

No. 137, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.
SPECIAL MASTER

**MONTANA'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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The State of Montana submits this Reply Brief in Support of its Motion for Summary Judgment on the Yellowstone River Compact's Application to Tributaries of the Tongue and Powder Rivers.

I. INTRODUCTION

The Special Master rendered his Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint on June 2, 2009 ("Memorandum Opinion" or "Mem. Op."). The Memorandum Opinion included the following language regarding inclusion of tributaries:

Wyoming also argues that Montana cannot complain about any reservoirs that are on tributaries of the Powder and Tongue rivers, rather than on the main stems of those rivers. According to Wyoming, Article V "only allocates to each state the post-1950 storage rights ... for waters of the 'Interstate Tributaries,'" which "are defined to include the main stems of the Powder and Tongue, not their tributaries." Contrary to Wyoming's contention, however, Article V(A) protects against new diversions for storage in reservoirs on the tributaries to the Powder and Tongue rivers. As Wyoming notes, Article V(B) refers to "Interstate Tributaries," which Wyoming believes does not refer to tributaries to tributaries. Article V(A), however, applies to "[a]ppropriative rights to the beneficial use of the water of the Yellowstone River System." The Yellowstone River System, in turn, is defined as the "Yellowstone River and all of its tributaries" and Article II(E) defines the term "tributary" as "including interstate tributaries and tributaries thereto." Article V(A) thus prohibits new diversions of water for storage facilities on tributaries to the Powder and Tongue rivers if the diversions interfere with pre-1950 appropriative rights in Montana.

Mem. Op. 29-30 (citations and footnotes omitted). Wyoming requested that this language be removed, stating that "Wyoming never raised in its Motion to Dismiss the issue of whether reservoirs diverting from the tributaries to the Interstate Tributaries are subject to either a call by Montana under Article V(A), or allocation under Article V(B)." Wyo. Ltr. Br. at 4 (July 17, 2009).

The Special Master, in his Supplemental Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint ("Supplemental Opinion" or "Supp. Op."), agreed to exclude the paragraph quoted above. Supp. Op. 28-30. At the same time, the Special Master invited "either Montana or Wyoming to bring a motion for summary judgment on this issue either before or after the filing of the First Interim Report. Resolution of the issue at an early stage is in the best interest of both States." *Id.* at 29-30.

Montana filed its Motion for Summary Judgment, and the State of Wyoming and the United States have now responded. Wyoming does not challenge Montana's Motion, or the Special Master's initial ruling, with respect to Article V(A). Rather, Wyoming argues that Article V(B) is not within Montana's claim in this case, but if it is, the tributaries are excluded under Article V(B). Wyoming's Brief in Opposition to Montana's Motion for Partial Summary Judgment ("Brief in Opposition" or "Wyo. Br. In Opp.")

The United States supports the position of Montana and the initial ruling of the Special Master, so far as they relate to Article V(A), but the United States argues that the Motion for Summary Judgment is premature with regard to Article V(B). Brief for the United States as Amicus Curiae in Partial Support of Montana's Motion for Summary Judgment ("Brief in Partial Support" or U.S. Br. In Part. Supp.")

II. SUMMARY OF ARGUMENT

It is now clear that there is no dispute over the correctness of the Special Master's initial ruling on the inclusion of tributaries. Wyoming asked that certain language be

removed from the Special Master's Memorandum Opinion, only to agree, in response to Montana's Motion for Summary Judgment, that the Special Master's language was correct.

Initially, Wyoming saw only a third-tier Article V(B) claim when it responded to Montana's Motion for Leave to File, but now Wyoming sees only an Article V(A) claim in its response to Montana's Motion for Summary Judgment. Both Wyoming readings of the Montana Bill of Complaint are too narrow. Montana pled its claim for a violation of the Yellowstone River Compact broadly under all of Article V.

Wyoming argues, nevertheless, in case the Special Master rules that Article V(B) claims are at issue, that tributaries of Interstate tributaries are excluded under Article V(B). Yet Article V(A) and Article V(B) are two sides of the same inseparable coin. They both deal with the same physical water of the Tongue and Powder Rivers. Article V(A) addresses the part of that water in use on January 1, 1950, while Article V(B) addresses the part of that water put to beneficial use thereafter. It would be contrary to the structure of the Compact and the intent of the drafters, as recognized by Congress, to include the physical waters of the tributaries of the Tongue and Powder Rivers under Article V(A) and to exclude them under Article V(B). Moreover, the plain language of the Compact and reliable extrinsic sources support Montana's Motion.

III. ARGUMENT

A. There Is No Dispute Over The Special Master's Ruling In The Memorandum Opinion On Tributaries

Wyoming now concedes that the terms of the Compact "ensure that the broadest geographical array of pre-1950 surface water diversions receive recognition under

Article V.A.” Wyo. Br. In Opp. at 12; *see also id.* at 11 (explaining that Article V(A) of the Compact does not exclude tributaries to the Interstate tributaries); *id.* at 15 (accord). Likewise, the United States agrees that “[t]he Compact makes clear that for purposes of Article V(A), the Compact applies to diversions from all surface waters tributary to the Tongue and Powder Rivers in Wyoming.” U.S. Br. in Part. Supp. at 4 (emphasis in the U.S. Br.). Thus, there is no dispute that Article V(A) of the Compact applies to all surface waters tributary to the Tongue and Powder Rivers, and the Special Master should include this ruling in his First Interim Report.

B. Montana Has Stated Its Claim Broadly To Include All of Article V of the Compact

Wyoming argues that the Special Master should not address the Compact’s application to tributaries of the Interstate tributaries because the term “Interstate tributaries” does not appear in Article V(A), and “Montana’s claims are based solely on Article V.A of the Compact.” Wyo. Br. in Opp. at 3. Likewise, the United States asserts that Montana’s claim is limited to Article V(A) and is therefore premature. U.S. Br. In Part. Supp. at 3. Both Wyoming and the United States thereby claim that Montana has limited its claims to Article V(A). Whether this is so turns primarily on whether Montana has properly pled a claim for relief under Article V(B).

Supreme Court Rule 17.2 provides that “The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules . . . may be taken as guides.” Sup. Ct. R. 17.2. According to Federal Rule of Civil Procedure 8(a)(2), the heart of a complaint must include only “a short and plain

statement of the claim showing that the pleader is entitled to relief.” “As the text of the rule thus makes clear, all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity, a standard articulated many times over by federal courts throughout the country.” Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1215. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining that allegations need only “be enough to raise a right to relief above the speculative level”). The Supreme Court has explained that “[s]uch a statement of the claim must simply ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Montana concurs with the United States that “matters outside the scope of the complaint as pleaded are not properly before the Special Master at this juncture. . . .” U.S. Br. In Part. Supp. at 3 (emphasis added); see also Transcript of Hearing on Motion to Dismiss (Feb. 3, 2009) at 113 (acknowledging that “primarily the source document is the bill of complaint”). Thus, in order to address the argument that Montana has limited its claim to Article V(A), it is necessary to evaluate the Bill of Complaint. See generally *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 834 (2002) (concluding that a civil action “arises under” a statute when the statutory claim appears on the face of plaintiff’s complaint).

As master of its own complaint, Montana is entitled to choose its own claims. See, e.g., *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987). With regard to Article V, Montana broadly pled violations of the entire Article. Indeed, a review of

the Complaint will reveal no limiting reference to Article V(A). Rather, Paragraph 7 specifically identifies the water that is allocated to each state in each tier under subsections V(A) and V(B). Further, Paragraph 13 of the Bill of Complaint provides:

By undertaking and allowing the aforementioned actions, the State of Wyoming has depleted and is threatening further to deplete the waters of the Tongue and Powder Rivers allocated to the State of Montana *under Article V* of the Compact.

Complaint ¶ 13 (emphasis added). Thus, the plain terms of Paragraph 13 include an alleged violation of Article V(B). Likewise, each of the other allegations broadly pleads violations of “Article V.” In short, paragraphs 9 through 11, and 13 through 14 of the Complaint allege that Wyoming violated Article V, necessarily including all of its subsections. It follows, that Montana has alleged a violation of Article V(B) in its Complaint.

Montana’s Bill of Complaint need only “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555). It is beyond dispute that Wyoming received notice of Montana’s Article V(B) claim. By its own admission “Wyoming initially read . . . the Bill [of Complaint] to assert a violation of Article V.B. of the Compact,” and therefore “focused on particulars of Article V.B. in its first brief in this case.” Wyo. Br. In Opp. at 3. Notice pleading is a modest standard, and the Complaint therefore adequately placed Wyoming on notice of Montana’s claims arising out of Article V(B).

Wyoming places much emphasis on the positions that Montana took in its Reply Brief in support of its Motion for Leave to File and Its Response in Opposition to

Wyoming's Motion to Dismiss. According to Wyoming, through those briefs, Montana limited its claims to Article V(A). *Id.* at 3-5. But Wyoming ignores the fact that each of those briefs was responding to Wyoming's own arguments. As Wyoming admits, it focused on Article V(B) in its opposition to the Motion for Leave to File. More specifically, in its opposition to the Motion for Leave to File Bill, the thrust of Wyoming's argument was that the "Court need not consider the Compact's first tier allocation under Section A of Article V." Wyo. Br. In Opp. to Mot. For Leave at 2 (citation omitted). Based on this briefing, it should come as no surprise that Montana, in turn, responded with its position regarding Article V(A).

Similarly, Wyoming began the Summary of Argument section of its Brief in Support of the Motion to Dismiss as follows:

The language of the Compact, and its drafting history, establish that the commissioners intended to create a divertible flow compact, not a depletion compact. There is no basis for Montana's claim that the Compact restricts Wyoming's ability to deplete flows of the Tongue or Powder River in order to protect water levels at the state line as they existed on January 1, 1950.

Wyo. Mot. Dis. at 36. This is an argument against an Article V(A) claim. In its opposition, Montana was responding to "that narrow argument alone." *Atchison, Topeka and Santa Fe Railway Company v. Buell*, 480 U.S. 557, 568 (1987). Wyoming could have filed a motion to dismiss any claims arising under Article V(B). Had it done so, Montana would have responded in kind. Having failed to do so, Wyoming cannot now point to Montana's failure to address a non-existent argument as proof that Montana has limited its claims. Wyoming's argument concerning the failure of the

Special Master to address Article V(B) in his Memorandum Opinion suffers from this same defect.

Nor has Montana ever abandoned its Article V(B) claims. For example, in its Motion to Dismiss, Wyoming asserted that Montana did not claim a violation of the percentage allocations. Wyo. Mot. Dis. at 37. In its response, Montana was quick to dispute this assertion. Montana explained its Article V(B) claims as follows:

It is central to Montana's Complaint that Wyoming has violated Article V.A of the Compact by using post-Compact water in derogation of Montana's protected pre-Compact rights, but Montana has also broadly pled violations under Article V generally. Montana has pled the matter broadly because the amendment of pleadings in original actions "does not suit cases within the Court's original jurisdiction." See *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Because factual development has not yet occurred in this case, and because in any complete equitable apportionment, a violation of the apportioned supply of one category (pre-Compact rights) necessarily causes a violation of the allotment of post-Compact Supply. For that reason, the Complaint does not single out Article V.A or V.B, and instead focuses on Montana's claims for violations of the apportionment in Article V.

Mont. Resp. to Wyo. Mot. to Dis. Bill Comp. at 18; *see also id.* at 17, 38-39, 44. In short, Montana properly pled, and continues to assert, a violation of Article V(B).

In its brief in partial support of Montana's summary judgment, the United States maintains that Montana "is bound by the representations that it made in persuading the Court to grant it leave to file the complaint." U.S. Br. In. Part. Supp. at 3. Although it does not offer any citation to the record in this case, the implication is that Montana limited its claim through the briefing on the Motion for Leave to File. There are three problems with this argument. First, as discussed above, much of the Reply in support of the Motion for Leave was appropriately responsive to Wyoming's opposition

arguments. Second, the implication that Montana limited its claims to Article V(A) is incorrect. For example, in the second paragraph of its Brief in Support of Motion for Leave to File Bill of Complaint, Montana explained that “Montana claims that Wyoming has disregarded Wyoming’s obligations under Article V of the Compact, *including, among others*, its obligation to curtail consumption of the waters of the Tongue and Powder River Basins in excess of Wyoming’s pre-January 1, 1950 consumption of such water whenever the amount of water necessary to satisfy Montana’s pre-January 1, 1950 uses of such water is not passing the Wyoming-Montana stateline.” Mont. Br. in Supp. at 2 (emphasis added). The other referenced claims under Article V necessarily include Article V(B) claims.

Moreover, the Court looks primarily to the complaint itself to determine the scope of the claims in an original proceeding. For example, in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), Wyoming argued that Nebraska was seeking to expand its original petition (equivalent to the Bill of Complaint in this case). After referring to the existence of an ambiguity in the filings, the Court relied on Nebraska’s petition to resolve the issue. *Id.* at 590-591. In the present case, as demonstrated above, the Bill of Complaint is unambiguous in alleging a claim under all of Article V of the Yellowstone River Compact. That would normally be dispositive, unless there were equally unambiguous statements to the contrary in other initial pleadings. In this case, there have been no such statements. Wyoming quotes several paragraphs from Montana’s Reply Brief on the Motion for Leave to File Bill of Complaint. Wyo. Br. in Opp. at 4. Yet there is no limitation to Article V(A) in the paragraphs quoted. These

paragraphs appear under the heading “Wyoming Ignores Montana’s Central Claim.” Mont. Rep. Br. on Mot. For Leave at 1-2. The V(A) claim is referred to as Montana’s “central” claim, “basic” claim, “a claimed violation” and “Montana’s most fundamental claim.” None of these are exclusive. None of these amount to a statement that the Article V(A) claim is Montana’s *only* claim. On the contrary, they necessarily suggest the existence of other claims. As a result, the Special Master should decline the invitation to limit Montana’s case to Article V(A).

C. The Allocations Throughout Article V Include All Tributaries With Only Express Exceptions

Wyoming devotes the bulk of its Brief In Opposition to the argument that the term “Interstate Tributaries,” if at issue, excludes tributaries of the Tongue and Powder Rivers. Wyo. Br. in Opp. at 7-17. Wyoming opens its argument by suggesting the possibility of engaging in discovery with respect to extrinsic evidence on the meaning of the Yellowstone River Compact. *Id.* at 7. The United States has persuasively argued against this approach, however. *See* U.S. Br. in Part. Supp. at 2.

Wyoming, in effect, argues that tributaries of the Tongue and Powder Rivers are *included* with respect to Article V(A) of the Compact, but are *excluded* with respect to Article V(B). This makes little sense as a practical matter. Articles V(A) and V(B) are part of the same whole. They are joined together as two sides of the same coin: Article V(A) deals with the portion of the waters of the Tongue and Powder Rivers that was being put to beneficial use as of January 1, 1950. Article V(B) deals with the other portion of those same waters, the portion that was not being put to beneficial use as of

January 1, 1950. These are two complementary portions of the same physical water. It would have been impractical, unnecessary and contrary to the broad purposes of the Compact for the drafters to try to separate out and exclude the molecules from tributaries of the Tongue and Powder Rivers that were not destined to be used by water rights in existence on January 1, 1950.

Further, Article V(B) includes both second-tier and third-tier allocations, with Article V(A) being the first tier. The existence of the three tiers of allocation is something on which the States agree. *See* Wyo. Br. in Opp. to Mot. For Leave at 2 (“Montana’s legal theories are based on Article V of the Compact, which creates a three-tiered water allocation scheme”). Article V(B) allocates to the second tier “such quantity of” the unused and unappropriated waters of the Interstate tributaries “as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V.” Wyoming has correctly admitted that Article V(A) deals with water on the tributaries of the Tongue and Powder Rivers. The natural and most likely sources for supplemental water supplies for Article V(A)-protected rights on tributaries of the Tongue and Powder Rivers would be sources located on those very tributaries. It is implausible to suggest that the drafters, *sub silentio*, were requiring that pre-1950 rights on tributaries of the Tongue and Powder Rivers must obtain their supplemental supplies from the main stems of the Tongue or Powder Rivers to achieve protection under the Compact. For example, under Wyoming’s theory, a direct flow pre-1950 irrigation right on a tributary to the Tongue River would not qualify for protection under the Compact’s second-tier allocation if the source of supplemental

water was new storage upstream on that same tributary. The implausibility of such a scenario supports the understanding that Article V(B) must have been intended to cover tributaries of the Tongue and Powder Rivers.

Wyoming suggests that it would be unnatural to include a tributary with a name unrelated to the name of the Tongue or Powder Rivers within the definition of “Interstate Tributaries.” Wyo. Br. in Opp. at 8. It is difficult to accept, however, the unprecedented notion that whether a tributary should be included within the scope of the Yellowstone River Compact should depend upon the historical happenstance of whether each tributary incorporated some reference in its name to the name of the main stem. Rather, as shown by the initial paragraph of the Compact, the intent was to apportion all waters of the Yellowstone River and its tributaries other than the waters within or waters which contribute to the flow of streams within the Yellowstone National Park. Indeed, the United States points out that the “broad purpose expressed by the drafters” in that initial paragraph, “argues for a broad definition of the waters subject to regulation under the Compact and against a limitation based on the location of the diversion.” U.S. Br. in Part. Supp. at 6.

Wyoming next argues that “If the drafters intended the four rivers listed in the definition of ‘interstate tributaries’ to include all tributaries thereof (including remote tributaries several steps removed) they simply could have said so.” Wyo. Br. in Opp. at 8. In making this statement, however, Wyoming overlooks the burdensome drafting that they are suggesting. The Wyoming suggestion is that the phrase “tributaries thereof,” in addition to being included in the definition of “Tributary” in Article II(E),

should have also been included in Article II(F) in which the term “Interstate Tributaries” is defined. To carry out Wyoming’s hypothetical suggestion would require Article II(F) to read as follows:

The term “Interstate Tributaries” means the Clarks Fork, Yellowstone River, and tributaries thereto; the Big Horn River (except Little Big Horn River) and tributaries thereto; the Tongue River and tributaries thereto; and the Powder River and tributaries thereto whose confluences with the Yellowstone River are respectively at or near the city or town) of Laurel, Big Horn, Miles City, and Terry, all in the State of Montana.

65 Stat. 665 (italicized and underlined wording added). Furthermore, even the insertions hypothesized above would not be sufficient to deal with the “remote tributaries several steps removed” under Wyoming’s proposal, since, if not mentioned, under Wyoming’s interpretation, such subtributaries would be excluded. Moreover, all of the additional drafting that is being suggested by Wyoming as to how the drafters should have drafted the Compact is unnecessary for the reasons pointed out by the Special Master and the United States. Mem. Op. 29-30; U.S. Br. in Part. Supp. at 5-6. Those reasons can be stated as follows: The Tongue and Powder Rivers are interstate tributaries pursuant to Article II(F); interstate tributaries are tributaries pursuant to Article II(E); tributaries are “any stream which in a natural state contributes to the flow of the Yellowstone River” pursuant to Article II(E); and each tributary and subtributary of the Tongue and Powder Rivers, no matter how remote, “in its natural state contributes to the flow of the Yellowstone River.” Further, the Wyoming argument founders on the implausibility of the drafters’ having expressly included tributaries of Interstate Tributaries in the Article II(E) definition of “Tributary,” only to exclude them in the very next definition, without even mentioning such an exclusion.

Wyoming bases a considerable part of its argument on its efforts to separate the terms “tributary” and “Interstate Tributaries.” Wyo. Br. in Opp. at 9-11. Yet those two terms cannot be separated because “Interstate Tributaries” is a subset of all “tributar[ies]” within the Yellowstone River Basin. The effect of that textual connection is that references to “Interstate Tributaries,” like every other “tributary,” includes tributaries of that tributary, and so on.

Wyoming relies, as a “possibility,” on a single passage from the negotiating minutes to support the exclusion of tributaries of Interstate Tributaries. Wyo. Br. In Opp. at 14-15. The entire passage reads as follows:

There was discussion of the meaning of the terms “tributaries” and “interstate tributaries,” Mr. Bunston expressed concern over the possible drying up of intrastate tributaries in Wyoming and the consequent reduction of interstate tributaries.

Yellowstone River Compact Commission, Meeting Minutes of December 7-8, 1950, at 5, Jt. App. at 42. According to Wyoming, the fact that no change was made in response to Mr. Bunston’s concern should be understood to mean that “‘intrastate tributaries’ were not covered by the definition of ‘interstate tributaries.’” Wyoming argues that Montana simply “decided not to press the point,” and voluntarily relinquished any claim to the water of the tributaries to Interstate tributaries. Wyo. Br. In Opp. at 14. It appears more plausible, however, that Mr. Bunston was assured that his concern was unfounded because intrastate tributaries *were* subject to the Compact. In the end, however, the reference to Mr. Bunston’s concern is simply too brief to be helpful.

Wyoming also points out that in Article V(B)(4) there is an express *inclusion* of a tributary: “(including the Little Powder River).” Wyo. Br. In Opp. at 15. Wyoming concludes that this implies the opposite of the exclusion of the Little Big Horn River in the definition of “Interstate Tributaries” in Article II(F). *Id.*, at 15-16. This is not likely the case, however, because, with regard to the Little Powder River, the Commissioners were considering two conflicting drafts regarding its treatment. The Engineering Committee draft included the Little Powder, Jt. App. 173, but the Burke draft explicitly excluded the Little Powder from the Compact by parenthetical, Jt. App. 138. Because the Burke draft had excluded the Little Powder, it was logical for the drafters to specifically include it in the text by parenthetical in order to avoid future confusion. Thus, there was a special reason for the negotiators to specify the inclusion of the Little Powder River.

Similarly, The Little Big Horn was specifically considered by the Compact Commission at their February 1950 meeting. Yellowstone River Compact Commission, Meeting Minutes of February 1-2, 1950, at 6, 9-10, Joint Appendix (“Jt. App.”) at 81, 83-84. Commissioners from Montana suggested that the Little Bighorn be included in the Compact. *Id.* at 9, Jt. App. at 84. The Compact Commission recognized, however, that the “entire drainage area [of the Little Bighorn] in Montana is within the Indian reservation,” and agreed to exclude it from the Compact. *Id.* at 9-10, Jt. App. at 84-85; *see also* App. A. to Brief in Mot. For Leave, Bill & Br. in Support at A-1 (map showing location of Little Bighorn within the Crow Reservation in

Montana). This is consistent with the Compact's treatment of rights "owned by or for Indians, Indian tribes, and their reservations." YRC, art. VI.

What is plain from the reliable sources of the negotiations is that the drafters were attentive to their inclusion and exclusion of tributaries and subtributaries. For example, at the October 1950 meeting of the Compact Commission, the negotiators considered the issue as it related to the definition of Interstate tributaries. Yellowstone River Compact Commission, Meeting Minutes of October 24-25, 1950, at 16, Jt. App. at 70. "It was agreed that in Article II, (C), (D), and (F) where necessary the Little Bighorn River should be expressly excluded from the compact." *Id; compare* Jt. App. 128 (definition of "Interstate tributaries" in Burke draft that did not expressly exclude the Little Bighorn River). The drafters also agreed to expressly exclude "tributaries lying within Yellowstone Park." Meeting Minutes of October 24-25, 1950, at 16, Jt. App. at 70. This was consistent with the authorizing legislation. *See* Act of June 2, 1949, 63 Stat. 152. Contrary to Wyoming's assertions, the negotiating history confirms that the States intended to include all tributaries that were not expressly excluded from the definition of "Interstate tributaries" in Article II(F).

Finally without contribution from the tributaries, the flows of the Tongue and Powder Rivers could be reduced to just the rainfall on the bed of the mainstem. The diffuse surface waters flowing directly to the Tongue and Powder Rivers are excluded from the Compact by Article V(E).¹ The Special Master has ruled that return flows

¹ Article V(E) reads: "There is hereby excluded from the provisions of this compact: . . . 2. Devices and facilities for the control and regulation of surface waters." 65 Stat. 667. "Devices and facilities for the control and regulation of surface waters" was explained to mean "modern soil conservation practices." Waters involved are "waters which diffuse over the land and do not flow intermittently or continually through and into natural water courses," which are allowed by the Compact to be regulated by the owner

can be reduced to zero on precompact rights. Mem. Op. at 37-41. With the ability of Wyoming to completely deplete tributary inflows, the Tongue and Powder Rivers would be left with only such flow as might occur as the result of rainfall on the riverbed itself. Thus, under Wyoming's formulation, Wyoming could deprive Montana of virtually all water under Article V(B). The States and Congress could not have intended such a result.

IV. CONCLUSION

For the reasons stated above, the State of Montana requests a summary judgment ruling that the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers.

Respectfully submitted,

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of the land on which such waters are diffused." 82d Congress, Senate Report No. 883 (Oct. 2, 1951) at 11, reprinted in App. A to Mont. Resp. to Wyo. Mot. To Dis. at 29a; *see also id.* at 19a (Report of the Federal Representative).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Montana's Reply Brief in Support of Its Motion for Summary Judgment was served by electronic mail and by placing the same in the United States mail, postage paid, this 9th day of November, 2009, to the following:

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