

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

DISCUSSION DRAFT OF JUDGMENT AND DECREE

May 15, 2017

Discussion Draft of Judgment & Decree

Attached are three documents: (1) a draft Judgment & Decree, (2) a chart correlating Montana's proposed terms with those of the draft Judgment & Decree, and (3) a chart correlating Wyoming's proposed terms with those of the draft Judgment & Decree. Please keep in mind that this is a draft for discussion purposes. It should not be circulated beyond the parties, their advisors, and amici.

I have annotated the draft Judgment & Decree to explain the basis for each of the included provisions. Each footnote starts by showing the equivalent provisions in Montana's and Wyoming's proposed decrees. The footnote then goes on to explain how, if at all, the specific provision diverges from Montana's and/or Wyoming's proposed provisions, as well as the basis for the language used. I have also included several textual comments explaining the reasons for particular language.

There are at least three general observations worth making at the outset. First, in drafting the draft Decree, I have used language wherever appropriate from the Supreme Court's opinion in *Montana v. Wyoming*, 563 U.S. 368 (2011), my two interim reports, and my December opinion on remedies. In some cases, however, I have diverged from this language where needed for greater clarity. Some provisions also build on implied obligations and provisions typically found in contracts to ensure the effective implementation and enforcement of the Compact.

Second, after reviewing Montana's and Wyoming's proposals, I have tentatively concluded that it is not appropriate to include evidentiary rules or burdens of proof in the Decree. The Second Interim Report sets out particular evidentiary rules and burdens, but they deal with judicial rules rather than with the appropriate interpretation of the Compact. I therefore have not included in the draft Decree any such evidentiary rules or burdens.

Third, it also did not seem appropriate to set out the accounting rules used by each state for its reservoirs – particularly since each State uses slightly different language to describe them. Instead, I have included a general provision that states, "Except as otherwise expressly provided in this Decree or the Compact, Montana's and Wyoming's state rules and regulations (including rules for reservoir accounting) govern the administration and management of each state's respective water rights in the implementation of Article V(A) of the Compact."

Each State is free to make suggestions for improving the draft Judgment & Decree. If a State believes that any provision should be changed or additional provisions added, the State should include its suggested language, along with the reasons for the change and references to any relevant portion of the record that supports its proposed change. Please keep in mind that the ultimate goals of the Decree should to set out the rights and obligations of Montana and Wyoming under the Compact and to minimize the chances of future disputes.

Comments on the draft Judgment & Decree are due on or before Monday, May 22. Any State or amicus is free to file a response or opposition to the comments of others on or before Monday, May 29. After receiving comments and responses, I will finalize a proposed Judgment & Decree for submission to the Court with my Final Report. I currently plan to circulate a draft of my Final Report to the parties in late June.



Barton H. Thompson, Jr.
Special Master

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JUDGMENT¹

Judgment is awarded against the State of Wyoming and in favor of the State of Montana for violations of the Yellowstone River Compact resulting from Wyoming's reduction of the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1300 acre feet in 2004 and 56 acre feet in 2006. Judgment is awarded in the amount of \$20,340, together with pre-judgment and post-judgment interest of seven percent (7%) per annum from the year of each violation until paid. Costs are awarded to Montana in the amount of \$67,270.87.

Wyoming shall pay these damages, interest, and costs in full not later than 90 days from the date of entry of this Judgment. Wyoming shall make its payment into an account specified by Montana to be used for improvements to the Tongue River Reservoir or related facilities in Montana. Montana may distribute these funds to a state agency or program, a political subdivision of the State, a nonprofit corporation, association, and/or a charitable organization at the sole discretion of the Montana Attorney General in accordance with the laws of the State of Montana, with the express condition that the funds be used for improvements to the Tongue River Reservoir or related facilities in Montana.

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

DECREE

A. General Provisions

¹ The Judgment and Decree follows the general form used in *Kansas v. Colorado*, 556 U.S. 98, 103-104 (2009).

1. Article V(A) of the Yellowstone River Compact protects pre-1950 appropriative rights to the beneficial uses of water of the Yellowstone River system in Montana from diversions and withdrawals of surface water and groundwater in Wyoming, whether for direct use or storage, that are not made pursuant to appropriative rights in Wyoming existing as of January 1, 1950.²

2. Article V(A) of the Compact apportions and regulates all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact).³

3. Article V(A) of the Compact does not guarantee Montana a fixed flow of water, nor does it limit Wyoming to the net volume of water actually consumed in Wyoming prior to January 1, 1950.⁴

4. Article V(A) of the Compact protects pre-1950 appropriative rights only to the extent they are for “beneficial uses,” as defined in Article II(H) of the Compact, and are

Commented [BT1]: This language is different than that proposed by either Montana or Wyoming. It is designed to cover both post-1950 appropriative rights in Wyoming **and** diversions or withdrawals (e.g., of groundwater) that are not made pursuant to any appropriative right. The language in the First Interim Report was that Article V(A) protects pre-1950 rights in Montana “from new diversions and withdrawals in Wyoming *subsequent to January 1, 1950.*”

² Mont. A(1)(a); Wyo. II(E). I concluded that Wyoming’s additional language, “that prevent sufficient water from reaching pre-1950 appropriative rights in Montana when those rights are unsatisfied,” is unnecessary because it is implicit in the word “protect.” Protection is needed only from Wyoming diversions that injure pre-1950 rights in Montana. The Second Interim Report recognizes that liability under Article V(A) is subject to a “futile call” defense, but concludes that it is an affirmative defense on which Wyoming has the burden. See Second Interim Report, pp. 224-225.

³ Mont. A(7); Wyo. II(A). Wyoming proposed the verb “applies,” which is the verb used in p. 96 of the First Interim Report. Montana suggested that the verb “apportions” is clearer. “Apportions,” however, seems too limited because the Compact also regulates water use. I therefore have used the dual term “apportions and regulates.”

⁴ Mont. A(8), A(9); Wyo. II(B). Page 162 of the Second Interim Report states that Montana is not entitled to any “set flow” of water, but “fixed flow” seems a clearer term. While Montana suggests that the first half of this paragraph should affirmatively state how Montana’s water rights are protected, paragraph A(1) of my proposed Decree already does that. Adding anything additional here would seem either repetitive or potentially confusing. I similarly decided that Montana’s proposed addition to the second half of the paragraph (“so long as the pre-1950 water rights remain unchanged with respect to irrigated acreage, type of use, and location and capacity of diversion”) is unnecessary given the other provisions of this Decree (specifically ¶¶ C(2) and C(3)).

otherwise consistent with the doctrine of appropriation. In particular, pre-1950 rights are not protected to the extent they are wasteful under the doctrine of appropriation.⁵

5. Except as otherwise expressly provided in this Decree or the Compact, Montana's and Wyoming's state rules and regulations (including rules for reservoir accounting) govern the administration and management of each state's respective water rights in the implementation of Article V(A) of the Compact.⁶

B. Calls

1. To protect pre-1950 appropriative rights under Article V(A) of the Compact, Montana must place a call. Wyoming is not liable for flow impacts that take place when a call is not in effect.⁷

2. Subject to paragraph B(3), Montana may place a call on the Tongue River whenever (a) a pre-1950 direct flow right in Montana is not receiving the water to which it is entitled, or (b) Montana reasonably believes, based on significant evidence, that the Tongue River Reservoir might not fill to capacity before the end of the calendar year.⁸

⁵ Mont. B(13); Wyo. II(G)(2nd sentence), II(G)(i). The paragraph avoids reference to "present administration of waste" (as Montana suggests it should), because I have not had any opportunity to evaluate current administration of water rights in Montana. The trial dealt only with administration in 2004 and 2006.

⁶ Mont. B(16)-B(18), B(22); Wyo. II(I)(iv)-(v). This paragraph expressly provides that each state's reservoir accounting rules will apply to reservoirs within its borders. It thus implicitly incorporates Montana's proposed ¶ 22, which would have provided that Wyoming's Early-Fill Rule and Store-It-Or-Lose-It Rule do not apply to Montana reservoirs.

⁷ Mont. B(1); Wyo. II(I). The language of the second paragraph is meant to accomplish the same purpose as Wyoming's proposed paragraph II(I). Wyoming is not liable for flow levels if a call is not in effect. However, contrary to the language of Wyoming's proposed paragraph II(I), Wyoming has a general obligation to regulate and administer its water rights to avoid violating Article V(A).

⁸ Mont. B(1), B(6); Wyo. II(J)(i). In the case of proposed ¶ B(2)(b), no provision of the Compact sets out the type of flat rules, based purely on reservoir levels, suggested by Montana. Although clear, easy-to-apply rules for when Montana would make it easier for Montana to determine when it can make a call (and make it easier for Wyoming to determine whether a call is appropriate), the Compact provides for no basis for establishing any particular set of rules. The parties must adopt such rules either directly or through the Yellowstone River Compact Commission. However, the Compact also does not require Montana to have any *specific* evidence at the time that it makes a call, although a call must be *based on evidence that justifies Montana making a call*. Consistent with general contract rules, I have provided that Montana must "reasonably believe" that the Reservoir might not fill, "based on significant evidence." Although the

3. Montana cannot place a call under Article V(A) when it can remedy shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact.⁹

4. A call need not take any particular form, use any specific language, or be delivered by or to any particular official, but should be sufficient to place Wyoming on clear notice that Montana believes it needs additional water to satisfy its pre-1950 appropriative rights.¹⁰

5. A call is effective upon receipt by Wyoming and continues in effect until Montana notifies Wyoming that Montana is lifting the call.¹¹

6. Montana shall promptly notify Wyoming that it is lifting a call when (a) pre-1950 direct flow rights in Montana are receiving the water to which they are entitled, and (b) Montana has reasonable grounds, based on significant evidence, to believe that the Tongue River Reservoir will fill to capacity before the end of the calendar year. Montana may initiate a new call at a later point if the conditions of paragraph B(2) are again met.¹²

formulation in this paragraph focuses on reasonable belief, the language is consistent with pages 78-79 (footnote 20) of the Second Interim Report, which notes that Montana can make a call when there is "significant evidence showing that, without more, the Reservoir might not fill."

⁹ Mont. A(13); Wyo. II(G)(1st sentence), II(G)(ii). Although my wording is different from that suggested by Montana and Wyoming, this paragraph is meant to accomplish the same purpose. The placement of the paragraph here clarifies that the question of intrastate regulation arises when Montana is considering making a call. If intrastate remedies are sufficient, Montana cannot make a call. Conversely, when intrastate remedies are not sufficient, the appropriate remedy is a call. I have not included the second sentence of Montana's proposed ¶ A(13) ("Where this is not possible ..."), which is duplicative of ¶ B(7) in this Decree that requires Wyoming to avoid interferences with Montana's pre-1950 rights when a call is in effect.

¹⁰ Wyo. II(H). The operative language in this language comes from p. 61 of the Second Interim Report. The Second Interim Report is clear that a call does not need to include a request that "Wyoming regulate its post-1950 appropriative rights for the benefit of Montana's pre-1950 appropriative rights" (see p. 59), as Wyoming's language would suggest, although Montana would be wise to include such language in future calls for total clarity.

¹¹ Mont. B(8)(3rd & 4th sentences).

¹² Mont. B(6), B(11). The Compact provides no basis for requiring Montana to lift a call within any set period of time. The proposed language therefore requires Montana to provide "prompt" notification rather than notification within two business days.

7. Upon receiving a call, Wyoming shall promptly initiate action to ensure, to the degree physically possible, that only pre-1950 appropriators in Wyoming are diverting or withdrawing water and only to the degree permitted by their appropriative rights and this Decree. Wyoming shall be liable for diversions or withdrawals in violation of Article V(A) of the Compact even if it was not possible for Wyoming to prevent the diversions or withdrawals. Wyoming shall notify Montana of the actions that it is taking and, when requested, provide Montana with reasonable documentation of these actions (including records of reservoir operations, hydrographer reports, and field notes).¹³

C. Pre-1950 Appropriative Rights in Wyoming

1. The Compact assigns the same seniority level to all pre-1950 water users in Montana and Wyoming. Except as otherwise provided in this Decree, the exercise of pre-1950 appropriative rights in Wyoming does not violate the Compact rights of pre-1950 appropriative rights in Montana.¹⁴

2. Article V(A) does not prohibit Montana or Wyoming from allowing a pre-1950 appropriator to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands to which the specific pre-1950 appropriative rights attaches, even when the increased consumption interferes with pre-1950 uses in Montana. Article V(A) protects pre-1950 appropriators in Montana from the use of such

Commented [BT2]: I have chosen this language to address (1) the possibility that a farmer may have rotated his or her fields (and thus not have been using particular acreage on January 1, 1950), (2) the possibility that a farmer may have legitimately changed his or her place of use prior to making conservation changes, or (3) similar issues. I am happy to entertain alternative language.

¹³ Mont. B(7), B(9), B(1). The proposed language recognizes that Wyoming may not be able to physically prevent some post-1950 uses in the case of a call (e.g., if snow prevents Wyoming from releasing water from post-1950 reservoirs that are accumulating water). However, the language also provides that any Wyoming remains liable to Montana in such cases. The proposed language seeks also to set out Wyoming's requirements without reference to terms such as "adjudicated amounts" that could lead to disagreement and controversy. Finally, while requiring Wyoming to notify Montana of the actions that it is taking (which are implicit in the Compact requirements), the Decree does not incorporate specific timing requirements not found in the Compact (e.g., a requirement that Wyoming notice Montana of its actions within two business days or that documentation be furnished within ten business days).

¹⁴ Mont. A(10); Wyo. II(C). The second sentence makes clear that the exercise of pre-1950 rights in Wyoming does not violate Article V(A) *except as otherwise provided in the Decree*.

conserved water in Wyoming on new lands or for new purposes. Such uses fall within Article V(B) of the Compact and cannot interfere with pre-1950 appropriative rights in Montana.¹⁵

3. Pre-1950 appropriators in Montana and Wyoming may change their place of use, type of use, and point of diversion pursuant to applicable state law, so long as any such changes in Wyoming do not prevent sufficient water from reaching pre-1950 appropriative rights in Montana when those rights are unsatisfied.¹⁶

D. Wyoming Storage Reservoirs

1. Under Article V of the Compact, post-1950 appropriators in Wyoming may not store water when the water is needed to satisfy pre-1950 appropriative rights in Montana and Montana has issued a call. Post-1950 appropriators in Wyoming may store water during periods when Montana has not made a call.¹⁷

2. Water stored under post-1950 appropriative rights in Wyoming when a call is not in effect has been legally stored under the Compact and can be subsequently used at any time, including when pre-1950 appropriative rights in Montana are unsatisfied. The

¹⁵ Mont. A(3). As discussed in the textual box, I have revised part of Montana’s proposed language to better reflect the limits of where conserved water can be used. Both parties are free to suggest alternative language if they believe that my language is inaccurate.

¹⁶ Mont. A(1)(c), A(11), A(12); Wyo. II(D). Wyoming’s proposed language that changes are permitted “within the legal parameters of the appropriative rights” is ambiguous and overly broad. As Montana suggests, this language could be read to permit changes that would injure pre-1950 appropriative rights in Montana in violation of Article V(A). The new language makes it clear that changes are permitted under Wyoming law, but not if they would injure pre-1950 appropriators in Montana. This is consistent with standard prior appropriation doctrine and the analysis in the First Interim Report (see pp. 66-71). This paragraph therefore incorporates the substance of Montana’s proposed ¶ A(1)(c), A(11), and A(12).

¹⁷ Mont. A(1)(b), A(1)(d); Wyo. II(I)(i). I have not included the language of Montana’s proposed ¶ A(1)(d) because, although it comes from page 89 of my First Interim Report, I do not believe that the language adds anything to the simple requirement that “post-1950 appropriators in Wyoming may not store water when the water is needed to satisfy pre-1950 appropriative rights in Montana and Montana has issued a call.” Indeed, the language seems unnecessarily confusing when included in the Decree (versus in the context of the First Interim Report). Montana, however, is free in its comments to explain why its language has independent significance.

Compact does not require Wyoming to release such water to Montana in response to a call.¹⁸

E. Tongue River Reservoir

1. Article V(A) protects Montana’s right to store up to, but not more than, 72,500 acre feet of water in the Tongue River Reservoir, less carry-over storage as of October 1 of the water year. If the Tongue River Reservoir begins the water year on October 1 with over 6,571 acre feet of carryover water, Article V(A) protects Montana’s right to fill the Tongue River Reservoir to its current capacity of 79,071 acre feet.¹⁹

2. Montana must avoid wasting water in its operation of the Tongue River Reservoir by not permitting outflows during winter months that are not dictated by good engineering practices. Any wasteful outflows reduce the amount of water storage protected under Article V(A) for that water year.²⁰

3. The reasonable range for winter outflows from the Tongue River Reservoir is 75 to 175 cubic feet per second. The appropriate outflow at any particular point of time varies within this range and depends on the specific conditions, including the needs of downstream senior water rights and risks such as ice jams and flooding. Montana enjoys significant discretion in setting the appropriate outflow within this range and in other reservoir operations.²¹

F. General Reservoir Rules

¹⁸ Mont. A(2); Wyo. II(I)(ii), II(I)(iii).

¹⁹ Mont. A(5); Wyo. II(J).

²⁰ Wyo. II(J)(ii). I have tried refining the language so that the exact requirements are clearer.

²¹ Mont. B(12), B(20); Wyo. II(J)(iv). The paragraph is different than those suggested by either Montana or Wyoming, but is consistent with the language at pages 153-154 of the Second Interim Report.

1. Article V(A) of the Compact does not protect water stored exclusively for non-depletive purposes, such as hydroelectric generation and fish protection.²²

2. Montana and Wyoming must operate and regulate reservoirs on the Tongue River in a fashion that is generally consistent with the appropriation laws and rules that govern similar reservoirs elsewhere in each respective state.²³

3. Reservoirs on the Tongue River in Montana or Wyoming cannot substantially change their operating procedures in a way that causes injury to appropriative rights in the other state.²⁴

G. Information

1. Appendix A to this Decree lists Montana's pre-1950 water rights in the Tongue River basin that are protected by Article V(A) of the Compact.²⁵

2. Appendix B to this Decree lists Wyoming's current post-1950 water rights in the Tongue River basin.²⁶

²² Wyo. II(J)(iii). I have refined the language and made it more general. Montana argues that Wyoming's proposed language does not address an issue that has arisen in the case and is unlikely to become a matter of dispute in the future. I did address the issue at page 111 of my Second Interim Report, however, and the proposed language would seem undeniably consistent with the Compact. The issue also arose in the first phase of the case, albeit in connection with the legitimacy of winter *outflows* for fish protection purposes. At the same time, I agree that the Decree should not address purely hypothetical issues that are unlikely to arise in the near future. Montana therefore is free to renew its objection to this language if it wishes in its comments on this proposed Decree (and Wyoming is then free to respond as to why the provision should be included).

²³ Wyo. II(J)(v). This paragraph incorporates the principle set out at page 154 of the Second Interim Report. However, I have broadened the provision to apply to both Montana and Wyoming, since the principle should apply under the Compact to both states.

²⁴ Wyo. II(J)(vi). This paragraph incorporates the principle set out at pages 154-155 of the Second Interim Report. However, I have broadened the provision to apply to both Montana and Wyoming, since the principle should apply under the Compact to both states.

²⁵ Mont. A(4). Appendices that list key data for implementing a compact or decree are appropriate and have been used by the Supreme Court in previous decrees.

²⁶ Mont. A(6). As just noted, appendices that list key data for implementing a compact or decree are appropriate and have been used by the Supreme Court in previous decrees. After reviewing the briefs of both Montana and Wyoming, I also was not convinced that compiling this appendix would be a significant burden on Wyoming.

3. Montana and Wyoming shall exchange information, as reasonable and appropriate, relevant to the effective implementation of Article V(A) of the Compact. In particular, Montana and Wyoming will keep each other informed of any changes in the water rights listed in Appendices A and B. Montana and Wyoming also shall provide the other State annually with any data available in the ordinary course of water administration that shows the amount and location of groundwater pumping in the Tongue River and Powder River basins. The Yellowstone River Compact Commission remains free to modify or supplement the terms of this paragraph pursuant to its authority under the Compact.²⁷

H. Rights of the Northern Cheyenne Tribe

Nothing in this Decree addresses or determines the water rights of any Indian Tribe or Indian reservation or the status of such rights under the Yellowstone River Compact.²⁸

I. Retention of Jurisdiction

Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree.²⁹

²⁷ Mont. B(14), B(15). Courts have frequently found that contracts include implied terms designed to allow for the reasonable implementation and enforcement of the contracts. The terms of this paragraph are consistent with such implied terms. Wyoming has not shown that the requirements set out in this paragraph would be onerous for it to implement (but is free to make such a case in its comments on the proposed Decree). The paragraph allows the Compact Commission to establish alternative procedures.

²⁸ Mont. C. The paragraph uses the language at pp. 159-160 of my Second Interim Report.

²⁹ Mont. D. As Montana notes, provisions of this nature are normally included in decrees in original jurisdiction cases before the United States Supreme Court. Continuing disagreements among the parties also militates for continuing jurisdiction.

Cross-References: Proposed Montana Decree

Paragraph in Montana Decree	Paragraph in Special Master Decree
A(1)(a)	A(1)
A(1)(b)	D(1)
A(1)(c)	C(3)
A(1)(d)	D(1)
A(2)	D(2)
A(3)	C(2)
A(4)	G(1)
A(5)	E(1)
A(6)	G(2)
A(7)	A(2)
A(8)	A(3)
A(9)	A(3)
A(10)	C(1)
A(11)	C(3)
A(12)	C(3)
A(13)	B(3)
B(1)	B(1)
B(2)	B(2)(a)
B(3)	No equivalent ³⁰
B(4)	No equivalent ³¹
B(5)	No equivalent ²
B(6)(1 st sentence)	B(2)(a)
B(6)(2 nd sentence)	B(6)(2 nd sentence)
B(7)	B(7)
B(8)(1 st & 2 nd sentence)	No equivalent ³²

³⁰ Montana’s proposed ¶ B(3) would seem unnecessary. ¶ B(3) of the Decree already requires Montana to address shortages through intrastate means prior to making any call for the benefit of the Tongue River Reservoir. Under that provision, Montana would necessarily have to ensure that pre-1950 appropriators in Montana upstream of the Reservoir are not using more than their appropriate amounts and that post-1950 appropriators in Montana upstream of the Reservoir are not using water at all. By trying to provide greater specificity to the general requirement, Montana’s proposal risks accidentally ignoring situations where Montana might need to regulate other water uses.

³¹ As explained in the draft Decree, Montana must “reasonably believes, based on significant evidence, that the Tongue River Reservoir might not fill to capacity before the end of the calendar year.” See ¶ B(2)(b). Although implementation of the Compact would benefit from the type of clear rules that Montana suggests in its proposed ¶¶ B(4) and B(5), the Compact does not provide any clear basis for these or any other rules. Given the language of the Compact, there is no reason to prefer one set of clear rules versus another. The proposed language of the Decree is based both on the language of the Second Interim Report (pp. 78-79 n.20) and general contract-interpretation rules that require parties to act reasonably in implementing a contract.

Paragraph in Montana Decree

Paragraph in Special Master Decree

B(8)(3rd & 4th sentences)
B(9)
B(10)
B(11)
B(12)

B(5)
B(7)
B(7)
B(6)
E(3)(3rd sentence)

B(13)
B(14)
B(15)
B(16)
B(17)

A(4)
G(3)
G(3)
A(5)³³
A(5)⁴

B(18)
B(19)
B(20)
B(21)
B(22)

A(5)⁴
No equivalent³⁴
E(3)
No equivalent³⁵
A(5)

C
D

H
I

³² As I concluded in my Second Interim Report, the Compact does not require that a call be made by any particular Montana official and to any particular Wyoming official. It also does not require the oral notices be reduced to writing within any set period of time. Although Montana is free to use the rules that it has set out in its proposed ¶ 8, it is not required to do so. The language of ¶ B(4) of the proposed Decree therefore simply notes that the Compact does not require calls to take any particular form.

³³ As explained in my cover memo, I do not believe that it is appropriate to include specific reservoir accounting rules in the Decree, since the rules simply restate state laws (which, in theory, could change). Instead, the Decree includes a general statement that state law prevails except as otherwise stated in the Decree or Compact.

³⁴ Montana points to no previous point in these proceedings where this issue was resolved, and there is no showing that the issue is of imminent importance. Although the issue might arise in the future, I am hesitant to unnecessarily reach to resolve issues in this proceeding. Based on argument at the hearing, the proposed paragraph also appears to be inconsistent with Wyoming law.

³⁵ As noted earlier, burdens of proof would not seem to be appropriate subjects for the Decree. Others provision of the Decree make clear that Wyoming has a responsibility to comply with calls once they are made. Wyoming, of course, remains free to ignore a call if it believes it is illegitimate, but Wyoming does so at the risk of being found liable for its failure to comply.

Cross-References: Proposed Wyoming Decree

Paragraph in Wyoming Decree	Paragraph in Special Master Decree
II(A)	A(2)
II(B)	A(3)
II(C)	C(1)
II(D)	C(3)
II(E)	A(1)
II(F)	No equivalent ³⁶
II(G)(1 st sentence)	B(3)
II(G)(2 nd sentence)	A(4)
II(G)(i)	A(4)
II(G)(ii)	B(3)
II(H)	B(4)
II(I) -- generally	B(1)(2 nd sentence)
II(I)(i)	D(1)(2 nd sentence)
II(I)(ii)	D(2)
II(I)(iii)	D(2)
II(I)(iv)	A(5) ³⁷
II(I)(v)	A(5) ²
II(I)(vi)	A(5) ²
II(J)	E(1)
II(J)(i)	B(2)(b)
II(J)(ii)	E(2)
II(J)(iii)	F(1)
II(J)(iv)	E(3)
II(J)(v)	F(2)
II(J)(vi)	F(3)
II(J)(vii)	No equivalent ³⁸

³⁶ As noted at page 209 of the Second Interim Report, groundwater pumping in Wyoming (not covered by a pre-1950 appropriative right) “violates the Compact when it interferes with the enjoyment of pre-1950 appropriative rights in Montana.” Paragraph A(1) of my proposed Decree, however, already makes this point. Wyoming’s proposed provision does not add anything and, by quoting the language “from at least some forms of groundwater” from the First Interim Report, could potentially confuse the question of when groundwater withdrawals violate the Compact.

³⁷ As explained in my cover memo, I do not believe that it is appropriate to include specific reservoir accounting rules in the Decree, since the rules simply restate state laws (which, in theory, could change). Instead, the Decree includes a general statement that state law prevails except as otherwise stated in the Decree or Compact.

³⁸ As noted in my cover memo, I do not believe that it is appropriate to set out specific evidentiary rules or burdens of proof in the Decree. The Decree already provides that Montana cannot engage in wasteful practices. See ¶ A(4).