NO. 137, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, PLAINTIFF

V.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, DEFENDANTS

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

WYOMING'S BRIEF IN OPPOSITION TO MONTANA'S RIGHT TO RAISE ARTICLE V(B) CLAIMS

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INTRODUCTION

In response to ¶ 3 of the Special Master's Case Management Order No. 8, the State of Montana submitted a brief supporting its right to raise a claim under Article V(B) of the Yellowstone River Compact ("Compact"). Wyoming hereby responds to Montana's brief and asserts that Montana should be barred from bringing any claims under Article V(B).

COURSE OF PROCEEDINGS

I. Motion for leave to file bill of complaint

In January of 2007, Montana submitted its Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support. In the complaint, Montana asserted that Wyoming violated Article V of the Compact by:

> (a) refusing to curtail consumption of waters in excess of Wyoming's consumption as of January 1, 1950, whenever the amount necessary to satisfy Montana's rights existing as of that date are not passing the state line. Complaint ¶ 8;
>
> (b) allowing construction and use of storage facilities since January 1, 1950. *Id.* ¶ 9;
>
> (c) allowing new acreage to be put under irrigation since January 1, 1950. *Id.* ¶ 10;
>
> (d) allowing the construction and use of groundwater wells for irrigation and other uses since January 1, 1950. *Id.* ¶ 11;
>
> (e) allowing increased consumption on existing acreage as of January 1, 1950. *Id.* ¶ 12.

In the complaint, Montana overtly alleged that it had requested that Wyoming comply with Article V of the Compact, but Wyoming had refused. *Id.* ¶ 16. Montana was specific about the details of its request for compliance in its motion to the Court for leave to file. It stated that it "officially notified" Wyoming in 2004 and 2006. Br. in Supp. of Mot. for Leave at 17. Those notifications came in the form of letters from Montana's compact commissioner to Wyoming's compact commissioner, and those letters only demanded compliance with Article V(A), never mentioning Article V(B). Tyrrell Aff. in Supp. of Wyo.'s Mot. for Partial Summ. J. Ex. 1-2.

When Wyoming filed its Brief in Opposition to Motion for Leave to File Bill of Complaint, Wyoming did not believe that Montana could state a claim for relief under Article V(A). Wyoming argued that Article V(A) merely recognized pre-1950 rights so that each state would manage them within its own borders, and under each state's own laws. Wyo. Br. in Opp'n to Mot. for Leave at 2. Consequently, Wyoming believed that Article V(B) was the sole basis for a Montana claim for relief. *Id.* at 3. Wyoming, therefore, focused on Article V(B), contending that Montana's Complaint did not allege an actual Compact violation under that provision because Montana never alleged that Wyoming exceeded its percentage allocation on any given day since January 1, 1950. *Id.* at 13-30.

Montana replied by asserting that Wyoming's attention to a potential violation under Article V(B), "[i]gnores Montana's Central Claim," and "misstates Montana's basic claim," which is to protect Montana's pre-1950 rights against Wyoming post-1950

uses. Mont. Reply Br. on Mot. for Leave to File Bill of Compl. at 1. Montana emphasized that its fundamental argument was that Wyoming violated the Compact by using post-1950 water in "derogation of Montana's protected pre-1950 rights." *Id.* at 2. Montana further stated, "Wyoming's entire brief is framed largely in reference to third-tier water uses [Article V(B)], making much of the Wyoming Brief essentially *irrelevant and non-responsive* to Montana's most fundamental claim, which focuses on protection of Montana's first-tier water rights." *Id.* (emphasis added).

Presumably based on Montana's representations, the Supreme Court granted its motion for leave, and simultaneously granted Wyoming leave to file a motion in the nature of a motion to dismiss. *Montana v. Wyoming,* 552 U.S. 1175, 1175 (2008) (Mem.).

II. Motion to dismiss

In its motion to dismiss, Wyoming relied on Montana's assertion that a violation of the Compact under Article V(A) was its fundamental claim, and that addressing Article V(B) would be, as Montana had represented, "essentially irrelevant and non-responsive." Wyoming expressly asserted its belief that pre-1950 rights were allocated to each state to be managed solely within each state's own borders, so Montana's claims for relief, all of which Montana had based on Article V(A) should be dismissed. Wyo. Mot. to Dismiss at 36-37.

In Montana's response to Wyoming's motion to dismiss, it argued that an Article V(A) claim was "central" to its complaint, but mentioned for the first time a possible violation of Article V(B). Mont. Resp. to Wyo. Mot. to Dismiss at 17-18. However, it

contended that any Article V(B) violation would be derivative of its V(A) claim, and not independent. *Id.* at 18. Even though the case had been filed more than a year earlier, Montana stated that "[b]ecause factual development had not yet occurred in this case," the complaint did not single out Article V(A) or V(B). *Id.*

The United States opposed Wyoming's motion to dismiss, stating that Montana had made a valid claim under Article V(A). United States Br. in Opp'n to Mot. to Dismiss at 22. However, the United States agreed with Wyoming that Montana did not state a claim under Article V(B). *Id.* at 20.

The Special Master heard Wyoming's motion to dismiss on February 2, 2009. During that hearing, Montana's counsel stated that it brought the lawsuit to ensure that it received its pre-1950 water under Article V(A). Tr. of Hr'g on Wyo.'s Mot. to Dismiss at 61, Feb. 2, 2009. Consistent with this, the United States argued that Montana had not pled a V(B) claim in its complaint. *Id.* at 111-112.

During a teleconference hearing four months later, the Special Master invited the parties to submit letter briefs regarding: (a) whether the Special Master should modify his forthcoming memorandum opinion, and (b) whether he should address any additional issues in his first report to the Court. Tr. of Tel. Hr'g at 8-10, June 1, 2009. In his memorandum opinion, the Special Master rejected Wyoming's theory that Article V(B) was the sole actionable clause of the Compact, and instead concluded that Article V(A) protected Montana's pre-1950 water rights from diversions by Wyoming's post-1950 rights when Montana's rights were not satisfied. Mem. Op. of Special Master at 2.

III. Montana's motion for partial summary judgment

After the Special Master issued his memorandum opinion, he invited Montana to file a motion for partial summary judgment on the Compact's application to tributaries of the Tongue and Powder rivers, which it did. Montana claimed that all tributaries to the Tongue and Powder rivers are included for purposes of enforcing both Article V(A) and V(B). Mont. Mot. for Partial Summ. J. at 9-10. In its response, Wyoming asked the Special Master to limit any ruling to Article V(A) because Montana had not pled a V(B) case. Wyo. Resp. on Mot. for Partial Summ. J. at 1-5. The United States agreed. Br. of United States as *Amicus Curiae* in Partial Supp. of Mot. for Partial Summ. J. at 2-3. In its reply brief, Montana claimed that it had broadly pled Article V to include a claim under both sections A and B. Mont. Reply on Mot. for Partial Summ. J. at 4.

The Special Master heard Montana's motion for partial summary judgment at Stanford University on November 17, 2009. At that hearing, the Special Master asked three separate times about the relevancy of V(B) to this case. Tr. of Hr'g on Mont.'s Mot. for Partial Summ. J. at 29-31, Nov. 17, 2009. After Montana appeared to evade the question, the Special Master finally asked Montana, "[m]y only question is, to your knowledge, have there been any disagreements between the two states over the amounts of water that is divided between post-50 appropriators in Montana and Wyoming?" *Id.* at 31. Montana responded that the only disagreements were under Article V(A). *Id.* Later, the Special Master asked if Montana contemplated that it would be relying upon Article V(B) to achieve anything that is not already in Article V(A) *Id.* at 92. Montana responded

yes. *Id.* But when the Special Master pressed for the way in which Article V(B) may become an issue, Montana claimed that answering that question would reveal attorney work product that its counsel was not prepared to go into for purposes of Montana's Motion for Partial Summary Judgment. *Id.* at 94.

After Wyoming and the United States repeated their interpretation of Montana's complaint, the Special Master abstained from a decision as to whether Montana had pled a V(B) case: "I don't believe that it's necessary, given the current posture of the case, to go beyond that and to address Article V(B), because at least for the moment, before I go back and review the papers one last time, I'm not convinced that Article V(B) will turn out to be relevant to the ultimate resolution of Montana's complaint." Tr. for Hr'g on Mont.'s Mot. for Partial Summ. J. at 41-45, 77, 98, Nov. 17, 2009.

IV. Special Master's first interim report

On February 10, 2011, the Special Master issued his first interim report. He did not decide the scope of Article V(B) as it related to "Interstate Tributaries" because "[b]ased on the briefing and hearings to date, Montana also has yet to show that Article V(B) is likely to have separate significance in this proceeding." First Interim Report at 95. He stated that Montana "might ultimately be able to show the independent relevance of Article V(B) to this proceeding." *Id.*

V. Case Management following the bill of exceptions

Montana filed a bill of exceptions on the increased consumption issue under Article V(A), and the Court overruled it on May 2, 2011. *Montana v. Wyoming,* 131 S.Ct.

1765 (2011). After the Court's decision on Montana's exception, the Special Master ordered Wyoming and Montana to "submit a list of the issues of fact and law that it currently believes the Supreme Court will still need to resolve in reaching a final decision in this case." Case Mgmt. Order No. 6 ¶ 4. Montana identified a V(B) claim. Mont. Initial List of Issues § C. The Special Master then ordered Montana to file a "statement identifying any claims that it may wish to make under Article V(B) of the Compact, along with a brief in support of its right to raise such claims in this proceeding. Case Mgmt. Order No. 8 ¶ 3.

SUMMARY OF ARGUMENT

For the Special Master to find that Montana has pled a claim under Article V(B), he must find that Montana set forth specific facts that state a plausible V(B) claim. However, Montana's complaint is devoid of any such facts. On the contrary, in paragraph 16 of its complaint Montana ties its allegations to its 2004 and 2006 calls on Wyoming, both of which were based entirely on Article V(A).

Second, to allow Montana to advance a V(B) claim at this stage would be tantamount to allowing it to amend its complaint, which the Supreme Court disfavors in original cases since amendments take the litigation beyond what the Court reasonably anticipated when it granted leave to file the initial pleadings. This is exactly what happened here. Montana represented to the Court in its briefs in support of its motion for leave that its case centered on Article V(A). And even when it raised Article V(B)

expressly for the first time a year after the Court accepted the case, Montana still characterized any Article V(B) claim as some vague adjunct to its V(A) case.

Third, besides creating the amendment issue through its post-complaint pleadings, Montana should be judicially estopped by those pleadings from now asserting a V(B) claim. Allowing Montana to initiate a V(B) claim would permit it to play fast and loose with the Court. Montana stated in its pleadings during the Court's gatekeeping phase that Wyoming's contentions about Article V(B) were "essentially irrelevant and non-responsive," but after receiving leave to file, asserts that its complaint subsumed an independent V(B) claim all along.

Finally, almost five years into the case, Montana has responded to the Special Master's order "to be as specific as possible in identifying such [V(B)] claims," with nothing more specific than several sentences restating its vague allegations from the complaint. The Special Master and parties must presume that Montana has developed no plausible facts supporting any V(B) claim, such as how and on what given dates Wyoming violated that provision. Defendants such as Wyoming should not be subjected to the expense of full discovery triggered by complaints filed without due diligence, which is why Rule 8, Fed. R. Civ. P. requires plaintiffs to allege plausible facts in the complaint. Moreover, Rule 16, Fed. R. Civ. P., gives judicial officers the power to require specificity before discovery commences so that they can regulate the process with adequate knowledge of the case. The principles of Rules 8 and 16 should be enforced so

that Wyoming need not discover and defend a V(B) case in the continued absence of plausible facts.

ARGUMENT

I. Legal standard for complaints

To be allowed to proceed with a V(B) claim, Montana must show that it properly pled such a claim for relief when it sought leave to file its complaint. United States Supreme Court Rule 17.2 states that the Federal Rules of Civil Procedure control the form of pleadings and motions in original actions. Sup. Ct. R. 17.2 (2010). Therefore, Rule 8(a)(2), Fed. R. Civ. P., governs the form of pleadings in original actions. That rule dictates that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and the Supreme Court has held that the purpose of this dictate is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]" *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)).

The Rule 8 pleading standard does not require "detailed factual allegations," but it demands more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* __U.S.__, 129 S.Ct. 1937, 1949 (2009); *see also Twombly,* 550 U.S. at 555 (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)). A complaint will not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 557).

In order to give the defendant fair notice of the claim, a complaint must set forth specific facts, accepted as true, to "state a claim for relief that is plausible on its face." *Twombly,* 550 U.S. at 570; *see also Iqbal,* 129 S.Ct. at 1953 (stating that the *Twombly* pleading standard is applicable to all civil cases). A claim has facial plausibility when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 556). The plausibility standard requires more than a mere possibility that a defendant has acted unlawfully. *Id.* Therefore, the facts in the complaint must state a claim that is plausible, and not merely conceivable. *Twombly,* 550 U.S. at 570. "Determining whether a complaint states a plausible claim for relief will. . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 129 S.Ct. at 1950.

In its brief, Montana argues that these pleading standards should be relaxed in original actions, relying on *Rhode Island v. Massachusetts,* 39 U.S. 210 (1840). Mont. Art. V(B) Br. at 9. However, the Supreme Court decided *Rhode Island* 98 years before the Federal Rules of Civil Procedure existed, at a time when courts imposed the formalism of code pleading which often prevented plaintiffs from having their claims heard on their merits. Peter Julian, *Charles E. Clark and Simple Pleading: Against a "Formalism of Generality,"* 104 Nw. U. L. Rev. 1179, 1186, 1195-96 (2010). In response to this rigidity, the *Rhode Island* court adopted the rules and practice of the English Court of Chancery, but imposed a duty on itself to "mould the rules of Chancery

practice and pleading, in such a manner as to bring this case to a final hearing on its real merits." *Rhode Island,* 39 U.S. at 256-57. In doing so, the Court adopted a liberal pleading practice based upon the Chancery rules. *Id.* at 257.

The baseline of code pleading, and Supreme Court jurisprudence deviating from that baseline and into modified chancery practice, became irrelevant with the advent of the Federal Rules of Civil Procedure in 1938, and Supreme Court case law, such as *Twombly,* in which the Court has construed these modern pleading rules. The Special Master should decline Montana's invitation to water down the *Twombly* plausibility standard.

II. Montana's bill of complaint does not allege specific facts that make a plausible claim under Article V(B)

Montana contends that it necessarily put Wyoming on notice of a V(B) violation when it generally alleged in its complaint that Wyoming violated Article V of the Compact. Mont. Art. V(B) Br. at 10. However, this is not enough under *Twombly,* because Montana included no specific factual allegations to support a plausible V(B) claim. *Twombly,* 550 U.S. at 570. At best, Montana's allegations might make a V(B) claim conceivable. The few specific allegations only refer to Article V(A).

While Article V(A) incorporates the doctrine of appropriation to protect pre-1950 water rights from post-1950 diversions, Article V(B) is quite different. First Interim Report of the Special Master at 16-18. Article V(B) apportions the divertible flows remaining after pre-1950 rights are satisfied on a percentage basis between Wyoming and

Montana. Thus, to state a plausible V(B) claim, Montana must allege facts that show that Wyoming exceeded its percentage allocation of water on some "given date(s)", and as a result Montana did not receive its allocation which injured its post-1950 users. Compact Art. V(B).

Montana fails to make any such allegations in the paragraphs that frame its complaint, paragraphs 8-13. Montana alleges in paragraph 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.

Complaint ¶ 8.

With this allegation, Montana states a V(A) claim because it alleges harm to pre-1950 rights. By contrast, in order to allege a V(B) claim, Montana would have to allege (a) that its rights established after 1950 to supplemental supplies for pre-1950 rights went unsatisfied because of post-1950 diversions in Wyoming, or (b) its percentage allocation for post-1950 rights was violated on one or more given dates. Paragraph 8 lacks any such allegations so it does not state a claim for a violation of V(B).

Montana states in paragraphs 9 through 12:

> 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. Complaint ¶ 9.

> 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. Complaint ¶ 10.
>
> Since January 1, 1950, Wyoming has allowed the construction and use of groundwater wells for irrigation and for other uses and has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact. Complaint ¶ 11.
>
> 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. Complaint ¶ 12.

Wyoming cannot have violated Article V(B) simply by allowing the construction and use of new and expanded storage facilities, by groundwater pumping, and by putting new acreage under irrigation. The Compact encourages these activities, but conditions this new development on the allocated percentage of total cumulative divertible flow under Article V(B). Therefore, to state a valid claim under Article V(B) within these paragraphs, Montana should have asserted that on some given date or dates Wyoming exceeded its allocated percentage or deprived supplemental water to Montana's pre-1950 rights by allowing post-1950 diversions from surface waters, inter-connected groundwater, or into storage. But Montana included no such allegations in these paragraphs. Therefore, Montana's claim in this paragraph does not pass the threshold from conceivable to plausible.

Montana contends that paragraph 13 summarizes its claims. Mont. Art. V(B) Br. at 10. It states:

> 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.

Complaint ¶ 13. The phrase "aforementioned actions" refers to paragraphs 8 through 12 of the complaint. However, since these allegations only plausibly allege violations of Article V(A), paragraph 13 only summarizes Montana's Article V(A) claims.

The allegations in Paragraph 16 of the complaint further confirm that Montana alleged only a V(A) claim:

> 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.

Complaint ¶ 16.

In that allegation, Montana told the Court that it was Wyoming's refusal to respond to its compliance requests that forced Montana to bring its claim. However, as Wyoming has shown in its Motion for Partial Summary Judgment, and documents submitted with it, Montana's only requests that Wyoming comply with the Compact were requests under Article V(A). Wyo.'s Mot. for Partial Summ. J. *passim*. Montana has characterized those requests as being under Article V(A) as well. Mont. Br. in Supp. of Mot. for Leave at 17 (Montana stating that it officially notified Wyoming in 2004 and 2006 that its pre-1950 uses were unsatisfied and asked for Wyoming to provide water); Tr. Mot. to Dismiss Hr'g at 60, 71-72, Feb 3, 2009. (Montana stating that it made calls in

2004 and 2006 to allege that Wyoming stored post-1950 water when Montana pre-1950 water rights were not being filled and that 2004 was the first time they realized that pre-1950 water rights were not being satisfied). The record confirms that the requests that Montana referenced in paragraph 16 were only V(A) requests. [1]

A reasonable defendant knowing that Montana had asserted only V(A) claims in its "requests," and reading Montana's allegation in paragraph 16 that it had asserted its claims in "requests" to Wyoming, would conclude that Montana only intended to make claims under V(A). If that defendant had any doubt about the accuracy of such an inference from paragraph 16, Montana dispelled such doubt in the brief it filed with its complaint, in which it stated that it had "officially notified" Wyoming twice that Wyoming had violated the compact by shorting pre-1950 Montana rights. Br. in Supp. of Mot. for Leave to File Bill of Compl. at 17.

In summary, Montana failed to allege specific facts forming a plausible claim for relief under Article V(B). *Twombly,* 550 U.S. at 570. Therefore, the case should only proceed under the provision that Montana alleged, Article V(A).

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[1] Tyrrell Aff. in Supp. of Wyo.'s Mot. for Partial Summ. J. Ex. 1 (In 2004, Montana, "call[ed] for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 water on the Tongue and Powder Rivers," and specified that "[t]his call is for all pre-1950 Montana prior rights in those drainages, as protected in the Compact in Article V ¶A"); ex. 2 to Tyrrell Aff. ("[T]his letter constitutes Montana's call and demand, under the terms of the Compact, for water to satisfy our valid and protected pre-1950 water rights on the Tongue and Powder Rivers.").

III. Wyoming has not admitted that Montana made an Article V(B) allegation

Montana claims that "it is beyond dispute that Wyoming received notice of Montana's Article V(B) claim" because Wyoming admitted that "Wyoming initially read . . . the Bill [of Complaint] to assert a violation of Article V(B) of the Compact," and therefore "focused on particulars of Article V.B. in its first brief in this case." Mont. Art. V(B) Br. at 12 (quoting Wyo. Resp. to Mont. Mot. for Part. Summ. J. at 3). However, if the foregoing sentence is considered in its entirety and placed in the context of Wyoming's argument at the time, Montana's mischaracterization is exposed. Wyo. Resp. to Mont. Mot. for Part. Summ. J. at 3-5.[2]

As the Special Master and parties know well from the proceedings on the motion to dismiss, Wyoming initially believed that the pre-1950 water rights encompassed by Article V(A) were only recognized by the Compact and were left to be administered by

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

While Wyoming's opposition to leave to file did not achieve its purpose of ending this case in its infancy, it did, in hindsight, serve the useful purpose of forcing Montana to clearly state the nature of its case."

the respective states. Under Wyoming's theory, Article V(A) created no cause of action. Therefore, when Wyoming filed its brief in opposition to Montana's motion for leave, it stated that Article V(B) provided the sole legal basis in the Compact that could support a Montana claim that Wyoming was diverting too much water.

In accordance with its theory, Wyoming initially asked the Court to deny Montana's Motion for Leave on the basis that Montana failed to assert any claim under V(B) because Montana never alleged that Wyoming diverted water in excess of its percentage allocation under Article V(B). Wyo. Br. in Opp'n to Mot. for Leave at 3, 5. In response, Montana characterized Wyoming's discussion of Article V(B) as "essentially irrelevant and non-responsive," and that Montana "clearly" asserted a violation of Article V(A), which it characterized as its "central," "basic" and "fundamental" claim. Mont. Reply Br. on Mot. for Leave at 1-2.

The Special Master ultimately decided that Montana could make a claim under Article V(A), and Wyoming did not file an exception on this issue. However, contrary to Montana's recent arguments, Wyoming has consistently maintained that Montana never made a valid claim under Article V(B) beginning with its opposition for leave to file and again in its brief in opposition to Montana's motion for partial summary judgment. Wyoming has never admitted that Montana properly pled a V(B) claim.

IV. Montana essentially seeks to amend its complaint to add a V(B) claim although such amendment is discouraged in original actions

Because Montana did not state a claim under Article V(B), its belated statements that it wished to pursue such a claim after the Court allowed it to file its complaint are, in essence, a request to amend. However, as Montana has previously conceded, amendment "'does not suit cases within the Court's original jurisdiction.'" Mont. Br. in Resp. to Wyo.'s Mot. to Dismiss at 18 (quoting *Nebraska v. Wyoming,* 515 U.S. 1, 8 (1995)). Montana has stated previously, and implies in its latest brief on it V(B) claims, that plaintiff states in original actions may plead their claims "very broadly" because the Court disfavors amendments. *Id.;* Mont. Article V(B) Br. at 7, 10-11. This logic is backwards.

Original actions between states are extremely serious, which is why the constitution places them before the Supreme Court. *Texas v. New Mexico,* 462 U.S. 554, 571, n. 18 (1983) ("[t]he 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."); *see also New York v. New Jersey,* 256 U.S. 296, 309 (1921). The Court requires a showing of seriousness before it even allows a state to file its complaint. *Nebraska v. Wyoming,* 515 U.S. 1, 8 (1995) (citing *Ohio v. Kentucky,* 410 U.S. 641, 644 (1973)). The Court's dim view of amendments is not, as Montana implies, an excuse for lack of seriousness in the initial pleadings. On the contrary, the Court disfavors amendments because a sovereign state should take the matter seriously and tell

the parties and the Court in its first pleadings what its claims consist of. The plaintiff state that should have done its due diligence commensurate with the seriousness of such a case, does not need to employ a vague complaint to get in the gate with its options open, and then essentially amend the complaint through more specific characterization at a later date. The Court's requirement that, "leave be obtained before a complaint may be filed in an original action . . . serves an important gatekeeping function, and proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what [the Court] reasonably anticipated when [it] granted leave to file the initial pleadings." *Nebraska,* 515 U.S. at 8 (citing *Ohio,* 410 U.S. at 644).

In this case, whether through lack of due diligence, or otherwise, Montana did not plead a V(B) case when it obtained leave to file this serious case, but instead characterized any discussion of Article V(B) as irrelevant. It was only in later characterization that Montana asserted a possible V(B) claim, and even now, almost five years later, cannot give even the simplest specifics.

Montana unequivocally rejected Wyoming's claim that this was a V(B) case. Instead, Montana stated in its reply brief on the motion for leave to file:

> Montana *clearly asserts a claimed violation of Article V.A. in that Wyoming has used post-1950 water in derogation of Montana's protected pre-1950 rights.* See Bill of Complaint 8-13. In fact, the very section of Montana's opening brief cited by Wyoming for its allegation that Article V.A. is not at issue, refutes that assertion: "Article V.A. of the Compact requires Wyoming to curtail consumption of such water whenever the amount of water necessary to satisfy Montana's pre-January 1, 1950 uses of such water is not passing the stateline." Mont. Br. 18-19 (quoting 3 of the Resolution rejected by Wyoming at the Dec. 6, 2006 Yellowstone River

> Compact Commission (Commission) meeting, reprinted in App. to Mont. Br. 4). This statement describes the practical effect of the apportionment by Article V.A. of all waters in use on January 1, 1950. See Mont. Br. 18-20; see also *id.,* at 2-3, 11-16, 22.
>
> Wyoming accepts Montana's description of the three-tier water allocation in the Compact. See Wyo. Br. 2-3. Yet Wyoming's entire brief is framed largely in reference to third-tier water uses, making the Wyoming Brief *essentially irrelevant and non-responsive to Montana's most fundamental claim, which focuses on protection of Montana's first-tier water rights.*

Mont. Reply Br. on Mot. for Leave at 1-2 (emphasis added).

Montana's first re-characterization of it pleading to possibly include a derivative V(B) claim came in its brief opposing Wyoming's motion to dismiss. Mont. Br. in Resp. to Wyo.'s Mot. to Dismiss at 18. However, at the hearing on the motion, Montana counsel seemed to disclaim a V(B) case: "We think the nature of the case now is the Court must decide whether Article V-A has any meaning, whether it provides the right of Montana to make a state line call." Tr. of Hr'g on Mot. to Dismiss at 51,Feb. 3, 2009. "This is a relatively new issue for us to realize, hey, wait a minute, we are not getting our pre-50 water. The legal issue was thoroughly distinct and clear. Hence the complaint and the motion to dismiss." *Id.* at 61.

The United States joined Wyoming in accepting at face value Montana's early characterizations that its claims were based on Article V(A). For example, the United States stated in its first brief as *Amicus Curiae*:

> Although Montana's assertion of injury lacks detail, it appears to be adequate to state a ripe claim. Montana alleges that in low-water years, and as a result of Wyoming's asserted Compact violations, an insufficient quantity of water has crossed the state line to satisfy its first-tier [pre-1950] water rights.

United States Br. as *Amicus Curiae* in Supp. of Mot. to File Bill of Compl. at 13. Four months later, the United States explained that Montana's V(B) discussion in its brief on Wyoming's motion to dismiss was new:

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

United States Br. as *Amicus Curiae* in Opp'n to Mot. to Dismiss at 20 (emphasis in original).

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

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

Id. at 20 n.9.

A year and half after the briefing on the motion to dismiss, at a November 17, 2009 hearing on Montana's motion for partial summary judgment, the possibility of V(B) claim had sufficiently arisen to compel the Special Master to press Montana as to whether

the states ever disagreed about the amounts of water divided between the post-1950 appropriators in Wyoming and Montana. Tr. of Hr'g on Mot. for Partial Summ. J. at 29-31, Nov. 17, 2009. Montana's counsel responded, "[a]ll I can say, Your Honor, is that there have been disagreements about whether Wyoming is complying with the compact under Article V(A)." *Id.* at 31. Despite its inability to give specifics about any V(B) claim, Montana did argue that it retained the option to pursue one in the future.

A fair reading of the early briefs and arguments in this case, reveals that Montana received leave to file based on a V(A) claim only, and that its V(B) claim is in essence, an amendment. Montana resists this fair reading by parsing words in its early briefs. It claims that by referring to its V(A) claim as its "central" claim, "basic" claim, and "most fundamental claim" it did not limit itself to one claim. Mont. Art. V(B) Br. at 14. It claims that those modifiers "necessarily *suggest* the existence of other claims." *Id.* (emphasis added). It simply is not enough for Montana to have "suggested" the existence of a V(B) claim in its initial brief, when it could have made a V(B) claim in its complaint and directly stated that it was posing such a claim in that brief. Instead, Montana affirmatively stated in that brief that discussion of V(B) was irrelevant to its claims.

In this serious case between sovereigns, Montana should not be permitted to effectively amend its complaint contrary to its initial representations.

V. Montana should be judicially estopped from making a V(B) claim

Even if the law of pleading allowed a party to maintain all possible claims that could be discerned from a vague complaint, Montana should be judicially estopped from

making any V(B) claim in this case. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee,* 156 U.S. 680, 689 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich,* 530 U.S. 211, 227 n.8 (2000).

Although no specific formula exists, certain factors typically inform the decision whether to apply the doctrine in a particular case. *New Hampshire v. Maine,* 532 U.S. 742, 750 (2001). "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled[.]'" *Id.*

Applying these factors, Montana should be judicially estopped from asserting a V(B) claim at this stage of the litigation. First, Montana's current position that it has pled an Article V(B) case is clearly inconsistent with its earlier position. As discussed above, Montana contended that discussion of Article V(B) was "essentially irrelevant and non-responsive." Mont. Reply Br. on Mot. for Leave at 1-2. Montana also repeatedly stated that its claim was under Article V(A).

Second, Montana employed its rejection of the V(B) discussion to try to persuade the Supreme Court to exercise its original jurisdiction, and the Court did accept the case. If the Court were to now accept Montana's inconsistent position, it would give the perception that it was misled, and that Montana could with impunity "play[] 'fast and loose with the courts.'" *New Hampshire v. Maine,* 532 U.S. 742, 750 (2001) (quoting *Stretch v. Watson*, 6 N.J. Super. 456, 469 (1949)). Montana should be barred from advancing a V(B) claim by the doctrine of judicial estoppel.

VI. Montana ignored the Special Master's order that it identify specific claims it intends to make under Article V(B)

In Case Management Order No. 8, the Special Master ordered Montana to "file a statement identifying any claims that it may wish to make under Article V(B) of the Compact[.]" Case Mgmt. Order No. 8 ¶ 3. Rule 16 of the Federal Rules of Civil Procedure allows a judicial officer to order attorneys to appear for pretrial conferences for purposes such as expediting disposition of the action. Fed. R. Civ. P. 16(a)(1). Further, a judicial officer may take actions necessary to formulate and simplify the issues, and "eliminate frivolous claims or defenses." Fed. R. Civ. P. 16(c)(2)(A). The intention of this rule is to promote efficiency and conserve judicial resources by identifying the real issues prior to trial, thereby saving time and expense. *Meadow Gold Prods. Co. v. Wright,* 278 F.2d 867, 869 (D.C.Cir. 1960). This is one of the rules of civil procedure that Supreme Court Rule 17.2 states "may be taken" as a guide.

The Special Master rightfully asked for this information. He should be seeking to narrow or resolve legal issues before discovery. *Ohio v. Kentucky,* 410 U.S. at 644 ("[I]n original cases," this Court will, "where feasible …dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear.").

Further, approaching five years into a lawsuit it initiated, Montana should be able to state with specificity the basic facts necessary to assert a plausible claim under V(B), such as how Wyoming violated V(B), or the "given date" when Wyoming exceeded its percentage allocations on one of the rivers. Compact Art. V(C). Even the federal form for a simple negligence complaint includes a place for the plaintiff to say when and where an automobile accident occurred. Fed. R. Civ. P., App. of Forms, Form 11. However, in its response to the Special Master's order, Montana merely repeated several conclusory assertions from its complaint, adding the catch phrases "V(B)" and "supplemental water supplies":

> Montana claims that Wyoming has allowed construction and use of new and expanded storage facilities, new irrigated acreage, and groundwater wells in the Tongue and Powder River Basins in violation of Article V. More specifically, Montana claims that by these three types of actions Wyoming has deprived Montana of supplemental water supplies and water for use on new lands and for other purposes to which it is entitled under Article V(B). As is often the case, Montana will not be able to be more specific with respect to its claims under Article V(B) until the conclusion of discovery in this case.

Mont. Art. V(B) Br. at 17-18.

The last sentence of Montana's brief summary is especially troubling. When Montana first alluded to a possible V(B) claim in its May, 2008 brief on Wyoming's motion to dismiss, it stated that it had been vague in its complaint because "factual development has not yet occurred in this case . . . ." Mont. Br. in Resp. to Wyo.'s Mot. to Dismiss at 18. Then, a year and a half later, at Stanford, Montana evaded the Special Master's request for a factual basis by asserting attorney work product. Tr. of Hr'g on Mot. for Partial Summ. J. at 94, Nov. 17, 2009. Now, almost two years after that, the Special Master has asked Montana to be "as specific as possible in identifying such claims." Case Mgt. Order No. 8 ¶ 3. Montana has responded with no specificity, and has offered the same excuse it made in May of 2008 – it needs to conduct discovery to find out if it has a V(B) case. In 2009, at Stanford, Montana claimed work product, presumably to shield facts about its claim. But now, Montana, having been told to be "as specific as possible," states that it does not know more, and "*will not be able* to be more specific with respect to its claims under Article V(B) *until the conclusion of discovery in this case.*" Mont. Art. V(B) Br. at 18 (emphasis added).

Moreover, in that last troubling sentence, Montana contends that such inability to provide specificity "is often the case." Wyoming refuses to concede that it is "often the case" that plaintiffs cannot reveal basic facts in support of their legal theories until the conclusion of discovery. Wyoming also resists the notion that it should be the case in serious litigation between two sovereigns, and that the plaintiff's lack of diligence should continue for over four years following the case's initiation.

The very reason that the Supreme Court imposed the plausibility standard that requires plaintiffs to include allegations of fact in complaints in *Twombly* was the specter of discovery expense that could be visited upon a defendant when the plaintiff lacks even the barest support for his claim. *Twombly,* 550 U.S. at 559. Even Justice Stevens, who opposed the majority's pleading standard in *Twombly*, expressed his concern with such abuse: "[I]f I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint." *Id.* at 593 (Stevens, J., dissenting). This is exactly what Montana proposes to do to Wyoming – subject it to the necessarily massive discovery involving Article V(B) calculations over a 60 year period, even though that discovery may well reveal no violation. *See* Andrew Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery,* 62 Fla. L. Rev. 1, 43 (2010) (Supreme Court's long-standing rejection of "fishing bills").

Montana failed to allege a V(B) case under the *Twombly* test, and should not be permitted to advance one now. Moreover, the Special Master has reasonably asked Montana to be as specific as possible, only to discover that Montana cannot be more specific until the end of discovery. The Federal Rules of Civil Procedure allow discovery limitations, presumably to the point of zero discovery, if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P.

16(b)(2)(C)(iii). The Special Master should use the authority vested in him under Rule 16 to prohibit Montana from pursuing a V(B) claim.

CONCLUSION

Montana has not alleged in its complaint facts supporting a plausible claim under Article V(B). Any attempt by Montana to add such a claim at this stage of the case is akin to amending its initial pleading, and should be denied. The Special Master should also bar any further proceedings on the claim based on judicial estoppel. Finally, after well over four years of litigation, Montana should not be allowed to rely on future discovery to determine whether it can plausibly assert a claim under Article V(B), so the Special Master should bar such a claim under the concepts of fairness that support Rule 16, Fed. R. Civ. P.

Dated this 23rd day of September, 2011

THE STATE OF WYOMING

Peter K. Michael
Counsel of Record
Chief Deputy Attorney General
David J. Willms
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
307-777-6946

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Wyoming's Brief In Opposition To Montana's Right To Raise Article V(B) Claims was served by electronic mail and by placing the same in the United States mail, postage paid, this 23th day of September, 2011.

Jeanne S. Whiteing
Whiteing & Smith
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteingsmith.com

John B. Draper
Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, NM 87501
jdraper@montand.com

Jennifer Anders
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401
janders@mt.gov

Jennifer Verleger
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
jverleger@nd.gov

James J. Dubois
Office of the Solicitor
US Department of Justice
Natural Resources Section
1961 Stout Street, 8th Floor
Denver, CO 80294
James.dubois@usdoj.gov

William M. Jay
Assistant to Solicitor General
US Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
William.m.jay@usdoj.gov

Michael Wigmore
Bingham McCutchen, LLP
2020 K Street NW
Washington, DC 20006-1806
Michael.wigmore@bingham.com

Barton H. Thompson Jr.
Susan Carter, Assistant
Jerry yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205
Susan.carter@stanford.edu

Wyoming Attorney General's Office