

No. 137, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

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

**MONTANA'S MOTION FOR SUMMARY JUDGMENT ON
THE YELLOWSTONE RIVER COMPACT'S APPLICATION
TO TRIBUTARIES OF THE TONGUE AND POWDER RIVERS
AND BRIEF IN SUPPORT**

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**MONTANA'S MOTION FOR SUMMARY JUDGMENT ON
THE YELLOWSTONE RIVER COMPACT'S APPLICATION
TO TRIBUTARIES OF THE TONGUE AND POWDER RIVERS**

COMES NOW, the Plaintiff State of Montana, and moves for a partial summary judgment ruling that the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers. This motion is brought as a motion in the nature of a motion for summary judgment under Federal Rule of Civil Procedure 56. As is more fully stated in the accompanying brief in support, the grounds for this motion are as follows:

1. There is no genuine dispute of material fact: the question presented is a purely legal question of compact interpretation and requires no factual investigation;
2. The plain language of the Compact includes all surface waters tributary to the Tongue and Powder Rivers;
3. Reliable extrinsic sources confirm that the States and Congress understood the Compact to include all surface waters tributary to the Tongue and Powder Rivers; and

WHEREFORE, Montana requests a partial summary judgment ruling that the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers.

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**BRIEF IN SUPPORT OF MONTANA’S MOTION FOR
SUMMARY JUDGMENT ON THE YELLOWSTONE RIVER
COMPACT’S APPLICATION TO TRIBUTARIES OF
THE TONGUE AND POWDER RIVERS**

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The State of Montana submits this Brief in Support of its Motion for Summary Judgment on the Yellowstone River Compact's Application to Tributaries of the Tongue and Powder Rivers.

I. INTRODUCTION

Montana moves for summary judgment at the invitation of the Special Master to resolve a legal question of compact interpretation. The question presented is whether the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers. For the reasons set out below, the Special Master should answer this question in the affirmative. An early resolution of this issue will promote judicial efficiency.

II. PROCEDURAL BACKGROUND

1. Montana submitted its Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support in January of 2007 ("Mot., Bill & Br.").
2. Wyoming, in its Brief in Opposition to Motion for Leave to File Bill of Complaint ("Wyo. Opp. Br."), argued that Article V of the Compact "only allocates to each state the post-1950 storage rights . . . for waters of the 'Interstate Tributaries,'" which "are defined to include the main stems of the Tongue and Powder, not their tributaries." Wyo. Opp. Br. at 21.
3. Montana replied that the Compact governs the tributaries to the Interstate tributaries. Montana Reply Brief on Motion for Leave to File Bill of Complaint at 5-6 ("Mont. Reply Br.").

4. The Court granted Montana's Motion for Leave to File Bill of Complaint, but simultaneously granted Wyoming leave to file a motion in the nature of a motion to dismiss. *Montana v. Wyoming & North Dakota*, 128 S.Ct. 1332 (2008). Wyoming filed its Motion to Dismiss Bill of Complaint, which was briefed by Wyoming, Montana, the United States, and Anadarko. At the hearing on the Motion to Dismiss, the Special Master inquired of Wyoming whether the interstate tributary issue needed to be addressed. Transcript of Hearing on Motion to Dismiss (Feb. 3, 2009) at 125, line 21. Wyoming responded in the affirmative. *Id.* at 126, line 15.

5. On June 2, 2009, the Special Master issued his Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint ("Memorandum Opinion" or "Mem. Op."). In the Memorandum Opinion, the Special Master determined that Article V(A) of the Compact "prohibits new diversions of water for storage facilities on tributaries to the Powder and Tongue rivers if the diversions interfere with pre-1950 appropriative rights in Montana." Mem. Op. at 30.

6. Wyoming, in its Letter Brief Commenting on the Special Master's Memorandum Opinion on Wyoming's Motion to Dismiss Bill of Complaint ("Wyo. Ltr. Br."), requested that the Special Master delete his ruling on the tributaries of the Tongue and Powder Rivers when the Memorandum Opinion is converted into a First Interim Report to the Court. Wyo. Ltr. Br. at 4-5.

7. The Special Master agreed to withdraw his ruling on the tributary issue, but invited either Montana or Wyoming to bring a motion for summary judgment for the purpose of resolving it. Supplemental Opinion of the Special Master on

Wyoming's Motion to Dismiss Bill of Complaint ("Supplemental Opinion" or "Supp. Op.") at 29.

III. SUMMARY OF ARGUMENT

Montana's Motion presents a pure question of law concerning the scope of the Yellowstone River Compact.

The plain language of the Compact, from the first sentence of the Compact, to the definitions of Article II and the operative terms of Article V, includes all surface waters tributary to the Tongue and Powder Rivers. Other provisions of the Compact make sense only if tributaries of the Tongue and Powder Rivers are included.

If, however, the Compact's language is determined to be ambiguous, contemporaneous sources of Compact interpretation also point to inclusion of waters tributary to the Tongue and Powder Rivers. These sources include the negotiating history and statements to Congress by the Federal Representative to the compact negotiations.

Judicial efficiency will be significantly enhanced by an early determination of the legal scope of the Compact. That determination will affect the scope of discovery and the scope of relevant evidence in this proceeding.

IV. ARGUMENT

A. Standards of Decision

1. Summary Judgment

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Nebraska v.*

Wyoming, 507 U.S. 584, 590 (1993). Federal Rule of Civil Procedure 56 and the Supreme Court’s precedents construing that Rule “serve as useful guides” in original actions. *Ibid.*; Sup. Ct. R. 17.2.

2. Compact Interpretation

An interstate compact is both a contract between States and 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 contract interpretation and statutory construction apply. *New Jersey v. Delaware*, 552 U.S. 597, ___, 128 S.Ct. 1410, 1420 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). As with other contracts and 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*, 482 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 purpose of the high contracting parties.”

552 U.S. at ___, 128 S. Ct. at 1423 (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 1420-21; *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 236, n.5. Those sources may include materials submitted to Congress in support of congressional approval of the Compact and items in the public record susceptible to judicial notice, such as the minutes of the Compact negotiations. *See id.*

B. The Compact Includes All Surface Waters Tributary to the Tongue and Powder Rivers

1. There Is No Genuine Dispute of Material Fact: The Question Presented is a Purely Legal Question of Compact Interpretation and Requires No Factual Investigation

Montana's Motion requests a ruling on the scope of the Yellowstone River Compact. The Compact is a law of the United States. *Texas v. New Mexico*, 482 U.S. at 567-68. The scope of a law of the United States is a purely legal question. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987) (purpose of a statute may "appropriately [be] determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency"). Therefore, no "factual development," Wyo. Ltr. Br. at 4, is required. Montana concurs with the Special Master's observation that "There do not appear to be any factual issues that would prevent resolving the tributaries issue prior to discovery. The issue would appear to be a purely legal question that not only is appropriate for prompt resolution but where quick resolution would promote judicial efficiency." Supp. Mem. Op. at 29. This is in accord with the position of the United States. U.S. Ltr. Br. at 1 ("The United States does not agree with Wyoming's suggestion (Wyo. Br. 4) that 'factual development' would be needed before resolution of this legal issue, which turns on normal tools of compact interpretation, *see* U.S. Invitation Br. 17-18."). Nevertheless, the following undisputed facts are informative of the context in which this legal question is posed:

1. The Tongue and Powder Rivers are interstate tributaries of the Yellowstone River. State of Wyoming's Answer to Bill of Complaint ("Wyo. Answer") at ¶ 2.

2. Many tributaries contribute water directly, or indirectly, through other tributaries, to the Tongue and Powder Rivers in Wyoming.¹ See App. A to Brief in Mot., Bill & Br. (maps of Tongue and Powder Basins).

3. The Yellowstone River Compact was entered into by the States of Montana, North Dakota, and Wyoming on the basis of an agreement reached on December 8, 1950. Wyo. Answer at ¶ 3. Each of the States subsequently ratified the Compact by legislative enactment. *Id.* The consent of Congress of the United States to the Compact was granted in 1951. *Id.*

4. "[C]ertain waters of the Tongue and Powder Rivers have been apportioned by the Yellowstone River Compact among the States of Montana and Wyoming." Wyo. Answer at ¶ 3.

5. Since January 1, 1950, Wyoming has allowed the construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins. Wyo. Answer at ¶ 9.

6. Since the adoption of the Compact, at least eight reservoirs have been constructed or enlarged on streams whose waters are tributary to the Tongue River in Wyoming, including Bighorn Reservoir, Cross Creek Reservoir, Dome Lake, Dome

¹ The word "tributary," as used in this Brief, includes any stream channel that delivers, or can deliver, water directly or indirectly to the Tongue or Powder Rivers, unless otherwise noted; that is, it includes tributaries of tributaries, tributaries of tributaries of tributaries, and so on.

Lake Reservoir, Park Reservoir, Sawmill Lakes Reservoir and the Twin Lakes Reservoirs. *See, e.g.*, Yellowstone River Compact Commission, Annual Report 2005, at 21; *see also* App. A to Brief in Mot., Bill & Br. (maps showing locations of reservoirs).

7. Since the adoption of the Compact, at least seven reservoirs have been constructed or enlarged on streams whose waters are tributary to the Powder River in Wyoming, including Cloud Peak Reservoir, Dull Knife Reservoir, Healy Reservoir, Kearney Reservoir, Lake DeSmet, Muddy Guard Reservoir and Tie Hack Reservoir. *See id.*

8. The Yellowstone River Compact Commission (“Commission” or “YRCC”) has published data on reservoirs located on tributaries to the Tongue and Powder Rivers since 1952. Motion to Dismiss, Joint Appendix of the Parties at 335 (“Joint Appendix” or “Jt. App.”); *see also id.* at 391, 481; Annual Summary for Yellowstone River Compact Reservoirs or Lakes, Mont. Reply Br. at App. A-1.

9. The Compact defines the term “Yellowstone River Basin” as “areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.” Yellowstone River Compact, art. II(C) (“YRC”).

10. The Compact defines the term “Yellowstone River System” as “the Yellowstone River and all its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Beauford, North Dakota, except

those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.” YRC, art. II(D).

11. The Compact defines the term “Tributary” as “any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.” YRC, art. II(E).

12. The Compact defines the term “Interstate Tributaries” as “the Clarks Fork, Yellowstone River; the Bighorn River (except Little Bighorn River); the Tongue River; and the Powder River.” YRC, art. II(F).

2. The Plain Language of the Compact Includes All Surface Waters Tributary to the Tongue and Powder Rivers

A compact is “a legal document that must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The first sentence of the Yellowstone River Compact declares the States’ intention to provide for an equitable division and apportionment of “the waters of the Yellowstone River and its tributaries.” YRC, ¶ 1. The only exception to this comprehensive apportionment scheme is for “waters within or waters which contribute to the flow of streams within the Yellowstone National Park[.]” *Id.* The definitions in Article II repeat reference to “the Yellowstone River and its tributaries” in both the definition of “Yellowstone River Basin,” *id.*, art. II(C), and “Yellowstone River System,” *id.*, art. II (D). The term “tributary” is itself defined to include “interstate tributaries and tributaries thereof,” excluding only those “which are within or contribute to the flow of streams within the Yellowstone National Park.” These plain terms undermine

Wyoming's position that tributaries of the Tongue and Powder Rivers are somehow excluded from the Compact.

Article V(A) protects "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950." As explained above, the Yellowstone River System includes "interstate tributaries and tributaries thereto." YRC, art. II(E). The plain language of the Compact thus includes tributaries to interstate tributaries in Article V(A).

It is easy to understand why all tributaries were included within the Compact. The landforms of the Yellowstone River Basin show that waters of all tributaries, including those far up in the basin, contribute to the flows of the mainstems of the Interstate tributaries, and eventually to the Yellowstone River. It follows that such waters form part of the water supply of the precompact water rights. If those tributary flows were not included as part of the Compact, it would have been impossible to achieve the purpose of Article V(A) that those rights "continue to be enjoyed" as they existed as of January 1, 1950. Consequently, postcompact reservoirs and other postcompact uses on tributaries of Interstate tributaries must be included in the Compact to protect the pre-1950 rights. Indeed, Wyoming has acknowledged that "the pre-1950 water rights grandfathered under Section A of Article V, apply to the 'Yellowstone River System,' which by definition includes not only the 'Interstate Tributaries,' but also the tributaries to the 'Interstate Tributaries.'" Wyo. Opp. Br. at 21, n.8.

By contrast, Wyoming asserts that Article V(B) of the Compact governs only the mainstems of the Tongue and the Powder Rivers, and not their tributaries. Wyo. Opp. Br. 21. But the Compact language cannot sustain this position.

Article V(B) allocates the unused and unappropriated waters of the “Interstate tributaries of the Yellowstone River.”² The Tongue and Powder Rivers are named as “Interstate Tributaries” in Article II(F). Wyoming misconstrues Article II(F) to exclude tributaries of the Tongue and Powder Rivers. But Interstate tributaries are a subset of the more general term tributaries, and Article II(E) defines “Tributary” to include “*interstate tributaries and tributaries thereof.*” App. to Bill of Comp. 4-5 (emphasis added). Thus, the references to the Tongue River and the Powder River necessarily include the tributaries of those rivers. Wyoming cannot simply write the term “Tributary” out of the term “Interstate Tributaries.” The latter term is composed of a defined term which cannot be ignored.

Wyoming’s argument also clashes with the Compact’s treatment of the Little Big Horn River. The Little Big Horn is not directly tributary to the Yellowstone. Instead it flows into the mainstem of the Big Horn, which then empties into the Yellowstone. Compact Article II(F) nevertheless explicitly excludes the Little Big Horn from the definition of “Interstate Tributaries,” an exclusion that would make no sense if, as Wyoming claims, tributaries of tributaries were never included in the term in the first place. *See generally, Tennessee Valley Authority v. Hill*, 437 U.S. 153,

² The decapitalized form of “tributaries” in Article V(B) is consistent with all other uses of that term in its decapitalized form elsewhere in the Compact, suggesting that that term was to have its defined meaning in V(B), *i.e.*, “including tributaries of interstate tributaries and tributaries thereof.” YRC, art II(E).

188 (1978) (observing that under the maxim *expressio unius est exclusio alterius*, only express exemptions were intended by Congress in the Endangered Species Act).

In addition, the Court has never held that an interstate compact approved by the legislatures and governors of the respective States and by the Congress and President of the United States has failed to attain its stated purpose. *See, e.g., Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 91 (1823) (Construction by which purposes of the Compact would be defeated by refusal to appoint commissioners “is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it.”); *Texas v. New Mexico*, 462 U.S. 554, 566-72 and n.17 (1983). By the same reasoning, the expressed intentions of the compacting states to apportion “the waters of the Yellowstone River and its tributaries” should be enforced. Article V(B) provides the only apportionment of the unused and unapportioned waters between Montana and Wyoming. If the term “Interstate tributary” is understood to exclude the tributaries of the interstate tributaries, then the Compact fails to apportion the unused and unappropriated waters of the tributaries to the Tongue, Powder, Bighorn and Clarks Fork Rivers. Such a result is contrary to the expressed intentions of the States.

A further textual indication that tributaries of the Tongue and Powder Rivers are included within the scope of the Compact is the point of measurement specified in Article V(B)(3) and V(B)(4) for the Tongue and Powder Rivers. In each case that point of measurement is at the downstream end of the river, where it enters the Yellowstone River. The waters of the tributaries necessarily contribute to the flows of the Tongue and Powder Rivers, and are part of the flows measured at the measuring points. To

exclude waters of the tributaries would have required measuring points at their confluences with the Tongue and Powder Rivers. But the Compact provides for no such additional measuring points. In sum, the language of Article V(B) unavoidably includes the waters of the Tongue and Powder Rivers.

3. Reliable Extrinsic Sources Confirm that the States and Congress Understood the Compact to Include All Surface Waters Tributary to the Tongue and Powder Rivers

If it were determined, despite the foregoing argument, that the language of the Compact is ambiguous with regard to inclusion of tributaries of the Tongue and Powder Rivers, resort to reliable sources of the parties' intent would be appropriate. Mem. Op. at 11 (citing *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991)); *see also Oklahoma v. New Mexico*, 501 U.S. at 248-250 (Rehnquist, C.J., dissenting). But reliable sources of the parties' intent with respect to the Yellowstone River Compact confirm that the Compact was intended to apply to the waters of the tributaries of the Tongue and Powder Rivers.

The negotiating history between compacting states is one reliable source appropriate for review when interpreting an ambiguous provision of a compact. *See id.* at 235 n.5. The negotiating history of the Yellowstone River Compact reveals an intent to allocate all of the waters that contribute to the Yellowstone River. For example, Article V of the Yellowstone Compact was approved by the States at the December 7-8, 1950 Commission meeting. Immediately before adopting Paragraph B, Mr. Burke, a representative of the Bureau of Reclamation, explained the "general theory of the Compact" as follows: "*Yields of the basin* are to be burdened by (1) existing

appropriative rights and (2) supplemental water for existing developments. *The remainder, the unappropriated and unused water, or residual water, is to be compacted.*” Yellowstone River Compact Commission, Meeting Minutes of December 7-8, 1950, at 4, Jt. App. at 41 (emphasis added). Two aspects of this explanation are noteworthy. First, Mr. Burke referred to the “yields of the basin,” indicating an intent to include the waters of all tributaries, including the tributaries to the Interstate tributaries. Second, there is no exclusion of any of the unappropriated or unused waters to be compacted. Indeed, Montana is unaware of any discussion within the reliable sources of the possibility of excluding the tributaries to the Interstate tributaries. Rather, the drafters were clear that “The [Yellowstone River] basin must be covered as a whole.” Yellowstone River Compact Commission, Meeting Minutes of October 24-25, 1950, at 12, Jt. App. at 66 (comments of Mr. Leonard); *see also id.* at 10, Jt. App. at 64 (Mr. Person explaining that the Commission “is attempting to divide the entire water produced in the basin”).

Another important indicator of the intention of the States is the locations of the irrigation and reservoir projects, existing and potential, that were in the contemplation of the States as they negotiated the Compact. *See, e.g.,* Federal Power Commission, “Preliminary Report on Yellowstone River Basin, Compilation of Factual Data For Use of The Yellowstone River Compact Commission” (1940), Jt. App. at 506, 680, 688, 704, 705, 715 (tabulations of existing and potential irrigation and reservoir projects on tributaries of the Tongue and Powder Rivers). The express purpose of the Federal Power Commission report was “to compile all pertinent information . . . in a form that

will be readily useable by the Yellowstone River Compact Commission.” *Id.* at 514; *accord* *Jt. App.* 771, 797. Thus, existing and potential irrigation and reservoir projects on tributaries of the Tongue and Powder Rivers were clearly in the contemplation of the parties. Given the lack of exclusionary language in the Compact, this strongly indicates that the parties intended tributaries of the Tongue and Powder Rivers to be included. *See generally* 82d Congress, Senate Report No. 883 (Oct. 2, 1951), reprinted as Appendix A to Montana’s Brief in Response to Wyoming’s Motion to Dismiss Bill of Complaint, at App. 15a (basis for division of water on Interstate tributaries was acreage in each State that could be feasibly irrigated).

Likewise, materials submitted to Congress in support of a compact’s congressional approval are generally considered to be reliable sources of the intent of the States. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). In his Report to the Congress by the Federal Representative on the Yellowstone River Compact, R.J. Newell described the geographical scope of the Compact:

The drainage basin of the Yellowstone River, *from its source in the highlands of the Rocky Mountains* extending downstream through north central Wyoming and southeastern Montana to its mouth a few miles below the Montana-North Dakota line, is involved in the proposed compact.

82d Congress, Senate Report No. 883 (Oct. 2, 1951), reprinted as Appendix A to Montana’s Brief in Response to Wyoming’s Motion to Dismiss Bill of Complaint, at App. 10a (emphasis added). It cannot be reasonably argued that the tributaries to the Tongue and Powder Rivers are not included in the area described as “the Yellowstone

River, from its source in the highlands of the Rocky Mountains” to the mouth of the river.

Federal Representative Newell further explained that the “area *drained* comprises over 70,000 square miles.” *Id.* (emphasis added). The U.S. Geological Survey confirms that 70,000 square miles is the area within the outer limits of the Yellowstone River Basin, which necessarily includes the tributaries of the Tongue and Powder Rivers. *See*, United States Geological Survey, U.S. Dep’t of Interior, Nat’l Water-Quality Assessment Prog.: Yellowstone River Basin (1997) (USGS Fact Sheet 149-97). An area of 70,000 square miles cannot be “drained” of water without implicating not only the mainstems of the Tongue and Powder Rivers, but also their tributaries.³

C. Judicial Efficiency Will Be Served by An Early Decision

Early resolution of the issue of the tributaries to Interstate tributaries “is in the best interest of both states.” Supp. Mem. Op. at 29-30. This is consistent with the Court’s precedents. *See, e.g., Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (Supreme Court’s “object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (noting that one principal purpose of Rule 56 is to dispose of claims or defenses where appropriate). The scope of discovery and evidence will be affected by the ruling on this issue. *See* U.S. Ltr. Br. at 1 (“The scope of the Compact term

³ In addition, the course of conduct of the parties to an interstate compact, “like the conduct of parties to any contract, is evidence of its meaning.” *New Jersey v. Delaware*, 552 U.S. 597, ___ 128 S. Ct. 1410, 1425 (2008). The longstanding practice of the Yellowstone River Compact Commission is to include reservoirs on streams tributary to the Tongue and Powder Rivers as part of Compact administration. *See* Jt. App. at 335, 391, 481; Annual Summary for Yellowstone River Compact Reservoirs or Lakes (2004), Mont. Reply Br. at App. A-1; U.S. Invitation Br. at 18.

'Interstate Tributaries' is one of those issues that should be resolved at an early stage, before discovery commences").

IV. CONCLUSION

For the reasons stated above, the State of Montana requests a partial summary judgment ruling that the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Montana's Motion for Summary Judgment on the Yellowstone River Compact's Application to Tributaries of the Tongue and Powder Rivers and Brief in Support was served by electronic mail and by placing the same in the United States mail, postage paid, this 16th day of October, 2009, to the following:

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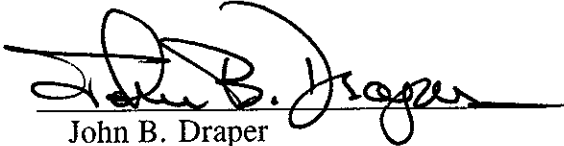
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