No. 137, Original

♦

In The
Supreme Court Of The United States

♦

STATE OF MONTANA,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

♦

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

♦

MONTANA'S RESPONSE IN OPPOSITION TO WYOMING'S MOTION FOR SUMMARY JUDGMENT AS TO REMEDIES

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Montana offers the following material facts as relevant to Wyoming's Motion:

1. Wyoming's longstanding position was that Wyoming had no obligation under the Compact to provide water to satisfy Montana's pre-Compact rights. Ex. J65; Ex. J69; Tr. 4991:6-16 (Lowry).

2. Based on this position, Wyoming resisted all efforts to develop a methodology to administer the Compact. Second Interim Report of the Special Master (Liability Issues) 18 ("SIR"); Montana's Post-Trial Brief at 12-19 (citing the record).

3. Wyoming's position on the Compact only changed in the course of this litigation, when the Court held that Article V(A) protects Montana's pre-Compact rights. Wyoming's Exception to the Second Interim Report of the Special Master (Liability Issues) and Brief in Support of Exception 15 ("Wyo. Exception").

4. Wyoming has conceded that the proper interpretation of Article V(A) was "the big issue" in the case, and that Montana "prevailed" on that issue. *See* Montana's Reply Brief Opposing the Exception of Wyoming ("Mont. Reply"). Based on the Court's ruling, the legal relationship of the States has changed to the benefit of Montana. Wyoming's Reply to Montana's Exception 9 ("Wyo. Reply").

5. The Special Master bifurcated the case into a liability phase and a remedies phase. The liabilities phase was limited to "a determination of whether Wyoming has violated the Yellowstone River Compact and the amount of any such violation." CMP No. 1 ¶ II (Dec. 20, 2011). As part of CMP No. 1, the Special Master stayed discovery on "remedies issues," so that no discovery was conducted by the States on those issues. *Id.* ¶ VIII.A.

6. Because of the limitation in CMP No. 1, Montana did not conduct discovery on damages, declaratory relief, injunctive relief, or costs. In particular, Montana did not conduct

discovery on the losses to Montana due to Wyoming's violation, the gains to Wyoming, the availability of water for replacement, the cost of water if it was available for replacement, whether Wyoming is likely to violate the Compact again, whether Wyoming is allowed to validate a call, whether the possibility of a futile call exists, or the timing and nature of payment of damages in water.

7. At trial, Wyoming took the position that it had the right to unilaterally evaluate and "validate" a call from Montana before deciding how to respond. Tr., Vol. 22, 5270:18 – 5278:18 (Tyrell).

8. Wyoming acknowledges that the extent of the Tongue River Reservoir ("Reservoir" or "TRR") right "needs to be settled." Wyoming urged the Special Master to decide the extent of the Reservoir right or the States "will be right back" in this Court litigating the issue. Mont. Reply 10 (citing the record).

9. At the conclusion of the trial on liability issues, Wyoming argued that the "case should end without proceeding to a needlessly wasteful remedies phase." Wyoming's Post-Trial Brief at 70.

10. The Special Master rejected Wyoming's position, and recommended that the Court remand the case for a remedies phase to address "damages and other appropriate relief." SIR 230.

11. In its Exception, Wyoming again argued that that no further relief was justified, and dismissively asked the Court to "exercise its authority to end this litigation immediately to avoid the needless expense associated with further proceedings." Wyo. Except. Br. 20. The Court implicitly rejected Wyoming's argument and remanded the case to the Special Master.

12. Wyoming's Motion is based on the exact same briefs and record that was before the Court on the Exceptions.

SUMMARY OF ARGUMENT

The Special Master should deny Wyoming's Motion in its entirety and allow the case to proceed to the remedies phase.

The Motion relies on the same briefs presented to the Court on Exceptions. It would be inherently inconsistent with the Court's remand to grant any part of the Motion based on the exact same arguments and record presented to the Court. The Motion should be denied because it fails to satisfy the basic requirements for a motion for summary judgment.

Wyoming's Motion also fails on each of its four claims: (1) Wyoming's Motion on damages fails because there are disputes over material facts, and Montana has not been given the opportunity to conduct discovery or determine what damages to pursue; (2) Wyoming's Motion on declaratory relief fails because the Court has expansive authority to grant the declaratory relief Montana seeks, an actual controversy exists, and declaratory relief is needed to guide future Compact compliance and avoid future suits; (3) Wyoming's Motion on injunctive relief fails because there are disputes over material facts, the Court routinely grants injunctions in interstate water disputes, Wyoming's promises of future compliance do not render the claim moot, and there is a cognizable danger of a future violation; and (4) Wyoming's Motion on costs fails because Montana prevailed on the significant issues in this proceeding, the Court found that Wyoming violated the Compact, and Wyoming has failed to overcome the presumption that Montana is entitled to costs.

Montana should be allowed a reasonable opportunity to investigate and present evidence on appropriate remedies.

ARGUMENT

I. STANDARD OF DECISION

Rule 56 of the Federal Rules of Civil Procedure and the Supreme Court's precedents construing that Rule "serve as useful guides" in original actions. *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *see* Sup. Ct. Rule 17.2. Summary judgment is appropriate only when no genuine issue of material fact exists and, as a matter of law, the moving party is entitled to judgment. *Nebraska v. Wyoming*, 507 U.S. at 590. Consequently, summary judgment will not lie when a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A dispute about a material fact is genuine when the evidence would allow a reasonable factfinder to reach a verdict for the nonmoving party. *Id.* at 248. "If reasonable minds could differ as to the import of the evidence," summary judgment should not be granted. *Id.* at 250. Thus, inferences drawn from any undisputed facts must be viewed in a light most favorable to the opposing party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). This is because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are [fact-finder] functions, not those of a judge [when] ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255. Summary judgment is therefore improper when evidence is susceptible to different inferences or interpretations by a factfinder. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

In original jurisdiction cases, "which involve issues of high public importance," *United States v. Texas*, 339 U.S. 707, 715 (1950), the Court has ruled on dispositive issues in summary judgment motions only in rare instances. *See, e.g., Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("[S]ummary procedures . . . present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated

legislation, contracting and practice."); *Eccles v. Peoples Bank*, 333 U.S. 426, 434 (1948) ("Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment.").

II. WYOMING'S MOTION IS INCONSISTENT WITH THE COURT'S ORDER REMANDING THE CASE FOR A REMEDIES PHASE

Wyoming's perfunctory Motion for Summary Judgment as to Remedies ("Motion") seeks the summary entry of judgment against the State of Wyoming in the amount of $20,340.00, plus prejudgment interest, on the grounds that the extent of Wyoming's liability is clear and further proceedings would be futile. Wyoming's Motion 2. In support of this proposition, Wyoming cites "the pleadings, the entire record created during the liability phase of these proceedings, Wyoming's Exception to the Second Interim Report, Wyoming's Sur-Reply in Support of Exception, and Wyoming's Reply to Montana's Exception." *Id.*

Essentially, Wyoming seeks to avoid the remedies phase of these proceedings altogether. If Wyoming's Motion were granted in its entirety, it would conclude this case without a remedies phase. This would be contrary to what the Special Master recommended to the Court, and it would be contrary to the Court's acceptance of the Special Master's recommendation. The Court ordered: "The case is remanded to the Special Master *for determination of damages and other appropriate relief*." *Montana v. Wyoming & North Dakota*, 136 S. Ct. 1034 (March 21, 2016), adopting the recommendation of the Special Master, Second Report 231, App. A at A-2, ¶ 5 (emphasis added).

III. WYOMING HAS NOT SATISFIED ITS BURDEN OF PRESENTING FACTS SUFFICIENT TO ESTABLISH THAT SUMMARY JUDGMENT IS WARRANTED

A. Wyoming Has Failed to Identify the Undisputed Material Facts on Which It Bases Its Motion

It is well-accepted that a motion for summary judgment must include those facts the movant deems undisputed and material. *See* Rule 56(c). This allows the non-moving party to respond to specific facts and demonstrate to the Court why those facts may be in dispute or are otherwise immaterial. *See id.* Wyoming's Motion is entirely devoid of undisputed material facts, making it difficult for Montana to properly respond. Instead, Wyoming unhelpfully refers the Special Master to "the entire record created during the liability phase of these proceedings," including its Exception and its Sur-Reply in Support of Exception ("Wyoming Sur-Reply"). It is therefore to these papers that Montana and the Special Master must look for the facts that Wyoming believes support its Motion.

Wyoming's brief on its Exception to the Second Interim Report includes a section titled "Statement of the Case Necessary to Decide This Exception." Wyoming Exceptionat 3-6. The following facts drawn from Wyoming's Statement—each of which is supported by the findings of the Special Master's Second Interim Report, or otherwise finds support in the testimony elicited and evidence admitted during the liability phase of this matter—are not disputed by Montana:

1. Fifteen miles after crossing the border into Montana, the Tongue River flows into the Tongue River Reservoir. Wyoming Exception at 3 (citing SIR at 5).

2. The Tongue River Reservoir is the largest reservoir in the watershed and supplies water to the farmers and ranchers in the Tongue River Valley of Montana during the irrigation season when the natural flow of the river is inadequate to meet their needs. *Id.*

3. The Tongue River Reservoir has a present capacity of 79,071 acre feet. *Id.* (citing SIR at 105-06).

4. Wyoming violated the Compact when it did not prevent ten irrigators and twenty-two reservoir owners on the Tongue River from diverting water that otherwise would have flowed into Montana. Wyoming Exception at 1 (citing SIR at Table D-1).

5. In 2004, Wyoming wrongfully diverted 1,300 acre feet. *Id.* (citing SIR at 231).

6. In 2006, Wyoming wrongfully diverted 56 acre feet. *Id.*

7. Under the 1991 Northern Cheyenne Compact between Montana and the Northern Cheyenne Tribe, the Tribe has a right to store up to 20,000 acre feet of water in the Tongue River Reservoir. *Id.* at 3 (citing SIR at 105; Mont. Code Ann, § 85-20-301, Art. II(A)(2)(b)).

8. The remainder of the reservoir's storage space belongs to Montana, which provides stored water to the Tongue River Water Users Association under a water marketing contract. *Id.* at 4 (citing SIR at 12).

9. The water rights of Montana and the Northern Cheyenne Tribe are separate, but physically commingled and administrated conjunctively. *Id.* at 4 (citing SIR at 105).

10. Montana and the Tribe share shortages and divide excess water pursuant to the terms of the Northern Cheyenne Compact. Mont. Code Ann. § 85-20-301, Art. II(A)(2)(c) and (d).

11. Water stored in the Tongue River Reservoir pursuant to the Tribe's storage right is "generally available" for sale to non-tribal members for use in the Tongue River basin off

the reservation. Mont. Code Ann. § 85-20-301, Art. III(B); Ex. W73 (letter from the Tribe to Montana Department of Natural Resources and Conservation notifying Montana of the Tribe's intent to sell compact water to individual water users in 2004).

In sum, Montana does not dispute that Wyoming was in violation of the Compact in 2004 and 2006. Montana also does not dispute that replacement water was "generally available" from the Tribe during the 2000s. From these undisputed facts, Wyoming would argue that it follows that a full and complete remedy may be rendered by the Court simply by multiplying the number of acre feet in which Wyoming was found in violation in 2004 and 2006 by the replacement value of that water, ordering Wyoming to pay this amount, and calling it a day.

This deceptively simple maneuver cannot, however, be made on the facts presently in the record, and does not address the full panoply of remedies issues that must be addressed in the next phase of these proceedings. As a result, Wyoming's Motion is premature and discovery on these issues must be allowed. Further, Wyoming's facts do not support a finding as a matter of law that declaratory relief, injunctive relief, or costs are unavailable to Montana. The reasons why these remedies questions are not amenable to summary judgment at this time are discussed at length below.

B. Summary Judgment Is Premature and Would Deprive Montana of the Opportunity to Conduct Discovery on Issues Related to the Remedies Phase

Montana must be given the opportunity to conduct discovery on issues related to the remedies phase. It has long been recognized that the Court "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases); *see Kansas v. Colorado*, 185 U.S. 125, 147 (1902) ("The general rule is that the truth of material and relevant matters set forth with requisite precision are

admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem wise to apply that rule, and we must decline to do so."); *see also Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *United States v. Wyoming*, 331 U.S. 440, 458-59 (1947); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894) ("In the exercise of original jurisdiction . . . this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded."); *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840) ("[T]he most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength.").

In sum, the Court's role is to resolve controversies on their merits whenever possible. *Church v. Hubbart*, 6 U.S. 187, 232 (1804) (Marshall, J.) ("[I]t is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so."). In view of that role, the Court has traditionally eschewed reliance on summary procedures and technical principles of pleading in original actions, preferring instead to allow for the full development of adjudicative facts. *See United States v. Texas*, 339 U.S. 707, 715 (1950); *United States v. Wyoming*, 331 U.S. 440 (1947); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Texas*, 162 U.S. 1 (1896); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894); *United States v. Texas*, 143 U.S. 216 (1891). "[A]t this stage [the Special Master has] no basis for judging [Montana's] proof, and no justification for denying [Montana] the chance to prove what it can." *Nebraska v. Wyoming II*, 515 U.S. at 13.

In the present case, following the Supreme Court's decision in *Montana v. Wyoming*, 563 U.S. ___, 131 S. Ct. 1765, the Special Master bifurcated the proceedings into two phases: a

liability phase and a remedies phase. Case Management Plan No. 1 ("CMP No. 1"), Dec. 20, 2011, Docket No. 118, ¶ II. The parties engaged in extensive discovery on the liability issues between January 2012 and July 2013. To govern and guide this discovery, the Special Master entered a case management plan that incorporated a modified version of the Federal Rules of Civil Procedure appropriate for this action. *Id.* ¶ VIII.

The case management plan expressly reserved remedies issues for the remedies phase. *See* CMP No. 1 at 4 ("The case is hereby bifurcated into two phases, a liability phase and a remedies phase. The liability phase will include a determination of whether Wyoming has violated the Yellowstone River Compact and the amount of any such violation. *Matters pertaining to retrospective or prospective remedies are hereby reserved for the later remedies phase.*" (emphasis added)). Consequently, discovery to date has been concerned only with liability – i.e., whether Wyoming violated the Compact, and if so, the extent of the violation. *Id.* ¶ VIII.A ("Discovery on remedies issues is hereby stayed until further order.").

Wyoming's Motion raises issues that were not addressed during the liability phase for the simple reason that they were specifically reserved by the States and the Special Master for the remedies phase. It is undisputed that the States have not engaged in any formal remedies discovery at this point. Entry of summary judgment on remedies before appropriate discovery has taken place would therefore be premature, as without such discovery, Montana is not in a position to present facts essential to oppose the Motion. *See, e.g.*, Rule 56(d).

Here, there remains substantial controversy as to both the form and measure of remedies. Both legal and factual issues remain with respect to these questions. Discovery is therefore necessary for full adjudication of this matter. It is only after a reasonable period of remedies discovery that Montana will be in a position to elect its remedy and respond to Wyoming's

assertions. *See Celotex Corp.*, 477 U.S. at 322 (stating that summary judgment should be entered "after adequate time for discovery," and explaining that Federal Rule of Civil Procedure 56(d)[1] "allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery"); *Anderson*, 477 U.S. at 257 (stating that "the plaintiff must present affirmative evidence to defeat a properly supported motion for summary judgment . . . even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery*" (emphasis added)); *CenTra, Inc. v. Estrin*, 538 F.3d 401, 420 (6th Cir. 2008) ("Typically, when the parties have no opportunity for discovery, denying the Rule 56[(d)] motion and ruling on a summary judgment motion is likely to be an abuse of discretion"); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) ("It is well-established that the plaintiff must receive 'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment."). As a result, the Special Master should reject Wyoming's suggestion that the Court forego the previously agreed-to remedies phase and enter a money damages award based on Wyoming's underdeveloped method of calculation.

C. Summary Judgment Should Be Denied Because There Are Disputed Issues of Material Fact

Because Montana neither took discovery nor questioned witnesses at the trial on liability as to the remedies phase of these proceedings, it would be difficult for Montana to produce its own facts sufficient to defeat summary judgment at this time. This is but one reason why remedies discovery is necessary before Montana can fully address Wyoming's Motion. *See* Rule 56(d). Even so, on the face of the limited facts set forth by Wyoming in its brief on its Exception

[1] Formerly Fed. R. Civ. P. 56(f).

to the Special Master's Second Interim Report, there is plainly a genuine dispute as to the proper calculation of money damages, should that be the damages remedy Montana ultimately selects.

More particularly, there are insufficient facts or disputes over the material facts on at least the following issues:

Damages:

1. Whether water was available from the Northern Cheyenne Tribe in both 2004 and 2006 in sufficient quantities for all Montana water users to purchase water. *See, e.g.*, Mont. Code Ann. § 85-20-301, art. III(B)(4).
2. If water was available from the Northern Cheyenne Tribe in both 2004 and 2006, what was the cost?
3. What were Montana's secondary losses as a result of Wyoming's violations of the Compact?
4. What were Wyoming's gains as a result of Wyoming's violations of the Compact?
5. What is the appropriate level of pre-judgment interest?

Declaratory Relief:

6. Is a dispute over the Tongue River Reservoir imminent?
7. Is Wyoming permitted to "validate" a call from Montana, and if so, what does that entail?

Injunctive Relief:

8. Is there a cognizable danger that Wyoming will violate the Compact again in the future?
9. Has Wyoming taken sufficient concrete steps to ensure that a violation will not occur again in the future?

<u>Costs</u>

10. What are Montana's reasonable or necessary costs?

Wyoming's suggested course is to accept the highest price paid for replacement water by any witness who happened to be asked about this at trial and perform a money damages calculation on that basis. However, such an approach would be random and imprecise, and—perhaps more importantly—would fail to provide useful guidance to the parties going forward in the event of future violation. Nor would such an approach appropriately address Montana's requests for declaratory relief, injunctive relief, or costs discussed below.

IV. WYOMING IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF DAMAGES

Wyoming's Motion asks the Special Master to recommend entry of judgment on damages based entirely on the isolated testimony of select witnesses elicited for purposes of determining liability during the liability phase of this bifurcated proceeding. In making such a request, Wyoming eliminates Montana's opportunity to discover facts or present testimony pertaining to the remedies phase of this litigation. Moreover, Wyoming's Motion fails to establish, on the record developed during the liability phase, an appropriate measure of damages or the proper amount of those damages. Consequently, summary judgment on damages is inappropriate at this time.

A. Summary Judgment on Damages Is Premature

1. Montana Has Not Been Given the Opportunity to Conduct Discovery on Damages

As explained above, Montana was not afforded an opportunity to conduct discovery on the remedies phase. Naturally, such discovery would include those facts necessary to address damages issues including those raised in Wyoming's Motion. Montana, relying on the

agreement that a separate and distinct remedies phase would follow the liability phase, committed its discovery resources and trial time in the liability phase solely to establishing liability. It would thus be fundamentally unfair to now eliminate Montana's opportunity to conduct necessary discovery on damages issues because Wyoming used limited trial cross-examination during the liability phase to elicit unnecessary facts they would later use to support a motion for summary judgment in the remedies phase.

Phase one of this proceeding established that Wyoming violated the Compact. Pursuant to the agreement to separate the issues, Montana should now be afforded a reasonable opportunity to conduct discovery on phase two, damages to determine an appropriate form and measure of Montana's damages flowing from Wyoming's violations. *See* Rule 56(d); *Celotex Corp. v. Catrett*, 477 U.S. at 322.

2. Montana Has Not Yet Decided What Damages It Will Pursue

Wyoming asserts that Montana's damages should be "limited to the cost of readily available replacement water." Motion 2. Because Wyoming's Motion is based on their briefing on Wyoming's Exception to the Second Interim Report, the Special Master must look there for the argument on this point. *See* Wyoming's Exception 8-13. In essence, Wyoming argues that the Compact should be construed using general principles of contract law applicable to the determination of damages in this case. In so arguing, Wyoming suggests "[t]hat this dispute is between two sovereigns should make no difference." *Id.* at 10.

In its reply brief opposing the exception of Wyoming, Montana strongly opposes this characterization, and incorporates those arguments herein. *See* Mont. Reply Brief 3-8. This question of law is, in and of itself, not amenable to summary judgment at this time. Wyoming having been found in breach of the Compact, a proper remedies phase is necessary to flesh out

the full measure of damages available to Montana under the Compact and the operative law. Furthermore, the factual issues are far less clear-cut than Wyoming would have the Special Master believe on the record developed during the liability phase.

Montana has not yet decided which damages remedy it wishes to pursue, whether in the form of replacement water or in money damages. Wyoming argues in its Exception briefing that case law "suggests" that Wyoming, as the breaching state, may elect the remedy Montana is to receive. *See* Wyoming Exception, p. 7. Neither the Compact at issue here nor the case cited by Wyoming supports any such proposition.

There is no dispute that the Court may allow a suitable remedy in either money damages or in water. *See Texas v. New Mexico*, 482 U.S. 124, 129 (1987). However, contrary to Wyoming's assertion at page 7 of its Exception brief, the Court has never held that the breaching state may dictate its remedy. *See, e.g., Kansas v. Colorado*, No. 105, Orig., Third Report of the Special Master 108-118 (Aug. 2000) (discussing and rejecting Defendant Colorado's proposal that it pay its damages in water rather than money, where Plaintiff Kansas consistently sought a remedy in money damages). Instead, it is up to the Court to craft a remedy "with reference to the facts of the particular case." *Kansas v. Nebraska*, 135 S.Ct. 1042, 1058 (2015) (citations omitted).

Here, the remedy may indeed be in payment of water. Some investigation is however required before any remedy should be awarded. *See Texas v. New Mexico*, 482 U.S. at 131 (noting that payment in water is "an equitable remedy that requires some attention to the relative benefits and burdens that the parties may enjoy or suffer"). Payment may instead be in the form of money. However, the required facts not yet appearing in the record, Montana needs discovery

to fully evaluate damages, including whether to pursue Montana's losses, consisting in part of secondary damages, or Wyoming's gains.

Finally, Montana has not yet decided whether to pursue disgorgement damages, which the Court has indicated may be available in compact enforcement actions. *See, e.g.*, *Kansas v. Nebraska*, 135 S.Ct. at 1058 (holding that order requiring Nebraska to disgorge monies representing portion of Nebraska's additional gain from its breach of Compact was a fair and equitable remedy for breach). Wyoming argues again that disgorgement damages are not available here because Wyoming's breach was not done "knowingly." *See* Wyo. Exception 11. Montana would dispute any such finding, and discovery on this question has not yet been taken. Whether such damages are available to Montana cannot be determined on the record developed on Wyoming's liability. Consequently, the door remains open for disgorgement damages. This issue falls within the scope of what the States and the Special Master reserved for the remedies phase.

B. Wyoming Has Not Met Its Burden, and Genuine Factual Issues Remain to Be Decided

Wyoming proposes a measure of damages based on select testimony elicited from witnesses at the trial on liability in this matter. Wyo. Exception 5-6. There is a fundamental factual question on the record developed at trial as to whether Northern Cheyenne replacement water was "readily available" in 2004 and 2006, and if so, at what price it was being marketed. Wyoming cites select testimony on these issues that it unnecessarily elicited on cross-examination during the liability phase from a handful of witnesses. However, of these witnesses only water user Raymond Harwood testified that the Tribe's water was available in either year of violation *at any specific price*. But, even this witness did not testify with certainty as to the year of his purchase. *See* Testimony of Raymond Harwood, Tr. Vol. 19 at 4424 ("I believe 2004").

Contrary to Wyoming's characterization, the remaining witnesses identified in Wyoming's brief testified only in vague generalities. *Compare* Testimony of Jason Whiteman, Tr. Vol. 8 at 1652 (water was leased from the Tribe "in the 2000s"), *and* Testimony of Maurice Felton, Tr. Vol. 19 at 4450 ("I'm not sure but it was sometime between 2001 and 2006."), *with* Wyoming Exception at 5 ("Jason Whiteman, the former Director of the Natural Resource Department for the Northern Cheyenne Tribe, testified that the Tribe sold its Compact water *during this period* for between $7 and $9 an acre foot." (emphasis added)). Wyo. Exception 5 (". . . Maurice Felton testified that *during the drought* years [he] paid $10 per acre foot to the Northern Cheyenne Tribe for stored water."). Water user John Hamilton testified on cross-examination that he leased water from the Tribe in 2004. Testimony of John Hamilton, Tr. Vol. 16 at 3670; Ex. M 387. He recalled that tribal water was available in the years 2001, 2002, 2004 and 2006, although "[t]here possibly was one year where they didn't apply to the [S]tate of Montana to sell the water." *Id.* He testified that Northern Cheyenne water costs "somewhere between 12 and $15 an acre-feet," but his testimony made no specific reference to the price Mr. Hamilton actually paid for water in 2004. *Id.* at 3662-63.

Tellingly, not one of these witnesses testified to any degree of certainty to a specific dollar amount at which the Tribe was marketing its water in 2004 or 2006. And, of course, Montana did not elicit testimony from any of these witnesses on this subject matter given that it was not within the relevant scope of the liability issues being tried at the time. For the same reason, Montana did not call any witness for purposes of testifying to the price of replacement water in 2004 or 2006. Assuming, *arguendo*, that the Special Master adopted Wyoming's method of calculating damages, discovery is still necessary to determine when water was available and at what price before any such calculation could properly be performed.

Montana's intent in bringing this original proceeding was to have the Court provide guidance for the oft-troublesome interpretation and continued implementation of the Yellowstone River Compact. As such, damages are but one component of the remedy Montana seeks in this action. *See generally*, Mont. Reply. The Compact being silent as to the measure and form of damages, a full and proper adjudication of these issues here will provide valuable guidance to the States in the event of future violations. Damages should not instead be calculated and entered based on imprecise, piecemeal testimony elicited during the liability phase of this bifurcated proceeding.

V. WYOMING IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF DECLARATORY RELIEF

A. The Court Has Not Yet Issued Declaratory Relief

In the briefing on the exceptions, Wyoming argues that no "*additional* declaratory relief" is warranted. *E.g.* Wyo. Sur-Reply 4 (emphasis added). Wyoming thereby implicitly accepts the notion that *some* declaratory relief is appropriate. Wyoming appears to consider the SIR to constitute declaratory relief. While Montana agrees that the SIR enunciates important principles, it does not go far enough, and it does not amount to a declaration from the Court.

Moreover, as discussed above, Wyoming has not given much guidance to the Special Master or to Montana concerning the basis for its motion. Based on the briefing to date, Montana does not construe Wyoming's motion to resist the uncontested principles discussed in the SIR. Instead, Montana understands Wyoming to oppose any further declaratory relief, and particularly to oppose a declaration identifying the extent of the Reservoir right. Since neither State opposes the principles stated in the SIR, at the very least, the Court should follow recent

practice, and enter a decree distilling these principles in a decree. *See, e.g., Kansas v. Colorado* 556 U.S. 98, 104 (2009), attached as Exhibit A.[2]

B. The Court Has Authority to Grant the Declaratory Relief that Montana Seeks

Wyoming argues that Montana's request for declaratory relief is governed by the federal Declaratory Judgment Act, 28 USC § 2201 ("DJA"). *See* Wyo. Reply 6 (" in original actions . . . the Court may provide declaratory relief when authorized by the Declaratory Judgment Act"). Wyoming is mistaken. The original jurisdiction, unlike the Court's appellate jurisdiction, is not subject to the authority of Congress. *See Kansas v. Colorado*, 556 U.S. 98, 109-10, (2009) (Roberts, C.J., concurring) (noting that it is the Court's "responsibility to determine matters related to our original jurisdiction"). For example, in *Texas v. New Mexico*, 482 U.S. 124 (1987), the Court considered an argument that the Court was "without power" to award post-judgment interest absent statutory authority. The Court rejected this argument, and explained that "we are not bound by this rule in exercising our original jurisdiction." *Id.* at 132 n.8; *see also Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174 (1803) (finding that Congress was prohibited from expanding the scope of the original jurisdiction). Despite issuing a number of declaratory decrees in interstate compact enforcement cases over the years, the Court has never held that the DJA applies to an action in the original jurisdiction.

Nonetheless, as Montana explained in its Motion and Brief for Summary Judgment on Tongue River Reservoir, the Court has "a serious responsibility to adjudicate cases where there are actual, existing controversies between the States over the waters in interstate streams." *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991). And there is little doubt that the Court has the authority "[t]o determine the nature and scope of [compact] obligations as between States."

[2] The decree in *Kansas v. Colorado* is not currently available in Westlaw or the Supreme Court Reporter. For convenience, Montana is attaching a copy as Exhibit A.

West Virginia ex rel. Dyer v. Sims, 341 U.S. at 28. Rather than the DJA, however, that authority is governed by the Court's own precedent. *See Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) (explaining that the Court's ability to "declare rights under a compact" stems from the United States Constitution).

The Court recently explained that its "equitable authority to grant remedies is at its apex" in a compact enforcement suit such as this one. *Kansas v. Nebraska*, 135 S.Ct. 1042, 1062-63 (2015). The Court's role in such a suit is "to declare rights under the Compact and enforce its terms." *Id.* at 1052. Because the Court acting in its original jurisdiction "serves 'as a substitute for the diplomatic settlement of controversies between sovereigns,'" *Kansas v. Nebraska*, 135 S.Ct. 1042, 1051 (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923)), the Court may adopt a remedy that "'in its judgment will best promote the purposes of justice,'" *Id.* at 1052 (quoting *Kentucky v. Dennison*, 24 How. 66, 98 (1861)). Thus, to prevent an upstream State from "continuing [to] overreach[]," the Court will "provide remedies necessary to prevent abuse," *id.*, including remedies necessary to "promote compliance with the agreement." *Id.* at 1053. The Court may "'mould each decree to the necessities of the particular case' and 'accord full justice' to all parties." *Id.* (quoting *Porter*, 328 U.S. at 398).

C. The Court's Authority to Grant Declaratory Relief Is Not Limited to the Findings Necessary to Establish a Past Violation

Wyoming argues that declaratory relief must be limited to findings necessary to establish that a past violation occurred. Wyo. Reply 8-9. Wyoming thus argues that declaring the extent of the Reservoir right would constitute "an advisory opinion" because it is not necessary to establish liability in 2004 and. Wyo. Sur-Reply 1, 4. In advancing this assertion, Wyoming

misunderstands the nature of declaratory relief and of the role of this Court in a compact enforcement proceeding in five fundamental ways.

First, the Court has consistently entered declaratory relief in original actions to guide future compliance. The Court long ago established that declaratory relief is appropriate, even if there is no prayer for additional relief. *See, e.g., Nashville, C.& St. L. Ry. v. Wallace*, 288 U.S. 249, 263 (1933) ("This court has often exerted its judicial power to adjudicate boundaries between states, although it gave no . . . other relief beyond determination of the legal rights which were the subject of controversy between parties."). Following *Kansas v. Nebraska*, there is little doubt that the Court has expansive authority to declare the rights of the States "to stabilize a compact and deter future breaches." 135 S.Ct. at 1057. One need look no further than *Kansas v. Colorado*, where the Decree provides that the H-I Model will be used to determine compact compliance. 556 U.S. 98, 104 (2009). That Model is not limited to the hydrologic conditions that gave rise to the compact violation. Instead, the H-I Model contains parameters to ensure compliance future hydrologic conditions.

Consistent with the principles identified in *Kansas v. Nebraska*, in interstate water disputes, the Court has routinely entered decrees setting out the rights of the parties in sufficient detail so as to ensure future compliance. *E.g. Kansas v. Colorado*, 556 U.S. 98, 104 (2009); *New Jersey v. Delaware*, 552 U.S. 597, 623 (2008); *Kansas v. Nebraska*, 538 U.S. 720 (2003); *Virginia v. Maryland*, 540 U.S. 56, 79-80 (2003); *Oklahoma v. New Mexico*, 510 U.S. 126, 128 (1993); *Texas v. New Mexico*, 485 U.S. 388, 389 (1988); *New Hampshire v. Maine*, 434 U.S. 1 (1977); *Arizona v. California*, 376 U.S. 340 (1964). Wyoming offers no basis for the Special Master to break from this well-established practice in this case.

Second, the Court has never limited its declaratory relief in the manner claimed by Wyoming. For example, in *Nebraska v. Wyoming*, 515 U.S. 1 (1995), the Court agreed to hear an action by Nebraska to enforce a prior decree over the North Platte River. In its initial filing, Nebraska expressly alleged that "Wyoming *was threatening its equitable apportionment*, primarily by planning water projects on tributaries that have historically added significant flows to the pivotal reach." *Id.* at 5 (emphasis added). Although no violation of the decree was even alleged, the Court granted Nebraska's motion for leave to file a complaint in order to resolve the dispute. It follows that the Court does not require a showing of a past violation of a previous allocation as a precondition to prospective relief. *See also Virginia v. Maryland*, 540 U.S. 56 (2003) (granting declaratory relief for a jurisdictional challenge); *New Jersey v. New York*, 523 U.S. 767 (1998) (same).

Third, contrary to Wyoming's claim that Montana seeks an "advisory opinion," Montana's claim for declaratory relief for its Reservoir Right is ripe for resolution by this Court. Wyo. Reply 9 ("Montana seeks to test *prematurely* its defense to a possible future claim by Wyoming that Montana wasted water by calling the river in excess of the amount protected by Article V(A) of the Compact." (emphasis added)). When the Court accepted this case for filing, it determined that there was a serious and dignified claim in need of resolution. And once "the States themselves are before this Court for the determination of a controversy between them, . . . this Court must pass upon every question essential to such a determination." *Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991). That includes the relief sought by Montana. Furthermore, a ripeness defense is typically raised at the beginning of a case. Here, conversely, the Court has already held that Wyoming violated the Compact. That holding directly undercuts Wyoming's ripeness argument.

Fourth, the parties' dispute over the Reservoir is neither "hypothetical" nor "academic," as Wyoming claims. Wyo. Reply 8-9. To the contrary, Wyoming's testimony at trial underscored the fact that future disputes are imminent. For example, Wyoming State Engineer Pat Tyrrell testified that before honoring a call, he would have to "validate it." Tr. Vol. 22, 5270:18 – 5278:18. According to Mr. Tyrrell, this involves a "fact-specific" evaluation by Wyoming to unilaterally determine if Montana's call is "valid" based on a number of considerations including: the calling right, whether that right is really short, how much water it is short, whether commissioners are appointed in Montana, how long it takes for the water to travel in Montana, and whether the call is futile. *Id.* Mr. Tyrrell also specified that Wyoming would not honor a call in December, Tr., Vol. 22, 5276:6-13, which is problematic considering that December is part of the winw sater fill season for the Reservoir. Contrary to Wyoming's assertion that they have unilateral authority to "validate" a call, "[a] State cannot be its own ultimate judge in a controversy with a sister State." *West Virginia v. Sims*, 341 U.S. 22, 28 (1951). Rather, "[t]o determine the nature and scope of [compact] obligations as between States . . . is the function and duty of the Supreme Court of the Nation." *Id.*

Moreover, Wyoming itself has previously urged the Court to declare the Reservoir right because it is the "biggest question" and "needs to be settled." Tr. Vol. 22, 5273:7-12; *see also id.* at 5275:11-15 ("I just am very nervous because I don't know what the pre-50 level is that I owe for that reservoir. . . . And that concerns me"). Wyoming's concern proved to be well-founded, as the dispute over the Reservoir played out in real time while briefing on the Exceptions was underway. Although the weather eventually cooperated in 2015, the dispute is real, and the looming issue of whether the Compact protects the full extent of the Reservoir right will be tested in the very near future.

Finally, Wyoming's suggestion that declaratory relief must be limited to the findings necessary to establish past violations misconstrues the nature of Montana's claim for declaratory relief. Montana claimed that Wyoming violated the Compact in past years—a claim that was proven in the liability phase. But Montana also separately sought a declaration of its rights under the Compact. In fact, the declaration was Montana's first claim for relief, and it could have been maintained even if Montana had been unsuccessful in its efforts to prove a past violation. Therefore, it simply misses the point to assert, as Wyoming does, that "Montana explicitly limited its claims at trial to the determination of whether Montana's reservoir went unsatisfied in specific years." Wyo. Reply 8. Evidence of past violations was all that was allowed in the liability phase." *See* SIR 26 (citing CMP No. 1, ¶ II). Montana has never limited its claim as alleged by Wyoming. Although Case Management Plan No. 1 restricted the liability phase to "a determination of whether Wyoming has violated the Yellowstone River Compact and the amount of any such violation," CMP No. 1 at ¶ II, at no time has Montana ever limited the purpose of bringing this action or the relief that it sought to past violations or specific years.

Quite the contrary, Montana has emphasized that the primary motivation for this suit was to impose rules to guide future compliance with the Compact. As set forth in its Complaint, Montana asked the Court to "Declare the rights of the State of Montana" and "command[] Wyoming in the future to deliver the waters of the Tongue . . . River[] in accordance with the . . . Compact." Complaint 5.

D. An "Actual Controversy" Exists Between Montana and Wyoming Over the Extent of the Reservoir Right

As discussed above, the DJA does not apply to this proceeding. Assuming, *arguendo*, however, that the principles articulated by the DJA and related case law are persuasive in an

original action, Montana is still entitled to further declaratory relief pursuant to those principles. The DJA, grants the federal courts broad authority to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

> Declaratory relief ... serves a preventive purpose .... permit[ing] [a] court in one action to define the legal relationships and adjust the attendant rights and obligations at issue between the parties so as to avoid the dispute escalating into additional wrongful conduct. In this manner, the statute can avert greater damages and multiple actions and collateral issues. . . . So employed, the remedy promotes several utilitarian values in the adjudication of disputes: speed, economy and effectiveness.

Dow Jones & Co., Inc. v. Harrods, Ltd., 237 F.Supp.2d 394, 405 (S.D. NY 2002); *see also Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) (identifying the purposes of declaratory judgments as (1) "clarifying and settling the legal relations in issue," and (2) "afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding"). Under the DJA, however, a federal court may only grant declaratory relief "[i]n a case of actual controversy." *Dow Jones*, 237 F.Supp.2d at 405. This limitation has generally been held to prevent federal courts from considering "hypothetical," "abstract," or "academic" controversies. *Aetna Life Ins. Co. of Harford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937).

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 272-73 (1941). "It is well established that what makes a declaratory judgment action 'a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior of the defendant toward the plaintiff.'" *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994) (*quoting Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (alteration omitted)); 22A Am. Jur. 2d *Declaratory Judgments*

§ 34 (2005) (same). Put another way, the "crucial question" for the Special Master "is whether granting a present determination of [the Reservoir issue] ... ***will have some effect in the real world."*** *Citizens for Responsible Gov't State Political Action Comm. v. Davidson,* 236 F.3d 1174, 1182 (10th Cir. 2000) (emphasis added); *see also Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) (declaratory relief "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff"); *Rhodes v. Stewart,* 488 U.S. at 4 (per curiam) ("A declaratory judgment ... is no different from any other judgment. It will constitute relief ... if, and only if, it affects the behavior of *the defendant toward the plaintiff.*" (emphasis added)); *Hewitt v. Helms,* 482 U.S. 755, 761 (1987) (same).

An example is instructive. In *Golden v. Zwickler,* 394 U.S. 103 (1969), a case relied upon by Wyoming, Congressman Zwickler sought a declaratory judgment that a New York statute prohibiting anonymous handbills directly pertaining to election campaigns was unconstitutional. Although Zwickler had once been convicted under the statute, he was no longer a Congressman and was not running for reelection because he had accepted a 14-year position as a judge. A unanimous Court held that because it was unknown whether Zwickler would again be subject to the statute, no case or controversy of "sufficient immediacy and reality" existed to allow a declaratory judgment. 394 U.S. at 109.

The controversy between Wyoming and Montana, however, presents a very different case. Unlike the statute in *Zwickler*, there is nothing "hypothetical," "abstract," or "academic" about the ongoing dispute over the Reservoir. Neither Montana nor Wyoming are going to retire from being States. In contrast with the statute in *Zwickler*, the Compact governs the on-going relations between the States now and in the future. As was established at trial, every year, Montana is short of water to satisfy its pre-1950 rights, so every year, a call for water to fill the

Reservoir and for direct flow rights will be necessary.. The Book Affidavit, which was attached to Montana's Motion for Summary Judgment, illustrates that the Reservoir requires over 32,000 acre-feet of water to fill in most years, and the States strongly disagree over the protection afforded by the Compact for the Reservoir. Dispute is inevitable. That point was emphasized by the recent interactions of the States. Even while the Court was actively considering the Exceptions, Wyoming did not immediately respond to a Montana call, and raised questions about the validity of the call that were not consistent with the SIR. *See* Mont. Reply at App. 12-18. Disagreement over this issue is certain. In Wyoming's words, absent declaratory relief on the Reservoir right, the States "will be right back here" litigating a future dispute. Transcript of Post-Trial Hearing Proceedings of May 1, 2014, at 27-28.

In light of these facts, there can be no question that a determination of the extent of the Reservoir right "will have some effect in the real world." *Cox,* 43 F.3d at 1348. It will have the effect of governing Wyoming's actions and ensuring that Montana receives its share of Compact water. It necessarily follows that Wyoming's Motion for Summary Judgment must be denied because the dispute over the Reservoir presents an "actual controversy" sufficient to warrant further declaratory relief.

E. Declaratory Relief Is Important to Guide the States and Prevent Future Disputes

Wyoming long insisted that the Compact did not afford protection for pre-1950 rights in Montana, a position that was advantageous to Wyoming as the upstream state in control of the resource. Based on its interpretation of the Compact, Wyoming has systematically, and over a period of decades, ignored Montana's complaint that its pre-Compact rights were not being satisfied, resisted Montana's efforts to develop a methodology for administering the Compact, and rejected all attempts by Montana to quantify water availability for administration of Article

V(A). Montana Post-Trial Brief at 12-19 (citing the record). Only after years of being rebuffed did Montana resort to the Court's original jurisdiction to protect its rights under the Compact.

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, as the upstream State, it is in Wyoming's interest to prevent relief that will establish rules for Compact administration. Consequently, Wyoming has resisted every effort in this case to develop lasting and meaningful relief that will guide the future actions of the States. Arguing that declaratory relief on the Reservoir would amount to an "advisory opinion," and requesting that the Special Master conclude these proceedings without an opportunity to explore the remedies issues, is but Wyoming's latest tactic. As demonstrated above, however, "existing rulings will not prevent future disagreements." Wyo. Reply 9. Meaningful guidance from the Court is necessary.

In addition, the general rule favoring protection of judicial resources is especially urgent in the context of the Court's original jurisdiction. The Supreme Court controls its original jurisdiction docket by a procedure unique among trial courts. Potential plaintiffs wishing to initiate litigation in the Supreme Court may not simply file a complaint in the clerk's office as they may do in the federal district courts. Rather, they must first file a motion seeking the Court's express leave to file a complaint commencing an original jurisdiction suit. Sup. Ct. R. 17. The Court has indicated that its "original jurisdiction should be invoked sparingly." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *see also* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Since 1961*, 45 Me. L. Rev. 185, 188-90 (1993) (explaining that during the period 1961 to 1991, almost half of the

motions for leave to file an original jurisdiction proceeding were denied). And once an original action is accepted by the Court, it is costly and time consuming to litigate.

Wyoming acknowledges that future disputes over the Reservoir and aspects of water administration are likely. Wyo. Reply 9 ("It may be that the existing rulings will not prevent future disagreements"). Yet Wyoming asks that the Court take no action to guide the States and deter future disputes. Presumably, Wyoming believes that Montana's recourse for the likely disputes will be to file a new original proceeding. However, equity favors the prevention of multiplicity of actions. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521 (1932); *City of Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U.S. 368 (1902); 42 Am. Jur. 2d, *Injunctions* § 38 (citing cases). Equitable relief in the form of a declaration and an injunction is appropriate in those situations where multiple suits "between the same parties involving the same issues of law or fact" are likely. *Matthews*, 284 U.S. at 530; *see also National Private Truck Council, Inc., v. Oklahoma Tax Comm'n*, 515 U.S. 582, 591 n.6 (1995); *see also Dow Jones & Co.*, 237 F.Supp.2d at 405 (identifying the desire to "avert . . . multiple actions" as one of the preventative purposes of declaratory relief). Requiring Montana to file a new proceeding when a dispute arises over whether the Compact protects the full measure of the Reservoir right or whether a Montana call is "valid" would be inefficient and would subject the Court and Montana to undue burdens.

This rationale has proven persuasive in previous compact enforcement suits. In *Texas v. New Mexico*, 482 U.S. 124, the Court considered a request that it appoint an impartial River Master to administer the Pecos River. The Court observed that "[t]he natural propensity of these two States to disagree if an allocation formula leaves room to do so cannot be ignored." *Id.* at

134. It therefore granted the request for a River Master in order to prevent "a series of original actions to determine the periodic division of the water flowing in the Pecos." *Id.*

This same reasoning applies in the present case. Almost ten years of litigation, by which the principles of Article V(A) of the Yellowstone River Compact have been translated through the substantial efforts of the States, the Special Master, and the Court, should not be discarded. The extent of the Compact's protection for the Reservoir right and requirements for Compact compliance should be determined in this proceeding.

VI. WYOMING IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF INJUNCTIVE RELIEF

Wyoming is asking, as a matter of law, for Montana to be barred from seeking an injunction commanding Wyoming to comply with the Compact. Wyoming asserts that Montana is not entitled to even ask for an injunction because "Wyoming continues to stand ready, willing, and able to comply with" the rulings of the Court in this case, Wyoming Exceptions Brief at 16, and therefore "there is no cognizable danger of a recurrent violation by Wyoming." *Id.* at 13.To the contrary, the Court should not deny Montana the opportunity to be heard, conduct discovery and present evidence supporting an injunction that sets standards for compliance with the Compact, particularly now — at the very outset of the second phase of this case. As discussed below, the Special Master should decline to determine at this preliminary stage whether an injunction should issue, and after discovery, allow Montana to prove that an injunction is appropriate.

A. Summary Judgment Should Not Issue Because There Is a Contested Material Fact

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Here, a significant issue of material fact is contested by the Parties. Montana disagrees with Wyoming's wholly unsupported assertion that it is "ready, willing and able to comply with" the Compact, as interpreted by the Court. Indeed, before Montana brought this case, Wyoming had *never* taken a single act to comply with the Compact, even when Montana issued proper calls. It is uncertain at best, therefore, that the government of Wyoming is in fact capable of voluntarily living up to the promises made by its counsel and officials. Thus, even if those who represent Wyoming now genuinely believe it would comply with the Compact, that still is no assurance that Wyoming will do so. Worse, Wyoming offers no support for its assertions that would tend to establish that, as a fact, Wyoming will be in compliance in the future. For this simple reason alone, Wyoming's motion for summary judgment that Montana may not make a case for injunctive relief must fail.

Wyoming's motion must fail for a second reason. Wyoming is not entitled to a judgment "as a matter of law" because the law requires, for the reasons set forth below, that Montana be given the opportunity to make its case for injunctive relief regardless of whether Wyoming can establish that its officials are genuine when they state that Wyoming will comply with the Compact.

B. An Injunction Is a Central Remedy for Montana

Montana's primary motivation for bringing this case was to ensure that Wyoming would comply with the Compact. Specifically, the Bill of Complaint sought a "Decree commanding the

State of Wyoming in the future to deliver the waters of the Tongue [River] in accordance with the provisions of the Yellowstone River Compact." Cmpl, at 5, para. B. The Court granted Montana's Motion for Leave to File the Bill of Complaint over Wyoming's opposition. 552 U.S. 1175 (2008). Montana met its burden that Wyoming violated the Compact. Second Report 231. Because Montana prevailed on liability, it should be permitted to present the Court with argument and evidence to support an award of the relief it seeks in this case.

Wyoming seeks to cut short Montana's opportunity to conduct discovery or present evidence in support of its request for injunctive relief. This would be an unjust result, and contrary to the Court's original jurisdiction jurisprudence. *See, e.g., Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (Court may "order[] future performance called for by the Compact. By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them"). Although the granting of Montana's Bill of Complaint did not guarantee that injunctive relief would be granted, it indicated unequivocally that the Court would hear Montana's case. Wyoming is seeking to deny Montana its fair opportunity to make the case that an injunction is needed here. To the contrary, an injunction will remind Wyoming "of its legal obligations, deter[] future violations, and promote[] the Compact's successful administration." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015) (discussing disgorgement).

C. Ensuring Future Compliance Is a Key Role Played by the Court in Compact Cases

The extraordinary exercise of the original jurisdiction by the Supreme Court to resolve interstate water allocation disputes almost always involves steps to assure future compliance. "[A]n interstate compact is not just a contract; it is a federal statute enacted by Congress." *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010). "[T]he Compact, having received Congress's blessing, counts as federal law." *Kansas v. Nebraska*, 135 S. Ct. at 1053. Where a

"federal law is at issue and 'the public interest is involved,'" the judicial role is not confined to awarding compensation against a party in breach of a private obligation. *Id.* (*quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Rather, "the Court may exercise its full authority," within the limits set by the express terms of the Compact, "to remedy violations of and promote compliance with the [Compact], so as to give complete effect to public law." *Id.* A full remedy for Wyoming's violations of a statute as well as a contract is one that "reminds [Wyoming] of its legal obligations, deters future violations, and promotes the Compact's successful administration," as well as compensating Montana for the injuries that Wyoming's violations have caused it. *Kansas v. Nebraska*, 135 S. Ct. at 1057. Here, the Special Master should allow Montana to pursue its claim that an injunction is necessary to provide Montana a full remedy.

D. The Court Has Often Enjoined States That Have Violated Previous Interstate Allocations

If Wyoming is correct that promises by the upstream State of future compliance renders the downstream State's need for injunctive relief unnecessary, then the Court would rarely, if ever, award injunctive relief in interstate compact disputes. In fact, the opposite is true. "It is well settled that one whose rights are invaded by the wrongful diversion and use of water is entitled to the preventative remedy of injunction." 78 Am. Jur. 2d § 62 *Waters* (2002). Accordingly, in virtually every other interstate water case involving the enforcement of a compact, where this Court has found a violation of that compact, it has issued as a matter of course an injunction to ensure future compliance.

In *Texas v. New Mexico*, 482 U.S. 124 (1987), New Mexico argued that a finding of past violations of the Pecos River Compact did not justify an injunction going forward. The Court

rejected this view, stating "There is nothing in the nature of compacts generally or of this Compact in particular that counsels against rectifying a failure to perform in the past as well as *ordering future performance called for by the Compact.*" *Id.* at 128 (emphasis added). The Court returned the case to the Special Master, stating, "[m]eanwhile, a decree in the form discussed below will issue with respect to New Mexico's current and future obligation to deliver water pursuant to" the Pecos River Compact "as interpreted and applied by the judgments of this Court." *Id.* at 133.

Likewise, in the North Platte litigation, *Nebraska v. Wyoming & Colorado*, 534 U.S. 40 (2001), the Court adopted mandatory injunctive language implementing the Court's earlier Decree as modified. In *Virginia v. Maryland*, 540 U.S. 56 (2003), a compact case involving states' competing jurisdiction over the Potomac River, the Court likewise entered an injunction. *Id.* at 79-80 (Maryland's permit "conditions . . . are null and void and the State of Maryland is enjoined from enforcing them").

In *Oklahoma & Texas v. New Mexico*, 510 U.S. 126 (1993), the Court found that New Mexico had violated the Canadian River Compact and enjoined New Mexico to comply with the Court's decree and the compact to, among other things, release water from Ute Reservoir "at the call of Texas." *Id.* at 629. The Court has issued injunctions in numerous other instances where violations of past allocations have been found. *See, e.g., Kansas v. Colorado*, 556 U.S. 98 (2009) (adopting Special Master's proposed Decree enjoining Colorado to comply with the terms of the Compact and the Decree); *Arizona v. California*, 376 U.S. 340 (1964) (enjoining the United States, Arizona, California, Nevada, New Mexico, and various constituent irrigation and water districts and "all other users of water from the mainstream in said States" to comply with the Court's decree enforcing a Congressional apportionment); *Wyoming v. Colorado*, 298 U.S.

573 (1936) (finding that Colorado had diverted more water than allocated to it in a previous Court decree, 259 U.S. 419 (1922), and enjoining any future diversion in excess of the earlier decree).

E. Wyoming's Assurances of Compliance Cannot Render Moot Montana's Claim for Injunctive Relief

In an effort to avoid an injunction in this case, Wyoming and its officials have promised to abide by the interpretations of the Compact by the Court and Special Master. *See* Wyoming Exceptions Brief at 15-16. Indeed, the Special Master has said "Wyoming state officials have seemed genuine in their willingness to abide by the decisions of this Court." Second Report 229. To use the language of prior Court decisions, Wyoming is suggesting that Montana's claim for injunctive relief has been rendered moot by Wyoming's assurances.

The general rule in an action for injunctive relief is that voluntary cessation of illegal conduct does not moot a claim. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave 'the defendant ... free to return to his old ways'" *United States v. Concentrated Phosphate Exp. Assn.*, 393 U.S. 199, 203 (1968) (*quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). Therefore, "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform . . .." *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952).

The mootness doctrine derives from Article III of the U.S. Constitution, which provides that "federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). The Court explains, "Simply stated, a case is moot when

the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

The standard for determining whether a case has become moot due to defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it *absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.*" *Concentrated Phosphate*, 393 U.S. at 203 (emphasis added). The "heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc.*, 528 U.S. at 189. Thus, it is Wyoming's "heavy burden" that it is "absolutely clear" that future Compact violations cannot "reasonably be expected to recur."

Here, Wyoming's claim of mootness is based on its assurances that it will voluntarily comply. These assurances provide no explanation as to how Wyoming will ensure compliance, such as a proposed plan or regulatory framework. The Court's jurisprudence provides, however, that a defendant's say-so is simply insufficient to meet its heavy burden to establish mootness. The Court's reasoning in *Concentrated Phosphate*, an antitrust action, is instructive:

> A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we only have appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes.

Concentrated Phosphate, 393 U.S. at 203. The Court explains elsewhere that the mere "possibility that [a] respondent may change its mind in the future is sufficient to preclude a finding of mootness." *U.S. v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983) (*citing City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982) and *W.T. Grant Co.*, 345 U.S. at 632). The Ninth Circuit, reviewing the Court's precedents in this area, concludes that "it is

clear that promises to refrain from future violations, no matter how well meant, are not sufficient to establish mootness." *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 953 (9th Cir. 1981) (*citing Quern v. Mandley*, 436 U.S. 725, 733-34 n. 7 (1978); *Concentrated Phosphate*, 393 U.S. at 203; *W. T. Grant*, 345 U.S. at 633).

Counsel for Montana are aware of no instance in which the Court concluded – or any Special Master has recommended – that a downstream State should not be permitted to develop and present a case for injunctive relief on the ground that the issue of future compliance is rendered moot by the downstream State's assurances that it would voluntarily comply.

To the contrary, the Court has repeatedly issued injunctions despite credible assurances of compliance by the upstream State. For example, in *Kansas v. Colorado*, No. 105 Orig., Kansas sought an injunction requiring Colorado to comply with the Compact and the rulings of Court. In that case, the Court had held that Colorado had a duty to either curtail hydrologically-connected groundwater pumping, or, if it continued such pumping, Colorado was required to deliver replacement water to Kansas. Colorado argued that "the Court 'can be satisfied that Colorado has no intention of deliberately violating the Compact in the future.'" Fifth Report of the Special Master, App. 103 (quoting the Colorado brief). The Special Master took Colorado at its word, but nevertheless concluded that an injunction was necessary to ensure compact compliance:

> No one doubts the good faith of the Colorado officials or counsel who have appeared before this Court, but there needs to be a judicial order that assures continued and proper implementations of the replacement water approach. And, indeed, I expect that in the long run both States would benefit from a clear injunction. It is my conclusion, therefore that the Decree should include injunctive relief. Judicial precedent more than amply supports this determination.

Id. at 104. The Court subsequently adopted the Special Master's recommendation and issued a decree that included an injunction. 129 S.Ct. 1294 (2009).

Likewise, in *Kansas v. Nebraska*, No. 126 Orig., the Court and the Special Master found that Nebraska had taken steps to comply with the Republican River Compact that far exceeded the platitudes that Wyoming offers in this case. In particular, the Court found that Nebraska had altered its conduct, had been in compliance with that compact for several years, and had instituted a new regulatory framework to ensure future compliance. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015). "The Master thus reasonably concluded that the current water management plans, if implemented in good faith, 'will be effective to maintain compliance even in extraordinarily dry years.'" *Id.* For the Special Master and the Court, however, Nebraska's efforts to ensure future compliance were, in and of themselves, insufficient. The Court adopted the Special Master's recommendation that a disgorgement of profits for past violations was required to put Nebraska "on notice that if it relapses, it may again be subject to disgorgement of gains." *Id.*

Thus, even where the Court is confident that a State's compact "compliance measures, so long as followed, are up to the task of keeping the State" in compliance, *id.*, it will fashion remedies to ensure future compliance "with reference to the facts of the particular case." *Id.* at 1058. In *Kansas v. Nebraska*, the Court chose the threat of future disgorgement over an injunction, but the intent was the same: to ensure future compliance.

F. The Special Master Should Not Determine at This Preliminary Stage Whether an Injunction Should Issue

When the Court issues an injunction, or other equitable remedy, it molds it as appropriate to the facts. "In exercising our original jurisdiction, this Court recognizes that flexibility [is] inherent in equitable remedies, and awards them with reference to the facts of the particular case. *Kansas v. Nebraska*, 135 S. Ct. at 1058 (internal citations and quotation marks omitted). As

noted, the question for the Special Master to answer at this initial stage of the remedies phase of these proceedings is whether Montana's request for injunctive relief is excluded as a matter of law by Wyoming's assurances of future compliance. For the reasons set forth above, Wyoming has not come close to establishing its right to summary judgment, nor can it meet its burden to establish mootness.

The determination as to whether Montana is affirmatively entitled to an injunction cannot be made now. Montana has not yet had an opportunity to conduct discovery, marshal its evidence, and present its case for an injunction. For example, Montana is entitled to conduct discovery to test Wyoming's assertion that it is "ready, willing and able" to voluntarily comply with the Compact, and that this capacity will in fact translate into compliance. Thus, until Montana has had the opportunity to conduct discovery, the Court cannot determine the appropriate remedies because it can only "award them with reference to the facts of [this] particular case." *Id.*

G. After Discovery, Montana May Obtain an Injunction if There Exists Some "Cognizable Danger" of a Future Violation by Wyoming

The Court in *Kansas v. Nebraska*, No. 126 Orig., cited its decision in *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), as providing the standard applicable to injunctions in compact enforcement actions. 135 S. Ct. at 1059. In both *Kansas v. Nebraska* and *W.T. Grant* – and unlike here – the trial and appellate courts were presented with a full record following completion of discovery before determining whether the moving party had met its burden.

W.T. Grant provides that a party moving for injunctive relief must show "that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *W.T. Grant*, 345 U.S. at 633. This "cognizable danger" standard

poses a "relatively modest hurdle." *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212 (10th Cir. 2012). "Cognizable dangers" are simply risks that are "recognizable":

> All [Montana] must show is a "cognizable" danger—one perceptible or recognizable from the evidence before the court. *See* 3 Oxford English Dictionary 446 (2d ed. 1989) (defining "cognizable" as, among other things, "capable of being known or perceived, or apprehended by the senses or intellect, perceptible"); *see also Mayorga–Vidal v. Holder*, 675 F.3d 9, 14 (1st Cir. 2012) (defining "legally cognizable social group" as one that is "socially visible—that is, generally recognizable in the community").

Id. The Court explains that "[a]ll it takes to make the cause of action for relief by injunction is . . . a contemporary violation of a nature likely to continue or recur." *U.S. v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952). The Court's jurisprudence provides that

> [i]n assessing the likelihood of recurrence, a court may consider all the circumstances, including the bona fides of the [defendant's] expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1201 (10th Cir. 2009) (internal quotation marks omitted); *accord E.E.O.C. v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012). As this test makes clear, "[c]ourts require 'clear proof' that an unlawful practice has been abandoned." *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 367 (7th Cir. 1990) (*quoting U.S. v. Oregon State Med. Soc'y*, 343 U.S. at 333).

In practice, the determination turns on the facts of the particular case. *Kansas v. Nebraska*, 135 S. Ct. at 1058. For example, courts will not issue injunctions in situations where the first factor set forth above – the "bona fides of the defendant's expressed intent to comply" – is met because the defendant terminated the illegal conduct before the litigation began and has instituted an unimpeachable compliance program. *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 954 (9th Cir. 1981). On the other hand, courts will issue injunctions when, for example, the second factor – the "effectiveness of the discontinuance" – is implicated because a company continues to offer

services in the area in which it previously violated the law and has "the capacity to engage in similar unfair acts or practices." *F.T.C. v. Accusearch Inc.*, 570 F.3d at 1202 (*citing W.T. Grant Co.*, 345 U.S. at 634) (quotation marks omitted). At the same time, injunctive relief will be denied where circumstances are such that future violations are exceedingly unlikely, such as where the defendant "had sold its [] business" that had been the source of the violation, *Borg-Warner Corp. v. F.T.C.*, 746 F.2d 108, 110 (2d Cir. 1984), or where intellectual property rights violations had stemmed from an eight-day Broadway theater production that concluded long-ago and where "there is no evidence whatsoever" that a new production was planned. *Robert Stigwood Group Ltd. v. Hurwitz*, 462 F.2d 910, 913 (2d Cir. 1972).

Wyoming, seeking to avoid the application of the injunction standard set forth in *W.T. Grant* and its progeny, ignores these cases entirely and cites instead an equitable apportionment case in which the Court declined to issue an injunction, *Connecticut v. Massachusetts*, 282 U.S. 660 (1931). Wyoming Exception at 14. The Special Master has also noted the "the high standard for injunctive relief set out in *Connecticut v. Massachusetts*," and stated that, given that standard, "Montana may not be able to justify such relief." Second Report 229.[3]

The Court's reasoning in *Connecticut v. Massachusetts*, however, has little relevance to this case. *Connecticut v. Massachusetts* did not involve the enforcement of a previous apportionment (such as a compact or court decree), but rather whether the Connecticut River should be equitable apportioned. Unlike all the other cases discussed above, which, as here, concerned the enforcement of previous apportionments, the Court in *Connecticut v. Massachusetts* was being asked to make an initial equitable apportionment. 282 U.S. 660 (1931). In such a case, the standard of proof is "clear and convincing." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). In contrast, the standard of proof in this case is a

[3] The origin of this citation can be traced to Wyoming's Final Pretrial Memorandum, at page 8.

preponderance of the evidence. Moreover, Connecticut's justification for an injunction was based on a contingent future possibility of a company enlarging a dam in Connecticut that would, if Massachusetts diverted as planned, allegedly suffer harm. The Court rejected this possibility as too remote. Thus, with no preexisting apportionment of the river nor harm shown from future diversions, the Court denied the application for an injunction.Given the very different facts and standard of *Connecticut v. Massachusetts*, the Court's reasoning there has little relevance to this case. Here, the parties negotiated the Compact, and Wyoming has been shown to have violated it. Second Report 231. As a result, Montana should be given the opportunity to establish that an injunction is appropriate. *Id.*

VII. WYOMING IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF COSTS

Despite openly admitting that it lost the core dispute between the parties in this litigation – i.e., whether the Compact protects Montana's pre-1950 rights – Wyoming argues that it should not pay Montana's costs, and that the Special Master should make this determination before this litigation concludes and well before the facts necessary to make it have been established. Wyoming's primary argument is that it has also "prevailed on some issues." Wyoming SMJ 2. This argument misunderstands the law and misstates the relevant facts.

As discussed below, this case was necessitated by Wyoming's refusal to comply with the Compact. Montana prevailed, and it is fundamentally fair and equitable to tax costs against Wyoming because Montana's expenditures would have been unnecessary but for Wyoming's recalcitrance. Montana should be awarded costs because it has already obtained substantial relief as the prevailing party.

A. The Court Routinely Awards Costs to the Party in Whose Favor Judgment Is Rendered.

When considering an award of costs, the Court is guided by Federal Rule of Civil Procedure 54(d), which provides: "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Sup. Ct. R. 17.2. Rule 54(d)(1) codifies the "venerable presumption" that the prevailing party is entitled to costs. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172, 185 L. Ed. 2d 242 (2013). Thus, "costs shall be awarded to the prevailing party unless the court directs otherwise." 10 Charles Alan Wright, et al., Fed. Prac. & Proc. Civ. § 2667 (3d ed.).

The "prevailing party" is the party in whose favor judgment is rendered. The Court explained:

> In designating those parties eligible for an award of litigation costs, Congress employed the term "prevailing party," a legal term of art. Black's Law Dictionary 1145 (7th ed.1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.—Also termed *successful party.*" This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases.

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 603 (2001). When one party is granted substantial relief it "prevails" even if it does not win on every claim. *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1014 (7th Cir. 1985). A party that is only partially successful is typically deemed a prevailing party. 10 Wright, *supra*, § 2667. Even in actions seeking no monetary damages but just injunctive relief, costs will be awarded. *Id.* The "key . . . is whether the plaintiff actually has gained some benefit, either directly or indirectly, from the litigation." *Id.*

B. The Court Routinely Awards Costs to the Prevailing State in Interstate Disputes.

It is beyond dispute that the Court has inherent authority to award costs against States. *See Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 74-75 (1927) ("For many years, costs have been awarded by this court against states."); *Hutto v. Finney*, 437 U.S. 678, 696 (1978) ("A federal court's interest in orderly, expeditious proceedings justifies [it] in treating the state just as any other litigant, and in imposing costs upon it when an award is called for." (internal quotation marks omitted)).

Whether the Court awards costs in the original jurisdiction has turned on the question of whether a case is "governmental" or "litigious." In cases involving "governmental questions, in which each party has a real and vital [interest]," costs have typically been divided. *North Dakota v. Minnesota*, 263 U.S. 583, 584 (1924). This is true because in a "governmental" case, neither state is culpable, and both have an equal interest in resolving the issue to promote order. Costs have therefore been divided in boundary disputes between states where both states share an equal interest in identifying the proper boundary between them because

> the matter involved is governmental in character, in which each party has a real, and yet not a litigious, interest. The object to be obtained is the settlement of a boundary line between sovereign states in the interest, not only of property rights, but also in promotion of the peace and good order of the communities; and is one which the states have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common . . ..

Maryland v. West Virginia, 217 U.S. 577, 582 (1910) (States split costs because they shared "a common interest to bring [the issues] to a satisfactory and final conclusion"); *see also Nebraska v. Iowa*, 143 U.S. 359, 370 (1892) (Costs were divided between the two states, "because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious, interest.").

In contrast, where an interest is "litigious," costs are awarded to the prevailing party in accordance with the general rule. *See North Dakota v. Minnesota*, 263 U.S. at 584. A review of the cases that the Court has deemed "litigious" is instructive. In *North Dakota v. Minnesota*, the State of North Dakota brought suit against the State of Minnesota to enjoin the use of drainage ditches and obtain damages; in *Wyoming v. Colorado*, 259 U.S. 496 (1922), suit was brought to obtain an equitable apportionment and to enjoin the diversion of water; and in *Missouri v. Illinois*, 200 U.S. 496 (1906), and *New York v. New Jersey,* 256 U.S. 296 (1921), a neighboring state brought suit to restrain Illinois and New Jersey, respectively, from actions that caused pollution to a shared body of water. *See also South Dakota v. North Carolina*, 192 U.S. 286 (1904); *New York v. Louisiana*, 108 U.S. 76, 91 (1883). In each of these cases, the Court awarded costs to the prevailing party.

The foregoing cases demonstrate that a case is "litigious" where one state is compelled to bring an original jurisdiction suit against another state in order to prevent or restrain the other state from taking actions that cause damages to the initiating state's rights or property. This is precisely the situation in the present case. Unlike the cases that are "governmental" in character, Montana and Wyoming did not share "a common interest to bring [the issues] to a satisfactory and final conclusion." *Maryland v. West Virginia*, 217 U.S. at 582. In fact, Wyoming had no incentive to bring suit at all. Rather, Wyoming refused all requests for water and resisted numerous efforts to work cooperatively to administer the Compact. Montana's only recourse was to file an original action in order to protect its Compact rights. Wyoming opposed the motion for leave to file, and has challenged Montana at every step of this litigation. This matter plainly falls within the category of "litigious" cases.

C. Montana Is the Prevailing Party and Is Entitled to Recover Its Costs.

As established above, there is nothing novel about an award of costs to the prevailing State in an interstate action. Montana discussed *Kansas v. Colorado*, No. 105 Original, in its Reply on the exceptions. That case provides direct guidance on how the Court will treat costs in a compact enforcement suit like this one. Mont. Sur-Reply 13-18. The Special Master should follow that guidance and recommend that costs be awarded to Montana as the "prevailing party."

It cannot be disputed that judgment was rendered in favor of Montana. The Court ruled that Wyoming violated the Compact, and it remanded the case "to the Special Master for determination of damages and other appropriate relief." *Montana v. Wyoming*, 136 S. Ct. 1034 (2016) (Order and Judgment). For this reason alone, Montana is entitled to recover its costs.

Indeed, Wyoming has repeatedly acknowledged that Montana is the prevailing party. For example, Wyoming admits that the Court and Special Master addressed the dispute over Compact interpretation "predominantly in favor of Montana." *See* Motion 39-40 (citing the record); *see also* Transcript of Motions Hearing of August 29, 2013 at 101 ("[Montana] won. . . . They already won this case on the big issue."); *id.* ("On the one thing that really matters, Montana's already prevailed."); Transcript of Status Hearing on July 29, 2011, at 31 (stating that Wyoming's "initial theory" of Compact interpretation has "been taken care of and we've lost"). Consequently, Wyoming "accede[d] to the conclusion of the Special Master . . . that Wyoming violated the Compact" and committed to compliance with the Court's interpretation of the Compact and the findings and conclusions in the Second Interim Report. Wyo. Exception 15-16.

In *Hewitt v. Helms*, 482 U.S. 755, the Supreme Court addressed the concept of the "prevailing party" in the context of attorney fees available under 42 U.S.C. § 1988. The Court held that when there has been a change in conduct that redresses a plaintiff's grievances, "the

plaintiff is deemed to have prevailed," despite, in that case, "the absence of a formal judgment in his favor." *Hewitt*, 482 U.S. at 761. The Court further explained that a plaintiff is a prevailing party when "the settling of some dispute [] *affects the behavior of the defendant towards the plaintiff*." *Id.* Thus, in a "declaratory judgment action: if the defendant, under the pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *Id.*; *see also Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (to be considered a prevailing party "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant"); *Rhodes v. Stewart*, 488 U.S. at 4 (party prevails if a declaratory judgment "affects the behavior of the defendant toward the plaintiff").

Here, Wyoming admits it has changed its conduct toward Montana as a result of this lawsuit. According to Wyoming, "[t]he Court's rulings in this case *have altered the positions of the parties* as they relate to the future administration of the Compact. *Wyoming no longer can refuse to honor a valid call* by Montana for the benefit of Montana's pre-1950 water rights, including the pre-1950 rights in the Tongue River Reservoir." Wyo. Reply at 9 (emphasis added); *see also* Wyo.'s Exception Br. 15 (conceding that Wyoming has changed its "longstanding interpretation of the Compact" as a result of this case). Consistent with this position, Mr. Tyrrell testified at trial that Wyoming recognizes the Court's decision that Wyoming is obligated to curtail post-1950 uses for the benefit of Montana. Tr. at 5270:18-5271:5 (Tyrrell); *see id.* at 5272:1-12 (stating that he understands Wyoming "need[s] to respond and honor" a call by Montana in future years); *id.* at 5275:9-11 ("[W]e now know that we need to honor the post-'50 curtailment for benefit of pre-'50 in Montana."); *id.* at 5278:23-5279:3 (stating that if he gets a valid call from Montana, "we would go out and regulate and curtail the

post-'50 uses in Wyoming at that time"). Although there were continuing disputes, in the spring of 2015 Wyoming honored a call from Montana for the first time in history. Mont. Reply at App. __. This case has therefore "materially alter[ed] the legal relationship between the parties by modifying [Wyoming's] behavior in a way that directly benefits [Montana]." *Farrar*, 506 U.S. at 111-12. It follows that Montana prevailed in this litigation and is entitled to costs.

In short, Montana stands in the same position as the State of Kansas in *Kansas v. Colorado*. *See* Mont. Reply 13-18. Montana was compelled to seek the Court's assistance to direct Wyoming to comply with the Compact. *See Montana v. Wyoming*, 136 S. Ct. 1034 (2016) (Order and Judgment); *Montana v. Wyoming*, 131 S. Ct. 1765, 1770-71 (2011). This litigation is not complete, but it is clear that Montana is entitled to its costs.

D. Wyoming Has Failed to Overcome the Presumption that Montana Is Entitled to Recover Costs

The unsuccessful party bears the burden to show sufficient circumstances to overcome the presumption in favor of the prevailing party. *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489, 490 (7th Cir. 1982); *Smith v. Southeastern Penn. Transp. Auth.*, 47 F.3d 97, 99-100 (3d Cir. 1995) (per curiam); *Serna v. Manzano*, 616 F.2d 1165, 1167 (10th Cir. 1980); 10 Wright, *supra*, § 2668. A court is unlikely to deny costs to the prevailing party, without "a persuasive reason for doing so, particularly when the losing party is capable of paying the costs." 10 Wright, *supra*, § 2668.

A "court must provide a valid reason for not awarding costs to a prevailing party under Rule 54." *Utah Animal Rights Coal. v. Salt Lake Cnty.*, 566 F.3d 1236, 1245 (10th Cir. 2009) (internal quotation marks omitted). "The unsuccessful litigant can overcome the presumption of an award of costs by pointing to some impropriety on the part of the prevailing party that would justify a denial of costs." *National Info. Servs.*, 51 F.3d 1470, 1472 (9th Cir. 1995); *see Klein v.*

Grynberg, 44 F.3d 1497, 1507 (10th Cir. 1995) (because denial of costs is a "severe penalty," there must be "some apparent reason to penalize the party if costs are to be denied"); *Delta Air Lines*, 692 F.2d at 490 ("[I]n the decisions upholding refusal of costs there has been some fault, misconduct, default, or action worthy of penalty on the party of the prevailing side."). These circumstances do not exist in the present case. Wyoming does not even allege any fault or misconduct by Montana. For this reason alone, Wyoming has not met its burden to overcome the presumption that Montana is entitled to its costs.

Instead, Wyoming's attempt to avoid paying costs centers on the assertion that Montana was "only partially successful, its damages are nominal and insignificant, particularly when compared to the unreasonably high and unnecessary costs incurred, . . . many of the issues were trivial in effect, [and] they were close and difficult to determine." Wyo. Sur-Reply 5-6. These arguments have no merit for several reasons.

First, as noted, being "only partially successful" still qualifies as "prevailing" for the purposes of awarding costs. *See Buckhannon Bd. & Care Home, Inc.*, 532 U.S. 598, 603 (2001).

Second, no damages have yet been awarded, so it is premature for Wyoming to allege that Montana's "damages are nominal and insignificant." That said, Wyoming itself asked the Court to "enter judgment against the State of Wyoming in the amount of $20,340.00 plus $15,537.06 in prejudgment interest." Wyo's. Exception 21. This amount is significantly greater than "nominal damages." *See, e.g.*, *Farrar*, 506 U.S. at 105, 108 (concluding that a party awarded nominal damages of one dollar was a prevailing party, but it was not entitled to attorney fees as such under 42 U.S.C. § 1988). But even if, at the conclusion of these proceedings, damages turn out to be nominal, this is not a ground on which Wyoming can overcome the presumption that costs should be awarded to Montana.

Third, this case was necessitated by Wyoming's continuous refusal to comply with the Compact. The circumstances do not support penalizing Montana for bringing suit to vindicate its rights. *See Klein*, 44 F.3d at 1507; *Delta Air Lines*, 692 F.2d at 490.

Fourth, Wyoming argues in a conclusory fashion that "many of the issues were trivial in effect." While it is impossible for Montana to know what issues Wyoming considers trivial, no issue was so trivial that Wyoming conceded or agreed to stipulate. To the contrary, Wyoming admits that Montana "won this case on the big issue" and that it prevailed "[o]n the one thing that really matters."

Finally, the fact that the losing party's position had merit and that the case presented close and difficult issues is not a sufficient ground to deny costs to the prevailing party. *See, e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 467 (3d Cir. 2000), *as amended* (Sept. 15, 2000) ("[T]o deny a prevailing party costs because it was successful in prosecuting or defending against a complex legal theory unduly punishes that party."); *Klein*, 44 F.3d at 1507 ("We find no justification to penalize plaintiffs because this litigation was complex or lengthy. Defendants' own actions brought about the litigation."); 10 Moore's Federal Practice § 54.101[b], at 54–152 to 54–153 (3d ed. 2016) (footnote and citations omitted) ("The presumption that the prevailing party is entitled to costs must be overcome by some showing that an award would be inequitable under the circumstances.").[4]

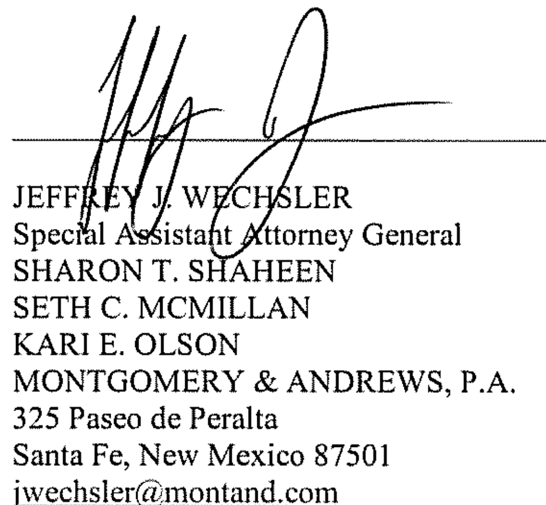
[4] Wyoming cites *Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 722 (10th Cir. 2000) and *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir. 1986)) to justify a denial of costs. Neither case is persuasive. *Zeran* did not concern the factors identified by Wyoming. Rather, it addressed whether misconduct outside the litigation process is a justifiable reason for denying costs. *Zeran*, 203 F.3d at 722. Similarly, *White & White* is inapposite because it concerns complex antitrust claims where there was considerable disparity between the litigants. 786 F.2d at 730-31; *see id.* at 730 (stating that the rule was "intended to take care of a situation where . . . it would be inequitable *under all the circumstances in the case* to put the burden of costs upon the losing party"). Neither *Zeran* nor *White & White* concerns two sovereign states engaged in an interstate dispute being litigated before the Supreme Court.

In sum, Wyoming's "own actions brought about the litigation." *See Klein*, 44 F.3d at 1507. Thus, there is "no justification to penalize [Montana] because this litigation was complex or lengthy." *Id.* To the contrary, "[t]o deny them costs would be in the nature of a severe penalty imposed upon them, and there must be some apparent reason to penalize the prevailing party if costs are to be denied." *Id.* Wyoming simply cannot overcome the presumption that Montana is entitled to recover costs. The Motion should be denied.

CONCLUSION

For the reasons stated above, Wyoming's Motion for Summary Judgment as to Remedies should be denied in its entirety, and the States should proceed with the remedies phase as contemplated by the Court.

Respectfully submitted,



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June 27, 2016

CERTIFICATE OF SERVICE

I certify that copies of Montana's Response in Opposition to Wyoming's Motion for Summary Judgment as to Remedies was served electronically to the following on June 27, 2016, and by U.S. Mail on June 28, 2016, as indicated below:

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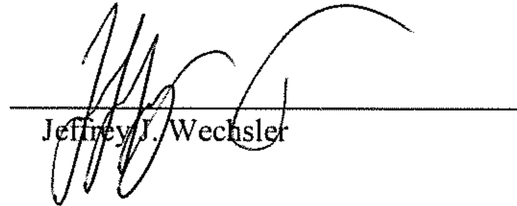
I further certify that all parties required to be served have been served.



Jeffrey J. Wechsler

litigation, including expert witness fees and miscellaneous costs such as transcripts and duplication). While this policy choice is debatable, we see no good reason why the rule regarding the recovery of expert witness fees should differ markedly depending on whether a case is originally brought in a district court or in this Court. Many cases brought in the district courts are no less complex than those brought originally in this Court. And while the parties in our original cases sometimes are required to incur very substantial expert costs, as happened in the present case, the same is frequently true in lower court litigation. Thus, assuming for the sake of argument that the matter is left entirely to our discretion, we conclude that the best approach is to have a uniform rule that applies in all federal cases.

We therefore hold that the expert witness attendance fees that are available in cases brought under our original jurisdiction shall be the same as the expert witness attendance fees that would be available in a district court under §1821(b). We thus overrule Kansas' exception to the Report of the Special Master.

It is so ordered.

JUDGMENT

Judgment is awarded against the State of Colorado in favor of the State of Kansas for violations of the Arkansas River Compact resulting from postcompact well pumping in Colorado. Judgment is awarded in the amount of $34,615,146.00 for damages and prejudgment interest, including the required adjustment for inflation, arising from depletions of usable streamflow of the Arkansas River at the Colorado-Kansas Stateline in the amount of 428,005 acre-feet of water during the period 1950–1996. The damages were paid in full on April 29, 2005. Costs through January 31, 2006, including reallocation of Kansas' share of the Special Master's fees and expenses, are awarded to Kansas in the amount of $1,109,946.73. These costs were paid in full on

Ex. A

June 29, 2006. By Stipulation, $100,000.00 of the Special Master's fees and expenses are reallocated from the United States to Kansas.

Kansas' claims regarding the Winter Water Storage Program and the operation of Trinidad Reservoir and all Colorado Counterclaims are hereby dismissed.

DECREE

I. Injunction

A. General Provisions

1. It is Ordered, Adjudged, and Decreed that the State of Colorado, its officers, attorneys, agents, and employees are hereby enjoined to comply with Article IV–D of the Arkansas River Compact by not materially depleting the waters of the Arkansas River, as defined in Article III of the Compact, in usable quantity or availability for use to the water users in Kansas under the Compact by Groundwater Pumping, as prescribed in this Decree, and more particularly:

a. To prevent Groundwater Pumping in excess of the precompact pumping allowance of 15,000 acre-feet per year without Replacement of depletions to Usable Stateline Flow in accordance with this Decree;

b. To enforce the Colorado Use Rules with respect to Groundwater Pumping, unless John Martin Reservoir is spilling and Stateline water is passing Garden City, Kansas; and

c. To enforce the Colorado Measurement Rules with respect to Groundwater Pumping.

2. Compliance with this Decree shall constitute Compact compliance with respect to Groundwater Pumping.

B. Determination of Compact Compliance With Respect to Groundwater Pumping

1. Compact compliance with respect to Groundwater Pumping shall be determined using the results of the H–I Model over a moving ten-year period beginning with 1997,

in accordance with the Compact Compliance Procedures described in Appendix A.* Any Shortfall shall be made up by Colorado as specified in Section I.C of this Decree.

2. Annual Calculations of depletions and accretions to Usable Stateline Flow shall be determined using the H–I Model, in accordance with the procedures described in Appendix B and the Durbin usable flow method with the Larson coefficients, which is documented in Appendix C. Annual Calculations shall be done on a calendar year basis unless the States agree to a different year for the calculations. Accumulation of accretions shall be limited as described in Appendix D. The Annual Calculations for each of the years 1997–2006, found in Appendix E, are final, except as set forth in Section III of this Decree. Similarly, the results of Annual Calculations for years after 2006 shall be final for use in the ten-year Compact compliance accounting, when determined as provided in Appendices A and B, subject to the same provisos applicable to the 1997–2006 Annual Calculations.

3. Colorado shall be entitled to credit for Replacement of depletions to Usable Stateline Flow. The credit for Replacement shall be determined using the H–I Model, except for credit derived from operation of the Offset Account, which shall be determined as set out in Appendix F, and except for credit for direct deliveries of water to the Stateline if the Offset Account does not exist, which shall be determined as set out in Appendix A.

4. The H–I Model may be improved by agreement of the States or pursuant to the Dispute Resolution Procedure contained in Appendix H.

C. Repayment of Shortfalls

1. If there is a Shortfall, Colorado shall make up the Shortfall in accordance with the provisions of Appendix A.

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*[Reporter's Note: The appendices will be found in the Final Report of the Special Master, available at http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html and in Clerk of Court's case file.]

2. Colorado shall make up a Shortfall by delivering water to the Offset Account in John Martin Reservoir to the extent that space is available. To the extent that space is not initially available in the Offset Account, Colorado shall make up the rest of such Shortfall by delivering water to the Offset Account as space becomes available. The timing, accounting, crediting, notice, and other matters related to deliveries of water to make up a Shortfall shall be accomplished pursuant to Appendix A.

II. Dispute Resolution

The States shall work together informally to the maximum extent possible to resolve any disagreements regarding implementation of this Decree. Disagreements that cannot be so resolved shall be submitted to the stipulated Dispute Resolution Procedure contained in Appendix H.

III. Modification of Appendices to the Decree

Appendices A–J may be modified only: (a) by agreement of the States or (b) pursuant to the Dispute Resolution Procedure, *provided* that the Colorado Measurement Rules and Colorado Use Rules may be amended by Colorado to the extent that Colorado can demonstrate that any such amendments will adequately protect Kansas' rights under the Compact, and *further provided* that Appendix E shall not be modified except that it shall be subject to later determinations of Replacement credits to be applied toward Colorado's Compact obligations by the Colorado Division 2 Water Court and any appeals therefrom, and further subject to the right of Kansas to seek relief from such Colorado Water Court determinations under the Court's original jurisdiction. Disputes arising under this Section III shall be subject to the Dispute Resolution Procedure.

IV. Retention of Jurisdiction

A. The Court retains jurisdiction for a limited period of time after the end of the initial ten-year startup period (end-

ing in 2006) for the purpose of evaluating the sufficiency of the Colorado Use Rules and their administration and whether changes to this Decree are needed to ensure Compact compliance. The procedures to be followed are set out in Appendix B.1, Part VII.

B. The retained jurisdiction provided in Section IV.A of this Decree shall terminate at the end of 2008, unless, prior to December 31, 2008, either State has notified the Special Master that there is a dispute concerning the sufficiency or administration of the Use Rules that has been submitted to the Dispute Resolution Procedure. If either State notifies the Special Master as provided herein, the retained jurisdiction shall continue, and the States, within 60 days from the conclusion of the Dispute Resolution Procedure, shall request either further proceedings before the Special Master or termination of the retained jurisdiction provided for in Section IV.A of this Decree. The Special Master shall recommend to the Court such action as he deems appropriate. The Special Master shall be discharged upon termination of the retained jurisdiction provided for in Section IV.A of this Decree.

C. Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

D. No application for relief under the retained jurisdiction in this Section IV shall be accepted unless the dispute has first been submitted to the Dispute Resolution Procedure.

V. Definitions

Whenever used in this Judgment and Decree, including Appendices, terms defined in the Compact shall have the meaning ascribed to them in the Compact; in addition, the following terms shall mean:

Acre-foot: The volume of water required to cover one acre of land to a depth of one foot, which is equal to 325,851 gallons;

Annual Calculations: The calculation for each year of depletions and accretions to Usable Stateline Flow using the H–I Model, as described in Appendix B;

Appendix: One of the Appendices listed in Section VI of this Decree and included in Volumes II and III of the Special Master's Fifth and Final Report in this case;

Acceptable Sources of Water: As defined in Appendix G;

ARCA: The Arkansas River Compact Administration created by Article VIII of the Compact;

Colorado Measurement Rules: Amended Rules Governing the Measurement of Tributary Ground Water Diversions Located in the Arkansas River Basin, revised November 30, 2005, contained in Appendix I.1, as they may be amended from time to time in accordance with Article III of this Decree;

Colorado Use Rules: Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin, Colorado, Kan. Exh. 1123, contained in Appendix J.1, as they may be amended from time to time in accordance with Article III of this Decree;

Compact: The Arkansas River Compact, 63 Stat. 145 (1949); Kan. Stat. Ann. § 82a–520; Colo. Rev. Stat. § 37–69–101;

Dispute Resolution Procedure: As set out in Appendix H;

Groundwater Pumping: Pumping of water from wells (other than the Wiley/Sapp Wells) in excess of 50 gallons per minute, from the alluvial and surficial aquifers along the mainstem of the Arkansas River between Pueblo, Colorado, and the Stateline within the domain of the H–I Model described in Appendix C.1;

H–I Model: The Hydrologic-Institutional Model as described and documented in Appendix C.1;

John Martin Reservoir: The reservoir constructed and operated by the United States Army Corps of Engineers on the mainstem of the Arkansas River approximately 58 miles upstream from the Stateline, as referred to in the Compact;

Offset Account: The storage account established in John Martin Reservoir and operated in accordance with the ARCA Resolution Concerning an Offset Account in John Martin Reservoir for Colorado Pumping, dated March 17, 1997, as amended twice on March 30, 1998, and contained in Appendix L, as the same may be further amended by the ARCA;

Replacement: Delivery of water from Acceptable Sources of Water to prevent depletions caused by Groundwater Pumping;

Shortfall: A net depletion to Usable Stateline Flow based on the results of the H–I Model over a ten-year period using the Compact Compliance Accounting Procedures described in Appendix A;

Usable Stateline Flow: Stateline flow as simulated by the H–I Model and determined to be usable pursuant to the Durbin usable flow method with the Larson coefficients, as set out in Appendix C.2; and

Wiley/Sapp Wells: Wells decreed as alternate points of diversion for precompact surface water rights in Colorado by the District Court, Water Div. 2, State of Colorado, Case Nos. 82CW115 (W–4496), 82CW125 (W–4497), and 89CW82; see App. to Third Report of the Special Master 59–61.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SOUTER joins, concurring.

I join the opinion of the Court in full. I do so only, however, because the opinion expressly and carefully makes clear that it in no way infringes this Court's authority to decide on its own, in original cases, whether there should be witness fees and what they should be.