

SUPREME COURT PRACTICE

TENTH EDITION

For practice in the
Supreme Court of the United States

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Summary Contents

Preface	vii
Checklists for Processing Cases Through the Court Including Document Length Limits and Cover Colors	xxxvii
1 Introduction to the Supreme Court.....	1
2 Jurisdiction to Review Decisions of Federal Courts	71
3 Jurisdiction to Review Decisions of State Courts	139
4 Factors Motivating the Exercise of the Court's Certiorari Appellate Jurisdiction.....	233
5 The Manner in Which the Court Determines to Take Jurisdiction	313
6 Procedure in Connection With Petitions for Certiorari	371
7 Procedure on Appeals.....	525
8 In Forma Pauperis Proceedings.....	555
9 Certified Questions	601
10 Original Cases.....	617
11 Extraordinary Writs	657
12 Preparing and Printing the Joint Appendix.....	687
13 The Briefs on the Merits	713
14 Oral Argument.....	763
15 Petitions for Rehearing and Final Disposition of Cases.....	825
16 Motions and Applications	857
17 Stays, Injunctions, and Bail.....	871
18 Capital Cases	923
19 Justiciability: Standing, Mootness, and Abatement	943
20 Admissions to the Bar and Disbarment.....	981
Appendix I. Rules of the Supreme Court of the United States	1007
Appendix II. Clerk's Guidelines Regarding Filing Cases.....	1091
Appendix III. Clerk's Guidelines Regarding Cases Selected for Review	1127

Appendix IV. Forms.....	1159
Appendix V. Statutes and Regulations.....	1307
Appendix VI. Admission to the Bar.....	1349
Table of Cases.....	1355
Subject Index.....	1423
Table of Rules and Laws.....	1477

Original Cases and Extraordinary Writs

P. Original Case—Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File

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No. ____, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF
COMPLAINT, BILL OF COMPLAINT, AND
BRIEF IN SUPPORT

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on interior page]

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Comes now the State of Montana, by and through the Attorney General of Montana, Mike McGrath, pursuant to the authority vested in him under the laws of Montana, and moves the Court for leave to file the accompanying Bill of Complaint.

In support of its Motion, the State of Montana asserts that its claims arise from an interstate water compact, its claims are serious and dignified, and there is no alternative forum in which adequate relief may be had. For the reasons more fully stated in the accompanying Brief in Support, the Motion of the State of Montana for Leave to File Bill of Complaint should be granted.

Respectfully submitted,

M.M.
(Address, e-mail, and telephone number)
Counsel for Plaintiff

No. _____ Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, *Plaintiff,*

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, *Defendants.*

BILL OF COMPLAINT

The State of Montana, by and through its Attorney General, Mike McGrath, brings this suit against Defendants the State of Wyoming and the State of North Dakota, and for its cause of action states:

1. The Court has exclusive and original jurisdiction this suit under Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28, Section 1251(a), of the United States Code.
2. The Tongue and Powder Rivers are interstate tributaries of the Yellowstone River. They originate in the State of Wyoming and flow generally northward into the State of Montana, where they join the mainstem of the Yellowstone River. The Yellowstone River flows generally northeast across the State of Montana and joins the Missouri River just after crossing into the State of North Dakota.
3. The waters of the Tongue and Powder Rivers have been equitably divided and apportioned among the States of Montana, North Dakota, and Wyoming by the Yellowstone River Compact. The Yellowstone River Compact (Compact) was negotiated pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States and pursuant to the Act of Congress of June 2, 1949, 63 Stat. 152. The Compact was entered into by the States of Montana, North Dakota, and Wyoming on the basis of an agreement reached on December 8, 1950. Each of the States subsequently ratified the Compact by legislative enactment. Act of Feb. 13, 1951, ch. 39, 1951 Mont. Laws 58 (codified at Mont. Code Ann. § 85-20-101 (2005)); Act of Mar. 7, 1951, ch. 339, 1951 N. D. Laws 505 (codified at N.D. Cent. Code § 61-23-01 (2005)); Act of Jan. 27, 1951, ch. 10, 1951 Wyo. Sess. Laws 7 (codified at Wyo. Stat. Ann. § 41-12-601 (2005)). The consent of the Congress of the United States to the Compact was granted by Act of October 10, 1951, 65 Stat. 663. The Compact is reprinted in the Appendix to this Bill of Complaint.
4. The State of North Dakota is named as a party to this cause of action as a signatory State to the Compact.
5. The waters of the Tongue and Powder River Basins are part of the Yellowstone River System and the Yellowstone River Basin as defined in Article II of the Compact.
6. The Compact was intended to effect and did effect a full equitable division and apportionment of all the waters of the Tongue and Powder River Basins.

7. Article V of the Compact apportions among the compacting States the waters of the Tongue and Powder Rivers that were in use in each State as of January 1, 1950, and for which appropriative water rights existed in each State as of that time. Article V also allocates the unused and unappropriated waters of the Tongue and Powder Rivers as of January 1, 1950 as shall be necessary provide supplemental water for existing rights. Finally, Article V allocates any remaining water of the Tongue and Powder Rivers by specified percentages.

8. Wyoming refuses to curtail consumption of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950, whenever the amount of water necessary to satisfy Montana's uses of such waters existing as of that date is not passing the Wyoming-Montana stateline, in violation of Montana's rights under Article V of the Compact.

9. Since January 1, 1950, Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

10. Since January 1, 1950, Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

11. Since January 1, 1950, Wyoming has allowed the construction and use of groundwater wells for irrigation for other uses and has allowed the pumping of groundwater associated with coalbed methane production the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

12. 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.

13. By undertaking and allowing the aforementioned actions, the State of Wyoming has depleted and is threatening further to deplete the waters of the Tongue and Powder Rivers allocated to the State of Montana under Article V of the Compact.

14. By depleting the waters allocated to the State of Montana, the State of Wyoming has injured the State of Montana and its water users.

15. Unless relief is granted by this Court, water use in the State of Wyoming in excess of its equitable share of the waters of the Tongue and Powder Rivers will continue and increase, resulting in substantial and irreparable injury to the State of Montana and its water users.

16. The State of Wyoming refuses to comply with Article V of the Yellowstone River Compact with respect to the waters of the Tongue and Powder Rivers, despite requests by the State of Montana that it do so.

17. The State of Montana has no adequate remedy at law to enforce its rights to the waters of the Tongue and Powder Rivers against the State of Wyoming.

18. The State of Montana has no sufficient remedy for the aforementioned violations of the Yellowstone River Compact by the State of Wyoming except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the State of Montana respectfully prays that the Court:

A. Declare the rights of the State of Montana to the waters of the Tongue and Powder Rivers pursuant to the Yellowstone River Compact;

B. Issue its Decree commanding the State of Wyoming in the future to deliver the waters of the Tongue and Powder Rivers in accordance with the provisions of the Yellowstone River Compact;

C. Award to the State of Montana all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Montana as a result of the State of Wyoming's past and continuing violations of the Yellowstone River Compact with respect to the waters of the Tongue and Powder River Basins; and

D. Grant such costs and other relief as the Court deems just and proper.

Respectfully submitted,

M.M.

(Address, e-mail, and telephone number)

Counsel for Plaintiff

[Appendices to the Bill of Complaint are omitted.]

No. _____, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE
TO FILE BILL OF COMPLAINT

The State of Montana, in support of its Motion for Leave to File Bill of Complaint, submits the following:

INTRODUCTION

The State of Montana seeks to invoke the Court's original jurisdiction to obtain a determination and enforcement of its rights as against the State of Wyoming to the waters of the Tongue and Powder Rivers pursuant to the Yellowstone River Compact ("Compact"), 65 Stat. 663 (1951). The Compact is reprinted in the Appendix to the Bill of Complaint ("App. to Compl."). The Attorney General of Montana brings this action on behalf of the State of Montana pursuant to his authority as chief legal officer of the State. Mont. Const. art. VI, § 4. Montana brings its claims after many years of attempting to resolve fundamental differences with Wyoming on matters of Compact interpretation. In the absence of a resolution by agreement between the States, only this Court can resolve the dispute.

Montana claims that Wyoming has disregarded Wyoming's obligations under Article V of the Compact, including, among others, its obligation to curtail consumption of the waters of the Tongue and Powder River Basins in excess of Wyoming's pre-January 1, 1950 consumption of such water whenever the amount of water

necessary to satisfy Montana's pre-January 1, 1950 uses of such water is not passing the Wyoming-Montana stateline. In response, Wyoming claims that pre-1950 water rights and groundwater are excluded from the Compact and that it has no obligation whatsoever to honor such water rights in Montana. Montana argues that such exclusions would be contrary to the plain language and structure of the Compact and are not plausible limitations in light of the intention expressed in the Compact.

It is Montana's view that Wyoming's violations have caused, and if not remedied will continue to cause, direct, immediate, grave, and irreparable injury to the State of Montana and its citizens by preventing Montana from receiving the amount of water to which it is entitled under the Compact. The Powder and Tongue Rivers and related groundwater are the primary, at some places the only, sources of supply for an area of southeastern Montana considerably larger than the States of Connecticut and Rhode Island combined. Consequently, Wyoming's continued violations threaten the very heart of this ranching and farming country by preventing Montana from obtaining its share of water for the benefit of its water users.

The instant dispute presents fundamental legal issues of Compact interpretation, including whether Wyoming would ever be obliged under the Compact to curtail post-1950 uses so that Montana's pre-1950 uses can be met. So long as Wyoming refuses to acknowledge its Compact obligations to Montana, no amount of negotiation or mediation can address Montana's claims. And, so long as the matter continues unresolved by this Court, Wyoming can simply continue to impound and use water in excess of its Compact apportionment, to the continued detriment of Montana.

The State of North Dakota is named as a defendant because North Dakota is the third compacting State under the Yellowstone River Compact. Montana seeks no relief against North Dakota in the Bill of Complaint.

◆

STATEMENT

1. The Tongue River Basin

The Tongue River is an interstate tributary of the Yellowstone River. The Tongue River originates in the Bighorn Mountains in northern Wyoming, and flows northeast across the Wyoming-Montana stateline to its confluence with the Yellowstone River at Miles City, Montana. The total length of the Tongue River is approximately 225 miles. The Tongue River Basin is approximately 5,400 square miles in size. Irrigation is the primary water use in both States. See Map of the Tongue and Powder River Basins Within the Yellowstone River Basin contained in Appendix A to this Brief, at A-1; United States Geological Survey, U.S. Dep't of Interior, Nat'l Water-Quality Assessment Prog.: Yellowstone River Basin 2 (1997) (USGS Fact Sheet 149-97).

2. The Powder River Basin

The Powder River is also an interstate tributary of the Yellowstone River, originating in the Bighorn Mountains of northern Wyoming immediately to the east of the

Tongue River. The Powder River flows generally north across the stateline and runs north in the State of Montana to its confluence with the Yellowstone River near Terry, Montana. The Powder River is approximately 500 miles long. The Powder River Basin is approximately 13,200 square miles in size. See Appendix A to this Brief; USGS Fact Sheet 149-97, at 2. Irrigation has been the primary water use in both States. Water production in connection with the production of coalbed methane has increased sharply in recent years and is expected to increase further in the near future.

3. The Yellowstone River Basin

The Tongue and Powder River Basins are part of the Yellowstone River Basin. See Map of the Tongue and Powder River Basins Within the Yellowstone River Basin, attached to this Brief as Appendix A, at A-1. The mainstem of the Yellowstone River is approximately 700 miles long, beginning in Yellowstone National Park, south of the Montana-Wyoming stateline. From Yellowstone National Park, it flows north across the Montana-Wyoming stateline and turns northeast to flow across the State of Montana to its confluence with the Missouri River just after crossing the Montana-North Dakota stateline. The Yellowstone River Basin is approximately 70,100 square miles in size. See Appendix A, at A-1; USGS Fact Sheet 149-97, at 2.

4. The Yellowstone River Compact

A. An Overview of the Compact

The waters of the Tongue and Powder Rivers have been equitably divided and apportioned among the States of Montana, North Dakota, and Wyoming by the Yellowstone River Compact. The Compact was negotiated pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States and pursuant to the Act of Congress of June 2, 1949, 63 Stat. 152. The Compact was entered into by the States of Montana, North Dakota, and Wyoming on the basis of an agreement reached on December 8, 1950. Each of the States subsequently ratified the Compact by legislative enactment. Act of Feb. 13, 1951, ch. 39, 1951 Mont. Laws 58 (codified at Mont. Code Ann. § 85-20-101 (2005)); Act of Mar. 7, 1951, ch. 339, 1951 N. D. Laws 505 (codified at N.D. Cent. Code § 61-23-01 (2005)); Act of Jan. 27, 1951, ch. 10, 1951 Wyo. Sess. Laws 7 (codified at Wyo. Stat. Ann. § 41-12-601 (2005)). Congress consented to the Compact by the Act of October 10, 1951, 65 Stat. 663. A brief description of the Compact's provisions follows.

The Yellowstone River Compact begins by declaring the intention of the States of Montana, North Dakota, and Wyoming "to remove all causes of present and future controversy" between the States "with respect to the waters of the Yellowstone River and its tributaries." The waters within or contributing to the flow of streams within Yellowstone National Park are excluded. The Compact further articulates the States' desire "to provide for an equitable division and apportionment of such waters" and declares that they "have resolved to conclude a Compact... for attainment of these purposes." 65 Stat. 663; App. to Compl. A-1, A-2.

Article I of the Compact defines the term "State" and declares that all entities using, claiming, or in any manner asserting any right to use the waters of the Yellowstone River System under the authority of a State, shall be subject to the terms of the Compact. App. to Compl. A-3, A4.

Article II of the Compact defines certain terms, including the State names, "Commission," "Yellowstone River Basin," "Yellowstone River System," "Tributary," "Interstate Tributaries," "Divert and Diversion," "Beneficial Use," "Domestic Use," and "Stock Water Use." *Id.*, at A-4, A-5.

Article III creates the Yellowstone River Compact Commission ("Commission") and defines its membership and powers. *Id.*, at A-5 to A-8.

Article IV provides for the establishment, maintenance, and operation of gaging and evaporation stations. *Id.*, at A-8.

Article V is the primary allocation article of the Compact. Article VA apportions water rights existing and in use as of January 1, 1950. It provides that such rights shall "continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."¹ *Ibid.*

Article VB provides that "supplemental water supplies" for the water rights described in Paragraph A of Article V are allocated to each State "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." The "remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes," according to percentages, between Wyoming and Montana on the Interstate Tributaries. The Interstate Tributaries are the Clarks Fork of the Yellowstone River, the Bighorn River (exclusive of the Little Bighorn River), the Tongue River, and the Powder River (including the Little Powder River), as set out in Article VB. *Id.*, at A-9; see App. A.

Article VC specifies how the water allocated by percentages shall be determined. *Id.*, at A-9, A-10. Article VD pertains to the allocation of the waters of the Yellowstone River between the States of Montana and North Dakota below Intake, Montana. *Id.*, at A-10, A-11. Article VE excludes from the Compact existing and future domestic and stock water uses, provided that the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet.² Devices and facilities for the control and regulation of diffuse surface waters are also excluded. *Id.*, at A-11. Article VF requires the Commission to reexamine the allocations and, upon unanimous agreement of the Commission, allows the Commission to recommend modifications of the allocations. *Ibid.*

Article VI declares that the Compact shall not affect adversely any Indian rights to the use of the waters of the Yellowstone River. *Ibid.*

Article VII provides for appropriations by one State in another State and for the construction of storage reservoirs and other works for the purpose of conserving and regulating water. *Id.*, at A-12, A-13.

Articles VIII and IX provide for the acquisition by purchase or through eminent domain of lands and other properties in one State for the benefit of another State. *Id.*, at A-13, A-14.

¹Under the doctrine of prior appropriation "one acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Continued beneficial use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976).

²An acre-foot is 325,851 gallons. It is equal to one acre of water one foot deep. The volume of the Supreme Court Courtroom, within the pillars, from floor to ceiling, is approximately 31/3 acre-feet.

Article X provides, "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Article X also provides for the accounting of imported water. *Id.*, at A-14.

Articles XI and XII provide that the Compact shall be in full force and effect until amended, that the Compact may be terminated by unanimous consent of the States, and that upon such termination, all rights then established shall continue unimpaired. *Ibid.*

Article XIII provides for the enforcement of the Compact:

"Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions." *Id.*, at A-15.

Article XIV disclaims any precedential value of the Compact. *Ibid.*

Article XV provides that the Compact will become operative when approved by the legislatures of the States and the U.S. Congress. *Ibid.*

Article XVI provides that the Compact shall not affect the sovereignty or jurisdiction of the United States or the extent to which the United States is subject to State law. *Id.*, at A-15, A-16.

Article XVII contains a severance clause. *Id.*, at A-16.

Article XVIII preserves the jurisdiction of the States over the water apportioned to them by the Compact and contains several concluding provisions regarding the filing and execution of the Compact. *Id.*, at A-16, A-17.

Section 2 of the Act of Congress adopting the Compact reserves to Congress the right to alter, amend, or repeal the Compact, and provides the terms under which that may occur. *Id.*, at A-18.

B. A Brief History of Negotiations and Adoption

The Compact of 1951 was the culmination of almost twenty years of negotiations among the States of Wyoming, Montana, and ultimately North Dakota, in coordination with the United States. Congress passed its first authorization for the States to enter into such an agreement in 1932. See *Act Granting the consent of Congress to the States of Montana and Wyoming to negotiate and enter into a compact agreement for division of the waters of the Yellowstone River*, 47 Stat. 306 (1932). The Yellowstone Basin was the subject of study for federal storage projects, but the United States had made it clear that no federal storage projects would be built until Wyoming and Montana had come to an agreement about the allocation of the interstate waters. Between 1932 and the adoption of the current Compact, several versions were suggested and debated, but not adopted.

The core discussions were among the United States and the States of Wyoming and Montana. The continuing settlement and development of primarily agricultural uses in the Yellowstone Basin in those States made obvious the benefits that additional storage facilities in the vicinity of the border would provide. The Yellowstone River and its tributaries and related groundwater provide the main, and in many places the sole, source of supply for a vast region of northern Wyoming and southcentral and

southeast Montana. See Appendix A to this Brief. The water supply is typical of the eastern slope of the Rocky Mountains where the rivers originate. In spring, the snowmelt and rains provide more water than can immediately be used. As a result, the only feasible means of supplying the year-round needs of the population from surface water is through water storage projects, which capture and store high spring flows for later irrigation, stock water, municipal, flood control, and hydropower uses. As the largest tributary of the Missouri River, the Yellowstone was a natural focus for water development for the United States as well as the States of Wyoming and Montana.

The goals of the negotiators were primarily: (1) to protect and apportion existing water rights in use at the time the Compact was negotiated; (2) to allocate the unused and unappropriated waters of the Interstate Tributaries between Wyoming and Montana to supplement the water supply for existing irrigated lands; and (3) to allocate the remainder of the unused and unappropriated waters of the Interstate Tributaries for beneficial use on new lands or for other purposes.

C. The Article V Apportionment

Article V of the Compact sets up a three-tiered system of apportionment. First, Article VA, which is applicable to the waters of the entire Yellowstone River system, apportions and protects the continued use in each State of the water needed to supply the valid state-based appropriative water rights in use as of January 1, 1950. Second, Article VB, Clause 1, which is applicable only to the Interstate Tributaries, allocates to each signatory State the quantity of water necessary for supplemental supplies for the rights protected in Article VA. Third, Article VB, Clause 2 allocates the unused and unappropriated remainder of the waters of the Interstate Tributaries between the States of Wyoming and Montana in specific percentages.

Protection of the water supply for state-based appropriative water rights throughout the Yellowstone River System in use as of the date of the Compact was a *sine qua non* of the agreement. Ultimately, however, the States could not arrive at a satisfactory explicit quantification of each State's existing rights in use as of January 1, 1950. As a result, the States protected and apportioned the water supply for existing rights in each State, but deferred the quantification of those rights, whatever they might be, by adopting the language of Article VA. Article VA provides:

"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." App. to Compl. A-8.

Thus, while carrying out their intentions to effect a full equitable apportionment of all the waters of the Yellowstone River System, the parties deferred quantifying explicitly the existing rights in use in each State. It was believed that in normal years these uses could continue without interference, and so the focus was on the division and allocation of water that was expected to be provided in the future by federal storage projects.

Article VB, Clause 1 establishes the second tier of protected and allocated waters. It applies only to the Interstate Tributaries, including the Tongue and Powder Rivers, and allocates to the signatory States the quantity of water needed to provide supplemental water supplies for the existing rights protected in Article VA, the rights to such supplemental water to be acquired and enjoyed in accordance with the

doctrine of prior appropriation, pursuant to post-January 1, 1950 water rights in each State. Article VB, Clause 1 provides:

"Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." *Ibid.*

In other words, the first claim that either Montana or Wyoming could make on waters of the Powder and Tongue Rivers not already appropriated and in use as of January 1, 1950, is for supplemental rights for the pre-1950 water rights. The supplemental water rights would have post-January 1, 1950 priority dates. As between competing supplemental water rights in Wyoming and Montana, the doctrine of prior appropriation, "First in time, first in right," is to be applied. *Arizona v. California*, 373 U.S. 546, 555 (1963) (describing the doctrine of prior appropriation generally, including this short-hand reference to it).

The third tier of protected and allocated waters of the Interstate Tributaries, including the Tongue and Powder Rivers, are those waters unused and unappropriated under either Article VA or Article VB, Clause 1. Article VB, Clause 2 allocates the remaining unallocated water for such future use by the States, stating that "the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:..." App. to Compl. A-8. There follow percentage allocations of such unappropriated waters between Wyoming and Montana. On the Tongue River, such waters are allocated 40% to Wyoming and 60% to Montana. On the Powder River, such waters are allocated 42% to Wyoming and 58% to Montana. *Id.*, at A-9.

5. Post-Compact Developments in the Tongue and Powder River Basins in Wyoming

Since the adoption of the Compact, eight reservoirs have been constructed or enlarged in the Tongue River Basin in Wyoming. These are Bighorn Reservoir, Cross Creek Reservoir, Dome Lake, Dome Lake Reservoir, Park Reservoir, Sawmill Lakes Reservoir and the Twin Lakes Reservoirs. In the Powder River Basin, seven reservoirs have been constructed or enlarged since the adoption of the Compact. These include Cloud Peak Reservoir, Dull Knife Reservoir, Healy Reservoir, Kearney Reservoir, Lake DeSmet, Muddy Guard Reservoir and Tie Hack Reservoir. See, e.g., Yellowstone River Compact Commission, Annual Report 2005, at 21; see also App. A, at A-2. The combined effect of these new and enlarged Wyoming reservoirs has been to increase the amount of reservoir storage capacity since January 1, 1950, by 216,000 acre-feet in the Powder River Basin and 9,400 acre-feet in the Tongue River Basin. See Commission, Annual Report 2005, at 21.

In addition, the amount of irrigated lands in Wyoming has increased in both the Tongue and Powder River Basins since the adoption of the Compact. Putting new lands under irrigation after January 1, 1950 is not, in and of itself, a violation of the Compact. Rather, in Montana's view, it is the failure of Wyoming to curtail uses of water on such new lands, when necessary to protect Montana's rights under the Compact, that constitutes the Compact violation.

The use of groundwater wells for irrigation and other purposes has also increased since the adoption of the Compact. The largest increases in groundwater pumping have been associated with the production of coalbed methane ("CBM"). In the Powder and Tongue River Basins in Wyoming there were approximately 23,000 permitted CBM wells in 2006. Wyoming Dep't of Env'tl. Quality, Wyoming Pollutant Discharge Elimination System Program, Summary of Coal Bed Methane Permitting Activities, October 2006, at 6, 15; see also Commission, Annual Report 2005, at III. All groundwater pumping has the potential to deplete the compacted waters of the Powder and Tongue Rivers. In Montana's view, to the extent that such pumping depletes the waters of the Powder and Tongue Rivers that are allocated to Montana, such pumping would constitute a violation of the Compact. See, e.g., *Kansas v. Colorado*, 514 U.S. 673 (1995) (holding that groundwater pumping violated the allocation of the Arkansas River in the Arkansas River Compact); First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig. (2000) (recommending denial of Nebraska's motion to dismiss on the basis that groundwater pumping was required to be included in the accounting of allocated uses of the Republican River under the Republican River Compact); 530 U.S. 1272 (2000) (Denial of Nebraska's Motion to Dismiss).

Further, Wyoming has allowed significant increases in consumption of water on irrigated lands through the conversion of flood irrigation to sprinkler irrigation, a much more consumptive method of irrigation. See HKM Eng'g, Inc., Powder/Tongue River Basin Plan Final Report, Technical Memoranda (2002). It is typical for flood irrigation to consume approximately 65% of the water applied to the fields. The other 35% of the water applied flows back to the stream either on the surface or by percolation through the ground. Use of sprinklers, especially with drop nozzles, can increase the efficiency from 65% to 90% or more. This reduces return flows back to the stream from 35% to 10% or less. Wyoming has allowed this transformation to occur in certain areas of the Powder and Tongue River Basins without imposing the administrative requirements necessary to protect the downstream rights of the State of Montana.

All of these developments since the adoption of the Compact have the potential, in some cases the strong potential, to increase the consumption of water in Wyoming. Wyoming refuses, however, to manage or curtail such activities for the purposes of protecting the rights of Montana under the Yellowstone River Compact.

6. The Present Controversy

The present controversy between Montana and Wyoming includes a fundamental dispute over the proper interpretation of the Compact. The difference in the States' interpretation has a significant impact on the water received by Montana from Wyoming. This controversy has existed since at least 1983. See Commission, Annual Report 1983, at IV.

For example, Montana understands Article VA of the Compact to apportion among the States those waters that were in actual use in each State at the time of the Compact pursuant to prior appropriation water rights. In contrast, Wyoming has long asserted that the Compact did not even address pre-1950 rights. Wyoming's view is that the States failed to reach agreement with respect to these rights and therefore allocated only post-January 1, 1950 water rights in the Compact. See, e.g., Commission, Annual Report 2004, at VIII.

In the 1980s a manifestation of the present controversy arose with respect to a permitted but unconstructed reservoir on the Middle Fork of the Powder River, near Kaycee, Wyoming. Wyoming claimed at that time, as it does today, that pre-1950 rights were not allocated or apportioned by the Compact. Wyoming asserted that it could allow the construction and filling of the reservoir on the basis of a pre-1950 permit, even though the waters to be stored were not being stored as of January 1, 1950. Wyoming's view was that the reservoir would therefore be exempt from any Compact obligations. Montana objected to Wyoming's position. See, e.g., Commission, Annual Report 1985, at III. Because of the disagreement between the States, the Commission was deadlocked and ultimately took no substantive action. See Commission, Annual Reports 1985-1989. The reservoir has not yet been built, but Wyoming's position has not changed. The permit, with its pre-1950 priority date, is still pending, and the Wyoming Water Development Commission continues to fund studies for the project.

More recently, in 2004 and again in 2006, Montana experienced severe water shortages in the Tongue and Powder River Basins. Montana officially notified Wyoming in each of these years that Montana's pre-1950 uses were unsatisfied due to shortages at the stateline and called for Wyoming to provide the water apportioned to Montana. In both years, Wyoming refused to curtail consumption in Wyoming for the benefit of Montana. Again, Wyoming excused its failure to act by asserting that pre-1950 rights are excluded from the Compact and that it has no legal obligation ever to administer its post-January 1, 1950 uses in deference to Montana's pre-1950 uses.

The most recent manifestation of this longstanding disagreement between Montana and Wyoming is the rejection at the December 6, 2006 Yellowstone River Compact Commission meeting of a resolution proposing administration by the Commission consistent with Montana's understanding of its rights under the Compact. The Resolution is attached to this Brief as Appendix B. The Resolution included a reference to the broad language of the Compact declaring the intention to remove *all* causes of controversy between the States with respect to the compacted waters and to provide for the "equitable division and apportionment of such waters." The Resolution stated the general principle as follows: "Article VA of the Compact apportions among the compacting States the waters of the Yellowstone River System³ that were in use in each State on January 1, 1950 and for which appropriative rights existed in each State as of that time." App. B, at A-4, ¶ 2. An important corollary of that general principle was also stated explicitly in the Resolution:

"Article VA of the Compact requires Wyoming to curtail consumption of the water of the Yellowstone River System in excess of Wyoming's pre-January 1, 1950 consumption of such water whenever the amount of water necessary to satisfy Montana's pre-January 1, 1950 uses of such water is not passing the stateline." *Id.*, ¶ 3.

This corollary describes the practical effect of the allocation principle stated above. It states what the impact of that principle should be on the daily administration of interstate waters at and above the Wyoming-Montana stateline.

In Montana's view, both States are protected by the general apportionment principle and by the corollary stated above. Wyoming's pre-1950 rights are protected by the Compact. Montana cannot demand water at the stateline that is needed to

³D. The term 'Yellowstone River System' means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park." Compact, Art. II.D, App. to Compl. A-4.

supply the valid Wyoming upstream rights that were in use on January 1, 1950. But neither can Wyoming deny Montana water that should be available for Montana's pre-1950 water uses by supplying supplemental water to pre-1950 Wyoming uses or by supplying water to new acreages or other post-January 1, 1950 uses in Wyoming. In disregarding these principles, Wyoming has failed to deliver water to which Montana is entitled.

As described above, in Montana's view, Wyoming has allowed a number of practices by its water users that create depletions of the natural flow of the Tongue and Powder Rivers in excess of the depletions that were occurring in Wyoming as of January 1, 1950, thereby diminishing the water that should be available to Montana under the Compact.

Montana is faced with an upstream State that denies that it has any present obligation to curtail uses in either the Tongue River or the Powder River. There is a fundamental disagreement between the States on the central allocation principle of the Yellowstone River Compact as it applies to the Tongue and Powder Rivers. The Yellowstone River Compact Commission is not able to resolve this fundamental controversy between the States.

◆

ARGUMENT

This Court has original jurisdiction over cases and controversies between States. See U.S. Const. art. III, § 2, cl. 2. That jurisdiction has been exclusive since the First Congress adopted the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (1789), (codified at 28 U.S.C. § 1251(a)). The Court's jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (citing *Virginia v. West Virginia*, 206 U.S. 290, 317-319 (1907)); see *Kansas v. Colorado*, 514 U.S. 673 (1995); *Oklahoma and Texas v. New Mexico*, 501 U.S. 221 (1991). The exercise of this Court's original jurisdiction is necessary here to declare and enforce Montana's rights under Article V of the Yellowstone River Compact.

In deciding whether to grant leave to file a complaint in a dispute arising under the Court's original jurisdiction, the Court has stated that it examines two factors: (1) "the nature of the interest of the complaining state," focusing on the "seriousness and dignity of the claim;" and (2) "the availability of an alternative forum in which the issue tendered may be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citation omitted). Under these criteria, the Court's exercise of its original jurisdiction in this case is warranted, and Montana should be granted leave to file its Bill of Complaint.

1. The Seriousness and Dignity of Montana's Claims Warrant Exercise of the Court's Original Jurisdiction.

The seriousness and dignity of Montana's claims weigh heavily in favor of the Court's exercise of original jurisdiction. A dispute over the waters of interstate rivers that have been apportioned by a compact is the quintessential dispute that, in the absence of agreement between the States, can be resolved only by this Court. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully

sovereign." *Mississippi v. Louisiana*, 506 U.S., at 77 (quoting *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983)); see *Kansas v. Colorado*, 185 U.S. 125, 143-144 (1902). *Casus belli* is defined as "[a]n act or circumstance that provokes or justifies war." *Black's Law Dictionary* 231 (8th ed. 2004). The "cause of every just war is injury, either already done or threatened." Emerich de Vattel, *Law of Nations* 301, §26 (J. Chetty ed. 7th ed., 1849). In this instance, the injury is both already done and threatened to continue in the future.

An interstate compact endorsed by congressional consent is in essence a treaty between sovereign States adapted to the federal system of the United States. See, e.g., *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (noting that an interstate compact "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations"). Violation of a treaty is one of the classic occurrences giving rise to war.

Montana brings this action as a sovereign party to the Compact. As such, it asserts a sovereign interest in enforcing its rights under the Compact. Montana's demand for recognition of these rights by another sovereign is an "easily identified" sovereign interest that is properly asserted in this interstate action. See *Alfred L. Snapp & Son v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601 (1982) (explaining that one of two "easily identified" sovereign interests is "the demand for recognition from other sovereigns - most frequently this involves the maintenance and recognition of borders"); see also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (States' authority to apportion waters of interstate stream by compact is equivalent to their authority to adjust boundaries by compact, which is "a part of the general right of sovereignty").

In claiming that Wyoming is depriving Montana of its lawful share of the water of an interstate stream, Montana asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, e.g., *Texas v. New Mexico*, 462 U.S., 554, 567 (1983); *Arizona v. California*, 373 U.S. 546 (1963); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Kansas v. Colorado*, 185 U.S. 125 (1902). Montana, unlike Wyoming, interprets the Compact to apportion among the compacting States those waters that were in actual use in each State on January 1, 1950, pursuant to water rights under the doctrine of prior appropriation and postcompact rights supplemental thereto. The gravamen of Montana's Article V claims is that Wyoming is violating the Compact by failing to curtail its post-January 1, 1950 water uses to protect Montana's rights under the Compact.

This Court has recognized that it has a unique duty to entertain claims concerning the interpretation and application of an interstate compact. See, e.g., *Texas v. New Mexico*, 462 U.S., 554, 567-568. Montana and Wyoming disagree at a fundamental level on the meaning of the Compact. The dispute over the meaning of the Compact has considerable impact on Montana because it directly affects the amount of water that Montana receives. Without the water allocated to Montana by the Compact, Montana's water users will continue to suffer.

This is especially true here, because the Tongue and Powder Rivers and hydrologically connected groundwater, swamps and springs, are essentially the only source of water supply for southeast Montana. When Montana is deprived of its equitable share of Compact water, its farmers and ranchers are unable to satisfy their immediate crop needs, and there are serious ripple effects throughout the Montana economy. For example, lack of good quality irrigation water reduces hay production;

reduced hay production reduces the ability of ranchers to hold onto their cattle long enough to obtain optimum price at market. The difference in the regional economy between three and two hay crops can be the difference between a profit and a loss, not only for the ranchers, but for all the regional retailers and service providers who depend on the local cattle market.

Consequently, the seriousness and dignity of Montana's claims call for the exercise of the Court's original jurisdiction.

2. The State of Montana Has No Alternative Forum.

The second factor that the Court considers in determining whether to exercise its original jurisdiction is the availability of an alternative forum in which the issue tendered can be resolved. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). In considering whether an alternative forum is adequate to resolve a dispute between States, this Court examines whether the alternative body could provide "full relief" for the States. *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992).

The Court has stated, "There is no doubt that this Court's jurisdiction to resolve controversies between two States ... extends to a suit by one state to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). As this Court has explained, "[a] Compact is, after all, a contract," and "[a] court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for." *Texas v. New Mexico*, 482 U.S. 124, 128-129 (1987) (citations omitted). This Court is the only court that can provide such a remedy. See U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a); *Mississippi v. Louisiana*, 506 U.S. 73 (1992).

The Yellowstone River Compact Commission is not an adequate alternative forum for resolution of the dispute giving rise to this suit. Although Article III.F of the Compact provides a potential mechanism for resolving disagreements concerning Compact administration, this Court is the only forum in which Montana may seek a remedy for the violations alleged in the Bill of Complaint. The Compact sets out the powers of the Commission in Article III, which powers do not include providing a remedy for a breach of the Compact. That is the function of this Court under the Yellowstone River Compact:

"By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them, . . . and this power includes the capacity to provide one State a remedy for the breach of another." *Texas v. New Mexico*, 482 U.S., at 128.

In *Texas v. New Mexico*, New Mexico argued in an exception to the Special Master's report against the inclusion of a third party vote on the Pecos River Commission. 462 U.S., at 564. The issue for decision was the role that the Pecos River Compact, 63 Stat. 159 (1949), left to this Court. *Texas v. New Mexico*, 462 U.S., at 568. The Pecos River Compact, like the Yellowstone River Compact, prescribed a procedure by which the Pecos River Commission could potentially make determinations incident to administering the Compact. New Mexico asserted that this Court lacked jurisdiction because the Pecos River Commission was intended to be the exclusive forum for disputes. The Court disagreed, and explained:

"In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id.*, at 569.

See also 1 First Report of the Special Master, *Kansas v. Colorado*, No. 105, Orig., 23-24 (1994), 1994 WL 16189353. This same reasoning applies in the present case. The Yellowstone River Compact contains no "clear indications" that judicial relief in this Court was to be precluded. The States' ability to invoke the original jurisdiction of this Court was an important consideration when they entered into the Yellowstone River Compact, as it was to the parties to the Pecos River Compact. *Texas v. New Mexico*, 462 U.S., at 569. In fact, the compacting States plainly expressed their intent to preserve the right to seek recourse to resolve a dispute in this Court in Article XIII. Article XIII provides:

"Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions." App. to Compl. A-15.

Thus, the plain language of the Compact preserves Montana's right to bring this suit.

Furthermore, the Yellowstone River Compact Commission is not capable of resolving the present dispute. Article III provides for dispute resolution procedures for matters relating to the "administration" of the Compact. In contrast, Article XIII preserves a remedy in this Court "for the protection of any right under this Compact or the enforcement of any of its provisions." App. to Compl. A-15. Montana's present cause of action is beyond the scope of Article III because it seeks a declaration, enforcement and protection of Montana's rights, and involves a disagreement over the fundamental meaning of the Compact. At the December 6, 2006 meeting of the Yellowstone River Compact Commission, both States agreed that the Commission is not a suitable forum for resolution of such issues.

Moreover, even if Article III provided a mechanism for addressing the issues, resolution of the dispute through the Commission is not possible because the States are deadlocked over threshold legal questions regarding the proper interpretation of the Compact. As discussed above, Montana has raised the issue with Wyoming in the forum of the Commission over a number of years. A resolution in the Commission has not been reached because the States disagree. The United States representative has not exercised his right to vote, and, indeed, he has never voted to break a tie to resolve a dispute between the States. The U.S. Representative has explained that the permanent policy of the United States is not to exercise its right to vote to resolve disputes between the States. Commission, Annual Report 1992, at III-IV. The Article III dispute resolution procedures can provide no relief. Montana has no recourse but to seek relief in this Court.

The Court has explained that the solution for an impasse between two States party to a Compact "is judicial resolution of such disputes as are amenable to judicial resolution..." *Texas v. New Mexico*, 462 U.S., 554, 565 (1983). The present dispute arises from differences in Compact interpretation and from Wyoming's refusal to respect Montana's Compact rights. Such a dispute is amenable to judicial resolution. As Frankfurter and Landis said so persuasively more than three-quarters of a century ago, "[N]o one State can control the power to feed or to starve, possessed by a river flowing through several States." Felix Frankfurter & James M. Landis, *The*

Compact Clause of the Constitution – A Study in Interstate Adjustments, 34 Yale L.J. 685, 701 (1925), (quoted in *Texas v. New Mexico*, 462 U.S., at 569 n.15). The Court has emphasized the necessity of a judicial remedy for a downstream State, in Montana's position, suffering violations under a compact where an administrative body requires unanimous concurrence of the States in order to act. *Texas v. New Mexico*, 462 U.S. 554, 568-569 (1983) ("New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions. ..."). Only this Court can provide that remedy.

Because Montana's claim that Wyoming has breached the Yellowstone River Compact is serious and dignified, and because there is no alternative forum to address Wyoming's ongoing and escalating violations of the Compact, this Court should invoke its original jurisdiction in this case.

CONCLUSION

The Motion for Leave to File Bill of Complaint should be granted.

Respectfully submitted.

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