JUDGMENT[1]

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.

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

DECREE

A. General Provisions

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 in Wyoming, whether for direct use or storage, that are not made pursuant to appropriative rights in Wyoming existing as of January 1, 1950.[2] Article V(A) of the Compact also protects pre-1950 appropriative rights to the beneficial uses of water of the Yellowstone River system in Montana from groundwater production that interferes with the continued enjoyment those rights.

2. Article V of the Compact allocates 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 quantity or flow of water, nor does it limit Wyoming to the net volume of water actually consumed in Wyoming prior to January 1, 1950.[4]

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Commented [KJ2]: The original intent of Wyoming's proposal for this section was to memorialize that Article V(A) applies to tributaries of the Tongue and Powder Rivers as well as the mainstems. This draft says something different. This draft incorrectly states that Article V(A) apportions and regulates all surface waters tributary to the Tongue and Powder Rivers. That subsection does not apportion all waters nor does it regulate any. Article V(A) governs the treatment of pre-1950 appropriative rights, while the remaining sections of Article V govern the treatment of other the appropriative rights in these rivers. Accordingly, it is more accurate to say that Article V, rather than V(A), "allocates" all surface waters tributary to the Tongue and Powder Rivers. The Compact uses the word allocates, and so should the decree. "Regulates" is both an unnecessary and unwarranted addition to the Compact. "Allocates" already correctly conveys what Article V does while "regulates," a word that denotes an action by an individual state in response to specific conditions, does not.

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Commented [KJ3]: There is a difference between quantity (volume) and flow (rate). The Court specifically rejected Montana's assertion that it was guaranteed a set quantity of water. *See* 563 U.S. at 386. Accordingly, the decree should reflect that Article V(A) ensures neither a specific volume nor a specific rate at any particular time.

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[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

4. Article V(A) of the Compact protects pre-1950 appropriative rights only to the extent they are for "beneficial uses," as defined in Article II(H) of the Compact, and are otherwise in accordance 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, the laws of Montana and Wyoming (including rules for reservoir accounting) govern the administration and management of each state's respective water rights in the implementation of Article V(A) of the Compact.[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 satisfied, or (b) Montana reasonably believes, based on significant evidence, that the Tongue River Reservoir might not fill before the end of the water year.[8]

Commented [KJ4]: Article V(A) uses the words "in accordance with" rather than "consistent." The decree should use these words as well to avoid any future argument that the Court must have meant something different than the Compact.

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Commented [KJ5]: Rules and regulations is under inclusive, and does not recognize that there are constitutional provisions, statutes, common law, and administrative adjudications bearing on the administration of water rights in each state.

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Commented [KJ6]: Use of the phrase "to which it is entitled" might suggest the appropriation's paper right, as opposed to its ability to put water to beneficial use at a particular point in time. *See Second Interim Report* at 163.

Deleted: receiving the water to which it is entitled

Commented [KJ8]: Sections B.2. and B.6. refer to the calendar year rather than the water year set forth in the Compact. These sections should refer to the water year. Nothing in the Compact operates on a calendar year and the rulings in this case do not provide a basis for creating such a novel fill period. As importantly, adjusting the fill period in such manner could prejudice both parties and lead to further disputes. Montana could be prejudiced in the current year if it was expected to obtain part of its fill after the irrigation season, and Wyoming could be prejudiced in the following year if storage from October through December did not count towards the next fill.

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of use, and location and capacity of diversion") is unnecessary given the other provisions of this Decree (specifically ¶¶ C(2) and C(3)).

[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-

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] When making a call, Montana shall notify Wyoming of the intrastate actions it has taken to comply with this obligation, and when requested, provide Wyoming with reasonable documentation of these actions (including records of reservoir operations, commissioner reports, and field notes).

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

Commented [KJ9]: If Wyoming is obligated under the Compact to provide information demonstrating that its regulatory actions comply with the Compact, as set forth below in Section B.7., then Montana is obligated to do the same. Certainly, every time Wyoming has asked for information regarding Montana's intrastate regulatory activities, Montana has chafed at the notion that it has any reciprocal or affirmative obligations under the Compact. It assuredly does and Wyoming will continue to ask for this information every time Montana makes a call. Setting forth Montana's obligation to demonstrate its own compliance with the Compact with equal specificity in the decree will benefit both parties and help avoid future disputes.

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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 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).

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

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 water to the degree permitted by their appropriative rights and this Decree, and that any groundwater withdrawals under post-1950 appropriative rights are not interfering with the continued enjoyment of pre-1950 surface rights in Montana. 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

[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.

[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).

Commented [KJ11]: The word "and" joining subsections (a) and (b) should be "or" to be consistent with Section B.2., and to reflect that once the specific condition necessitating a call is abated, the call should be lifted. Otherwise, this provision could be construed to provide that whenever Montana makes a direct flow call, Wyoming must also fill or refill the Tongue River Reservoir before Montana is required to lift the direct flow call.

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Commented [KJ12]: Sections B.2. and B.3. use the word "place" rather than "initiate."

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Commented [KJ13]: This distinction is necessary to recognize the ruling that not all post-Compact groundwater production is automatically violative of the Compact when a call is in effect.

1. The Compact assigns the same seniority level to all pre-1950 water users in Montana and Wyoming. 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 right attaches, even when the increased consumption interferes with pre-1950 uses in Montana. Article V(A) protects pre-1950 appropriators in Montana from the use of such conserved water in Wyoming on lands to which the specific pre-1950 appropriative right does not attach, 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 do not injure appropriators in the other State.[16] Once such a change is permitted, that changed right has all the attributes of and is entitled to the same protections as any other pre-1950 appropriative right and the appropriator is entitled to exercise that right to the full extent permitted under the Compact.

D. Wyoming Storage Reservoirs

[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.*

[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 injured 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).

Commented [KJ14]: Changing Section C.3. as set forth below obviates the need for this clause.

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Commented [KJ15]: Should be singular to agree with the remainder of the sentence.

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Commented [KJ16]: This revision is made to be consistent with the description in the preceding sentence and to avoid any ambiguity that might be caused by use of the term "new lands."

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Commented [KJ18]: As set forth in footnote 16, injury is the relevant inquiry, and the decree should say so directly. Moreover, the language of the draft decree creates a significant ambiguity as to whether the injury inquiry contemplated in the draft is continuing and made on an annual basis. That would be a dramatic departure from the current practice in either state, where injury is assessed fully and finally during consideration of the change petition by the appropriate state agency. Once the change is permitted, that changed right becomes the pre-1950 water right and the appropriator is entitled to exercise that right to the full extent permitted by the change. Thus, there can be no violation of the sort contemplated by Section C.1. above for the exercise of a pre-1950 water right regardless of whether the right has ever been through a change process. Here it is worth remembering that such changes are statutorily limited to historic consumptive use, and therefore, many of these changes result in a reduction in the amount of water that may be diverted at the new point of diversion or onto the new lands.

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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 placed a call. Post-1950 appropriators in Wyoming may store water during periods when Montana has not made a call.[17]

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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 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

[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.

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

[19] Mont. A(5); Wyo. II(J).

engineering practices. Any wasteful outflows shall equally reduce the amount of water storage protected under Article V(A) for that water year.[20]

Commented [KJ19]: This language is suggested to avoid any future dispute that there should be less than a 1 for 1 reduction.

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 appropriative 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]

Commented [KJ20]: This terminology is used throughout the draft, and this suggestion is offered for consistency.

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F. General Reservoir Rules

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

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[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.
[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.

G. Information

1. Montana and Wyoming shall exchange information, as reasonable and appropriate, relevant to the effective implementation of Article V(A) of the Compact.

H. Rights of the Northern Cheyenne Tribe

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

Commented [KJ21]: While Wyoming does not relish reiterating an argument made in its prior brief, the provisions in Section G beyond a general duty of reasonable information sharing are unacceptable. The perpetual obligation this draft decree would graft onto the Compact is onerous, duplicative of existing resources, and serves no useful purpose. Compiling and updating annually a specific list for the unique purpose of Compact implementation duplicates the work already performed by the State Engineer's Office and the Board of Control to update the Division II Tab Book and the e-permit database which are both readily available to Montana. Wyoming does not routinely collect data in the ordinary course of water administration on the amount of groundwater pumping in Wyoming, and at the current time, has no particular need for such information from Montana.

Deleted: 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]

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

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Deleted: 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]

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[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.

[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.