

Update on *Montana v. Wyoming* Litigation for May 2012 BAAG Meetings
May 23-24, 2012

Montana v. Wyoming and North Dakota

United States Supreme Court

Original Action No. 137

Background: Montana claims that Wyoming has violated, or threatens to violate, the Yellowstone River Compact through its use of water on the Powder, Little Powder, and Tongue Rivers. Montana alleges that Wyoming has allowed its irrigators and other water users with post-1950 water rights to deplete the flows of the rivers at times when Montana pre-1950 irrigators are not able to satisfy their needs. Montana claims this has occurred through Wyoming's failure to regulate reservoir storage, irrigation of new acreages after 1950, and groundwater pumping (especially coal bed methane pumping).

Course of Proceedings Before the 2011 BAAG Meetings:

The lawsuit was filed in 2007. The first several years were spent with legal motions and arguments interpreting the Compact and the viability of Montana's claims against Wyoming.

At the beginning of the case, the Supreme Court granted Montana's motion for leave to file its complaint over Wyoming's objection. But the Supreme Court allowed Wyoming to file a motion to dismiss Montana's complaint, which it did. The Supreme Court then appointed Special Master Barton Thompson, Jr. to hear the motion to dismiss and handle further proceedings in the case.

After briefing and oral argument on the motion to dismiss, Special Master Thompson filed his First Interim Report of the Special Master. This Report presented the Special Master's recommendations to the Supreme Court on how the Court should decide regarding each of the motions filed up to that point. The Special Master recommended that the Supreme Court deny Wyoming's motion to dismiss and also deny Anadarko Petroleum's motion to intervene in the case. The Special Master also recommended partially granting of Montana's motion for partial summary judgment on an issue Wyoming conceded. In his report, Special Master Thompson made several rulings that are positive for Wyoming's water users.

Montana took exception to the Special Master's recommendations, and Wyoming and the United States filed briefs in opposition to Montana's exceptions. The United States has been an intervenor to the case since shortly after it began.

Oral argument took place in front of the Supreme Court on January 10, 2011, on the issue of whether Wyoming users with pre-1950 water rights could violate the Compact by improving the efficiency of their use of the water under their water rights. The Supreme Court ruled in Wyoming's favor on May 2, 2011 in an opinion authored by Justice Clarence Thomas.

*Note: The Supreme Court opinion is available on the Special Master's website:

<http://www.stanford.edu/dept/law/mvn/>

Post-2011 BAAG Meetings Course of Proceedings:

Since the Supreme Court's decision, the Special Master has considered other legal issues in preparation for the parties beginning the discovery process where each party would begin gathering evidence from on another.

On July 29, 2011, following legal briefs by the parties, the Special Master held that it was the law of the case that the Compact did not require a "mass quantity delivery obligation" at the Wyoming-Montana state line. Such an obligation would have required Wyoming to deliver a set amount of water to the state line. But the Special Master found that the Yellowstone River Compact is not written like other compacts around the West that require state-line obligations.

The parties also briefed two issues and argued them in Denver before the Special Master on September 30, 2011: (1) whether the Compact requires Montana to "make a call" to enforce Article 5(A); and (2) whether Montana's bill of complaint includes allegations that Wyoming violated Article 5(B) of the Yellowstone River Compact.

The issue regarding a "call" on the river was addressed through a motion by Wyoming for partial summary judgment to exclude from the case years when Montana did not make a "call" to Wyoming to notify Wyoming that Montana's pre-1950 water rights were not being satisfied. Wyoming argues that Montana only made calls on the river to Wyoming in 2004 and 2006.

The second issue, whether Montana's complaint included allegations that Wyoming violated Article 5(B) of the Yellowstone River Compact, was addressed through briefing by the parties.

The Special Master issued memorandum opinions on the issues on December 21, 2011. In the opinion regarding the “call” issue, the Special Master deferred a decision on the issue in order to allow Montana to have time to discover more evidence about years when calls on the river were made to Wyoming. But the Special Master also allowed Wyoming to renew its motion in June of 2012 to try to exclude from the case any years when calls were not made.

The Special Master also held that Article 5(B) violations were not alleged in Montana’s complaint, but the State could seek leave from the Supreme Court to amend its complaint to include those allegations.

In January 2012, the parties began the discovery process to collect evidence. Both States have inspected each other’s documents related to the case. Wyoming has also held depositions of several of Montana’s potential witnesses. The discovery process will continue through 2012 and into Spring 2013. The Special Master has tentatively scheduled a trial in this case to be held in Summer 2013.

In June, Wyoming will file its renewed motion for summary judgment to exclude from the case every year but 2004 and 2006, when Montana made a call on the river to Wyoming.

Also later this summer, the parties will temporarily stay (stop) their discovery efforts for two months (July 15 to September 15) to allow Montana’s hired private counsel to participate in a trial on another interstate water case in which the private attorneys are involved.

For Further Information: The Special Master maintains a website with all of the parties’ filings and the Special Master’s orders and recommendations:

<http://www.stanford.edu/dept/law/mvn/>