.

4. Award Montana costs in the amount of $67,270.87. This amount constitutes Montana's costs through the filing of the First Interim Report. Montana and Wyoming should each bear their own costs for the remaining phases of this action.

Appendix A sets out a proposed Judgment & Decree incorporating these recommendations.

APPENDICES

APPENDICES

TABLE OF CONTENTS

	Page
Proposed Judgment and Decree	A-1
Yellowstone River Compact	B-1
Storage in the Tongue River Reservoir: 2000-2008	C-1
Storage in the Tongue River Reservoir: 1941-1950	D-1
Docket for the Remedies Phase	E-1

APPENDIX A

Proposed Judgment & Decree

No. 137 Original

STATE OF MONTANA

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

JUDGMENT

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

1. Article V(A) of the Yellowstone River Compact (the "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 of the Compact, including the protections of Article V(A), applies to 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 quantity or 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, the laws of Montana and Wyoming (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 or storage 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 substantial evidence, that the Tongue River Reservoir might not fill before the end of the water year.

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.

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 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 reasonably believes, based on substantial evidence, that the Tongue River Reservoir will fill before the end of the water year. Montana may place a new call at a later date 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 or storing surface water and only to the degree permitted by their appropriative rights and this Decree. Wyoming also shall promptly initiate any action needed to ensure, to the degree physically possible, that any groundwater withdrawals under post-January 1, 1950 appropriative rights are not interfering with the continued enjoyment of pre-1950 surface rights in Montana. Wyoming shall be liable for diversions, storage, or withdrawals in violation of Article V(A) of the Compact even if it was not physically possible for Wyoming to prevent the diversions, storage, or withdrawals during a call (including depletions caused by groundwater withdrawals occurring before the call). Where it is initially not physically possible to prevent the storage of water in violation of Article V(A), Wyoming shall deliver such water to Montana as soon as it is physically possible to do so after a request from Montana.

C. Pre-1950 Appropriative Rights

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 right 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 do not injure appropriators in the other States as evaluated at the time of the change.

D. Wyoming Storage Reservoirs

1. Post-January 1, 1950 appropriators in Wyoming may not store water when Montana has issued a call, except as provided in paragraph B(7) of this Decree. Post-January 1, 1950 appropriators in Wyoming may store water during periods when a call is not in effect.

2. Water stored under post-January 1, 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 each water year (October 1 to September 30) 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. 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 by an equal volume.

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, the needs of downstream appropriative 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 in a fashion that is generally consistent with the appropriation laws and rules that govern similar reservoirs elsewhere in each respective state.

G. Exchange of Information

1. Within 30 days of the entry of this Decree, Montana and Wyoming each shall provide the other State with a list of its current surface water rights in the Tongue River basin, including information on which rights are pre-1950 and which are post-January 1, 1950. Montana and Wyoming thereafter will annually inform the other State of any changes in these water rights, unless such information is publicly and readily available to the other State.

2. If requested, Montana and Wyoming also shall provide the other State annually with any data available in the ordinary course of water administration that shows the location and amount of groundwater pumping in the Tongue River and Powder River basins, except where the groundwater is used exclusively for domestic or stock water uses as defined in Article II of the Compact.

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, Wyoming in response to a call shall notify Montana of the actions that it intends to take and has taken in response to the call, and when

requested, provide Montana with reasonable assurances and documentation of these actions. In making a call, Montana in turn will notify Wyoming of any intrastate actions it has taken to remedy shortages of pre-1950 appropriators, and when requested, provide Wyoming with reasonable assurances and documentation of these actions.

4. The Yellowstone River Compact Commission remains free to modify or supplement the terms of the provisions of paragraph G of this Decree 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.

APPENDIX B

Yellowstone River Compact

Pub. L. No. 82-231, 65 Stat. 663 (1951)

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck	P. F. Leonard
A. W. Bradshaw	Walter M. McLaughlin
H. W. Bunston	Dave M. Manning
John Herzog	Joseph Muggli
John M. Jarussi	Chester E. Onstad
Ashton Jones	Ed F. Parriott

Chris. Josephson	R. R. Renne
A. Wallace Kingsbury	Keith W. Trout

For the State of North Dakota:

I. A. Acker	Einar H. Dahl
J. J. Walsh	

For the State of Wyoming:

L. C. Bishop	N. V. Kurtz
Earl T. Rower	Harry L. Littlefield
J. Harold Cash	R. E. McNally
Ben F. Cochrane	Will G. Metz
Ernest J. Goppert	Mark N. Partridge
Richard L. Greene	Alonzo R. Shreve
E. C. Gwillim	Charles M. Smith
E. J. Johnson	Leonard F. Thornton
Lee E. Keith	M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

A. Where the name of a State is used in this Compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators and all others using, claiming, or in any manner asserting any right to the

use of the waters of the Yellowstone River System under the authority of said State.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory State, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, shall be subject to the terms of this Compact. Where the singular is used in this article, it shall be construed to include the plural.

ARTICLE II

A. The State of Montana, the State of North Dakota, and the State of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "Commission" and "Yellowstone River Compact Commission" mean the agency created as provided herein for the administration of this Compact.

C. The term "Yellowstone River Basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.

D. The term "Yellowstone River System" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

E. The term "Tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except the Little Bighorn River); the Tongue River; and the Powder River, whose confluences with the Yellowstone River are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the State of Montana.

G. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

H. The term "Beneficial Use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "Domestic Use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "Stock Water Use" shall mean the use of water for livestock and poultry.

ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

B. The salaries and necessary expenses of each State representative shall be paid by the respective State; all other expenses incident to the administration of this Compact not borne by the United States shall be allocated to and borne one-half by the State of Wyoming and one-half by the State of Montana.

C. In addition to other powers and duties herein conferred-upon the Commission and the members thereof, the jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to such States upon matters connected with the administration of this Compact, and the Commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by

the respective States, and shall compile a report for each year ending September 30 and transmit it to the Governors of the signatory States on or before December 31 of each year.

D. The Secretary of the Army; the Secretary of the Interior; the Secretary of Agriculture; the Chairman, Federal Power Commission; the Secretary of Commerce, or comparable officers of whatever Federal agencies may succeed to the functions and duties of these agencies, and such other Federal officers and officers of appropriate agencies, of the signatory States having services or data useful or necessary to the Compact Commission, shall cooperate, ex-officio, with the Commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the Compact; and these officers may perform such other services related to the Compact as may be mutually agreed upon with the Commission.

E. The Commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this Compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the State Engineer of each of the signatory States for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this Compact, then the member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the States of Wyoming and Montana and said member selected by

the Director of the United States Geological Survey, each being entitled to one vote.

G. The Commission herein authorized shall have power to sue and be sued in its official capacity in any Federal Court of the signatory States, and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The Commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River

   a. To Wyoming.....60%

      To Montana 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

2. Bighorn River (Exclusive of Little Bighorn River)

   a. To Wyoming.....80%

      To Montana 20%

   b. The point of measurement shall be below the last diversion from the Bighorn River above its junction with the Yellowstone River, and the inflow of the Little Bighorn River shall be excluded from the quantity of water subject to allocation.

3. Tongue River

   a. To Wyoming.....40%

      To Montana 60%

   b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder River (Including the Little Powder River)

   a. To Wyoming.....42%

      To Montana 58%

   b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3, and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and

North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone River below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective States and flowing into the Yellowstone River below Intake, Montana, are allotted to the respective States in which situated.

E. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: Provided, That the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the Commission shall re-examine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;

Acreage irrigated;

Acreage irrigable under existing works; and

Potentially irrigable lands.

ARTICLE VI

Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative-consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: *Provided,* That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: *And, provided further*, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

B. Each claim hereafter initiated for an appropriation of water in one signatory State for use in another signatory State shall be filed in the Office of the State Engineer of the signatory State in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the State Engineer of the signatory State in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the State in which the water is diverted, and where a portion or all of the lands irrigated are in another

signatory State, such adjudications shall be confirmed in that State by the proper authority. Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used.

D. The use of water allocated under Article V of this Compact for projects constructed after the date of this Compact by the United States of America or any of its agencies or instrumentalities, shall be charged as a use by the State in which the use is made: *Provided*, That such use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.

ARTICLE VIII

A lower signatory State shall have the right to acquire in an upper State by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights-of-way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE IX

Should any facilities be constructed by a lower signatory State in an upper signatory State under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the

acquisition of rights by an upper State in a lower State.

ARTICLE X

No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. In the event water from another river basin shall be imported into the Yellowstone River Basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefore in determining its share of the water apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this Compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

ARTICLE XII

This Compact may be terminated at any time by unanimous consent of the signatory States, and upon such termination all rights then established hereunder shall continue unimpaired.

ARTICLE XIII

Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions.

ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory States in the consummation of this Compact, and none of them, nor the United States of America by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

ARTICLE XV

This Compact shall become operative when approved by the Legislature of each of the signatory States and consented to and approved by the Congress of the United States.

ARTICLE XVI

Nothing in this Compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any State or subdivision thereof, nor to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, State

agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the Compact.

ARTICLE XVII

Should a Court of competent jurisdiction hold any part of this Compact to be contrary to the constitution of any signatory State or of the United States of America, all other severable provisions of this Compact shall continue in full force and effect.

ARTICLE XVIII

No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be filed in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each signatory State.

Done at the City of Billings in the State of Montana, this 8th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifty.

Commissioners for the State of Montana:

FRED E. BUCK	P. F. LEONARD
A. W. BRADSHAW	WALTER M. McLAUGHLIN
H. W. BUNSTON	DAVE M. MANNING
JOHN HERZOG	JOSEPH MUGGLI
JOHN M. JARUSSI	CHESTER E. ONSTAD
ASHTON JONES	ED F. PARRIOTT
CHRIS JOSEPHSON	R. R. RENNE
KEITH W. TROUT	A. WALLACE KINGSBURY

Commissioners for the State of North Dakota:

I. A. ACKER	J. J. WALSH
EINAR H. DAHL	

Commissioners for the State of Wyoming:

L. C. BISHOP	N. V. KURTZ
EARL T. BOWER	HARRY L. LITTLEFIELD
J. HAROLD CASH	R. E. McNALLY
BEN F. COCHRANE	WILL G. METZ
ERNEST J. GOPPERT	MARK N. PARTRIDGE
RICHARD L. GREENE	ALONZO R. SHREVE
E. C. GWILLIM	CHARLES M. SMITH
E. J. JOHNSON	LEONARD F. THORNTON
LEE E. KEITH	M.B. WALKER

I have participated in the negotiation of this Compact and intend to report favorably thereon to the Congress of the United States.

R. J. NEWELL

Representative of the United States of America

APPENDIX C

STORAGE IN THE TONGUE RIVER RESERVOIR: 2000-2008

Year	Storage on Sept. 30 (af)	Maximum Storage during Water Year (af)	Increase in Storage (af)
2000	38,160	79,071 (max capacity)	**40,911**
2001	40,420	45,250 (May)	4,830
2002	17,210	43,430 (June)	26,220
2003	26,790	79,071 (max capacity)	**52,281**
2004 (call year)	39,760	49,680 (April)	9,920
2005	27,330	79,071 (max capacity)	**51,741**
2006 (call year)	44,470	73,400 (June)	28,930
2007	43,432	79,071 (max capacity)	**35,639**
2008	47,598	79,071 (max capacity)	31,473

Notes:

(1) All data is from Ex. M-5, tbl. 4-A (expert report of Dale Book), except for the maximum storage in 2006. The maximum storage of the reservoir in 2006 is from the testimony of Kevin Smith. *See* 6 Trial Tr. 1310:9-24.

(2) For all years except 2006, the maximum storage is assumed to be the same as the storage contents of the reservoir at the end of the month showing the greatest storage. This generally was the contents at the end of

May or June of the water year. Because the contents of the reservoir could have peaked between the month ends (e.g., on June 15), this assumption leads to an underestimate of the actual amount stored over the course of the water year.

(3) In five years (2000, 2003, 2005, 2007, and 2008), the maximum content of the Tongue River Reservoir as shown in Table 4-A of the Book report exceeded the capacity of the reservoir. For those years, I therefore used the new capacity of the Reservoir (79,071 af) as the maximum amount of water stored in the reservoir during the water year.

(4) The 1999 water year is not included because the reservoir was at an exceptionally low level going into the water year as a result of the reconstruction. As a result, the water year is not representative of typical storage operations on the Tongue River.

APPENDIX D

STORAGE IN THE TONGUE RIVER RESERVOIR: 1941-1950

Year	Storage at end of February (af)	Maximum Storage during Water Year (af)	Spring Storage (af)
1941	8,950	72,500 (max capacity)	63,550
1942	23,480	65,500	42,020
1943	1,310	40,450	39,140
1944	13,930	72,500 (max capacity)	58,570
1945	7,860	42,090	34,230
1946	13,920	41,730	27,810
1947	7,940	40,340	32,400
1948	9,720	46,490	36,770
1949	3,960	37,820	33,860
1950	5,780	36,390	30,610

Notes:

(1) All data is from Ex. M-5, tbl. 4-A (expert report of Dale Book), except as explained below.

(2) For all years, the maximum storage is assumed to be the same as the storage contents of the reservoir at the end of the month showing the greatest storage. Because the contents of the reservoir could have peaked between the month ends (e.g., on June 15), this assumption leads to an underestimate of the actual amount stored over the course of the water year.

(3) While the Book report indicates that the maximum storage at the end of any month in 1941 was 58,000 af,

a 1949 Bureau of Reclamation Report notes that the Reservoir filled and spilled that year for a short duration. Ex. M-557E, p. 2. The table therefore shows the Reservoir filling in that year to capacity.

(4) The Book report indicates that the Reservoir filled beyond capacity in 1944. For that year, I therefore have inserted the original capacity of the Reservoir (72,500 af).

APPENDIX E

DOCKET SHEET FOR THE REMEDIES PHASE

The official docket sheet for this case, as maintained by the Clerk of the Supreme Court of the United States, is available online. The official docket sheet does not contain entries for papers filed directly with the Special Master. The Special Master's separate docket sheet for the remedies phase of this case, which includes all filings made with or by the Special Master starting with the Second Interim Report, appears below. Appendix I to the Second Interim Report contains the Special Master's docket sheet for earlier proceedings in this case. The Special Master's entire docket sheet can be found online at https://web.stanford.edu/dept/law/mvn/.

Transcripts of hearings and status conferences are indicated by italics. Orders, memorandum opinions, or reports of the Special Master are indicated by bold.

DATE FILED	DKT. #	DESCRIPTION
12/29/14	**467**	**Second Interim Report of the Special Master**
3/6/15	468	Motion to Withdraw as Counsel
3/10/15	**469**	**Order Granting Motion to Withdraw as Counsel**
3/25/15	*470*	*Transcript of Status Conference Hearing*
4/9/15	471	WY's Exception to the Second Interim Report and Brief in Support

DATE FILED	DKT. #	DESCRIPTION
4/9/15	472	MT's Exception to the Second Interim Report and Brief in Support
4/21/15	*473*	*Transcript of Status Conference Hearing*
5/7/15	474	WY's Reply to Montana's Exception
5/11/15	475	MT's Reply Brief to Wyoming's Exception
5/12/15	*476*	*Transcript of Status Conference Hearing*
5/18/15	**477**	**Case Management Order No. 16**
6/3/15	478	WY's Sur-Reply Brief in Support of its Exception
6/10/15	479	MT's Sur-Reply Brief in Support of its Exception
6/26/15	*480*	*Transcript of Status Conference Hearing*
9/2/15	481	MT's Motion to Defer
9/14/15	482	WY's Response in Opposition to MT's Motion to Defer
9/16/15	483	MT's Reply to WY's Opposition to Montana's Motion to Defer
12/14/15	484	WY's Notice of Change of Address
12/23/15	485	Joint Status Report

DATE FILED	DKT. #	DESCRIPTION
3/28/16	*486*	*Transcript of Status Conference Hearing*
4/25/16	487	Joint Memorandum Regarding Issues, Procedure, and Proposed Schedule for Remedies
4/27/16	**488**	**Case Management Order No. 17**
4/27/16	489	WY's Motion for Summary Judgment
5/27/16	490	MT's Motion and Brief for Summary Judgment on Tongue River Reservoir
6/27/16	491	WY's Response to Montana's Motion for Summary Judgment
6/27/16	492	Affidavit of Patrick Tyrrell in Support of Wyoming's Response
6/27/16	493	MT's Response to Wyoming's Motion for Summary Judgment
7/11/16	494	WY's Reply In Support of Motion for Summary Judgment
7/11/16	495	MT's Reply In Support of Motion for Summary Judgment
7/27/16	*496*	*Transcript of Hearing*
8/11/16	497	MT's Notice of Settlement Offer
8/31/16	498	MT's Update On Its Settlement Offer to Wyoming
12/19/16	**499**	**Opinion of the Special Master on Remedies**

DATE FILED	DKT. #	DESCRIPTION
2/10/17	500	MT's Proposed Judgment and Decree and Brief in Support
2/27/17	501	WY's Proposed Decree and Brief in Support
3/2/17	502	MT's Motion For Leave to Respond to Wyoming Proposed Decree and Brief
3/6/17	**503**	**Case Management Order No. 18**
3/13/17	504	MT's Response to Wyoming's Proposed Decree and Brief
3/13/17	505-1	MT's Proposed Judgment and Decree
3/13/17	505-2	Appendices to MT's Proposed Judgment and Decree
3/17/17	**506**	**Case Management Order No. 19**
3/29/17	507	Notice of Substitution of Counsel
4/1/17	508	MT's Bill of Costs Declaration and Brief in Support
4/10/17	509	MT's Amended Bill of Costs and Declarations
4/11/17	510	WY Notice of Non-Opposition to MT's Amended Bill of Costs
5/1/17	*511*	*Transcript of Hearing*
5/15/17	**512**	**Discussion Draft of Judgment and Decree**

DATE FILED	DKT. #	DESCRIPTION
5/22/17	513	MT's Comments on the Discussion Draft
5/22/17	514	WY's Comments on the Discussion Draft
5/30/17	515	MT's Response to Wyoming's Comments
5/30/17	516	WY's Response to Montana's Comments
11/15/17	517	WY Comments on the (Draft) Final Report
11/15/17	518	MT's Response to the (Draft) Final Report
11/20/17	**519**	**Letter of the Special Master Requesting Additional Comments**
11/22/17	520	WY Response Letter
11/27/17	521	MT Response Letter