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.

WYOMING'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS BILL OF COMPLAINT

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May 2008

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WYOMING'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS BILL OF COMPLAINT

STATEMENT OF THE CASE

The State of Wyoming ("Wyoming"), by and through its Attorney General, Bruce A. Salzburg, respectfully submits this reply brief in response to Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint filed May 9, 2008, and the briefs of *amici curiae* the United States of America ("the United States") and the Northern Cheyenne Tribe ("the Tribe"), both filed May 16, 2008.

SUMMARY OF ARGUMENT

In its response to Wyoming's motion, the State of Montana ("Montana") contends that Section A of Article V of the Yellowstone River Compact[1] is a "depletion" provision, which obligates Wyoming to control its activities that could deplete river flows below a fixed quantity at the state line. Montana's Brief in Response ("Mont. Br.") at 11, 27-28. Montana bases this contention on the word "uses" in Section A of Article V. *Id.* at 28. When correctly parsed, however, the plain language of Section A does not support a depletion approach.

[1] Pub. L. No. 82-231, 65 Stat. 663 (1951) (Appendix A to Montana's Proposed Bill of Complaint) ("the Compact," cited below as "YRC").

Montana and the United States also argue that the phrase "shall continue to be enjoyed" in Section A should be read as an affirmative allocation or guarantee of water to satisfy each state's individual pre-1950 water rights. Wyoming, in contrast, contends that the drafters used that phrase simply to recognize these rights so that they remain in effect despite the division of water contained in Sections B and C. By recognizing these rights under the prior appropriation laws of each state, but not guaranteeing that water will be available to satisfy each of them, Section A contradicts the interpretation Montana, the United States and the Tribe suggest. Section A does not allow individual appropriators with pre-1950 water rights in Montana to make demands on post-1950 diversions or storage in Wyoming based on a non-existent guarantee.

As the Tribe admits, Sections A, B, and C are "inextricably linked." Tribe Br. at 9. Montana pre-1950 appropriations are, in fact, protected through the percentage allocation provisions of Sections B and C, which allow those pre-1950 appropriations to correct their deficiencies from water otherwise allocated to post-1950 Montana rights. On the Tongue and Powder Rivers, Section B allocates to Montana a minimum of 60% and 58% respectively of a running total of water available for post-1950 rights. Through its continuous rebalancing of post-1950 diversions in each state, the Compact ingeniously ensures that through any given date, Montana receives its

guaranteed percentage of "unused and unappropriated" water.

If Montana properly moves water from its post-1950 diversions to serve pre-1950 rights that are in need, the Compact automatically forces Wyoming to reduce its post-1950 diversions when necessary to keep Wyoming within its percentage limit. All flows in Wyoming that would cause Wyoming to exceed its share if diverted to post-1950 rights must be passed to Montana. Contrary to the arguments of Montana and the United States, the Compact does not allow Wyoming to divert and store water with impunity.

As all parties have agreed, the drafters anticipated that the states would build storage reservoirs. In fact, a primary motivation for the Compact was to remove impediments to reservoir construction. Such storage was the drafters' solution to a state's difficulty in supplying its pre-1950 rights because of timing of flows. Therefore, as long as an upstream state stays within its percentage allocation under Sections B and C, it is not responsible to solve the downstream state's timing issues by honoring direct demands by pre-1950 downstream appropriators. Such demands are not provided for in the Compact. The only Montana demand contemplated is one asserting that on a given date Wyoming has exceeded its cumulative annual percentage under Sections B and C. Montana asserts no such claim.

In discussing whether the drafters intended the Compact to regulate groundwater pumping, Montana and the United States improperly invite this Court to

rely on other language used by other states, in other compacts. The United States also argues that subsurface seepage from river channels that is later pumped from the ground is a "diversion" that is covered by the Compact. This interpretation is incorrect. The Compact only addresses surface water.

ARGUMENT

A. Montana's Depletion Interpretation of Article V, Section A Contradicts its Plain Meaning

Montana claims that Section A of Article V guarantees a specific quantity of water at its state line equal to what crossed that line in 1950, regardless of annual variations in surface supply. Mont. Br. at 11, 27-28, 29, 39-40. Montana bases this argument on the word "uses" in Section A. Wyoming submits that this is an improperly strained interpretation of the single sentence in Section A, which states:

> 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.

YRC art. V, § A.

The subject of this sentence is "rights," and the verb phrase is "shall continue to be enjoyed." The

remaining words simply modify these two key components.

The "rights" that will "continue to be enjoyed" are "appropriative" rights. They are simply water rights that follow the general principle of western water law – prior appropriation. *In re Adjudication of the Existing Rights to the Use of All the Water,* 55 P.3d 396, 399 (Mont. 2002); A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §§ 5:1, 5:5-5:8 (Thomson West 2007). "Appropriative rights," the subject of the sentence, is followed immediately by three phrases that modify it:

1. rights to beneficial uses of the water;

2. such water being of the Yellowstone River System; and

3. such rights existing in each "signatory State as of January 1, 1950."

The second and third modifiers may be disposed of simply. The second modifier provides that the "appropriative rights" are to water of the "Yellowstone River System," a term the drafters defined in Article II, D. The third modifier refers to rights "existing in each signatory State as of January 1, 1950." Therefore, as the United States agrees, "appropriative rights" as used in Section A are those established under the particular laws of each state as of January 1, 1950. This phrase negates any implication that under Section A the parties were to follow some new, tri-state prior appropriation law by which

interstate tributaries of the Yellowstone would be regulated without regard to state lines.

The verb phrase, "shall continue to be enjoyed," also confirms that the drafters intended Section A to continue intra-state regulation of appropriative rights on the rivers. As of 1950, both Montana and Wyoming regulated their appropriators' rights under their own prior appropriation laws and through their own regulatory authorities. There was no interstate law or regulatory body combining the laws of the three states to dictate how appropriative rights could "continue to be enjoyed." *Mettler v. Ames Realty Co.,* 201 P. 702, 704 (Mont. 1921).

The first modifying clause of "appropriative rights," is: "to the beneficial uses of the water." It is from this first modifying clause that Montana isolates the word "uses," and then converts it to the lynchpin of its depletion interpretation. Mont. Br. at 33. Under Montana's interpretation, the word "uses" is the subject of Section A, not part of a phrase that modifies its true subject. In order to make "uses" the subject, Montana argues that the drafters intended "uses" to be a noun synonymous with the concepts of quantity depleted or quantity consumed. *Id.* Montana thereby discards the subject of the sentence, "appropriative rights." "Uses" ceases to modify that subject.

However, "uses" has a much more logical role in the sentence that contradicts Montana's interpretation. The word "uses" does not stand alone, but is part of the phrase "beneficial uses," a well-understood

principle of appropriative rights water law. TARLOCK, *supra,* at § 5:30; WYO. STAT. ANN. § 41-3-101 (2007); MONT. CODE ANN. § 85-2-102 (2005). It denotes the *purposes* to which appropriators apply water that they divert. Montana, Wyoming, and other western states recognize water rights only for water applied to purposes or "uses" that the states consider beneficial. TARLOCK, *supra*, at § 5:66. The traditional core list of such purposes or uses includes irrigation, municipal, industrial, domestic and stock watering activities. *Id.*

The drafters' employment of the phrase "beneficial uses" in Section A is really of minimal consequence in interpreting that section. The purpose of most diversions from the Tongue and Powder Rivers since long before 1950 has been irrigation, a beneficial use of water under Wyoming and Montana law. *Id.*; *see also* Brief of the United States ("U.S. Br.") at 2-3, 29.

Irrigation is also a beneficial use under the Compact's own definition of that term. The drafters defined "beneficial use" "to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." YRC art. II, § H. Water diverted to irrigation, municipal, or industrial purposes is beneficially used under the Compact's definition, because water applied for those purposes is usually depleted to at least some extent when usefully employed by the activities of man. *See* Mont. Br. at 46.

The drafters did not modify "appropriative rights," with the phrase, "to beneficial uses," as Montana suggests, to establish a set quantity of water "used" or consumed by Montana appropriators in 1950. Rather, the phrase refers to the purposes to which appropriators must apply whatever quantity of water they are permitted to divert under their respective state's water law. The drafters merely confirmed that only legitimate state law appropriative rights – rights serving beneficial purposes – should be recognized in Section A and thereby incorporated by reference into the Compact.

There is a big interpretive difference between Montana's view that "uses" is the subject of Section A, and the positions of Wyoming and the United States that "appropriative rights" is the subject. It is axiomatic under western water law that an appropriative right is usufructuary, and not a traditional ownership right in the water itself. *Mettler v. Ames Realty Co.,* 201 P. 702, 704 (Mont. 1921); *Mitchell Irrigation District v. Sharp,* 121 F. 2d 964, 967 (10th Cir. 1941). A usufructuary right gives only a claim under which the appropriator can divert and apply water to a chosen beneficial purpose if and when water is available to satisfy the claim. TARLOCK, *supra,* at § 5:30.

When the drafters chose the language of Section A they simply recognized the existing usufructuary water rights in each state. They did not guarantee that any state would deliver a minimum quantity of water to match the amount that was "used" in a

downstream state in 1950. Therefore, this is not a depletion compact.

During negotiations in 1950, Montana attempted to amend Section A to provide for interstate demands "without regard to state lines," but the drafters rejected that attempt. Appendix to Wyoming's Motion to Dismiss ("Wyo. App.") at 64, 65. Montana criticizes Wyoming for providing detailed history of the Compact's drafting, contending that it is not "germane." Mont. Br. at 2, 19-23. On the contrary, those who actually drafted the Compact had the best grasp of what they intended. *New Jersey v. New York,* No. 120, 1997 WL 291594 at 24, 34 n.35 (U.S. Mar. 31, 1997), *received at* 520 U.S. 1273, *and reviewed at* 523 U.S. 767 (1998), *citing* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997). The drafters' formal vote against a depletion compact, their statement that they intended Section A to grandfather state law appropriative water rights, and their rejection of an interstate regulatory scheme proposed by Montana for Section A, are all important to the section's proper interpretation. Wyo. App. at 61-62, 65, 66; *Oklahoma v. New Mexico,* 501 U.S. 221, 235 n.5 (1991) (extrinsic evidence appropriate to interpret compact terms). Montana's brief is silent on the content of any of the negotiations between 1940 and 1950, perhaps because that content contradicts Montana's current interpretation of Section A.

B. Legislative History Supports Wyoming's Interpretation of Section A

Montana does cite Senator O'Mahoney's committee report, asserting that it supports Montana's depletion interpretation. Mont. Br. at 27-29. The senator's report is important, but it actually supports Wyoming's view of the Compact. The senator wrote:

> V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B.

Wyo. App. at 77.

Senator O'Mahoney observed that Section A recognizes each state's "appropriative rights" that existed as of January 1, 1950, not "uses" as Montana now argues. However, he also observed that Section A itself did not contain a mechanism to protect those rights outside of intra-state water law, and therefore created no basis for interstate regulation of supply to satisfy those appropriative rights. He explained that

if in the future the water supply became deficient compared to the 1950 supply, the drafters did not contemplate that the appropriators with pre-1950 rights could make demand on appropriators in an upstream state, and such a demand would have no legal standing. Instead, appropriators with pre-1950 rights suffering from deficiency would have to satisfy those rights from waters under Section B. Since no upstream demands are permitted, the Section B rights from which pre-1950 Montana appropriators could demand satisfaction would be Section B (post-1950) rights held within Montana.

C. Interstate Demands to Satisfy Individual pre-1950 Appropriations Violate the Compact's Integrity

The drafters rejected any interstate demands because the percentage allocation scheme of Section B and C obviates the need for such demands. The scheme fairly divides all the available surface water between the states each water year. On the Tongue and Powder Rivers respectively, Section B of Article V allocates Montana 60% and 58% of all water that either runs out of the rivers at the mouths, or is diverted or stored to post-1950 rights in both states. The percentage allocation is to be adhered to throughout the water year. If on any given date, Wyoming is in compliance with its allocation percentages, then at least 60% and 58% of the running total of the divertible flow will be available in Montana, undiverted and unstored by Wyoming. Montana

pre-1950 appropriators need only supplement their rights from this post-1950 water allocated to Montana under Section B in order to satisfy their claims.

Montana may say that its percentage of post-1950 water may not be available late in a water year because it has already allowed it to flow out the bottom of the river, released it from storage to post-1950 Montana appropriators, or diverted it to post-1950 Montana appropriators. Montana's problem, if there is one, is less about how the Compact equitably divides water, and more about timing of flows. However, the timing problem is not one contemplated by the Compact. As the United States agreed in its brief, the Compact adopts the "modified" (annual cumulative) divertible flow allocation. U.S. Br. at 19. It is not a daily divertible flow allocation under which demands can be made across state lines outside of the context of the Section B cumulative allocation.

The Compact's answer to Montana's timing complaint is storage. As Compact Commission Chairman Newell explained to Congress, construction of storage would fully protect pre-1950 appropriative rights. Wyo. App. at 83. Therefore, expecting that reservoirs would be built, the drafters did not provide for interstate demands to alleviate late-season deficiencies. The downstream states were expected to avoid timing issues by constructing storage or managing existing storage correctly.

Montana's interpretation that the Compact creates a cumulative percentage allocation, but also

allows demands by individual appropriators across state lines is an unfair one which was unacceptable to Wyoming's delegation. Wyo. App. at 63, 65. For example, according to Montana, one of its appropriators with a pre-1950 right who lacked natural flow from a river to fully satisfy that right late in the season could demand satisfaction from Wyoming storage, even if: (1) the Montana appropriator did not build the reservoir, (2) the Wyoming owner stored the water earlier in the year when other senior users on the river could not use it, (3) the amount stored did not put Wyoming beyond its cumulative percentage shares (40% or 42%) of Section B post-1950 divertible flow.

Under Montana's interpretation, its pre-1950 appropriators would have no incentive to build storage near the state line, or even in Wyoming as permitted specifically by Articles VII and VIII. YRC arts. VII and VIII (article VIII actually authorizes a downstream state to exercise eminent domain to build a reservoir in an upstream state). Moreover, Wyoming appropriators interested in constructing new reservoirs after 1950 would be discouraged from doing so if Montana could commandeer the water stored in them. If the drafters intended the Compact to allow Montana's pre-1950 appropriators to commandeer Wyoming storage through an interstate demand, it is unlikely they would have given Montana the right to build reservoirs in Wyoming.

As Wyoming conceded in its opening brief, if it has exceeded its Section B limitation on post-1950

diversions or storage at any time in the water year, it must immediately reduce its diversions for either direct use or storage, and allow enough water to pass to bring it back within its percentage, and thereby bring Montana back up to its percentage. Even then, Montana's demand would not come from one of its appropriators against Wyoming diverters. Its demand would be to enforce its percentage allocation governed entirely by Sections B and C. Upon such demand, both states would add up the total divertible flows and storage under the subsections of Section C, apply the percentages to the total, and determine if Wyoming is in compliance. To this day, Montana has never made such a demand under Sections B and C, and its Complaint does not address the mechanics of the Compact.

The Compact ingeniously self-corrects across state lines for drought years when post-1950 Montana diversions are regulated to satisfy Montana pre-1950 appropriative rights. When Montana satisfies deficiencies to its pre-1950 Montana rights by reducing diversions to its post-1950 Montana rights, by drawing on post-1950 storage, or by diverting water that would otherwise flow out the mouth of the river, this quantity is removed from the total annual divertible flow by definition. YRC art. V, § C (counting only post-1950 diversions and storage) This reduces the total annual divertible flow from what it would have been otherwise. If Montana corrects its pre-1950 deficiency at a time when Wyoming is up against its percentage limit of post-1950 diversions on the river,

Wyoming must reduce its post-1950 diversions to keep Wyoming in compliance. If, however, when Montana redirects water from its post-1950 diversions to its pre-1950 appropriations, Wyoming's total diversions and storage are less than its full percentage of post-1950 water, Montana's intra-state adjustment would move Wyoming closer to its percentage limit, which could have implications later in the year to Wyoming. In either case, Montana's in-state satisfaction of its pre-1950 rights *does* affect Wyoming.

If Montana cannot satisfy all of its pre-1950 rights by drawing on post-1950 diversions, storage or flow out of the mouth of the river even though Wyoming is in compliance, then Montana faces a timing problem from its failure to construct storage or manage its existing storage. If as Montana argues, it could turn to Wyoming appropriators to solve its timing woes, it could force Wyoming's diversions to post-1950 rights below Wyoming's guaranteed percentage allocations to those rights. Montana and the United States envision a double recovery when they assert that Montana is entitled to: (1) the protection of the balancing mechanism of percentage allocation, and (2) the right to make interstate demands by its individual appropriators even when the water is balanced. When read as a whole, the Compact fairly divides all surface waters between Montana and Wyoming only if the Court refuses to create a provision for interstate demands by individual appropriators. Wyo. App. 63, 65.

In summary, Section A of the Compact does not follow the depletion interpretation that would guarantee Montana a quantified or quantifiable flow in either river at the state line. Section A recognizes existing rights in each state and expects each state to continue to regulate those rights under its own laws. Montana and the United States err when they contend that Section A of the Compact both recognizes and "protects" pre-1950 rights. While that section recognizes those rights, protection occurs through the percentage allocation mechanism of Sections B and C, under which Montana makes no claim.

D. The Compact does not Cover Groundwater

The Compact in general, and Article V in particular, expressly covers only the diversion of surface water. Montana cites no indication in any of the voluminous minutes of the Yellowstone River Compact Commission meetings that the commissioners intended the Compact to cover groundwater. Presumably, if Montana had found any expressions of such intent, it would have mentioned it in its brief.

Instead, Montana argues that this Court should ignore the Compact's resounding silence about groundwater for two reasons. First, Montana contends that such silence is unimportant because this Court found in other interstate compact cases involving "depletion" compacts that groundwater was included. Mont. Br. at 51-53. Although the United States does not support Montana's contention that

the Compact restricts "depletions" by an upstream state and therefore covers groundwater, it argues that the Compact covers groundwater because groundwater pumping is a "diversion" from the rivers. U.S. Br. at 19, 23-26.

Montana's second argument in support of groundwater coverage is that in the absence of such coverage it would lack any recourse if Wyoming were to "dry up" the Tongue and Powder Rivers through groundwater withdrawals. Mont. Br. at 54. All of these arguments are unpersuasive.

1. The Court should not Rely on other Compacts to Determine if the Yellowstone River Compact Covers Groundwater

Wyoming agrees with Montana, the United States, Anadarko Petroleum Corporation, and with this Court's decisions, that the Republican and Arkansas River Compacts expressly cover all man-induced depletions in state line flows, and therefore include depletions traceable to groundwater withdrawals. *See* Anadarko Petroleum *Amicus* Brief ("Anadarko Br.") at 10-13; Mont. Br. at 50-53; U.S. Br. at 27-28; *Kansas v. Colorado,* 543 U.S. 86, 91 (2004); *Kansas v. Nebraska and Colorado,* 530 U.S. 1272 (2002). However, no part of the Yellowstone River Compact is based on the depletion theories that the Kansas, Colorado, and Nebraska drafters chose for their compacts. *See* Richard A. Simms, Leland E.

Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment,* 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] (1988); JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL INTERSTATE COMPACT 11-12 & n.19 (National Water Comm'n 1971); Floyd A. Bishop, *Interstate Water Compacts and Mineral Development* (Administrative Aspects), 21 ROCKY MTN. MIN. LAW INST. 801, 802 (1975) (identifying Republican and Arkansas as depletion compacts and identifying YRC as divertible flow compact).

The Pecos River Compact, on which Montana also relies, is another classic depletion compact that covers surface and groundwater sources of the Pecos in New Mexico. It states in part: "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." *Texas v. New Mexico*, 482 U.S. 124, 126 (1987), *quoting* Pecos River Compact art. III(a), 63 Stat. 159 (1949). Nothing approaching this language appears in the Yellowstone River Compact.

Not only did Montana, Wyoming, and North Dakota choose not to insert depletion provisions in the Yellowstone River Compact, they actually confirmed that choice by considering depletion provisions drafted by Engineering Committee Chairman Myers and affirmatively rejecting them. Wyo. App. 62-63. When Commission Chairman Newell reported to Congress that the commission had taken the

significant step of rejecting the depletion method in favor of the modified divertible flow method, he referred Congress to another compact that Wyoming had recently concluded, the Upper Colorado River Compact. Wyo. App. at 84. He noted that, although Wyoming had agreed to the depletion approach in that compact, it chose the divertible flow approach for the Yellowstone River Compact.

This Court has recently refused an invitation to discern the intent of compact drafters based on compacts between unrelated states involving different circumstances, even when those compacts contained similar language to the compact at issue. *New Jersey v. Delaware,* 128 S. Ct. 1410, 1424-25 (2008). So too, the Republican, Arkansas, and Pecos River Compacts negotiated by Kansas, Nebraska, Colorado, New Mexico, and Texas do not help to discern the intent of the Yellowstone River Compact's drafters, especially since no common language is used. *Id.*

By contrast, this Court held in *New Jersey v. Delaware* that an earlier compact between New Jersey and New York *did* help interpret New Jersey's intent in its later compact negotiations with Delaware. *Id.* at 1423-24. There, New Jersey used specific language in its New York compact that it failed to include in its later compact with Delaware. New Jersey then argued to this Court that its compact with Delaware should be interpreted to follow the concept embedded in that missing language. This Court disagreed, explaining that New Jersey could not expect an implied interpretation consistent with

language it had used in an earlier compact, when it could have simply used that very same language to make its intent plain in the later compact. *Id.*

That same logic applies here to the drafters' choice of language for the Yellowstone River Compact. Wyoming had used depletion language in its Upper Colorado River Compact shortly before the Yellowstone River Compact was negotiated. Upper Colorado River Compact, 63 Stat. 31; Wyo. App. at 61, 84. Yet it expressly rejected that concept and that language in the Yellowstone negotiations. Wyo. App. 61, 84. The Court should ask the same question in this case as it asked in *New Jersey v. Delaware* – if Wyoming wished to enter into a depletion or partial depletion compact with Montana (and thus a compact that covers all sources of water including groundwater) why did it fail to include depletion language that it knew intimately? Obviously, Wyoming did not include the language because it did not agree to the concept.

Montana's insistence on pounding a square peg from unrelated compacts into the round hole crafted by the drafters of the Yellowstone River Compact violates both the basic tenets of compact interpretation and explicit cautionary clauses contained in the very compacts to which Montana harkens. For example, the Republican River Compact states:

> The physical and other conditions peculiar to the Basin [of the Republican River] constitute the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes

> that this compact establishes any general principle or precedent with respect to any other interstate stream.

Republican River Compact art. I, 57 Stat. 86 (1943). *See also* Pecos River Compact art. XIII, 63 Stat. 159 (1949); Arkansas River Compact arts. II, VII B, 63 Stat. 145 (1949) (nearly identical language).

The drafters of the Republican, Arkansas, and Pecos River Compacts recognized the common sense notion that peculiar characteristics of those basins led to unique negotiated agreements, not form contracts. These compacts did not establish any precedent that should govern other interstate streams in those states, let alone the states of Wyoming, Montana, and North Dakota. *Id.*

The drafters of the Yellowstone River Compact similarly recognized that it was a bargained-for agreement based on unique history, geology, and geography. Article XIV of the Compact states:

> 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.

YRC art. XIV.

Relying on the other compacts to interpret this one would ignore the proscriptions of the drafters of those compacts, and the proscription against rewriting compacts to suit the Court's tastes rather than the drafters' intent. *See Oklahoma v. New Mexico,* 501 U.S. 221, 235 n.5 (1991) (Court's goal is to ascertain the intent of the drafters of a compact). The drafters of the Compact would likely be dismayed to learn that 58 years after they completed their lengthy negotiations, the depletion interpretation, and groundwater coverage based on that interpretation, was imported into the Compact based on compacts between other states, even though the drafters expressly rejected it by formal vote. It is remarkable that Montana asks this Court to ignore the Compact's negotiating history on the one hand, but on the other hand, asks it to rely on other states' compacts. Mont. Br. at 19-23, 49-54. If Montana had in 1950 wanted any of the various depletion compacts it now applauds, or any other basis for groundwater allocation, its delegation should have supported the Myers depletion draft that died when the commission adopted the divertible flow method. Wyo. App. at 62. It could also have sought to include specific groundwater provisions. It did not.

2. A Fairness Argument does not support Retroactive Insertion of Groundwater into the Compact

The second argument that Montana makes in favor of inserting groundwater coverage into the Compact is perceived fairness. Mont. Br. at 54. It

asserts that if this Court does not interpret the Compact to include groundwater pumping, Wyoming could with impunity dry up rivers through extraction of interconnected groundwater. *Id.* Even if this were so, parties are bound by contracts even if they subsequently perceive that they made a bad bargain. Moreover, Montana's premise that the Compact's exclusion of groundwater would leave it helpless fails.

A compact is a contract and a federal statute. *Texas v. New Mexico,* 482 U.S. 124, 128 (1987). It establishes rights and obligations of the parties with respect to the subjects it covers. Through explicit language, the Yellowstone River Compact comprehensively regulates surface water allocations except for a few express surface water exceptions. This preempts one of the parties from asserting claims for relief regarding surface water independent of the Compact, unless one of the exceptions applies. *English v. General Electric Co.,* 496 U.S. 72, 79 (1990), *citing Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Thus, Montana could not assert a claim to equitably apportion the "Yellowstone River System," a system of surface waters, outside of the bounds of the Compact, because the drafters and Congress preempted the field.

Montana could, on the other hand, seek equitable apportionment of groundwater assuming it could establish a viable claim. States may refuse to enter into any compact at all, and may simply rely on this Court to equitably apportion uncompacted interstate

waters if a controversy arises that motivates one state to bring suit.

During the course of the Yellowstone River Compact negotiations, several statutory deadlines expired when the drafters could not reach agreement, and this was perfectly permissible as an aspect of their freedom to contract. Even if states decide to enter into a compact, they are free to construct it as they see fit. In fact, states act sensibly when they do not allow negotiations to become bogged down on issues which they do not deem important. When the drafters finally did conclude the Compact, they excluded several surface water rights from its coverage – stock watering and domestic withdrawals, and rights to the Yellowstone River within Yellowstone National Park. YRC art. IV, § E; art. II, § D. As noted by the United States, the drafters also avoided the potentially complicated issue of reserved water rights for the Northern Cheyenne Reservation on the Tongue River and for the Crow Reservation on the Big Horn River. U.S. Br. at 6, *quoting* YRC art. VI.

Since the Compact's language is so clearly limited to surface waters, the drafters did not need to expressly exclude groundwater. Their express rejection of depletion approaches, together with their failure to reference groundwater, negates the inference that they incorporated groundwater by silence. Yet Montana and the United States contend that this Court should write groundwater coverage into the Compact.

The United States argues that various state courts developed common law theories before 1950 to resolve disputes involving groundwater withdrawals that could affect surface water flows – so-called interconnected or hydrologically connected groundwater. U.S. Br. at 26-27. While courts often have a duty to apply the common law to resolve disputes over water law issues that are not covered by statute, that is a very different charge than that faced by the drafters of the Compact. As freely contracting parties, Montana, Wyoming and North Dakota did not enter compact negotiations with an obligation to interpret the common law. They were free to do nothing at all, or to cover only particular issues at their discretion. The United States errs when it implies that the drafters must have intended to silently cover groundwater in the 1950 Compact simply because courts had been deciding groundwater issues for some time.

On the contrary, the existence of the common law background, together with geological realities, supported the drafters' decision not to even discuss the subject of groundwater during drafting sessions or commission meetings. In a 1940 study, the Bureau of Reclamation discovered that the Powder River Basin had minimal potential for irrigation from groundwater, which was not a surprise given the fine clay soils that give the Powder its name. Wyo. App. at 31-32. Ranchers had erected many small dams in the drainage to catch rainwater for livestock because of the poor potential for shallow groundwater. It is perilous

to assume, as do Montana and the United States, that the Compact Commission lacked good reason to select a divertible flow compact containing careful language that limited its coverage to surface flows.

Now, Montana contends that groundwater development has become a problem. But instead of asserting a claim to equitably apportion that resource between the states, it asks this Court to insert a depletion interpretation into this Compact so that groundwater is covered. Mont. Br. at 49-54. While the United States does not adopt Montana's depletion interpretation, it argues that the Compact covers hydrologically connected groundwater through its definition of the term "diversion." This argument fails on closer analysis.

Montana's groundwater allegations involve post-1950 development in Wyoming, which means that if the Compact covers groundwater, that groundwater would be allocated between the states under Sections B and C as post-1950 water. However, the Compact does not function with respect to post-1950 groundwater pumping because measurement of the equivalent contemporary stream diversion is not feasible. Surface water "diversions" can be measured at the moment the water leaves a stream through a headgate or pump, and that measurement can be immediately inserted into the divertible flow calculation under Section C. The tabulation of surface water diversions to ensure compliance with the Section B percentages *through a given date* in the water year, can be accomplished.

By contrast, groundwater pumping impacts the channel of a river, if at all, by either drawing water away from the river underground and diffusely, or by intercepting water that would otherwise percolate underground and diffusely into the stream channel. Laura Ziemer, Eloise Kendy, and John Wilson, *Ground Water Management in Montana: On the Road From Beleaguered Law to Science-Based Policy,* 27 PUB. LAND & RESOURCES L. REV. 75, 77 (2006). Although the instantaneous withdrawal from the well can be measured, the attenuated impact on surface flows cannot be readily measured. It cannot be assumed that water pumped from a well came immediately from the channel or would have made it to the channel that day, that year, or even that century. The timing depends on many variables.

The divertible flow allocation scheme of Sections B and C requires the authorities in both states to identify when water is diverted from the river channels. Water diverted on September 30 counts in one water year, while water diverted on October 1 counts in the next. If, as the United States argues, groundwater seepage is countable as a "diversion" under what it claims is a "capacious definition" in the Compact, the authorities would not know when interconnected water pumped from a well in the river basin was actually "taken or removed" from the river channel. Also, unless the authorities knew that water pumped from a well on a given date would have reached that channel in the absence of pumping on that very day, they could not include it in the running

calculation of divertible flow as of the "given date" under the United States' interpretation.

Interminable calculation problems would arise if this Court were to force groundwater into this Compact's allocation scheme designed for surface water. It is inconceivable that if the drafters intended the Compact to cover groundwater they would have overlooked in the text the many variables and assumptions that would be necessary to determine how much groundwater drawn from a well had seeped from the channel of the river, and when it had seeped from the channel.

The United States improperly stretches the drafters' definition of "diversion" beyond its practical intent of covering only the measurable taking or removing of surface water from the rivers and tributaries through headgates and pumps. Montana's legislature understood that diversions to post-1950 water rights to be measured under Section B of Article V were diversions of surface water. In 1953, the Montana legislature provided that its post-1950 appropriators that divert Yellowstone water through a "ditch" "or other means of diversion" must measure that water with a "weir," "or other measuring device." MONT. CODE ANN. § 85-20-105 (2005) (passed in 1953). Ditches remove surface water from rivers and tributaries, and weirs are surface water measuring devices. Under the concept of *ejusdem generis,* this Montana statute would not be broadly interpreted to cover groundwater well pumping and meters measuring such pumping. *Walter v. Bd. of R.R. Comm'rs,* 457

P.2d 479, 481-82 (Mont. 1969). The Montana legislature did not need to require its post-1950 appropriators to measure groundwater because the Compact does not cover groundwater.

The Compact's failure to cover groundwater does not prevent Montana from obtaining redress for harm it can prove Wyoming has caused through its groundwater activities. First, Montana can ask Wyoming to negotiate an amendment to the Compact to add the complicated groundwater provisions, assumptions and protocols that would be necessary to make the divertible flow scheme function for groundwater. Second, Montana can ask Wyoming to agree to a separate compact covering groundwater, which is not tied to the Compact's existing divertible flow concept. Finally, if Wyoming is unwilling to negotiate with Montana, Montana can bring an equitable apportionment case in this Court to apportion groundwater. However, Montana cannot properly invite this Court to expand the existing Compact to include groundwater.

CONCLUSION

Wyoming respectfully requests that the Court dismiss Montana's Bill of Complaint.

Respectfully submitted,

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May 2008