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

WYOMING'S BRIEF IN OPPOSITION TO MONTANA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. SUMMARY OF ARGUMENT

The State of Wyoming opposes Montana's motion for partial summary judgment for two reasons. First, Montana's spartan claims for relief in its Bill of Complaint have been clarified in the briefing and argument before the Supreme Court and the Special Master, and it has been established that Montana's claims are all based on alleged violations of Article V.A. of the Yellowstone River Compact ("the Compact"). The defined term "interstate tributaries" does not appear in Article V.A., but instead only functions within Article V.B., which is not at issue in this case. For both practical and constitutional reasons, the Special Master should not attempt to interpret "interstate tributaries" when it is not posed in the case.

Second, even if the meaning of "interstate tributaries" were at issue in this case, the drafters' definition of that phrase is unambiguous when considered within the four corners of the Compact.[1] It means the four rivers listed in the definition, not other streams or other water bodies that contribute flows to the four rivers. If the drafters had intended the phrase "interstate tributaries" to include not only the four rivers, but also the tributaries thereto, they could have said so in that definition. They showed in their definition of the word "tributaries" that they knew how to expressly refer to streams that flowed into the "interstate tributaries" when that was their desire.

[1] During the status conference on August 5, 2009, the Special Master agreed with Wyoming that if the meaning of "interstate tributaries" is ambiguous, then its determination would be premature until the parties can engage in discovery. Tr. of Status Conf. at 27 (Aug. 5, 2009).

II. ARGUMENT

A. Montana's Claims for Relief are Based on Alleged Violations of Section V.A. rather than V.B., so the Defined Term "Interstate Tributaries" should not be Interpreted in this Case

The briefing and oral argument in this case has clarified that Montana's claims for relief are not based on an alleged violation of Article V.B. of the Compact, under which Wyoming and Montana post-1950 diversions or storage are limited to cumulative annual percentages of divertible flow. Since the definition of "interstate tributaries" only pertains to Article V.B., it is neither necessary nor proper for the Special Master to rule on the meaning of that term.

Like any other Court, the Supreme Court applies the practical concept of judicial economy. *Osborn v. Haley,* 549 U.S. 225, 245 (2007) (*citing United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726 (1966)). Not only does this benefit the calendars of the Court and of special masters it may appoint, it prevents the unnecessary expenditure of public funds by the parties in an original action like this one. Someday Montana may allege that Wyoming is exceeding its allowable divertible flows under Article V.B., and if that occurs, judicial resources may then be committed to an analysis of that section of the Compact. But until then, only the actual issues in this case deserve the undivided attention of the Court, Special Master, and parties.

Judicial restraint is not merely a matter of protecting the taxpayers, but has fundamental constitutional underpinnings. Article III, Section 2 of the United States Constitution extends the judicial power only to cases or controversies. *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 477 (1990). If the Supreme Court and lower federal courts ignore this limitation and make advisory rulings on issues that are not posed via actual cases or controversies, they may intrude on the powers of the legislative and executive branches, destroying the critical separation of powers

doctrine upon which our republic is based. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471 (1982). To ensure separation of powers, federal courts have consistently emphasized limits "'founded in concern about the proper--and properly limited--role of the courts in a democratic society.'" *Allen v. Wright,* 468 U.S. 737, 750, *(quoting Warth v. Seldin,* 422 U.S. 490, 498 (1975)).

The case and controversy requirement of Article III, Section 2 also serves important jurisprudential considerations. When courts try to decide issues not necessary to resolution of an actual case or controversy before them, they cannot expect the parties' advocacy to be sufficiently focused to support a sound decision. *United States v. Fruehauf,* 365 U.S. 146, 157 (1961). Legal questions presented to the court should be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge,* 454 U.S. at 472.

Montana's claims are based solely on Article V.A. of the Compact. Yet Article V.B. is the only operative provision of the Compact where the term "interstate tributaries" appears. Montana filed its Motion for Leave to File Bill of Complaint, its Bill of Complaint, and its Brief in Support in January of 2007. Wyoming initially read the bare notice pleading of the Bill to assert a violation of Article V.B. of the Compact, since as Wyoming asserted in its later Motion to Dismiss, it believed that Article V.B. was the sole legal basis in the Compact supporting a Montana claim that Wyoming was diverting too much water. Therefore, Wyoming focused on particulars of Article V.B. in its first brief in this case. *See* Wyoming's Br. in Opp'n to Mot. for Leave to File Bill of Compl., *passim* (April 2007). In short, Wyoming questioned whether there was any legitimate way, under the hydrologic history and manmade development of the Tongue

and Powder Rivers, that Montana could claim that Wyoming was exceeding its percentage share of cumulative annual divertible flows.

While Wyoming's opposition to leave to file did not achieve its purpose of ending this case in its infancy, it did, in hindsight, serve the useful purpose of forcing Montana to clearly state the nature of its case. Montana stated in its reply brief on the motion for leave to file:

> Wyoming misstates Montana's basic claim, *i.e.*, that the Compact effected a complete apportionment of the Yellowstone River System that protects Montana's pre-1950 rights to the extent they were in use at the time the Compact was entered. It follows that when Montana's first-tier, or pre-1950 rights, are unsatisfied, Wyoming must curtail its second-tier and third-tier post-1950 uses in deference. See Montana's Brief in Support of Motion for Leave to File Bill of Complaint (Montana's Brief or Mont. Br.) 11-14. Inexplicably, Wyoming claims that Montana agrees that "these pre-1950 rights are to be administered within each state based only on intra-state prior appropriation. Therefore, this Court need not consider the Compact's first tier allocation under Section A of Article V." Wyo. Br. 2 (citation omitted).
>
> On the contrary, Montana *clearly asserts a claimed violation of Article V.A. in that Wyoming has used post-1950 water in derogation of Montana's protected pre-1950 rights.* See Bill of Complaint ¶¶ 8-13. In fact, the very section of Montana's opening brief cited by Wyoming for its allegation that Article V.A. is not at issue, refutes that assertion: "Article V.A. of the Compact requires Wyoming to curtail consumption of such water whenever the amount of water necessary to satisfy Montana's pre-January 1, 1950 uses of such water is not passing the stateline." Mont. Br. 18-19 (quoting ¶ 3 of the Resolution rejected by Wyoming at the Dec. 6, 2006 Yellowstone River Compact Commission (Commission) meeting, reprinted in App. to Mont. Br. 4). This statement describes the practical effect of the apportionment by Article V.A. of all waters in use on January 1, 1950. See Mont. Br. 18-20; see also *id.*, at 2-3, 11-16, 22.
>
> Wyoming accepts Montana's description of the three-tier water allocation in the Compact. See Wyo. Br. 2-3. Yet Wyoming's entire brief is framed largely in reference to third-tier water uses, making the Wyoming Brief *essentially irrelevant and non-responsive to Montana's most fundamental claim, which focuses on protection of Montana's first-tier water rights.*

Mont. Reply Br. (On Mot. for Leave to File Bill of Compl.) at 1-2 (April 2007) (emphasis added).

Relying on Montana's statement that the case was based on an interstate prior appropriation theory under Article V.A., Wyoming filed a motion to dismiss which contested the legal basis of such claims under that article. Wyoming did not address Article V.B. except to the extent that its percentage allocation might shed light on Montana's Article V.A. claims. In fact, during oral argument on the motion to dismiss, Wyoming's counsel contended that since Montana could not state a claim under Article V.A., but could potentially state one under Article V.B., Montana would have to amend its complaint to assert an Article V.B. claim if it wanted its case to survive dismissal of its Article V.A. claims. Tr. of Hrg. on Mot. to Dismiss at 123-24 (Feb. 3, 2009). Wyoming counsel's later affirmative response to the Special Master's question as to whether the definition of "interstate tributaries" under Article V.B. might have to be decided later in the case, was based on Wyoming's position that Montana could not state a claim under Article V.A., but could, theoretically do so under Article V.B. *Id.* at 126-28. Of course, once the Special Master decided that Montana could state a claim under Article V.A., he effectively confirmed Montana's earlier observation that Wyoming's positions on Article V.B. were "irrelevant" to Montana's case.[2] Mont. Reply Br. (On Mot. for Leave to File Bill of Compl.) at 1-2 (April 2007).

As this case progressed from Montana's Motion for Leave to File Bill of Complaint to Wyoming's Motion to Dismiss, the United States joined Wyoming in accepting at face value Montana's characterization that its claims were based on Article V.A. The United States explained the case's posture succinctly in its brief in opposition to Wyoming's Motion to Dismiss:

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[2]During the hearing on Wyoming's Motion to Dismiss, Montana's counsel declared: "We think the nature of the case now is the Court must decide whether Article V-A has any meaning, whether it provides the right of Montana to make a state line call." Hrg. Tr. at 51 (Feb. 3, 2009).

> Montana suggests, for the first time, that the motion to dismiss should be denied in any event, on the theory that even if Wyoming is not violating Montana's pre-1950 rights, it is (or may be) violating *post*-1950 rights. See Mont. Br. 17-18, 38-39, 44. To the extent that Montana seeks to introduce a new, freestanding allegation that Wyoming is consuming more than its percentage share under Article V(B) and (C), that allegation would not be appropriately introduced at this state of the litigation.

Br. for the United States as Amicus Curiae in Opp. to the Mot. to Dismiss at 20 (emphasis in original).

In a footnote to that accurate summation, the United States added:

> Montana's motion for leave to commence this action repeatedly asserted that Montana's first-tier rights under Article V(A) were at issue. Br. in Supp. of Comp. 17-20, 33; Br. in Supp. of Comp. A5; Mont. Reply Br. 2. As Montana recognizes (Br. 18), it is limited to the theory it advanced in seeking leave to file the action, unless it seeks and obtains leave to file an amended bill of complaint, which is sparingly granted in original actions. See *Nebraska v. Wyoming,* 515 U.S. 1, 8 (1995).

Id. at 20 n.9.

Finally, throughout his exhaustive Memorandum Opinion on Wyoming's Motion to Dismiss, the Special Master analyzed each of Montana's claims for relief as claims under Article V.A. Mem. Op. of the Special Master on Wyoming's Mot. to Dismiss, *passim*. While the Special Master did mention an interpretation of the term "interstate tributaries" found in Article V.B., he did so in a single paragraph on reservoir issues that is clearly tangential to the treatment of reservoirs under Article V.A. He then removed this paragraph at Wyoming's request, creating a blank slate for his consideration of whether it is necessary or proper to interpret Article V.B., including the term "interstate tributaries." *See* Tr. of Status Hrg. at 25-27 (Aug. 5, 2009); Supp. Op. of the Special Master on Wyoming's Mot. to Dismiss Bill of Compl. at 28-30.

To summarize, future proceedings by which Montana might try to prove up its Article V.A. claims do not require the Special Master to decide whether the term "interstate tributaries" found in Article V.B. includes tributaries to the four rivers named in that definition. The Special

Master will presumably apply, as a matter of law, the "doctrine of appropriation" as he has outlined it (subject to Supreme Court confirmation), without regard to how the Article V.B. percentage allocation might be applied if and when a case under Article V.B. is ever posed. Venturing into this unnecessary topic would violate the practical, jurisprudential and constitutional restrictions recited above. The Special Master should deny the motion for partial summary judgment on these grounds.

B. Even if the Meaning of "Interstate Tributaries" was at Issue in this Case, the Drafters Unambiguously Limited that Term to the Main Stems of the Four Rivers Named in the Definition

If the Special Master disagrees with Wyoming's position regarding the justiciability of the definition of "interstate tributaries," he should only grant summary judgment in favor of Montana if he finds its proposed definition to be unambiguously correct. *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). On the other hand, if the Special Master finds ambiguity upon reviewing the Compact's four corners, the parties should be permitted to engage in discovery to gather extrinsic evidence to prove their respective cases on the issue. *Oklahoma v. New Mexico,* 501 U.S. 221, 235 n.5 (1991). The Special Master correctly made this point in a recent status conference. Tr. of Status Conf. at 27 (Aug. 5, 2009).

Wyoming agrees with Montana that the customary rules of contract and statutory construction apply to interstate compacts. Mont. Br. in Supp. of Summ. J. at 4. Indeed, the Compact's many drafters were quite competent and knowledgeable as to their charge, and must be presumed to have had good reason to agree to the express terms they chose. *New Jersey v. Delaware,* 552 U.S. 597, __, 128 S.Ct. 1410, 1421 (2008). Evaluation of the drafters' intent must begin with the words they chose, and not be turned on its head by starting with a presumption of

what in hindsight might be an interpretation the Court would have chosen if it were in the drafters' shoes. *Id.* at 1420-21.

Analyzing the defined term "interstate tributaries" within the four corners of the Compact, without preconceived notions of how Article V.B. would best function, reveals a straightforward and unambiguous construction contrary to Montana's interpretation. Article II.F. states:

> The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except 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.

Yellowstone River Compact, P.L. 231, 65 Stat. 152 (Oct. 30, 1951)[3]

While there might be some small risk of confusion as to whether the Bighorn River would include the Little Bighorn within its ambit if not expressly mentioned, it is quite a stretch to believe that these knowledgeable drafters would intend that some other tributary with an unrelated name, such as Goose Creek (a tributary to the Tongue) would be considered "the Tongue River," which enters the Yellowstone River at Miles City, unless they made plain such an unnatural inclusion. If the drafters intended the four rivers listed in the definition of "interstate tributaries" to include all tributaries thereof (including remote tributaries several steps removed) they simply could have said so. We know this because within the definition of the word "Tributary" in the same Compact, the drafters expressly added the phrase "tributaries thereof"

[3] In its brief, Montana places minor stock in how "interstate tributary" and "tributary" may be capitalized. Mont. Br. in Supp. of Mot. for Summ. J. at 10 n.2.When printed in Public Law 231, the terms "Tributary" and "Interstate Tributaries" are capitalized in their definitions, but in Article V.B. the word "Interstate" is capitalized while the word "tributaries" is not. However, in the codifications of the Compact in the Wyoming and Montana statutes, those words are all in lower case within the definitions and also when used elsewhere in those versions of the Compact. MONT. CODE ANN. § 85-20-101 (2005) (stating in the title page that the code is "published and distributed by Montana Legislative Services Division"); WYO. STAT. ANN. § 41-12-601 (2007). It is likely that the capitalizations are irrelevant, perhaps a result of scrivener sloppiness.

when they wanted to make clear that tributaries to the "interstate tributaries" were included in the broad term "tributaries."[4] YRC Art. II,E. Conversely, if they felt that the tributaries of the "interstate tributaries" were already included within the meaning of "interstate tributaries" under that term's definition, they would not have had to specifically mention the "tributaries thereof" to make that inclusion in the definition of "tributary."

Montana misreads the Compact when it asserts that the expansive word "tributary" forms one element of the clearly less comprehensive term "interstate tributaries," and thereby inflates the latter beyond its otherwise limited plain meaning. Mont. Br. in Supp. of Summ. J. at 10. The drafter's decision to separately define the terms "tributary" and "interstate tributaries," creates a clear hierarchy that flows in only one direction, from the less comprehensive "interstate tributaries" to the more comprehensive "tributary." "Tributary," when it appears alone in the Compact, means any stream outside of Yellowstone Park that contributes to the flow of the Yellowstone River, a very broad definition. The term "tributary" would include the Powder, Tongue, Bighorn, and Clarks Fork Rivers, Pumpkin Creek (a Tongue tributary in Montana), Rosebud Creek (a direct Yellowstone tributary in Montana) and hundreds, if not thousands, of other streams in the Yellowstone basin that both directly and indirectly feed the Yellowstone.

Perhaps to negate any erroneous construction that only streams that flowed directly into the Yellowstone itself would be considered "tributaries," and thus, be considered within the "Yellowstone River System," the drafters went on to state that the term "tributary" included the "interstate tributaries" and "tributaries thereof." YRC Art. II.E. Again, if the drafters believed that the defined term "interstate tributaries" already included the tributaries to those four rivers,

[4]Article II.E. states: "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."

there would have been no reason for them to have added the phrase "and tributaries thereof" within the definition of "tributary." Montana states in its brief, "the Court should give effect to every clause and every word." Mont. Br. in Supp. of Summ. J. at 4, *citing New Jersey v. Delaware*, 552 U.S. 597, ___, 128 S. Ct 1410, 1420-21 (2008). In order to give meaning to every word, the Special Master cannot ignore the drafters' decision to list not only the "interstate tributaries" but also "tributaries thereof," as being included in the definition of "tributary."

At the hearing on the motion to dismiss, Montana's counsel agreed with the important distinction between the defined term "Yellowstone River System" in Article V.A. and the defined term "interstate tributaries" in V.B. She stated:

> Clause V-B(1) is the second tier. It comes from the unused and unappropriated, not just unused but unappropriated waters of the Interstate tributaries. There again, you have another defined term. It's not the Yellowstone system. It's Interstate tributaries.
>
> That's where the storage was going to be, the big tribs. Those tribs. were going back and forth across the border. That's not what they were focused on. They wanted to build storage.

Tr. of Hrg. on Mot. to Dismiss at 63-64 (Feb. 3, 2009).

Thus, Montana's explanation at the hearing, consistent with Wyoming's position today, was that the words "interstate tributaries" in Article V.B., referred back to the definition of that term in Article II.F, and that the "interstate tributaries" were the "big tribs." However, Montana now contends that those two consecutive words are not meant only as they were specifically defined in Article II.F., but they should be separated, and the second word, "tributaries," should be interpreted to pull all the streams covered by the singular defined term "tributary" back within the term "interstate tributaries." Mont. Br. in Supp. of Mot. for Summ. J. at 10 n.2. However, this convoluted logic raises the question of why if the drafters wanted the defined term "interstate tributaries" to include the "tributaries thereof," they would not have simply said so right in that

definition of "interstate tributaries" by adding the phrase and "tributaries thereof" after listing the four rivers.[5]

Also, Montana's argument proves too much. If by using the plural of the word "tributary" in the phrase "interstate tributaries," the drafters incorporated everything they meant by the defined term "tributary," then the "interstate tributaries" must include not only the four rivers and the tributaries to those four rivers, but also every stream that contributes to the flow of the Yellowstone River. The simpler and better explanation is that the drafters wanted the term "tributary," when standing alone in the Compact, to mean any stream that contributed to the flow of the Yellowstone outside Yellowstone National Park (including the four named tributaries and tributaries to those "interstate tributaries), but when they used the term "interstate tributaries" in the Compact, they meant a lesser subset-- the four rivers they identified in that definition. YRC Art. II.F.

Montana contends that if Wyoming is correct, and the definition of "interstate tributaries" reads exactly as written to include the main stems of the four named rivers, then the tributaries to those four rivers are excluded from the Compact's coverage. *See* Mont. Br. in Supp.of Mot. for Summ. J. at 12-15 (Oct. 16, 2009). Montana claims that such exclusion of such tributaries would conflict with the Compact's purpose of covering all waters within the Yellowstone River System. *Id.* However, this argument suffers from a false premise. Wyoming's strict adherence to the plain terms of the definition of "interstate tributaries" may exclude tributaries to those tributaries from coverage under Article V.B., but it does not exclude them from coverage under the Compact, specifically Article V.A.

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[5] Another option available to the drafters to define "interstate tributaries" to include the tributaries thereof, would have been to keep the first "tentative" draft of the 1950 compact which defined the waters subject to the percentage allocation as the waters of the "Tongue River System" or "Powder River Basin." *See* Wyoming's Mot. to Dismiss Bill of Compl. at 20; Joint Appendix to Wyoming's Mot. to Dismiss at 0825.

If the Special Master is correct that Article V.A. creates a prior appropriation scheme that allows pre-1950 Montana water rights to call off post-1950 Wyoming rights under a general "doctrine of appropriation" under certain circumstances, then Wyoming agrees that such a call could be asserted under Article V.A. against a Wyoming irrigator who diverts from a tributary to the Tongue River or Powder River all the way to the headwaters of the surface water basins of those "interstate tributaries." As Wyoming conceded in its very first brief in this case, Article V.A. speaks to the continued enjoyment of appropriative rights to beneficial uses of "water of the Yellowstone River System." Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at 21 n.8 (April 2007). The Yellowstone River System is a defined term covering the Yellowstone River and all of its tributaries outside of Yellowstone Park "from their sources to the mouth of the Yellowstone River near Buford, North Dakota." The word "tributary" embedded in the definition of "Yellowstone River System" is also a defined term, which includes all streams that naturally contribute to the flow of the Yellowstone River, "including the interstate tributaries and tributaries thereof." YRC Art. II.E. Together, these terms ensure that the the broadest geographical array of pre-1950 surface water diversions receive recognition under Article V.A.

In fact, Wyoming that rejected the earlier versions of the Compact that had combined pre-1950 water rights with future rights for purposes of divertible flow allocation, and Wyoming also rejected Montana's efforts to subject pre-1950 rights to prior appropriation across state lines. *See* Wyoming's Mot. to Dismiss Bill of Complaint at 13-17 (April 2008); Wyoming's Reply Br. in Supp. of its Mot. to Dismiss Bill of Compl. at 9 (May 2008). As the negotiator seeking special protection for its pre-1950 rights in the final Compact, Wyoming would have been highly motivated to seek a very broad definition of waters of the "Yellowstone River System," and a

broad definition of the word "tributary," which was a key term in that definition, so that pre-1950 irrigators on *all* Wyoming streams contributing to the Yellowstone River, including irrigators diverting from the "interstate tributaries and tributaries thereof," would benefit from Article V.A. While it may not be appropriate to consider, in the context of a plaintiffs' summary judgment motion, this sort of probability from materials submitted in a different process involving Wyoming's motion to dismiss, the possibility that the history of Compact negotiations presented at trial after full discovery may overwhelm Montana's current interpretation should counsel against the premature granting of summary judgment. [6]

A compact, like any contract, is a negotiated document that may represent a compromise in which each party gives up some benefit in exchange for another. *Texas v. New Mexico,* 482 U.S. 124, 128 (1987). For example, Montana proposes that the drafters would not have intentionally left various tributary streams and high mountain reservoirs out of the percentage allocation of Article V.B. because such an allocation would have undercut their purpose of apportioning all of the post-1950 rights between the two states. Mont. Br. in Supp. of Summ. J. at 11-12. The unstated premise of this argument is that the drafters could not have been satisfied that the post-1950 rights in the tributaries to the "interstate tributaries" were adequately covered by Article V.A., but must have chosen to cover such rights within the divertible flow allocation

[6] During proceedings on Wyoming's Motion to Dismiss, Wyoming and Montana agreed to the authenticity of the documents in their joint appendix, although not necessarily to relevancy. *See* Case Mgt. Order No. 1 at 2 (Nov. 25, 2008). Given the time constraints of responding to Montana's current motion, which is for partial summary judgment for the plaintiff rather than dismissal, there has been no agreement on such materials. Wyoming does not agree that in the context of summary judgment, extrinsic evidence should be considered to aid in the determination of whether the Compact is unambiguous on any particular points. This is especially true when Montana filed its motion and brief just a short time before the Special Master intended to complete his first interim report, necessitating a rapid response from Wyoming if the ruling on this issue is to be included in that first report. Aside from having no chance to seek discovery from Montana and third parties, Wyoming could not have completed a thorough review of internal files and archives on this issue in the two weeks between service of the motion on October 16, 2009 and November 2, 2009.

of Article V.B. to make the Compact fair. However, examination of the facts on the ground in 1950 might reveal that the vast majority of the water rights that would ever garner wet water from the smaller tributaries had already been established by 1950, so there was no justification for the cost of measuring the few potential post-1950 headgates on these streams in both states, or the cost of measuring fluctuations of post-1950 small high mountain reservoirs for purposes of Article V.B.

A second possibility is that the Montana delegation felt that by including within the Article V.B. cumulative allocation its future post-1950 diversions from its own intrastate tributaries to the four rivers, it would push Wyoming's volumetric share of the cumulative divertible flow higher than would be the case if such tributaries in both states were not counted at all under Article V.B.

A third possibility, that is actually raised by the Compact minutes, is that the Montana delegation recognized that the final definition of "interstate tributaries" included only the main stems of the four rivers, that such a definition was detrimental to Montana's interests, but the delegation decided not to press the point. On December 7, 1950, as the drafters were settling on what would become the final definition of "interstate tributaries," Mr. H.W. Bunston, a member of the Montana delegation, expressed concern that the definition could allow Wyoming to dry up the "intrastate tributaries," presumably through Wyoming post-1950 diversions from those tributaries that were unrestricted by the percentage allocations of Article V.B. since those "intrastate tributaries" were not covered by the definition of "interstate tributaries." The minutes further reveal that Mr. Bunston stated his specific concern that such drying up of the "intrastate tributaries" would reduce water available in the "interstate tributaries." Nevertheless, the drafters did not change the definition to prevent this possible outcome resulting from the fact that the

definition of "interstate tributaries" did not include the intrastate tributaries to those tributaries. Joint Appendix to Wyoming's Mot. to Dismiss at 0042.

The point here is not that either party can definitively prove or disprove such possible bargaining at this stage of the case,[7] but rather that proper analysis of the Compact itself for ambiguity should not be swayed by assumptions about what the drafters "must" have intended when they defined "interstate tributaries."

In summary, Wyoming's textual argument that the "interstate tributaries" covered by Article V.B. consist of only the main stems of those four named rivers, does not lead to Montana's assertion that Wyoming's argument would take the tributaries to those rivers entirely out of the Compact's coverage. Rather, those tributaries to the interstate tributaries would be subject to the Compact, but only under Article V.A., not the divertible flow allocation scheme of Article V.B. Under Wyoming's interpretation, the only classes of diversions and surface features within the Yellowstone River System that the drafters excluded from *any* treatment by the Compact are the domestic and stock rights, and surface water devices and facilities, excluded under Article V.E.

Before leaving the four corners of the Compact to discuss extrinsic evidence that it claims to support its position, Montana emphasizes the Compact's express exception of the Little Bighorn River in parentheses after "the Bighorn River" within the definition of "interstate tributaries." Mont. Br. in Supp. of Mot. for Summ. J. at 10-11. However, when identifying the allocation percentages for the Powder River under Article V.B.4., the drafters inserted in parentheses after "Powder River," the phrase "(including the Little Powder River)." If the express exception of the Little Bighorn implies that the drafters intended to generally include all

[7] In the absence of discovery, Wyoming has yet to explore what documents may be in Montana's possession, or the possession of third parties, or what knowledgeable witnesses might say under oath, that could bear on the drafters' intent in defining "interstate tributaries."

tributaries within the definition of "interstate tributaries," it could also be said that the express inclusion of the Little Powder in Article V.B.4. implies the drafters' intent to generally exclude tributaries of the main streams from that definition.

These conflicting express exclusions and inclusions are of little weight. The drafters may have simply referred specifically to how they wanted the Little Bighorn and Little Powder Rivers handled under V.B. because of the potential for confusion resulting from the fact that both of these rivers had parts of their names in common with the rivers into which they flowed, and because they also both happen to be tributaries of the Yellowstone River that flow across state lines. It is not too surprising that the drafters made special mention of these two tributaries, making clear that the Little Bighorn should be treated like other tributaries to the "interstate tributaries" and not be combined with the Bighorn River for allocation under Article V.B., but further making clear that they wanted the diversions from the Little Powder included in the divertible flow summation, even though it was not an "interstate tributary," under the plain meaning of that definition.

In conclusion, the term "interstate tributaries" means what its definition says: the four named rivers, not the tributaries to those named rivers. Under Article V.B., in any particular water year, water that passes unused and unappropriated out the bottom of the main stems of the four named rivers, or which is diverted or stored from the main stems (and Little Powder) to post-1950 rights and thus is unused and unappropriated by pre-1950 rights, must be included in the divertible flow allocation. Water that never reaches these four rivers and the Little Powder, either because of upstream diversion, storage or use, or because of some natural process such as evaporation, transpiration, or infiltration into groundwater, is not included in the total divertible flow. If the Special Master disagrees with Wyoming's contention that he should deny Montana's

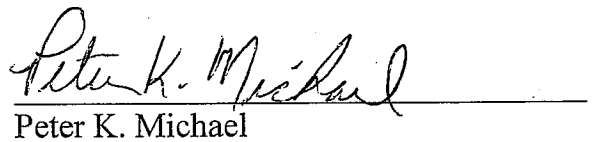
motion because it is not justiciable, he should nevertheless deny the motion because the term "interstate tributaries" has a plain meaning at odds with Montana's interpretation.

III. CONCLUSION

For the reasons stated above, the Special Master should deny Montana's motion for partial summary judgment. Consistent with its position on justiciability, Wyoming has not filed a cross-motion for summary judgment on the interpretation of "interstate tributaries" under Article V.B. Therefore, denial of Montana's motion will not bar the parties from litigating the issue if it is properly joined in a future case.

Dated this 2nd day of November, 2009.

THE STATE OF WYOMING



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the State of Wyoming's Brief in Opposition to Montana's Motion for Partial Summary Judgment was served by electronic mail and placing the same in the United States mail, postage paid, this 2nd day of November, 2009, to the following:

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