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**MONTANA V. WYOMING AND NORTH DAKOTA; THE
CONTOURS OF ADEQUATE NOTICE IN THE TONGUE RIVER
BASIN**

E. Lars Phillips

No. 137, Original
U.S. Supreme Court
Special Master Barton H. Thompson.

Oral Argument: Thursday, May 1, 2014, at 9:00 a.m. in the Moot Courtroom, Room 80, at 559 Nathan Abbott Way, on the campus of Stanford University, Stanford, California

I. QUESTION PRESENTED

Did Wyoming violate the Yellowstone River Compact's provisions governing the Tongue River in various years when senior, pre-1950 water rights in Montana went unsatisfied while junior, post-1950 rights located upstream in Wyoming drew on the river?

II. BACKGROUND

The current iteration of *Montana v. Wyoming* addresses water usage on the Tongue River, which begins in Wyoming and travels through Montana on its way to the Yellowstone River. Eastern Montana is a notoriously dry environment; in basins like the Tongue River drainage, every drop of water matters. As the downstream neighbor, Montana depends on Wyoming to manage the uses on the Tongue that are located within its territory in accordance with the doctrine of prior appropriation.¹ In 1950, in order to protect existing water rights and alleviate concerns over the impact of future development in the various watersheds (including the Tongue River drainage) that feed the Yellowstone River, Montana, Wyoming, and North Dakota entered into the Yellowstone River Compact (Compact). The Compact recognized, and specifically protected, numerous pre-1950 water rights in Montana from being negatively impacted by post-Compact (post-1950) development on the Tongue River.²

¹ The doctrine of prior appropriation holds that when a person takes an amount of water, usually from a stream or river, and puts that water to beneficial use, he has developed the right to continue such beneficial use with that amount of water. The next person to take an amount of water from that same source may also take as much as he can beneficially use. However, this person has a 'junior' right to the original, or senior, user, and the senior may request that the junior release water if the senior is not receiving the full amount that is due under his right. (First Interim Report of the Special Master 4-6 (Feb. 10, 2010)).

² Montana's Post Trial Br. 3 (March 31, 2014).

Since the Compact was signed, the dispute over water rights on the Tongue River has simmered for almost half a century. Montana contends that, since the signing, it has endeavored to work with Wyoming to find extralegal solutions to water usage issues in the drainage; the evidence supporting this claim highlights the futility of the efforts.³ Inevitably, the interstate issues surrounding senior and junior water rights in the basin boiled over into litigation.

In February of 2008, the U.S. Supreme Court granted Montana leave to file a bill of complaint against Wyoming.⁴ Montana claimed that by refusing to “curtail the consumption” by post-1950 water uses on the Tongue River, when pre-1950 water uses in Montana were unsatisfied, Wyoming had violated Article V of the Compact.⁵ The U.S. Supreme Court appointed a Special Master, the Honorable Barton H. Thompson, Jr., to oversee the proceedings.⁶ The most recent proceeding has focused on one question: whether or not the actions of Wyoming violated the Compact. Over the course of the trial, it became clear an affirmative finding of a violation would likely hinge on whether or not Montana provided Wyoming with adequate notice that pre-1950 appropriate rights on the Tongue River were not being satisfied in the years at issue. While the ultimate decision by the U.S. Supreme Court will determine whether Wyoming has violated the Compact in light of the evidence presented, this case will likely define what constitutes an adequate call on the Tongue River for years to come.

III. SUMMARY OF CLOSING ARGUMENTS

In May, 2014, advocates for Montana and Wyoming presented closing arguments to Special Master Thompson in an event spanning an entire day on the campus of Stanford University in San Francisco, California. Montana’s Attorney General, Tim Fox, began the day with a brief overview of the dispute as a whole. Fox painted a picture of the ongoing hardships faced by individual farmers, including those with pre-1950 water rights, on the Tongue River. These hardships, Fox argued, were exacerbated by the fact that the State of Wyoming had “never taken a single action to provide any water to Montana under the Compact.”⁷ In presenting the argument this way, Fox illustrated the fundamental premise behind Montana’s position: the Compact obligated Wyoming to protect pre-1950 water rights from post-1950 uses and the unsatisfied

³ *Id.* at 12–19.

⁴ *Montana v. Wyoming*, 552 U.S. 1175 (2008).

⁵ Bill of Complaint ¶ 8 (Jan. 2007).

⁶ A timeline of the case, including PDF versions of the documents, can be found at <http://web.stanford.edu/dept/law/mvn>.

⁷ Transcr. Post-Trial Hrg. Proc. 14:4–5 (May 1, 2014).

pre-1950 uses in Montana were prima facie proof of a violation of the Compact.

James Kaste, Wyoming's Senior Assistant Attorney General, countered by describing the dispute as revolving around "a simple breach of contract." Therefore, Kaste argued, Montana must meet three criteria. First, Montana must prove that pre-1950 water rights were unsatisfied "at a specific place on the river at a specific time."⁸ Second, Montana must prove "a specific shortage," after the "appropriate intrastate mechanisms" had been implemented to ensure that post-1950 uses within Montana had already been curtailed.⁹ And third, Montana must provide Wyoming with adequate notice which, in light of the nature of the dispute, would be in the form of a call.¹⁰ While arguments explaining these three issues would guide the remainder of the closing arguments, the third issue, adequate notice, was particularly contested.

A. Notice

Montana and Wyoming advocated incredibly different views of what adequate notice in a call on the Tongue River would look like. The essential question, developed during the course of the arguments, was whether or not a call for water must not only inform the junior user that the senior was low on water but also include a demand that the junior user release the water. Arguing for Montana, Mr. Swanson, Deputy Attorney General for the State of Montana, suggested that, even though Montana felt it had provided adequate notice, Montana could avail itself of any of the three exceptions to the notice requirement previously recognized in the course of the proceedings.¹¹ Specifically, Swanson emphasized the futility exception and highlighted the frustration of trying to reach an agreement with such a historically "unyielding" contractual partner like Wyoming.¹²

For Wyoming, Kaste argued it was not sufficient for Montana to simply inform Wyoming of a shortage. He proposed that Montana must take the second step of making "a demand for water."¹³ The Special Master seemed to side with Wyoming and cited a U.S. Supreme Court

⁸ *Id.* at 21:22.

⁹ *Id.* at 22:3–8.

¹⁰ *Id.* at 23:15–23.

¹¹ Three exceptions to the notice requirement were recognized by the Special Master. First, the futility exception, where it would be futile for Montana to issue further notice to Wyoming that it was short of water because Wyoming had made it clear it simply wasn't going to remedy the situation. Second, the prior knowledge exception, where Montana could show that Wyoming already knew Montana's pre-1950 senior appropriators were not receiving the water guaranteed to them under their rights. And third, the Compact administration exception, which would exist where Montana would try to "set up a process for meeting its rights under the Compact," and the actions of Wyoming would evade those processes to such an extent that it would alleviate the need for notice. (Transcr. Post-Trial Hrg. Proc. 69:5–6).

¹² Transcr. Post-Trial Hrg. Proc. at 61:8–18.

¹³ *Id.* at 58:5–6.

case for the premise that the senior user must inform the junior of his water shortage and then demand the junior release water to satisfy the senior right.¹⁴

Kaste, however, went further and argued that not only was a demand required but the interstate relationship required increased specificity in the call itself. Kaste insisted Montana must be able to prove pre-1950 water rights were unsatisfied “at a specific place on the river at a specific time.”¹⁵ In theory, such specifics would allow Wyoming to ensure that Montana was not issuing a call on the river without taking appropriate intrastate measures. In response, Montana maintained that, since 1952, interactions between the two sovereigns illustrated Wyoming’s penchant for using increased specificity as a smokescreen to further delay the delivery of water in a given year.

B. Pre-1950 Uses in Montana

Wyoming’s focus on specificity allowed a natural progression into the next topic for argument: the substantive nature of pre-1950 uses in Montana. This discussion was divided primarily into two issues: the storage rights and the direct flow rights in existence at the time of the Compact in 1950. Mr. Wechsler, Special Assistant Attorney General, provided the argument for Montana regarding storage rights on the Tongue and focused, specifically, on the Tongue River Reservoir (Reservoir). He presented the historical argument explaining how the storage capacity protected under the Compact was much greater than the amount recognized by Wyoming.

Wyoming’s counter argument as to why the storage capacity of the Reservoir was less than the amount argued for by Montana was extensive. Mr. Kaste covered issues such as whether the one-fill rule applied in Montana and whether or not voluntary bypasses of water by the Reservoir should be counted against the Reservoir.¹⁶ The underlying current of the argument revolved around whether or not Montana was putting the full amount of water in the Tongue River Reservoir to beneficial use. Under the doctrine of appropriation, Kaste argued that, if Montana was being wasteful in its management of the Reservoir, it should not be able to force Wyoming to bail it out.¹⁷ When given the opportunity to rebut, Wechsler insisted Montana had continued to operate its reservoirs in a way that was reasonable, prudent, and “consistent with the doctrine of appropriation.”¹⁸

¹⁴ *Id.* at 65:18–23.

¹⁵ *Id.* at 21:22.

¹⁶ The one-fill rule refers to the premise that a reservoir’s storage right only guarantees the reservoir enough water to fill the reservoir once.

¹⁷ Transcr. Post-Trial Hrg. Proc. at 174: 6–18.

¹⁸ *Id.* at 189:13–16.

The discussion surrounding pre-1950 direct flow rights proved to be much simpler. Wechsler argued that the doctrine of appropriation governed the rights and therefore, once a right had been adjudicated, the user was “entitled to the amount of water to satisfy your water right.”¹⁹

C. Post-1950 Uses in Wyoming

The third, and final topic of the hearing revolved around post-1950 uses in Wyoming. The arguments from both sides focused on the merits, or flaws, of various experts and models used by Montana to determine the amount of water Wyoming was liable for withholding from pre-1950 users if found in violation of the Compact. The Special Master recognized this particular section as fact intensive and allowed only an hour for both sides to present their arguments. With Wyoming potentially on the hook for the numbers shown by Montana’s expert testimony, Mr. Kaste issued an impassioned argument against the validity of the expert and the model used in the expert’s analysis. His argument boiled down to the concept he had advocated for when discussing adequate notice earlier in the day: there must be some specific, particular proof before the Court can find the evidence of violation credible.

IV. ANALYSIS

By the conclusion of the proceedings, the underlying question of whether or not Wyoming had violated the Compact appeared at least partially resolved. It seemed likely that the Special Master would find for Montana on two of the years at issue, 2004 and 2006, solely because Wyoming admitted to having received adequate notice of a call on the river in those years. This suggests that adequate notice will prove to be the determinative factor for whether or not a violation of the Compact had occurred. Therefore, unfortunately for Montana, it is unlikely that the Special Master will agree that the evidence presented supports the premise that Montana issued calls on the Tongue River prior to 2004 and 2006.

This reliance on notice suggests that, while the Special Master’s recommendations to the U.S. Supreme Court will decide whether Wyoming previously violated the Compact, the real impact of this case will be its future application. To illustrate, the Special Master will likely find that there are two distinct components to an interstate call on a river: (1) a statement informing the junior right that the senior right is unsatisfied and (2) a demand that the junior right release the water for the benefit of the senior. Furthermore, due to the importance placed on

¹⁹ *Id.* at 142:8-9.

adequate notice in the proceedings, it is likely that the first component, the statement informing the junior of the shortage, will require some level of detail. The rationale for this heightened specificity will likely lie in the importance of providing the junior use with the ability to prove the senior use was not able to issue a valid call on the river. The Special Master's recommendation as to the necessary level of detail will likely fall closer to Wyoming's position that there must be an exact moment at an exact place on the river where the shortage can be proven than to Montana's position that the simple fact of a shortage at a senior right is enough.

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