No. 137, Original

In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

MONTANA'S EXCEPTION AND BRIEF

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MONTANA'S EXCEPTION

The State of Montana excepts to the First Interim Report of the Special Master with respect to the following conclusions on Wyoming's Motion to Dismiss:

1. That Montana has no claim under the Yellowstone River Compact for Wyoming's depletion of flows on which Montana depended at the time of the Compact, where those depletions result from new consumption of irrigation water on lands in Wyoming that were being irrigated at the time of the Compact; and

2. That Wyoming's Compact obligations are contingent upon Montana's actions.

Respectfully submitted,

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BRIEF IN SUPPORT OF MONTANA'S EXCEPTION

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INTRODUCTION

This case seeks to enforce the Yellowstone River Compact ("Compact") with respect to the Tongue and Powder Rivers, two tributaries of the Yellowstone River that flow north from Wyoming into Montana. Montana alleges that Wyoming has violated the Yellowstone River Compact by failing to deliver Montana's allocation of water in those rivers. The Bill of Complaint alleges four ways in which activities in Wyoming deplete the rivers in violation of the Compact: by new water storage, by new irrigated acreage, by new groundwater pumping and by new consumption of irrigation water on previously irrigated acreage, all since January 1, 1950.

The Special Master has recommended that Wyoming's Motion to Dismiss Montana's Bill of Complaint be denied, but he has concluded that the last listed activity – new consumption of irrigation water on lands in Wyoming irrigated under pre-1950 rights – cannot lead to a violation of Montana's Compact rights. As will be shown below, this conclusion is inconsistent with the language of the Compact and conflicts with the Special Master's reasoning with respect to the other three actions in Wyoming that he held were actionable under the Compact.

The Special Master has also concluded that Montana, the downstream State, will be required to impose priority water rights administration on its own water users and, implicitly, make a formal demand on Wyoming, before Wyoming will be required to comply

with the Compact. As will be shown, there is no basis in the Compact's language or in this Court's case law for imposition of such conditions on Montana's rights.

While the recommendations of the Special Master are correct in many regards, the conclusions to which Montana excepts would force Montana to accept a diminishment of its rights under the Compact and would place additional and unprecedented burdens on Montana's ability to enforce its rights.

STATEMENT

A. Background

The arid lands of the upper Great Plains are in many cases valueless for agricultural purposes without water for irrigation. Common law principles of western water law developed around the concept that a water right is acquired by diversion of water from a stream and application of that water to a beneficial use. Among appropriators, the first in time is the first in right.

This case involves the physical reality that an upstream State – in this case Wyoming – can increase its uses of water in ways that so deplete a compacted stream that the downstream State – Montana – does not receive, for distribution to its water users, the amount of water guaranteed in the Compact. In general, an upstream water user has the physical ability to deprive downstream users of flows to which the

downstream users are entitled by taking more water from the stream than the upstream user is allowed to take. The Bill of Complaint alleges that Wyoming is doing just this by taking and depleting excessive amounts of water from the Tongue and Powder Rivers.

In 1950, when Montana, Wyoming, and North Dakota adopted the Yellowstone River Compact, the prevalent method of irrigation was flood irrigation. This method of irrigation relies on gravity flow of water across a field to provide water to crops. Under flood irrigation, typically only 65% of the water applied to the field is actually consumed by evaporation or transpiration. The remaining 35% returns to the stream and is available for re-application by water users downstream. As conditions become drier during the summer months, it is typical for an irrigation stream to contain little water other than return flow.

More modern irrigation procedures, such as application of water by sprinkler, allow crops to consume more of the water applied. Use of such procedures can reduce the percentage of water returned to the stream for re-use from 35% to 10% or less. As a result, return flows on which downstream users rely can be reduced or even eliminated entirely. Montana's exception presents the question whether Wyoming, as the upstream State, can allow its water users, by adoption of more consumptive irrigation methods that reduce or eliminate return flows, to deplete the Tongue and Powder Rivers to an extent that denies

Montana its share of the waters of these streams allocated under the Yellowstone River Compact.

B. The Yellowstone River Compact

The Yellowstone River Compact was negotiated between the States of Montana, Wyoming and North Dakota ("States") as a means of apportioning the waters of the Yellowstone River Basin and, more particularly for purposes of this case, the Tongue and Powder Rivers, interstate tributaries of the Yellowstone River that begin in Wyoming and flow into Montana. The Compact was ratified by the States and Congress in 1951. 65 Stat. 663. The complete text of the Compact is attached to the First Interim Report ("FIR") as Appendix A.[1]

The Yellowstone River runs generally northeast for almost 700 miles from its headwaters in Wyoming through Montana and into North Dakota to its confluence with the Missouri River soon after crossing the North Dakota border. FIR 3. The Yellowstone River has four principal tributaries, which begin in Wyoming and flow north into Montana, two of which are the subject of this original action. *Id.,* at 3-4. The First Interim Report describes the major geographical

[1] Citations to the Compact will be by reference to the copy attached as Appendix A to the First Interim Report. The citations will be abbreviated "Compact at" followed by the page number of Appendix A to the First Interim Report.

features of the Basin, FIR 3-4, and contains a map of the Basin as Appendix C.

C. Prior Proceedings in This Case

Montana filed its Motion for Leave, Bill of Complaint and Brief in Support in January 2007. The Bill of Complaint sought a declaration by the Court that the Compact recognizes and protects actual uses of water at the time of the Compact (pre-1950 uses), and provides an enforcement mechanism if post-1950 development in Wyoming adversely affects pre-1950 uses in Montana. The Bill of Complaint included four counts describing four different types of activities in Wyoming that may violate the Compact if they deplete the water supply necessary to satisfy pre-1950 uses in Montana:

1. New and expanded water storage (¶ 9);
2. New irrigated acreage (¶ 10);
3. New groundwater pumping (¶ 11);
4. New consumption of water on existing irrigated acreage (¶ 12).

The Court granted the Motion for Leave on February 15, 2008. *Montana v. Wyoming & North Dakota*, 552 U.S. 1175 (2008).

At the same time, the Court allowed Wyoming to file a motion to dismiss. *Ibid.* Wyoming did so, and, in its supporting brief, claimed that the Compact did not require it to deliver any quantity of water at the state

line for pre-1950 uses in Montana, and that the Compact's only purpose was to allocate water that was unused and unappropriated as of 1950. See Wyoming's Motion to Dismiss Bill of Complaint 36-37. Montana submitted a brief in opposition, and amicus briefs were filed by the United States and the Northern Cheyenne Tribe. The Court then appointed Barton H. Thompson, Jr., as Special Master. 129 S.Ct. 480 (October 20, 2008).

The Special Master heard oral argument on the Motion to Dismiss and entertained subsequent motions to intervene by Anadarko Petroleum Corporation, as well as a motion for partial summary judgment by Montana on a discrete question of whether the Compact included tributaries of the interstate tributaries. The Special Master's rulings on these motions are contained in the First Interim Report, FIR 90-115, and are not at issue in Montana's Exception. The Special Master has recommended that Wyoming's Motion to Dismiss be denied. Montana supports that recommendation, but seeks a ruling from this Court on two points set forth in Montana's Exception, as more fully described below.

D. The First Interim Report of the Special Master

In denying the Motion to Dismiss, the Special Master rejected Wyoming's view that the Compact only allocates water that was unused and unappropriated as of 1950, and does not recognize or protect

pre-1950 uses in either State. Rather, the Special Master ruled that the Compact "protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950." FIR 89, ¶ 1.

Nonetheless, there are two aspects of the First Interim Report that Montana challenges in this Exception. First, the Special Master concluded that, contrary to Paragraph 12 of Montana's Bill of Complaint, increased consumption in Wyoming on pre-1950 irrigated acreage cannot violate the Compact. Paragraph 12 alleges: "Since January 1, 1950, Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased in violation of Montana's rights under Article V of the Compact." In response to this claim, the Special Master concluded:

> 8. Article V(A) of the Compact does not prohibit Wyoming from allowing its pre-1950 appropriators to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands that they were irrigating as of January 1, 1950, even when the increased consumption interferes with pre-1950 uses in Montana.

FIR 90, ¶ 8.

Second, the Special Master also concluded that Wyoming's obligation to deliver water at the state line is contingent upon actions by Montana:

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

Id., at 89, ¶ 3.

Montana challenges Conclusion No. 8 because it has the potential to prevent Montana from conducting discovery and presenting evidence on some aspects of its Paragraph 12 claim unless Conclusion No. 8 is overruled by the Court. Montana challenges Conclusion No. 3 because, unless overruled by the Court, it has the potential to place additional burdens on Montana that are not expressed in the Compact or recognized in the Court's precedents.[2]

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[2] Although Montana's arguments in this Brief are necessarily founded on the protections afforded by Article V(A) of the Compact, Montana has pleaded its Bill of Complaint in broad terms that go beyond Article V(A). Montana expressly maintains its claims that go beyond Article V(A). See FIR 93-95 (reserving any ruling on the scope of the Bill of Complaint beyond Article V(A)).

SUMMARY OF ARGUMENT

1. The States entered into the Yellowstone River Compact to attain an equitable allocation of the waters of the Yellowstone River and its tributaries, and to eliminate "all causes of present and future controversy" between the States and their respective citizens. Compact at A-1. They accomplished the equitable allocation by adopting a three-tier system in which all "beneficial uses" existing in the three States as of January 1, 1950 "shall continue to be enjoyed," with any remaining water not needed to satisfy pre-1950 rights dedicated first to supplemental water for pre-1950 rights and last to the States according to a percentage allocation. Compact, art. V(A) and (B), at A-7.

The Compact is an enforceable agreement among the States, not among their individual water users. The Special Master correctly found that it obligates Wyoming to deliver at the state line a block of water sufficient under the stream conditions then in existence to satisfy Montana's pre-1950 rights. FIR 21-22. Montana's Bill of Complaint does not seek an order from this Court directing Wyoming to meet its obligation in any particular way. The means by which Wyoming delivers the water are of no consequence; what is important to Montana is that Wyoming meet its obligation to Montana under Article V of the Compact.

The Special Master correctly interpreted the Compact to allow Montana to enforce the allocation

when activities in Wyoming reduce stream flows below levels needed to satisfy Montana's pre-1950 rights. FIR 16-37. He found that the Compact language clearly and unambiguously protected Montana's right to insist that its pre-1950 uses "continue to be enjoyed," a term whose "natural meaning" protected them from interference by Wyoming's post-1950 actions. FIR 16-17.

The Special Master then correctly applied the clear Compact language to hold that Montana could base a cause of action for violation of its pre-1950 Compact rights on new irrigation activities in Wyoming, FIR 40-41, new expansion of storage in Wyoming, *id.,* at 41-43, and new pumping of groundwater that, by virtue of hydrological connection to the stream, reduced streamflow, *id.* at 43-54. With respect to each activity, the Special Master did not require that there be specific language in the Compact allowing Montana to challenge the activity. Rather, he concluded that the Compact's requirement that Montana's pre-1950 rights "continue to be enjoyed," was sufficient to support Montana's claim.

The Special Master erred, however, in his consideration of the role of increased consumptive use on lands irrigated under pre-1950 rights. With respect to this aspect of Montana's claim, the Special Master thought that the right to increase consumptive use was an attribute of the pre-1950 Wyoming right that was protected by the Compact. He reached this conclusion, not by applying Compact language but by overlooking it in favor of an ultimately inconclusive

survey of the common law of prior appropriation in Wyoming, Montana, and the West. In doing so, he misunderstood the nature of Montana's claim and disregarded the Compact's plain language.

Montana does not seek an order from this Court that Wyoming curtail more efficient irrigation practices. Wyoming can allow, or even encourage such practices, as long as Wyoming accounts for their effect on stream flows on which Montana relies for its pre-1950 rights, and makes up any shortfall in some other way.

The plain language of the Compact protects Montana's right to object to increased depletion of the stream. The Compact protects the enjoyment of pre-1950 "beneficial uses" in the three signatory States. "Beneficial use" is defined in the Compact in terms of depletion of the water supply. Thus, regardless of any contrary state law rules, Wyoming's pre-1950 rights are protected up to the extent of their pre-1950 consumption, but no more.

The Special Master erred when he applied a different analysis to this particular Wyoming method of increasing depletions. This Court should act to correct this error.

2. For much the same reason, the Special Master erred in suggesting that Montana could not enforce its Compact rights against Wyoming without first taking intrastate enforcement actions to satisfy

its pre-1950 rights. The Compact contains no such condition precedent to an enforcement action.

The Special Master correctly interpreted the Compact to require the delivery at the state line of sufficient water to satisfy Montana's pre-1950 uses. Actions taken or not taken in Montana cannot be an excuse for Wyoming's failure to do what the Compact requires. The Special Master's conclusion in this regard was erroneous.

ARGUMENT

I. Standards for Compact Interpretation

A congressionally approved interstate compact is a law of the United States. See *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (*citing Texas v. New Mexico,* 482 U.S. 124, 128 (1987)). As a result, the customary rules of statutory construction apply. *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (*citing New Jersey v. New York*, 523 U.S. 767, 811 (1998)). As with other federal laws, if the text of the Compact is unambiguous, it is conclusive. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 690 (1995) ("unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms") (*citing Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). In *New Jersey v. Delaware* the Court observed:

> Interstate compacts, like treaties, are presumed to be the "subject of careful

> consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties."

552 U.S. at 615-616 (*quoting Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). In interpreting the Compact, the Court should give effect to every clause and every word. *Id.*, at 610; see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

On the other hand, if the language of the compact is ambiguous, other reliable indications of the parties' intent may be taken into account. *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5. Those sources include legislative history and other extrinsic material, including evidence regarding the negotiating history of a compact. *Ibid.*

II. The Compact Does Not Allow Wyoming to Deplete Flows on Which Montana Depended at the Time of the Compact

A. The Compact Created a Permanent Allocation Among the States

It is a fundamental principle that a compact is an enforceable allocation of water between States, not between individual users. Ever since *Hinderlider v. La Plata River & Cherry Creek Co.*, 304 U.S. 92 (1938), it has been abundantly clear that individual water users are subject to a State's compact entitlement, not

vice versa. *Id.,* at 106-107. In that case, a ditch company sought to enjoin the Colorado State Engineer from honoring a rotation agreement contained in the La Plata River Compact on the grounds that the rotation interfered with its rights under Colorado law. This Court unanimously held that a compact apportionment binds the private water users of each State. *Id.,* at 106. Yet, as explained in more detail below, the First Interim Report allows the allocation between Wyoming and Montana on the Yellowstone River to be changed by individual water users who implement changes in irrigation practices that have the effect of reducing flows below the amount needed to satisfy Montana's Compact allocation. For example, Wyoming irrigators would be allowed by the Special Master's ruling to increase their consumption, thereby reducing the return flows on which Montana depends to zero.

It is clear from *Hinderlider* that a compact creates an allocation, or method of allocation, that will apply according to its terms during the life of the compact. The Yellowstone River Compact is not time-limited. Therefore, the allocation methodology of the Yellowstone River Compact is permanent as long as the Compact remains in effect. This does not mean that the same amount of water is due at the state line on every day, of course, but only that the methodology that requires a certain amount of water to be at the state line depending on water supply conditions, is permanent. But this is exactly what the Special Master proposes to allow Wyoming to change unilaterally.

The notion that a State may unilaterally change the amount of water it is to receive under an interstate compact is an unprecedented and novel proposition, to say the least. *Hinderlider* directly held to the contrary. 304 U.S. at 106-107 (explaining that a State's water users are bound by a compact allocation). In *Kansas v. Nebraska & Colorado,* Special Master McKusick addressed this notion in response to the suggestion by Nebraska that it could deplete the compacted waters of the Republican River by groundwater pumping without accounting for that pumping under the Republican River Compact:

> The Compact endeavors "to provide for an equitable division of such waters," see Art. I, and neither the parties to the Compact, nor the Congress and the President who approved it, could have intended that an upstream State could, with impunity, unilaterally enlarge its allocation by taking some of the virgin water supply before it reached the stream flow.

First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) 21 (2000), *Kansas v. Nebraska & Colorado*, No. 126, Orig.[3] On the basis of Special Master McKusick's First Report, the Court denied Nebraska's Motion to Dismiss. 530 U.S. 1272 (2000).

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[3] The Republican River Compact employs the same concept as the Yellowstone River Compact in its definition of "Beneficial Consumptive Use," which is defined to be "that use by which the water supply of the Basin is consumed through the activities of man." 57 Stat. 86, 87 (1943).

The *Hinderlider* and *Kansas* cases stand for the accepted principle that a State and its water users cannot unilaterally change a State's allocation under a congressionally approved interstate compact. The upstream State is simply not allowed to deplete the downstream State's equitable share of the compacted river contrary to the compact. Yet that is what the Special Master has recommended.

The Special Master's allowance of increased consumption on pre-Compact irrigated lands in Wyoming to the detriment of Montana's pre-1950 allocation is at odds with all of the precedents of the Court. The Special Master's ruling would, in effect, allow the consumption of water that has previously taken place in Montana to be unilaterally transferred upstream to Wyoming. Since there is a direct relationship between consumption of water on irrigated lands and crop yields, this amounts to transferring crop production from Montana to Wyoming. See, *e.g.,* Third Report of the Special Master 47-48, 64 (2000), *Kansas v. Colorado*, No. 105, Orig. (recognizing the direct relationship between crop yield and water consumption based on expert evidence). Thus, the Special Master's recommendation would undo the negotiated apportionment among the States.

B. The Plain Language of Article V Limits Wyoming's Consumption

The Compact states four motivations of the signatory States: (1) considerations of interstate comity;

(2) the desire to remove all causes of present and future controversy; (3) the desire to provide for an equitable division and apportionment of water; and (4) the desire to encourage beneficial development and use. See Compact, at A-1.

To this end, the drafters set up a three-tiered system of apportionment in Article V: existing uses and two types of new uses. Pre-1950 beneficial uses are protected in Article V(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." *Id.,* at A-7. Article V(B) then apportions the "unused and unappropriated waters" of the interstate tributaries. *Id.,* at A-7 to A-8. The "unused and unappropriated" waters are divided into supplemental uses and uses on new lands or for other purposes. *Id.,* at A-7.

A comprehensive methodology thus emerges from the structure of the Compact itself: Pre-Compact rights in all three States take first priority. Each State's right is protected in whatever amount was being put to actual beneficial use as of January 1, 1950. Any water available after pre-1950 rights are satisfied may be used under Article V(B), first for new supplemental water supplies for the rights described in Article V(A), and the remainder as divided by specific percentages for uses on new lands or for other purposes. The Special Master adopted this reading

of the Compact, rejecting Wyoming's contrary arguments. FIR 18-19.

Consistent with this methodology, the States are prohibited from depleting the apportioned pre-Compact water supply in two ways: First, Article V(A) provides a mandatory directive that such rights "*shall* continue to be enjoyed." Compact at A-7 (emphasis added). As the Special Master explained:

> The word "enjoy" means "[t]o have the *undisturbed use* or possession of something, particularly real property." Webster's New World Law Dictionary 133 (2006) (emphasis added). . . . Montana water users would not "continue to . . . enjoy[]" pre-1950 water rights, under the common and straightforward meaning of those words, if Wyoming were free to allow new diversions or withdrawals that interfere with pre-1950 Montana appropriations.

FIR 17 (*quoting* Article V(A)). It is only because additional withdrawals cause additional depletions that they are forbidden.

Second, the Compact explicitly recognizes that the pre-Compact "beneficial uses" that are protected by Article V(A) involve depletion of the water supply. The Compact makes this clear by defining the term "beneficial use" as "that use by which the water supply of a drainage basin is ***depleted*** when usefully employed by the activities of man." Compact, art. II(H), at A-4 (emphasis added). Thus, Congress and the States recognized the physical reality that the beneficial use of water necessarily involves depletion

(consumption) of water in the process of beneficial use. Any action by Wyoming that deprives Montana of the supply which existed in 1950 violates Article V(A). Thus, Wyoming's pre-1950 rights are protected to the extent of their pre-1950 depletions, but no further.

Despite the foregoing, the Special Master concluded that "[t]he Compact's language says nothing one way or the other regarding the right of a pre-1950 Wyoming appropriator to increase the efficiency or intensity of his or her 'beneficial use' subsequent to the passage of the Compact." FIR 61. This conclusion is hard to reconcile with the central role that "beneficial use" plays in Article V(A) and the unambiguous definition of that term that ties it to depletions. "Increasing efficiency" is a policy description for increasing depletions. See *id.*, at 54-55, 87-88 (describing purportedly positive effects of improved irrigation practices). Policy considerations have no place in compact interpretation. See *New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite.") (quotation marks and citation omitted).

In sum, the Compact prohibits the consumption and depletion of waters by one State that are apportioned to another State under Article V. Thus, Montana cannot increase its consumptive use (depletions) and, on that basis, call upon Wyoming to provide more water to Montana under the guise of uses at the

time of the Compact. By the same token, Wyoming cannot increase the consumptive use (depletions) associated with its diversions at the time of the Compact if it would decrease the flows on which Montana was depending for its uses at the time of the Compact, thus violating Article V(A). There is no principled basis on which to distinguish the increased consumption claim from the other three claims that the Special Master accepted. The Compact "provides block protection for all existing, pre-1950 appropriations," FIR 21, and any interpretation that allows an upstream State to interfere by any means with pre-1950 rights in a downstream State must be rejected.

C. The Special Master's Analysis of New Consumption on Existing Irrigated Acreage Is Inconsistent With His Overall Interpretation of the Compact

In explaining the overall function of the Compact, the Special Master noted that protection of pre-1950 appropriations under Article V(A) "requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not ***depleting*** the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana." FIR 29 (emphasis added). Likewise, the Special Master summarized Article V(A) by declaring that it "clearly and unambiguously protects pre-1950 appropriative rights in Montana from new ***diversions or withdrawals***

in Wyoming that prevent sufficient water from reaching Montana." *Id.*, at 37 (emphasis added).

The Special Master applied these rules with a steady hand in rejecting Wyoming's motion with respect to irrigation of new acreage, construction of storage, and pumping of at least some types of groundwater hydrologically connected to the surface water. In each case, he held that upon proper proof Montana could require Wyoming to curtail or otherwise account for post-1950 changes in water use to protect Montana's pre-1950 allocation. When it came to Montana's Paragraph 12 claim, however, he disregarded the plain meaning of the Compact as he had previously determined it and adopted a rule based on an inconclusive survey of the law of prior appropriation.

The Special Master accurately described the nature of Montana's Paragraph 12 claim as follows:

> Montana's final allegation highlights the difference between the amount of water diverted for an off-stream use and the amount consumed by that use. Most water users consume only a percentage of the water that they divert. The remainder often flows back into a waterway and is available for consumption by downstream users. The percentage of water that is consumed is known as "water efficiency." When a water user increases its water efficiency and thus its consumption, the change can reduce the amount

> of water that flows back into the waterway and is available for downstream water users – even though the amount that is diverted does not increase.

FIR 54-55. The Special Master appears to have conceded for purposes of argument throughout his analysis of this issue that such an increase in "water efficiency" on lands irrigated under pre-1950 Wyoming water rights could serve to decrease the amount of Wyoming's water delivery to Montana in a manner that would prevent enjoyment of Montana's entitlement.

The Special Master's treatment of this form of depletion differed from his treatment of the other three forms of depletion. As to each of the other three, he relied on the general rule under Article V(A) that pre-1950 uses "shall continue to be enjoyed." With respect to these accepted claims, the Special Master found it unnecessary to have specific Compact language governing each offending type of use. With respect to groundwater pumping, for example, he started with the finding that "[f]irst, Article V(A) provides without any limitation that pre-1950 rights 'shall continue to be enjoyed.' Article V(A) does not protect pre-1950 rights only from surface diversions or storage; instead, it provides broadly for the continued enjoyment of such rights." FIR 44.

With respect to new consumptive use on pre-Compact irrigated lands, however, he reversed his analysis 180 degrees. Rather than maintaining his

broad rule based on the broad Compact language, the Special Master began his analysis by looking for specific language allowing Montana to curtail this kind of use, stating: "On its face, the language of Article V(A) would not appear to directly limit the consumptive efficiency of pre-1950 appropriative rights in Wyoming." FIR 59. Yet it is equally true that, on its face, the language of Article V(A) contains no express exception of any kind from the general rule that pre-1950 rights will be protected. It provides no exception for new storage, new irrigated acreage or new groundwater pumping, and it provides no exception for new consumption of irrigation water on pre-1950 irrigated acreage.

The Special Master explained this differing treatment by stating: "While the other allegations involve conflicts between pre-1950 uses in Montana and post-1950 uses in Wyoming, this allegation involves a conflict between two sets of pre-1950 uses." FIR 56. This analysis clashes with the fundamental principle described above that a compact is an enforceable allocation of water between States, not between individual users. *Hinderlider v. La Plata River & Cherry Creek Co.*, 304 U.S. 92, 106-107 (1938). The Compact does not allocate water for individual uses in each State. See FIR 99 ("Interstate water disputes such as the instant action by Montana inherently deal with sovereign interests that supersede the interests of individual water users"). It creates "block protection for all pre-1950 rights." *Id.*, at 22.

In effect, the Special Master's ruling turns the rule announced in *Hinderlider* on its head. This is true because the First Interim Report, if adopted, allows the allocation between Wyoming and Montana on the Yellowstone River to be changed by individual water users. For example, if pre-1950 Wyoming irrigators as a block have traditionally consumed 65% of their diversions, the Special Master's ruling would allow them to increase their block consumption to 100%, thereby reducing the return flows on which Montana depends for its pre-1950 uses to zero. Under the Special Master's interpretation, the Compact would leave Montana without recourse.

The Special Master's unique treatment of new consumptive use on pre-Compact irrigated lands reflects a fundamental misunderstanding of the Compact. The Compact promises delivery at the border of sufficient water to meet Montana's pre-1950 uses. Montana has never contended that the Compact requires Wyoming to meet this obligation in any particular way. Nor has Montana requested an order from this Court specifying the particular actions Wyoming must take to meet its obligations.

If a shortfall in Wyoming's delivery obligation stems from increased groundwater pumping, for example, Wyoming need not make up the deficiency by reducing groundwater pumping. Instead, it is free to choose any appropriate legal or administrative adjustments, as long as the result is a sufficient supply at the state line to meet its Compact obligation. It could meet the obligation by reducing groundwater

pumping, curtailing irrigation on lands not irrigated prior to 1950, or providing releases from storage. As long as Wyoming provides the water the Compact requires, it is of no moment for Montana how Wyoming accomplishes the task. Of course, if Wyoming, faced with an interpretation by this Court requiring delivery of Montana's entitlement, refuses to provide it, this Court retains the authority to impose more specific requirements.

D. The Special Master Essentially Disregarded the Compact's Definition of "Beneficial Use"

The Special Master concluded, based on his analysis of the common law, that a pre-1950 water right in Wyoming, and therefore the Compact, included as an attribute the right to increase consumption by use of more efficient irrigating practices. FIR 86-87. In reaching this conclusion, he disregarded plain Compact language establishing that Wyoming's pre-1950 rights are limited to beneficial uses then in place, and that the limits of those uses was the water they consumed. His reliance on perceived common law principles that contradict explicit Compact definitions is an error this Court must correct.

Under Article V(A), irrigators in both Wyoming and Montana are entitled to "continue[] to . . . enjoy[]" their "appropriative rights ***to the beneficial uses of water*** . . . in accordance with the laws governing the acquisition and use of water under the

doctrine of appropriation." (Emphasis added.) "Beneficial use" is a defined term in the Compact. Article II(H) states:

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

Compact, art. II(H), at A-4 (emphasis added). The Compact as of 1950 locked in "that use by which the water supply of [the Yellowstone River System] [was] depleted." *Ibid.* When Wyoming allows its users to consume more water on existing acreage, that water is removed from the system and is no longer available to Montana to satisfy its pre-1950 rights. To the extent that increased consumption on existing irrigated acreage in Wyoming deprives Montana of the water it received and used prior to 1950, it necessarily violates the plain edict of the Compact that Montana shall "continue to . . . enjoy[]" its pre-1950 uses.

This aspect of the protection afforded to Montana's "beneficial uses" is a function of the plain language and structure of the Compact that the Special Master overlooked. Rather than apply the Compact definition of the term, the Special Master mistakenly found that the definition of "beneficial use" merely "echoes the traditional requirement of prior-appropriation law that appropriations actually divert water from a stream for consumptive use." FIR 61. The basis for the Special Master's finding is that

"[r]ead in the context of western appropriation law, the beneficial-use language in Article V(A) addresses the *types* of uses that the Compact protects, not the right of a pre-1950 appropriator to increase his or her efficiency." *Ibid.* (emphasis in original).

If the text of a compact is unambiguous, it is conclusive. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 573, 690 (1995). To the extent that common law principles conflict with the plain language and structure of the Compact, they are not controlling. See *generally* 2B Sutherland Statutory Construction § 50:1 (7th ed.) (explaining that resort to common-law principles is proper only where a statute is ambiguous); *accord Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (extrinsic materials may be used to interpret a compact where it is ambiguous). In the present case, the Court need not look to the common law or other extrinsic materials because the Compact is unambiguous that "beneficial use" is defined in terms of depletions. Since "beneficial use" is a defined term, the Special Master should have read it according to the Compact's definition. *Kansas v. Colorado*, 514 U.S. at 690 ("unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms") (*citing Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). It is a fundamental principle of Compact and statutory construction that "the context of western appropriation law" cannot alter this plain language.

This error is important for Montana's increased consumption claim. The Special Master concluded

based on his analysis of the common law that a pre-1950 water right in Wyoming included as an attribute the right to increase consumption by use of more efficient irrigating practices. FIR 86-87. But the Wyoming water users "beneficial use" as defined in the Compact is limited to the amount "depleted when usefully employed by the activities of man." The Special Master should have employed the Compact definition regardless of any other attribute of the doctrine of prior appropriation. Under the plain language Wyoming's pre-1950 users can not adopt more consumptive irrigation practices that deprive Montana of its Compact allocation. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. at 689-690 (increased use of pre-Compact rights allowed under the law of prior appropriation nevertheless violates Arkansas River Compact if it depletes usable flows to the downstream State).

E. Reliable Extrinsic Authority Does Not Contradict, But Supports Article V(A)'s Express Limitation on Consumption

As demonstrated by the arguments set forth above, the plain language of the Compact is unambiguous, and resort to extrinsic sources to determine the intent of the parties is unnecessary. However, should the Court conclude that the language of Article V(A) is ambiguous and requires construction, reliable extrinsic sources of the parties' intent confirm that the Compact was intended to fix the allocation

between the States and thereby preclude increased depletions by any means that would impair any of the States' pre-1950 rights.

The Compact drafters were well versed in the concepts of consumptive use and return flows. For instance, the Engineering Report produced for the Compact Commission devotes an entire section to calculations of consumptive use in the Basin. The compacting States thus understood that Montana, as the downstream State, would rely on the return flows from Wyoming, and that Montana's allocation would be reduced by increased consumption in Wyoming. See Joint Appendix[4] 502 ("Joint App.") (discussing necessity of factual data establishing the "net water duty on irrigated lands," and the sufficiency of annual run-off of the Basin to meet "existing and potential consumptive uses"); *id.*, at 764 (discussing return flows); *accord Texas v. New Mexico*, 462 U.S. at 570 ("It is difficult to conceive that Texas would trade away its right to seek equitable apportionment in return for a promise that New Mexico could, for all practical purposes, avoid at will"). As the Senate Report explains, the allocations in Article V(B) "take into account return flows and uses of them, as well as original runoff." This same statement applies to Article V(A). Article V(A) was designed to fix and protect existing rights as measured by the amount of water actually being put to consumptive and beneficial use

[4] The Joint Appendix is described at FIR 3.

in each State on January 1, 1950. Wyoming, in fact, insisted that this be the case. See, *e.g.*, Joint App. 120 ("Wyoming suggests that the actual beneficial use now made of water be declared the principal factor in dividing the water to meet the needs of the situation as it is today. Actual use of water on land is of more importance than priorities or court decrees").

The Senate Report provides the cleanest description of the protections afforded by Article 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.

Sen. Rep. No. 883, 82d Cong., 1st Sess. (1951), at 2. (Joint App. 13) (emphasis added). Thus, the Senate Report was clear that the Compact would not allow one State to cause another State to receive a different supply of water. But by increasing its consumption on existing irrigated acreage, Wyoming has caused Montana to receive a different supply of water. Contrary

to the Special Master's recommendation, this additional consumption in Wyoming on existing pre-Compact acreage has no "legal standing" under Article V(A).

F. Article V(A)'s Reference to the Doctrine of Prior Appropriation Does Not Alter the Compact's Limitation on Consumption

Rather than focus on the plain definition of "beneficial uses" in Article V(A), the Special Master focuses on the language in Article V(A) that those uses are protected "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." See FIR 65. According to the Special Master:

> If prior-appropriation law clearly proscribe[d] increases in consumption on existing acreage to the detriment of downstream appropriators, the Compact arguably would prohibit Wyoming from allowing its appropriators to make such increases to the detriment of Montana's pre-1950 uses.

Ibid. The Special Master then devoted 24 pages of the First Interim Report to an ultimately inconclusive analysis of the laws of various western States and the thoughts of commentators on the question. The result of this analysis can be summarized as follows: (1) neither Montana nor Wyoming courts have expressly decided the exact issue presented; (2) three

Wyoming cases "strongly indicate that Wyoming appropriators are free to increase consumption on existing acreage through improved irrigation techniques;" (3) Montana law is inconclusive; (4) a review of case law from other States does not show that "Wyoming's rule is anomalous, although some courts might reach different results;" and (5) therefore, "the most reasonable interpretation of Article V(A), as applied in this context, is that it does not ban increased consumption on existing acreage as a result of improved irrigation," a result that "favors Wyoming over Montana." FIR 86-87. Respectfully, the Special Master's conclusion is incorrect and should be overruled for two reasons: (1) the enactment of the Compact established the interstate allocation and preempted any State law to the contrary; and (2) the Court should not rely on an "inconclusive" analysis to modify the plain language of the Compact, FIR 86.

First, the Compact does not adopt any aspect of the prior appropriation doctrine that is inconsistent with the Compact allocation. Once the Compact was enacted into state and federal law, the allocation negotiated by the States was established. The enactment of the Compact into federal law had the effect of preempting state law contrary to the Compact. As shown above, Article V(A) protects only each State's "beneficial uses" in place as of 1950. Since the Compact defines "beneficial use" in terms of the amount of water depleted from the stream it protects pre-Compact uses only to the extent of their pre-Compact consumption.

Once the Compact was enacted, its terms govern the allocation between Montana and Wyoming. Consequently, while it is true that the Compact refers to the state law "doctrine of appropriation," if that doctrine is inconsistent with the allocation set forth in the Compact in any respect, it is the Compact that governs. *Hinderlider*, 304 U.S. 92 (1938).

Moreover, as recognized by the Special Master, the States intended to avoid interstate administration across state lines. *E.g.*, Sen. Rep. at 1, Joint App. 12. The reference to the prior appropriation doctrine relied upon by the Special Master was included in the Compact to specify that the "acquisition and use" of the water associated with those water rights within the two States would continue to be administered *intra*state in accordance with that State's prior appropriation laws. See Joint App. 61-62; *accord, Nebraska v. Wyoming*, 325 U.S. 589, 623 (1945) ("Nor will the decree interfere with relationships among Colorado's water users. The relative rights of the appropriators are subject to Colorado's control"). It does not affect the overall allocation as between the two States.

The Special Master acknowledged that "whether and under what circumstances an appropriator can increase consumption to the detriment of downstream appropriators is not one of the clearer areas of prior-appropriation law." FIR 65. He further observed that "Montana law is ultimately inconclusive" on the issue. *Id.*, at 86. Nonetheless, despite the "confused" nature of "the law pertaining to seepage or return flows," the Special Master relied on his own interpretation of

that same law for his conclusion.[5] *Id.*, at 65 (*quoting* Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. Min. L. Inst. 464, 469 (1960) (quotation marks omitted)). In light of the plain language of the Compact, it was unnecessary to delve into this issue at all.

Moreover, the Wyoming cases relied upon by the Special Master are inapposite. As the Special Master recognized, different rules have developed with regard to whether a senior appropriator can increase his or

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[5] According to the Special Master, "the only legal commentary that [he] found explicitly addressing the question of whether an irrigator can switch to a more efficient irrigation system concludes that such a switch is legal even if it reduces downstream flows to other appropriators." FIR 77, *citing* David H. Getches, Water Law in a Nutshell 144 (Thomson/West 2009) ("Getches"). A closer examination, however, reveals that the cited text does not support the Special Master's conclusion in this case. Dean Getches explains that increased consumption would be allowed, so long as the amount consumed is "within the terms of the original appropriation." Getches 144. Dean Getches also clarifies that the total water used may not exceed the maximum limit as defined by the diversion or consumption. *Id.*, at 140. As recognized by the Special Master, Article V(A) ensures the States' ability to "continue . . . to enjoy[ ]" its "beneficial uses" based on *actual use*. Thus, the actual use of water in 1950 provides the maximum limit on pre-1950 Wyoming water rights under the Compact. Dean Getches recognizes that consumption must be contained "[w]ithin these limits." *Ibid.* Moreover, Dean Getches expressly recognizes protections afforded to downstream junior appropriators. See, *e.g.*, *id.*, at 174 ("The doctrine of prior appropriation recognizes a right of junior appropriators in the continuation of stream conditions as they existed at the time of their respective appropriations" (internal quotation omitted)).

her consumption to the detriment of a junior appropriator, and these rules are based in part on whether the water is "seepage water," "waste water," or "return flow." *Id.*, at 65; see also Montana's Letter Brief 2-4 (7/17/09) ("Mont. Ltr. Br.") (available at http://www.stanford.edu/dept/law/mvn/). The consequences of the distinction between return flows and seepage are substantial. If the water is waste or seepage that never reached a natural watercourse where it was relied upon by a junior appropriator, the original appropriator can reuse the water. See Mont. Ltr. Br. 2, 8-12, and cases cited; Joseph L. Sax, Barton H. Thompson, Jr., et al., Legal Control of Water Resources 197 (Thomson/West 2006) ("Sax et al."). But if the water is return flow that reached the natural watercourse or source and was relied upon, downstream appropriators may object to a reduction in that return flow. Mont. Ltr. Br. 3-5, 8-10; Sax et al. 199, 270, 274; David H. Getches, Water Law in a Nutshell 120-121, 173-175 (Thomson/West 2009) (*cited in* FIR, at 77-78).

As Montana explained in its Letter Brief to the Special Master, its claim arises from diminishment of water that returned to the natural watercourses of the Tongue and Powder Rivers, where it had been appropriated and relied upon by Montana water users. Because Montana claims rights to *return flow*, as opposed to waste or seepage, several principles of the doctrine of appropriation, including the No-Injury Rule, see Mont. Ltr. Br. 5-6; Sax et al. 270, 274, and the doctrine of beneficial use, see Mont. Ltr. Br.

4-5; Sax et al. 152-153, prohibit Wyoming from increasing its total consumption to the detriment of Montana. Taken together, these universal western water law principles establish that (1) a downstream appropriator has a right to the maintenance of the stream flow in the condition that existed when the downstream right was perfected, and (2) that an upstream appropriator, such as Wyoming in this case, may not reduce historic return flows where the water has returned to the natural watercourse from which it originated.

The Special Master conflated principles dealing with the two different kinds of capturable water. The three Wyoming cases that the Special Master found instructive – *Fuss v. Franks*,[6] 610 P.2d 17 (Wyo. 1980), *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957), and *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940) – are all seepage cases. They involve conflicting claims by neighbors to surface runoff before it has returned to the stream channel. Montana does not complain that Wyoming's pre-1950 users are reusing seepage water and thus preventing it from reaching

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[6] In *Fuss v. Franks* the Wyoming Supreme Court clarified that where water flows uninterrupted to a natural stream, it leaves the upstream appropriator "without any superior right." 610 P.2d at 20. Accordingly, the court found that the downstream appropriator had a valid and vested right to the return flow water, and the upstream user had no superior right to that same water. *Id.*, at 21. Montana advocates for the application of this same rule.

Montana as surface runoff. As a result, the Special Master erred in placing reliance on those cases.

Since, as discussed above, the language of the Compact is plain in its protection of Montana's right to continue to receive water to satisfy its pre-1950 uses, the Court need not address this "inconclusive" and "confused" area of law. Rather, the Court should rely on accepted principles of Compact interpretation to overrule the Special Master's recommendation.

III. Wyoming's Compact Obligations Are Not Contingent Upon Montana's Actions

The First Interim Report contains the following legal conclusion: "Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the solution." FIR 89, ¶ 3. This conclusion of the Special Master shortchanges the Compact rights of Montana in several ways. Most importantly, it suggests that there is a contingent nature to Montana's allocation of waters of the Yellowstone River and its interstate tributaries. But the Compact provides for no such contingencies. In particular, the Compact does not require that Montana demonstrate that it has exhausted its intrastate remedies in order to be entitled to its allocation of water under the Compact. Yet, the Special Master's Conclusion No. 3 assumes that Montana must

determine, and perhaps be in a position to prove, that it has no purely intrastate means to satisfy pre-1950 appropriators in Montana before it can enforce its rights against Wyoming for the water accorded to Montana by the Compact. Moreover, no "call" or any other communication between Montana and Wyoming is necessary for the enjoyment by Montana of its rights under the Compact.

It must be remembered that the Yellowstone River Compact is a congressionally approved compact among three States, not among individual water users in those States. While Article V(A) speaks in terms of "Appropriative rights . . . in each signatory State," this formulation is simply a means to an end: the apportionment of the waters of the Yellowstone River among the three States. Under any particular set of water supply conditions, there is a determinable amount of water that Wyoming is required to provide to the state line. This amount of water is dependent upon water supply conditions in Wyoming, not upon water administration in Montana or whether Montana has made a "call" on Wyoming.

The Court has never interpreted an interstate water allocation compact to mean that enjoyment by the downstream State of its rights under the compact is contingent upon the downstream State's taking certain intrastate administrative actions. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 673 (1995) (compact enforced without regard to actions of downstream state); *Texas v. New Mexico*, 482 U.S. 124 (1987) (same). Nor has a State ever been required to place a

"call" or been required to make any kind of a demand of the upstream State in order to be entitled to receive its water. See *ibid.*

Further, Wyoming's obligation to preserve Montana's allocation of water under the Compact is not dependent upon actions of individual water users in Montana. Wyoming's obligations under the Compact were set at the time of the Compact. See, *e.g.*, Compact at A-1 ("[The States] desiring to remove all causes of present and future controversy . . . with respect to the waters of the Yellowstone River and its tributaries . . . and desiring to provide for an equitable division and apportionment of such waters . . . have agreed upon the following articles, to-wit:"). The allocation of water among the States by the Compact for any given set of water supply conditions was determined at the time of the Compact. Otherwise, the States would not have "remove[d] all causes of present and future controversy," nor would it have "provide[d] for an equitable division and apportionment of such waters." It follows that the obligations of Wyoming are independent of actions by Montana or Montana's water users.

The care exercised by the drafters to avoid creation of an interstate water management process strongly suggests that if they had intended to make Montana prove such a condition precedent, there would be at least some reference to the requirement in the Compact. The recommended exhaustion of intrastate remedies requirement is a recipe for precisely the kind of interstate allocation squabbles that

the drafters of the Compact sought to avoid. Wyoming will certainly demand that Montana prove as a condition precedent to any inquiry into Wyoming's own actions that Montana has exhausted intrastate sources of supply for its pre-1950 rights, presumably by requiring Montana to show, among other things, that ***all*** of its pre-1950 users have called ***all*** junior users on the stream. This will trigger discovery regarding a wide array of water management issues in Montana, at great expense and with a great deal of delay in the ultimate resolution of this case. For this reason, it is important that this Court correct the erroneous recommendation.

CONCLUSION

Although Montana supports the Special Master's recommendation that the Court deny Wyoming's Motion to Dismiss, Montana requests that the Special Master's conclusion that would bar Montana's claim based on Wyoming's increased consumption of irrigation water on pre-Compact irrigated acreage, be overruled. Further, Montana requests that the Court overrule the Special Master's conclusion that

Wyoming's Compact delivery obligations are dependent upon Montana's actions.

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