

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 MOTION FOR SUMMARY JUDGMENT ON  
THE YELLOWSTONE RIVER COMPACT'S APPLICATION TO  
TRIBUTARIES OF THE TONGUE AND POWDER RIVERS**

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**December 18, 2009**

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ON MONTANA’S MOTION FOR SUMMARY JUDGMENT ON  
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TRIBUTARIES OF THE TONGUE AND POWDER RIVERS**

Montana moves for partial summary judgment that the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers (the “Motion for Partial Summary Judgment”). For the reasons discussed below, I conclude that Article V(A) of the Compact applies to all such surface waters (subject to the specific exclusions set out in Article V(E) of the Compact). I also conclude that it is unnecessary at this point in time to determine whether other provisions in the Compact – in particular, Article V(B) – apply to all such surface waters.

**Background**

In opposing Montana’s motion for leave to file this action, Wyoming argued that Montana could not complain about waters stored in those Wyoming reservoirs that Montana identified in its brief supporting that motion, because the reservoirs are located on tributaries to, rather than the main stems of, the Tongue and Powder Rivers. According to Wyoming in its opposition brief, “the Compact does not purport to govern water stored in reservoirs on the tributaries to the Tongue, Powder, and Little Powder, the only reservoirs about which Montana complains.” Wyoming’s Brief in Opposition to Motion for Leave to File Bill of Complaint, pp. 21-22. When I later asked Wyoming’s counsel at the hearing on its Motion to Dismiss whether this coverage question was still an issue that needed to be resolved, counsel informed me that it was. Hearing Trans., at 125, line 21 to 127, line 20. I therefore addressed this coverage question in my Memorandum Opinion on the Motion to Dismiss, concluding that Article V(A) covers the reservoirs at issue:

Contrary to Wyoming’s contention, ... 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. *Id.* at 21-22. Article V(A), however, applies to “[a]ppropriative rights to the beneficial uses 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” (Compact, Art. II(D)), 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.

Memorandum Opinion on Wyoming’s Motion to Dismiss Bill of Complaint, June 3, 2009, at 29-30.

In a footnote, I also discussed, without resolving, Wyoming’s interpretation of the term “Interstate Tributaries,” as used in Article V(B) and defined in Article II(F) of the Compact:

Article II(F) provides that the “term ‘Interstate Tributaries’ means the Clarks Fork; Yellowstone River; the Bighorn River (except Little Bighorn River); the Tongue River; and the Powder River ....” Joint App. at 4. Although Article II(F) does not expressly say that tributaries to these rivers are included in the term “Interstate Tributaries,” it also does not exclude them. Both the fact that the definition explicitly excludes one specific tributary (the Little Bighorn River) and the fact that the definition of the more general term “tributary” includes tributaries to tributaries (Compact, Art. II(E)) suggest that tributaries are included.

*Id.* at 29 n.6. Because Article V(A) does not refer to the term “Interstate Tributaries,” this latter discussion was not essential to decide the coverage of Article V(A), which is why the discussion was relegated to a footnote of my Memorandum Opinion on the Motion to Dismiss. I included the discussion only as guidance to the Supreme Court in case the proper interpretation of the term “Interstate Tributaries” ultimately comes up in any deliberations by the Court regarding the scope of the Compact.

Wyoming subsequently asked that I delete the paragraph and footnote from my Memorandum Opinion on the Motion to Dismiss. State of Wyoming's Letter Brief Commenting on Special Master's Memorandum Opinion on Wyoming's Motion to Dismiss, pp. 4-5. According to Wyoming, resolution of the issue was not necessary to resolve its Motion to Dismiss, Wyoming had not actually raised the issue in its Motion to Dismiss, and Wyoming therefore had not had an opportunity to brief the issue. After considering Wyoming's objection, I concluded that I should withdraw this portion of my Memorandum Opinion on the Motion to Dismiss. Supplemental Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint, Sept. 4, 2009, p. 29.

At the same time, I concluded that (1) early resolution of the coverage issue would help speed adjudication on the merits and save the parties unnecessary expense in discovery and (2) there did not appear to be any factual issues that would prevent resolving the tributaries issue prior to discovery. *Id.* I therefore invited either Montana or Wyoming to bring a motion for partial summary judgment on this issue either before or after the filing of the first interim report. *Id.* Montana chose to take me up on this opportunity and filed the current Motion for Partial Summary Judgment.

### **Discussion**

Montana and Wyoming, as well as the United States as *amicus curiae*, now agree that Article V(A) applies to all water uses in the Yellowstone River Basin, including water uses on the Powder and Tongue Rivers and on the tributaries to those rivers. The parties and *amicus* disagree, however, on whether Article V(B) applies to water uses on the tributaries to those rivers – and even whether the reach of Article V(B) is legitimately at issue in this proceeding.

As I found in my Memorandum Opinion on the Motion to Dismiss, the protections of Article V(A) clearly extend to diversions and storage of water from tributaries to the Tongue and Powder Rivers. First, Article V(A) does not restrict its protection of pre-1950 appropriative rights to diversions from any particular waters. Instead, Article V(A) provides

expansively that, “Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed ...” Second, the definition of the term “Yellowstone River System” as used in Article V(A) explicitly includes the tributaries to the Tongue and Powder Rivers. Article II(D) of the Compact defines “Yellowstone River System” as “the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota ...” Article II(E), in turn, defines the term “Tributary” to mean “any stream which in a natural state contributes to the flow of the Yellowstone River, including *interstate tributaries and tributaries thereof* ...” (emphasis added). And Article II(F) includes both the Tongue and Powder Rivers in its definition of “Interstate Tributaries.” Article V(A) thus prohibits diversions of water for direct use or storage on tributaries to the Powder and Tongue rivers if the diversions interfere with pre-1950 appropriative rights in Montana in violation of the Compact. The only exceptions are diversions for water uses explicitly excluded from the provisions of the Compact under Article V(E). Because the Compact is clear on this issue, there is no need to resort to the history of the Compact or any other extrinsic evidence in resolving the Compact’s coverage.

As noted, there no longer appears to be any disagreement on this issue. Both Montana and the United States, as *amicus curiae*, have consistently taken the position that Article V(A) protects against diversions from the tributaries to the Tongue and Powder Rivers for either direct use or storage. Although Wyoming originally argued that the Compact does not cover reservoirs on these tributaries, Wyoming explains that it took this position because it believed that Montana was basing its case on Article V(B) of the Compact rather than Article V(A). As discussed below, Wyoming does not believe that Article V(B) applies to the tributaries to the Tongue and Powder Rivers. According to Wyoming, however, it has always agreed that Article V(A) covers not only the main stems of but also the tributaries to these rivers. See Wyoming’s Brief in Opposition to Montana’s Motion for Partial Summary Judgment, Nov. 2, 2009, p. 12 (“Summary Judgment Opposition”); Wyoming’s Brief in Opposition to Motion for Leave to File Bill of Complaint, April 1, 2007, p. 21 n.8.

Montana’s Motion for Partial Summary Judgment is not limited to Article V(A) but seeks more broadly a ruling “that the *Yellowstone River Compact* applies to all surface waters

tributary to the Tongue and Powder Rivers.” Montana’s Motion for Partial Summary Judgment on the Yellowstone River Compact’s Application to Tributaries of the Tongue and Powder Rivers (emphasis added). Both in its briefs and at oral argument, Montana has made it clear that it ideally would like a ruling that not only Article V(A) but also Article V(B) applies to the surface tributaries. See, e.g., Montana’s Reply in Support of Motion for Summary Judgment, Nov. 9, 2009, pp. 2-3 (“Summary Judgment Reply”); Summary Judgment Hearing Trans., p. 22, lines 3-20.<sup>1</sup>

The principal disagreement between Montana and Wyoming over Montana’s Motion for Partial Summary Judgment focuses on whether Article V(B) is properly part of Montana’s case and therefore whether Montana can seek a ruling on its coverage. Wyoming argues that the “briefing and oral argument in this case has [sic] clarified that Montana’s claims for relief are not based on an alleged violation of Article V.B. of the Compact” and that it is therefore “neither necessary nor proper for the Special Master” to rule on its scope. Summary Judgment Opposition, p. 2. The United States, as *amicus curiae*, argues that the scope of Article V(B) is “outside the scope of the complaint as pleaded” and that Montana cannot raise issues under Article V(B) without moving for leave to amend its complaint. Brief for the United States as Amicus Curiae in Partial Support of Montana’s Motion for Summary Judgment, Nov. 2, 2009, p. 3. Montana, by contrast, argues that it has stated its claim broadly to include all portions of Article V. See Summary Judgment Reply, pp. 4-10.

Montana and Wyoming also disagree regarding the scope of Article V(B). Unlike Article V(A), Article V(B) speaks specifically of the “unused and unappropriated waters of the *Interstate tributaries*” (emphasis added). The term “Interstate Tributaries,” in turn, is defined in Article II(F) as “the Clarks Fork, Yellowstone River; the Bighorn River (except Little Bighorn River); the Tongue River; and the Powder River ...” Noting that Article II(F) speaks only of the five specific rivers and not expressly their tributaries, while Article II(E) talks of “interstate tributaries *and tributaries thereof*” (emphasis added), Wyoming argues that Article V(B) does not extend to the tributaries to the Tongue and Powder Rivers. See Summary Judgment Opposition, pp. 8-11. Montana, however, argues that Article V(B)

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<sup>1</sup> References to the transcript of the November 17, 2009 hearing on Montana’s Motion for Partial Summary Judgment are indicated by Summary Judgment Hearing Trans., followed by the relevant pages and lines of the transcript.

covers tributaries to the named rivers because the term “Interstate Tributaries” includes the term “Tributary,” which is defined under Article II(E) as including tributaries to the interstate tributaries. Montana’s Brief in Support of its Motion for Summary Judgment, Oct. 16, 2009, p. 10. Montana also argues that the drafters would not have needed to exclude the Little Bighorn River from the term “Interstate Tributaries” if the term did not otherwise include tributaries to the listed rivers. *Id.*, pp. 10-11.

There is no need at this stage of the case to decide the scope of Article V(B) of the Compact (or the meaning of “Interstate Tributaries” as defined in Article II(E)). As I explained in my Memorandum Opinion on the Motion to Dismiss, pre-1950 appropriators in Montana are protected by Article V(A) of the Compact. Although Article V(B) reinforces the protections of Article V(A) by allocating only “*unused and unappropriated waters*” (emphasis added), Article V(B) does not appear to provide any independent protection for pre-1950 appropriators separately from Article V(A). At the hearing on Montana’s motion, moreover, counsel for Montana was unable to explain to me how Article V(B) is likely to have independent significance in this proceeding. As a result, it would be inappropriate for me to currently address the coverage of Article V(B). Having ruled that Article V(A) applies to tributaries to the Tongue and Powder Rivers, any ruling that currently went further and addressed Article V(B) would go beyond what is apparently necessary to resolve the current case and controversy and could potentially enmesh the Court in issues not currently before it and perhaps not currently justiciable.

Although it would be inappropriate to rule today on whether Article V(B) applies to tributaries to the Tongue and Powder Rivers, I do not in this opinion decide the legitimate scope of Montana’s Complaint. 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 refer to Article V as a whole, rather than to 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. At the moment, however, Article V(A) would appear to be the only operative provision of relevance to pre-1950 appropriators and thus to Montana’s claims for relief. As a result, this ruling is limited to the coverage of Article V(A).

## **Ruling**

Having reviewed the briefs and heard oral argument, I conclude that Montana's Motion for Summary Judgment should be granted in part and denied in part without prejudice. In particular, I conclude that Article V(A) of the Compact applies to all surface waters tributary to the Tongue and Powder Rivers (with the exception of explicit exclusions set out in Article V(E) of the Compact). For the reasons discussed above, however, I decline to address the scope of Article V(B) of the Compact and the meaning of the term "Interstate Tributary."