**No. 137, Original**

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**In the**

# Supreme Court of the United States

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STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

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## MEMORANDUM OPINION OF THE SPECIAL MASTER

## ON MONTANA'S CLAIMS UNDER ARTICLE V(B)

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**December 20, 2011**

**MEMORANDUM OPINION OF THE SPECIAL MASTER**
**ON MONTANA'S CLAIMS UNDER ARTICLE V(B)**

Subsequent to the filing of Montana's Complaint and the resolution of Wyoming's Motion to Dismiss, a disagreement has arisen over the scope of the Complaint. Montana contends that the Complaint is broad enough to permit a wide variety of claims that Wyoming is taking too much water under either Article V(A) or V(B) of the Yellowstone River Compact. By contrast, Wyoming contends that the Complaint permits Montana to raise issues only under Article V(B) of the Compact. I conclude that the Complaint covers both Articles V(A) and V(B), but that the only adequately pled allegation of a violation of the Compact is that Wyoming has denied water needed for pre-1950 uses in Montana. If Montana wishes to raise and pursue other alleged violations, it must seek leave to amend its Complaint.

## I. Procedural Background

Montana moved for leave to file its Complaint on January 31, 2007. Montana, Wyoming, and the United States all briefed the motion. Following briefing, the Supreme Court granted leave to file the Complaint in a short opinion that also allowed Wyoming 45 days to file a motion to dismiss. 552 U.S. 1175 (2008).

Wyoming subsequently moved to dismiss the Complaint on the ground that it failed to state a claim upon which relief can be granted under the terms of the Compact. The Motion to Dismiss assumed that Montana's only allegation of a violation of the Compact was that Wyoming failed to provide sufficient water in some years to enable Montana to meet the needs of its pre-1950 water uses. Wyoming argued that the Compact does not require Wyoming to provide sufficient water to satisfy such water uses. Wyoming also argued that none of the specific actions that Montana alleged in its Complaint could violate the Compact. After briefing

by both the parties and amici, I recommended in my First Interim Report that the Motion to Dismiss be denied. First Interim Report of the Special Master 15 (Feb. 10, 2010). Montana filed two exceptions to the Report. The Supreme Court recommitted one of the exceptions to me, and it held a hearing on and overruled the other exception. Montana v. Wyoming, 131 S. Ct. 1765 (2011).

At my invitation, Montana filed a Motion for Partial Summary Judgment in 2009 regarding the Compact's coverage of tributaries of the Tongue and Powder Rivers. The motion revealed for the first time a fundamental disagreement regarding the breadth of Montana's Complaint. In its motion, Montana sought summary judgment that both Articles V(A) and V(B) of the Compact cover all tributaries of the Tongue and Power rivers. Wyoming ultimately conceded that Article V(A) covers these tributaries, but argued that the Article V(B) was outside the reach of this case and that I therefore should not reach the question of whether Article V(B) covers the tributaries. Wyoming's Brief in Opposition to Montana's Motion for Partial Summary Judgment, Nov. 2, 2009, p. 2. The United States, filing a brief as *amicus curiae*, also argued that the scope of Article V(B) was "outside the scope of the complaint as pleaded." Brief for the United States as *Amicus Curiae* in Partial Support of Montana's Motion for Summary Judgment, Nov. 2, 2009, p. 3.

I ultimately concluded that it was unnecessary to decide the legitimate scope of Montana's Complaint as part of Montana's motion for partial summary judgment and left open the question of the Complaint's breadth:

> Although both Wyoming and the United States suggest that the Complaint is limited to Article V(A) and the substantive arguments to date have focused on that article, the Complaint is broadly written to claim the protection of Article V

> as a whole, rather than of individual subparts. Article V, moreover, constitutes a comprehensive scheme of which Article V(A) is one interconnected part. Montana might ultimately be able to show the independent relevance of Article V(B) to this proceeding.

First Interim Report, p. 95.[1] The Supreme Court subsequently granted in part and denied in part Montana's Motion for Partial Summary Judgment "in accordance with the Special Master's First Interim Report." 131 S. Ct. 442 (2010).

In June of this year, I asked Montana and Wyoming to each "submit a list of the issues of fact and law that it currently believes the Supreme Court will still need to resolve in reaching a final decision in this case." Case Management Order No. 6, June 15, 2011, ¶ 4. In its response, Montana listed legal issues under Article V(B) as well as factual issues involving post-January 1, 1950 uses in Montana that would not appear to be relevant to its claims under Article V(A). Montana listed five legal issues involving Article V(B):

> 18. What is the measure of "unused and unappropriated" water in Article V(B)?
>
> 19. Is it a violation of Article V(B) to take water that was either "used" or "appropriated" as of January 1, 1950?
>
> 20. Do supplemental water rights have priority without regard to the stateline?
>
> 21. Does the allocation of water between the States under Article V(B) change based on the individual action of water users?
>
> 22. What is the accounting period for Article V(B) uses?

Montana's Initial List of Issues of Fact and Law, July 20, 2011, pp. 2-3. Although some of these issues (e.g., Issues 18 and 19) could be relevant to an understanding of the Compact's protection

[1] During the hearing on Montana's motion, I also noted that I was "inclined to agree with Montana that the complaint itself is pled relatively broadly and that it refers not simply to Article V(A), but to Article V more generally." Transcript of Hearing on Motion for Partial Summary Judgment, at 6:24 to 7:2 (Nov. 17, 2009).

of pre-1950 rights under Article V(A), others (e.g., Issue 20) would appear to raise issues unique to Article V(B).

Similarly, a number of the listed factual issues were written in ways to suggest that Montana might seek to litigate whether Montana has received all of the waters to which it is entitled under Article V(B) for post-January 1, 1950 uses. For example, Montana's seventh issue of fact states, "What is the nature and extent of supplemental new post-1950 rights in Montana and Wyoming?" Id., p. 4. While the nature and extent of post-1950 rights in Wyoming would seem relevant to Montana's claims under Article V(A), the nature and extent of post-1950 rights in Montana would appear to go beyond Montana's claims under Article V(A). Other issues of fact that would appear either to go beyond what is needed to address Montana's Article V(A) claims, or to be ambiguous in that regard, include paragraphs 6 (nature and extent of supplemental rights), 8 (total amount of water available for use), 10 (new or expanded storage), 12 (groundwater pumping), 13 (hydrologic connection), 14 (depletion by groundwater), and 15 (use of saved water for new uses or on new lands). Id. , p. 4.

To help resolve the breadth of the Complaint, I directed Montana to file a "statement identifying any claims that it may wish to make under Article V(B) of the Compact, along with a brief in support of its right to raise such claims in this proceeding." Case Management Order No. 8, Aug. 19, 2011, ¶ 3. In this order, I directed Montana to "be as specific as possible in identifying such claims." Id. On September 12, 2011, Montana filed the requested statement and brief. Montana's Brief on its Right to Raise Article V(B) Claims and Statement of its Article V(B) Claims, Sept. 12, 2011. Despite my request that Montana be as specific as possible in identifying its Article V(B) claims, Montana provided only a broadly worded and qualified one-paragraph summary:

> With regard to Article V(B) of the Yellowstone River Compact, Montana claims that Wyoming has allowed construction and use of new and expanded storage facilities, new irrigated acreage, and groundwater wells in the Tongue and Powder River Basins in violation of Article V. More specifically, Montana claims that by these three types of actions Wyoming has deprived Montana of supplemental water supplies and water for use on new lands and for other purposes to which it is entitled under Article V(B). As is often the case, Montana will not be able to be more specific with respect to its claims under Article V(B) until the conclusion of discovery in this case.

Id., pp. 17-18. While exceptionally broad, the statement made clear that Montana wishes to pursue claims for post-1950 water uses under Article V(B).

I held a hearing on Montana's right to raise Article V(B) claims on September 30, 2011. At the conclusion of that hearing, I directed Montana to submit an additional statement regarding the issues of fact and law that Montana seeks to pursue with regard to its Article V(B) claims. In its response, Montana lists eight issues of law and 10 issues of fact "specific to Montana's Article V(B) claims." Montana's Supplemental Statement of Article V(B) Issues, Oct. 7, 2011, pp. 6-8. This list includes a number of issues that clearly go beyond Montana's pre-1950 rights and instead concern whether Montana has received sufficient water for post-1950 uses. Thus, the issues ask, "How are Article V(B) violations determined," and, "Since the time that significant post-1950 development in Wyoming has occurred, did Montana receive 60% of the water subject to the percentage allocations on the Tongue River?" Id. pp. 7-8.

## II. Analysis

I conclude that Montana, under its Complaint, can raise issues under both Articles V(A) and V(B), but only to the degree that the claims are relevant to the allegations in its Complaint that it has not received adequate water to satisfy its pre-1950 water uses. It is important to differentiate two separate issues regarding the coverage of Montana's Complaint. First, which provisions of the Compact form the basis of Montana's claims under its Complaint? Second, what alleged violations of the Compact does Montana adequately plead in its Complaint? While the Complaint broadly asserts violations of Article V of the Compact, the only violation clearly alleged in the Complaint is that Wyoming denied Montana sufficient water to meet its pre-1950 water uses. If Montana wishes to raise other alleged violations, it therefore must seek leave to amend its Complaint.

### A. Compact provisions adequately pled by the Complaint.

While Wyoming argues that Montana should be barred from bringing any claims under Article V(B), Montana's Complaint consistently refers to Article V as a whole and not simply to Article V(B). Thus, paragraphs 8-12 of the Complaint all allege actions or inactions by Wyoming "in violation of Montana's rights under Article V of the Compact." Paragraph 13, in turn, alleges that, "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*" (emphasis added).

Montana's brief in support of its motion for leave to file its Complaint similarly refers throughout to Article V, not merely Article V(A). At the very beginning of its brief, for example, Montana notes that it "claims that Wyoming has disregarded Wyoming's obligations

*under Article V of the Compact*." Brief in Support of Motion for Leave to File Bill of Complaint, p. 2 (emphasis added).

Given the language of the Complaint and Montana's brief in support, it is clear that Montana has pled its Complaint to cover Article V in general, and not simply Article V(A). This, however, does not end the question of the Complaint's coverage because there is the separate question of whether Montana has adequately pled any violations other than Wyoming's alleged failure to deliver sufficient water to meet pre-1950 uses. As I have previously noted, Article V(B) is relevant not only to the allocation of waters for post-1950 uses, but also to an understanding of Montana's rights with respect to pre-1950 uses. There is nothing inconsistent in concluding that the Complaint relies on Article V in general but that the Complaint alleges only violations that restrict water for pre-1950 uses.

**B. Violations adequately pled by the Complaint.**

What violations are covered by the Complaint is a closer question than what articles of the Compact are covered. As Montana notes, some paragraphs of the provisions of the Complaint can be read, absent context, to plead broad violations of Montana's rights under the Compact. Paragraphs 14 through 16 fall into this category:

> 14. By depleting the waters allocated to the State of Montana, the State of Wyoming has injured the State of Montana and its water users.
>
> 15. Unless relief is granted by this Court, water use in the State of Wyoming in excess of its equitable share of the waters of the Tongue and Powder Rivers will continue and increase, resulting in substantial and irreparable injury to the State of Montana and its water users.

16. The State of Wyoming refuses to comply with Article V of the Yellowstone River Compact with respect to the waters of the Tongue and Powder Rivers, despite requests by the State of Montana that it do so.

Montana's brief in support of its motion for leave to file its Complaint focuses on Montana's allegation that Wyoming has not provided it with sufficient water to satisfy pre-1950 water uses. In most places, however, the brief seems careful not to say that this is Montana's only allegation. Thus, Montana argues that Wyoming has "disregarded Wyoming's obligations under Article V of the Compact, *including, among others,*" the obligation to curtail post-1950 consumption of water in Wyoming when Montana is not receiving sufficient water for its pre-1950 water uses. Brief in Support of Motion for Leave to File Bill of Complaint, Jan. 31, 2007, p. 2 (emphasis added). According to Montana, the "dispute presents fundamental legal issues of Compact interpretation, *including* whether Wyoming would ever be obliged under the Compact to curtail post-1950 uses so that Montana's pre-1950 uses can be met." Id., p. 3 (emphasis added).

Montana's reply brief in support of its motion for leave to file its Complaint appears equally careful to leave doors open. Thus, Montana states that its claims regarding water for pre-1950 uses are its "central," "basic," and "most fundamental" claims, not its *only* claims. Montana's Reply Brief, April 16, 2007, pp. 1-2.

In determining the scope of Montana's Complaint, however, the question is not whether the Complaint *possibly* or *conceivably* could be read to allege violations other than those concerning pre-1950 uses in Montana. Instead, the question is how the Supreme Court would have reasonably read the Complaint at the time that it granted leave to file the Complaint. This

requires a review of the Complaint as a whole and of the record before the Court at the time that the Court granted leave to file the Complaint.

At least two factors militate against an overly liberal and speculative reading of the Complaint. First, the Supreme Court has "substantial discretion to make case-by-case judgments as to the practical necessity" of hearing disputes under its original jurisdiction. Texas v. New Mexico, 462 U.S. 554, 570 (1983), citing 28 U.S.C. § 1251(a). The Supreme Court grants leave to file an original action only when claims are of "that character and dignity which makes the controversy a justiciable one under [the Court's] original jurisdiction." Nebraska v. Wyoming, 507 U.S. 584, 593 (1993), quoting Nebraska v. Wyoming, 325 U.S. 589, 610 (1945). In order to show cause to file an original action, a state therefore must plead an actual injury serious enough to justify the Court's intervention. Nebraska v. Wyoming, 507 U.S. at 593, 598, 601.

The requirement that a state seek leave to file a complaint also enables the Supreme Court to "dispose of matters at a preliminary stage." Ohio v. Kentucky, 410 U.S. 641, 644 (1973). In original actions, the Supreme Court seeks "to have the parties, as promptly as possible, reach and argue the merits of the controversy presented." Id. "To this end, where feasible, [the Court] dispose[s] of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." Id.

An overly broad and liberal reading of the Complaint in this action would undermine the purposes underlying the requirement that a state seek leave to file its complaint and fully brief its motion. In this case, the Supreme Court granted Montana leave to file its Complaint only after review of the pleadings and the briefs for and against leave – and only after seeking and receiving the views of the United States. 550 U.S.732 (2008). To ensure that the Court has had an adequate opportunity to determine whether particular allegations are sufficient to justify the

Court's original jurisdiction and to dispose of them, where possible, at a preliminary stage, it is critical that allegations be sufficiently clear and apparent that the Court would reasonably have read the Complaint as encompassing them and sufficiently specific to have allowed the Court to determine whether and how it should resolve them under its original jurisdiction.

Second, any allegations of Compact violations in Montana's Complaint must have been sufficient to have given Wyoming "fair notice of what the … claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), quoting Conley v. Gibson, 355 U.S. 41, 47 (1957). Under Supreme Court Rule 17.2, the Federal Rules of Civil Procedure – and thus Rule 8(a)(2) – govern pleadings in original actions. Although "detailed factual allegations" are unnecessary, a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. A complaint must contain more than "naked assertions" and "unadorned, the-defendant-unlawfully-harmed-me accusations." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Bell Atlantic Corp. v. Twombly, supra, 550 U.S. at 555 n.3.[2] In interpreting Montana's Complaint, the question therefore is not what unspecified factual claims might conceivably be covered by the Complaint's broad, general allegations of injury, but instead what allegations have been pled with sufficient transparency to have given Wyoming "fair notice" of the claims against it and the "grounds" on which the claim rests.

[2] Thus, in *Twombly*, the Supreme Court said, in the context of an antitrust complaint, that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." 550 U.S. at 556.

Read with these considerations and standards in mind, Montana's Complaint raises only allegations regarding its right to water for pre-1950 uses. The only specific factual allegations in the Complaint are paragraphs 8 through 12. Paragraph 8 explicitly focuses on water for pre-1950 uses:

> Wyoming refuses to curtail consumption of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950, whenever the amount of water necessary to satisfy Montana's use of such waters existing as of that date is not passing the Wyoming-Montana stateline, in violation of Montana's rights under Article V of the Compact.

Paragraphs 9 through 12 then specify the types of post-1950 water consumption that have led to the violation specified in paragraph 8.[3] No other particular allegations of Compact violations and injuries are found anywhere in the Complaint.

While secondary to the language of the Complaint itself, the pleadings filed with the Court in connection with Montana's motion for leave to file its Complaint support this reading of the Complaint. For example, Montana's brief in support of leave to file the Complaint, as well as its reply brief, also focus singularly on Montana's allegations that Wyoming has failed to provide sufficient water to meet Montana's pre-1950 uses. While the briefs refer to Montana's pre-1950 claims as merely "central" or "most fundamental," no other specific violations are mentioned or discussed. The section of Montana's initial brief entitled "The Present Controversy" talks only of interference with pre-1950 uses. Brief in Support of Motion for Leave to File Bill of Complaint, Jan. 31, 2007, pp. 16-20. As Montana notes later in the same brief,

[3] None of the actions alleged in paragraphs 9 through 12 would constitute violations of the Compact standing alone. They are violations only to the extent, as alleged in paragraph 8, that they interfere with the amount of water needed to satisfy Montana's pre-1950 uses.

> Montana, unlike Wyoming, interprets the Compact to apportion among the compacting States those waters that were in actual use in each State on January 1, 1950, pursuant to water rights under the doctrine of prior appropriation and postcompact rights supplemental thereto. The gravamen of Montana's Article V claims is that Wyoming is violating the Compact by failing to curtail its post-January 1, 1950 water uses to protect Montana's rights under the Compact.

Id., p. 22.

The United States brief on Montana's motion for leave to file its Complaint also supports this reading of the Complaint. As noted, the Supreme Court specifically asked for the United States' view of Montana's motion. The United States' reading of the Complaint is evidence of how members of the Court would have read the Complaint. The Supreme Court, moreover, may have relied on the United States' interpretation and views in deciding to grant leave to file the Complaint. While the United States' reading of the Complaint cannot override the wording of the Complaint itself, the United States' reading in this case is again consistent with the reading set out above:

> Montana does not allege that Wyoming has violated the Compact merely by allowing [the activities specified in paragraphs 9 through 12 of the Complaint]. Instead, Montana argues that, as a result of them, it has received insufficient water to satisfy its own rights under the Compact's first-tier allocation, and that Wyoming therefore has violated the Compact by permitting the aforementioned increases in water use while failing to curtail the diversion of water as necessary to protect Montana's rights under the Compact. Compl. ¶¶ 14-16; Br. In Supp. of Compl. 14. The gravamen of Montana's complaint is that in some recent years,

> there has been insufficient water available in the Powder and Tongue Rivers to satisfy pre-1950 water rights in Montana under the Compact's first tier, see Br. in Supp. of Compl. 17, and that when Montana's first-tier rights are not satisfied there is no 'unused and unappropriated' water to be allocated between the States pursuant to the Compact's second and third tiers.

Brief for the United States as Amicus Curiae, Jan. 2, 2008, pp. 7-8. The United States brief does not suggest that the Complaint involves any other alleged violations or injuries.

In rejecting Wyoming's argument that the assertion of injury in Montana's Complaint lacked sufficient detail, moreover, the United States specifically relied on Montana's allegations regarding pre-1950 water uses:

> Although Montana's assertion of injury lacks detail, it appears to be adequate to state a ripe claim. Montana alleges that in low-water years, and as a result of Wyoming's asserted Compact violations, an insufficient quantity of water has crossed the state line to satisfy its first-tier water rights. Those allegations of past incidents state a cognizable claim of failure to perform under the Compact, which in similar cases has been held to be a sufficient injury to warrant retrospective relief – either money damages or repayment in water.

Id., p. 13. It is questionable whether Montana's more general allegations in paragraphs 14 through 16 of the Complaint, standing alone, would have been adequate to meet the relevant pleading requirements.

Several other facts provide further evidence of the limited character of Montana's current Complaint (although they would not require limiting Montana's Complaint if it otherwise adequately set out a broader set of allegations). First, all of the proceedings prior to the Supreme

Court's May 2011 opinion assumed that Montana's Complaint dealt only with pre-1950 water uses, and Montana never set out other particular allegations. Wyoming's motion to dismiss, for example, argued only that Montana had no cause of action for failures to receive water needed to meet pre-1950 needs. See Wyoming's Motion to Dismiss Bill of Complaint, April 1, 2008, pp. 2-3. If Montana's Complaint was not limited to pre-1950 water uses, an important response to Wyoming's motion to dismiss would have been that Wyoming's motion addressed only part of the Complaint, ignoring entirely allegations regarding rights to water for post-1950 uses. Montana, however, never made such an argument but instead focused solely on Wyoming's arguments regarding its pre-1950 claims.

Similarly, at the hearing on Montana's motion for partial summary judgment, I specifically noted my understanding that Montana's case "only deals with the pre-1951 [sic] appropriators" and asked whether there had been "any disagreements between the two states over the amounts of water that is [sic] divided between post-1950 appropriators in Montana and Wyoming." Hearing of Nov. 17, 2009, p. 31, lines 16-21. Counsel for Montana did not explicitly disagree with my understanding of the case, noting instead that "there have been disagreements about whether Wyoming is complying with the compact under Article V(A). Wyoming takes its position that they always have been, and we take the position that they have not." Id., p. 31, line 23 to p. 32, line 1. See also id. at p. 91, line 4 to p. 94, line 20.

Second, the United States Supreme Court in its opinion on Montana's exception described the Complaint as focused on Montana's pre-1950 water uses. The Court mentions no other allegations, as one might expect if the Court believed that the Complaint was broader.

In February 2008, we granted Montana leave to file a bill of complaint against Wyoming for breach of the Compact. 552 U.S. 1175. Montana alleged

> that Wyoming had breached the Compact by consuming more than its share of the Tongue and Powder Rivers. Bill of Complaint 3, ¶8. Specifically, Montana claimed that Wyoming was appropriating water for a number of new, post-1950 uses; irrigating new acreage; building new storage facilities; conducting new groundwater pumping; and increasing consumption on existing agricultural acreage. Id., at 3-4, ¶¶9-12. *According to Montana's complaint, the Compact did not permit Wyoming to use water for any of these practices as long as Montana's pre-1950 users' rights remained unfulfilled.* Id., at 3, ¶8.

Montana v. Wyoming, 131 S. Ct. 1765, 1770 (2011) (emphasis added).

**III. Opportunity to Amend**

If Montana wishes to allege additional violations of the Compact, it can seek leave from the Supreme Court to amend its Complaint. As both Wyoming and Montana have emphasized, the Supreme Court does not liberally grant leave to amend. As the Court has noted,

> the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure … does not suit cases within this Court's original jurisdiction. The need for a less complaisant standard follows from [the Court's] traditional reluctance to exercise original jurisdiction in any but the most serious of circumstances, even where, as in cases between two or more States, [the Court's] jurisdiction is exclusive.

Nebraska v. Wyoming, 515 U.S. 1, 8 (1995). As explained earlier, the requirement that a state seek leave to file a complaint in an original action serves an important "gatekeeping" function, which could be evaded if amendments to a complaint were not subject to similar oversight. Id.

See also Ohio v. Kentucky, 410 U.S. 641, 644 (ordinary procedures for seeking leave to amend a complaint do not apply because an original action is "not an ordinary case").

The significant burden that a state carries when seeking leave to amend, however, does not mean that amendments are impossible. Indeed, the Court has granted leave to amend when amendments meet the standards for filing original complaints and will not "take the litigation beyond what [the Court] reasonably anticipated when [it] granted leave to file the initial pleadings." Nebraska v. Wyoming, 515 U.S. at 8. Thus, after setting out the rigorous standards for amendment just quoted, the Supreme Court in Nebraska v. Wyoming permitted the two states to amend their pleadings in a variety of specific ways. Id. at 8-23. See also Third Interim Report of the Special Master, Nebraska v. Wyoming (recommending that the parties be granted leave for a variety of amendments).

Unlike an overly speculative reading of the Complaint, a petition for leave to amend the Complaint would permit the Court to determine whether any additional alleged violations of the Compact that Montana seeks to raise are of a "character and dignity which makes the controversy a justiciable one under [the Court's] original jurisdiction." Nebraska v. Wyoming, 507 U.S. 584, 593 (1993), quoting Nebraska v. Wyoming, 325 U.S. 589, 610 (1945). The Court would be able to exercise its discretion in deciding whether to hear the additional allegations and thus preserve the gatekeeping function provided by the requirement that a party seek leave to file an original complaint.

In this regard, it is important to note that it is not clear from the current record (1) what, if any, disagreements Montana and Wyoming currently have over the interpretation and implementation of Article V(B) of the Compact (other than the inclusion of tributaries to the Powder and Tongue Rivers), (2) whether Montana has suffered any injury to date as a result of

any such disagreement, and (3) whether there is any reason that Montana and Wyoming cannot resolve any disagreement on their own without having to invoke the original jurisdiction of the Supreme Court. Throughout the years, the States have discussed the need for better administration of the Compact's requirements (see, e.g., 1988 Annual Report of the Yellowstone River Compact Commission, p. IV), and it is not clear why the States have not succeeded. To the degree that there have been legal disagreements between the two States in the past over the requirements of the Compact (e.g., the Compact's coverage of groundwater), many of these disagreements hopefully will be resolved in the course of addressing pre-1950 water uses in this action. Other disagreements hopefully might be resolved without the need for court involvement.[4] Petitions to amend should generally be reserved for situations where Montana alleges that it has suffered actual injury either because of a fundamental disagreement between the States over the meaning of the Compact or because Wyoming has ignored its obligations under the Compact.

## IV. Proceedings under the Current Complaint

Several comments about future proceedings under the current Complaint may be useful in closing. First, although the current Complaint covers only allegations of violations dealing with pre-1950 water uses, the resolution of many of the legal issues are likely to be equally applicable to both pre-1950 and post-1950 uses.

[4] In Oklahoma v. New Mexico, the Special Master recommended that the Supreme Court provide that good faith negotiations among the parties to a compact are a condition to invoking the Court's jurisdiction. Report of the Special Master, Oklahoma v. New Mexico, Oct. 15, 1990, pp. 31-32. As the Special Master in that case noted, general commercial law provides for an implied commitment to make a contract work. Id., p. 30. He therefore suggested that a state that is party to a compact should have an obligation, prior to obtaining leave to file a complaint to enforce that compact, "to negotiate in good faith with the other states, either in the compact commission forum or otherwise, to address such matters as ambiguities or uncertainties in compact meanings." Id., p. 31. Such a requirement, he suggested, would be a "reasonable exercise of this Court's often exercised power to limit the use of its original jurisdiction." Id., p. 32.

Second, Article V is an integrated allocation scheme, and resolution of issues regarding pre-1950 rights may ultimately require rulings on the operation of other aspects of Article V. For example, in my First Interim Report, I suggested that an intrastate remedy might be appropriate for water shortages confronting pre-1950 appropriators in Montana where Montana can use such a remedy to remedy the shortages of its pre-1950 appropriators and such intrastate means "do not prejudice its other rights under the Compact." First Interim Report of the Special Master, p. 27.[5] Thus, any claim that Montana could have avoided injury to pre-1950 uses through an intrastate reallocation of water might well require an examination and analysis of Montana's other rights under the Compact.

Finally, the limited nature of Montana's current Complaint should not be used to try to unduly limit Montana's discovery. As noted already, Article V is an integrated allocation scheme, and information relevant to portions of the Compact other than Article V(A) will often be relevant to a resolution of Montana's allegations regarding pre-1950 uses. Montana, of course, must limit its discovery to information relevant to the allegations that it has currently pled, but Montana will be given reasonable latitude subject to that constraint.

[5] This is the subject of Montana's exception to my First Interim Report that the Supreme Court recommitted to me. 131 S. Ct. 497 (2010).