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.

♦

Before the Honorable Barton H. Thompson, Jr.
Special Master

♦

MONTANA'S RESPONSE TO WYOMING'S PROPOSED DECREE AND BRIEF, WITH REVISED JUDGMENT AND DECREE

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MONTANA'S RESPONSE

I. Introduction

This Response is filed in accordance with Case Management Order No. 18. It responds to Wyoming's Proposed Decree and Brief filed on February 27, 2017 ("Wyoming's Proposal" or "Wy. Pr."), which responded to Montana's Proposed Judgment and Decree and Brief in Support filed on February 10, 2017 ("Montana's Initial Proposal" or "Mt. Pr."), as required by the Opinion of the Special Master on Remedies, dated December 19, 2016 ("Opinion" or "Op."). A revised Proposed Judgment and Decree, dated March 13, 2017, in Word electronic format ("Decree") is submitted herewith.

This Response consists of two sections. The first section (II) responds to Wyoming's arguments and analyzes Wyoming's proposed Decree. The second section (III) is a paragraph-by-paragraph explanation of the provisions of Montana's Proposed Judgment and Decree submitted herewith.

II. Certain Provisions of Wyoming's Proposal Are Unsupported or Misleading

A. Wyoming Takes an Improperly Restrictive View of the Proposed Decree

Underlying Wyoming's Proposed Decree and its Brief in Support is an improperly restrictive view of the purpose of the Decree. It is evident from its submittals that Wyoming takes the position that the Decree should be limited to a recitation of the language of past decisions, even if those recitals are taken out of context. Thus, Wyoming spends much of its Brief complaining about "new obligations" and provisions of Montana's Proposed Decree that go "beyond the rulings in this case." Wyo. Br. 6-11. But the Special Master has eschewed this restrictive approach and made clear that the purpose of the Decree is to identify the "rights and responsibilities" of the States, "enable Montana to defend its rights under the Compact," "deter prospective violations,"

and "reduce any uncertainty that [Wyoming] has regarding its obligations." Opinion of the Special Master on Remedies 27, 30 (Dec. 19, 2016) ("Op." or "Opinion"); *see also Kansas v. Nebraska*, 135 S.Ct. 1042, 1052 (2015) (the Court may adopt a remedy that "'in its judgment will best promote the purposes of justice'").

To guide the efforts of the States, the Special Master identified five principles for crafting the Decree. As discussed in its opening brief, Montana used those principles as the foundation for its Proposed Decree. Contrary to Wyoming's approach, the third principle articulated by the Special Master is that the States may "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)." Op. 32 (emphasis in original). Each of the provisions proposed by Montana is either an unambiguous finding or conclusion of the Court or Special Master, or a provision that is directly related and "critical to effective implementation of Article V(A)."

B. Response to Issues Raised in Wyoming's Brief

Montana responds to the primary issues raised by Wyoming in its Brief as follows:

1. <u>Wyoming's Proposed Paragraph II.D Would Significantly Expand Wyoming's Rights to Montana's Detriment</u>

In its Proposed Paragraph II.D, Wyoming invites the Special Master to include language in the Decree that would significantly expand Wyoming's rights beyond what is allowed by the prior orders of the Court and Special Master.

The Special Master concluded in the First Interim Report that "the Compact does not prohibit Wyoming from allowing pre-1950 appropriators in the State to increase their consumption of water *on lands they were irrigating as of January 1, 1950* by improving their irrigation systems, even when that reduces the runoff that reaches Montana." FIR 86 (emphasis added). In its 2011

decision, the Court agreed. While acknowledging that "the no-injury rule prevents appropriators from making certain water-right changes that would harm appropriators," 563 U.S. at 378, it found that the no-injury rule does not apply to "improvements in irrigation efficiency," *id*. at 380, on the same lands and for the same purposes. According to the Court, rather than "improvements to irrigation systems," the no-injury rule generally applies to "changes in the location of the diversion and the place or purpose of use." *Id*. at 378 (citations omitted).

Montana included Proposed Paragraph A.3 in its initial Proposed Decree that carefully tracked the language of the First Interim Report. *Compare* FIR at 90, ¶ 7 *with* Montana Proposed Paragraph A.3. In its Brief, Wyoming argues for the first time that this language should be expanded. Specifically, it suggests that the Decree should abandon the restriction that this principle should apply only to irrigation on "the same lands that they were irrigating as of January 1, 1950." Instead, Wyoming requests that the Decree allow all pre-1950 rights "to change their water use efficiency, consumptive use, and return flow volumes and timing" without restriction "within the legal parameters of the appropriative rights." Wyoming Proposed Paragraph II.D. There are three problems with Wyoming's request.

First, Wyoming's Proposed Paragraph II.D is not consistent with the findings of the Court and Special Master in that Wyoming's proposal would significantly expand Wyoming's rights. Instead of limiting increased consumption to the same use on acreage being irrigated in 1950, it would allow all pre-1950 rights to expand their efficiency and consumptive use to the detriment of Montana, regardless of whether basic components of the rights have been changed. Presumably, this would allow Wyoming to circumvent the Court's limitations by enabling its water users to change rights to new lands or new purposes, and still increase

consumptive use in violation of the no-injury rule. That was not contemplated by the Court or Special Master, and it should be rejected.

Wyoming self-consciously admits that its proposal represents a "deviation from the language of the existing opinions," Wyo. Br. 4, but suggests that it should be adopted "to prevent future confusion," *id*. at 5. But there is nothing confusing about the long-standing no-injury rule that "prohibits appropriators from changing the purpose or place of their water use, or the point from which they divert the water, if that change would injure downstream appropriators by decreasing return flows upon which they rely." FIR 67. Indeed, "[s]tatutes in both Montana and Wyoming codify this rule." *Id*. (citing Mont. Code Ann. § 85-2-402; Wyo. Stat Ann. § 41-3-104). Simply put, if a pre-1950 water right in Wyoming seeks to change one of the cardinal aspects of the right, then the no-injury rule will apply, and the right will be limited to its historic beneficial use.

Second, Wyoming is asking the Special Master to undo a ruling of the Supreme Court. Because the Court itself held that the no-injury rule applies to changes to the cardinal aspects of water rights, the Special Master lacks the authority to modify this principle.

Third, as discussed above, the "prior appropriation doctrine has long protected downstream appropriators from formal changes in upstream water rights that reduce return flow to the waterway and thereby reduce the amount of water available to the downstream appropriators." FIR 66. Whether intentional, or not, Wyoming's Proposed Paragraph II.D is inconsistent with the doctrine of appropriation, and therefore is inconsistent with the Compact.

Montana has no quarrel with refining the language of the Court and Special Master so long as it accurately reflects the doctrine of appropriation, but the language proposed by Wyoming in

its Proposed Paragraph II.D does not accomplish that task. Instead, as illustrated above, it would allow an expansion of water rights in Wyoming. Assuming that Wyoming was attempting to accurately reflect the doctrine of appropriation, Montana has included language in its Paragraphs A.3, A.9, A.11 and A.12 to accomplish this goal.

2. <u>Montana's Proposed Decree Accurately Reflects the Previous Orders of the Court and Special Master</u>

As the downstream State, Montana has been and will continue to be at the mercy of Wyoming to receive its share of water. From its inception, this case was about whether the Court should declare Montana's rights and provide clear guidance for future compliance. In contrast, Wyoming has resisted every effort in this case to develop lasting and meaningful relief that will guide the future actions of the States. Claiming that Montana's Proposed Decree must track the language of past orders *exactly* and arguing that "Montana's proposed decree is neither adequate nor accurate," Wy. Pr. 6, is but Wyoming's latest tactic.

Wyoming asserts that Montana "is attempt[ing] to change the outcome of this case." *Id*. This is not correct. Rather, as Montana has previously explained, "Montana largely agrees with the Second Interim Report of the Special Master," Mont. Exception and Br. 1 (April 9, 2015), and has attempted to faithfully capture the principles outlined by prior orders of the Court and Special Master in its Proposed Decree. As discussed above, however, this does not mean the language of the Proposed Decree must be limited to the exact language contained in those orders. Instead, the Decree should distill the essential principles, and provide guidance for future interactions of the States.

3. <u>Attaching a List of Wyoming's Post-1950 Rights Will Provide a Valuable Resource</u>

Next, Wyoming argues that "the new requirement that Wyoming provide a list of its post-1950 water rights to Montana also serves no useful purpose." Wy. Pr. 8. To the contrary, such an appendix would provide a valuable resource for identifying the rights that need to be regulated in the event of call by Montana. It would thereby eliminate uncertainty and help avoid future disputes.

4. Montana Has Modified Its Proposed Decree to Include the Orders on Intrastate Remedies

Wyoming complains that Montana omitted the Special Master's orders on intrastate remedies. As discussed in Sections II.C and III below, Montana has incorporated those provisions in response to Wyoming's concerns.

5. Montana Has Modified Its Proposed Decree to Reflect the Special Master's Findings on the Operation of the Tongue River Reservoir

Wyoming argues that Montana's former Paragraph B.13 improperly reflected the discretion accorded to Montana in operating the Tongue River Reservoir. The language formerly contained in that Paragraph was an inarticulate attempt at stating that if Montana is not attempting to assert its Compact rights, then Wyoming has no cause to complain about Montana's operations of the Tongue River Reservoir. In response to Wyoming's concerns, Montana has removed that language. While not without limit, in the Second Interim Report, the Special Master made clear that "Montana should be given significant discretion in how it sets its winter outflows." SIR 154. In Montana's attached revised Proposed Judgment and Decree, Montana has replaced the former language with a provision that closely tracks this language.

6. Wyoming Is Required to Regulate All Post-Compact Rights in Response to a Call

Wyoming complains about the proposed Decree provisions requiring Wyoming to curtail its water rights in response to a call. Wy. Pr. 10. But as discussed below in response to Wyoming's

Proposed Paragraph II.I, it is black letter law that the doctrine of appropriation requires a junior user to curtail its water right in response to a call. The Special Master agreed, holding that Wyoming "must ensure that it does not divert water for post-1950 storage or use when Montana has inadequate water for its pre-1950 rights." SIR 46. This is particularly appropriate in this case where the rights of the two States are treated as blocks. If Wyoming contends that curtailing certain rights would be futile, it bears the burden of establishing that fact. Montana's revised Proposed Decree has been modified to reflect this principle.

Inasmuch as Wyoming complains about groundwater, the evidence at trial established that Wyoming regulates groundwater wells located close to the creeks and rivers. Montana's Proposed Decree would impose no additional burdens on Wyoming beyond what the doctrine of appropriation requires in response to a call from a Wyoming water user.

7. Wyoming Should Not Recognize "Free River" and "Surplus Water" Conditions When There is a Montana Call

Wyoming asserts that Montana is attempting to "alter the obligations imposed by the Court" because "surplus water is part of an adjudicated right." Wyo. Br. 10-11. Wyoming Statutes §§ 41-4-318 provide for an extra cfs of water when the stream has an "excess [beyond] the total amount required to furnish to all existing appropriations" their permitted amount. In interpreting this provision, the Wyoming Supreme Court clarified that if there is limited water, the rights "are regulated on a strict priority basis." *Budd v. Bishop*, 543 P.2d 368, 369-70 (Wyo. 1975). Thus, when a Montana call is in effect, there is likely no "surplus water" and certainly no "free river."

C. Comments on the Provisions of Wyoming's Proposed Decree

Montana has the following comments on each of Wyoming's Proposed Paragraphs. Where the proposed provision "accurately sets forth . . . the rights and obligations of both parties' as they

have been determined over the course of this litigation," Wy. Pr. 3, Montana has incorporated them into the attached integrated Proposed Decree as indicated below, and in Section III of this Response.

Wyoming Proposed Paragraph II.A: Wyoming's Proposed Paragraph II.A is mostly unobjectionable. The language "applies to" is confusing, however, so Montana has proposed a change to "apportions" as reflected in Montana's Proposed Paragraph A.7.

Wyoming Proposed Paragraph II.B: Montana has incorporated Wyoming's Proposed Paragraph II.B into Montana's Proposed Paragraph A.8, but has modified Wyoming's language to accurately reflect the decisions of the Court and Special Master. Without these changes, Wyoming's Proposed Paragraph II.B does not provide sufficient guidance to the States because it focuses on a negative rather than how pre-Compact water rights *are* protected. Wyo. Proposed Decree ¶ II.B ("the Yellowstone River Compact does not guarantee Montana . . . "). The inserted language will provide helpful guidance to the States.

Wyoming Proposed Paragraph II.C: Montana has incorporated Wyoming's Proposed Paragraph II.C into Montana's Proposed Paragraph A.10.

Wyoming's Proposed Paragraph II.D: As discussed in section II.B of this Response, Wyoming's Proposed Paragraph II.D represents an astonishing attempt to expand the prior decisions of the Court and Special Master to the detriment of Montana. Wyoming's proposal should be summarily rejected. To the extent that Wyoming is intending to refine the language of the prior orders to accurately reflect the doctrine of appropriation, Montana has proposed language in its Proposed Paragraph's A.3, A.9, A.11, and A.12.

Wyoming Proposed Paragraph II.E: Montana does not object to Wyoming's Proposed Paragraph II.E, and the principles it embodies are included in Montana's Proposed Decree Paragraph A.1.

Wyoming Proposed Paragraph II.F: Montana does not object to Wyoming's Proposed Paragraph II.F, and the principles it embodies are included in Montana's Proposed Decree Paragraph A.1.

Wyoming Proposed Paragraph II.G: Montana has incorporated Wyoming's Proposed Paragraph II.G into Montana's Proposed Paragraph A.13, but has modified Wyoming's language to accurately reflect the decisions of the Court and Special Master. In part, Montana has included language drawn from the Second Interim Report to reflect that "Wyoming has the burden of showing that Montana could have avoided the need for an interstate call by regulating post-1950 uses in Montana." SIR 40, 223. This language is important to take account of the full conclusion of the Special Master, which was not excepted to, and to provide guidance to the States for future calls.

Wyoming Proposed Paragraph II.G.i & ii: Similarly, Montana has incorporated the principles embodied in Wyoming's Proposed Paragraph II.G.i & II.G.ii into Montana's Proposed Paragraphs B.20 and B.21 to the extent warranted.

Wyoming Proposed Paragraph II.H: Wyoming's Proposed Paragraph II.H contains proposed language on the required notice that Montana must give prior to a call. The language proposed by Wyoming is problematic because it is inconsistent with the requirements adopted by the Special Master. After trial, as it does in Proposed Paragraph II.H, Wyoming argued that in providing notice, Montana was required to specifically "request[] that Wyoming regulate its post-

1950 appropriative rights for the benefit of Montana's pre-1950 appropriative rights." That argument was rejected, and the Special Master found that "nothing in the Compact or the general law of prior appropriation mandates that the 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." SIR 59. Montana has included a specific proposal for the notice that is required in Montana's Proposed Paragraphs B.2 and B11.

Wyoming's Proposed Paragraph II.I: Wyoming's Proposed Paragraph II.I is problematic due to its limitation of the post-1950 rights that it must administer to those "that prevent sufficient water from reaching the border." Under the prior rulings of the Court and Special Master, Wyoming "must ensure that it does not divert water for post-1950 storage and use when Montana has inadequate water for its pre-1950 rights." SIR 46. This obligation is not qualified, and Wyoming's proposed language to the contrary should be rejected.

To the extent that Wyoming is raising the futile call doctrine with its proposed language, it offered no evidence at trial that regulation of specific Wyoming rights would have been futile, so there is no support for this provision. If the futile call concept embodied in Wyoming's proposed language is included, the Decree should indicate that Wyoming bears the burden of establishing that a call is futile. SIR 225. Montana's Proposed Paragraph B.21 incorporates this principle.

Wyoming's Proposed Paragraphs II.I.i through vi: Wyoming's Proposed Paragraphs II.I.i through vi are generally acceptable to Montana, and, to the extent they are not redundant, have been incorporated into Montana's integrated proposal as Proposed Paragraphs A.2 and B.16 through B.18.

Wyoming's Proposed Paragraphs II.J: Wyoming's Proposed Paragraph II.J is generally acceptable to Montana. The principles embodied in Wyoming's proposed language are included in Montana's integrated proposal, as Proposed Paragraph A.5.

Wyoming's Proposed Paragraphs II.J.i: Wyoming's Proposed Paragraph II.J.i is problematic due to its limitation that Montana is only allowed to make a call when "there is significant evidence showing that, without more water, the Reservoir might not fill to that capacity." There are several problems with the proposed language. First, Wyoming has cherry-picked language from a footnote, taken out of context, as a support for the provision. But the language is generally not consistent with the broader principle that "Montana must notify Wyoming that it needs additional water for its pre-1950 appropriative rights." *E.g.*, SIR 47. There is nothing in the doctrine of appropriation which requires that a downstream senior provide "significant evidence" that its storage right will not fill, and trial established that such a practice is not required in Wyoming or Montana. Simply put, if a valid right is not yet filled, then the senior has the right to make a call.

At trial, Montana argued in favor of a basin-wide approach to reservoirs in which the storage situation would be assessed at the end of the year, and the water shepherded to the senior-most right. This reasonable approach would have allowed the States to make most efficient use of storage water in the basin, and the evidence showed that this principle of "highority" is practiced in Wyoming. SIR 189. Wyoming argued against application of the principle, however, and the Special Master agreed, concluding that "highority is not embodied in the prior appropriation doctrine and is not to be found in the language of the Compact." *Id.* Instead, the Special Master concluded that Montana was required to place a call, and the date of notice is "critical" because "[b]efore the notice, the junior appropriator is free to continue to divert water." SIR 62. Thus, only after placing a call can Montana demand water from Wyoming. The evidence at trial also

showed that conditions in the basin can change rapidly. SIR 97 (recognizing that "conditions suddenly changed in late July" of 2006). Combining the two legal findings of no highority and the critical nature of the call date, with the practical reality of rapid changes in the basin, leaves Montana no choice but to make a call whenever the Tongue River Reservoir right is not filled (taking into account the 45,000 winter maximum). If it does not, it risks the possibility that conditions will change, and Montana will have no way to recover the water that was stored in Wyoming before the call. Wyoming's proposed language would unfairly place a qualification on Montana's Tongue River Reservoir.

Equally as important, Wyoming's proposal that the Decree require "significant evidence showing that, without more water, the Reservoir might not fill to that capacity" is certain to lead to future disputes. History has shown that Wyoming will use every tool at its disposal to keep water within its own borders, to the detriment of Montana. Wyoming's Proposed Paragraph II.J.i will give it another weapon to accomplish this task. If this language is included, Wyoming's predictable response to every future call for water for the Tongue River Reservoir is that Montana has not shown, in Wyoming's unilateral judgment, that there is "*significant evidence* showing that, without more water, the Reservoir might not fill to . . . capacity."

Wyoming's proposal should be rejected as contrary to the doctrine of appropriation, unfair to Montana in light of prior rulings, and certain to cause future disputes.

<u>Wyoming's Proposed Paragraph II.J.ii</u>: Wyoming's Proposed Paragraph II.J.ii is generally unobjectionable, so long as the Decree also specifies that it is Wyoming's burden to establish that Montana has wasted water. The principles embodied in Wyoming's Proposed paragraph II.J.ii are incorporated into Montana's integrated proposal at Proposed Paragraphs B.12, B.13, B.20, and B.21.

Wyoming's Proposed Paragraph II.J.iii: Wyoming's Proposed Paragraph II.J.iii is not included because it was not an issue in this case, nor is there any evidence that it is likely to become a matter of dispute.

Wyoming's Proposed Paragraph II.J.iv: Wyoming's Proposed Paragraph II.J.iv is generally acceptable to Montana, and has been incorporated into the integrated proposal as Proposed Paragraph B.20. Montana has modified the language slightly to more accurately reflect the conclusions of the Special Master.

Wyoming's Proposed Paragraph II.J.v through vii: Wyoming's Proposed Paragraphs II.J.v through vii are generally acceptable to Montana, so long as the Decree also reflects that it is Wyoming's burden to establish that Montana has not operated the Tongue River Reservoir appropriately. To the extent they are not redundant, Wyoming's Proposed Paragraphs II.J.v through vii have been incorporated into Montana's integrated proposal at Proposed Paragraphs B.12, and B.20.

III. Montana Has Appropriately Transformed the Rulings in this Case into a Forward-Looking Decree, Incorporating Wyoming's Proposals to the Extent Warranted

Following is a paragraph-by-paragraph description and explanation of the Proposed Judgment and Decree, as revised and attached to this Brief.[1] The division between Judgment and Decree has been retained, based on the form adopted by the Court in *Kansas v. Colorado*, 556 U.S. 98 103-104 (2009). This is a matter of preference for the Special Master and the Court. For another approach, *see Kansas v. Nebraska*, 135 S.Ct. 1255 (2015).

The Judgment section of the Judgment and Decree covers essentially the same subject as part I of Wyoming's Proposed Decree ("Wyoming's Decree" or "Wy. Dec."). The interest

[1] In preparing a final decree, it may be appropriate to reorder the paragraphs.

provision has been changed to agree with the Wyoming proposal that the award of 7% interest be simple interest, not compounded. The attached Montana Judgment makes clear that interest runs until the date on which the principal amount is paid. Payment of interest up to the date on which the principal is paid is standard practice with respect to judgments awarding damages generally and with respect to judgments awarding damages between States. *See, e.g., Kansas v. Colorado*, 556 U.S. 98, 103 (2009) (awarding damages and prejudgment interest to the date of payment).

Wyoming's proposal to include a paragraph denying all other requests for relief and dismissing the complaint with prejudice is included in the form used by the Court in the recent case of *Kansas v. Nebraska*, No. 126, Orig., 575 U.S. ___, 135 Ct. 1255, ¶ 6 (2015).

The Decree is divided into four sections: A. General Provisions, B. Special Provisions, C. No Effect on Rights of Indian Tribes and Reservations, and D. Retention of Jurisdiction. The explanations for each paragraph of the Decree are as follows:

A.1. The general provisions of this paragraph are drawn primarily from the First Interim Report, pages 89-90. The subdivisions of this paragraph address protection of pre-1950 surface water rights in Montana from (a) diversion, (b) storage, (c) irrigation of new acreage and (d) storage for post-January 1, 1950 uses or supplemental water supplies for pre-1950 acreage. The diversion of groundwater is included in paragraph A.1(a) based on the Special Master's determination that groundwater pumping has the potential to violate the Compact: "If Montana shows that CBM groundwater pumping in Wyoming has depleted Stateline flows at a time when the water was needed for pre-1950 appropriative rights in Montana, Montana has established a violation of the Compact." Second Interim Report 211. The inclusion of groundwater is also supported by Wyoming. *See* Wy. Dec. ¶ II.E.

A.2 This provision guarantees that Wyoming may continue to store until Montana makes a call, that the Compact does not require Wyoming to release water from its reservoirs if the water was stored prior to Montana making a call, and that water stored prior to a call can subsequently be used at any time, even if it is ultimately used when pre-1950 appropriative rights in Montana are unsatisfied. This provision thus covers all of the protections for Wyoming in the Wyoming Proposal, ¶¶ I(i)-(iii).

A.3 This provision is essentially a quotation of paragraph 8 on page 90 of the First Interim Report. This interpretation of the Compact was subsequently adopted by the Court. *Montana v. Wyoming*, 563 U.S. 368 (2011). Several words are added to clarify the references. Throughout, references by the Special Master to "post-1950" have been clarified to specify "post-January 1, 1950." Finally, the paragraph is expanded to cover both Wyoming and Montana. While the principle was established in the context of Montana's claim against Wyoming for increased consumption, the protection afforded Wyoming by the Court's ruling is also applicable to Montana. Thus, increased efficiency and diminished return flows from a senior pre-1950 water right in Montana may cause a more junior pre-1950 water right in Montana to call for water earlier. This provision will make clear that changes in the timing of the call by Montana because of increases in efficiency are permitted.

A.4 This provision provides for Appendix A, which will specify Montana's pre-1950 rights in the Tongue River Basin.

A.5 This paragraph sets out the most important Montana right in the Tongue River Basin. This right is set out as determined by the Special Master: "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." Opinion 56. Wyoming made a good attempt to describe the Tongue River Reservoir right, Wy. Pr., ¶ J., but the right is more accurately described by this provision. For instance, references to "capacity" in Wyoming's ¶ J are inconsistent, and the Wyoming provision does not specify that the carryover referenced is the carryover under the 72,500 acre-foot right. Therefore, this description of the right should be adopted.

A.6 This provision refers to Appendix B, which specifies the post-January 1, 1950 water rights in Wyoming. It is necessary to include this list with the Decree so that it is clear which rights must be regulated off during a call. Importantly, being derived from the Wyoming Tab Book, it includes groundwater rights administered in priority with surface water rights. The compilation of such a list, contrary to Wyoming's assertion, Wy. Pr. 6-7, is an easy task. Wyoming has a well-organized listing of water rights, the Tab Book for Division II, in its electronic and hard copy forms. The rights can easily be sorted for rights with priorities after January 1, 1950. *See* Ex. M 5, App. G (Listing of post-January 1, 1950 Wyoming water rights), attached to Montana's Decree as an example of what Appendix B should contain.

A.7 This provision adapts the statement of the Special Master in the First Interim Report at page 116. Further discussion of the subject occurs on pages 90-93. The adaptation adopted in paragraph A.7 is to change the Special Master's word on page 116, first line, "applies" to "apportions." The reason for this adaptation is to put the statement in a more general context beyond the context in which it was made. In the First Interim Report, when he made that ruling, the Special Master was responding to an argument by Wyoming that

"'the Compact does not purport to govern water stored in reservoirs on the tributaries to the Tongue, Powder, and Little Powder, the only reservoirs on about which Montana complains.'" First Interim Report 91, quoting Wyoming's Brief in Opposition to Motion for Leave to File. The language used by the Special Master made perfect sense in the context of the question that was being answered. In the context of a final decree, however, the word "applies" in reference to surface waters might be mistakenly taken to mean that the Compact does not require accounting of groundwater pumping effects on the compacted surface waters. *Cf.,* Wy. Pr. ¶ II.A.

A.8 This paragraph is Wyoming's ¶ II.E modified to match the Special Master's language on page 162 of the Second Interim Report, which is cited by Wyoming as one of the bases for their paragraph. Other appropriate aspects of Wyoming's ¶ II.E are recognized in the paragraphs that follow below.

A.9 This paragraph adopts Wyoming's ¶ II.B to the appropriate extent. Thus, it affirms that Wyoming is not limited to a net volume of water that was actually being consumed prior to January 1, 1950, but it adds the important condition that this is true so long as the cardinal aspects of the pre-1950 water right remain unchanged. The Court made clear that the no-injury rule would apply if any of the cardinal aspects of a water right were changed. Thus, increases in efficiency are allowed only so long as the pre-1950 water rights remain in place. Additionally, this provision is made equally applicable to Montana.

A.10 This paragraph is ¶ II.C from the Wyoming proposal.

A.11 This paragraph adopts ¶ II.D of the Wyoming proposal, except that it removes the freewheeling language of the Wyoming proposal and adds the important proviso that confines its effect to rights that are not changed.

A.12 This paragraph takes the aspect of Wyoming's ¶ II.D that seeks to preserve appropriate flexibility in the transfer of water rights and makes clear that pre-1950 water rights may be changed with respect to place of use, type of use, and point of diversion, provided that the consumptive use and related parameters as they existed as of January 1, 1950, are not changed. This maintains the limitation recognized by the Court in its 2011 decision. *Montana v. Wyoming*, 563 U.S. at 378 ("although the no-injury rule prevents appropriators from making certain water-right changes that would harm other appropriators, a change in irrigation methods does not appear to run afoul of that rule in Montana and Wyoming"). Thus, the Court distinguished between changes in irrigation efficiency alone and changes in water rights that require application of the no-injury rule. This paragraph maintains that distinction.

A.13 This paragraph is essentially Wyoming's ¶ II.G, which originally comes from the First Interim Report at 89. A clarifying date change is made, specifying "January 1, 1950" instead of "new."

B.1 This paragraph confirms the requirement that Montana place a call in order to receive the water due to Montana under the Compact when its pre-1950 water rights are short of water.

B.2 This paragraph confirms that Montana may place a call at any time during the year. It also requires that a call be lifted as soon as Montana's pre-1950 rights are satisfied.

B.3 This paragraph confirms that Montana must, simultaneously with placing a call, ensure that all pre-1950 Montana rights upstream of the unsatisfied pre-1950 right are strictly regulated to their recognized amounts and that all post-January 1, 1950 Montana rights upstream of the unsatisfied pre-1950 right are regulated off.

B.4 This paragraph specifically confirms Montana's right to place a call during the winter season if the Tongue River Reservoir has not reached its maximum winter capacity.

B.5 This is a provision describing the call that may be made by Montana on or after April 1 whenever Tongue River Reservoir has not filled and that may be continued until it reaches the maximum physical capacity, subject to the limits of the 72,500 acre-foot storage right.

B.6 This is the corresponding provision for protection of pre-1950 Montana direct-flow rights. Since such rights divert only during the irrigation season, which is considered to start no earlier than April 1, this provision contemplates direct-flow-based calls starting at that time.

B.7 This provision requires strict regulation of pre-1950 rights and closure of all post-January 1, 1950 rights in Wyoming when a Montana call is on. Paragraph B.3 above places a similar restriction on Montana. This provision ensures that no water is to be diverted under assumptions of a free river or the existence of supplemental water upstream of the calling right.

B.8 This paragraph describes, in general terms, how a call is to be made and its period of effectiveness. It also specifies that a call shall be documented if it is not originally communicated in a document. This provision should minimize miscommunication. It is expressed in a way meant to accommodate considerable changes over time in how communication takes place.

B.9 This paragraph specifies the timing of the Wyoming response to a call and the documentation of that response. Again, this should minimize miscommunication.

B.10 This paragraph provides for the documentation, based on data and water commissioner records, that the required regulation of rights in Wyoming has occurred. This supplements the simple written confirmation provided for in the previous paragraph.

B.11 This provision provides that Montana shall lift a call within two business days of Montana's pre-1950 water rights being satisfied.

B.12 This paragraph recognizes the significant discretion that Montana is accorded in its operations of Tongue River Reservoir. *See* Second Interim Report 154 ("Montana should be given significant discretion in how it sets its winter outflows.").

B.13 This paragraph implements the ruling of the Special Master that Montana is generally operating the Tongue River Reservoir in a fashion consistent with the appropriation laws and rules that govern reservoir operations under the doctrine of prior appropriation, makes this a general requirement for the future, and makes this provision equally applicable to the two States. Such administration is presumed unless proven otherwise by the other State.

B.14 This paragraph simply provides for changes in the appendices to be communicated to the other State.

B.15 This paragraph is based on the recognition that groundwater pumping in the Tongue River and Powder River Basins has potential to impact Compact compliance. This requirement is placed on both States. There is no requirement, however, that the States devote additional resources to collecting such information beyond what is done in the normal course of their respective State administration of water rights.

B.16-19 These paragraphs adopt the fill order rules proposed by Wyoming, but makes them assumptions rather than hard-and-fast rules. They make them applicable in both

States, and the same principle is extended to the impact of sedimentation of reservoirs. Sedimentation has been shown to occur in this basin in the past, and it should be provided for going forward.

B.20 This paragraph is based on the Special Master's rulings on the operations of Tongue River Reservoir. It incorporates a good deal of language from the Wyoming proposal. *See* Second Interim Report 153-157.

B.21 This paragraph covers potential objections that Wyoming may have to Montana's calls. It provides that Wyoming may challenge the basis for those calls, but that Wyoming has the burden of proving such allegations and that Wyoming shall continue to honor a call in the meantime.

B.22 The Special Master has ruled that these Wyoming rules do not apply to Montana Reservoir operations. This provision implements those rulings. *See* Second Interim Report 147-148.

Section C. This provision ensures that there is absolutely no impact of this Decree on the rights of any Indian Tribe. The Special Master has been careful to steer clear of any impact, and this policy should be implemented in the Decree. *See*, Second Interim Report 159-160.

Section D. The appropriateness of a section on retention of jurisdiction has been pointed out in Montana's earlier brief, citing the recent decrees in *Kansas v. Colorado*, 556 U.S. 98, 107, ¶ C (2009); *Kansas v. Nebraska & Colorado*, 135 S.Ct. 1255, ¶ 9 (2015). Wyoming argues against it in its brief, complaining that it is improper to provide for any application for further relief, that, while it is typical in such cases, it is unnecessary and

counter-productive here, that there is no injunction or other prospective relief for the Court to enforce and that it will make the Court into "a de facto river master." Wy. Br. 12-13.

Wyoming's arguments are not well-founded. As Wyoming recognizes, it is standard practice for the Court to include such a provision in its decrees. This is true whether an injunction is entered or not. *Compare Kansas v. Colorado*, 556 U.S. 98, 107, ¶ C (2009) (injunction) with *Kansas v. Nebraska & Colorado*, 135 S.Ct. 1255, ¶ 9 (2015) (no injunction). Additionally, Wyoming harks back to its previous position that Montana has already "been granted all the relief it is entitled to for Wyoming's breaches in 2004 and 2006." Wy. Pr. 12. The Special Master has rejected this position in his Opinion on Remedies. *See* Op. 25.

IV. Conclusion

For the foregoing reasons, Montana recommends that the Special Master adopt Montana's Proposed Judgment and Decree dated March 13, 2017.

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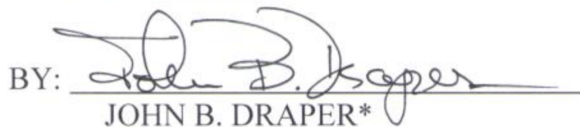

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No. 137, Original

♦

In The
Supreme Court Of The United States

♦

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

♦

Before the Honorable Barton H. Thompson, Jr.
Special Master

♦

CERTIFICATE OF SERVICE

I certify that copies of Montana's Response to Wyoming's Proposed Decree and Brief, With Revised Judgment and Decree and Montana's Proposed Judgment and Decree (March 13, 2017) were served electronically and by U.S. Mail to the following on March 13, 2017, as indicated below:

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I further certify that all parties required to be served have been served.

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