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

OFFICE OF THE SPECIAL MASTER

OPINION OF THE SPECIAL MASTER ON REMEDIES

December 19, 2016

OPINION OF THE SPECIAL MASTER ON REMEDIES

Montana brought this case in January 2007 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"). Montana and Wyoming had long disagreed as to the meaning of key provisions of the Compact. Second Interim Report of the Special Master (Liability Issues), Dec. 29, 2014, p. 2 ("Second Interim Report"). 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." Compact, pmbl. 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, Jan. 2007, ¶¶ A-D.

The Case Management Plan bifurcated proceedings into two phases, one dealing with liability and the other with remedies. Final Case Management Plan, Dec. 20, 2011, ¶ II. 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.

Following trial in the liability phase, I issued my *Second Interim Report* recommending that the Supreme Court find that Wyoming violated the Compact in 2004 and 2006. Second Interim Report, *supra*, p. 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 timely notice of the deficiency. *Id.*, pp. 66-87. Actual liability was relatively small: 1300 acre-feet in 2004, 56 acre-feet in 2006. *Id.*, p. 231. 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*., p. 230. Given the limited size of liability and the narrowed focus of the case, I assured the Court that "proceedings can and should be short." *Id.*

Both Montana and Wyoming filed exceptions to my *Second Interim Report.* Montana urged the Court to require me to resolve what pre-1950 storage rights, if any, Montana enjoys in the Tongue River Reservoir beyond 32,000 acre-feet per year. *See* Montana's Exception to the Second Interim Report of the Special Master (Liability Issues), April 9, 2015. Wyoming urged the Court, in light of my recommended findings on liability, to award limited damages based on trial testimony regarding the price of mitigation water allegedly available in 2004 and 2006 and to deny all other relief, rather than remanding the case to me for further proceedings. *See* Wyoming's Exception to the Second Interim Report of the Special Master (Liability Issues), April 9, 2015. The Supreme Court did not explicitly rule on these exceptions, but instead signed a slight variant of the order and judgment that I included with the *Second Interim Report* adopting my liability recommendations and remanding the case to me for "determination of damages and other appropriate relief." Order and Judgment of the United States Supreme Court, March 21, 2016.

By issuing this Order and Judgment, the Supreme Court implicitly rejected Wyoming's request that the Court resolve remedies without a remand to me. The Order and Judgment, however, does not address Montana's exception or the appropriateness of declaratory relief on Montana's storage rights. Nor does the Order and Judgment suggest that evidentiary hearings are necessary to determine damages or other relief. Indeed, the Court has made one point clear since my *Second Interim Report*: it would like this case resolved, if possible, without lengthy and costly new discovery and evidentiary

proceedings. Concerns regarding the costs in money and time to all parties of continued litigation clearly motivated the Court's unusual order in March 2015 encouraging the parties to settle this matter. *See* Order of the United States Supreme Court, February 23, 2015.

In an effort to expedite the determination of remedies, I invited the parties during a conference call on April 27, 2016 to file summary judgment motions concerning the appropriate remedies. Wyoming 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 denying 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, p. 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 acre-feet, less carryover storage, each year." Montana's Motion for Summary Judgment on Tongue River Reservoir, May 27, 2016, p. 1. In short, both parties seek the results that they did not get through their exceptions to the Supreme Court. I held a hearing on the two motions in Denver, Colorado, on July 27, 2016.

Rather than address the two motions separately, this Memorandum Opinion examines each of the separate forms of relief that Montana seeks in its Complaint, combining Montana's and Wyoming's separate motions for purposes of the opinion's discussion of declaratory relief. Part I begins with an overview of the Supreme Court's guidance on the appropriate remedies in an original jurisdiction case. Part II then turns to the question of damages. Part III examines appropriate declaratory relief, including the question of whether declaratory relief should address the Tongue River Reservoir issue raised by Montana and, if so, how. Part IV considers the appropriateness of injunctive relief. Finally, Part V discusses costs.

I. ORIGINAL JURISDICTION REMEDIES

Before turning to the specific issues presented by Montana's and Wyoming's motions, it is worth reviewing the general standards that the Supreme Court has used in determining 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 thus 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 enjoys 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).

There are limits, of course, to this equitable discretion. The Court, for example, will not use its equitable authority to modify the terms of an interstate compact or to add additional provisions. An interstate compact is a "legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, *supra*, 482 U.S. at 128. *See also Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (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 justices to dissent from the award of disgorgement damages in *Kansas v. Nebraska*, arguing that the Court should adhere strictly to clear principles of contract law and "*reject* loose equitable powers." 135 S. Ct. at 1065 (Thomas, J., dissenting) (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. Accordingly, the Court should "exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use." *Id.* at 1067, *quoting Jenkins, supra,* 515 U.S. at 131. The Court's equitable authority, in short, should carefully balance the desire to protect and compensate downstream states with 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, supra,* 135 S. Ct. at 1058, *quoting Texas v. New Mexico, supra,* 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., supra,* 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 of downstream states in enforcing its rights. *Kansas v. Nebraska, supra,* 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, supra,* 482 U.S. at 134. The Court's remedial authority, moreover, "gains still greater force" in 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 (emphasis added). And 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).

II. DAMAGES

Wyoming's argument for a summary award of damages without trial 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 phase of the case indicated that the Northern Cheyenne Tribe was charging somewhere between $7 and $15 an acre foot for its water during this general time period. *See* 8 Tr. 1666-1667 (testimony of Jason Whiteman) ($7-9/af); 16 Tr. 3663 (testimony of John Hamilton) ($12-15/af); 19 Tr. 4424 (testimony of Raymond Harwood) ($10/af); 19 Tr. 4500 (testimony of Maurice Felton) (same). According to Wyoming, Montana's damages therefore cannot exceed $15 per acre foot – or $20,340 in total. Wyoming is willing to pay this sum to Montana, along with prejudgment interest based on the "generous rate provided by Wyoming law."[1] Brief in Support of Wyoming's Exception to the Second Interim Report of the Special Master (Liability), April 9, 2015, pp. 12-13 ("Wyoming's Exception Brief"). Wyoming offers to pay Montana a total of $35,877.06 ($20,340 in damages plus $15,537.06 in prejudgment interest), rather than spending far more money in trial seeking to establish a lower award of damages, and seeks summary judgment that this sum is sufficient. *Id.*, p. 21.

A. Monetary Damages Versus Water

Wyoming's motion for summary determination of damages falters at the outset on its assumption that monetary damages are the appropriate relief in this case. As Montana

[1] 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). Wyoming is willing to pay prejudgment interest to Montana.

notes, it "has not yet decided which damages remedy it wishes to pursue, whether in the form of replacement water or in money damages." Montana's Response in Opposition to Wyoming's Motion for Summary Judgment as to Remedies, June 27, 2016, p. 16 ("Montana Opposition"). Before the Court addresses Wyoming's motion, Montana should have an opportunity to choose which relief it wishes to pursue and, if Montana seeks water relief, to show that water relief is feasible and appropriate.

A "suitable remedy may be in terms of money damages or in water." *Kansas v. Colorado*, Second Report of the Special Master, Sept. 1997, p. 72. Prior to 1987, delivery of water was always the remedy awarded by the Supreme Court for the violation of an interstate water compact. *Kansas v. Nebraska, supra*, 135 S. Ct. at 1070 (Thomas, J., dissenting). Before then, 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. 1, 23 (O'Connor, J., concurring in part and dissenting in part). Indeed, the special master in *Texas v. New Mexico, supra,* worried that the Court did not have authority to award monetary damages because monetary relief would be outside the terms of the compact involved in that case. 487 U.S. at 130. The Court, however, disagreed with the special master and held that the lack of a specific provision in a compact providing for monetary damages "does not, in our view, mandate repayment in water and preclude damages." *Id.*

Water relief can provide several advantages in interstate water disputes. 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. While I conclude below that monetary damages in this case can be measured by the cost it would have taken to mitigate Wyoming's breach, those damages will not seem adequate to many Montana water users. The determination of appropriate monetary damages, moreover, is almost inherently open to uncertainty.

Specific relief in the form of water, therefore, may often be preferable to an injured state 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, p. 128 (water award "might both disgorge the fruits of Nebraska's breach while simultaneously restoring to Kansas only the loss caused by that breach"). A water award is thus more equitable than monetary damages because they ensure that Wyoming does not benefit from its breach. A water award also helps ensure that an upstream state does not have an economic incentive to breach a compact where water is worth more economically to the upstream state than to the downstream state. Although disgorgement damages are not appropriate in this case for the reasons discussed below, the rationale for disgorgement damages supports a water remedy.

An award of water, of course, raises its own 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 accomplishing the delivery that would not simply generate another lawsuit in the Supreme Court. 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*, *supra*, 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, supra*, 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).

According to two of the current Supreme Court justices, the "usual" approach to remedying a violation of an interstate water compact remains an award of water. *Kansas*

v. Nebraska, supra, 135 S. Ct. at 1070 (Thomas, J., dissenting).[2] Since 1987, the Supreme Court has considered violations of interstate water compacts in four different cases, in addition to the instant dispute. 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, concerns about the practicality of a water remedy led to monetary damages either by order of the Court or stipulation of the parties. According to the Court or special master, a water award would not have significantly 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 plaintiff did not argue strongly for monetary relief. Third Report of the Special Master, *Kansas v. Colorado* (No. 105 Orig.), Aug. 31, 2000, pp. 109, 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, pp. 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. [3] 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.*

[2] Justices Alito and Scalia joined the relevant portion of Justice Thomas' opinion.

[3] 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, p. 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, he 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.*, pp. 129-130.

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, p. 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 would seem trickier in this case because the Compact does not require Wyoming to provide a set amount of water each year but instead to ensure that the needs of pre-1950 appropriations in Montana are met. Montana's need for additional water therefore might not arise for two years, 10 years, 20 years, or longer, preventing immediate completion of the remedy.

Montana should have the opportunity to decide whether it would prefer an award of water or monetary damages. Wyoming intimated in its exception to my *Second Interim Report* that Wyoming, not Montana, is allowed to elect which remedy to use in this case. *See* Wyoming's Exception Brief, *supra*, p. 7. Wyoming based this suggestion on the language in *Texas v. New Mexico*, *supra,* 482 U.S. at 132, in which the Supreme Court remanded the case to the special master "for his ensuing recommendation as to whether New Mexico [the defendant in the case] should be allowed to *elect* a monetary remedy" (emphasis added). As the special master in *Kansas v. Colorado* concluded, however, the Court in this passage presumably intended only to indicate that New Mexico would have an opportunity "to be heard on its choice, once an alternative became possible," not to dictate the choice. Second Report of the Special Master, *Kansas v. Colorado* (No. 105 Orig.), Sept. 1997, pp. 73-74. In a normal case, the plaintiff elects which remedy to pursue, and there is nothing in the Court's opinion in *Texas v. New Mexico* to suggest that the Court was suggesting a different rule in interstate water disputes.

Wyoming also argues that "[p]ayment in water is not an option for Montana in this case because it failed to mitigate its damages by covering the loss with substitute

water." Wyoming's Reply in Support of Motion for Summary Judgment as to Remedies, July 11, 2016, p. 7. Wyoming, however, cites no case for this proposition, and I have been unable to find one. If water users in Montana failed to mitigate their damages by buying water from the Northern Cheyenne Tribe, Montana cannot claim the damages that it would have avoided by doing so. But any failure to mitigate does not negate Wyoming's failure to supply water to Montana pursuant to the Compact. Montana still received less water, and Wyoming more.

Montana will have until Friday, February 10, to decide whether to pursue a water remedy or monetary damages. Assuming that Montana is interested in pursuing a water remedy, I would encourage Montana to approach Wyoming prior to February 10 to see if a mutually agreeable approach might be worked out for the provision of the compensatory water – or, short of that, narrow the issues at dispute in the provision of a water remedy. If Montana ultimately decides to pursue a water remedy, it shall on or before February 10 (1) submit to me a proposed process for the water remedy, (2) indicate if Wyoming agrees to the proposal, and (3) if Wyoming does not, submit a brief supporting the feasibility and equity of the proposed remedy. If Montana pursues a water remedy with which Wyoming disagrees, Wyoming will be entitled to file a brief explaining the grounds for its opposition to the remedy on or before March 3.

B. The Appropriate Amount of Monetary Damages

If Montana chooses to pursue monetary damages, I am convinced by Wyoming's motion that payment of $35,877.06 is adequate compensation and that no further discovery or evidentiary proceedings will be necessary. 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.

1. Montana's failure to reasonably mitigate.

The Supreme Court, to my knowledge, 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) ("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* also recognized the applicability of mitigation rules to monetary damages in an interstate compact case, although he ultimately concluded that Colorado failed to prove that Kansas had unreasonably failed to mitigate its damages. *See* Third Report of the Special Master, *Kansas v. Colorado, supra*, App. at 68 (Order Re Kansas' Objection to Evidence on Mitigation).[4]

In this case, Wyoming has carried its burden of showing that Montana failed to mitigate. As noted earlier, testimony during the liability trial revealed that the Northern Cheyenne Tribe was willing to sell water to Tongue River users in Montana during both 2004 and 2006. Testimony also established that the price of the water was no more than $15 per acre foot (and perhaps significantly less). Given the failure of local water users to purchase this water, Montana should not now be able to claim that its damages were more than $15 per acre foot.

[4] I also 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 mitigated by purchasing alternative water when the United States failed to supply water under its contract. 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.

Montana does not present any evidence in its papers showing that water was not available during 2004 and 2006, that the water would have cost more than $15 an acre foot, or that purchase of the water would have been infeasible or unreasonable. Instead, Montana primarily argues that it has not had an opportunity to conduct discovery into the damages issue, making it premature to rule on the issues raised by Wyoming's motion for summary judgment. Proceedings in this case were divided by my order into separate liability and remedies phases. The evidence on which Wyoming relies for summary judgment arose tangentially in testimony in the liability trial. Montana claims that it had no reason to cross-examine witnesses during the liability trial regarding potential mitigation options, and indeed may not have even held the right to do so. Montana Opposition, *supra*, p. 18. The only discovery permitted to date, moreover, has been 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, *supra*, ¶ VIII.A.

Montana cannot defeat Wyoming's summary judgment motion, however, simply by arguing that it has not had 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 $35,877.06. *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);[5] 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)

[5] *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 below.

allow time to obtain affidavits or declarations *or to take discovery*") (emphasis added).[6] 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 has filed *no* affidavit at all showing why it needs additional discovery to show a genuine issue of material fact and how additional discovery would provide the needed evidence.

Most of the evidence relevant to the appropriate amount of monetary damages, moreover, is in the hands of Montana or readily accessible to Montana without the need for further discovery. If replacement water was not available in 2004 or 2006 from the Northern Cheyenne Tribe, or if the water would have cost more than $15 per acre-foot, Montana has failed to show why it could not have submitted evidence or affidavits from its water users or the Northern Cheyenne Tribe to that effect in its opposition papers. *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.

As Montana has noted at frequent points throughout this case, 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). The Court therefore has often avoided summary resolutions of interstate disputes where more complete proceedings are justified. I similarly 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.

[6] 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).

Montana also argues that the testimony and evidence cited by Wyoming fails to show that mitigation water was available in 2004 and 2006. *See* Montana Opposition, *supra*, pp. 13, 17-19. The evidence is clear, however, that mitigation water was available from the Northern Cheyenne Tribe in 2004. At least six Tongue River water users purchased water in that year, totaling some 1,300 acre feet. *See* Ex. M-387 (record of water purchases). Mr. Hamilton explicitly testified that he leased water that year. 16 Tr, 3670 (testimony of John Hamilton). Although testimony was more general regarding the availability of water in 2006 (when Wyoming's total liability was 56 acre feet), the evidence as a whole is again more than sufficient to establish that mitigation water was available. *See, e.g.*, Ex. M-399, at pp. MT-015542, MT-015549 (showing purchases from Northern Cheyenne Tribe by at least two water users); 16 Tr. 3670 (testimony of John Hamilton) (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 also questions whether water was available "in sufficient quantity" from the Northern Cheyenne Tribe to provide mitigation. *See* Montana Opposition, *supra*, p. 13. However, the Tribe held storage rights to 20,000 acre feet, 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, 7 Tr. 1390 (testimony of Kevin Smith), 1502 (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, *supra*, 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 acre foot. *See* 8 Tr. 1666-1667 (testimony of Jason Whiteman) ($7-9/af); 16 Tr. 3663 (testimony of John Hamilton) ($12-15/af); 19 Tr. 4424 (testimony of Raymond Harwood) ($10/af); 19 Tr. 4500 (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 an acre foot, 16 Tr. 3662

(testimony of John Hamilton), providing rough confirmation of the range of prices that the Northern Cheyenne Tribe would have charged. Recognizing 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 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 Tr. 1499. 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 Tr. 2669. 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 ("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 crops justified paying $15 an acre foot for the Northern Cheyenne Tribe's water. Some Montana water users in the Tongue River valley did purchase water from the Tribe in 2004 and 2006 when they realized that they would be short of water. *See, e.g.,* 19 Tr. 4424 (testimony of Raymond Harwood). While Mr. Hamilton did not purchase water in 2006, he did in 2004. 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 wise. *See* 16 Tr. 3668 ("I just felt [the water] was too expensive for the kind of crops I had"), 3669 ("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.[7]

[7] Wyoming also argues that, even if Montana water users did not have the resources needed to mitigate, Montana had an obligation to and should have mitigated for its users by purchasing water itself from the

Finally, as I noted during oral argument, Wyoming's mitigation argument raises a curious line of cases that suggest that neither Montana nor its water users had 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. 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. 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*, *supra*, App. at 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 also presumably could have purchased water from the Northern Cheyenne

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Northern Cheyenne. Montana, not its water users, is the plaintiff in this action. Just as Montana has brought this suit on behalf of itself and its citizens, Wyoming argues, Montana had an obligation to mitigate injury to its citizens. Transcript of Proceedings, Hearing of July 27, 2016, pp. 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 times 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 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 caused by the illegal diversions of upstream states. 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 could be reasonably mitigated at all.

Tribe and made it available to pre-1950 users in Montana. *See, e.g.*, April 14, 2015 Letter of Patrick J. Tyrrell, Wyoming State Engineer, attached to Montana's Reply Brief Opposing the Exception of Wyoming, May 11, 2015, App. at 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 Proceedings, July 27, 2016 Hearing, pp. 26-28 (argument of James Kaste). *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 Fischer 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

unquestionable 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 federal 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., supra*, 576 F.2d at 430 (emphasis added). *See also* Russell 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").

Finally, Montana questions the "appropriate level of pre-judgment interest." Montana Opposition, supra, p. 13. Wyoming uses a seven percent per annum interest rate as determined by section 40-14-106(e) of the Wyoming Statutes. Wyoming's Exception Brief, *supra*, pp. 12-13. As Wyoming notes, this interest rate would appear to be generous. *Id*., p. 12. If Montana believes that a different interest rate is preferable, however, Montana is free to suggest an alternative, and I will then rule on whether Montana's alternative should be used in calculating Montana's ultimate damage award.

2. Montana is not entitled to disgorgement damages.

Montana also argues that it should have the right to pursue disgorgement damages, as the Supreme Court recently awarded in *Kansas v. Nebraska, supra*. *See* Montana Opposition, *supra*, p. 17. Here again, however, I conclude that Wyoming has adequately shown for purposes of summary judgment that the standard for disgorgement damages is not met 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, supra,* 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, supra,* p. 80 (disgorgement should not be awarded where there was no "willfulness" behind the compact violation).[8]

The motivations behind Wyoming's refusal to comply with its Compact obligations were probed extensively during the liability trial. The resulting evidence does not suggest that Wyoming "knowingly" violated the Compact (although Wyoming may have had little incentive to carefully consider Montana's interpretation of the Compact or voluntarily agree to furnish more water to pre-1950 appropriators in Montana). Nor does the evidence suggest that Wyoming "recklessly" disregarded Montana's rights under the Compact. Instead, the dispute between Montana and Wyoming over Compact terms resulted from good-faith differences in interpretation.

Although it is conceivable that undiscovered emails or memos in Wyoming's records indicate thoughtless discounting of Montana's legitimate concerns, the evidence

[8] 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, supra,* p. 80

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 cut its water use. But 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 very well 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 more closely resemble the violations at issue in *Kansas v. Nebraska*. In that situation, disgorgement damages 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 does not simply ignore its Compact violations in return for paying the purely compensatory damages of its actions). But 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 here.

C. The Shape of a Potential Water Remedy

Because Montana is free to propose a water remedy, it is worth briefly discussing the appropriate goals of any such remedy. A water remedy should ideally satisfy three criteria. First, the remedy must fully compensate Montana for Wyoming's breach of the Compact. The total amount of water provided by Wyoming should be 1356 acre feet – the quantity that Wyoming failed to deliver in violation of the Compact in 2004 and 2006

– and the water must be delivered at the stateline. Wyoming must provide the water at a time when Montana needs the water to satisfy its pre-1950 appropriative rights. Although Montana can store water in the Tongue River Reservoir, for example, limits on winter storage mean that any water provided at the end of a water year might not increase the amount of water available to Montana users in the growing season. Any water deliveries, moreover, must be *additional* to the obligations that Wyoming already has to deliver water under Article V(A) of the Compact.

Second, the purpose of the water delivery must be compensatory and not punitive or unrelated to the harm resulting from the breach. Montana, for example, must use the water to meet the needs of its pre-1950 appropriators, who were the water users damaged by Wyoming's breaches, not for other purposes such as instream flow. Montana's exercise of the remedy also must provide sufficient advance notice to Wyoming that Wyoming is able to furnish the water without unnecessary injury or cost.

Finally, the process for determining when and how the water is delivered must be as free as possible from the types of conflict that could lead to either delay in exercise or further litigation. Any remedy should be designed to remedy the dispute between Montana and Wyoming, not prolong it by triggering further disagreement.

Montana is free to shape an initial proposal if it decides to pursue a water remedy. To be approved and adopted by the Court, however, any proposal must meet the three criteria just outlined. To be adopted, a water remedy must attend to the "relative benefits and burdens that the parties may enjoy or suffer as compared with a legal remedy in damages" and should be equitable. *See* Texas v. New Mexico, *supra*, 482 U.S. at 131. For this reason, I again encourage the States to meet and confer in an effort to develop a mutually agreeable proposal.

The following is one possible process that might meet the three criteria. I offer it purely for guidance in thinking about a potential structure for a water remedy. Other structures might work more effectively under the facts of this case, or the process set out

below might not meet the three criteria when closer attention is paid to the details of this case.

- Montana would notify Wyoming when it wishes to call on the 1356 acre-feet of compensatory water that Wyoming owes Montana. There would be no time limitation on this call.
- Montana would accompany its notification with an affidavit from a state water official with jurisdiction over the Tongue River that the water is needed to meet the needs of pre-1950 appropriators on the Tongue River.
- Wyoming would deliver the water within a specified period of time (e.g., one or two weeks) that would allow Wyoming sufficient time to arrange for the water delivery while ensuring that Montana water users receive the water when it is still needed and useful.
- Wyoming would deliver the water at the stateline.
- Wyoming would be free to obtain the water from any source available to it under the Compact. The water, however, must be additional to the water that Wyoming must already deliver to Montana under the Compact. Because Montana is likely to ask for the water only at a time when it already has called the Tongue River, Wyoming cannot count water from post-1950 appropriators unless the post-1950 appropriators previously stored the water at a time when the river was not under call.
- When Wyoming provides the water to Montana, the Wyoming State Engineer would provide an affidavit to Montana certifying that Wyoming has supplied the water to Montana on a timely basis and that the water is additional to all water that Wyoming is otherwise required to deliver to Montana pursuant to the Compact.
- Montana shall use the compensation water to satisfy pre-1950 appropriative rights in Montana. At the end of the water year, a Montana official with responsibility for the Tongue River would provide an affidavit to Wyoming certifying that the water was used for this purpose and not for others.

- No challenge could be brought to Wyoming's or Montana's actions until the process is complete. Ideally, there would be a process for resolving complaints that are raised thereafter, short of returning to the Supreme Court.

D. Summary

For the reasons discussed above, I conclude that Wyoming's motion for summary judgment as to damages should be granted, but subject to Montana's right to pursue a water remedy instead of monetary damages and to Montana's right to propose an alternative method of calculating pre-judgment interest. If Montana wishes to examine the feasibility of a water remedy, I encourage it to meet and confer with Wyoming regarding the potential structure of such a remedy. I realize that Wyoming may prefer monetary damages in light of my ruling on its summary judgment motion. I nonetheless trust that Wyoming will approach any discussion with Montana in a good faith effort to determine whether there is a workable approach to a water remedy that is both feasible and equitable, and I am bolstered in this trust by the suggestion of the Wyoming State Engineer at the July 27 hearing that Wyoming could make a water payment work if that is the Court's preference. *See* Transcript of Proceedings, July 27, 2016, p. 126.

III. DECLARATORY RELIEF

A declaration of "the rights of the State of Montana in the waters of the Tongue … River[] pursuant to the Yellowstone River Compact" is at the very top of Montana's prayers for relief. *See* Bill of Complaint, *supra*, ¶ A. 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. According to Montana, future relief has always been its principal goal in this litigation. Transcript of July 27, 2016 Hearing, *supra*, p. 73 (argument of Attorney General Timothy Fox). Such relief, moreover, has been central to the Supreme Court's resolution of

interstate disputes. As the Court has noted, its role is to "declare rights under the Compact and enforce its terms." *Kansas v. Nebraska, supra*, 135 S. Ct. at 1052.

The Supreme 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, the cases in which the Court has granted declaratory relief outnumber the cases in which the Court has granted damages. In many interstate cases, such as those involving border disputes, future relief has been the only type of relief sought and granted.

In its exception to my *Second Interim Report*, Wyoming nonetheless argued that no "additional declaratory relief" is appropriate in this case. Wyoming's Sur-Reply in Support of Exception, June 3, 2015, p. 4.[9] Wyoming made two arguments in support of its exception. First, Wyoming suggested that declaratory relief is "extraordinary" and justified only where "actual damages will not suffice to deter future breaches." *Id.* Second, Wyoming argued that the Court is not free "to enter further declaratory relief in the absence of 'a case or actual controversy.'" *Id.*, p. 5, *quoting* 28 U.S.C. § 2201(a).

In opposing any "*further* declaratory relief," Wyoming apparently mistakenly believed that the Court had already entered some form of declaratory relief (or would be doing so when it ruled on my *Second Interim Report*). In fact, the Court has not yet awarded any declaratory relief. Nor has the Court provided any explicit guidance of its

[9] Wyoming did not specifically address the issue of declaratory relief in its original brief in support of its exception. *See* Wyoming's Exception Brief, *supra*. Instead, Montana first discussed the issue in its reply brief, presumably because Montana had raised declaratory relief in its opposition. *See* Montana's Reply Brief Opposing the Exception of Wyoming, *supra*, pp. 2-3, 8-10.

own regarding the rights and obligations of the States in the future except to the degree stated in its one opinion to date. *See Montana v. Wyoming*, 563 U.S. ___, 131 S. Ct. 1765 (2011).

Recognizing this, Wyoming reframes its motion for summary judgment to urge that the Court enter a declaratory order simply adopting the contents of my two reports without specifying the specific rights and obligations of the parties set out in those reports. Transcript of July 27, 2016 Hearing, *supra*, pp. 48-49 (argument of James Kaste). Montana, by contrast, argues that the Court should adopt detailed declaratory relief that clearly sets out those rights and obligations, including a declaration of Montana's rights to store water in the Tongue River Reservoir. *See* Montana Opposition, *supra*, pp. 19-20 ("the Court should follow recent practice, and enter a decree distilling these principles in a decree").

Montana's and Wyoming's summary judgment motions raise three issues: First, what form of declaratory relief should the Supreme Court grant? In particular, should the Court set out the specific rights and obligations of the States under the Compact, or simply adopt by reference the contents of my reports? Second, should the Supreme Court resolve Montana's right to store more than 32,000 acre-feet of water in the Tongue River Reservoir as part of the remedies phase of this case – or should it alternatively leave it open for a future lawsuit if it becomes an issue in a future call? Finally, if the Supreme Court should address the storage issue in this proceeding, what is Montana's storage right, if any, beyond 32,000 acre feet?

A. Specific Declaratory Relief Is Appropriate & Useful.

While Wyoming argues for a decree that simply adopts by reference my two reports, I conclude that the Court should grant Montana declaratory relief that specifies the future rights and obligations of the States who are parties to the Compact. There are three principal reasons. First, the Supreme Court is the decision maker in this case under

Article III of the Constitution and therefore should set out for the States their rights and obligations. As special master, I am merely an advisor to the Court, and my reports reflect purely my recommendations to the Court. Although the Court agreed with my recommendations as to ultimate liability when it entered its March 21, 2016 Order and Judgment, the Court did not thereby adopt all of the recommendations in my *Second Interim Report.* Nor is it reasonable to ask the Court to enter a decree that adopts by reference all of the details and nuances in the 231 pages of my report (not counting the appendices). Instead, the Court will want to issue a decree that specifies particular rights and obligations, and the parties will benefit from such a decree. My two reports will hopefully provide useful guidance to the State moving forward, but the reports are not a substitute for a Supreme Court decree that specifies 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. 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); *Oklahoma v. New Mexico*, 510 U.S. 126 (1993); *Texas v. New Mexico*, *supra,* 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 the 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 my two reports. As a result, the parties can benefit from a concise decree setting out those rights and responsibilities as clearly as possible. In its opposition to Montana's summary judgment motion, for example, Wyoming suggests that Montana is entitled to store at least 32,000 acre feet of water in the Tongue River Reservoir in addition to whatever is stored during the winter. See Wyoming's Response to Montana's Motion for Summary Judgment on Tongue River

Reservoir, *supra*, p. 4. According to Montana, however, this "misunderstands" the *Second Interim Report.* Montana's Reply in Support of Motion for Summary Judgment on Tongue River Reservoir, July 11, 2016, p. 3. "Wyoming seems to think that the 32,000 acre-foot limit apples only to the spring runoff season. The Special Master, however, made clear that this is not the case." *Id.*

Recent efforts to resolve shortages on the Tongue River further highlight the value of providing declaratory relief that specifies the rights and responsibilities of Montana and Wyoming to the degree possible. Wyoming promptly responded to Montana's April 10, 2015 call on the Tongue River by ensuring that pre-1950 appropriators in Wyoming were not diverting any water and by determining the storage levels in pre-1950 Wyoming reservoirs. *See* Letter of Patrick J. Tyrrell, April 14, 2015 (*attached to id.*, App. at 6). 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*. Montana subsequently rejected these various "conditions." Letter of Tim Davis, April 27, 2015 (*attached to* Montana's Reply Brief Opposing the Exception of Wyoming, *supra*, App. at 12). Montana also suggested that it had the right to demand that post-1950 reservoirs in Wyoming immediately cease storage, but that it was willing to allow Wyoming to continue storing as "a good partner and [to] maximize the use of water in the basin." *Id.*, App. at 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, May 5, 2015 (*attached to*

Wyoming's Sur-Reply in Support of Exception, App. at 1 ("Wyoming's Sur-Reply")). 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 J. Tyrrell, May 13, 2015 (*attached to* Wyoming's Sur-Reply, *supra*, App. at 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 J. Tyrrell, May 19, 2015 (*attached to* Wyoming's Sur-Reply, *supra*, App. at 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, May 21, 2015 (*attached to* Wyoming's Sur-Reply, *supra*, App. at 14, 15-16). This lengthy exchange of letters suggests that Montana and Wyoming still disagree over what the Compact requires and does not require.

Montana's 2016 call on the Tongue River involved fewer questions and process disagreements, possibly because the call lasted only two weeks and because 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 16, 2016, ¶ 3, 6 ("Tyrell Affidavit"). Both States made a commendable effort to work cooperatively. Indeed, Wyoming thanked Montana for tightening its storage practices in the Tongue River Reservoir. Letter of Patrick T. Tyrrell, April 22, 2016, p. 2., Exhibit C to the Tyrrell Affidavit. And Montana, in ending its call, 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. 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*, p. 2.

Third, specific declaratory relief will better enable Montana to defend its rights under the Compact in the future and deter prospective violations. As noted in Part I, the Court has often emphasized the importance of awarding relief that will help deter future violations. *See* page 6 *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 can make it easier for a state to demonstrate liability in the future if an upstream state violates the decree. Violations also can trigger disgorgement damages or, if an injunction is issued, contempt penalties, enhancing prospective deterrence. Finally, a clear and specific decree 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, specificity is important in protecting a downstream state like Montana from future violations of its sovereign rights.

Although I stand ready to prepare a recommended decree for the Court, I would like the parties first to try to agree on the provisions of a decree setting out the States' key rights and obligations as embodied in the Supreme Court's 2011 opinion in this case, the Court's various orders and judgments, my two reports, and this memorandum opinion. Montana should start by submitting a proposed decree to Wyoming for its comments. The parties should then meet and confer to determine the extent to which they can agree on proposed terms. While counsel for neither Montana nor Wyoming at the July 27, 2016 hearing provided much reason to be optimistic that the parties can agree on all the terms of a proposed decree, I have faith that the States can reach agreement on much of a proposed decree. The process of meeting and conferring, moreover, will have value in

identifying those areas of agreement and disagreement among the parties, even if it fails to produce complete agreement. If the parties are unable to agree on all the provisions of a decree, Montana shall submit a proposed decree to me by Friday, February 10, along with a written brief indicating which, if any, of the provisions are acceptable to Wyoming and providing a justification for the other suggested provisions. Wyoming will then have an opportunity to submit its views on or before Friday, March 3, after which I will meet with the parties, if needed, and prepare a decree to recommend to the Court.

In the course of this process, the parties should keep in mind five guidelines for a proposed decree. First, the decree should meet the Goldilocks test: it should contain all of the rights and obligations relevant to this litigation that are necessary to guide the parties' future actions, while not setting out so much detail that the decree unnecessarily constrains the parties, eliminates needed flexibility moving forward, or obscures the key provisions of the decree. The best guidance as to length and detail is the Supreme Court's prior decrees in interstate disputes. These decrees have differed in their length and degree of detail, depending on the nature of the case. The portions of the decrees setting out the rights and obligations of the parties have ranged from a few paragraphs, *e.g., New Jersey v. Delaware, supra,* to several pages, *e.g., Arizona v. California, supra; New Jersey v. New York, supra.* The number and factual complexities of the issues involved in a case has largely determined the length and detail of each decree, with decrees in interstate water cases generally being longer and more complex than decrees in border disputes.

Second, the provisions of the decree typically should come directly from the Supreme Court's 2011 opinion, the Court's various orders and judgments, my reports, or this opinion. The proposed decree is not an opportunity unilaterally to relitigate issues addressed in those documents or to impose a particular spin on a right or obligation set out therein. As discussed below, however, *all* parties can agree to new provisions if they jointly believe they are valuable.

Third, either Montana or Wyoming is free to suggest the inclusion of other rights or obligations *which they believe are dictated by the terms of the Compact* if such rights or obligations are critical to effective implementation of Article V(A). This is not an open invitation to add significant new issues at this stage of the litigation. Any suggested provision should be carefully limited and must relate directly to the enforcement of the rights and obligations at issue so far in this case. The suggesting party, moreover, will need to explain both how the Compact supports the provision and why the provision is critical to the decree. As I noted in the *Second Interim Report*, "great caution" should be used "in reading too many specific requirements into Article V(A)'s general incorporation of the 'doctrine of appropriation' – particularly when deciding how each state must internally use and administer its pre-1950 rights." Second Interim Report, *supra*, p. 44. The Compact simply does not address many of the questions that have arisen in the parties' efforts to deal with calls in 2015 and 2016. Neither I nor the Court will read provisions into the Compact that are not there.

Fourth, the Court will not typically consider procedures for ensuring future compliance that are not required by the Compact or jointly agreed upon by the parties. Rather than imposing procedures on the parties to a compact, the Court instead "entertain[s] the hope that the … States will by cooperative efforts accomplish a satisfactory solution." *Vermont v. New York*, 417 U.S. 270, 274 (1974), *quoting Wyoming v. Colorado, supra*, 298 U.S. at 586.[10] For similar reasons, there is no need for a water master in this case, even if either party favors one. The Court has typically declined to appoint a water master to oversee a compact where one does not exist. *See Vermont v. New York, supra*, 417 U.S. at 275 (appointments of water masters are "rare").

[10] In *Wyoming v. Colorado* at least, the Court's hope paid off. "In time the two States, policing themselves, resolved the controversy." *Vermont v. New York, supra*, 417 U.S. at 274, *citing Wyoming v. Colorado*, 309 U.S. 572 (1940).

As the Court has noted, its role in interstate water cases is "judicial" rather than "arbitral." *Id*. at 277.

Fifth, however, the parties are welcome to *jointly* propose processes that would enable clearer or simpler enforcement of Article V(A) in the future. Indeed, this is an opportunity for the States to agree on useful procedures that could improve calls under Article V(A), and I encourage the states to avail themselves of the opportunity. For example, "nothing in the Compact or the general law of prior appropriation mandates that [a call] notice take any particular form or include any information other than Montana's need for additional water to ensure that pre-1950 rights are met." Second Interim Report, *supra*, p. 59. Nor does the Compact or the general law of prior appropriation appear to dictate many other elements of a call process. Jointly, however, the parties are free to propose a specific process for making and responding to future calls, including the format of the call itself. While substantive issues have naturally divided the States in the past, clear processes for enforcing Article V(A) can benefit everyone. To become part of the decree, of course, any proposed process would need to be approved by the Court.

B. Montana's Request for Declaratory Relief regarding Storage Rights in Excess of 32,000 Acre-Feet

1. Appropriateness of declaratory relief on the storage issue.

Having decided that the Court should award declaratory relief that specifies in concise and specific terms the rights and obligations of the parties, the next question is whether that declaratory relief should address Montana's rights to store more than 32,000 acre-feet of water in the Tongue River Reservoir. For the reasons discussed below, I conclude that the Court should reach the issue as part of its determination of appropriate declaratory relief.

In my *Second Interim Report*, I determined 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*, p. 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.*, pp. 140-141. In 2004 and 2006, the only two years in which Montana proved that it provided adequate notice, Montana stored less than 32,000 af. *Id.*, p. 141.

Montana in its summary judgment motion now argues that the Court should resolve the issue as part of its 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 Brief for Summary Judgment on Tongue River Reservoir, May 27, 2016, p. 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 that the Court should not consider Montana's rights beyond 32,000 acre-feet for a trio of related reasons. First, and foremost, Wyoming argues that Montana's rights beyond 32,000 acre-feet 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. Wyoming's Response to Montana's Motion for Summary Judgment on Tongue River Reservoir, June 27, 2016, pp. 3-4. In Wyoming's view, there thus 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, p. 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.*, p. 15.

As the federal Declaratory Relief Judgment Act demonstrates, courts have authority to award declaratory relief even when there has yet to be any justiciable injury.

See 28 U.S.C. § 2201(a) (courts can declare the rights of parties "whether or not further relief is *or could be* sought") (emphasis added). Declaratory relief 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 merely 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.*, *supra*, 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.[11]

The Court has struggled to come up with a clear test for when an issue meets the case-or-controversy test. 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, supra*, 344 U.S. at 243. In short, the justiciability of an issue is a highly fact-specific inquiry, and there is no simple black-and-white rule that can be easily applied.

As analyzed below, however, Supreme Court opinions discussing the justiciability of declaratory relief since passage of the federal Declaratory Judgment Act suggest that the inquiry into 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, would impact the parties?[12]

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[11] 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, moreover, 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.

[12] 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, supra*, 344 U.S. at 344, *quoting* S. Rep. No.7005, 73d Cong., 2d Sess., May 10, 1934.

The Court first addressed the case-or-controversy question under the federal Declaratory Judgment Act in two insurance cases -- *Maryland Casualty Co., supra*, and *Aetna Life Ins. Co., supra.* 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., supra,* 312 U.S. at 273. 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., supra,* 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 constitutes interstate commerce," and was thus free from state interference. *Id.* at 239. The Court, with only Justice Douglas dissenting, found that declaratory relief was not appropriate. 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 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 state supreme court seat, 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., supra,* 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 to ever 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.*

Most recently, in *MedImmune, Inc. v. Genentech, Inc., supra,* a patent licensee sought a declaratory judgment that the underlying patent was invalid, unenforceable, or not infringed, even though the licensee was paying its fees 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 therefore is whether the dispute over Montana's right to fill the Tongue River Reservoir beyond 32,000 acre feet 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, *supra*, p. 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 that the overall dispute presents a "serious and dignified claim in need of resolution," *id.*, but that does not mean that all issues on which Montana might seek declaratory relief are appropriate for consideration. The Court therefore must now decide whether the extent of Montana's storage right beyond 32,000 acre feet presents an appropriate controversy for resolution. *See 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) presence of a legal dispute, (2) clarity of the facts, (3) ability to provide conclusive legal relief, and (4) the immediacy of the dispute. 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*, pp. 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 Tr. 5273 (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 acre feet in the reservoir will not provide a better factual setting in which to resolve the basic question of Montana's rights. The facts underlying this basic issue are already clear from this case. Nor are other facts needed to clarify or address the issue. This is not an appropriate case, of course, to resolve all future storage issues – e.g., the legitimacy of particular storage practices. These can and should be addressed in the future.

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 highly likely to arise in the future, although there is no certainty that it will, nor is it definite when the issue will arise. Since increasing the size of the Tongue River Reservoir in 1998, Montana has frequently stored more than 32,000 acre-feet of water in the reservoir during the winter and spring months. As shown in Table 1 at the end of this opinion, Montana has stored more than 32,000 acre-feet 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 acre-feet in

2000, 2003, 2005, and 2007. Storage came close to 32,000 in 2008.[13] Not surprisingly, storage tends to be less in dry years (when a call is most likely to occur). Montana, however, stored almost 29,000 acre-feet 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 over 31,000 acre feet after the reservoir reached its low point of storage at the end of December. Given the high percentage of years when Montana has stored more than 32,000 acre feet of water in recent years, there is a real and significant probability that Montana will make a call in a year when it seeks to store more than 32,000 acre feet.

While it is not certain that Montana will seek to store more than 32,000 acre feet in a year when it is forced to call the Tongue River, prior cases do not require 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 willingly 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, primary by *planning* water projects on tributaries that [had] historically

[13] In support of its motion for summary judgment, Montana submits a table (based on Dale Book's initial expert report) showing the amount of water that Montana *could* have stored in all of the water years from 1941 through 2008 – viz., the difference between the capacity of the reservoir and storage at the outset of each water year. *See* Affidavit of Dale E. Book, May 26, 2016, tbl., attached to Montana's Brief for Summary Judgment on the Tongue River Reservoir, May 27, 2016. As Mr. Book notes in his affidavit, more than 32,000 acre-feet could have been stored in the reservoir (and was needed to fill it to capacity) "in 63 of the 68 years of record, 93% of the years of record." *Id.* ¶ 5. From 2000 to 2008, Montana could have stored more than 32,000 in every year except 2008. *Id.*, tbl. However, in determining whether there is an actual controversy between Montana and Wyoming requiring declaratory relief, the more relevant question is how often Montana actually *did* store more than 32,000 acre feet, since this shows how likely the issue is to arise between the two States in the future.

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.

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 acre feet, *see* pages 44-45 *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 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. 221, 241 (1991) (emphasis added), *quoting Arizona v. California*, 373 US. 546, 564 (1963). And such adjudication "must pass upon every question essential to" a determination of the controversy. *Id.*, *quoting Kentucky v. Indiana*, 281 U.S. 163, 176-177 (1930).[14]

As noted, Wyoming also argues that the Court should refuse to address Montana's right to store more than 32,000 acre feet of water in the Tongue River Reservoir because the issue could be resolved either by the Yellowstone 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 initial decision" to

[14] 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]omplance [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.

another body, *Public Serv. Comm'n, supra,* 344 U.S. at 246, Montana's reservoir rights are not committed for initial decision to the Yellowstone Compact Commission. Indeed, the Commission has not played a significant role to date in resolving disagreements regarding the rights and responsibilities of the states under the Compact, nor is it likely to do so given its current voting structure. Under the Compact, Montana and Wyoming each get one vote. If the two states disagree, a federal representative can vote (but is not compelled to do so). Second Interim Report, *supra*, p. 17. 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, p. 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 never appears 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 parties also have proven singularly unable to settle disputes among themselves regarding the Compact without judicial intervention. As I observed in my *Second Interim Report*, 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*, p. 18. Montana's and Wyoming's inability to settle this matter even after the issuance of my Second Interim Report is further evidence of the need for a judicial declaration of Montana's storage right.

2. Resolution of the storage issue.

Having decided that the storage issue presents a case or controversy, I turn to the question of what pre-1950 storage rights Montana enjoys under the Compact beyond the 32,000 acre-foot right recognized in my *Second Interim Report*. That report already detailed the history of Montana's storage right in the Tongue River Reservoir. *See* Second Interim Report, *supra*, pp. 100-107. In 1937, the Montana Conservation Board filed a Declaration of Intention to Store, Control, and Divert River Water (the "Storage Declaration). Ex. M-558A. In the Storage Declaration, the Conservation Board explicitly avowed 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 state 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 its 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. Ex. M-529A, p. 1. The dam and reservoir had not been constructed yet, and the contract recognized that the reservoir might ultimately have a live capacity of and be able to deliver more than 32,000 acre feet annually. Id., § 4, at p. 3.

In 1969, the Conservation Board amended the contract to provide for the sale of 40,000 acre feet of water annually to the TRWUA, which the amendment stated was the "approximate firm yield" of the reservoir. 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 1999. Second Interim Report, *supra*, pp. 104-106.

Montana is currently adjudicating all pre-1973 rights in the State. *See* 1973 Mont. Laws, ch. 452 (providing for the adjudication); Ex. M-230, p. 5 (explaining Montana's water-right system). The United States objected to the initial description of the storage rights in the Tongue River Reservoir, which included a "volume guideline" of 127,324 equivalent to "one complete fill, [a] partial refill for carryover storage, and evaporative losses." *See* Second Interim Report, *supra*, pp. 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 delivery contracts for Reservoir water, which now total 60,000 acre feet per year, "define the amounts to be delivered in any one year," but "do not define the amount of water that can be diverted into storage in any year." *Id*.

This stipulation unfortunately is not conclusive as to Montana's pre-1951 storage rights under the Compact or even under Montana law, requiring a deeper dive into Montana storage and appropriation law. The stipulation does not constitute a final 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 thus "null and voice" if the Water Court does not accept its terms. *Id*. The question before the Supreme Court, moreover, is the extent of Montana's rights under the Compact, not under Montana state law. Even if Montana's adjudication process ultimately determines that Montana has a right to fill the reservoir to its pre-1951 capacity, that does not mean that the Compact protects the right. Finally, where state decisions affect the rights of other states under an interstate compact, judicial review is essential to ensure against local state bias.

I have re-read all of the briefs submitted on the reservoir issue during and after the liability trial, as well as the case law and exhibits cited therein. I also have reviewed more recent decisions of the Montana courts on reservoir rights in the State and the annual reports of the Yellowstone River Compact for additional guidance on the extent of the Tongue River Reservoir's storage rights. Based on this evaluation, I conclude that Montana has a right protected by Article V(A) of the Compact to fill the pre-1950 capacity of the reservoir, subject to the various restrictions and conditions set out below and in my *Second Interim Report*. *See* Second Interim Report, *supra*, pp. 141-144 (discussing the post-1950 storage capacity resulting from the reservoir's expansion), 144-157 (discussing the reservoir's operating rules). As in that report, I 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 id.*, pp. 157-160.

a. Interpretive principles.

In determining Montana's storage rights under the Compact, the initial question is the extent of those rights under Montana law. 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*, p. 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. ___, 133 S. Ct. 2120, 2132 (2013), *quoting Virginia v. Maryland*, 540 U.S. 56, 67 (2003). Because the Compact does not explicitly spell out the storage rights of the parties but instead looks generally to the "laws governing the acquisition and use of water under the doctrine of appropriation, Compact, *supra*, art. V(A), the first step in determining Montana's storage rights under the Compact is to look to Montana state appropriation law. The most relevant Montana law, moreover, is the law existing at the time the Compact was negotiated and signed, because that law would have informed the understanding of the parties.

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 state-law storage rights. Moreover, official documents surrounding the negotiation, adoption, and implementation of the Compact may shed light on the parties' understanding of Montana's storage rights and thus the intent of the Compact. 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. It is for this reason that I did not address Montana's right to store more than 32,000 acre feet of water in my *Second Interim Report,* after having come to the conclusion that the issue did not need to be resolved for purposes of establishing liability. Montana law is not always clear as to the exact nature and extent of storage rights. *See, e.g., Findings of Fact & Conclusions of Law for the Preliminary Decree of the Tongue River Above & Including Hanging Woman Creek*, Basin 42B (Montana Water Ct., Feb. 28, 2008), at 8 ("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 (Montana 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, there also was little relevant case law at the time that the Compact was negotiated and signed.

The Tongue River Reservoir, moreover, is not a typical reservoir. 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*, p. 124. The Montana Conservation Board built these 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 (Mont. Water Ct., March 9, 2000), at 3 (introduced at trial as Ex. M-319) ("*Painted Rocks Reservoir*"). 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").

b. State law analysis.

As noted, Montana case law on storage rights was sparse prior to the signing of the Compact. Most of that case law merely 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. 963, 965 (Mont. 1926), *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) provided the greatest guidance on the nature of storage rights in the State. Two passages in the opinion are of particular relevance. 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). Capacity, in short, is the measure of a storage right. Second, *Morris* 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 (Mont. Water Court, April 27, 2016), ¶ 22, at 50 (*"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, supra,* 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 rules apply to the Tongue River Reservoir as a matter of Montana law is not entirely clear. 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 (1933 repealed). The Montana Water Court, however, has used general appropriative principles to determine the storage rights in other reservoirs constructed pursuant to this provision. *See, e.g.*, *Flint Creek Drainage Area*, *supra* (using historic operation of a reservoir to establish its water right). While section 89-121 clearly indicated the legislature's intent to give state storage projects wide berth, moreover, the explicit adoption of appropriative law by Article V(A) of the Compact requires a consideration of intent and historical operations 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 acre feet of water annually was based in part on the Conservation Board's 1937 contract with the TRWUA, described earlier. The 1937 contract, however, does not indicate that the Board intended to store *only* 32,000 acre feet of water each year. Indeed, the opposite is true. The contract shows that, two years prior to constructing the Tongue River Reservoir, the Board expected that the "live capacity" of the reservoir would be *at least* 32,000 acre feet. *See* Ex. M-529A, p. 1. 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 acre feet "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, at p. 3. The Board further agreed to provide the association with the "total available yield of storage water." *Id.*, § 1, at p. 2. Given operating experience with the reservoir, the Board ultimately amended the contract in 1969 to provide for the delivery of 40,000 acre-feet 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. At the time the Compact was negotiated and signed, storage of "water in one year for use in a later year [was] common practice." 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, tbl. 4-A,

at p. 29 (showing carryover amounts from 1941 through 1950 ranging from 18,470 acre feet to 42,090 acre feet).

By storing more water than needed and carrying that water over to future years, reservoir operators can provide a more assured supply of water in dry years. In *Morris, supra,* for example, 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 this 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. *Order re: Teton Co-Op Reservoir Co. Water Right Claims,* Case No. 41O-84, April 27, 2016, ¶ 22, at 50 (involving carry-over of 20,000 acre feet).

Operations of the Tongue River Reservoir in the decade prior to the signing of the Compact also shows that Montana intended to make full use of the reservoir's capacity and to store more than 32,000 acre feet each year in the reservoir. Then, as now, the primary storage period for the Tongue River Reservoir was during the spring runoff. In the decade prior to the Compact, however, Montana's practice was to reduce storage in the reservoir during the late fall and winter, for reasons not explained in the record, and then to store water beginning in the spring. *See* Ex. M-5, tbl. 4-A, at 29. As shown in Table 2, between the end of February and late spring or early summer, Montana generally added far more than 32,000 acre feet of water to storage. Indeed, Montana exceeded 32,000 acre-feet of storage 80 percent of the time and exceeded 40,000 acre-feet of storage almost a third of the time. On average, Montana added slightly less than 39,000 acre feet of storage each spring during the ten year period ending in 1950.

Montana also filled the reservoir both in 1941 and in 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.[15] The failure of the reservoir to fill in other years, moreover, is not evidence that Montana intended to stop storing water at any set volume. The record contains little evidence regarding water conditions during this period. Given the low amounts of water stored in the winter, however, filling the reservoir would often have been difficult. What the record does show is that, during the first ten complete years of the reservoir's operation, Montana stored close to 40,000 acre feet of water on average during its spring fills and filled the reservoir to capacity almost 30% 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 acre feet of water in the reservoir and to use the remainder 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. Aycock's expert testimony at trial that Montana's intent was to use the top 20,000 acre feet or so of storage capacity *jointly* for both food control and storage, depending on the needs at any point in time. While reserving a portion of the dam's capacity for flood control during flood month might reduce the total amount that ultimately could be stored in any year, the joint use of the reservoir space does not prove that Montana's intent was to use only 32,000 acre feet of the reservoir for storage.

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

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. However, because the reservoir stores more water during the winter, when water is not limited, rather than reducing storage during the early winter as occurred in the 1940's, the reservoir is far more likely to fill near or to its capacity. *See id.*; Table 1 *infra* (reservoir filled four years from 2000 to 2008). So long as Montana's spring storage remains within the historic range of spring filling in the period prior to the Compact, Montana's current storage operations are fully consistent with historical operations and, in fact, demand less water during the key spring months.

For all of these reasons, I conclude that Montana enjoys a state appropriative right to store up to the pre-1950 capacity of the Tongue River Reservoir.

c. Compact provisions.

Compact provisions do not call for limiting Montana's storage right to less than the pre-1950 capacity of the Tongue River Reservoir. Article V(A) of the Compact provides for the protection of "[a]pproprative rights to the beneficial uses of the water of the Yellowstone River System existing in each signature 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 fill 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*, pp. 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.

There is no direct evidence of what the Compact negotiators believed was Montana's storage right, if they held any specific view. 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 acre-feet. *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 rights in the Tongue River Reservoir were less than the capacity of the reservoir. Whenever a document listed the storage quantity for the Tongue River Reservoir, it consistently listed the presumed pre-1950 capacity of 69,400 acre feet. *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 acre feet and a "Post-Compact 1950 Water Right" of 11,070 acre feet. Yellowstone River Compact Comm'n, 53rd Annual Report, 2004, p. 20.

C. Summary

For the reasons discussed above, I conclude that Wyoming's summary judgment motion as to declaratory relief should be denied. Consequently, I instruct the parties to meet and confer, as discussed earlier, regarding the provisions of such relief.

I also conclude that Montana's summary judgment motion should be granted and 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. It is worth emphasizing that this only addresses the total amount of water that Montana can store in the reservoir and does not address the timing of storage. Efforts to store significantly more water in the spring, for example, might conflict with the reservoir's historic practices and raise legal issues under either Montana law or the Compact. The timing of storage is not an issue that is before me, nor would it be appropriate to consider such hypothetical situations. My conclusion is simply that the aggregate limit on storage is the pre-1950 capacity of the reservoir, not 32,000 acre-feet.

IV. INJUNCTIVE RELIEF

Wyoming also seeks to preclude injunctive relief in its summary judgment motion. Wyoming's Exception Brief, *supra*, pp. 13-16. As both Montana and Wyoming agree, injunctive relief is appropriate in this action only if there is a "cognizable danger of recurrent violation." *Kansas v. Nebraska, supra,* 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, *supra*, p. 15), (2) Wyoming's officials are "genuine in their willingness to abide" by that law (*id.*, p. 15, *quoting* Second Interim Report, *supra*, p. 229), and (3) Wyoming has a well-honed regulatory system for water and therefore has "the means" to comply (*id.*, p. 15). Wyoming also argues that injunctive relief is inappropriate unless Montana shows that Wyoming's breach was of "serious magnitude and established by clear and convincing evidence." *Id*., p. 14, *quoting Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931).

Montana makes a strong argument that, despite Wyoming's objections, 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 my *Second Interim Report.* *See* Montana's Reply Brief Opposing the Exception of Wyoming, *supra*, App. at 1 ("call" letter of April 10, 2015); Tyrell Affidavit, *supra*, ¶ 3 (discussing "call" of April 18, 2016). As noted in Part III, Wyoming's response to Montana's 2015 call raised various concerns, although Wyoming properly assured that post-1950 diversions were not occurring in Wyoming and recorded elevation data levels for its post-1950 reservoirs. *See* pages 32-33 *supra*. As Montana notes, moreover, one would expect that all parties would be on their best behavior while this case is still before the Supreme Court.

In Montana's view, injunctive relief is important to deter Wyoming from violating the Compact again. According to Montana, "an injunction will remind Wyoming 'of its legal obligations, deter[] future violations, and promote[] the Compact's successful administration.'" Montana Opposition, *supra*, p. 33, *quoting Kansas v. Nebraska*, *supra*, 135 S. Ct. at 1057. While Wyoming officials have testified that they will comply with the rulings of the Court and with the provisions set out in my two reports, Montana shares the Supreme Court's view 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). Instead, Montana suggests that the Court should put greater emphasis on the "natural propensity of these two States to disagree." *Texas v. New Mexico*, *supra*, 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 pause twice before violating Montana's Compact rights in the future.

The Supreme Court has granted injunctive relief, moreover, in several of the disputes in which it has found violations of interstate compacts. *See, e.g., Kansas v.*

Colorado, 556 U.S. 98, 103-106 (2009) (injunction issued in case involving violation of the Arkansas River Compact); *Texas v. New Mexico*, 482 U.S. 124, 133, 135 (1987) & 485 U.S. 388 (1988) (Pecos River Compact).[16] The Court has also frequently granted injunctive relief requiring states to comply with its equitable apportionment decrees. *See, e.g., Nebraska v. Wyoming*, 534 U.S. 40 (2001); *Arizona v. California*, 376 U.S. 340 (1964); *Wyoming v. Colorado*, 298 U.S. 573, 586 (1936).

Special masters similarly have decided that injunctions are appropriate where states have violated interstate water compacts. In *Kansas v. Colorado*, the special master explicitly found that, although Colorado officials' attestations that they would not engage in future violations were in good faith, "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, Feb. 4, 2008, Vol. I, Exh. 8 (Order re Decree Issues – Injunction), App. at 101, 104. In the view of the special master, "Judicial precedent more than amply support[ed his] determination." *Id.*

The Supreme Court's recent decision in *Kansas v. Nebraska*, however, convinces me that an injunction is not appropriate in this case. In that case, Kansas sought an "injunction ordering Nebraska to comply with the Compact and Settlement." 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.* According 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).[17] Such a danger must be more than a "mere possibility" (*W.T. Grant Co., supra*, 345 U.S.

[16] 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.

[17] In civil disputes outside its original jurisdiction, the Supreme Court has explained 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. 95, 103 (1983).

at 633) or "speculation" (*City of Los Angeles v. Lyons,* 461 U.S. 95, 108 (1983)). And the party seeking the injunction has the burden of proof in showing that there is a "cognizable danger." *Id.* Despite the Court's frequent issuance of an injunction in the past, 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).

As Montana notes, the facts of this case differ from *Kansas v. Nebraska.* 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 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, supra,* p. 183.

Yet looking at all aspects of *Kansas v. Nebraska* and this case, the two cases are not that dissimilar. In both cases, the defendant expressed its intent to comply with the Compact in the future. While Kansas was skeptical of Nebraska's actual willingness to comply and the special master did not entirely "discount[] that skepticism" (which he noted 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, supra,* p. 183. As I noted in my *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*, p. 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*, the assurances of Nebraskan officials were supported by the State's recent compliance with the Compact and its development of new Integrated Development Plans. *See* Report of the Special Master, *Kansas v. Nebraska, supra,* p. 183 (noting Nebraska's "recent record of strong compliance"). Similarly, Wyoming has been responsive to Montana's two most recent calls, checking 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*, p. 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 order in this case. But I am not convinced that this risk is significant enough to justify the issuance of an injunction.

Finally, the Supreme Court's recognition of disgorgement damages in *Kansas v. Nebraska, supra,* reduces the need for an injunction in this case. While I have concluded earlier in this opinion that the Supreme Court should not order disgorgement for Wyoming's 2004 and 2006 violations, disgorgement damages remain an active deterrent going forward, 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.*

The presence of disgorgement damages, moreover, was not critical to the Supreme Court's decision not to issue injunctive relief in *Kansas v. Nebraska.* Thus, 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).

Most of the cases in which the Supreme Court has issued an injunction, by contrast, are clearly distinguishable. In many of the cases, for example, the defendant was continuing to divert water in violation of the rights of the downstream state. *See, e.g., Texas v. New Mexico, supra,* 482 U.S. at 133; *Wyoming v. Colorado,* 309 U.S. 572, 578 (1940). An 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 other cases, the defendant has diverted water contrary to prior decrees, raising the 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 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), *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 (1923).

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, I 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 conclude that injunctive relief is inappropriate in this case and that Wyoming's summary judgment should be granted on this issue.

V. COSTS

In the final part of its motion, Wyoming argues 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, *supra*, p. 17. As Wyoming recognizes, the Court has discretion to award costs in an interstate dispute. *Id.* Wyoming notes, however, that lower courts often decline to award costs to ether 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, Powder River clams, and Wyoming's liability on the Tongue River in years other than 2004 and 2006 and for groundwater withdrawals. Wyoming's Exception Brief, *supra,* pp. 17-19.

As Montana notes, 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,* 263 U.S. 583 (1924) (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, supra*, 552 U.S. at 623-624; *Virginia v. Maryland, supra,* 540 U.S. at 79-80; *Oklahoma v. New Mexico, supra.* The principal exception is *Kansas v. Colorado*, in which the special master recommended that costs should be awarded to Kansas as the "prevailing party." *See* Fifth and Final Report, *Kansas v. Colorado* (No. 105 Orig.), Jan. 2008, 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 deciding whether costs should be awarded, the Court often looks to Federal Rule of Civil Procedure 54(d), 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.*, 133 S. Ct. 1166, 1172 (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, supra,* 133 S. Ct. at 1172. 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 is granted 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 that case, 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). I therefore conclude that Montana is a prevailing party for purposes of seeking an award of costs.

The second question is whether Wyoming has shown for purposes of summary judgment that costs should not be awarded to Montana. In answering this question, I find it useful to divide costs into those incurred for two separate phases of this action: (1) proceedings up to and including resolution before me of Wyoming's motion to dismiss, and (2) all of the proceedings to date after my First Interim Report, including trial.

For purposes of summary judgment, Wyoming has failed to convince me that Montana should not have the opportunity to seek some or all of its costs for the first phase of the proceeding. In bringing the action and defending against Wyoming's motion to dismiss, Montana established that Article V(A) of the Compact protects its pre-1950 appropriative rights, which was the principal source of disagreement between the States that led to the litigation. Montana also established that Article V(A) applied to groundwater use in Wyoming. Although Montana lost on the issue of increased irrigation efficiency, the overarching issue at this stage was the applicability of Article V(A) at all. As the prevailing party in the litigation, Montana therefore should be free to seek some or all of its costs incurred in this initial phase.

By contrast, Wyoming has convincingly established that Montana should not receive any costs for the second phase of the case, including trial. While Montana established liability for two years, the amounts of liability were relatively small. Montana, moreover, did not prevail on a number of important issues, including its groundwater claims and the adequacy of Montana's notice in all years except 1981, 2004, and 2006. These issues, moreover, took more time and resources to resolve than the issues on which Montana prevailed. Montana also voluntarily dismissed its Powder River claims.

I therefore conclude that Wyoming's motion for summary judgment on costs should be granted in part and that Montana should not recover costs for any portion of

this action to date subsequent to the filing of my First Interim Report. At an appropriate time, however, both Montana and Wyoming will be able to address the question of what, if any, costs Montana should be able to recover in connection with the first phase of these proceedings.

VI. CONCLUSION

In summary:

1. I conclude that Wyoming's motion for summary judgment as to damages should be granted, subject to Montana's right to pursue a water remedy instead of monetary damages and to Montana's right to propose an alternative method of calculating pre-judgment interest.

2. I conclude that Wyoming's summary judgment motion as to declaratory relief should be denied. I also conclude that Montana's summary judgment motion should be granted and that Montana holds an appropriative right, protected by Article V(A) of the Compact, to store up to the pre-1950 capacity of the Tongue River Reservoir.

3. I conclude that injunctive relief is inappropriate in this case and that Wyoming's summary judgment should be granted on this issue.

4. I conclude that Wyoming's motion for summary judgment on costs should be granted in part and that Montana should not recover costs for any portion of this action to date subsequent to the filing of my First Interim Report.

Table 1

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	79,450 (May)	**52,120**
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 Expert Report of Dale E. Book, Jan. 4, 2013, tbl. 4-A (Exhibit M-5), except for the maximum storage in 2006. The maximum storage of the reservoir in 2006 is from the testimony of Kevin Smith. See 6 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 four years (2000, 2003, 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 acre-feet) 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.

Table 2

Year	Storage at end of February (af)	Maximum Storage during Water Year (af)	Spring Storage (af)
1941	8,950	58,000	49,050
1942	23,480	65,500	42,020
1943	1,310	40,450	39,140
1944	13,930	75,760	61,830
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 Expert Report of Dale E. Book, Jan. 4, 2013, tbl. 4-A (Exhibit M-5).
(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.