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.

On Motion to Dismiss the Bill of Complaint, Motion for Partial Summary Judgment, and Motion to Intervene

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FIRST INTERIM REPORT OF THE SPECIAL MASTER

BARTON H. THOMPSON, JR.
Special Master
Stanford, California

February 10, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

FEDERAL CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES, RULES, & COMPACTS

TABLE OF AUTHORITIES—Continued

STATE STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BOOKS, TREATISES, & ARTICLES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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FIRST INTERIM REPORT OF THE SPECIAL MASTER

This case deals with the entitlements of the States of Montana and Wyoming to the waters of the Powder and Tongue Rivers, two interstate tributaries to the Yellowstone River. Both tributaries begin in Wyoming and then flow north into Montana where they merge into the main stem of the Yellowstone River. Rights to water in the Powder and Tongue Rivers, as well as other parts of the Yellowstone River system, are governed by the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (the

"Compact"). Montana argues that various actions in Wyoming violate the Compact by depriving Montana of water to which it is entitled under the Compact.

This First Interim Report addresses three pre-trial motions: (1) Wyoming's motion to dismiss Montana's Bill of Complaint, (2) Montana's motion for partial summary judgment regarding the Compact's coverage of tributaries to the Powder and Tongue Rivers, and (3) Anadarko Petroleum Corporation's motion to intervene as a party. The next step in this case will be discovery.

This is an appropriate time for the Supreme Court to examine and consider the issues that have arisen in the case to date. Wyoming's motion to dismiss and Montana's motion for partial summary judgment present major legal issues that are critical to an ultimate decision in this matter. Resolution of these two motions will limit and frame the future proceedings, including discovery, and may encourage settlement discussions among the parties. It is also important to come to a final resolution of Anadarko's motion to intervene prior to discovery, so that the parties can agree on the scope of and procedure for discovery.

As discussed below, I recommend that the Court deny Wyoming's motion to dismiss, grant in part Montana's motion for partial summary judgment, and deny Anadarko's motion to intervene.

I. THE RECORD

The principal record for purposes of the motions addressed in this First Interim Report consists of the Compact, Montana's Bill of Complaint, and the various briefs filed in support of or in opposition to the three motions. A copy of the Compact is attached as

Appendix A. In preparation for the hearing on Wyoming's motion to dismiss, I also asked the parties to compile and file a Joint Appendix of all documents relating to the history of the Compact on which they expected to rely or that they believed relevant to the motion. There is no dispute as to the authenticity of the documents in the Joint Appendix, although Montana and Wyoming disagree over the relevance of some of the documents. Copies of the Joint Appendix are being lodged with the Court concurrent with the filing of this Report.[1]

II. BACKGROUND

A. The Yellowstone River System

Montana and Wyoming have extensively developed the Yellowstone River system for irrigation. The Yellowstone River runs in a generally northern direction for almost 700 miles from the slopes of Yount Peak in Wyoming through Montana and into North Dakota to its confluence with the Missouri River soon after crossing the North Dakota border. The Yellowstone River has four principal tributaries—the Bighorn, Clarks Fork, Powder, and Tongue rivers—all of which begin in Wyoming and flow North across the border with Montana before joining the main stem in Montana. The Yellowstone River and its tributaries together drain a large area of approximately 70,000 square miles. *See* Appendix C.

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[1] In this Report, documents in the Joint Appendix are referenced as Joint App., followed by the relevant page numbers. References to the transcript of the hearings held on each of the motions are indicated by "Hearing Trans." and the name of the relevant hearing in parentheses (*e.g.*, "Hearing Trans. (Motion to Dismiss)"), followed by the relevant pages and lines of the transcript.

This case focuses on the Powder and Tongue rivers. Both tributaries begin in the Big Horn Mountains of Wyoming and then travel into Montana where they ultimately join the main stem of the Yellowstone River. The Tongue River basin is approximately 5,400 square miles in size, while the Powder River basin covers over 13,000 square miles. Irrigation is the primary use of the waters of the tributaries in both states. According to the Bill of Complaint, the production of coalbed methane has led also to sharp increases in recent years in the pumping of groundwater in the portion of the Powder River basin lying in Wyoming. Bill of Complaint ¶ 11. *See also* Montana's Brief in Support of Motion for Leave to File Bill of Complaint, Jan. 2007, p. 4 ("Montana's Brief in Support of Leave to File"). Although Montana's Bill of Complaint alleges violations of the Compact only on the Powder and Tongue rivers, the Compact covers the Yellowstone River and all of its tributaries, and resolution of this case could have implications for water rights throughout the Yellowstone River system.

B. Background Principles of Water Law

Like most western states, Montana and Wyoming follow the law of prior appropriation in allocating both surface water and groundwater. 6 Waters and Water Rights 473 & 865 (Robert E. Beck ed., 1994 repl. vol.). Under the prior appropriation doctrine, water uses that are prior in time are generally prior in right. As the Wyoming State Constitution has provided since statehood, "Priority of appropriation for beneficial uses shall give the better right." Wyoming Const., Art. 8, § 3.

As a general matter, an appropriative water right in the western United States gives a water user the

entitlement to divert a specified flow of water, typically measured today in the pre-metric unit of "cubic feet per second," from a particular point on a waterway for specific use on particular land. Where there is insufficient water in a stream to meet the right of a given appropriator, the prior appropriation doctrine generally gives the appropriator the right to demand that any upstream appropriators who are junior in time reduce or, if necessary, cease their diversions to the extent necessary to ensure that the more senior appropriator receives the water to which he or she is entitled. When a senior appropriator wishes to require a junior appropriator to reduce or cease its diversions, the senior appropriator "calls" the river.

Although both Montana and Wyoming follow the prior appropriation doctrine, specific rules and institutions of the prior-appropriation systems in Montana and Wyoming have differed at various points in time. Wyoming, for example, was the first state in the nation to adopt an administrative structure for administering appropriative rights; under this system, water users must apply for and obtain a permit from the State Engineer. *See* Wyo. Stat. Ann. §§ 41-4-501 to -502; 6 Waters and Water Rights, *supra*, at 865-866. In Montana, by contrast, water users could acquire rights on most streams before 1973 merely by putting the water to a beneficial use.[2] 6 Waters and Water Rights, *supra*, at 473. Determining the existing rights on a waterway

[2] Where a court had determined and "adjudicated" the water rights on a particular stream, new water rights could be obtained by filing a petition in the court that had conducted the adjudication. 6 Waters and Water Rights, *supra,* at 473.

in Montana prior to 1973, therefore, was often a complex task. Montana finally adopted a permit system for appropriative water rights in 1973.

C. The Yellowstone River Compact

Montana, Wyoming, and North Dakota have apportioned the waters of the Yellowstone River and its tributaries through the Yellowstone River Compact. Water shortages were not a major problem at the time that the states negotiated the Compact. The "compelling reason" for negotiating the Compact was instead to open the way for getting federal assistance for new water storage facilities in the basin. Senate Rep. No. 883, 82d Cong., 1st Sess. 6 (1951), Joint App. 12, 17 ("Senate Rep. No. 883"). As in other instances around the nation, Congress wanted agreement on the division of the waters of the Yellowstone River system among the states before building or funding new storage projects.

1. Negotiations & Approval

Congress first gave its consent to Montana and Wyoming to negotiate a compact in 1932. Act of June 14, 1932, 47 Stat. 306. Negotiators for the two states and the federal government agreed to a proposed compact on February 6, 1935. *See* 1935 Draft Yellowstone River Compact, Joint App. 274 ("1935 Draft Compact"). The proposed compact allocated water among users of the two states under the doctrine of prior appropriation. Water use was to be "subject to appropriation for beneficial use under the laws of the separate states and under general water-right law as interpreted by the Courts." *Id*., Art. V(a), Joint App. at 278. Each existing appropriator was to be entitled to the beneficial use of the stream flow that he enjoyed "when he appropriated,

undiminished by the use of any later appropriator or by any increased use of earlier priority." *Id*., Art. V(b), Joint App. at 278-279. Neither the Montana nor Wyoming legislature approved the 1935 Draft Compact. *See* Senate Rep. No. 883, *supra*, at 5, Joint App. at 16.

In 1937, Congress gave Montana and Wyoming permission to restart negotiations (50 Stat. 551 (1937)) and, in 1940, authorized North Dakota to join the negotiations (54 Stat. 399 (1940)). Negotiators for all three states agreed to a new proposed compact on December 31, 1942. *See* 1942 Draft Yellowstone River Compact, Joint App. 253 ("1942 Draft Compact"). The new draft took a different approach to apportioning the waters of the Yellowstone River system. Article V(A) of the 1942 Draft Compact apportioned to each state specified percentages of the "divertable daily flow" of the main stem and each major tributary of the Yellowstone River. *Id.* at 261-264. Article VI "recognized" present vested rights in each state, but emphasized that all "rights to the beneficial use of the waters of the Yellowstone River System, heretofore and hereafter established under the laws of any signatory State, shall be satisfied solely from the proportion of the water allotted to that State as provided in Article V." *Id*. at 266-267. The 1942 Draft Compact fared no better in gaining legislative approval than had the 1935 Draft Compact. The Wyoming legislature refused to approve the 1942 Draft Compact as agreed to by the negotiators, and the legislatures of the other two states declined to accept Wyoming's proposed amendments. Senate Rep. No. 883, *supra*, at 5, Joint App. at 16.

In 1944, Congress again authorized the three states to negotiate a compact (58 Stat. 117), leading to the negotiation and signing of a new compact on December 18, 1944. *See* 1944 Draft Yellowstone River Compact, Joint App. 238 ("1944 Draft Compact"). The 1944 Draft Compact was similar in most key respects to the 1942 Draft Compact. Article V(A) again apportioned to each state specified percentages of the "divertable daily flow" of the main stem and each major tributary of the Yellowstone River. Joint App. at 244-246. Article VI again "recognized" present vested rights and provided that they would be "administered by the proper officials of the respective States." *Id*. at 247. As before, all such rights were to be "satisfied solely from the proportion of the water allotted to [each] State as provided in Article V." *Id*. Although the legislatures of all three states voted to ratify the proposed compact, the governor of Wyoming vetoed the proposed compact. Senate Rep. No. 833, *supra*, at 5, Joint App. at 16.

For the Yellowstone River Compact, four times was the charm. In 1949, Congress yet again gave its consent to the three states to negotiate a compact "providing for an equitable division or apportionment between the States of the water supply of the Yellowstone River and of the streams tributary thereto." Act of June 2, 1949, 63 Stat. 152. Soon thereafter, Montana, North Dakota, and Wyoming appointed a negotiating commission, known as the Yellowstone River Compact Commission. The Commission included representatives of the three states, as well as a number of federal agencies. *See* Yellowstone River Compact Commission, Meeting Minutes of Nov. 29, 1949, Joint App. 89, 92, 108-112 ("November 1949 Meeting Minutes"). The Commission first met on November 29, 1949 in Billings, Montana. *Id*. at 91.

An Engineering Committee, consisting of engineers from the three states and various federal agencies, did much of the work for the Commission. *See* Senate Rep. No. 883, *supra*, at 6, Joint App. at 17. During the negotiations, the Commission considered a number of different draft compacts, including the Burke Draft, dated April 14, 1950 (Joint App. 124), the Myers Draft, dated September 18, 1950 (*id*. 195), and the Engineering Committee Draft, undated (*id*. 160). After a year of negotiations, the Commission agreed to and signed the final version of the Compact on December 8, 1950. Yellowstone River Compact Commission, Meeting Minutes of Dec. 7-8, 1950, at 13-14, Joint App. 34, 50-51 ("December 1950 Meeting Minutes"). The three states each ratified the Compact in early 1951. Act of Feb. 13, 1951, ch. 39, 1951 Mont. Laws 58 (codified at Mont. Code Ann. § 85-20-101); Act of March 7, 1951, ch. 339, 1951 N.D. Laws 505 (codified at N.D. Cent. Code § 61-23-01); Act of Jan. 27, 1951, ch. 10, 1951 Wyo. Sess. Laws 7 (codified at Wyo. Stat. Ann. § 41-12-601). Congress consented to the Compact later that same year. Act of Oct. 30, 1951, ch. 629, 65 Stat. 663.

2. Key Provisions of the Compact

Although the Compact deals broadly with the rights of all three states to the waters of the Yellowstone River system, the "real problem" addressed by the Compact was how to apportion the waters of the principal tributaries between Montana and Wyoming. Senate Rep. No. 883, *supra*, at 6, Joint App. at 17. Unlike the tributaries, the main stem of the Yellowstone River lies "almost entirely in Montana," and the negotiators believed that its water supply was "adequate for feasible developments along its course." *Id*. And while North Dakota participated in

negotiating the Compact and various provisions of the Compact protect its interests, North Dakota's "real interest" was "minor on account of the very small part of the drainage basin that is within its borders." *Id*. *See also* November 1949 Meeting Minutes, *supra*, at 6, Joint App. at 97 (statement of North Dakota representative).

The preamble to the Compact notes the desire of Montana, North Dakota, and Wyoming to "remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries." The preamble also notes the states' desire to "provide for an equitable division and apportionment of such waters."

Article V allocates the waters of the Yellowstone River system among the three states and is the key substantive provision of the Compact for purposes of this action. Article V differentiates between appropriative rights existing as of January 1, 1950 ("pre-1950 appropriative rights") and subsequent water uses. Article V(A) addresses pre-1950 appropriative rights:

> 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 in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Article V(B) then apportions "the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950." Of these "unused and unappropriated waters," Article V(B) first allocates to each state

> such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V [*i.e.*, for the pre-1950 rights], such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Article V(B) then allocates fixed percentages of "the remainder of the unused and unappropriated water" of each tributary to Montana and Wyoming "for storage or direct diversions for beneficial use on new lands or for other purposes." In the case of the Tongue River, for example, the Compact allocates 40% of such waters to Wyoming and the remainder to Montana. Under Article V(C), these percentages are to be applied on a yearly basis to the algebraic sum of:

> (1) diversions "for irrigation, municipal, and industrial uses . . . developed after January 1, 1950,"
>
> (2) the "net change in storage . . . in all reservoirs . . . completed subsequent to January 1, 1950,"
>
> (3) the "net change in storage . . . in existing reservoirs . . . which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950," and
>
> (4) the instream flow at a "point of measurement" below the last diversion from the tributary before its confluence with the main stem of the Yellowstone River.

Article II defines relevant terminology used in the Compact. Article III provides for a Commission (consisting of a representative each of Montana,

Wyoming, and the United States Geological Survey) with the "power to formulate rules and regulations and to perform any act which it may find necessary to carry out the provisions of this Compact." Compact, Art. III(E). Article XIII provides that nothing in the Compact "shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions."

D. The Bill of Complaint

The Supreme Court granted leave to Montana to file its Complaint in 2008. 552 U.S. 1175 (2008). In the Complaint, Montana alleges that Wyoming has violated Article V of the Compact by refusing 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 water is needed to meet Montana's pre-1950 appropriative rights. Bill of Complaint ¶ 8. Montana more specifically alleges that Wyoming has violated Montana's rights under Article V by allowing:

- Irrigation of new acres (*id.* ¶ 10),
- Construction and use of "new and expanded storage facilities" (*id*. ¶ 9),
- New groundwater withdrawals and "the pumping of groundwater associated with coalbed methane production" (*id*. ¶ 11), and
- Increased consumption of water on existing acres (*id*. ¶ 12).

The discussion of Wyoming's motion to dismiss in the next section of the Report provides greater detail on these various allegations.

North Dakota is named as a defendant to Montana's cause of action because it is a signatory to the Compact. Bill of Complaint ¶ 4. Montana seeks no relief against North Dakota in its Complaint. Brief in Support of Motion for Leave to File Bill of Complaint, *supra*, p. 3. As a result, North Dakota has not filed any briefs in this case or presented any oral argument, although it has attended all hearings and participated in status conferences.

The United States is not a party to this case. Although federal lands such as Yellowstone National Park and Indian reservations such as the Northern Cheyenne Indian Reservation are in the greater Yellowstone River basin, the Compact expressly states that its provisions should not be construed to impact either Indian water rights (Compact, Art. VI) or water rights of the United States (*id*., Art. XVI). Because compacts possess the status of federal law once approved by Congress and because the United States administers water projects in the Yellowstone River basin that this case could affect, the views of the United States in this case are still important. The Supreme Court invited the Solicitor General to file a brief addressing Montana's motion for leave to file a bill of complaint (550 U.S. 732 (2008)). I have continued to seek the views of the United States on all aspects of the case, and the Solicitor General at my invitation has filed *amicus* briefs and participated in the oral argument on all three motions addressed in this Report.

III. WYOMING'S MOTION TO DISMISS

At the same time that the Court granted Montana leave to file it Complaint, the Court also allowed Wyoming 45 days to file a motion to dismiss. 552 U.S. 1175 (2008). Wyoming subsequently filed its

Motion to Dismiss on a timely basis. After the motion was briefed, the Supreme Court appointed me to serve as Special Master and referred the Motion to Dismiss to me to resolve. ___ U.S. ___ (Oct. 20, 2008).

Wyoming moves to dismiss the Complaint on the ground that the Complaint fails to state a claim upon which relief can be granted under the terms of the Compact. Wyoming asserts that the Compact does not require Wyoming to provide sufficient water at the state line of the Powder and Tongue Rivers to satisfy Montana's pre-1950 water uses—even when the water is not needed to satisfy Wyoming's pre-1950 water uses. Wyoming also argues that none of the specific actions that Montana alleges in its Complaint can violate the Compact.

Briefs were filed on the Motion to Dismiss by Montana and Wyoming, as well as by three *amici*—the United States and the Northern Cheyenne Tribe (both in opposition to the Motion to Dismiss) and Anadarko Petroleum Corporation (in support of the Motion to Dismiss).[3] Council for Montana, Wyoming, and the United States presented oral arguments at a hearing on the Motion to Dismiss held in Denver, Colorado on February 3, 2009.

I conclude that Article V of the Compact protects pre-1950 appropriations in Montana from new surface and groundwater diversions in Wyoming,

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[3] Counsel for all parties consented to the filing of the Northern Cheyenne Tribe's *amicus* brief. Because Montana did not consent to the filing of Anadarko Petroleum Corporation's *amicus* brief, Anadarko moved for leave to file its brief. The Supreme Court referred that motion to me (___ U.S. ___ (Oct. 20, 2008)), and I granted the motion. Case Management Order No. 1, ¶ 6 (Nov. 25, 2008).

whether for direct use or for storage, that prevent adequate water from reaching Montana to satisfy those pre-1950 appropriations. Montana, however, cannot insist that Wyoming release storage water for the benefit of pre-1950 appropriations in Montana if the water was stored at a time when there was adequate water reaching Montana to satisfy those appropriations. Nor can Montana object to efficiency improvements by pre-1950 appropriators in Wyoming if the Wyoming appropriators put the conserved water to use on their existing acreage for the same purpose as before. Moreover, if Montana can remedy water shortages facing pre-1950 appropriators in Montana through purely intrastate means (*e.g.*, by reducing deliveries to post-1950 uses in Montana) that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. When this is not possible, however, the Compact requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the border to enable Montana to satisfy its pre-1950 appropriations.

Although some of Montana's specific allegations do not state a claim for relief, Montana sets out several alternative factual bases for its claim of a violation of the Compact. I therefore recommend that the Motion to Dismiss be denied.

A. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides guidance in ruling on Wyoming's Motion to Dismiss. In particular, the factual allegations of Montana's Bill of Complaint should be assumed to be true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007); *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989). And the Bill of Com-

plaint should be liberally construed in favor of Montana. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

The rules for interpreting interstate compacts are also clear. An interstate compact that has been approved by Congress is both a contract and a federal statute. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). If the text of a compact is unambiguous when placed in context, the text is conclusive. *Kansas v. Colorado*, 514 U.S. 673, 690 (1995). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (cardinal rule in interpreting statutes is that unambiguous wording is conclusive). If the text is ambiguous, "it is appropriate to look to extrinsic evidence of the negotiation history of the Compact" and to the legislative history before Congress. *Oklahoma v. New Mexico*, *supra*, 501 U.S. at 235 n.5.

B. Article V of the Compact Protects Pre-1950 Water Rights in Montana from Subsequent Diversions and Withdrawals in Wyoming

1. The Language of Article V is Clear and Unambiguous

The language of Article V of the Compact unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950. As already noted, Article V(A) provides that pre-1950 rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." This language is instructive in several important respects. First, it mandates the *continued enjoyment* of pre-1950 rights.

The word "enjoy" means "[t]o have the *undisturbed use* or possession of something, particularly real property." Webster's New World Law Dictionary 133 (2006) (emphasis added). The Compact, moreover, pairs the term "enjoyed" with the mandatory term "shall"—requiring that action be taken under the Compact to ensure the continued enjoyment of pre-1950 appropriative rights. Montana water users would not "continue to . . . enjoy[ ]" pre-1950 water rights, under the common and straightforward meaning of those words, if Wyoming were free to allow new diversions or withdrawals that interfere with pre-1950 Montana appropriations. Confirming the natural meaning of this language, the Compact uses similar language to provide for the acquisition and protection of supplemental water rights. *See* Compact, Art. V(B) ("such supplemental rights to be acquired *and enjoyed* in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation" (emphasis added)).

Second, Article V(A) provides for continued enjoyment *under the appropriation doctrine*. As explained earlier, the essence of the appropriation doctrine is the concept of first in time, first in right, under which earlier or "senior" appropriators are protected from the actions of later or "junior" appropriators. As the Supreme Court explained in an early equitable apportionment action involving the appropriation doctrine, "The cardinal rule of the doctrine is that priority of appropriation gives superiority of right." *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922). The reference in Article V(A) to the "doctrine of appropriation" would be stripped of its defining characteristic if Wyoming could permit new water diversions and withdrawals that interfere with earlier pre-1950 appropriative rights in Montana.

Article V(B) further confirms the Compact's intent to protect pre-1950 appropriative rights by providing that supplemental water supplies for land already under irrigation, as well as water for "storage and direct diversions for beneficial use on new lands or for other purposes," are to be allocated from the "*unused* and *unappropriated* waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950" (emphasis added). Under this language, new water users cannot take water that is already appropriated and used by pre-1950 appropriators. Instead, new water users must draw from those waters that were *unappropriated* as of January 1, 1950.

Read together, Articles V(A) and V(B) of the Compact establish a three-level hierarchy.

> (1) First, pre-1950 appropriative rights are to "continue to be enjoyed." Compact, Art. V(A). These pre-1950 rights receive the highest priority under the Compact.
>
> (2) "Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950," water goes next to "provide supplemental water supplies" for pre-1950 right holders. Compact, Art. V(B), 1st clause. These supplemental water rights, like pre-1950 rights, are to be "enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Compact, Art. V(B), 2nd clause.
>
> (3) Finally, the "remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes" according to

the percentages specified for each tributary. Compact, Art. V(B), 3rd clause.

2. Wyoming's Arguments Are Inconsistent with the Clear and Unambiguous Meaning of Article V(A)

Wyoming argues that Article V(A) merely recognizes pre-1950 water rights under each state's water laws, without requiring Wyoming to curtail post-1950 uses when needed to ensure that adequate water reaches Montana to protect pre-1950 appropriations in Montana. According to Wyoming, "the drafters intentionally withheld from the Compact any directive or mechanism by which a water user in Montana could make an interstate 'call' to shut down the diversion of a Wyoming water user whose rights were junior to a Montana user's right." Wyoming's Motion to Dismiss Bill of Complaint, April 2008, p. 37 ("Motion to Dismiss"). Wyoming claims that the drafters instead "intended the states to regulate . . . pre-1950 diversions . . . under their own laws, unimpaired by the Compact." *Id*., p. 43. Under Wyoming's reading of the Compact, Montana would administer its pre-1950 uses, and Wyoming would administer its pre-1950 uses, but Montana, the downstream state, could not demand that Wyoming provide sufficient water to meet the needs of Montana's pre-1950 uses.

The fundamental flaw in Wyoming's argument is that the language of the Compact does not merely recognize pre-1950 appropriative rights, but affirmatively protects them. Prior negotiators knew how to recognize the water rights of each state without protecting those rights from subsequent water uses in the other state. The 1942 Draft Compact, for example, provided simply that present vested rights

"are recognized by this Compact," without using any words of affirmative protection. 1942 Draft Compact, *supra*, Art. VI, Joint App. at 266. The 1944 Draft Compact similarly "recognized" present vested rights and provided that such rights would be "administered by the proper officials of the respective States." 1944 Draft Compact, *supra*, Art. VI, Joint App. at 247. The final Compact, by comparison, provides not for the *recognition* but for the *continued enjoyment* of pre-1950 rights, and it provides that such rights will be "enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation," not under the separate laws of Montana and Wyoming. Compact, Art. V(A).

A comparison of the underlying structures of the Compact and the various draft compacts that preceded it is also instructive. Both the 1942 and 1944 draft compacts attempted to apportion the waters of each tributary among the three states by (1) taking an initial amount of the flow in the tributary and awarding both Montana and Wyoming a percentage of that flow, and then (2) providing that any remaining "unappropriated" waters in the tributary could be appropriated under the law of each state. The draft compacts protected pre-existing rights in both Montana and Wyoming by taking the amounts of those rights into account in setting the percentage of the initial flow awarded to each state. The 1942 Draft Compact, for example, allocated to Wyoming the great bulk of the first 4,600 acre-feet of daily flows from the Powder River between May 1 and September 30. 96 ½ percent of the first 2,000 acre-feet would have gone to Wyoming, and only 3 ½ percent to Montana; 60% of the next 2,600 acre-feet would have gone to Wyoming, and 40% to Montana. 1942 Draft Compact, *supra*, Art. V(A)(4), Joint App.

at 246. The drafters allocated more water from the Powder River to Wyoming because it had more of the irrigation rights in the basin at that time. *See* Federal Power Comm'n, Preliminary Report on Yellowstone River Basin 169 (Dec. 1940), Joint App. 505, 684. Water for all existing rights were to be "satisfied solely" from these amounts. 1942 Draft Compact, *supra*, Art. VI, Joint App. at 247. Unappropriated daily flows in excess of these allocated amounts, as well as all unappropriated flows from October 1 to April 30, were "subject to future appropriation . . . in Wyoming, Montana, and North Dakota in accordance with the laws of said respective States." *Id*., Art. V(A)(4), Joint App. at 246.

The final Compact, by contrast, takes a quite different approach. Rather than dividing an initial amount of flow in each tributary between Montana and Wyoming and then providing for the appropriation of any remaining amounts, the final Compact provides for percentage apportionments of the "unused and unappropriated water" remaining after satisfying appropriative rights existing as of January 1, 1950 and any supplemental water supplies needed for such rights. Compact, Art. V(B). Because Article V(A) protects existing rights, Article V(B) allocates smaller percentages of the remaining unappropriated waters to Wyoming than the percentages used by the draft 1942 and 1944 compacts. *Id*. The final Compact essentially flips the approach of the earlier drafts. The earlier drafts apportioned an initial flow, taking into account existing rights, and provided for the appropriation of any additional, unappropriated water. The final Compact provides block protection for all existing, pre-1950 appropriations, without attempting to quantify the amounts of those appropriations, and then, after providing for supplemental

appropriations for lands already under irrigation, apportions the amount that remains.

The decision to provide block protection of all pre-1950 rights and not to include those rights in the numerical division of waters avoided the "huge and time-consuming task" of quantifying such rights in 1951. Senate Rep. No. 883, 82d Cong, *supra*, at 6, Joint. App. at 17. As noted earlier, Montana, North Dakota, and Wyoming all had "differing water laws and practices in establishing water rights." *Id*. Determining the quantity of pre-1950 rights would have been a difficult task, particularly in Montana which lacked a permit system. The approach adopted by the Compact provided for the protection of pre-1950 rights without the need for a contemporaneous quantification of those rights.

Another problem with Wyoming's argument that Article V(A) merely recognizes without protecting pre-1950 rights is that it would render Article V(A) superfluous. Both Montana and Wyoming already recognized and protected their own pre-1950 rights. Unless Article V(A) requires each state to recognize and protect pre-1950 rights existing in the other state, the provision would appear to do nothing that existing law did not already provide—rendering it mere surplusage. Federal statutes, and thus interstate compacts, should be read, "where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting a statutory provision to avoid making it superfluous).

If the Compact merely recognizes without protecting pre-1950 appropriative rights in Montana, interference with pre-1950 rights would also remain a

potential source of future controversy and could potentially trigger an equitable apportionment action before the Supreme Court. Yet the parties to the Compact emphasized in its preamble that it was their desire to "remove *all* causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries" (emphasis added). Wyoming's reading of the Compact, by leaving open a major source of controversy, would defeat the Compact's express goal to remove all such causes of controversy. Although the preamble by itself is not conclusive, it provides further support for the clear and natural reading of Article V(A). *See*, *e.g.*, *Virginia v. Maryland*, 540 U.S. 56, 68-69 (2003) (using the preamble of an interstate compact as an interpretive aid).

Wyoming responds to these points by suggesting that Article V(A) plays an independent role in resolving future disputes by precluding Montana and its pre-1950 appropriators from seeking any judicial relief against diversions and withdrawals in Wyoming that interfere with the pre-1950 appropriations. At the hearing on the Motion to Dismiss, I asked counsel for Wyoming whether Article V(A), under Wyoming's interpretation, achieves anything more than if the drafters had simply left pre-1950 appropriative rights out of the Compact completely. Counsel responded:

> It does. Because if you exclude them from the Compact, then Montana is free to bring an equitable apportionment claim at a later date. . . . . [What the negotiators] wanted to do was to preempt, which is to try to reduce all causes of future

> controversy with respect to the water in the Yellowstone River, and do an equitable division.

Hearing Trans. (Motion to Dismiss), p. 25, lines 15-18, & p. 26, lines 8-11. Under Wyoming's reading of the Compact, in short, Article V(A) plays an important role and resolves future controversies regarding pre-1950 rights in Montana by precluding any interstate protection for them.

The language of the Compact, however, does not support this reading of Article V(A). No language in the Compact suggests an intent to preclude the protection of pre-1950 appropriative rights across state lines. Instead, as discussed above, Article V(A) expressly mandates their continued enjoyment. It strains credulity, moreover, to argue that Montana was willing to give up interstate protection of its pre-1950 appropriative rights in entering into the Compact—and that it did so without clear language to that effect. Prior to the Compact, individual appropriators in Montana were free to bring actions in federal or state court to block new water uses in Wyoming that interfered with their prior appropriative rights. *See Bean v. Morris*, 221 U.S. 485 (1911) (allowing an action by a Wyoming appropriator against a Montana appropriator in federal court in Montana); *Willey v. Decker*, 73 P. 210, 224 (Wyo. 1903). *See generally* Douglas L. Grant, *Private Interstate Suits*, in 4 Waters and Water Rights ch. 44 (Robert E. Beck ed., 2004 repl. vol.). If the interference was severe enough, Montana could also have brought an equitable apportionment action in the United States Supreme Court. *See*, *e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Under Wyoming's interpretation of Article V, however, Montana gave up its right and those of its citizens and left pre-1950

appropriative rights in Montana exposed to potential interference from new uses in Wyoming.

Wyoming also argues that there is no need to read Article V(A) as allowing Montana to demand enough water from Wyoming to satisfy the rights of Montana's pre-1950 appropriators "because the percentage allocation scheme of Section B and C [of Article V of the Compact] obviates the need for such demands." Wyoming's Reply Brief in Support of its Motion to Dismiss Bill of Complaint, May 2008, p. 11 ("Wyoming's Reply Brief"). As Wyoming notes, if new diversions in Wyoming deprive a pre-1950 appropriator in Montana of some or all of its water, the pre-1950 appropriator may have some intrastate remedies: the appropriator may be able to make a "call" on more junior appropriators in Montana, draw on water stored in Montana for the needs of post-1950 appropriators, or divert unappropriated water that would otherwise flow out the mouth of the tributary. *Id*., p. 14. To the extent this reduces the amount of water that post-1950 appropriators use in Montana, the Compact may then require Wyoming to reduce its post-1950 appropriations in order to stay within the percentage allocations set out in Article V(B) for such new appropriations. *See id*., pp. 14-15. In Wyoming's view, the Compact thereby "self-corrects" by forcing Wyoming to reduce post-1950 appropriations under Article V(B). *Id*.

To understand Wyoming's argument, it is useful to work through a simple hypothetical.[4] As described above, Article V(B) allocates fixed percentages of "unused and unappropriated water" (what the

[4] To keep the numbers simple, the hypothetical assumes no storage or return flow.

Compact labels "divertible flow") in each tributary to Montana and Wyoming. Under Article V(C), the divertible flow is determined on a yearly basis by summing post-1950 diversions and storage, as well as instream flows at the base of the tributaries. Assume that, over the course of a given water year,[5] there is 10,000 acre-feet of divertible flow available in a tributary and that both Montana and Wyoming would normally fully use their allocations of this water. If Montana is entitled to 60% and Wyoming 40%, new users in Montana could use 6,000 acre-feet, and new users in Wyoming could use 4,000 acre-feet.

Assume next that a new Wyoming user starts to use an additional 500 acre-feet a year of water, depriving a pre-1950 appropriator in Montana of water needed for his crops. Under Montana state law, the pre-1950 appropriators could "call" the river in Montana and force post-1950 appropriators in Montana to reduce their withdrawals by 500 acre feet. Although divertible flow under Article V(C) remains the same, Wyoming is now using 4,500 acre feet of the divertible flow, which exceeds its percentage allocation, while Montana is using only 5,500 acre-feet, which is less than its allocation. Article V therefore would require Wyoming to reduce its post-1950 diversions by 500 acre-feet to 4,000 acre-feet and would allow Montana to increase its post-1950 diversions by 500 acre-feet to 6,000 acre-feet, bringing the overall system "back into balance" without the need for any separate interstate action under Article V(A). In Wyoming's view, the Compact

[5] Under Article V(C) of the Compact, water calculations are made on the basis of a "water year" that begins on October 1 rather than a calendar year.

thereby "self-corrects across state lines." Wyoming's Reply Brief, *supra*, p. 14.

Wyoming's argument, however, depends on the existence of an adequate intrastate remedy. This will not always be the case. Intrastate remedies and Article V(B), for example, do not help Montana's pre-1950 appropriators when there is insufficient water passing the state line into Montana even to meet the needs of pre-1950 Montana appropriators and when there is no post-1950 storage in Montana from which to draw. In that situation, pre-1950 appropriators in Montana would not be able to remedy their shortages within the Montana system, and Montana would be forced to rely on the interstate protections of Article V(A). Although Wyoming suggests that the answer is to build more storage in Montana (*id.*, p. 15), the Compact does not require Montana to add more storage capacity, and there is no evidence that Montana gave up the right to protect its pre-1950 uses from new uses in Wyoming on the mere hope that storage capacity in Montana would always be adequate.

Although Wyoming's "self-correction" argument does not undermine either the meaning of or the need for Article V(A), the argument illustrates that Montana may not always need to invoke Article V(A) to protect its pre-1950 uses. Under what circumstances Wyoming must respond to shortages suffered by pre-1950 appropriators in Montana by immediately reducing post-1950 diversions or withdrawals in Wyoming is a factual inquiry. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact, an intrastate remedy is the appropriate solution. Where

this is not possible, however, the Compact requires that Wyoming ensure that new uses in Wyoming do not interfere with pre-1950 appropriations in Montana. The questions of when "intrastate" remedies are adequate under the Compact and, alternatively, when Wyoming must curtail post-1950 uses pursuant to Article V(A), are best addressed in subsequent proceedings in this case after discovery is complete and an appropriate factual record can be developed.

Wyoming finally argues that requiring it to curtail post-1950 uses in Wyoming whenever needed to protect pre-1950 appropriations in Montana is inconsistent with the system used by the Compact to apportion the "unused and unappropriated water" of the tributaries under Articles V(B) and V(C). As Wyoming notes, the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana (an approach taken by Article III(d) of the Colorado River Compact, 70 Cong. Rec. 324 (1928)) or to limit Wyoming to a specific level of consumptive use (an approach taken by the Upper Colorado River Compact, 63 Stat. 31). Instead, the drafters chose an approach under which the two states, after providing for the continued enjoyment of pre-1950 rights and supplemental water rights, share any remaining divertible flow of the tributaries by fixed percentages (a "divertible-flow approach"). *See* Compact, Art. V(B); Senate Rep. No. 883, *supra*, at 7, Joint App. at 18. The drafters, moreover, chose to calculate the percentages based on cumulative flows and diversions over the course of "an annual water year," rather than daily flows and diversions. *See* Compact, Art. V(C).

Protection of pre-1950 appropriations under Article V(A), by contrast, requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana. Wyoming argues that the drafters could not have intended that Article V(A) would protect pre-1950 appropriations in Montana on a daily basis when Articles V(B) and V(C) provide for the apportionment of other waters on a yearly cumulative basis. Motion to Dismiss, *supra*, pp. 43-50.

By the terms of the Compact, however, the cumulative divertible-flow approach of Articles V(B) and V(C) applies only to the "quantity of water subject to the percentage allocations" in Article V(B)—*i.e.*, to new uses. Compact, Art. V(C). There is nothing inconsistent in protecting pre-1950 appropriative rights through the typical process for protecting senior appropriative rights under the prior appropriation doctrine, while allocating the "unused and unappropriated water" of the tributaries under a cumulative divertible-flow approach. Both steps can be taken under the Compact without creating any conflicts. Western states regularly require junior appropriators to reduce their diversions when needed to protect the water rights of senior appropriators. Article V(A) establishes a similar, interstate requirement for the waters of the Yellowstone River tributaries in those situations where it is necessary to protect pre-1950 appropriations in Montana. Article V(A) of the Compact, on the one hand, and Articles V(B) and V(C), on the other, address different tasks and, as a result, take different but compatible approaches.

3. *The History of the Compact Supports the Unambiguous Meaning of Article V(A)*

Because the language of Article V(A) clearly and unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming that interfere with those rights, there is no need to rely on the history of the Compact to interpret that language. *See*, *e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (clear language is conclusive). The history of the Compact, however, confirms that Article V(A) was intended to protect pre-1950 appropriations from interstate interference by new diversions and withdrawals.

From the very outset of the negotiations that led to the final Compact, two major themes emerged regarding existing water rights. The first theme was the importance of protecting existing water uses. Second, the parties agreed that it would be exceptionally difficult and ultimately unnecessary to try to integrate and prioritize all existing appropriative rights throughout the Yellowstone River system and across state lines (so that a 1924 appropriator in Montana, for example, could object to diversions by a later 1932 appropriator in Wyoming). *See*, *e.g.*, Letter from Engineering Committee to Commission Chair R.J. Newell, Oct. 23, 1950, at 2, Joint App. 230, 232 ("It would be a major research project to place existing rights in all States on an equivalent basis"). As a result, the final Compact protects pre-1950 appropriative rights from new post-1950 diversions and withdrawals, but does not attempt to set up a system for administering all pre-1950 rights on an integrated, interstate basis.

At a discussion during the February 1950 meeting of the negotiating commission of the principles to be

used in developing the Compact, several speakers spoke of the importance of protecting existing rights. *See*, *e.g.*, Yellowstone River Compact Commission, Meeting Minutes of Feb. 1-2, 1950, at 3, Joint App. 75, 78 (comments of T.R. Person) (existing rights should be "recognized and remain unimpaired") ("February 1950 Meeting Minutes"); *id*. at 5, Joint App. at 80 (comments of Commissioner R.E. McNally on behalf of the Wyoming members of the Tongue River committee) (Wyoming commissioners want all existing rights recognized in both states).[6] Throughout the negotiations, Montana representatives repeatedly insisted on the protection of existing rights under the doctrine of prior appropriation. *See*, *e.g.*, Yellowstone River Compact Commission, Meeting Minutes of Oct. 24-25, 1950, at 6-7, 11, 13, Joint App. 54, 60-61, 65, 67 ("October 1950 Meeting Minutes"); February 1950 Meeting Minutes, *supra*, at 3, Joint App. at 78. Wyoming representatives were no less vocal in their call for protecting established appropriative rights. *See*, *e.g.*, Letter from Commissioner R.E. McNally to Wyoming Members of the Yellowstone River Compact Commission, Oct. 3, 1950, Joint App. 285.

The key phrasing found in Article V(A) of the Compact first appeared in an April 14, 1950 draft of a proposed compact prepared by W.J. Burke of the United States Bureau of Reclamation. The draft

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[6] Copies of the meeting minutes of the Yellowstone River Compact Commission were not included with the Congressional reports on the Compact, but copies were "furnished for the official files of the appropriate committees of Congress and for the General Services Administration of the United States for filing with the original of the compact." Senate Rep. No. 883, *supra*, at 6, Joint App. at 17.

provided that appropriative rights existing as of January 1, 1950 in the Tongue River "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Burke Draft, *supra*, Art. V(A)(3), Joint App. at 137. The "*unappropriated* waters of the Tongue River System subsequent to January 1, 1950" were then to be split between Montana (receiving 60%) and Wyoming (40%). *Id.* (emphasis added).

The negotiators spent considerable time discussing existing rights at the October 24-25, 1950 meeting of the Yellowstone River Compact Commission. A wide variety of views were expressed. As noted by W.J. Burke of the Bureau of Reclamation, however, "there seemed to be no question about recognizing existing rights, that the question was what body would enforce those rights, the Courts or a Compact Commission." October 1950 Meeting Minutes, *supra*, at 7, Joint. App. at 61. At the meeting session on October 25, the negotiating commission turned its attention to detailed drafting of the compact and voted to take the language quoted above from the Burke Draft and apply it to all the waters of the Yellowstone River system, rather than just to the waters of the Tongue River. *Id*. at 17, Joint App. at 71. *See also* Engineering Committee Draft, *supra*, Art. V(A), Joint. App. at 171 (containing the final language of Article V(A)).

At the same meeting, the negotiators rejected the idea of having a compact commission administer pre-1950 appropriative rights as one integrated prior-appropriation system without regard to state line, which would have permitted a pre-1950 appropriator in one state to "call" a more junior pre-1950 appropriator in another state during periods of shortage. One of Montana's commissioners moved to amend the

language of the Burke draft to provide that existing appropriative rights would be administered by "the principle of priority, regardless of state line." October 1950 Meeting Minutes, *supra*, at 17, Joint App. at 71. Following discussion, however, the proposed amendment was dropped. Wyoming stated that it would not agree to such "interstate administration" of existing appropriative rights. *See*, *e.g.*, *id*. at 13, Joint App. at 67 (comments of Commissioner R.E. McNally of Wyoming).

At least one proposed draft of the compact would not have affirmatively protected pre-existing water rights, but would have excluded them entirely from the compact's coverage. In September 1950, Carl L. Myers, who worked for the Bureau of Reclamation and chaired the Engineering Committee, sent a "rough draft of a possible Compact" to representatives of the three states. Letter from Carl L. Myers to Fred Buck *et al*., Sept. 19, 1950, Joint App. 195, 196. The first principle on which the draft was based was that "[e]xisting rights [should] be undisturbed and not administered under the Compact." *Id*. Pursuant to this principle, Article V(D) of the draft compact "excluded from the provisions of this Compact . . . 2. Established rights to the beneficial use of water in each signatating [sic] State existing on January 1, 1951 . . . ." Myers Draft, *supra*, Art. V(D), Joint App. at 207. The apportionment provisions of the draft compact, in turn, stated that the apportionments were to be "exclusive of established rights . . . coming within the provisions of paragraph D . . . ." *Id*. at 206. Rather than taking this approach, however, the drafters adopted the language that is now found in Article V(A) of the Compact.

Discussion at the final negotiating session on December 7-8, 1950 confirms the intent of the negotiators to protect pre-1950 appropriative rights. In discussing article V(B) of the proposed compact, for example, W.J. Burke of the Bureau of Reclamation

> discussed the basis on which the Compact was drafted and the general theory of the Compact. Yields of the basin are to be *burdened* by (1) existing appropriative rights and (2) supplemental water for existing developments. The remainder, the *unappropriated* and unused water, or residual water, is to be compacted.

December 1950 Meeting Minutes, *supra*, at 4, Joint App. at 41 (emphasis added).

The House and Senate committee reports on the Compact make it clear that the drafters of the Compact did not intend to create an integrated system for administering priority disputes among pre-1950 appropriative rights. The drafters saw little need for the Compact to resolve such disputes. According to the Congressional reports, the drafters apparently believed that there was sufficient water to meet all pre-1950 appropriative rights if the water was "properly conserved by storage." Senate Rep. No. 883, *supra*, at 6-7, Joint App. at 17-18. As a result, "little could be gained, from a water supply standpoint, by attempting in the compact, the regulation and administration of existing appropriative rights in the signatory States." *Id*. at 11, Joint App. at 22. *See also* House Rep. No. 1118, 82d Cong., 1st Sess. 2 (1951), Joint App. 24, 26 ("House Rep. No. 1118").

At the same time, however, the Congressional reports make clear that it was the intent of the Compact to protect pre-1950 appropriative rights in

one state from interference by post-1950 diversions and withdrawals in another. The reports emphasize that Article V(A) recognizes pre-1950 rights and "permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Senate Rep. No. 883, *supra*, at 11, Joint App. at 22; House Rep. No. 1118, *supra*, at 3, Joint App. at 27. New and supplemental rights under Article V(B) are to come from residual waters remaining after pre-1950 rights are satisfied. "The unused and unappropriated waters of the interstate tributaries only are treated; *i.e.,* the waters that are residual to those *required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V*." Senate Rep. No. 883, *supra*, at 11, Joint App. at 22 (emphasis added). *See also* House Rep. No. 1118, *supra*, at 3, Joint App. at 27 (same).

Congressional discussions of the United States' interests in the waters of the Yellowstone River system also confirm that Congress' intent was to protect pre-1950 rights. In response to an expressed concern that the Compact would not adequately protect rights in a federal reclamation project on the lower Yellowstone River, for example, the House Committee on Interior and Insular Affairs noted that Article V(D), "[*c*]*onsidered with paragraph A of Article V*, . . . gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the *protection* of a right existing on January 1, 1950."[7]

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[7] Article V(D) provides, "All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and

House Rep. No. 1118, *supra*, at 3, Joint App. at 27 (emphasis added). And in response to concerns that Article V(B)'s allocation of "unused and unappropriated waters" between Montana and Wyoming might injure the United States, the Senate Committee on Interior and Insular Affairs responded that, "Article V-B, it is true, allocates to the States the 'unused and unappropriated waters,' but this follows V-A which recognizes all existing beneficial uses as of January 1, 1950." Senate Rep. No. 883, *supra*, at 3, Joint App. at 14.

Various comments in both the Congressional reports and the minutes of the Compact negotiations note that it was not the intent of the drafters to "regulate" or "administer" pre-1950 water rights. *See*, *e.g.*, Senate Rep. No. 883, *supra*, at 2, Joint App. 13 ("No regulation of the supply is mentioned for the satisfaction of those rights"); *id*. at 11, Joint App. at 22 ("little could be gained . . . by attempting in the compact, the regulation and administration of existing appropriative rights"); House Rep. No. 1118, *supra*, at 2, Joint App. at 26 (same); October 1950 Commission Minutes, *supra*, at 6, Joint App. at 60 (same); *id*. (Wyoming did not want a "provision in the Compact that existing rights shall be administered under the Compact by the Administrative Commission that may be established"); *id*. at 13, Joint App. at 67 ("Wyoming would not agree to interstate administration"). Read in context, however, each of these comments refer to the decisions by the negotiators either (1) to exclude pre-1950 appropriations from the percentage allocations of divertible flow under Articles V(B) and V(C), or (2) not to subject all

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shall be and remain unimpaired by this Compact." Joint. App. at 6.

pre-1950 water rights, no matter where located, to a unified and integrated regulatory system under the management of the Yellowstone River Compact Commission. None of the comments suggests that the states, Congress, or the drafters intended to leave pre-1950 appropriations in one state unprotected from interference by new diversions or withdrawals in another state.

4. Summary

Wyoming's argument ultimately boils down to the contention that Montana has no means, other than what Wyoming refers to as the "self-correcting" mechanism of Article V(B), to protect pre-1950 appropriative rights in Montana against new diversions or withdrawals of water in Wyoming that prevent sufficient water from reaching Montana. If a new Montana water user interferes with a pre-1950 appropriator in Montana, the appropriator would be entitled to block that use in Montana state court. But under Wyoming's interpretation of the Compact, Montana gave up the right to block water diversions by new users who sit on the other side of the border. Article V(A), however, clearly and unambiguously protects pre-1950 appropriative rights in Montana from new diversions or withdrawals in Wyoming that prevent sufficient water from reaching Montana. As Article V(A) states, pre-1950 appropriative rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."

C. Montana's Specific Allegations of Violations Resulting from New Surface Diversions, Storage, and Groundwater Withdrawals in Wyoming

Wyoming also argues that the specific actions about which Montana complains cannot constitute a violation of Article V, even if Article V(A) provides general protection to pre-1950 appropriators. Montana's claims divide into two categories. First, Montana complains that three types of post-1950 water uses in Wyoming are interfering with Montana's pre-1950 uses: (1) irrigation of new acreage, (2) storage of water in new or expanded reservoirs, and (3) groundwater withdrawals. This section of the Report discusses these claims. Second, Montana complains that pre-1950 appropriators in Wyoming have increased their consumption of water on existing acreage to the detriment of Montana's downstream pre-1950 water uses. Because this final claim does not involve a new water use but instead involves a conflict between the water uses of two groups of pre-1950 appropriators, it is discussed separately in section III-D of this Report.

Before examining what actions violate Article V(A), it is useful to consider in more depth what Article V(A) means by its reference to the "laws governing the acquisition and use of water under the doctrine of appropriation." Article V(A) provides not for the continued enjoyment of pre-1950 rights in the abstract but for their continued enjoyment in accordance with such laws. In some instances, therefore, the "laws governing the acquisition and use of water under the doctrine of appropriation" may determine or help guide what is and is not protected under Article V(A). Where the relevant law of appropriation is clear in

both Montana and Wyoming, and the laws of the two states agree, applying the language of Article V(A) is not a problem. If the law of the two states is unclear, the laws of the two states differ, or the law has changed since the Compact was negotiated, what law to apply is less clear.

Article V(A) does not provide for the use of water under the "laws of the separate states," as the 1935 Draft Compact did. *See* 1935 Draft Compact, *supra*, Art. V(a), Joint App. at 278. Instead, Article V(A) of the final Compact refers generically to "the laws governing the acquisition and use of water under the doctrine of appropriation," suggesting that the Compact incorporates a general concept of appropriation law rather than the law of any specific state. The analysis that follows therefore looks first but not exclusively to the laws of Montana and Wyoming, and also includes an examination of (1) relevant decisions of the United States Supreme Court regarding the appropriation doctrine, and (2) general practice in applying appropriation law in other western states. Thankfully, the laws of Montana and Wyoming do not appear to directly disagree on the issues raised by Wyoming's Motion to Dismiss, although the law of one or the other state is sometimes clearer on relevant points. The laws of Montana and Wyoming on key issues also appear to be compatible with the general principles of appropriation law applied in other western states. An examination of general appropriation law in the western United States, however, helps in understanding and interpreting the law of the two states.

Article V(A) also does not specify whether it incorporates the law of prior appropriation at the time when the Compact was negotiated or when a

dispute arises. "It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made." *Kansas v. Colorado*, 533 U.S. 1, 89 (2001) (O'Connor, J., dissenting), citing *Norfolk & Western R. Co. v. Am. Train Dispatchers*, 499 U.S. 117, 129-130 (1991). There is no evidence, however, that Congress or the ratifying states intended to freeze prior appropriation law for the pre-1950 appropriations protected by Article V(A). Otherwise, pre-1950 appropriations in the Yellowstone River system could be subject to legal rules totally different from those applying to all other appropriations in the states. It is again unnecessary to resolve this question of timing in order to resolve Wyoming's Motion to Dismiss, although the question may need to be addressed in future proceedings in this case. The discussion that follows includes references to cases and statutes subsequent to the negotiation of the Compact, but primarily for the purpose of understanding and confirming the law of prior appropriation at the time of the Compact.

1. Irrigation of New Acreage in Wyoming Can Violate Article V of the Compact

Montana alleges that "Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basin, in violation of Montana's rights under Article V of the Compact." Complaint ¶ 10. Wyoming disagrees. Motion to Dismiss, *supra*, p. 54. Wyoming's argument relies principally on the same arguments discussed in Part III-B of this Report and have no greater weight here than before. Article V(A) clearly protects pre-1950 appropriations in Montana from irrigation of new acreage in Wyoming if that

irrigation prevents sufficient water from reaching Montana. Protecting senior appropriations from new water diversions and uses is the essence of prior appropriation. Article V(B), moreover, explicitly subordinates "direct diversions for beneficial use on new lands" to both pre-1950 appropriations and "supplemental water supplies."

Wyoming correctly observes that one of the purposes of the Compact "was to encourage the compacting states to proceed with irrigation of new acreage by establishing a firm understanding of how divertible flow would be allocated to such new acreage." Motion to Dismiss, *supra*, p. 54. There is no evidence in the record, however, that Congress or the state legislatures that approved the Compact intended to encourage the irrigation of new acreage at the cost of pre-1950 appropriators losing the security of their rights. As discussed, the Compact expressly subordinates the provision of water for use on new lands under Article V(B) to the continued enjoyment of pre-1950 appropriative rights under Article V(A).

2. Construction and Use of New or Expanded Water Storage Facilities Can Violate Article V of the Compact

Montana also alleges that "Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact." Complaint ¶ 9. According to Montana, eight reservoirs have been built or enlarged in Wyoming's portion of the Tongue River Basin since January 1, 1950, expanding storage capacity by 9,400 acre-feet. Montana's Brief in Support of Leave to File, *supra*, p. 14. The Powder River Basin in

Wyoming has seen the construction or enlargement of seven reservoirs during this period, according to Montana, expanding capacity by 216,000 acre-feet. *Id*.

Wyoming argues that the construction and use of new and expanded water storage facilities cannot violate the Compact. Motion to Dismiss, *supra*, pp. 50-54. As Wyoming correctly observes, the Compact "does not restrict the construction of reservoirs, but instead, encourages it in both states." *Id*., p. 50. For the reasons discussed earlier, however, Article V(A) of the Compact clearly proscribes diversions of water into storage facilities in Wyoming for new beneficial uses beginning after January 1, 1950 if those diversions prevent adequate water from reaching pre-1950 appropriators in Montana. Under Article V, the "storage" of water for either "beneficial uses on new land" or "supplemental water supplies" on existing acreage is to come only from "unused and unappropriated water," after protecting the continued enjoyment of pre-1950 appropriations.

Montana, however, cannot demand that Wyoming release water from its reservoirs to meet the needs of pre-1950 appropriators in Montana if the water was stored at a time when the needs of the pre-1950 appropriators were fully met. As Wyoming notes, the law of prior appropriation in both Wyoming and Montana provides that the key question in determining the lawfulness of storage is whether water was stored "in priority," not whether senior appropriators need water after the water has been stored. *See*, *e.g*., *Federal Land Bank v. Morris*, 116 P.2d 1007, 1011-1012 (Mont. 1941); *Kearney Lake Land & Reservoir Co. v. Lake DeSmet Reservoir Co*., 475 P.2d 548, 551 (Wyo. 1970). Counsel for Montana conceded this

point at the February 3, 2009 hearing on Wyoming's Motion to Dismiss. Hearing Trans. (Motion to Dismiss), p. 59, line 22 to p. 60, line 1 ("we agree with Wyoming that the general rule of prior appropriation provides that, if you store in priority, you may use out of the priority").

3. Groundwater Development in Wyoming Can in Some Situations Violate Article V(A) of the Compact

Montana finally alleges that "Wyoming has allowed the construction and use of groundwater wells for irrigation and for other uses and has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins." Complaint ¶ 11. According to Montana, such pumping "has the potential to deplete the compacted waters of the Powder and Tongue Rivers" and thus deprive Montana of water needed to satisfy its pre-1950 appropriations. Montana's Brief in Support of Leave to File, *supra*, p. 15.

Wyoming argues that the Compact governs only "surface water, not groundwater." Motion to Dismiss, *supra*, p. 59. Whether groundwater withdrawals in Wyoming can violate Article V(A) of the Compact is a more difficult question than whether new surface water uses or storage can do so. The Compact never uses the term "groundwater." This does not end the inquiry, however, because the United States Supreme Court has found that several other interstate river compacts regulate at least some groundwater withdrawals even though they never use the word "groundwater." *See Kansas v. Colorado*, 543 U.S. 86, 91 (2004) (1949 Arkansas River Compact); *Kansas v. Nebraska*, 530 U.S. 1272 (2000) (1942 Republican River Compact). In determining whether interstate

river compacts regulate groundwater extractions, the Supreme Court and prior special masters have looked to determine whether the language of the compact is sufficiently broad and inclusive to clearly encompass groundwater even though groundwater is never explicitly mentioned. *See*, *e.g.*, First Report of the Special Master, *Kansas v. Nebraska*, No. 108, Orig., pp. 19-23 (Jan. 28, 2000).

The language of the Compact in this case is sufficiently broad and inclusive to encompass at least some forms of groundwater that are hydrologically connected to the surface waters of the Powder and Tongue Rivers. The starting point for resolving coverage of groundwater is again Article V(A), which provides that pre-1950 appropriative rights in the "Yellowstone River System . . . shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."

Three elements of Article V(A) demonstrate its coverage of at least some forms of hydrologically connected groundwater. First, Article V(A) provides without any limitation that pre-1950 rights "shall continue to be enjoyed." Article V(A) does not protect pre-1950 rights only from surface diversions or storage; instead, it provides broadly for the continued enjoyment of such rights. According to Montana's allegations, new groundwater withdrawals in Wyoming are no different than new surface diversions; both directly interfere with the continued enjoyment of pre-1950 surface rights in Montana. As the Special Master recognized in *Kansas v. Nebraska*, the pumping of water that is hydrologically connected to surface water can deplete the surface water as surely as a surface diversion. *See* First Report of the Special

Master, *Kansas v. Nebraska*, No. 108, Orig., pp. 22-23 (Jan. 28, 2000). If Article V(A) were read to incorporate a silent restriction that the Compact protects pre-1950 appropriations only against surface diversions, post-1950 water users in Wyoming who found their surface diversions limited as a result of Article V(A) could switch to groundwater withdrawals even if the adverse consequences to pre-1950 appropriators in Montana were largely similar.

Second, Article V(A) protects rights in the "Yellowstone River System"—which Article II(D) defines, in relevant part, as "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River." Compact, Art. II(D). This language again does not appear to exclude groundwater. To the contrary, the broad language of Article II(D), including its use of the terms "sources," "springs," and "swamps," indicates an intent to cover all waters including groundwater. As scientists and courts recognized for decades prior to the negotiation of the Compact, groundwater is a significant source of water for many rivers and streams. *See*, *e.g.*, *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*, 260 U.S. 596, 598 (1923) (explaining how groundwater finds its way into the surface channels of streams).[8] A "spring," moreover, is

[8] In *Snake Creek Mining & Tunnel Co.,* a mining company collected and brought to the surface groundwater that fed a spring. As the Supreme Court noted, the practice had "materially diminished" the stream waters. Unless the groundwater was permitted to flow into the stream, "a material part of the lands historically reclaimed and irrigated thereunder will be without water and their cultivation must be discontinued." 260

> a location where *groundwater naturally emerges from the Earth's subsurface* in a defined flow and in an amount large enough to form a pool or stream-like flow. Springs can discharge fresh groundwater either onto the ground surface, *directly into the beds of rivers or streams*, or directly into the ocean below sea level. Springs form the headwaters of some streams.

Water Encyclopedia: Science and Issues, www.waterencyclopedia.com (emphasis added). A "swamp," in turn, is an older name for a "wetland," which is merely "an area that is periodically or permanently saturated or covered by surface water or *groundwate*r." *Id*. (emphasis added).

Third, as noted above, Article V(A) mandates that pre-1950 appropriative rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the *doctrine of appropriation*" (emphasis added). Beginning with cases in the late 19th century, courts employing the appropriation doctrine have generally managed the surface channel of a river jointly with any groundwater clearly known to be hydrologically interconnected to the surface channel. One of the most frequently cited treatises on western water law during the first half of the 20th century was Samuel C. Wiel, Water Rights in the Western States (3d ed. 1911). As Wiel explained, where groundwater was "directly connected with the flow of a definite stream, the western cases . . . usually regarded the stream rights as the principal, and the ground water as but incident to the stream, subordinating the ground-

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U.S. at 606. Relying on Utah law, the Supreme Court held that the groundwater was part of the stream. *Id.*

water claimants to the stream claimants." 2 *id.* § 1076, at 1010. The courts gave differing names to such groundwater, depending on the particular facts: "underground streams," the "subflow of a stream," and "percolations tributary to watercourses." No matter what the name, however, the cases generally treated the groundwater as part of any hydrologically interconnected surface channel and barred groundwater withdrawals that interfered with senior surface appropriators. *See id*. § 1077, at 1011-1012 (underground streams), §§ 1078-1081, at 1012-1021 (subflow of a stream), § 1082, at 1022-1025 (percolations tributary to surface watercourses).

The Supreme Court recognized that groundwater can be hydrologically interconnected with a surface channel and should in at least some instances be treated as part of that channel in its first equitable apportionment case, *Kansas v. Colorado*, 206 U.S. 46 (1907). An issue in that case was the proper treatment of groundwater that flowed alongside the Arkansas River. According to the Court, this water was properly treated as the

> accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. . . . . If the entire volume of water passing down the surface was taken away the subsurface water would gradually disappear, and in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water, it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the further it will reach in its percolations on either side, as well as more

> distinct will be its movement down the course of the stream. The testimony therefore given in reference to this subsurface water, its amount and its flow, bears only upon the question of the diminution of the flow from Colorado into Kansas caused by the appropriation in the former state of the waters for the purposes of irrigation.

Id. at 114-115. *See also Snake Creek Mining & Tunnel Co.*, *supra*, 260 U.S. at 606 (holding that, as a matter of Utah appropriation law, a mining company could not intercept and collect groundwater that otherwise would have flowed to surface appropriators).

Particularly relevant for this case is the groundwater that Wiel labeled "percolations tributary to surface waterways"—groundwater that does not lie beneath or alongside the bed of a waterway but that ultimately feeds the surface channel. 2 Wiel, *supra*, § 1082, at 1022-1025. As Wiel explained, the law initially treated such groundwater as separate from surface channels because the linkage between the two was unclear. By the time that Wiel wrote his treatise, however:

> More recent scientific investigation has dispelled much of this mystery concerning the movement of underground water. . . . . If, on the proof, the percolations are shown to be tributary to the spring or watercourse in a material degree, the loss of them causing a substantial diminution of the spring or watercourse, they are now treated as a component part of the watercourse, and follow rights on the watercourse, and rights therein are not regarded as underground rights separate therefrom.

Id. at 1022-1023. *See also id*. § 337, at 358-359 (stream appropriators have a right to block hostile diversions from "underground percolations tributary" to the surface channel); C.F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Or. L. Rev. 113 (1942); Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1921).

Forty years prior to the negotiation of the Compact, the Montana Supreme Court recognized the scientific and legal linkage between surface waterways and tributary groundwater. In *Smith v. Duff*, 102 P. 984, 986 (Mont. 1909), the Montana Supreme Court wrote, "It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules." Three years later, in *Ryan v. Quinlan*, 124 P. 512 (Mont. 1912), the Montana Supreme Court held that groundwater in general was not subject to the legal rules for surface water, but was the property of overlying landowners. *Id*. at 515-516. At the same time, however, the court reaffirmed that groundwater "flowing in defined channels" or "tributary to a stream" was "subject to the same rules as water flowing in surface streams" (although there was no presumption that groundwater was tributary to a stream). *Id*. at 516. *See generally* Wells A. Hutchins, The Montana Law of Water Rights 111-112 (1958) (underground streams and subflow of surface streams are the same as surface water under Montana law).

When Montana finally adopted a permit system for appropriative rights in 1973, it applied the system to both surface and groundwater. *See* Mont. Code Ann.

§ 85-2-109(19); *see also* Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 64 (1987). Under Montana's current water provisions, junior uses may not impair or adversely affect senior rights. *See* Mont. Code Ann. § 85-2-311(1)(b).

Wyoming law was less clear on the issue of interconnected groundwater and surface water when the Compact was negotiated. At that time, Wyoming courts had apparently never dealt with the question of hydrologic interconnections between groundwater and surface water. Hearing Trans. (Motion to Dismiss), pp. 44-45. The Wyoming legislature had recently passed a groundwater statute that subjected all new groundwater withdrawals to the prior appropriation system, but the statute was silent on whether and how to integrate groundwater withdrawals with hydrologically interconnected surface channels. *See* 1947 Wyo. Sess. Laws ch. 107. When Wyoming passed a new groundwater statute in 1957, however, it explicitly provided for the legal integration of hydrologically interconnected groundwater and surface water:

> Where . . . underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply.

Wyo. Stat. Ann. § 41-3-916. *See also id*. § 41-3-915 (providing corrective measures for cases of interference, including ordering junior appropriators to cease or reduce withdrawals); Lawrence J. Wolfe &

Jennifer G. Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 Land & Water L. Rev. 39, 61-62 (1989) (providing examples of the coordination of groundwater and surface water in Wyoming).

The language of the Compact, as well as the general treatment of hydrologically interconnected groundwater under the doctrine of appropriation both at the time the Compact was negotiated and subsequently, demonstrates that the Compact protects pre-1950 uses in Montana from interference by at least some forms of groundwater pumping that date from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its surface tributaries. The failure of the Compact to specifically use the term "groundwater" is not surprising given both the general understanding at the time that rivers implicitly included at least some hydrologically interconnected groundwater and the fact that the negotiators did not believe that groundwater was likely to be a significant issue in managing the Yellowstone River system. Federal Power Comm'n, Preliminary Report on Yellowstone River Basin, *supra*, at 45, Joint App. at 559 (Dec. 1940) ("it may be assumed that irrigation from underground pumping will not have a significant effect on stream diversions within the calculable future"). Groundwater was not a major issue in the negotiations. The overall language of the Compact, however, reveals a clear intent to protect pre-1950 appropriations from all forms of interference by subsequent water users, including the withdrawal of at least some forms of hydrologically connected groundwater.

The Compact's definition of "diversion" in Article II would appear to provide further support for this conclusion. As discussed above, Article V(B) provides that "diversions for beneficial use on new lands" are to come from "unused and unappropriated" waters, not from waters belonging to pre-1950 appropriators. Article II(G) provides that the term "diversion" means "the *taking* or *removing* of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken" (emphasis added). The United States in its *amicus* brief makes a strong case that the pumping of groundwater that is hydrologically interconnected to the surface channel of a tributary is encompassed by this definition. Brief for the United States as *Amicus Curiae* in Opposition to the Motion to Dismiss, May 2008, pp. 24-26. Such groundwater pumping, by preventing the water from reaching the channel of the tributary, would appear to quite literally "take" or "remove" water from that tributary.

Because the language of Article V(A) of the Compact clearly protects pre-1950 appropriators from at least some forms of harmful groundwater withdrawals, however, it is unnecessary for purposes of resolving Wyoming's motion to determine whether groundwater pumping is included in the term "diversion." The meaning of the term "diversion," which is used in Articles V(B) and V(C) but not Article V(A), has implications for the application of the Compact that go beyond protecting pre-1950 appropriations. While Article V(A) addresses only the protection of pre-1950 appropriations, Articles V(B) and V(C) apportion the waters of the Yellowstone River among post-1950 water users. Deciding whether the term

"diversion" includes groundwater withdrawals is not only unnecessary but could affect the administration of Articles V(B) and V(C) and the rights of post-1950 water users in ways that are unpredictable.

Recognizing the potential implications of a holding that Article V(A) does not protect Montana's pre-1950 uses from withdrawals of interconnected groundwater, Wyoming argues that Montana would not be without any redress. According to Wyoming, Montana could ask Wyoming to negotiate an amendment to the existing Compact, start negotiations with Wyoming for a new compact, or bring an equitable apportionment action in the Supreme Court to apportion groundwater. Wyoming's Reply Brief, *supra*, p. 29. As the preamble to the Compact emphasizes, however, the Compact was designed to avoid additional negotiations and disputes. The Compact was meant to "remove all causes of present and future controversy . . . with respect to the waters of the Yellowstone River and its tributaries" and "provide for an equitable division and apportionment of such waters." Compact, Preamble. Article V(A) does this by protecting pre-1950 appropriations in Montana against all interference by new users, whether by surface or groundwater diversion. Given the purposes of the Compact, "neither the parties to the Compact, nor the Congress and the President who approved it, could have intended that an upstream State could, with impunity, unilaterally enlarge its allocation by taking some of the virgin water supply before it reached the stream flow." First Report of the Special Master, *Kansas v. Nebraska*, No. 126, Orig., p. 21 (Jan. 28, 2000).

The conclusion that Article V(A) covers at least some groundwater withdrawals does not answer the

subsidiary issues of exactly what groundwater is covered or the exact circumstances under which groundwater pumping violates Article V(A). It is not necessary to answer these issues, however, in order to resolve Wyoming's Motion to Dismiss. Because the parties did not brief these issues and because answers to the issues are likely to be fact specific, resolution of the issues is best left for subsequent proceedings in this case.

D. Montana's Specific Allegation of Violations Resulting from Increased Consumption by Pre-1950 Uses in Wyoming

Montana also alleges that pre-1950 appropriators in Wyoming have increased their irrigation efficiency and, as a result, consume more water on lands that were irrigated as of January 1, 1950, reducing the water flowing downstream to Montana and depriving pre-1950 uses in Montana of sufficient water.[9] *See* Complaint ¶ 12. Montana's final allegation highlights the difference between the amount of water diverted for an off-stream use and the amount consumed by that use. Most water users consume only a percentage of the water that they divert. The remainder often flows back into a waterway and is

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[9] After I issued a Memorandum Opinion on Wyoming's Motion to Dismiss in June 2009, I invited the parties to submit letter briefs advising me of any corrections or clarifications that they believed should be made to the opinion. In its letter brief, Montana argued that the opinion had erred in concluding that increases in consumption by pre-1950 appropriators in Wyoming did not violate Montana's rights under the Compact. Both Wyoming and the United States filed letter briefs in response, and Montana filed a reply letter brief. On September 4, 2009, I issued a supplemental opinion confirming my original conclusion and providing an expanded legal analysis.

available for consumption by downstream users. The percentage of water that is consumed is known as "water efficiency." When a water user increases its water efficiency and thus its consumption, the change can reduce the amount of water that flows back into the waterway and is available for downstream water users—even though the amount that is diverted does not increase.

According to Montana, pre-1950 Wyoming appropriators have switched from flood irrigation to sprinkler irrigation, which can significantly reduce return flows to the waterways:

> It is typical for flood irrigation to consume approximately 65% of the water applied to the fields. The other 35% of the water applied flows back to the stream either on the surface or by percolation through the ground. Use of sprinklers, especially with drop nozzles, can increase the efficiency from 65% to 90% or more. This reduces return flows back to the stream from 35% to 10% or less.

Montana's Brief in Support of Leave to File, *supra*, pp. 15-16. Because pre-1950 appropriations in Montana depend on this return flow during periods when the tributaries carry little other flow, Montana alleges that Wyoming farmers' increased consumption reduces the amount of water available to satisfy Montana's pre-1950 uses in violation of Article V of the Compact. Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint, May 2008, p.47 & n.7 ("Montana's Brief in Response to Motion to Dismiss"); Montana's Letter Brief Re Memorandum Opinion on Motion to Dismiss, July 17, 2009, p. 4 ("Montana's Letter Brief").

This final allegation raises a very different issue than Montana's other allegations do. While the other allegations involve conflicts between pre-1950 uses in Montana and post-1950 uses in Wyoming, this allegation involves a conflict between two sets of pre-1950 uses. As discussed above, Article V(A) protects Montana's pre-1950 uses from post-1950 surface diversions, storage, and groundwater withdrawals in Wyoming. Article V(A)'s mandate is less clear, however, where pre-1950 farmers in Wyoming increase their irrigation efficiency and thus their water consumption without increasing their diversions. Article V(A) provides for the "continued enjoyment" of appropriative rights in both Montana and Wyoming. In Montana's view, the increased consumption is interfering with its pre-1950 appropriative rights in violation of Article V(A). In Wyoming's view, however, its farmers are simply exercising their pre-1950 appropriative rights under the recognition of Article V(A).

The Compact's history cautions against reading the Compact to require any of the signatory states to impose new requirements or procedures for the management of pre-1950 appropriative rights unless the Compact clearly mandates them. While the drafters were intent to protect pre-1950 appropriations from later diversions and withdrawals, they recognized that the signatory states differed in some aspects of their administration of existing rights, and they explicitly declined at several points to create a unitary system for regulating and administering pre-1950 appropriative rights. As discussed earlier, both Congress and the negotiators of the Compact believed that "little could be gained, from a water supply standpoint, by attempting, in the compact, the regulation and administration of *existing* appropri-

ative rights in the signatory states." House Rep. No. 1118, *supra*, at 2, Joint App. at 26 (emphasis added). *See also* Senate Rep. No. 883, *supra*, at 11, Joint App. at 22; October 1950 Meeting Minutes, *supra*, at 6, Joint App. at 60 (noting that the Engineering Committee had concluded that there was "little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact").

The negotiators saw little benefit and significant difficulty in trying to administer pre-1950 rights under the Compact on an interstate basis, particularly given the differences in water law among the signatory states and the difficulties this would pose for interstate administration. The Engineering Committee discussed the question in its letter of October 23, 1950 to the chair of the Compact Commission:

> Concerning treatment of existing developments in the Compact, the committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way justify the benefits that might be obtained. There are insufficient data upon which to base this type of administration due principally to differences in the water laws of the States involved. It would be a major research project to place existing rights in all States on an equivalent basis. Such procedure undoubtedly would involve interstate adjudication procedures.

Letter from Engineering Committee to Commission Chair R.J. Newell, *supra*, at 1-2, Joint App. at 231-232.

This history does not directly resolve Montana's objection to increased consumption by pre-1950 appropriators in Wyoming. Montana is not seeking the direct "regulation and administration of existing appropriative rights" under the Compact. Montana is arguing neither that the Compact establishes a unitary system for regulating pre-1950 appropriative rights nor that the Compact directly prohibits pre-1950 appropriators from increasing their water consumption. Instead, Montana simply argues that Wyoming must ensure that any increased consumption does not interfere with return flow needed to satisfy Montana's pre-1950 uses. Montana's Letter Brief, *supra*, pp.12-13.

The practical consequences of Montana's argument, however, would raise the types of concerns that led the Compact negotiators not to regulate or administer pre-1950 appropriative rights. Under Montana's argument, Wyoming must either prevent its pre-1950 appropriators from increasing their consumption to the detriment of Montana's pre-1950 uses or make up for the increased consumption through some other means. Any such requirement would at a minimum force Wyoming to determine its appropriators' pre-1950 efficiency levels and then track any changes in that efficiency over time. Because Wyoming would likely find it difficult if not impossible to offset any increased consumption during times of shortage, it would almost certainly lead to additional regulation of Wyoming's pre-1950 appropriators. For these reasons, the Compact's history cautions against

reading requirements into the Compact unless the Compact's intent is clear.

1. The Language of the Compact Does Not Explicitly Limit Consumption Levels of Pre-1950 Appropriators.

In deciding whether increased consumption by pre-1950 appropriators in Wyoming can violate Wyoming's commitments under the Compact, the inquiry begins again with the language of the Compact, specifically Article V(A):

> 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 in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

On its face, the language of Article V(A) would not appear to directly limit the consumptive efficiency of pre-1950 appropriative rights in Wyoming. Focusing on Article V(A)'s reference to "beneficial uses . . . existing . . . as of January 1, 1950," Montana nonetheless argues that this language prohibits Wyoming from "expand[ing] its pre-1950 consumptive water uses by increasing its irrigation efficiency to the detriment of Montana." Montana's Letter Brief, *supra*, pp. 4-5, 13-14. In Montana's view, an increase in consumption is an increase in "beneficial use" and thus not permitted by Article V(A). Beneficial use is central to the concept of prior appropriation and determines not only the legitimacy of an appropriation but also the measure and limit of an appropriative right. *See*, *e.g.*, *Bailey v. Tintinger*, 122 P. 575, 580 (Mont. 1912) (putting water to a beneficial use is the essence of an appropriation); Wyo.

Stat. Ann. § 41-3-101 (beneficial use is the "basis, the measure and limit" of an appropriative right).

The language of Article V(A), however, establishes only the amount of water that can be diverted, not consumed, by pre-1950 uses in Wyoming. Article V(A) provides for the continued enjoyment of "[a]ppropriative rights to the beneficial uses" of water existing as of 1950. Prior-appropriation states have generally measured appropriative rights by the amount of water diverted from the waterway and put to a beneficial purpose, not the amount consumed. So long as the water diverted is put to a valuable use and not wasted (*i.e.*, is "beneficially used"), the entire amount diverted is the measure of the appropriative right. *See* 1 Samuel C. Wiel, Water Rights in the Western States, *supra*, § 478, at 502 (appropriator is entitled to the quantity of water actually diverted and used for a beneficial purpose). Article V(A) thus would appear to preclude the enlargement of pre-1950 diversions but does not speak directly to increases in efficiency.

If the drafters of the Compact had intended to limit the amount of water that could be consumed under pre-1950 rights in Wyoming, they enjoyed far clearer and more explicit ways to do so. Article V(A), for example, could have provided for the continued enjoyment of only "the amount of water *consumed* for a beneficial use in each signatory state as of January 1, 1950." *See*, *e.g.*, Wyo. Stat. § 41-3-104(a) (appropriator can transfer water to a new use or place of use provided that the transfer does not "increase the historic amount *consumptively used* under the existing use" (emphasis added)). Instead, Article V(A) provides for the continued enjoyment of "appropriative rights to . . . beneficial uses."

Montana notes that Article II(H) defines "beneficial use" under the Compact as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Montana argues that this language demonstrates an intent to "quantif[y] existing uses in terms of depletion"—*i.e.*, consumption, not diversion. Montana's Letter Brief, *supra*, p. 13; Montana's Reply to the Letter Briefs of Wyoming and the United States, Aug. 3, 2009, p. 2. Article II(H), however, does not define "beneficial use" as the *amount* of water depleted or consumed. Instead, Article II(H) merely provides that a "beneficial use" is a use that depletes the water supply of a basin. In requiring that a "beneficial use" deplete a waterway, Article II(H) echoes the traditional requirement of prior-appropriation law that appropriations actually divert water from a stream for consumptive use. *See* 2 Waters and Water Rights, *supra*, § 12.02(c)(1), at 12-9 to 12-22.

Read in the context of western appropriation law, the beneficial-use language in Article V(A) addresses the *types* of uses that the Compact protects, not the right of a pre-1950 appropriator to increase his or her efficiency. The principal purpose of the "beneficial use" doctrine in prior appropriation law is to ensure that water is appropriated and used for only valuable purposes and is not wasted. *See id*. § 12.02(c)(2), at 12-22 to 12-41. Reflecting this purpose, Article II(H) defines "beneficial use" as a use that depletes a drainage basin "when usefully employed by the activities of man." The Compact's language says nothing one way or the other regarding the right of a pre-1950 Wyoming appropriator to increase the efficiency or intensity of his or her "beneficial use" subsequent to the passage of the Compact.

Montana suggests that any post-1950 increases in consumption by a pre-1950 appropriator fall under Article V(B), which apportions the "*unused* and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950" (emphasis added), rather than Article V(A). If true, increases in consumption would be subordinate to the pre-1950 appropriative rights protected under Article V(A). Article V(B), however, governs "unused" not "unconsumed" waters. In normal parlance, water that is diverted from a river for a beneficial purpose is "used" even if it is not fully "consumed." The language of Article V(B) thus does not suggest that increases in consumption by pre-1950 appropriators fall under its provisions rather than those of Article V(A).[10]

Montana also argues that, if the Compact is interpreted to permit pre-1950 appropriators to increase their water consumption under Article V(A), the interpretation would render superfluous the provi-

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[10] By apportioning the "*unused* and unappropriated waters" in Article V(B), the drafters may have intended to address the problem of unexercised appropriative rights (what are sometimes known as paper rights). Paper rights are a significant problem in the western United States because they can deter new appropriations of unused water. *See*, *e.g.*, Michael McIntyre, *The Disparity Between State Water Rights Records and Actual Water Use Patterns: "I Wonder Where the Water Went?,"* 5 Land & Water L. Rev. 23 (1970) (noting that there are often significant differences between the water rights recorded in state water agencies and the water actually used). *Cf. Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (holding that, under the Arkansas River Compact, Colorado pumpers cannot increase their pumping beyond pre-compact levels). Under the language of Article V, any attempt to use rights that existed only "on paper" as of January 1, 1950, would seem to fall under Article V(B) rather than V(A).

sion for "supplemental water supplies" in Article V(B). *See* Montana's Brief in Response to Motion to Dismiss, *supra*, p. 49. As noted earlier, Article V of the Compact establishes a three-tier hierarchy of rights: (1) pre-1950 appropriative rights, (2) "supplemental water supplies" for pre-1950 appropriators, and (3) other new appropriative rights. In Montana's view, the provision for "supplemental water supplies" covers exactly the type of consumption increases to which Montana objects. According to Montana, allowing pre-1950 Wyoming users to increase consumption under Article V(A) destroys the Compact's hierarchy and makes unnecessary the portion of Article V(B) providing for "supplemental water supplies."

When a pre-1950 appropriator needs additional water for use on existing irrigated acreage, however, the appropriator has at least two potential means of obtaining the water. The appropriator can increase his efficiency, stretching his existing water supply sufficiently to meet his unmet needs, or the appropriator can divert more water. Article V(A) does not allow increased diversions, so an appropriator wishing to go this latter route must avail himself of the provision for "supplemental water supplies" in Article V(B). Thus, if Article V(A) permits increased consumption of existing diversions, the provision for "supplemental supplies" still has independent meaning and significance. Article V(B), moreover, refers not to "supplemental water" but to "supplemental water *supplies*" (emphasis added), suggesting that the provision refers to new diversions of water rather than to merely a more "efficient" and thus consumptive use of *existing* water supplies. Improved water efficiency merely stretches existing water supplies and does not produce new supplies.

In determining whether the Compact restricts pre-1950 Wyoming appropriators to the amounts of water that they were *consuming* rather than *diverting* as of January 1, 1950, it is informative that, in deciding how to allocate unused and unappropriated water under Article V(B) of the Compact, the negotiators decided to apportion water on the basis of "divertible flow" rather than consumptive use. The earliest drafts of the Compact provided for apportionment of divertible flow. *See*, *e.g.*, Burke Draft, *supra*, at 10, Joint App. at 135. In late 1950, however, the chairman of the Engineering Committee submitted a proposal that would have apportioned water instead on the basis of annual "consumptive use." *See* Myers Draft, *supra*, at 9, Joint App. at 206; October 1950 Meeting Minutes, *supra*, at 13, Joint App. at 67. The Engineering Committee's draft of the Compact and the final Compact rejected this approach and returned to the original system of allocating waters based on divertible flow. *See* Engineering Committee Draft, *supra*, at 11, Joint App. at 173. According to Congress, the negotiators chose a divertible-flow approach because it "had been used in earlier negotiations and was more familiar to the commissioners." Senate Rep. No. 883, *supra*, at 7, Joint App.18.

2. Do Consumptive Limits Follow from Article V(A)'s Incorporation of the Doctrine of Appropriation?

The absence of explicit language limiting the consumption of pre-1950 appropriators, by itself, does not demonstrate that the Compact allows pre-1950 appropriators in Wyoming to increase their efficiency and consumption to the detriment of Montana's pre-1950 uses. Article V(A) of the Compact provides for the continued enjoyment of pre-1950 appropriative

rights in both Montana and Wyoming, but only "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." If prior-appropriation law clearly proscribe increases in consumption on existing acreage to the detriment of downstream appropriators, the Compact arguably would prohibit Wyoming from allowing its appropriators to make such increases to the detriment of Montana's pre-1950 uses.

Unfortunately, whether and under what circumstances an appropriator can increase consumption to the detriment of downstream appropriators is not one of the clearer areas of prior-appropriation law. According to the late Dean Frank Trelease, "Perhaps no area of the doctrine of prior appropriation is so confused as is the law pertaining to seepage or return flows." Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. L. Rev. 464, 469 (1960). The law in some states, for example, can depend on whether a court decides that previously unconsumed water was "seepage water," "waste water," "surplus water," or "return flow," yet courts seldom define these terms or explain why they should matter. Adding to the confusion, different courts often use these terms in different ways and attach different consequences to the resulting classifications.

No western state court appears to have conclusively answered the question posed by this case—viz., can (1) an agricultural appropriator, (2) increase his or her consumption of water, (3) on the same irrigated acreage to which the appropriative right attaches, (4) to the detriment of downstream appropriators, (5) in the same water system from which the water was originally withdrawn? Although Montana observes that it is "not aware of a single case in any

jurisdiction in which a court allowed a senior appropriator to increase efficiency and thereby decrease historic return flows to a fully appropriated natural watercourse" (Montana's Letter Brief, *supra*, p. 8), none of the parties or *amici* in this case has cited a case to the contrary either. Despite significant independent research, I also have been unable to find a case that is on all fours with the question posed here. As explained below, however, Wyoming Supreme Court decisions both before and after the Compact was negotiated strongly indicate that Wyoming law permits appropriators to increase consumption on existing acreage through improved irrigation techniques. No Montana case or statute would appear to contradict this rule. As a result, Article V(A) should not be read to require Wyoming to forbid or remedy such increased consumption in this case.

3. General Principles of Appropriation Law Regarding Changes in Water Uses

In order to better understand Wyoming and Montana law, it is useful to look first at the general prior-appropriation principles regarding changes in water uses. The prior appropriation doctrine has long protected downstream appropriators from formal changes in upstream water rights that reduce return flow to the waterway and thereby reduce the amount of water available to the downstream appropriators. Although the law has long permitted and even encouraged changes in water rights, states have sought to protect the interest of downstream appropriators who have grown reliant on the return flow from the existing uses. Writing at approximately the same time as the Compact, the Colorado Supreme Court noted the "well established" principle that "junior appropriators have vested rights in the

continuation of stream conditions as they existed at the time of their respective appropriations" and can therefore complain of "all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights." *Farmers Highline Canal v. Golden*, 272 P.2d 629, 631-632 (Colo. 1954). Every western state therefore prohibits appropriators from changing the purpose or place of their water use, or the point from which they divert the water, if that change would injure downstream appropriators by decreasing return flows upon which they rely. Statutes in both Montana and Wyoming codify this rule. *See*, *e.g.*, Mont. Code Ann. § 85-2-402; Wyo. Stat. Ann. § 41-3-104.

This "no injury" rule, however, is not inviolable. Western states have adopted several exceptions to the rule where they have concluded that the benefits of allowing a change outweigh the cost to downstream appropriators. A number of states, for example, permit cities to change or reduce the discharge of sewage effluent even though downstream appropriators have been using the effluent and grown reliant on its discharge. In *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989), two cities that had long discharged treated sewage effluent into the Salt River, where it was appropriated and used by downstream appropriators, sought instead to purify and sell the sewage effluent to several electric utilities as cooling water. The court held that this was permissible even though it would reduce the water available to the downstream appropriators. According to the court, downstream water users can appropriate sewage water that a city voluntarily permits to return to a stream, but cannot insist on its continued discharge. Two policy considerations influenced the

court's decision: (1) the importance of allowing cities to dispose of sewage effluent in an efficient and environmentally sound fashion, and of more direct relevance to this case, (2) the need to avoid waste. According to the Arizona Supreme Court,

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator, through scientific and technical advances, can utilize his water so that none is wasted, no other appropriator can complain. *See Reynolds v. City of Roswell*, 99 N.M. 84, 654 P.2d 537 (1982); *Bower v. Big Horn Canal Association*, 77 Wyo. 80, 307 P.2d 593 (1957). The junior appropriator, using waste water, "takes his chance" on continued flow. *Thayer v. Rawlins*, 594 P.2d 951 (Wyo. 1979). To hold otherwise and require the Cities to continue to discharge effluent would deprive the Cities of their ability to dispose of effluent in the most economically and environmentally sound manner . . . . Moreover, such a holding would be contrary to the spirit and purpose of Arizona water law, which is to promote the beneficial use of water and to eliminate waste of this precious resource. . . . .

Id. at 996-997. *See also Metropolitan Denver Sewage Disposal Dist. v. Farmers Reservoir & Irrig. Co*., 499 P.2d 1190 (Colo. 1972) (city can change point of return of sewage effluent even if it injures downstream appropriators).[11]

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[11] Other exceptions also exist to the "no injury" rule for changes in water rights. Some courts, for example, allow water users who import water from foreign watersheds to increase their consumption of that water even to the detriment of other appropriators who have grown reliant on return flow. *See, e.g*.,

The cases and statutes protecting downstream appropriators from formal changes in water rights, moreover, are not directly applicable to Montana's Complaint. In the present case, Montana alleges that pre-1950 Wyoming appropriators are using irrigation improvements to increase water consumption on the *same acreage* and for the *same use* as before. Montana has not alleged that the Wyoming appropriators are changing their place of use, point of diversion, or type of use (at least as the term "use" is employed in change-of-use statutes). The normal events that trigger the "no injury" rule are thus not applicable to this case.

Practical considerations also differentiate this case from those situations where states normally impose a "no injury" rule. States do not generally have procedures for overseeing changes in water efficiencies stemming from crop shifts or irrigation improvements where there are no formal changes in the underlying water rights. Before appropriators change their place or type of use or change their point of diversion, most states require them to apply for state approval—giving the states an opportunity to evaluate, among other factors, whether a change would reduce return flow to, and thus injure, other appropriators. Reflecting the difference between these changes and mere increases in efficiency or consumption on existing acreage, state change procedures do not typically apply to changes only in crops or irrigation techniques.[12] Neither Montana nor

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Stevens v. Oakdale Irrigation Dist., 90 P.2d 58 (Cal. 1939); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 74 (Colo. 1996).

[12] This does not mean that there is no way to challenge increases in efficiency. Downstream water users, for example, could sue to enjoin an upstream appropriator from increasing

Wyoming, for example, applies its change procedures to such actions. In order to effectively oversee shifts in efficiency or consumption that do not involve changes in place or type of use or point of diversion, Wyoming would thus need to extend existing procedures to all changes in water use that could materially impact efficiency or develop a new oversight system for such changes. Irrigators would need to seek state approval whenever they shifted to more water-intensive crops or changed their irrigation equipment or practices.

Historically, appropriators could not take water that they did not need on the land to which a water right attached and use it on *different* land. Under the traditional doctrine of prior appropriation, any unneeded water had to return to the waterway for use by others. For this reason, appropriators could not save water by improving their irrigation practices and then either sell that water to another user or use the water on other land they owned. In *Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201 (Ariz. App. 1966), for example, an appropriator saved water by lining and improving its ditches and then sought to use the saved water on adjacent land. The Arizona Court of Appeals held that this violated the "beneficial use" rule because the appropriator, having improved its ditches, no longer needed the saved

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consumption or to force the upstream appropriator to replace the lost runoff. *See, e.g., Estate of Paul Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992) (downstream appropriator brought lawsuit to force an upstream appropriator to replace lost runoff). To ensure that pre-1950 Wyoming appropriators were not increasing efficiency and consumption in violation of the Compact, however, Wyoming would need to establish regular state oversight of the farmer's crop and irrigation practices.

water to irrigate crops on the land to which the appropriative right attached. Because the saved water was no longer needed for a beneficial use on the appurtenant land, the saved water had to return to the stream "to the benefit of other water users." Id. at 204. Because this rule can discourage useful conservation, Montana and several other states have adopted statutes in recent decades allowing appropriators to keep and use conserved water in at least some situations on other land. *See, e.g.*, Cal. Water Code § 1011; Mont. Code Ann. § 85-2-419; Or. Rev. Stat. §§ 537.455 to 537.500.

Montana's allegations, however, also do not trigger the beneficial use doctrine because according to Montana, Wyoming appropriators are not seeking to take unneeded water and use it elsewhere as in *Kovacovich*. Instead, Wyoming appropriators are seeking to make increased, more efficient use of water on the very acreage to which their rights attach. All of the water is therefore still being put to a "beneficial use." Water uses generally raise concerns under the beneficial-use doctrine when they are *inefficient*, not *efficient*.

A number of cases have discussed the capture and reuse of water that is left over after appropriators irrigate or otherwise use water on their land. Courts have used a variety of labels to describe this water. Depending on the context, courts have called this water "seepage," "waste," "wastage," "run-off," "percolation," and various other terms. The use of this terminology, unfortunately, often differs among courts and even among cases in the same jurisdiction, so that too much weight cannot be placed on the particular terminology used in any case. The law on the capture and reuse of water also differs more

among states than do the "no injury" rule or the beneficial-use doctrine, dictating caution in generalizing from the law of any particular state.

One line of cases deals with the right of property owners to appropriate what is often labeled "seepage" water—vagrant water that runs or diffuses across a property owner's land after being used for irrigation or other purposes on neighboring land. In many states, property owners cannot appropriate such "seepage" water while the water remains vagrant and diffuse.[13] *See*, *e.g.*, *Thompson v. Bingham*, 302 P.2d 948, 949 (Idaho 1956). Although property owners can generally capture and use such water as it crosses their properties, they cannot demand that the original appropriator continue the seepage. *See, e.g., id*. at 949-950; *Crawford v. Inglin*, 258 P. 541, 543 (Idaho 1927); *Garns v. Rollins*, 125 P. 867, 872 (Utah 1912). As a result, the original appropriator is always free to recapture the water and apply it to a beneficial use. *See, e.g., Thompson v. Bingham, supra*, 302 P.2d at 949; *Crawford v. Inglin*, *supra*, 158 P. at 543; *Garns v. Rollins*, *supra*, 125 P. at 872. According to the United States Supreme Court, "Considerations of both public policy and natural justice strongly support" the rule that an appropriator has a right to capture and reuse their own waste water "from surface run-off and deep percolation, necessarily incident to practical irrigation." *Ide v. United*

[13] However, once such "seepage" water makes it to a natural waterway (or, in some states, even to a confined canal), most states permit water users to divert and appropriate the water from the waterway. *See, e.g.*, *Sebern v. Moore*, 258 P. 176, 178 (Idaho 1927) (canal); *McNaughton v. Eaton*, 242 P.2d 570, 574 (Utah 1952) (waterway).

States, 263 U.S. 497, 506 (1924), quoting *United States v. Haga*, 276 F. 41, 43 (D. Idaho 1921).

A second and partially overlapping line of cases holds that appropriators can capture and reuse waste water while the water is still on their property. As the Oregon Supreme Court has written,

> an appropriator is justified in recapturing waste water remaining upon his land and in applying it to a beneficial use. In fact it is said that water "is not waste water so long as it remains upon the land of the original appropriator." It would seem that an appropriator should be commended for recapturing water that has already been used by himself and applying it again in a beneficial manner.

Barker v. Sonner, 209 P. 1053, 1054 (Or. 1931), quoting Long on Irrigation 89 (2d ed.). *See also McNaughton v. Eaton*, 242 P.2d 570, 574 (Utah 1952). While some of these cases involve diffused water, others do not. *See*, *e.g.*, *id*. As a corollary to the basic rule, the cases also hold that an appropriator cannot capture and reuse such water after the water has flowed into a natural waterway; water must be captured on the land where it is originally used, not from a natural waterway.

If appropriators can capture and reuse waste water while it is still on their land, it would seem to follow that appropriators have a right to reduce or eliminate the return flows entirely by increasing irrigation efficiency, lining canals, and similar actions. In *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 619 P.2d 1130 (Idaho 1980), the Hagerman Water Users ("Hagerman") had long tried to reduce leakage from a ditch they used to transport water for

use on their land. The leaking water formed a spring, from which the Hidden Springs Trout Ranch had long diverted water. When Hagerman succeeded in reducing the leakage by replacing the ditch with a steel pipe, the Hidden Springs Trout Ranch objected. Citing *Bower v. Big Horn Canal Assoc.*, 307 P.2d 593 (Wyo. 1957), the court held that no distinction should be made "between waste water appropriated after it has been put to irrigation use and waste water seeping from irrigation canals." 619 P.2d at 1133. "No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former." *Id.* at 1134. A rule allowing downstream appropriators to "enforce the continuation of waste will not result in more efficient uses of water." *Id.* As a result, an appropriator is free to "reclaim" reasonable seepage, "for instance, by improving his transmission system." *Id.*

None of these cases, however, involved an appropriator who increased his efficiency and consumption to the detriment of downstream appropriators *on the same waterway from which the water was diverted*. For this reason, they are not on all fours with Montana's allegation in this case. The Utah Supreme Court has addressed the issue, but only in passing and inconclusively. In *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 271 P.2d 449 (Utah 1954), 23 different irrigators on the south fork of the Sevier River sought to change the place of diversion and type of use for their waters over the objection of downstream appropriators reliant on the return flow. The water users argued that it should not matter that the changes would reduce return flow because the water users could "legally increase the quantity of water consumed in irrigating their lands by changing to more water consuming crops, by applying

more water on their presently irrigated lands and by bringing under cultivation presently irrigated and even non-irrigated pasture lands"—all to the same effect on return flow. *Id*. at 455. The Utah Supreme Court disagreed because, as a matter of both common law and statute in Utah, appropriators cannot change their points of diversion or places of use to the impairment of other appropriators' rights. *Id*. The court, however, "assum[ed] without conceding" that the irrigators could increase consumption on their existing acreage. *Id*. According to the court, "it would be difficult to prevent plaintiffs from making such increased consumptive use of this water." *Id*. The plaintiffs "could increase the amount of water consumed by changing the kind of crops, the manner of use and intensity of irrigation . . . under conditions which require no application for a change." *Id.*

In *Estate of Paul Steed v. New Escalante Irrigation Co*., 846 P.2d 1223 (Utah 1992), the New Escalante Irrigation Company switched from flood irrigation to sprinklers, reducing runoff on which a downstream appropriator relied. The Utah Supreme Court held that the New Escalante Irrigation Company had the right to do so even over the objections of the downstream appropriator. The court relied on prior cases holding that a "reappropriator acquire[s] no rights as against the original appropriator to have the waste water continue" and that an appropriator can capture and reuse waste waters "if he does so before they get beyond his property and control." *Id*. at 1225-1226. According to the court, "efficient and beneficial use of water should be encouraged. In furtherance of that objective, an appropriator should be encouraged to apply water in the most efficient manner." *Id*. at 1229.

Because the case did not involve return flow to the same waterway from which the water was diverted, *Estate of Paul Steed* is again not authority for concluding that pre-1950 appropriators in Wyoming can increase their consumption in this case to the detriment of Montana's pre-1950 water uses. New Escalante diverted water from the Escalante River, but New Escalante's runoff flowed into Alvey Wash, a natural watershed to which the Escalante River did not directly contribute water. *Id*. at 1223-1224. In fact, the Utah Supreme Court stated that the "rule that the upstream irrigator [has] the right to completely consume all the water it diverted, by using it over and over again," does not apply "when the runoff or waste water return[s] to the stream from which it was originally diverted." *Id*. at 1225. Where runoff or waste water reaches and reenters a stream system from which it was diverted, water "becomes a part of that watercourse in legal contemplation as well as physically, and from the standpoint of rights of use, it is just as much a part of the flow as is the water with which it is mingled." *Id*., quoting Wells A. Hutchins, Selected Problems on the Law of Water Rights in the West 362-368 (1942). In support of this distinction, however, the court cited *East Bench Irrigation Co*., which as just described, "assume[d] without conceding" that irrigators could increase consumption on their existing acreage by, for example, switching to more water-intensive crops or applying more water.[14]

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[14] In its original context, moreover, the quote from Wells Hutchins seems to address the question of whether waste water can be recaptured after it has returned to a natural waterway rather than the right of a water user to increase consumption on the land that he or she irrigates.

The case law outside Montana and Wyoming is ultimately inconclusive as to whether appropriators can improve their irrigation efficiency and increase consumption on existing acreage to the detriment of downstream appropriators reliant on historic levels of return flow. As discussed, the language and logic of many cases are supportive of increases in efficiency. The lack of any procedure to oversee changes in efficiency also suggests that prior-appropriation law does not proscribe increases in efficiency. At the same time, however, no case directly addresses the facts presented by Montana's Complaint, and language in *Estate of Paul Steed* could be read as proscribing such increases where water both is diverted and returns to the same stream.

The only legal commentary that I have found explicitly addressing the question of whether an irrigator can switch to a more efficient irrigation system concludes that such a switch is legal even if it reduces downstream flows to other appropriators. *See* David H. Getches, Water Law in a Nut Shell 144 (2009). Dean Getches begins by stating that waters "originating within the watershed generally can be recaptured and reused by an appropriator if: (1) the total used does not exceed rights under a permit or decree; and (2) the recapture and reuse occur within the land for which the appropriation was made." *Id.* at 139. Dean Getches then discusses what happens if recapture and reuse leads to more water consumed:

> For instance, if a water user is consuming less than the permitted amount of water and plants a more water-intensive crop or puts in a more efficient irrigation system, most or all of the water that had previously been returned to the stream might be consumed. This can deprive other

> appropriators of water on which they depend *but it is allowed since it is technically within the terms of the original appropriation.*

Id. at 144 (emphasis added).

4. The Law of Wyoming and Montana.

This brings us to the laws of Wyoming and Montana which, as discussed earlier, are the laws of most relevance in interpreting the Compact. The Wyoming Supreme Court has addressed the right of an appropriator to reduce its waste of water in at least three cases, one of which was decided prior to the negotiation of the Compact. In *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940), Charles Bayer was diverting water from a swale, "Spring Gulch Creek," that collected runoff from irrigation by Burleigh Binning. When Binning sought to block the runoff before it reached the swale, Bayer objected. Bayer claimed the right to take the water pursuant to both a disputed 1906 appropriation of the water by George M. Glover, a predecessor in interest, and a 1936 "correction of the adjudicated right" by the Wyoming Board of Control. Looking first at the 1906 appropriation, the Wyoming Supreme Court held that, because Spring Gulch Creek was not at that time a natural stream, Glover did not have a right to appropriate the "seepage and waste water." *Id*. at 59. According to the Wyoming court, the authorities seemed to "agree that the lower owner using such water merely takes his chances that the supply will be kept up; that he has no right thereto, no matter how long he may have used it." *Id*. at 60.

The court found, however, that by 1936 Spring Gulch Creek had become a natural stream, "with very definite channels and banks and so forth." *Id*. at

63. As a result, the "water running in the stream," including the runoff from Binning's irrigation, was "subject to appropriation." *Id*. Bayer therefore had a right to the runoff. *Id*. However, even though the runoff was now flowing into a natural stream and Bayer had a right to appropriate it, the court held that Binning could still capture and reuse the runoff on his land. "In view of the uncertainty of the future, the right of [Bayer] should be made subject to the usual rights of landowners, namely, the right of Binning and his successors in interest to use the water above mentioned for beneficial purposes upon the land for which the seepage water was appropriated, should such beneficial purpose be possible." *Id*.

Six years after the Compact went into effect, the Wyoming Supreme Court had occasion again to address rights to runoff from irrigation operations. In *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957), water seeped from the Big Horn Canal toward the Big Horn River, passing across Ray Bower's property. When Bower sought to capture and use this runoff on his property before it reached the river, the Big Horn Canal Association objected, urging that Bower had no right to appropriate its "seepage water." The Wyoming Supreme Court disagreed. *Binning* had held that "seepage water which, if not intercepted, would naturally reach a stream is just as much a part of the stream as the water of any tributary" and is appropriable. *Id*. at 602. Bower did not have to wait until the water reached the river to appropriate it.

Of direct relevance to this case, the Wyoming Supreme Court went on to hold that "any rights [Bower] secured thereby" were "subject, of course, to

the right of [the Big Horn Canal Association] to terminate that source of the supply which seeps directly from [its] canal." *Id*. According to the court,

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolaton [sic] to the river, *no other appropriator can complain*.

Id. at 601 (emphasis added).

The Wyoming Supreme Court again addressed rights to "seepage or waste water" in *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980). *Fuss* dealt with water that ran off the irrigation property of several landowners (the "appellants") into a highway borrow pit. One of the appellants sought to convey the water from the borrow pit for use on other lands that he leased and farmed, but Franks diverted the water first for use on his land. *Id*. at 18-19. Because this water "would, if uninterrupted, flow into a natural stream," the court held that Franks could appropriate the water. *Id*. at 19-20. Of most importance to this case, the Wyoming Supreme Court confirmed again that "the owner of land upon which seepage or waste water rises has the right to use and reuse—capture and recapture—such waste waters," but "for use only 'upon the land for which the water forming the seepage was originally appropriated.'" *Id*. at 20, quoting *Binning*. Because the appellants in *Fuss* sought to recapture the water after it had left their land and for use on other property, they had no "superior right to such water." *Id*. Waters "become appurtenant to the lands for which they are acquired," and "unless the statutes

are followed with respect to change of use, the waters cannot be detached and assigned to *other* land without the loss of priority." *Id*. (emphasis added).

Binning, *Bower*, and *Fuss* therefore all appear to hold that an appropriator in Wyoming can increase his water use efficiency by recovering runoff on his property or through other means so long as the increased consumption is on the same land to which the appropriative right attaches. Montana argues that *Binning* and *Bower* are irrelevant to this case because they involve "seepage" or "waste" water and are an exception to general rules regarding runoff. As explained above, however, both of the Wyoming cases involved runoff from agricultural land that, in *Binning*, had actually become part of a natural stream (albeit a stream made up primarily if not entirely of agricultural runoff) and, in *Bower*, would have naturally reached a stream (and thus was "just as much a part of the stream as the water of any tributary"). The language of the Wyoming Supreme Court, moreover, was expansive in all three cases. In each case, the court held explicitly that appropriators have a right to reduce waste even to the detriment of other appropriators who have become reliant on the runoff. *Binning*, 102 P.2d at 60; *Bower*, 307 P.2d at 601-602; *Fuss*, 610 P.2d at 20.

Nothing in the Wyoming Supreme Court's language suggests that the announced rule would not apply to the facts presented by Montana's Complaint. Although the Wyoming Supreme Court might distinguish a future case in which runoff flows to the same waterway from which water is originally appropriated, the language and logic of *Binning*, *Bower*, and *Fuss* strongly suggest that the court would reach the same result in such a case. It is

informative that other courts have read *Binning* and its progeny to speak broadly to the right of an appropriator to eliminate water waste even to the detriment of downstream appropriators. *See*, *e.g.*, *Arizona Public Service Co.*, *supra*, 773 P.2d at 996-997 (holding that cities can cease the discharge of sewage effluent to a natural waterway) (discussed *supra* at pp. 67-68); *Hidden Springs Trout Ranch*, *supra*, 619 P.2d at 1133 (noting that no distinction should be made "between waste water appropriated after it has been put to beneficial use and waste water seeping from irrigation canals") (discussed *supra* at pp. 73-74).[15]

No opinion of the Montana Supreme Court speaks as directly as *Binning*, *Bower*, and *Fuss* to the right of appropriators to increase their irrigation efficiency and amount of water consumption. The Montana Supreme Court, like other western courts, has long held that appropriators cannot change their place or type of use if that would modify return flow to the detriment of downstream appropriators. *See*, *e.g.*, *Cate v. Hargrave*, 680 P.2d 952 (Mont. 1984) (change in use); *Whitcomb v. Helena Water Works Co.*, 444 P.2d 301, 304 (Mont. 1968) (change in storage);

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[15] Illustrating the potential for confusion in this area, the water-law casebook of which I am a co-author excerpts part of *Bower* in its section on "seepage appropriators" and states that "seepage cases are an exception to the usual rule" that a "senior's right is limited to the amount he originally beneficially applied and consumptively used on his land, that is, the amount received at his point of use, minus the runoff." Joseph L. Sax et al., Legal Control of Water Resources: Cases and Materials 197 (4th ed. 2006). As discussed above, however, *Bower* would actually appear to speak to all situations where an appropriator reduces waste and thereby increases consumption on the land to which the appropriative right attaches.

Quigley v. McIntosh, 103 P.2d 1067, 1072 (Mont. 1939) (expansion of use to new lands); *Mannix & Wilson v. Thrasher*, 26 P.2d 373, 374-375 (Mont. 1933) (change in place and manner of use); *Featherman v. Hennessy*, 115 P. 983, 986 (Mont. 1911) (change in use) As the Montana Supreme Court stated over a century ago, "each subsequent appropriator is entitled to have the water flow in the same manner as when he located." *Spokane Ranch & Water Co. v. Beatty*, 96 P. 727, 731 (1908). The Montana Supreme Court has also held that water users are not entitled to divert from a stream more water than they need for use on the land to which their right attaches. *See*, *e.g.*, *Whitcomb*, *supra*, 444 P.2d at 303-304; *Conrow v. Huffine*, 138 P. 1094, 1096 (Mont. 1914). As explained earlier, however, such cases do not resolve the issue in this case because Montana does not allege that Wyoming appropriators are attempting to change their place or purpose of use or are using more water than they can put to a beneficial use on their existing acreage.

On the subject of "seepage water," the Montana Supreme Court has held that no one can appropriate such water if it is vagrant and diffuse and that those who capture such water cannot insist on the continued flow of such water. *See Popham v. Holloron*, 275 P. 1099, 1102 (Mont. 1929). Seepage waters are a "proper subject of appropriation" when they reach a watercourse—or even a drainage ditch beyond the control of the original appropriator. *Id*. at 1102-1103. *See also Wills v. Morris*, 50 P.2d 862, 870-871 (Mont. 1935); *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1077 (Mont. 1933). These cases, however, do not directly address the question of whether the original appropriator can reduce wastage that is subsequently appropriated downstream.

Once runoff reaches a natural waterway, opinions of the Montana Supreme Court state that the original appropriator can no longer recapture that water. *See*, *e.g.*, *Rock Creek Ditch & Flume Co.*, *supra*, 17 P.2d at 1077. These cases, however, appear to address the issue of *where* water can be recaptured, not whether appropriators can increase their consumption by eliminating waste. As the Montana Supreme Court noted in *Rock Creek Ditch & Flume Co.*, when water flows from the property of an appropriator, that water is abandoned; this is "not an abandonment of a water right, but an abandonment of specific portions of water, viz., the very particles that are discharged or have escaped from control." 17 P.2d at 1077, quoting Samuel C. Wiel, Water Rights in the Western States § 37 (3d ed. 1911). An appropriator can collect or recapture runoff "*before it leaves his possession*, but, after it gets beyond his control it . . . becomes waste and is subject to appropriation by another." *Id.* at 1080 (emphasis added).

Montana case law is ultimately inconclusive on the key question of whether an appropriator can consume more on existing acreage by switching from flood to sprinkler irrigation. Montana statutory law is no more accommodating. In 1991, Montana passed a "Salvaged Water" statute that declares the policy of Montana to "encourage the conservation and full use of water." Mont. Code Ann. § 85-2-419. The statute permits appropriators to "salvage" water and "retain the right to the salvaged water for beneficial use." *Id.* Salvage is defined as making "water available for beneficial use from an existing valid appropriation through application of water-saving methods." *Id.* § 85-2-102(20). The appropriator must seek approval from the Department of Natural Resources and

Conservation only if it seeks to use the salvaged water for a new use or in a different location. *Id.* § 85-2-419. The statute "encourages water rights holders to take steps to save water by improving their efficiency. As an incentive, the statute authorizes water rights holders to retain and use water saved, rather than having it simply revert back to the stream for further appropriation." *In re Applications for Change of Appropriation of Water by Smith Farms, Inc.*, 1999 Mont. Dist. LEXIS 433 (Mont. Dist. Ct. 1999).

At first glance, improved irrigation efficiency would appear to fit within the Salvaged Water statute. By switching to sprinklers (the "application of water-saving methods"), appropriators make "water available for beneficial use" on their properties. Montana, however, urges that the statute applies only where an appropriator frees up water that otherwise would be unavailable for *anyone's* use. If someone downstream is using runoff from a field employing flood irrigation, a switch to sprinkler irrigation would not "make water available" under Montana's interpretation of the term "salvage." In support of this interpretation, Montana notes that appropriation states have often defined "salvaged water" as "parts of a particular stream or other water supply that have been lost, as far as any beneficial use is concerned, to any of the established users, but are saved from further loss from the supply by artificial means and so are made available for use." 2 Wells A. Hutchins, Water Rights Laws in the Nineteen Western States 565 (1971). For the reasons discussed below, it ultimately is unnecessary to determine the correct meaning of Montana's Salvaged Water statute in order to resolve Wyoming's motion to dismiss Montana's claim regarding increased consumption.

5. Conclusion

Given the law of prior appropriation both at the time the Compact was negotiated and today, I conclude that the Compact does not prohibit Wyoming from allowing pre-1950 appropriators in the State to increase their consumption of water on the lands they were irrigating as of January 1, 1950 by improving their irrigation systems, even when that reduces the runoff that reaches Montana. Nor does the Compact require Wyoming to remedy the reduction in runoff. Although neither the Montana nor Wyoming courts have expressly decided the exact issue presented, the Wyoming Supreme Court's decisions both before and after the negotiation of the Compact strongly indicate that Wyoming appropriators are free to increase consumption on existing acreage through improved irrigation techniques.[16] No Montana case or statute contradicts this rule; instead, Montana law is ultimately inconclusive. The appropriation law of other states does not suggest that Wyoming's rule is anomalous, although some courts might reach different results. As a consequence, the most reasonable interpretation of Article V(A), as applied in this context, is that it does

[16] Montana objects to the consideration of cases and statutes that postdate the negotiation and ratification of the Compact. *See* Montana's Letter Brief, *supra*, p. 7. *Binning*, of course, was decided before the Compact and, as discussed above, states that appropriators in Wyoming can lawfully increase consumption on existing acreage. Post-Compact law is useful in interpreting and understanding the law that existed as of the Compact's inception. As noted earlier, Article V(A) may also incorporate changes in the law of appropriation. It is unnecessary to resolve the latter question, however, because there is no indication that the relevant law on increases in consumption in either Montana or Wyoming has changed since the inception of the Compact.

not ban increased consumption on existing acreage as a result of improved irrigation.

Because this rule favors upstream appropriators, the rule favors Wyoming over Montana. According to Montana, increased consumption by pre-1950 Wyoming appropriators has already reduced the amount of water available to Montana's pre-1950 uses during periods of low water flow. The rule, however, is not unreasonable. While the rule reduces the security of downstream appropriators who rely on return flow, it also encourages increased conservation (a goal that both Wyoming and Montana, like most western states, share) by giving farmers an incentive that they otherwise would not have to invest in improved irrigation techniques. The potential loss in return flow available to satisfy Montana's pre-1950 uses is also inherently limited. The rule covers only increased consumption on lands that were being irrigated as of January 1, 1950. Any uses of conserved water for "beneficial uses on new lands or for other purposes" would fall under Article V(B) and are subject to the restrictions for post-1950 water uses.

Considerations of practicality reinforce this rule and its logic under the Compact. As noted earlier, neither Montana nor Wyoming requires farmers to seek approval of state water officials before changing irrigation practices. If Montana were correct in its interpretation of the Compact, Wyoming would need to establish a continual process for reviewing changes in irrigation techniques by pre-1950 appropriators, as well as other actions such as crop changes that might increase consumption, in order to ensure that such actions do not increase on-farm consumption (or to try to find a supplemental source of water to make up the difference). As Congress reported in considering

the Compact, one of the Compact's attributes is that its "provisions are easily administered, and require no elaborate organization." Senate Rep. No. 883, *supra*, at 1, Joint App. at 12. The approach taken by the Compact "appears to be easily installed, workable, and not requiring the establishment of a large new organization for its operations." *Id*. at 8, Joint App. at 19. Montana's reading of the Compact would complicate administration of the Compact's guarantees and require new oversight of pre-1950 appropriators in Wyoming.

Montana notes that it is "not necessarily alleging that individual Wyoming appropriators should not be able to increase efficiency and therefore consumptive use on their lands, if otherwise permitted by Wyoming law." Montana's Letter Brief, *supra*, pp. 12-13. Instead, as discussed earlier, Montana seeks only to require Wyoming to provide the same supply of water for pre-1950 Montana rights as "were being supplied when the Compact was adopted." *Id*. p. 13. According to Montana, Wyoming is free to do this in any way that it wishes. *Id*. However, because the return flows are presumably of the greatest importance to pre-1950 Montana appropriators when there are no post-1950 uses which can be reduced or shut down, it is difficult to see how Wyoming could meet what Montana claims is Wyoming's obligation without continually overseeing actions by pre-1950 Wyoming appropriators that might change consumption and without restricting the right of pre-1950 appropriators to engage in such actions when needed to satisfy pre-1950 uses in Montana.

E. Conclusions

For the reasons discussed above, I conclude:

1. The language of the Compact unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950.

2. Even if the language of the Compact were less clear, the history of the Compact negotiations shows that the Compact was intended to protect pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950.

3. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that new diversions or withdrawals in Wyoming not interfere with pre-1950 appropriative rights in Montana.

4. Article V of the Compact clearly protects Montana's pre-1950 appropriations from irrigation of new acreage in Wyoming if that irrigation prevents sufficient water from reaching the pre-1950 uses.

5. Under Article V of the Compact, diversions of water into storage for either beneficial uses on new land or "supplemental water supplies" on existing acreage are to come only from "unused and unappropriated water" after protecting pre-1950 appropriations.

6. Montana, however, cannot demand that Wyoming release water from its reservoirs to satisfy

Montana's pre-1950 uses if the water was stored at a time when sufficient water was reaching Montana to satisfy those uses.

7. The Compact protects Montana's pre-1950 uses from interference by at least some forms of groundwater pumping that dates from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its tributaries. The question of the exact circumstances under which groundwater pumping violates Article V(A) is appropriately left to subsequent proceedings in this case.

8. Article V(A) of the Compact does not prohibit Wyoming from allowing its pre-1950 appropriators to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands that they were irrigating as of January 1, 1950, even when the increased consumption interferes with pre-1950 uses in Montana. Uses of conserved water for "beneficial use on new lands or for other purposes," by contrast, fall within Article V(B) of the Compact and are subject to the same restrictions discussed above for post-1950 water uses.

For all these reasons, I recommend that Wyoming's Motion to Dismiss be denied.

IV. MONTANA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Montana moves for partial summary judgment that the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers. In opposing Montana's initial motion for leave to file this action, Wyoming argued that Montana could not complain about waters stored in reservoirs that are located on tributaries to, rather than the main stems

of, the Tongue and Powder Rivers. According to Wyoming's 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, April 1, 2007, pp. 21-22 ("Wyoming's Brief in Opposition to Leave to File"). Because Wyoming suggested during the hearing on its Motion to Dismiss that it still did not believe that the Compact applies to tributaries to the Tongue and Powder Rivers, Montana brought its Motion for Partial Summary Judgment to resolve that question.

Montana, Wyoming, and the United States (as *amicus curiae*) filed briefs on Montana's Motion for Partial Summary Judgment. A hearing was held on Montana's motion on November 17, 2009 in Stanford, California.

During the briefing and hearing on Montana's Motion for Partial Summary Judgment, it became apparent that 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 diversions and storage on the Powder and Tongue Rivers and the tributaries to those rivers. The parties and *amicus* disagree, however, on whether Article V(B) applies to water diversions and storage on the tributaries to those rivers—and even whether the reach of Article V(B) is legitimately at issue in this proceeding.

The protections of Article V(A) clearly apply to diversions and storage of water from tributaries to the Tongue and Powder Rivers. 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 . . .” The definition of the term “Yellowstone River System” as used in Article V(A) explicitly includes the tributaries to the Tongue and Powder Rivers. As noted earlier, 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 ("Wyoming's Brief in Opposition to Summary Judgment"); Wyoming's Brief in Opposition to Leave to File, *supra*, 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 entire 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, Oct. 16, 2009. 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 tributaries. *See*, *e.g.*, Montana's Reply in Support of Motion for Summary Judgment, Nov. 9, 2009, pp. 2-3 ("Montana's Summary Judgment Reply"); Hearing Trans. (Summary Judgment), p. 22, lines 3-20.

Montana and Wyoming disagree as to 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. Wyoming's

Brief in Opposition to Summary Judgment, *supra*, p. 2. The United States, as *amicus curiae*, also 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 claims broadly to include all portions of Article V. *See* Montana's Summary Judgment Reply, *supra*, pp. 4-10.

Montana and Wyoming also disagree regarding the scope of Article V(B). Unlike Article V(A), Article V(B) applies to 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 . . ." Wyoming argues that this language demonstrates that Article V(B) does not extend to the tributaries to the Tongue and Powder Rivers. As Wyoming notes, Article II(F) speaks only of the five specific rivers and not expressly of their tributaries, in contrast to Article II(E) that talks of "interstate tributaries and *tributaries thereof*" (emphasis added). *See* Wyoming's Brief in Opposition to Summary Judgment, *supra*, pp. 8-11. Montana, however, responds that Article V(B) covers tributaries to the named rivers because the term "Interstate Tributaries" includes the word "Tributaries," and Article II(E) defines "Tributary" as including tributaries to the interstate tributaries. Montana's Brief in Support of its Motion for Summary Judgment, Oct. 16, 2009, p. 10. Noting that Article II(F) explicitly

excludes the Little Bighorn River from the term "Interstate Tributaries," Montana also argues that this exclusion would have been unnecessary 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(F)). As discussed above, 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, Article V(B) does not appear to provide any independent protection for pre-1950 appropriations separately from Article V(A). Based on the briefing and hearings to date, Montana also has yet to show that Article V(B) is likely to have separate significance in this proceeding. As a result, it would be inappropriate at this stage of the proceeding to address the coverage of Article V(B). Any such ruling would go beyond what currently appears to be necessary to resolve Montana's claim.

It also is unnecessary at this point to 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 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.

For the reasons discussed, I recommend that Montana's Motion for Summary Judgment be granted in part and denied in part without prejudice. In particular, I recommend that the Court hold that Article V(A) of the Compact applies to all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact). However, the Court should decline at this time to address the reach of Article V(B) of the Compact and the meaning of the term "Interstate Tributary."

V. ANADARKO'S MOTION TO INTERVENE

Anadarko Petroleum Corporation ("Anadarko") seeks leave to intervene as a party. As noted earlier, Montana alleges that the "pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins" is impairing downstream flows and violating its rights under the Compact. Bill of Complaint ¶ 11. Anadarko is one of the principal companies involved in such production. Anadarko extracts natural gas from coal seams in the basin of the Powder River. Declaration of John A. Broman ¶ 2 ("Broman Declaration"), attached to the Motion of Anadarko Petroleum Corporation for Leave to Intervene, July 17, 2009 ("Motion to Intervene"). During its production process, Anadarko pumps groundwater from coal seams in order to free the natural gas trapped in the coal. *Id*. Although Montana alleges that coalbed methane pumping is impairing pre-1950 appropriations, Montana seeks no relief directly against Anadarko, nor is Anadarko specifically mentioned in Montana's Complaint.

Montana and the United States, as *amicus curiae*, filed briefs opposing Anadarko's Motion to Intervene. Wyoming, by contrast, filed a one-sentence letter

brief noting that it does not object to the Motion to Intervene. North Dakota, which is not playing an active role in the case, did not file any papers regarding the Motion to Intervene. A hearing was held on the Motion to Intervene on October 8, 2009 in Denver, Colorado.

I conclude that the Motion to Intervene should be denied. At this point in time, Anadarko has failed to show either that it has an interest sufficiently distinct from all other groundwater users in the basins of the Yellowstone River tributaries to justify intervention or, more importantly, that the State of Wyoming will not properly represent Anadarko's interests. Intervention at this stage could unnecessarily complicate the case and, during discovery and trial, potentially lengthen the proceedings. Anadarko can help inform the resolution of issues concerning the Compact's coverage of groundwater through the mechanisms available to an *amicus curiae* without becoming a party to this original matter. Intervention is unnecessary for full exploration of the issues.

A. The Applicable Legal Standard for Intervention

As the Supreme Court recently reconfirmed, intervention by private and public water users in original jurisdiction cases before the Court involving interstate water disputes is neither appropriate nor desirable except in unusual and compelling circumstances, and special masters should therefore employ a high standard in considering motions to intervene. *See South Carolina v. North Carolina*, 558 U.S. ___ (2010) (denying the City of Charlotte's motion to intervene in an interstate dispute involving the Catawba River, but granting intervention to the other two uniquely situated non-state entities); *New*

Jersey v. New York, 345 U.S. 369 (1953) (denying the City of Philadelphia's motion to intervene in an interstate dispute involving the Delaware River). Although the standard for intervention is not insurmountable (*South Carolina v. North Carolina*, *supra*, slip op. at 10), individual water users "ordinarily . . . have no right to intervene in an original action." *United States v. Nevada*, 412 U.S. 534, 538 (1973). For this reason, special masters have generally been cautious about granting motions to intervene, lest original jurisdiction matters involving sovereign states turn into "intramural disputes" or *de facto* class actions involving multiple parties each pursuing their own interests.

As the Court noted in *South Carolina v. North Carolina*, both due respect for "sovereign dignity" and a "working rule for good judicial administration" drive this high standard for intervention. Slip op. at 9, quoting *New Jersey v. New York*, 345 U.S. at 373. In deciding a motion to intervene in original jurisdiction actions, it is appropriate to assume, absent evidence to the contrary, that states will adequately and appropriately represent the interests of their water users. The *parens patriae* doctrine recognizes "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. at 372, quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930). *See also South Carolina v. North Carolina*, *supra*, slip op. at 8; *Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995) (a "State is presumed to speak in the best interests" of all its citizens); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (states "act as the representative" of their citizens as a whole).

The *parens patriae* doctrine applies not only where water users are citizens of one of the state parties but also where water users are citizens of other states but use the waters of one of the state parties. Although the Court often speaks of states representing all their "citizens," states in interstate water disputes stand as representatives of all their water users, whether or not those water users are technically citizens of the states. *See*, *e.g.*, *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) (holding that the United States Secretary of the Interior was not an indispensable party in an interstate water dispute involving the North Platte River, despite a local federal reclamation project, because Wyoming would "stand in judgment for him as for any other appropriator").

Interstate water disputes such as the instant action by Montana inherently deal with sovereign interests that supersede the interests of individual water users. Interstate water disputes before the Supreme Court are cases "between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other." *Wyoming v. Colorado*, 286 U.S. 494, 508-509 (1932). The waters of a state affect the prosperity of its people as a whole. As a result, Montana's lawsuit rises "above a mere question of local private right and involves a matter of state interest." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). *See also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (interstate water disputes involve the "unique interests" of sovereign states).

As the Court has observed, there are not only jurisprudential but practical reasons to set a high standard for intervention in interstate water disputes

such as this one. *See*, *e.g.*, *South Carolina v. North Carolina*, *supra*, slip op. at 9; id. at 3-4 (Roberts, C.J., dissenting). Montana's lawsuit potentially affects hundreds of water users in the involved states. If the principle of *parens patriae* were ignored and intervention freely granted, there could be "no practical limitation on the number of citizens, as such, who would be entitled to be made parties," and the Supreme Court's original jurisdiction could readily be "expanded to the dimensions of ordinary class actions." *New Jersey v. New York*, *supra*, 345 U.S. at 373. *See also Utah v. United States*, 394 U.S. 89 (1969) (denying intervention by a private landowner, in part because, if intervention were allowed, "fairness would require the admission of any of the other 120 private landowners" in a similar position, "greatly increasing the complexity of this litigation").

In evaluating Anadarko's Motion to Intervene, I have therefore used the rigorous standard that the Court originally set out in *New Jersey v. New York* and recently reconfirmed in *South Carolina v. North Carolina*: a private entity should be permitted to intervene only where (1) it has "some compelling interest in [its] own right," (2) that interest is different from the interests of "all other citizens and creatures of the state" as a class, and (3) the interest is "not properly represented by the state." *New Jersey v. New York*, *supra*, 345 U.S. at 373; *South Carolina v. North Carolina*, *supra*, slip op. at 8. *See also Nebraska v. Wyoming*, *supra*, 515 U.S. at 21-22.

Anadarko suggests that the standard for intervention might be lower in a case, such as this one, involving the interpretation and application of an interstate compact, than in original jurisdiction

cases, such as *New Jersey v. New York* and *South Carolina v. North Carolina*, seeking an equitable apportionment of the waters of an interstate river. *See* Motion to Intervene, *supra*, p. 5. As Anadarko notes, the rights of water users in an equitable apportionment case are derivative of those of the state in which they withdraw water. *See Nebraska v. Wyoming*, *supra*, 295 U.S. at 43 (water user's rights "can rise no higher than those of" the State). In Anadarko's view, compacts, by contrast, are akin to federal statutes or regulations. Anadarko therefore suggests that it should have as much right to participate in interpreting a compact as it would in challenging a new federal regulation. Motion to Intervene, *supra*, pp. 7 & 9.

Compacts, however, are agreements among states acting in their sovereign capacity. The only parties to the Compact in this case are Montana, North Dakota, and Wyoming. Because Congress must consent to any compact, judicial interpretations of compacts draw on the rules of statutory interpretation, and compacts have the force of federal law. *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (federal law); *Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.5 (1991) (applying rules of statutory interpretation); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983), quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (federal law). However, these aspects of compact procedure, interpretation, and authority do not change the fact that compacts are sovereign, not private, agreements. Given the sovereign character of compacts, there is no justification for using a lower standard for

intervention in cases involving compacts than in cases seeking equitable apportionments.[17]

B. Anadarko Has Not Met the Standards for Intervention

Anadarko has failed to show that it currently meets the standards for intervention set out in *New Jersey v. New York*. Anadarko would appear to have a significant interest in one of the central questions in this case: what groundwater withdrawals, if any, does section V(A) of the Yellowstone River Compact constrain? As noted above, Anadarko pumps groundwater from coal seams in the Powder River basin in order to free the natural gas trapped in the coal. Broman Declaration, *supra*, ¶ 2. Such natural gas is known as coalbed natural gas or coalbed methane ("CBM"). *Id*. The production of CBM uses a large volume of water. *Id*. ¶ 3. If this case ultimately concludes that the Yellowstone River Compact protects pre-1950 appropriations in Montana from groundwater withdrawals occurring as part of Anadarko's CBM operations in the Powder River basin, this holding could negatively affect Anadarko's ability to produce natural gas from coal beds in the Powder River basin and thereby "compromise its business operations." *See* Reply of Anadarko Petroleum Corporation to Oppositions to Its Motion for

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[17] In fact, one could argue that intervention is less appropriate in original actions involving compacts than in equitable apportionment cases. As the Court noted in *South Carolina v. North Carolina*, equitable apportionment requires the "exercise of an informed judgment," and non-state water users may sometimes be the best source of information relevant to that inquiry. Slip op., at 14. A compact case, by contrast, involves only the interpretation of a sovereign agreement among two or more states.

Leave to Intervene, Sept. 25, 2009, p. 2 ("Anadarko's Reply Brief"); Motion to Intervene, *supra*, p. 5.[18]

Anadarko, however, has failed to establish either that its interest in this case is significantly different from that of other post-1950 water users in the river basins at issue in this case or, more importantly, that Wyoming will not properly represent Anadarko's interest. Turning to the first issue, Anadarko argues that its interest is unique and different from other water users in the river basins because it does not believe that the groundwater that it is extracting is "subject to allocation under the Compact in the first place." Motion to Intervene, *supra*, p. 6. Assuming that this is a meaningful distinction, all groundwater users in the relevant river basins could make the same argument. All groundwater users have an interest at this stage of the proceeding in establishing that their groundwater withdrawals are not subject to the Compact.

Anadarko argues that there are particularly strong reasons to conclude that Article V(A) does not extend to the groundwater withdrawn in its CBM operations

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[18] Such a holding would not necessarily require Wyoming to restrict Anadarko's pumping of groundwater. Montana seeks only to protect its appropriations; it does not specify how Wyoming should provide that protection. So long as Wyoming reduces withdrawals from the Yellowstone River in other ways that offset any effect of Anadarko's groundwater withdrawals (and thereby protects pre-1950 Montana appropriations), Montana arguably would have no ground to complain under the Compact. If the Supreme Court ultimately concludes that the Compact protects pre-1950 appropriations from Anadarko's operations, however, Wyoming would seem likely to restrict Anadarko's pumping to whatever degree is necessary to avoid violating the Compact, posing a serious risk to Anadarko's operations.

in the Powder River basin. In particular, Anadarko argues that the groundwater it pumps as part of its operations is not hydrologically connected to the Powder River and thus not subject to the Compact even if other groundwater is. According to Anadarko, "CBM pumping takes place at depths that agricultural pumping may not reach" and where "there is at least a serious issue . . . whether any meaningful hydrological interconnection exists [with] the surface water of the Powder River within Montana." Motion to Intervene, *supra,* p. 2. Anadarko also argues that, while some experts believe that CBM operations can "reduce surface flows in limited circumstances," CBM can also "*increase* surface waters where the water pumped to the surface is discharged to a surface pond or directly to the stream." *Id*. However, even if Anadarko has stronger arguments than many shallower groundwater users that Article V(A) does not reach the groundwater it extracts, this does not separate Anadarko's interest from that of other groundwater users. The difference between Anadarko's interest and that of other groundwater users is at best one of degree rather than kind. Like Anadarko, all groundwater users currently have an interest in excluding the groundwater they pump from the specific reach of the Compact.

If Anadarko were allowed to intervene, there thus would be no basis for denying applications of other groundwater users seeking to intervene. Anadarko suggests that there is little risk of its intervention leading to the intervention of other water users and the devolution of this action into a *de facto* class action. Motion to Intervene, *supra*, p. 9. As Anadarko notes, it is the only water user that to date has sought to intervene (and one of only two entities that has participated as an *amicus*). This procedural

setting, however, is no different from *New Jersey v. New York*, where only Philadelphia was seeking to intervene. Allowing Anadarko to intervene in this action might well prompt other water users to raise similar motions to intervene. According to Montana, there are "thousands of CBM wells pumping in Wyoming involving many businesses and property interests." Montana's Response in Opposition to Motion of Anadarko Petroleum Corporation for Leave to Intervene, Sept. 18, 2009, p. 6. *See also* Hearing Trans. (Motion to Intervene), p. 53, lines 3-6 (total number of CBM wells is 12,000 to 13,000). Although only eight companies apparently engage in the vast majority of CBM pumping (*id*., p. 33, lines 17-21; *see also* Anadarko's Reply Brief, *supra*, p. 9 n.3), all companies could potentially seek to intervene.

Anadarko responds that, if other water users seek to intervene, their motions could be denied either as untimely or on the ground that Anadarko would adequately represent their interests. Anadarko's Reply Brief, *supra*, p. 9. Other water users, however, could reasonably argue that they had previously assumed that motions to intervene would be denied or that, because Anadarko has become a party, they now need to intervene to protect their own separate interests. Granting leave to intervene to Anadarko alone among all groundwater and surface-water users could risk inappropriately biasing the proceeding in favor of Anadarko's interests. Furthermore, although Anadarko might adequately represent the interests of other CBM drillers, the very arguments that Anadarko makes in favor of intervention (*i.e*., that its interests are distinct from those of other water users) suggests that they could not adequately represent other non-CBM water users. Only states reflect the broad interests of all water users, which is

why intervention by individual water users is generally not allowed in interstate water disputes before the Supreme Court.

Even if Anadarko had a unique interest in this case that is significantly different from that of other water users, moreover, Anadarko has failed to show that Wyoming will not properly represent Anadarko's interests. In its Motion to Dismiss, Wyoming argued that the Compact does not apply to *any* groundwater, a position that is totally consistent with that of Anadarko. Motion to Dismiss, *supra*, pp. 59-63. There is currently no evidence that Wyoming will not continue to try to minimize the reach of the Compact and argue that, even if the Compact applies to some groundwater, the Compact applies only to groundwater with the strongest hydrologic connections to the surface waters of the involved tributaries.

Anadarko speculates that, in future proceedings, Wyoming's views of what groundwater, if any, is covered by Article V(A) of the Compact might diverge from the views of Anadarko. According to Anadarko, Wyoming has multiple, potentially conflicting interests in the resolution of this case, and therefore Wyoming's determination of how to define coverage "is not likely to coincide with Anadarko's stake in preserving the viability [of] one of its most significant business operations." Motion to Intervene, *supra*, p. 7. Indeed, Anadarko suggests that Wyoming might conclude for political reasons that it is in the best interests of the State to include CBM pumping in the groundwater covered by Article V(A) of the Compact. According to Anadarko, "it is not at all clear where the State's interest lies. Some agricultural users may feel that if the groundwater they rely on is subject to the Compact, it might be to their advantage to have

the Compact interpreted so as to expand the reach of groundwater potentially available to satisfy the demands of downstream users in Montana with a prior claim." Anadarko's Reply Brief, *supra*, p. 7. *See also* Hearing Trans. (Motion to Intervene), p. 20, lines 10-15 ("The State of Wyoming and the citizens of the State of Wyoming, agricultural interest farmers, may seek to include more waters under the compact in order to have available to the State of Wyoming an additional ability to try and satisfy any calls that may be made under the compact").

Anadarko's effort to show why Wyoming *might* not properly represent the interests of Anadarko and other CBM pumpers in Wyoming is factually unconvincing. If Anadarko's operations actually do affect the amount of water that reaches downstream users in Montana, Wyoming does not have to argue that the Compact reaches such operations in order to offset other violations of the Compact by restricting Anadarko's pumping. Wyoming can simply exercise its state powers to restrict Anadarko's operations. Indeed, if Anadarko's pumping is covered by the Compact, that inclusion could reduce Wyoming's ability to offset other violations because the rights of pre-1950 Montana appropriators might require the cessation of *all* pumping in Wyoming. By contrast, if Anadarko's operations do not affect the water that reaches downstream users, extending the reach of the Compact to those operations will not help other groundwater users, because a reduction in Anadarko's pumping will not remedy any impact that those other groundwater users have on pre-1950 appropriators in Montana.

Whatever the factual merits of Anadarko's argument, moreover, the argument is at best conjecture

and not actual evidence of a conflict between Wyoming's position in this case and the interests of CBM pumpers such as Anadarko. Anadarko notes that, to establish a right to intervene under Federal Rule of Civil Procedure 24, someone moving to intervene need not show that representation by the government would be inadequate. Instead, the movant need establish only "sufficient doubt about the adequacy of representation" and that "representation of his interest 'may be' inadequate." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 & n. 10 (1972). As Anadarko also recognizes, however, the Federal Rules "are only a guide to procedures in an original action." *Arizona v. California*, *supra*, 460 U.S. at 614. *See South Carolina v. North Carolina*, *supra*, slip op. at 18-19 n.8; U.S. Supreme Court Rule 9.2.

Given the unique nature of original jurisdiction matters before the Supreme Court, a private water user seeking to intervene must demonstrate more than a mere chance that the state within which it is operating will not properly represent its interests. Even in regular civil matters before federal courts, a number of circuit courts demand a "strong affirmative showing that the sovereign is not fairly representing the interests" of the proposed intervenor. *See, e.g., United States v. Hooker Chems. & Plastics Cor*p., 749 F.2d 968, 985 (2d Cir. 1984); *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). The standard should be higher in original matters where states' sovereign interest over water is involved.

In *New Jersey v. New York*, Philadelphia also argued that it could not "rely for an adequate presentation of its interest upon Pennsylvania," noting that it was "without any guide" as to what Pennsylvania's

"policy on the Delaware now is or later may be." Memorandum in Support of the Motion of the City of Philadelphia for Leave to Intervene and To File an Answer to the Petition of the City of New York for Modification of the Decree, *New Jersey v. New York*, No. 5, Original, p. 6 (March 7, 1953). The Court, however, denied Philadelphia's motion to intervene, noting that the city had "been unable to point out a *single concrete consideration* in respect to which the Commonwealth's position does not represent Philadelphia's interests." 345 U.S. at 374 (emphasis added). Similarly, in this case, Anadarko has failed to show any concrete evidence that Wyoming will not properly represent Anadarko's interests as a user of groundwater in that State.

As explained earlier, a state "must be deemed to represent all of its citizens" in interstate water litigation. *New Jersey v. New York*, 345 U.S. at 372, quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930). When I asked Wyoming at the hearing on Anadarko's Motion to Intervene whether the State will appropriately represent the interests of Anadarko and other CBM companies, Wyoming noted that it was difficult to answer the question because it was not sure yet what positions it would take in the litigation in the future. Hearing Trans. (Motion to Intervene), p. 45, lines 15-20. Wyoming's comments at the hearing, however, give little reason to believe that it will not properly represent Anadarko's interests. According to Wyoming, "if [the Court] were to choose not to allow Anadarko to intervene obviously we as the State of Wyoming would do the best of our ability to represent all the interests within the state." *Id*., p. 51, lines 9-12. At this point in time, Wyoming "would like to be able to adequately represent everybody." *Id*., p. 46, lines 4-6. Although Wyoming has

not made a determination of how it specifically will handle the CBM issue, moreover, its implementation of its state water laws is reportedly consistent with the position that CBM groundwater is not closely linked hydrologically with most surface waters. *See id*., p. 47, lines 13-19 (from "the standpoint of within our own state and how we manage the conjunctive resource would probably suggest that we don't see many examples where this coal bed methane water is really impacting the surface flows as far as how we make our own statutes, but how we would treat it under this compact we just haven't made that decision").

Practical considerations also militate against permitting Anadarko to intervene at this point in time. Even if no other water user sought to follow in Anadarko's footsteps and moved to intervene, Anadarko's intervention still would unnecessarily complicate this action and could potentially delay the action's ultimate resolution. Anadarko would be entitled to participate actively in discovery, to present expert and other testimony, to cross-examine witnesses at trial, to file exceptions to reports, and to object to settlements. *See South Carolina v. North Carolina*, *supra*, slip op. at 12 (Roberts, C.J., dissenting) (noting that intervention can "prolong the resolution" of original actions). Absent evidence that Wyoming will not properly represent Anadarko's interests, there is no justification for complicating the case and potentially delaying its resolution.

Granting Anadarko's Motion to Intervene, moreover, would also establish a precedent for intervention by a wide array of water users in future interstate water disputes before the Supreme Court. The question of what water is covered is endemic to inter-

state water disputes involving compacts, Congressional apportionments, and prior Supreme Court decrees. Several recent interstate water cases involving interstate compacts have involved the question of what, if any, groundwater is covered under the compact. *See, e.g., Kansas v. Colorado*, 543 U.S. 86, 90-91 (2004); *Kansas v. Nebraska*, 530 U.S. 1272 (2000). *See also Texas v. New Mexico*, 462 U.S. 554 (1983). Under Anadarko's arguments, groundwater users in all such cases could intervene to show that the compact at issue does not cover either groundwater use in general or their particular groundwater use. Other interstate water disputes before the Supreme Court have often involved similar questions regarding what types of water and waterbodies are included in compacts, Congressional apportionments, or prior judicial decrees. *See, e.g., Arizona v. California*, 373 U.S. 546 (1963) (dealing with the question of whether the Boulder Canyon Project Act included Arizona tributaries to the Colorado River in its apportionment of Colorado River waters). Under Anadarko's arguments, water users could intervene in such actions on the theory that they are seeking only to establish that particular waters or waterbodies are or are not included.

Anadarko's status is similar to that of the City of Charlotte in *South Carolina v. North Carolina*.[19]

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[19] As a matter of pure size and significance, Anadarko would actually seem to have a weaker argument for intervention than the argument that the City of Charlotte enjoyed. The City had been granted one of only two permits to transfer water from the Catawba River, and its permit was by far the larger of the two. Slip op., at 2. The City was also named in South Carolina's complaint, although South Carolina sought no relief against the City. Slip Op. at 17. By contrast, Anadarko is one of a large

Anadarko's interest in this case, like that of the City of Charlotte in *South Carolina v. North Carolina*, stems from its use of the waters of a state defendant. As a result, Anadako's "interest falls squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." Slip op. at 17. Just as North Carolina noted that it could adequately represent Charlotte's interest (*id*. at 18), Wyoming has stated that it will do its best to adequately represent Anadarko's interest.

Two other issues raised by Anadarko's Motion to Intervene deserve brief discussion. First, Anadarko notes in passing that it is not a citizen of Wyoming (Anadarko's Reply Brief, *supra*, p. 8) but instead is incorporated in Delaware with its principal place of business in Texas (Hearing Trans. (Motion to Intervene), p. 21, lines 13-16), suggesting that the normal assumption that states will properly represent individual water users is inappropriate in this case. According to Anadarko, "it's certainly not inconceivable that the State of Wyoming may take the position, as states often do, to the benefit of their own citizens over that of a foreign corporation." *Id*., p. 21, lines 8-12. As noted earlier, however, the presumption that states will provide proper representation in interstate water disputes applies not simply to the citizens of a state but to all of its water users. States in their sovereign capacity have an interest in protecting their waters from claims of other states, no matter who is using or not using the waters. If intervention standards varied depending on whether a water user is a citizen of a state, foreign corporations would be at an advantage in seeking to intervene,

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number of groundwater users in Wyoming and was not named in Montana's complaint.

and any corporation that wished to intervene could simply change its state of incorporation in order to improve its odds of being permitted to intervene.

Second, Anadarko suggests that, because it does not believe its operations are covered by the Compact, its rights and interests are "not subsidiary to the State of Wyoming's interest. We have a completely separate interest." Hearing Trans. (Motion to Intervene), p. 18, lines 17-19. Anadarko's interests are subsidiary to Wyoming's interest, however, not because its groundwater withdrawals might be covered by the Compact (an issue that has not been resolved yet), but because it is utilizing the water resources of the State. On the question whether the groundwater that Anadarko is extracting as part of its CBM operations is part of the Yellowstone River waters allocated by the Compact, Anadarko's rights are derivative of the rights of Wyoming.

C. Conclusion

For the reasons discussed above, I recommend that Anadarko's Motion to Intervene be denied. Anadarko has not met the standard for intervention set out in *New Jersey v. New York*. Anadarko has not shown that it has a compelling interest that is different in kind or character from those of "all other citizens and creatures of the state." 345 U.S. at 373. More importantly, Anadarko has not shown that its interest will not be properly represented by the State of Wyoming. Indeed, Wyoming noted during the hearing on Anadarko's Motion to Intervene that it plans to "represent all the interests within the state" to the best of its ability. Hearing Trans. (Motion to Intervene), p. 51, lines 9-12. Far from aiding in the resolution of this action, intervention at the moment would inevitably complicate the proceedings and

could ultimately delay the action's resolution. If the circumstances of this case should change in the future in a manner that would meet the requirements for intervention, Anadarko can bring a new motion to intervene at that time.

While Anadarko has not met the standard for intervention in interstate water disputes before the Supreme Court, Anadarko makes a strong argument that it can provide useful information and argument on whether and how the Compact applies to groundwater extraction, particularly in the context of CBM production. As Anadarko notes in its motion, it has "access to a wealth of information concerning CBM operations and the related issues of hydrology." Motion to Intervene, *supra*, p. 6. Intervention, however, is not currently needed to obtain the benefit of Anadarko's perspective and expertise. Allowing Anadarko to participate actively as an *amicus curiae*, where appropriate, should permit Anadarko to inform these proceedings and represent its interests without raising the problems of intervention discussed earlier. *See South Carolina v. North Carolina*, *supra*, slip op. at 9 (Roberts, C.J., dissenting) ("Parties to litigation have ready means of access to relevant information held by nonparties, and those nonparties can certainly furnish such information on their own if they consider it in their best interests (through, for example, participation as *amicus curiae*)).

I have already allowed Anadarko to file a brief as amicus curiae in support of Wyoming's Motion to Dismiss (although I denied Anadarko's motion to participate in the oral argument on that motion). *See* Case Management Order No. 1, Nov. 25, 2008, ¶ 6 (granting motion for leave to file brief); Modification

to Case Management Order No. 1, Dec. 12, 2008, ¶ 2 (denying motion for divided argument). I will continue to use my procedural authority in this case to ensure the full and fair exposition of the factual and legal issues. In *Nebraska v. Wyoming*, the Special Master "provided for active involvement in the case by the *amici*, allowing them to present affidavits, file briefs, including reply briefs, as well as the potential to participate more fully respecting key matters in the proceedings upon showing of good cause." First Interim Report of the Special Master, *Nebraska v. Wyoming*, No. 108, Original, at 6 (June 14, 1989). The Special Master suggested that an amicus could even "selectively be permitted to introduce evidence . . . to develop certain issues." Third Interim Report on Motions To Amend the Pleadings, *Nebraska v. Wyoming*, No. 108, Original, at 20 (Dec. 11, 2000). Given Wyoming's participation in the case and my authority to permit Anadarko to provide information and argument as an *amicus* where appropriate, Anadarko's intervention as a party is not currently required to fully and appropriately develop the issues in this matter.[20]

VI. RECOMMENDATIONS

For the reasons discussed above, I recommend that:

1. Wyoming's Motion to Dismiss should be denied.

2. Montana's Motion for Summary Judgment should be granted in part and denied in part without prejudice. In particular, the Court should hold that

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[20] The question of exactly what role Anadarko might play on issues of groundwater as an *amicus* is best resolved at a later point in the proceedings when both the nature of the issues and the potential contributions of Anadarko are clearer.

Article V(A) of the Compact applies to all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact). The Court, however, should decline to address the reach of Article V(B) of the Compact and the meaning of the term "Interstate Tributary."

3. Anadarko's Motion to Intervene should be denied.

A proposed Decree embodying my recommendations is attached as Appendix B.

Respectfully submitted,

BARTON H. THOMPSON, JR.
Special Master
Stanford, California

February 10, 2010

APPENDIX A

Yellowstone River Compact

Pub. L. No. 82-231, 65 Stat. 663 (1951)

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck	P. F. Leonard
A. W. Bradshaw	Walter M. McLaughlin
H. W. Bunston	Dave M. Manning
John Herzog	Joseph Muggli
John M. Jarussi	Chester E. Onstad
Ashton Jones	Ed F. Parriott
Chris. Josephson	R. R. Renne
A. Wallace Kingsbury	Keith W. Trout

For the State of North Dakota:

I. A. Acker	Einar H. Dahl
J. J. Walsh	

For the State of Wyoming:

L. C. Bishop	N. V. Kurtz
Earl T. Rower	Harry L. Littlefield
J. Harold Cash	R. E. McNally
Ben F. Cochrane	Will G. Metz
Ernest J. Goppert	Mark N. Partridge
Richard L. Greene	Alonzo R. Shreve
E. C. Gwillim	Charles M. Smith
E. J. Johnson	Leonard F. Thornton
Lee E. Keith	M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

A. Where the name of a State is used in this Compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory State, and all others using, claiming, or in

any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, shall be subject to the terms of this Compact. Where the singular is used in this article, it shall be construed to include the plural.

ARTICLE II

A. The State of Montana, the State of North Dakota, and the State of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "Commission" and "Yellowstone River Compact Commission" mean the agency created as provided herein for the administration of this Compact.

C. The term "Yellowstone River Basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.

D. The term "Yellowstone River System" means 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, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

E. The term "Tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except the Little Bighorn River); the Tongue River; and the Powder River, 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.

G. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

H. The term "Beneficial Use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "Domestic Use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "Stock Water Use" shall mean the use of water for livestock and poultry.

ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one

representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

B. The salaries and necessary expenses of each State representative shall be paid by the respective State; all other expenses incident to the administration of this Compact not borne by the United States shall be allocated to and borne one-half by the State of Wyoming and one-half by the State of Montana.

C. In addition to other powers and duties herein conferred-upon the Commission and the members thereof, the jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to such States upon matters connected with the administration of this Compact, and the Commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective States, and shall compile a report for each year ending September 30 and transmit it to the Governors of the signatory States on or before December 31 of each year.

D. The Secretary of the Army; the Secretary of the Interior; the Secretary of Agriculture; the Chairman, Federal Power Commission; the Secretary of Commerce, or comparable officers of whatever

Federal agencies may succeed to the functions and duties of these agencies, and such other Federal officers and officers of appropriate agencies, of the signatory States having services or data useful or necessary to the Compact Commission, shall cooperate, ex-officio, with the Commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the Compact; and these officers may perform such other services related to the Compact as may be mutually agreed upon with the Commission.

E. The Commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this Compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the State Engineer of each of the signatory States for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this Compact, then the member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the States of Wyoming and Montana and said member selected by the Director of the United States Geological Survey, each being entitled to one vote.

G. The Commission herein authorized shall have power to sue and be sued in its official capacity in any Federal Court of the signatory States, and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The Commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

A. 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 in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River

   a. To Wyoming..... 60%
      To Montana 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

2. Bighorn River (Exclusive of Little Bighorn River)

   a. To Wyoming 80%
      To Montana 20%

   b. The point of measurement shall be below the last diversion from the Bighorn River above its junction with the Yellowstone River, and the inflow of the Little Bighorn River shall be excluded from the quantity of water subject to allocation.

3. Tongue River

   a. To Wyoming 40%
      To Montana 60%

   b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder River (Including the Little Powder River)

   a. To Wyoming 42%
      To Montana 58%

   b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3, and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana

developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date:

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone River below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective States and flowing into the Yellowstone River below Intake, Montana, are allotted to the respective States in which situated.

E. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: *Provided*, That the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the Commission shall re-examine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;
Acreage irrigated;
Acreage irrigable under existing works; and
Potentially irrigable lands.

ARTICLE VI

Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative-consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam,

storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: *Provided*, That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: *And*, *provided further*, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

B. Each claim hereafter initiated for an appropriation of water in one signatory State for use in another signatory State shall be filed in the Office of the State Engineer of the signatory State in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the State Engineer of the signatory State in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the State in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory State, such adjudications shall be confirmed in that State by the proper authority. Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used.

D. The use of water allocated under Article V of this Compact for projects constructed after the date of this Compact by the United States of America or

any of its agencies or instrumentalities, shall be charged as a use by the State in which the use is made: *Provided*, That such use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.

ARTICLE VIII

A lower signatory State shall have the right to acquire in an upper State by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights-of-way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE IX

Should any facilities be constructed by a lower signatory State in an upper signatory State under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE X

No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. In the event water from another

river basin shall be imported into the Yellowstone River Basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefore in determining its share of the water apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this Compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

ARTICLE XII

This Compact may be terminated at any time by unanimous consent of the signatory States, and upon such termination all rights then established hereunder shall continue unimpaired.

ARTICLE XIII

Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions.

ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory States in the consummation of this Compact, and none of them, nor the United States of America by its consent and

approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

ARTICLE XV

This Compact shall become operative when approved by the Legislature of each of the signatory States and consented to and approved by the Congress of the United States.

ARTICLE XVI

Nothing in this Compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any State or subdivision thereof, nor to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, State agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the Compact.

ARTICLE XVII

Should a Court of competent jurisdiction hold any part of this Compact to be contrary to the constitution of any signatory State or of the United States of America, all other severable provisions of this Compact shall continue in full force and effect.

ARTICLE XVIII

No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be filed in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each signatory State.

Done at the City of Billings in the State of Montana, this 8th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifty.

Commissioners for the State of Montana:

FRED E. BUCK	P. F. LEONARD
A. W. BRADSHAW	WALTER M. MCLAUGHLIN
H. W. BUNSTON	DAVE M. MANNING
JOHN HERZOG	JOSEPH MUGGLI
JOHN M. JARUSSI	CHESTER E. ONSTAD
ASHTON JONES	ED F. PARRIOTT
CHRIS. JOSEPHSON	R. R. RENNE
A. WALLACE KINGSBURY	KEITH W. TROUT

Commissioners for the State of North Dakota:

I. A. ACKER	J. J. WALSH
EINAR H. DAHL	

Commissioners for the State of Wyoming:

L. C. BISHOP	N. V. KURTZ
EARL T. BOWER	HARRY L. LITTLEFIELD
J. HAROLD CASH	R. E. McNALLY
BEN F. COCHRANE	WILL G. METZ
ERNEST J. GOPPERT	MARK N. PARTRIDGE
RICHARD L. GREENE	ALONZO R. SHREVE
E. C. GWILLIM	CHARLES M. SMITH
E. J. JOHNSON	LEONARD F. THORNTON
LEE E. KEITH	M. B. WALKER

I have participated in the negotiation of this Compact and intend to report favorably thereon to the Congress of the United States.

R. J. NEWELL
Representative of the United States of America

APPENDIX B

Proposed Order

STATE OF MONTANA

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

No. 137 Original

_____, 2010

ORDER

Having considered the briefs of the parties and amicus curiae in support of, opposition to, or otherwise relating to the Motion to Dismiss filed in this action by the State of Wyoming (dated April 2008), the Motion for Partial Summary Judgment filed in this action by the State of Montana (dated October 16, 2009), and the Motion to Intervene filed in this action by Anadarko Petroleum Corporation (dated July 17, 2009), and having received and considered the First Interim Report of the Special Master heretofore appointed by the Court, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

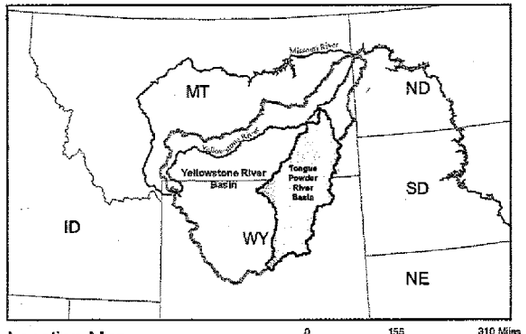
1. The Motion to Dismiss of the State of Wyoming is DENIED.

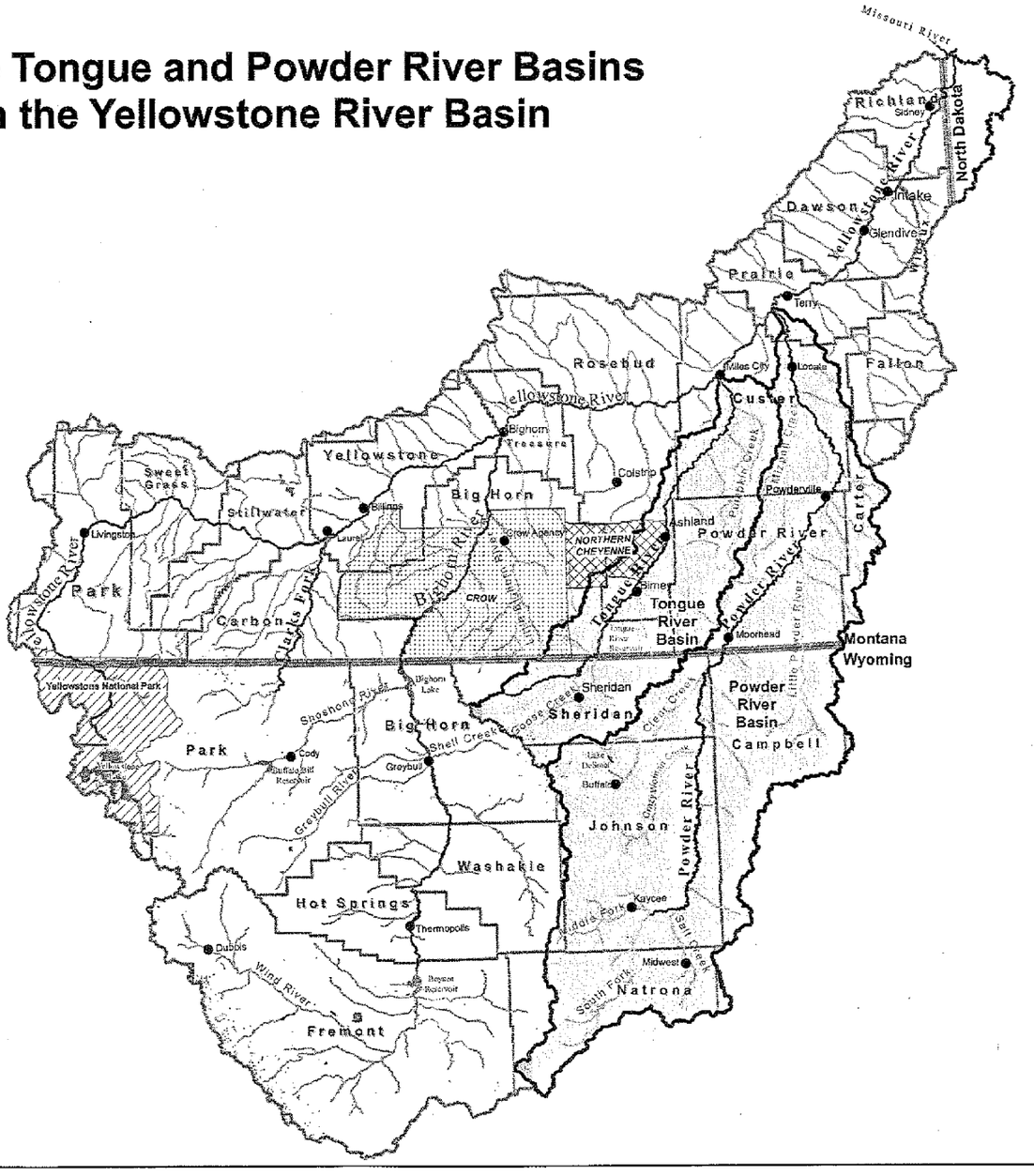
2. The Motion for Partial Summary Judgment of the State of Montana is GRANTED IN PART AND DENIED IN PART WITHOUT PREJUDICE. The Motion for Partial Summary Judgment is granted as to the coverage of Article V(A) of the Yellowstone River Compact. Article V(A) applies to all surface

waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact). The Motion for Partial Summary Judgment is denied as to the applicability of Article V(B) and other provisions of the Compact to surface waters tributary to the Tongue and Powder Rivers, without prejudice to the motion being renewed at a later point in time upon showing that the issue is within the legitimate scope of the State of Montana's Bill of Complaint and relevant to the ultimate decision and decree in this case.

3. The Motion to Intervene of Anadarko Petroleum Corporation is DENIED.

Map of the Tongue and Powder River Basins within the Yellowstone River Basin





Yellowstone River Basin

- Towns
- Crow Reservation
- Northern Cheyenne Reservation
- Yellowstone National Park
- County Boundary

0 10 20 40 Miles

Scale 1:2,500,000

Map prepared by:
State of Montana
Department of Natural Resources and Conservation
Water Resources Division
December 20, 2006