No. 137, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF MONTANA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The State of Montana has moved the Court for summary judgement to resolve a legal question of Compact interpretation. Montana asks the Court to determine that "the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers." Mont. S.J. Mot. at 1. At present, the only claim that Montana has asserted is that Wyoming has breached its obligations under Article V(A) of the Compact. Within the context of that claim, the United States generally agrees that diversions from "all surface waters tributary to the Tongue and Powder Rivers," *id.*, are relevant to Compact compliance. Montana, however, has sought a general ruling that "the Yellowstone River Compact," not merely Article V(A), "applies to all surface waters tributary to the Tongue and Powder Rivers." *Ibid.* To the extent that Montana seeks an interpretation of Article V(B) and (C) of the Compact, any such ruling is premature at this point and need not be resolved before the filing of a First Report with the Supreme Court.

ARGUMENT

1. The Supreme Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented," and to that end will dispose of antecedent legal questions at the earliest stage "feasible." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). Accordingly, part of a Special Master's role is to focus the proceedings by narrowing the issues in dispute, to the extent feasible. *See* U.S. Invitation Br. at 17-19. Whether tributaries to the Tongue and Powder Rivers are excluded from the allegedly breached Compact provision is a question of law that should be resolved at an early stage of these proceedings before discovery commences. U.S. Letter Br. at 1; Suppl. Op. at 29-30.

Wyoming has suggested (Wyo. Letter Br. on Mem. Op. at 4) that factual development might be necessary before this question is resolved. As discussed below, the United States believes that resort to extrinsic sources is not necessary to resolve this question. Nonetheless, to the extent that the question requires consideration of extrinsic sources, *see* Memorandum Opinion on Wyoming's Motion to Dismiss Bill of Complaint ("Mem. Op.") at 11; U.S. Invitation Br. at 18, the United States believes that those sources serve as interpretive aids in resolving the meaning of a legal text, akin to legislative history, and not as factual evidence bearing on subjective questions about the negotiators' intent. *See Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991). Indeed, the Supreme Court has cautioned against attributing any significance to "oral statements" by negotiators that were not "called to the attention of Congress" or "the Legislatures of the several [S]tates" during the process of ratifying a compact. *Arizona* v. *California*, 292 U.S. 341, 360 (1934); *see* also *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5 (citing this discussion). In this case, the parties have already devoted extensive study and analysis to the negotiating history of the Compact, and the relevant parts of that history were contemporaneously considered by Congress and the Executive Branch. *See* generally U.S. Br. at 13-14 (disagreeing with Montana's argument that some aspects of this history might not properly be considered on a motion to dismiss). Accordingly, at present there appears to be no need for discovery—meaning not just archival research, but formal document production, interrogatories, and the like—in order to permit Wyoming to oppose the motion. Cf. Fed. R. Civ. P. 56(f).

2. a. Montana has previously made clear to the Court that its claim as pleaded pertains to its rights under Article V(A) of the Compact. Montana's briefs seeking leave to commence this action repeatedly asserted that its first-tier rights under Article V(A) were at

issue. Mont. Br. in Supp. of Compl. at 17-20, 33; Mont. Reply Br. at 2. Montana's complaint does not allege freestanding allegations that Wyoming is diverting more than its share of "unused and unappropriated waters of the Interstate tributaries" under Article V(B) or (C).

Montana is limited to the theory advanced in its complaint, and it is bound by the representations that it made in persuading the Court to grant it leave to file the complaint. "[T]he solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure does not suit cases within th[e] Court's original jurisdiction." *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995) (citations omitted). Because the Court performs an "important gatekeeping function" when it scrutinizes the initial motion for leave to file, "proposed pleading amendments must [likewise] be scrutinized closely in the first instance to see whether they would take the litigation beyond what [the Court] reasonably anticipated when [it] granted leave to file the initial pleadings." *Ibid.* Accordingly, matters outside the scope of the complaint as pleaded are not properly before the Special Master at this juncture, and would require the making and granting of a motion for leave to amend. Because the claim in the instant case is limited to Article V(A), how the interpretation of the term "Interstate Tributaries" relates to a potential future claim regarding "third tier" annual allocations and storage under Article V(B) is not properly before the Court. That is particularly so in this case, in which the Court invited the filing of a motion to dismiss the initial complaint, referred that motion to the Special Master, and has not yet entertained exceptions to the recommended ruling on that motion.

Accordingly, to the extent that Montana's motion invites the Court to resolve aspects of a claim under Article V(B) or (C), it is premature and accordingly should be denied.

b. Wyoming has not yet taken a position on the question whether the reach of Article V(A) extends to all waters tributary to the named Interstate Tributaries. To date, Wyoming has affirmatively asserted only that "[t]he third tier allocation of Article V" is limited to the mainstems of the Interstate Tributaries, a reference to Article V(B) and (C). Wyo. Br. in Opp. to Mot. for Leave to File Bill of Compl. at 21; *see id.* at 23; Transcript of Hearing at 126:11-127:13 (Feb. 3, 2009); cf. Wyo. Letter Br. on Mem. Op. at 4 (noting that "Wyoming never raised in its motion to dismiss the issue of whether reservoirs diverting from the tributaries to the Interstate Tributaries are subject to either a call by Montana under Article V(A), or allocation under Article V(B)"). Accordingly, depending on the content of Wyoming's submission (which is due to be filed contemporaneously with this amicus brief), there may be no live dispute about either the interpretation of Article V(A) (if Wyoming does not contest it) or Article V(B) and (C) (which in our view is beyond the scope of the complaint).

3. Within the confines of Montana's claim as pleaded in the complaint, the United States generally agrees with Montana's interpretation. The Compact makes clear that for purposes of Article V(A), the Compact applies to diversions from all surface waters tributary to the Tongue and Powder Rivers in Wyoming. There is no exception for storage of water on tributaries to the named Interstate Tributaries. Consequently, the Special Master correctly concluded in the since-deleted portion of his Memorandum Opinion that "Article V(A) . . . prohibits new diversions of water for storage facilities on tributaries to the Powder and Tongue rivers if the diversions interfere with the pre-1950 appropriative rights in Montana." Mem. Op. at 30.

The plain text of the Compact demonstrates that Article V(A) encompasses pre-1950 rights in the entire "Yellowstone River System," including all tributaries up to their sources. As Montana points out, Article V(A) itself protects "[a]ppropriative rights to the beneficial uses of water of the Yellowstone River System existing in each signatory State as of January 1, 1950." Art. V(D), 65 Stat. 666. Under the Compact, the "Yellowstone River System" comprises (with exceptions not relevant here) "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River." Art. II(D), 65 Stat. 664. Thus, the system referred to in Article V(A) extends all the way up to the source of each river, "including springs and swamps" -- a definition that plainly includes tributaries to the four Interstate Tributaries. Cf. Mem. Op. at 31. The Compact confirms that plain reading by defining "tributary" as "any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries *and tributaries thereof*," again with exceptions not relevant here. Art. II(E), 65 Stat. 664 (emphasis added). Furthermore, a "diversion" from the Yellowstone River system is, in turn, defined as the "taking or removing of water from the Yellowstone River or any tributary thereof," Art. II(G) 65 Stat. 665, with "tributary" defined expansively as just discussed.

Indeed, continued enjoyment of water rights under the doctrine of appropriation as protected by Article V(A) is only effective where the entire source of supply is protected from diminution by anyone not holding a superior water right. Thus it is irrelevant under Art. V(A) whether activities that remove the natural flow of a stream (including storage) occur on the mainstem of a named Interstate Tributary, or on a subsidiary tributary of the Yellowstone River system. On the face of the Compact, if water storage or another diversion is commenced after

January 1, 1950, removing water from the a tributary of the Yellowstone anywhere below the headwaters, it potentially affects pre-Compact water rights and can be regulated under Art. V(A) of the Compact. Cf. Art. II(G), 65 Stat. 665 (any act that involves "taking or removing of water" from a stream is covered by the Compact as a regulated diversion).

Furthermore, the stated purposes of the Compact, as set forth in the Preamble, are to eliminate "present and future controversy . . . 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 . . . to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof." 65 Stat. 663. The broad purpose expressed by the drafters argues for a broad definition of the waters subject to regulation under the Compact and against a limitation based on the location of the diversion. Cf. Mem. Op. at 32-34.

For the foregoing reasons, the text, structure, and purpose of the Compact establish that, with respect to diversions that interfere with Montana users' first-tier rights under Article V(A), the location of the diversion does not matter—whether it occurs on the mainstem of an Interstate Tributary, a tributary to an Interstate Tributary, a spring or swamp, or a hydrologically connected groundwater well that removes surface water from a tributary.

CONCLUSION

For the reasons set forth herein, Montana's Motion for Summary Judgment should be granted to the extent of determining that diversions from all surface waters tributary to the Interstate Tributaries are relevant to Compact compliance under Art. V(A). To the extent that Montana seeks broader relief in the instant motion, such relief should be denied as premature.

Respectfully submitted this 2nd day of November, 2009.

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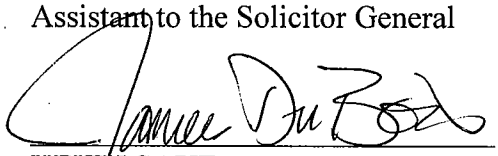

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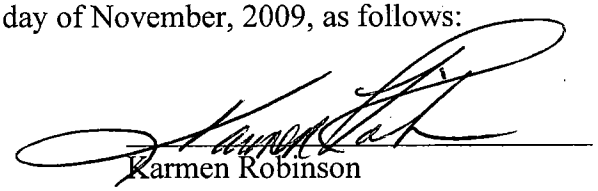
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the United States, **BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF MONTANA'S MOTION FOR SUMMARY JUDGMENT**, Case No. 137, Original, was served by electronic mail and was duly served upon the following parties, by first-class mail postage-prepaid, this 2nd day of November, 2009, as follows:



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