

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 SUPPLEMENTAL
STATEMENT OF ARTICLE V(B) ISSUES**

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I. INTRODUCTION

On September 30, 2011 a hearing was held before Special Master Thompson regarding Montana's Brief on its Right to Raise Article V(B) Claims and Statement of its Article V(B) Claims. At that hearing, the Special Master inquired about the nature and scope of Montana's Article V(B) claims and directed Montana to submit an additional statement regarding the issues of fact and law and related investigations that Montana intends to pursue with regard to its Article V(B) claims. Montana submits this Supplemental Statement of Article V(B) Issues ("Supplemental Statement") in accordance with the Special Master's direction to clarify and explain its Article V(B) claims. This Supplemental Statement should be considered as a supplement to Montana's Initial List of Issues of Law and Fact, Montana's Brief on its Right to Raise Article V(B) Claims and Statement of Its Article V(B) Claims, and Montana's Reply Brief in Support of Its Article V(B) Claims, all of which are incorporated herein by reference. Montana reserves the right to raise additional Article V(B) issues that arise in discovery and otherwise in this litigation.

II. THE ARTICLE V ALLOCATION

It is instructive to consider Montana's Article V(B) claims in light of the Article V Allocation. Article V of the Yellowstone River Compact ("Compact") allocates all of the waters of the Yellowstone River and of the Interstate tributaries. The Compact establishes "a three-level hierarchy." First Interim Report of the Special Master at 18 ("FIR"); *see also Montana v. Wyoming*, 131 S.Ct. 1765, 1770, Bench Op., at 2 (2011) ("The Yellowstone River Compact divides the water into three tiers of priority"). The Compact "provides block protection for all existing, pre-1950 appropriations, without

attempting to quantify the amounts of those appropriations, and then, after providing for supplemental appropriations for lands already under irrigation, apportions the amount that remains.” FIR 21-22.

Articles V(A) and V(B) are parts of the same allocation. Since all of the water of the Yellowstone River and its tributaries is allocated by Article V, the amount allocated to each State under Article V(B) can only be determined after the amount allocated to each State under Article V(A) is known. As the upstream State, Wyoming bears the responsibility for ensuring that it does not over-use its share of the water, *see, e.g., Texas v. New Mexico*, 462 U.S. 554, 569 (1983), thus allowing adequate water to pass into Montana to satisfy Article V. In determining the amount of water to which each State is entitled, the following issues must be resolved in the order specified: (1) pre-1950 uses in Wyoming;¹ (2) pre-1950 uses in Montana; (3) supplemental rights in each State; and (4) post-January 1, 1950 uses in each State.

A. Article V(A)

Article V(A) apportions the water in use as of January 1, 1950. It provides that such rights shall “continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.” Article V(A) “requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana.” FIR 29.

¹ The Compact looks first to Wyoming’s pre-1950 uses because Montana’s “downstream pre-1950 users cannot stop Wyoming’s upstream pre-1950 users from fully exercising their water rights.” *Montana v. Wyoming*, 131 S.Ct. at 1772, Bench Op. at 6.

B. Article V(B)

Article V(B) allocates water supplies unused and unappropriated as of January 1, 1950. Supplemental supply for pre-1950 water rights is allocated first. The remainder is allocated by percentage to Wyoming and Montana in each basin for storage or direct diversions. The percentages allocated for post-1950 use are listed in Article V(B) for each State.

The supply subject to the percentage allocation is defined in Article V(C). The post-1950 use allocated by percentage is to be determined as the sum of diversions and storage for such uses and the gage flow at the “point of measurement.” In the Tongue and Powder basins, the points of measurement are specified as the stream gages in Montana near the confluences with the Yellowstone River. Articles V(C)(2) and V(C)(3) specify that the storage component of the combined supplies is net storage change, i.e., storage accruals increase the computed supply and storage reductions decrease the computed supply.

The information necessary to calculate the V(C) quantities subject to the percentage allocation includes the following:

- Gage flows at the point of measurement;
- Diversions for post-1950 uses in each State;
- Net storage accrual for post-1950 uses in each State.

III. HISTORICAL BACKGROUND

A review of the historic material also helps provide context to the Article V(B) claims that Montana raises in this action. For years Montana requested that Wyoming

work with Montana to develop the data and process necessary for Compact administration to ensure that Montana received its full share of water under all of Article V. As far back as 1952, in the first meeting of the Yellowstone River Compact Commission (“YRCC”), the YRCC recognized that “[t]he States of Wyoming and Montana by entering into the Yellowstone River Compact have assumed a responsibility which cannot be properly discharged until information on water rights acquired since January 1, 1950 and the quantities of water diverted under those rights, can be made a matter of ready record.” 1952 Annual Report at 6. The YRCC further expressed in 1952 that “the lack of information [regarding diversion in both States] must be remedied if the Compact is to be properly administered.” *Id.* at 5.

Unfortunately, the issues with Compact administration and division of water under Article V have persisted. For example, in 1988, the Montana Compact Commissioner “stated that a sincere effort must be made to develop an acceptable procedure to administer water rights.” 1988 Annual Report at IV. Montana “suggested that the technical committee prepare a report for the entire basin that would describe the existing water rights in Wyoming and Montana, show the priority dates, and compare water rights with water availability. . . . [A] better understanding of the water rights situation was needed to give some guidance for the administrative process.” *Id.* Wyoming resisted this effort. In 1992 the Montana Commissioner:

“[R]eported that his staff had compiled information on pre- and post-1950 water use in Wyoming. Based on that information, he had concluded that pre-1950 use impacts Montana and that evidence suggests that post-1950 use also affects Montana’s utilization of water in the basin. He noted that the impacts do not occur every year but that they do occur. He stated that he was skeptical that the Commission would proactively establish an administration method and process, and after years of attempting to have such a system adopted

by the Commission, would no longer pursue such an action.” 1992 Annual Report at IV.

In 2004, and again in 2006, when a frustrated Montana made written calls, Montana repeated its long-standing request to fully administer the Compact when it explained that the States needed to develop a “workable process,” not only for delivery of water for pre-1950 uses, but also “to provid[e] for the Compact apportionment of all waters developed after 1950.” *See* Declaration of Richard M. Moy, App. A to Montana’s Brief in Opposition to Wyoming’s Motion for Partial Summary Judgment, Exh. A, at 2, and Exh. B, at xxii.

Despite Montana’s efforts, Wyoming has never provided an accounting of water provided under Article V(A) or V(B). Nor has Wyoming ever altered its actions or intrastate water administration to comply with the Compact.

Due to the impasse between the States over the administration of the Compact, Montana has long suspected that it may not be receiving its water under all of Article V, including Article V(B). Only after years of being rebuffed did Montana resort to the Court’s original jurisdiction to protect its rights under the Compact. As Montana has previously explained, it broadly pled Article V in its Bill of Complaint in order to preserve and pursue all of its claims against Wyoming for under-delivery of Compact water.

IV. STATEMENT OF ARTICLE V(B) ISSUES

A. Issues Common to Montana's Article V(A) and Article V(B) Claims

On July 20, 2011, Montana filed its Initial List of Issues of Law and Fact ("Initial List"). Most of the issues identified in that Initial List are issues that will need to be explored for both Montana's Article V(A) claims and for Montana's Article V(B) claims. This is true because pre-1950 uses in each State must be quantified before determining the amount of water subject to the percentage allocations, and Wyoming's post-1950 use must be quantified to determine if there was a violation of Article V(A). Thus, for Montana's Article V(B) claims, as with Montana's Article V(A) claims, the Court will need to resolve the nature and extent of the pre-1950 rights and uses in both States, the post-1950 diversions in Wyoming (including diversions for new acreage and groundwater), and the post-1950 storage in Wyoming.

More specifically, the following Issues of Law identified in Montana's Initial List are common to both Montana's Article V(A) claims and Montana's Article V(B) claims: Nos. 1, 2, 3, 4, 7, 10, 11, 12, 13, 14, 23, 24, and 26.

Likewise, the following Issues of Fact identified in Montana's Initial List are common to both Montana's Article V(A) claims and Montana's Article V(B) claims: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, and 15.

B. Additional Issues Specific to Montana's Article V(B) Claims

In addition to those issues identified above, which are common and will likely need resolution for both Montana's Article V(A) and Article V(B) claims, the following issues of fact and law appear at this time to be specific to Montana's Article V(B) claim:

i. Issues of Law

1. How are Article V(B) violations determined?
2. If an interstate priority call is required, but not made, is the water reallocated under Article V(B)?
3. Does the abandonment of a water right by an individual water user change the allocation between the States? If so, is the abandoned water allocated under Article V(B)?
4. What is the measure of “unused and unappropriated” water in Article V(B)?
5. Is it a violation of Article V(B) to take water that was either “used” or “appropriated” as of January 1, 1950?
6. Do supplemental water rights have priority without regard to the stateline?
7. Does the allocation of water between the States under Article V(B) change based on the individual actions of water users?
8. Does Article V(B) exclude water from the tributaries to the Interstate tributaries?

ii. Issues of Fact

The issues of fact particular to Montana’s Article V(B) claims will depend on the rulings on legal issues. To the extent that water is not used to satisfy pre-1950 rights in both States, or is legally beyond the scope of Article V(A), it is allocated under Article V(B). Accordingly, the following is only a tentative list of factual issues.

1. What is the nature and extent of supplemental post-January 1, 1950 (“post-1950”) rights in Montana and Wyoming?

2. Has Wyoming delivered the supplemental supplies in priority without regard to the stateline?
3. How much water was available for percentage allocations in Montana and Wyoming in each year beginning in 1950?
4. What were the post-1950 diversions in Montana and Wyoming in each year beginning in 1950?
5. To what extent and when was water delivered to new or expanded storage in each State since January 1, 1950?
6. To what extent has post-1950 groundwater pumping, including CBM, been accounted for under the Compact?
7. Given that many of the reservoirs were enlarged since 1950, what is the allocation between storage for pre-1950 uses, storage for supplemental use for pre-1950 water rights, and post-1950 storage in each reservoir?
8. Since the time that significant post-1950 development in Wyoming has occurred, did Montana receive 60% of the water subject to the percentage allocations on the Tongue River?
9. Since the time that significant post-1950 development in Wyoming has occurred, did Montana receive 58% of the water subject to the percentage allocations on the Powder River?
10. What was the streamflow at each point of measurement in each year since 1950?

C. Montana's Article V(B) Claims Will Not Significantly Expand Discovery

Because the main inquiries for both Montana's Article V(A) and V(B) claims overlap, discovery to pursue Montana's Article V(B) claims would be largely the same as that necessary for analysis of Montana's Article V(A) claims. As a result, contrary to Wyoming's unsupported and inappropriate assertions, allowing Montana to proceed with its Article V(B) claims will not significantly expand the scope of this case.

V. MONTANA'S ARTICLE V(A) AND (B) CLAIMS CANNOT BE SEPARATED

Montana's basic claim in this suit is that it is not receiving its share of Compact water. As can be seen in the above list of issues, Montana's Article V(A) claims cannot easily be separated from its Article V(B) claims. For example, as discussed above, the amount of water subject to the percentage allocations depends on the proper scope of the pre-1950 uses in each State. Wyoming has never calculated this amount, and has never adjusted its actions to comply with the Compact. Since all of the water is divided between the States in either Article V(A) or V(B), as the proportional block of pre-1950 water in Wyoming increases, the amount of water available for the percentage allocations decreases. Consequently, in any given year the scope of Wyoming's pre- and post-1950 uses impacts the amount of water allocated to Montana under Article V. The nature and extent of those pre and post-1950 uses is being determined for the first time in this action.

Moreover, decisions made in this case will impact whether water is allocated between the States under Article V(A) or V(B). By way of illustration, if the Court were to determine that an interstate priority call is implicitly required for Montana to receive

its Article V(A) entitlement in past years, water used in Wyoming in those same years beyond Wyoming's legitimate pre-1950 uses may have been subject to the Article V(B) percentage allocations, and Montana was entitled to its share (60% on the Tongue; 58% on the Powder).

VI. EXAMPLES OF MONTANA'S ARTICLE V(B) CLAIMS

In order to satisfy the Special Master's request for more specificity with respect to Montana's Article V(B) claims, Montana offers the following examples. These examples should not be taken to imply that Montana's V(B) claims are limited to these examples. Rather, Montana believes that there are many other examples of Article V(B) claims that fall within the scope of Montana's Bill of Complaint.

A great deal of storage has been developed on the Powder River in Wyoming since January 1, 1950. Lake DeSmet has been enlarged from 37,520 acre-feet to 235,000 acre-feet, an increase in the post-Compact period of 197,500 acre-feet. See, *e.g.*, Montana's Reply Brief on Motion For Leave to File Bill of Complaint, at A-1. There are more than 14,800 acres of adjudicated, permitted, or otherwise approved irrigation rights in Montana with post-January 1, 1950 priorities.

With the parallel post-January 1, 1950 development in Wyoming and Montana set out above, it is clear that there is great potential for violation of the Article V(B) percentage allocations. In addition to Lake DeSmet, there are a number of other reservoirs in Wyoming with post-January 1, 1950 storage: Cloud Peak Reservoir, Dull Knife Reservoir, Healy Reservoir, Kearney Reservoir, Muddy Guard Reservoir and Tie Hack Reservoir. See *id.*; App. A to Brief in Support of Motion for Leave to File Bill of Complaint, at A-2 (map showing reservoirs in the Powder River Basin in Wyoming).

On the Tongue River in Montana, a state adjudication is in progress. Post-January 1, 1950 water rights have been asserted in that adjudication and necessarily depend upon the Yellowstone River Compact Article V(B) allocation to the State of Montana in order to be exercised. These rights are subject, however, to being impaired by post-January 1, 1950 storage right reservoir operations in Wyoming. See, *e.g.*, Montana's Reply Brief on Motion For Leave to File Bill of Complaint, at A-1 (listing post-January 1, 1950 storage in Tongue River reservoirs in Wyoming); App. A to Brief in Support of Motion for Leave to File Bill of Complaint, at A-2 (map showing post-January 1, 1950 reservoirs in the Tongue River Basin in Wyoming: Bighorn Reservoir, Cross Creek Reservoir, Dome Reservoir, Park Reservoir, Sawmill Lakes Reservoir, Twin Lakes Reservoir).

In addition to the post-January 1, 1950 reservoir operations described above, there are also post-January 1, 1950 groundwater diversions, for coalbed methane extraction and other purposes in Wyoming that impair Montana's Article V(B) allocation and thereby the specific post-January 1, 1950 water uses in Montana described above. See Brief in Support of Motion For Leave to File 15.

The foregoing are examples of the subjects that Montana needs to pursue in this case in order to protect that part of its Compact allocation based on Article V(B).

VII. PRECLUSION OF MONTANA'S ARTICLE V(B) CLAIMS WOULD RESULT IN AN INSUFFICIENT REMEDY

In its prayer for relief, Montana requests that the Court: (A) "Declare the rights of the State of Montana to the waters of the Tongue and Powder Rivers pursuant to the Yellowstone River Compact;" and (B) "Issue its Decree commanding the State of

Wyoming in the future to deliver the waters of the Tongue and Powder Rivers in accordance with the provisions of the Yellowstone River Compact.” Bill of Complaint at pg. 5, ¶¶ A-B. This relief would be incomplete and wholly unsatisfying to Montana if it were limited to the States’ relative rights and obligations for pre-1950 uses under Article V(A). Rather, it is in the best interests of both the Court and the States for the Court to provide guidance on all of Article V. As the downstream State, Montana has been and will continue to be at the mercy of Wyoming for the purposes of Compact compliance. It is better that the Court resolve these issues now, rather than provide a piecemeal path forward that will invite future dispute.

VIII. CONCLUSION

For the reasons set out above, the Special Master should allow Montana to pursue its Article V(B) claims in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Montana's Supplemental Statement Of Article V(B) Issues was served by electronic mail and by placing the same in the United States mail, postage paid, this 7th day of October, 2011, to the following. I further certify that all parties required to be served have been served.

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