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

On Motion to Dismiss Bill of Complaint

MONTANA'S LETTER BRIEF RE MEMORANDUM OPINION ON MOTION TO DISMISS

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Montana submits this Letter Brief in accordance with Case Management Order No. 2. This Letter Brief addresses primarily Part III.C.4 (pp. 37-41) of the Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint ("Memorandum Opinion" or "Mem. Op."). It also provides formal and typographical suggestions in the Appendix.

I. The Yellowstone River Compact Requires that Depletions Caused by Increased Consumption on Precompact Irrigated Acreage in Wyoming Be Accounted For

In its Bill of Complaint, Montana alleged that "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." Bill of Complaint ¶ 12 ("Fourth Claim for Relief"). The Memorandum Opinion includes the following conclusion:

> 8. Article V(A) of the Compact does not prohibit pre-1950 appropriators in Wyoming from conserving water through the adoption of improved irrigation techniques and then using that water to irrigate the lands that they were irrigating as of January 1, 1950.

Memorandum Opinion at 42-43. Consistent with Case Management Order No. 2, Montana offers the following corrections and clarifications to the Memorandum Opinion: (1) Prior Appropriation law prohibits an appropriator from "conserving" water by recapturing and reusing water that has contributed to return flow, to the detriment of a downstream appropriator; (2) Wyoming law and Montana law agree on this principle; (3) Montana's Fourth Claim for Relief is not based on seepage water, but rather on increased consumption that increases depletions of the streams to the detriment of Montana's Compact rights; and (4) in the interest of judicial efficiency, Montana should be allowed to present its evidence on depletions of return flows as part of its case. The issue of what element is cognizable as a violation, and what is not, is best sorted out at the evidentiary phase.

A. The Doctrine of Prior Appropriation Prohibits a Senior Appropriator from Increasing His Consumption to the Detriment of a Subsequent Appropriator

The Memorandum Opinion relies on two Wyoming cases to conclude that "the laws governing the use of water under the doctrine of appropriation, and thus Article V(A) permit efficiency improvements where the salvaged water is used on existing lands." Memorandum Opinion at 38 (citing *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957) and *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940)). More specifically, the Memorandum Opinion concludes that current Montana statutory law is consistent

with the rule that "[d]ownstream water users have no ground for complaint where the appropriator increases its water efficiency (e.g. by improving its irrigation techniques) and uses the saved water for the same use on the same land." *Id.* at 40. This statement does not accurately describe the doctrine of appropriation or the rule in the State of Montana if applied to recapture of return flows that have historically reached a watercourse. The two cases cited in the Opinion in support of this conclusion dealt with seepage water that had not become return flows, and therefore are distinguishable from the facts alleged by Montana in this case.

As the Memorandum Opinion correctly points out, two rules have developed with regard to whether a senior appropriator can increase his or her efficiency to the detriment of a junior appropriator, the "No-Injury Rule" and the "Seepage Rule." The Memorandum Opinion goes on to describe the two rules as "seemingly inconsistent." Memorandum Opinion at 38. Montana submits, however, that these rules are not inconsistent with each other. Rather, the two rules work in conjunction and apply to different types of water under different circumstances.

Unlike Montana's Fourth Claim for Relief, both *Bower* and *Binning* involved waste and seepage. In *Binning,* for example, the court addressed a claim in which the upstream irrigator built a dam and thereby ceased the flow of waste water across a neighbor's land. 102 P.2d at 57. As noted above, Montana's claim does not involve waste or seepage, but return flows that formerly returned *to the stream.* That is, Montana's increased consumption claim involves the interruption of return flows on which Montana, as the downstream appropriator, relied.

In sum, there is a distinction between seepage or waste waters and return flows. Irrigation uses are only partially consumptive. Water leaks from unlined canals, and, after water is applied to a crop, the run-off returns to the stream or to the groundwater. Water left standing on the appropriator's property, commonly called "seepage," "diffuse surface water," "waste water," or "vagrant fugitive waters" may be captured and reused, generally with the restriction that it may be used only on the land to which the original appropriation is appurtenant. *See generally* 1 Kinney on Irrigation 36 (2d ed. 1912) (defining seepage waters as waters that collect in low spots below irrigation ditches and irrigated fields). Generally, reuse seepage cases arise in the context of a downgradient appropriator asserting a right to receive the irrigation runoff that an upstream appropriator has recaptured and reused. However, "[m]ost reuse cases can be viewed as exceptions to the rule of return to the common supply." James W. Johnson, Timothy Berg, & Douglas C. Northup, *Reuse of Water, Policy Conflicts and New Directions*, 38 Rocky Mt. Min. L. Inst. § 23, at 23-23-5 (1992); *see also* Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, LEGAL CONTROL OF WATER RESOURCES, at 197 (Thomson/West 2006) (describing seepage cases as an exception to the usual rule that the senior's right is limited to the amount he originally beneficially applied and consumptively used on his land).

In contrast to seepage water, "the definition [of return flow] suggested by the contexts generally is water drawn from a stream and impounded or used in irrigation which subsequently arrives again at the stream from which it was initially abstracted. The contexts also suggest that 'return flow' may be found either in surface or percolating waters." *United States v. Warmsprings Irr. Dist.*, 38 F.Supp. 239, 241 (D. Oregon 1940). In *City of Boulder v. Boulder & Left Hand Ditch Co.*, 557 P.2d 1182, 1185 (Colo. 1977), the Colorado Supreme Court explained, "Return flow is not waste water. Rather it is irrigation water seeping back to a stream after it has gone underground to perform its nutritional function." Thus, in contrast to seepage water that would otherwise have been lost to the system and can be recaptured on the appropriator's land, water that is on its way back to the common stream or channel, or that has reached the stream or channel, may not be recaptured and reused if a downstream appropriation would be harmed:

> Where vagrant, fugitive waters have reached a natural channel, and thus have lost "their original character as seepage, percolating, surface or waste waters," they serve to constitute a part of the watercourse, and are subject to appropriation.

Rock Creek Ditch & Flume Co. v. Miller, 17 P.2d 1074, 1077 (Mont. 1933) (quoting *Popham v. Holloran*, 275 P. 1099, 1102 (Mont. 1933)). Indeed, the law "makes no distinction between previously appropriated waste waters which are beyond the control of the original appropriator and the flow of natural streams, . . . all . . . are subject to appropriation." *McNaughton v. Eaton*, 242 P.2d 570, 574 (Utah 1952); *see also Stubbs v. Ercanbrack*, 368 P.2d 461, 464 (Utah 1962) ("But after the irrigation water is used and becomes commingled with the waters in the natural water table it has lost its identity as irrigation water and is no longer owned by the [appropriator] as such. Such waters in the natural water table are and always have been subject to appropriation"). Even the treatise cited in the Memorandum Opinion for the proposition that the No-Injury Rule and Seepage Rules are inconsistent recognizes this principle: "The basic exception to allowing recapture occurs where the [water] that would be subject to recapture has become return flow, that is, finds its way back to its source. At that point, if not before, it becomes tributary water and subject to the call of the stream." 2 Waters & Water Rights § 13.03, at 13-16 to 13-17 (Robert E. Beck & Amy K. Kelley eds., 2008 repl. vol.).

In short, the consequences of the distinction between return flows and seepage are substantial. If the water is waste or seepage that is within the original appropriator's control, and never reached a natural watercourse where it was relied upon by a junior appropriator, the original appropriator can reuse the water. But if the water is return flow that reached the natural watercourse or source and was relied upon, downstream appropriators may object to a reduction in that return flow.

Montana's claim arises from diminishment of water that returned to the natural watercourses of the Tongue and Powder Rivers, where it had been appropriated and relied upon by Montana water users. Because Montana claims rights to return flow, as opposed to waste, several principles of the doctrine of appropriation, including the No-Injury Rule, prohibit Wyoming from increasing its total consumption to the detriment of Montana. Put another way, although Wyoming users may increase their efficiencies, the increment of return flows thereby prevented from returning to the watercourse must be accounted for.

1. Beneficial Use Is the Limit of the Right

It is fundamental prior appropriation law that the waters of the public streams belong to the people, and that "the appropriator of the water of a running stream does not own the corpus of the water; he owns only the right to use it." *Custer v. Missoula Pub. Serv. Co.*, 6 P.2d 131, 133 (Mont. (1931). Montana and Wyoming state law are in accord: beneficial use is the basis, measure and limit of a water right. *Bailey v. Tintinger*, 122 P. 575 (Mont. 1912); Mont. Const., art. IX, § 3 (2007) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law"); Wyo. Const. art. 8, § 1 ("Water is state property. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state"); Wyo. Stat. Ann. § 41-3-101 ("A water right is a right to use the water of the state, when such use has been acquired by the beneficial application of water . . . . . Beneficial use shall be the basis, the measure and limit of the right to use water at all times"). Under the beneficial use doctrine, a water right will be recognized only to the extent that the water is put to beneficial use. Lack of beneficial use of all or part of a water right may result in forfeiture or abandonment. *See, e.g., In re Petition for Declaration of Abandonment of Various Water Rights in Lake DeSmet Resevoir,* 623 P.2d 764 (Wyo. 1981).

It is also settled law that an appropriator is limited to the amount of water that is reasonably needed for the purpose of the appropriation. *Brennan v. Jones*, 55 P.2d 697, 702 (1935). An appropriator must not waste water, and if there is a surplus remaining after the use, it must be returned to the stream. *Id.* "The tendency of recent decision of the courts in arid states is to . . . regard the actual beneficial use, installed within a reasonable time . . . as the test of the extent of the right." *McDonald v. State*, 722 P.2d 598, 604 (Mont. 1986); *see also Basin Electric Power Co. v. State Bd. of Control*, 578 P.2d 557, 563 (Wyo. 1978) ("While this court has for many years recognized that one of the fundamental principles applicable to any transfer of water rights is avoidance of injury . . . equally fundamental is the principle which holds that an appropriator obtains a transferable water right only to the extent that he has put his appropriation to a beneficial use").

The beneficial use limitation protects the water rights of junior appropriators by

protecting their right to the continuation of the stream conditions that existed at the time they commenced their appropriations. *See, e.g., Quigly v. McIntosh*, 103 P.2d 1067, 1072 (Mont. 1940); *see also, Farmers Highline Canal & R.R. Co. v. City of Golden*, 129 Colo. 575, 579, 272 P.2d 629, 631 (1954) ("junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations"). Put another way, junior appropriators have the right to rely on the maintenance of stream conditions as they existed at the time they made their appropriations. *See Atencio v. Richfield Canal Co.*, 492 P.2d 620, 623 (1972). Once the Compact was enacted by Congress, it became the pre-emptive law governing interstate relations in the basin. Montana effectively became a downstream junior appropriator relative to Wyoming with respect to precompact rights. As such, she is entitled to the maintenance of the stream conditions at the time the Compact was entered.

To protect the vested rights of subsequent appropriators, beneficial consumptive use for purposes of a change application must be quantified not only with respect to use at the time of perfection, but also in light of use at the time subsequent appropriators commenced their appropriations. The Wyoming Supreme Court recently explained "the concept [of beneficial use] represents a continuing obligation that must be satisfied in order for the appropriation to remain viable." *Basin Electric*, 578 P.2d at 562; *see also id.* at 564 ("the amount of water originally decreed or disclosed in a water permit is not necessarily the amount that may be transferred to a new place of use"). Thus, an existing use is limited to water that has been historically applied to a beneficial use. *Irion v. Hyde*, 81 P.2d 353, 358 (Mont. 1940) (water right must "be measured and gauged by their beneficial use over a reasonable period of time after they initiated the appropriations. . . consideration must be given to the extent and manner of their use, the character of their land, and the general necessities of the case").

Thus, under universally accepted prior appropriation doctrine, the amount of water actually consumed on an ongoing basis represents the limit of a water right. Under the, Compact therefore, Wyoming is limited to the amount of water that was put to beneficial consumptive use as of 1950. Because it expressly protects and apportions the pre-1950 "beneficial uses" and allocates only the "*unused* and unappropriated waters," the plain language of the Compact supports this interpretation. Wyoming should not be able to expand its pre-1950 consumptive water uses by increasing its irrigation efficiency to the detriment of Montana.

2. The No-Injury Rule

Courts have always protected junior appropriators relying on return flow through application of the no injury rule. This rule provides that one's right to change the point of diversion, or the place, purpose, or time of use, is subject to the limitation that the change shall not injure the rights of subsequent appropriators. 2 *Waters & Water Rights* § 13.04(c) (Robert E. Beck & Amy K. Kelley eds., 2008 repl. vol.). Put

simply, "junior appropriators have vested rights in a continuation of stream conditions existing at the time of their appropriations, thus entitling them to resist changes in points of diversion or use which materially affect their rights." *Thayer v. City of Rawlins*, 594 P.2d 951, 954 (Wyo. 1979); *see also Whitcomb v. Helena Water Works Co.*, 444 P.2d 301 (Mont. 1968); 1 W. Hutchins, *Water Rights in the Nineteen Western States,* at 623 (1971). As a leading Colorado case said:

> Equally well established . . . is the principle that junior appropriations have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and that subsequent to such appropriations they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights.

Farmer's Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629 (Colo. 1954). "In general, any act that increases the quanitity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use." 2 *Waters & Water Rights* § 13.01(c)(1) (Robert E. Beck ed., 2001 repl. vol.). The removal of such return flows tends to reduce the water available to the downstream appropriator, and thus constitutes an injury to his or her water rights.

In the present case, Montana is the downstream appropriator. The right to receive return flow water ensures Montana the same quantity of water from the Tongue and Powder Rivers historically delivered prior to the Compact. Any reduction in the quantity or quality of return flow caused by change in irrigation methods by Wyoming water users must be accounted for under the Compact.

3. Montana Does Not Claim the Right to Salvage Water.

The Memorandum Opinion cites to the 1991 Montana salvage statute in support of its finding that Montana law allows a water user to make beneficial use of water that it conserves by increases in water efficiency. Mont. Code Ann. §§ 85-2-102(20), 85-2-402 (1991). No party cited or briefed this statute, and Montana asserts that it has no bearing on the law at the time the Compact was enacted. The reliance on the Montana salvage statute for this finding, however, is misplaced.

The Montana salvage statute defines "Salvage" as "to *make water available* for beneficial use from an existing valid appropriation through application of water-saving methods." Mont. Code Ann. § 85-2-102(20) (emphasis added). Consistent with this definition, "salvaged waters" have generally been defined as "parts of a particular stream or other water supply *that have been lost, as far as any beneficial use is concerned, to any of the established users*, but are saved from further loss from the supply by artificial means and so are made available for use." 2 W. Hutchins, *Water Rights Laws in the Nineteen Western States,* at 565 (1971) (emphasis added). Salvage

is achieved by reducing, not increasing, consumptive use. Reducing consumptive use makes new water available without reducing the return flows that had historically reached the watercourse.

As discussed above, the water at issue in Montana's Bill of Complaint is not water that was *made available*. Rather, it was water that was previously available to Montana water users in the natural watercourse as return flow. By changing their irrigation methods, the Wyoming water users increased their consumption and decreased the water available to Montana. The effect of Wyoming's conversion to sprinklers was not to make new water available, but to shift consumption of water from Montana users to Wyoming's users. This is contrary to the apportionment in Article V(A).

Next, the Memorandum Opinion relies on *In re Matter of the Applications for Change of Appropriation Water by Smith Farms, Inc.*, 1999 Mont. Dist. LEXIS 433 (Mont. Dist. Ct. 1999) ("*Smith Farms*"), a case not previously briefed, for its interpretation of the Montana salvage statute. In that case, however, the state district court clearly found that "the appropriation change will not adversely affect the United States." *Id.* at *7; *see also* Donald D. MacIntyre, *The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals – Responding to Twenty-First Century Needs*, 55 Mont. L. Rev. 303, 315 (1994) (Mr. MacIntyre is a former chief counsel for the Montana Department of Natural Resources).

Furthermore, the Montana salvage water statute does not apply for the additional reason that it represents a change in the common law, and therefore is not relevant here. *Smith* Farms, 1999 Mont. Dist. LEXIS 433, *10 ("the statute goes against common law doctrines that would otherwise prevent a water user from acquiring any legal rights to salvaged or conserved water"); *see also* Karen A. Russell, *Wasting Water in the Northwest: Eliminating Waste as a Way of Restoring Streamflows*, 27 Envtl. L. 151, 168 (1997). The Montana salvage statute was passed in 1991, 40 years after the Compact became effective. One text explains the common law by explaining, "In ordinary circumstances the water saved by an appropriator who ceases wasteful use goes back into the river and is available for the next most senior appropriator who needs it. The reason is that an appropriator only has a right to water that he is using beneficially (non-wastefully)." Sax, Thompson, et al., *Legal Control of Water Resources*, at 182. This was the law in Montana:

> *If conditions change as time passes, and the necessity for the use diminishes, to the extent of the lessened necessity the change inures to the benefit of subsequent appropriators having need of the use*, for subject to the rule that "as between appropriators the one first in time is first in right," the prior appropriator may not divert from the stream more than an amount actually necessary for his use. While therefore, the extent of the right cannot in any case exceed the means of diversion, the

ultimate question in every case is: How much will supply the actual needs of the prior claimant under existing conditions?

Conrow v. Huffine, 138 P. 1094, 1096 (Mont. 1914) (citations omitted) (emphasis added). Furthermore, an appropriator who is able to accomplish the purpose of his water right with less than his decreed right, as, for example, through more efficient irrigation practice, could not apply the water to some other use. *See e.g., Quigly v. McIntosh*, 103 P.2d 1067, 1072 (Mont. 1940); *Brennan v. Jones*, 55 P.2d 697, 702 (Mont. 1936); *Whitcomb v. Helena Water Works Co.*, 444 P.2d 301, 303-04 (Mont. 1968). Taken together, these decisions stand for the proposition that in 1950, water no longer needed for the purpose of the appropriation had to be left in the stream for downstream appropriators.

Consistent with this rule, courts have routinely held that any water saved by irrigation conservation techniques reverts back to the river for the benefit of junior appropriators. *See Southeastern Colorado Water Conservancy District v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1974); *Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201 (Ariz. Ct. App. 1966); *Oliver v. Skinner*, 226 P.2d 507 (Ore. 1951). Montana is not aware of a single case in any jurisdiction in which a court allowed a senior appropriator to increase efficiency and thereby decrease historic return flows to a fully appropriated natural watercourse. As a result, when the Compact was negotiated and ratified, Wyoming water users would not have been entitled to increase consumptive use by way of a change in irrigation methods if that change was shown to injure downstream users. Here, Montana is simply asking that it be allowed to show that such changes have injured its rights under the Compact.

4. Representative Montana Cases

The following selected Montana pre-1950 cases illustrate the principles described above:

- *Smith v. Duff*, 102 P. 984 (Mont. 1909): Appropriator who changed his purpose of use was restricted to using the water in the spring and fall, which is when the water was used in a prior mining operation. ("Whoso asserts that he is entitled to the exclusive use of water by reason of its development by him must assure the court by satisfactory proof that he is not intercepting the supply to which his neighbor is rightly entitled.");

- *Popham v. Holloran*, 275 P. 1099 (Mont. 1929): When "vagrant fugitive water" reaches a natural watercourse, such water is a proper subject of appropriation. A "watercourse" is "a living stream with defined banks and channel, not necessarily running at all times, but fed from other and more permanent sources than mere surface water . . .

which channel may at times be dry, so long as, to the casual glance, it bears the unmistakable impress of the frequent action of water which has flowed through it from time immemorable." *Id.* at 1102.

- *Wills v. Morris*, 50 P.2d 862 (Mont. 1935): Seepage water held subject to appropriation after neighboring user had lost control of the water and it had entered into a drainage ditch.

- *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074 (Mont. 1933): Plaintiff denied right to recapture water because it had become subject to appropriation. When underground water becomes part of a natural stream, it "is publici juris."

- *Quigly v. McIntosh*, 103 P.2d 1067 (Mont.1940): Court addressed a case in which the senior appropriators enlarged their historic use under a 1913 decree. The court found that the senior appropriator was not entitled to expand its historic use to the detriment of subsequent appropriators beyond what could be beneficially applied. *Id.* at 1072; *see also Cate v. Hargrave*, 680 P.2d 952, 956 (Mont. 1984) (describing *Quigly*);

5. Representative Cases from Other Jurisdictions

The following selected cases from other jurisdictions illustrate the principles described above:

- *Jones v. Warmsprings Irr. Dist.*, 91 P2d 542, 547-48 (Or. 1939): Waste water returned to the natural stream is available for appropriation.

- *East Bench Irr. Co. v. Deseret Irr. Co.*, 271 P.2d 449 (Utah 1954): Appropriator allowed to put new lands under cultivation as a result of efficiency improvements, but only because it was understood that no harm would result to downstream junior appropriators.

- *Salt River Valley Water Users' Ass'n v. Kovacavich*, 411 P.2d 201 (Ariz. 1966): Water users saved water through change in irrigation practices and sought to apply the salvaged water. Court commended conservation measures, but found that "[a]ny practice, whether through water-saving procedures or otherwise, whereby appellees may in fact reduce the quantity of water actually taken inures to the benefit of other water users and neither creates a right to use the water saved as a marketable commodity nor the right to apply same to adjacent property having no appurtenant rights."

- *Southeastern Colorado Water Cons. Dist. v. Shelton Farms, Inc.*, 529 Pl.2d 1321 (Colo. 1974): Appropriator sought to acquire superior water right by killing water-using vegetation and reducing evaporation. Held that salvaged water must return to the river for the benefit of subsequent appropriators.

B. *Binning* and *Bower* Do Not Permit a Senior Appropriator to Decrease Historic Return Flows to the Detriment of Vested Junior Appropriators

As discussed above, the Memorandum Opinion relies on the Wyoming cases of *Binning v. Miller* and *Bower v. Big Horn Canal Association* to formulate the following rule in Wyoming:

> Appropriators cannot change the purpose or place of their water use if that change would injure downstream appropriators by decreasing downstream flow. Downstream water users have no ground for complaint, however, where the appropriator increases its water efficiency (e.g., by improving its irrigation techniques) and uses the saved water for the same use on the same land. Under *Bower*, however, the appropriator enjoys the "right to use and reuse – capture and recapture – such waste waters for use only 'upon the land for which the water forming the seepage was originally appropriated.'"

Memorandum Opinion at 40. *Binning* and *Bower*, however, do not stand for the above-stated proposition.

Binning presented a classic case of seepage water, as was noted by the Special Master at oral argument. Transcript of Hearing on Wyoming's Motion to Dismiss at 41 (Feb. 3, 2009). In that case, Binning sought to enjoin Miller, the water superintendent from interfering with his dam on Spring Gulch Creek. Binning had appropriated water from Spring Gulch Creek, an intermittent stream that did not reach the lands of the Intervener. 102 P.2d at 58. Water from Spring Gulch Creek was appropriated and used by Binning on his lands, and the excess water was allowed to flow off of his land into a swale or depression on the neighboring lands belonging to Intervener where no water had previously been present. *Id.* at 57-58. Over a period of thirty years, however, the seepage waters created a water channel on the Interveners land. *Id.* at 63. In 1936, Binning erected a dam that effectively stopped the flow of water through this channel. The court correctly observed the Seepage Water Rule that "seepage and waste water [is] private water so long as it is on the lands from which it originates." *Id.* at 61; *see also id.* ("the general rule is still that seepage water belongs to the owner absolutely, so long, at least, as he can make beneficial use of it on the land for which it was appropriated"). The court further recognized that "seepage water

which, if not intercepted, would naturally reach the stream, is just as much a part of the stream as the waters of any tributaries and must be permitted to return thereto." *Id.* (citing *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074 (Mont. 1933)).[1]

Thus, the case turned on whether the Intervenor "made an appropriation in 1906 from a natural stream." *Id.* at 57. This determination was critical because the Intervener had no right to use the water if it was seepage or waste that did not return to a natural watercourse. If, on the other hand, the channel had become a natural watercourse, then the water was available for appropriation, subject to the applicable rules, including the No-Injury Rule. Significantly for the purpose of the present case, the *Binning* court recognized that "In view of our law relating to priority of right by virtue of appropriation, and in view of the fact that appropriators often depend on return water, we could in no event say that the intervener had any right to the water in this case, unless we knew definitely that appropriators further down the stream were not injured or did not object. . . ." *Id.* at 62.

Bower v. Big Horn Canal Association, involved a claim by Bower against the Big Horn Canal Association to condemn a right of way for a flume to be used to carry seepage water to previously dry lands. Plaintiff owned land which was down-gradient from the Big Horn Canal. 307 P.2d 593, 594. Water seeped from the canal onto Plaintiff's lands, and he sought to appropriate this seepage. The court reaffirmed the rule in *Binning* that seepage water is private water so long as it is on the lands from which it originates. *Id.* at 601. In so holding, it stated:

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain.

Id. at 601. But contrary to the conclusion reached in the Memorandum Opinion, this language does not support the proposition that a senior water user may always increase his consumption to the detriment of a downstream user. Rather, it stands for the well-accepted and unremarkable position that *waste water* may be reused by the original appropriator. Notably, the *Bower* court recognized that "the importance of protecting water rights based upon return flows" as opposed to waste or seepage. *Id.* at 602; *see also id.* at 600 ("When appropriated water have been used to the full extent intended by the appropriation, the quantities unconsumed and returned to the stream are then a part of the waters of the State.").

[1] The *Binning* decision cites four Montana cases. 102 P.2d at 58, 61 and 62. These favorable citations illustrate that Wyoming law is in accord with the law in Montana.

The rule annunciated in *Binning* and *Bower* was explained succinctly in *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980). In *Fuss*, the plaintiffs were down-gradient appropriators who received water from the waste-water ditch that separated the plaintiff's land from the defendant's land. *Id.* at 19. The waters that were used by plaintiffs would have reached a natural stream if they had been left uninterrupted. *Id.* at 21. Plaintiffs sued to enjoin the defendant from utilizing a dam that inhibited the flows upon which they relied. After discussing the *Binning* and *Bower* cases, the Wyoming Supreme Court clarified the applicable rule:

> [T]he owner of land upon which seepage or waste water rises has the right to use and reuse capture and recapture such waste waters for use only "upon the land for which the water forming the seepage was originally appropriated." When the water leaves the land for which it was appropriated and would, if left to flow uninterrupted, reach a natural stream, it becomes eligible to other and separate appropriation for other and different uses. It leaves the landowner upon which the seepage rose, and from which it has escaped, *without any superior right* to such water by reason of having been utilized upon the land to which it was first appropriated.

Id. at 20; *see also id.* at 22-23 (McClintock, J., specially concurring). Applying this rule, the court found that plaintiffs had a valid and vested right to the return flow water, and the defendant had no superior right to that same water. *Id.* at 21.

As discussed, Montana's claim does not involve waste or seepage water. Rather, it is for return flows that commingled with the natural waters of the Tongue and Powder Rivers and formed an essential part of the water appropriated by downstream users in Montana. It follows that the seepage rule discussed in *Binning* and *Bower* is inapplicable.

II. Montana Is Not Alleging that the Compact Limits Individual Wyoming Water Users

In explaining the conclusion that Article V (A) "permit[s] efficiency improvements where the salvaged water is used on existing lands," the Memorandum Opinion states, "Any other rule would provide pre-1950 appropriators in Wyoming with fewer use rights under the Compact than they would otherwise enjoy under state law." Mem. Op. 38, 41.

The enactment of the Compact into federal law had the effect of preempting state law to the contrary with respect to interstate waters in the Yellowstone River Basin. However, because Montana does not seek to dictate to Wyoming how it meets its Compact obligations in administration of individual water rights, Montana is not

necessarily alleging that individual Wyoming appropriators should not be able to increase efficiencies and therefore consumptive use on their lands, if otherwise permitted by Wyoming law. Rather, Montana is alleging that the State of Wyoming is obliged not to allow the diminishment of the stateline flows that are necessary to supply pre-1950 rights in Montana to the same extent that they were being supplied when the Compact was adopted. Wyoming is free to administer its own system of water rights in any way it sees fit so long as it meets its Compact delivery obligations. Wyoming's Compact delivery obligations are contained in the plain language of the Compact. They require Wyoming to account for increased depletions of the Yellowstone River by any means, including changes in irrigation methods, as explained below.

The Memorandum Opinion states that irrigators in both Wyoming and Montana are entitled to "'continue to . . . enjoy[]' their appropriative rights 'in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.'" Memorandum Opinion at 38, n.7 (citing Compact, Art. V(A)). It is not "appropriative rights" that are protected, however. Rather, Article V(A) of the Compact protects "Appropriative rights to the beneficial *uses* of the waters of the Yellowstone River System *existing* in each signatory state *as of January 1, 1950.*" (emphasis added). Protection of beneficial uses is critical because the Compact specifically defines "Beneficial Use" as "that use by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." (emphasis added). The drafters thereby quantified existing uses in terms of depletion.

Because the Compact protects the "beneficial uses" existing in both states, it prohibits any post-1950 activity that depletes the waters essential to supply protected beneficial uses in another state. When Wyoming allows its users to employ irrigation techniques that consume more water, that water is removed from the system and no longer available to Montana to satisfy its pre-1950 rights. As the Memorandum Opinion recognizes, "Montana water users could scarcely 'continue to . . . enjoy[]' pre-1950 water rights, under the common and straightforward meaning of those words, if Wyoming were free to allow new . . . withdrawals [i.e., depletions] that interfere with pre-1950 Montana appropriations." Memorandum Opinion at 12 (quoting Article V(A)). That is precisely what occurs when Wyoming allows increased consumption on existing acreage. It follows that allowing new depletions or withdrawals by increased consumption on existing acreage violates the plain language of Article V(A).

Furthermore, the Compact provides that pre-1950 rights were protected based on *actual use*. *See, e.g.* S. Rep. No. 883 ("a demand of one State upon another for a supply different from that now obtaining is not contemplated, nor would such a demand have legal standing"). Rights that were not in actual use at the time of the Compact fall under the second or third tier of water rights found in Article V(B).[2] If the Compact

[2] The Memorandum Opinion relies on a Wyoming statute to define the Compact term "supplemental water supplies" as being from a new source. Mem. Op. 13 (citing Wyo. Stat. Ann. § 41-3-113 (1957)). None of the States referred to this statute in their briefs. Reliance on a Wyoming statute that did not

does not prohibit increased consumption in Wyoming on pre-1950 irrigated acreage, then Wyoming could unilaterally increase its allocation under the Compact. Such an unprecedented result is not contemplated by the Compact, and is contrary to its stated intentions. The express purpose of the Compact is to effect a complete apportionment of the Yellowstone River Basin and remove "*all* causes of present and future controversy." (Emphasis added). But allowing Wyoming to increase its allocation by increasing consumption on existing acreage would only invite dispute between the states.

Finally, this is not the first time that an upstream state has claimed the right to increase its pre-compact depletions. In *Kansas* v. *Colorado*, 514 U.S. 673 (1995), the Supreme Court discussed the interplay between two analogous articles of the Arkansas River Compact. Article VI-A(2) of that Compact provides:

> Except as otherwise provided, nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas River in said State as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River.

Id. at 690 n.4. Colorado's water rights are all established under the doctrine of appropriation, like those of Montana and Wyoming. Article VI-A(2) of the Arkansas River Compact preserves uses just as Article V(A) of the Yellowstone Compact does.

Colorado argued this language indicated that the limit to its pre-Compact pumping was the level of pumping allowed by Colorado appropriation law, namely the maximum amount of pumping possible using existing wells. *Id.* The capacity of the wells was greater than the amount of pumping that was occurring when the Compact was negotiated. But Article IV-D of the Arkansas River Compact permits "'future beneficial development of the Arkansas River basin . . . which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, *as well as the improved or prolonged functioning of existing works*: Provided, that the waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability. . . ." *Id.* (quoting the Arkansas River Compact) (emphasis in original). Accordingly, the Court held that Colorado was limited to the maximum amount of pumping that actually occurred during the negotiations. *Id.* at 90-91. This same reasoning applies in the present case. Even if Wyoming law permits

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exist at the time of the Compact and has no counterpart in Montana law for the interpretation of a federally enacted interstate compact is open to question. Further, application of Wyoming law on this point is contrary to the language of the Compact and its history. The term "supplemental water supplies" refers to any new beneficial use of water on existing irrigated acres.

water users to change their irrigation methods to increase consumption, which Montana denies, Wyoming is nonetheless limited to its pre-1950 uses and depletions.

III. Conclusion

Judicial efficiency is best served by initial presentation of all the evidence of increases in depletions to the compacted surface waters, whether as a result of increases in irrigated acres, increases in storage, increases in groundwater pumping, or increases in consumption on existing acres, as they are all intertwined. Montana should therefore be allowed to present, as part of its case, evidence that increased depletions arising from increases in consumption on existing acres have caused a violation of Montana's rights under the Compact.

Dated this 17th day of July, 2009

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APPENDIX

Formal and Typographical Suggestions

Page	Reference	Suggestion
10	line 5 in "III.	Analysis" second reference to "Montana" should be Wyoming
11	second to last line	"new Mexico" should be "New Mexico"
12	line 2	citation to Kansas v. Colorado should include date (2001)
12	line 3	citation should read "Norfolk & Western R. Co. v. Am. Train Dispatchers"
14	line 5 under 2.a	the quote should read "'call' to shut down the diversion of a Wyoming water user whose rights . . .
16	paragraph 2, line 5	date for Sprietsma should be (2002), not (2003)
18	line 3	Bean v. Morris citation should be 221 U.S. 485 (not 221 U.S. 874)
22	paragraph 1, line 9	citation to "Joint App. at 32" should read "Joint App. at 232."
23	paragraph 1, line 4	quotation of Article VA should read "shall continue to be enjoyed in accordance with the laws governing"
24	last line	no period after "Joint"
25	paragraph 1, line 7	citation to Joint App. should be "at 17-18"
25	paragraph 1, line 9	no period after "Joint"
34	last paragraph, lines 8-9	citation to statutory provision should be "Mont. Code Ann. § 85-2-109(19)"
35	quote from § 41-3-916	needs a period at the end of quote
39	paragraph 1, line 10	reference to "Montana" should be "Wyoming"
40	paragraph 2, line 5	"adverse" should be "adversely"
42	paragraph 5	reference to "Articles V" should be "Article V"

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Montana's Letter Brief Re Memorandum Opinion on Motion to Dismiss was served by electronic mail and by placing the same in the United States mail, postage paid, this 17th day of July, 2009, to the following:

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