**No. 137, Original**

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**In the**

# Supreme Court of the United States

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STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

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**MEMORANDUM OPINION OF THE SPECIAL MASTER**

**ON WYOMING'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

**(NOTICE REQUIREMENTS FOR DAMAGES)**

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BARTON H. THOMPSON, JR.
Special Master
Jerry Yang & Akiko Yamazaki Environment &
Energy Building
473 Via Ortega
MC: 4205
Stanford, California 94305

**December 20, 2011**

**MEMORANDUM OPINION OF THE SPECIAL MASTER**
**ON WYOMING'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
**(NOTICE REQUIREMENTS FOR DAMAGES)**

During a telephonic status conference on July 29, 2011, Wyoming raised the issue of whether Montana can claim damages for years in which it did not notify Wyoming that insufficient water was reaching Montana to meet its pre-1950 appropriations. July 29, 2011 Hearing Transcript, p. 45, line 21 to p. 47, line 15. As Wyoming noted, resolution of the issue could limit the years for which discovery must be conducted and thereby speed resolution of this case. Id. I consequently requested that Wyoming file a motion for partial summary judgment on the issue. Case Management Order No. 8, Aug. 19, 2011, ¶ 2.

On September 12, 2011, Wyoming filed the motion, seeking to

> preclude the State of Montana from claiming damages or other relief based on Section V(A) of the Yellowstone River Compact for the years 1952-2003, and 2005, which were years in which Montana did not notify Wyoming that Montana's pre-1950 appropriators were not receiving adequate water from the Tongue and Powder Rivers. Wyoming also seeks partial summary judgment precluding Montana from claiming damages or other relief for those days in the years 2004 and 2006 that preceded Montana's notifications in those years.

Wyoming's Motion for Partial Summary Judgment, Sept. 12, 2011, p. 1. A hearing was held on Montana's motion in Denver, Colorado on September 30, 2011.

## I. What Notice, If Any, Was Montana Required to Provide?

The principal legal issue is what, if any, notice Montana was required to provide Wyoming in order to maintain an action for damages against Wyoming under Article V of the

Compact for failing to curtain pre-January 1, 1950 water uses that prevented adequate water reaching Montana to satisfy its pre-1950 appropriations. The starting point, as always, is the language of the Compact. However, the Compact does not explicitly spell out a procedure for enforcing the requirements of Article V.

As Wyoming notes, most prior appropriation states historically have depended on "calls" to enforce senior water rights. Given changing flows, upstream junior appropriators do not always know if they need to reduce diversions to protect the rights of downstream seniors. Where seniors are not receiving sufficient water, most states therefore require them to give notice of that fact – or, to use the technical term, "call the river." Once the river is called, juniors have to reduce their diversions. See generally George Vranesh, Vranesh's Colorado Water Law 27 (James W. Corbridge & N. Teresa Rice eds., rev. ed. 1999); Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources 1081 (4th ed. 2006); David H. Getches, Water Law 111 (4th ed. 2009). In cases where a river is administered by a water master or other official with day-to-day oversight, calls may not be needed; instead, the water master or other official may sometimes directly manage and enforce priorities.

The Compact may not require calls once the data needed to implement the comprehensive scheme of rights set out in Article V of the Compact is available. As discussed in previous rulings, Article V(A) is merely the first level in a three-level hierarchy of water rights. See First Interim Report of the Special Master, Feb. 10, 2010, pp. 18-19. The highest priority under the Compact goes to pre-1950 appropriative rights. Compact, art. V(A). Once these rights are satisfied, water goes next to "provide supplemental water supplies" for pre-1950 right holders. Id., art. V(B), 1st clause. Finally, the "remainder of the unused and unappropriated

water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes" according to percentages set out for each tributary. Id., art. V(B), 3rd clause. To allocate the second and third priorities, the Compact would seem to require knowledge of how much water is already protected under Article V(A). Therefore, if the necessary data is available and Article V is fully and effectively implemented, Montana may never need to call the river because the water necessary to meet Article V(A) obligations would be provided as part of the Compact's overall allocation scheme.

That, at least in theory, is how the Compact might ultimately be administered. However, while the parties at times have discussed the value of developing data and an administrative structure to better administer the Compact (see, e.g., Yellowstone River Compact Commission, Forty-First Annual Report VI-VII (1982)), it appears that they have yet to do so. Indeed, during at least part of the Compact's life, Montana itself did not have accurate and detailed information on its pre-1950 appropriative rights. Moreover, the parties understood that this would be the case in at least the early years of the Compact. See Montana's Brief in Opposition to Wyoming's Motion for Partial Summary Judgment, Sept. 23, 2011, p. 19 & n.3. In this context, where Wyoming would not have known or been able to determine how much water was needed at any point in time to satisfy Montana's pre-1950 rights, Wyoming would have had exceptional difficulty complying with Article V(A) of the Compact absent a formal call or other notice when pre-1950 users in Montana were receiving insufficient water.

I conclude that, for periods when data was not available to Wyoming regarding the extent of Montana's pre-1950 appropriations, Montana generally should not be entitled to damages for a violation of Article V(A) if it did not provide notice to Wyoming that insufficient water was

reaching Montana to satisfy those pre-1950 appropriations.[1] As discussed above, prior appropriation law typically requires a call as a prerequisite for a damages action. Prior appropriation law is relevant here because, as the Supreme Court has emphasized, Article V(A) provides that pre-1950 appropriative rights in Montana "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water *under the doctrine of appropriation*" (emphasis added). See Montana v. Wyoming, 131 S. Ct. 1765, 1771 (2011) (looking to the law of prior appropriation to determine Montana's and Wyoming's rights under Article V(A)).

An upstream junior generally cannot be held liable for a downstream senior's "shortage of water unless [the senior has] demanded that water, to the extent of his needs and within his senior appropriation, be allowed to reach his diversion point. The absence of such a demand [is] decisive." Worley v. United States Borax & Chemical Corp., 428 P.2d 651, 654-55 (1967). The call requirement is not merely an idol mandate, but serves the important function of avoiding the possibility that water will be wasted. Id. at 654 (requiring an upstream junior to furnish water without a call "opens up the possibility of wasting water"). As noted earlier, Wyoming would appear to have had no way of knowing on its own in many, if not all, years how much water Montana needed to satisfy pre-1950 appropriations.[2] In this setting, a notice from Montana generally would have been the only way that Wyoming would have had to determine that more water needed to reach Montana to satisfy its pre-1950 appropriations. Requiring Wyoming to

[1] As discussed later, there are exceptions to this general rule.
[2] As Montana notes, "At the time of the adoption of the Compact, Wyoming and Montana did not know what the comparable pre-1950 rights were in each State." Montana's Brief in Opposition to Wyoming's Motion for Partial Summary Judgment, p. 19 n. 3.

have guessed at the amount of water would have invited substantial and unneeded waste (not to mention raising significant inequity).[3]

The call requirement also helps mitigate any injury that is occurring to a senior appropriator.[4] This case helps illustrate that value of a call requirement. In most if not all years, Montana was in the best position to determine and know whether its pre-1950 appropriative rights were being met or not. If Montana knew that it was not receiving adequate water, notifying Wyoming would have given Wyoming the opportunity to curtail post-January 1, 1950 uses and thus reduce any damages. Absent some form of notice, Wyoming may have had little reason to suspect that it was violating Article V of the Compact by failing to curtail post-January 1, 1950 uses.

Not surprisingly, the parties to the Compact appear to have anticipated the requirement of some form of call or notification. In the 1982 annual report of the Yellowstone River Compact Commission, the representatives noted that Montana had "voiced its concern that during low-flow years Wyoming needs to regulate its post-1950 water rights more carefully so that Montana can use its pre-1950 water." The report goes on to note that "Montana, in turn, must notify Wyoming when it is not able to obtain its pre-1950 water." Yellowstone River Compact

[3] As Wyoming notes, "Montana's alternative, 'self-execution,' would mean that Montana could sit on its rights … and at some later date, perhaps many years later, as in this case, sue Wyoming for not having the clairvoyance to curtail its post-1950 rights when Montana was in need." Wyoming's Reply Brief in Support of its Motion for Partial Summary Judgment, p. 6.

[4] Because the parties did not brief what, if any, role the concept of mitigation plays where damages are being sought for violations of an interstate water compact, I do not decide whether notice was required under the doctrine of mitigation. It is worth noting that the Supreme Court has emphasized that an interstate compact is essentially a contract between states. See Kansas v. Colorado, 533 U.S. 1, 20 (2001 (O'Connor, J., concurring in part and dissenting in part); Texas v. New Mexico, 482 U.S. 124, 128 (1987), quoting Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting). And the "duty to mitigate is a universally accepted principle of contract law requiring that *each* party exert reasonable efforts to minimize losses whenever intervening events impede contractual obligations." Charles J. Goetz & Robert E. Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 Va. L. Rev. 967, 967 (1983) (emphasis added). Other considerations, however, may make the doctrine of mitigation inapplicable in this case or may vary the requirements from standard mitigation law.

Commission, Thirty-First Annual Report, p. IV (1982). The 1983 annual report similarly notes Montana's concerns regarding its pre-1950 water rights and once again notes that Montana "must notify Wyoming when it is not able to obtain its pre-1950 water." Yellowstone River Compact Commission, Thirty-Second Annual Report, p. IV (1983).[5]

When Montana believed that it had received insufficient water to satisfy its "developed and protected pre-1950 appropriative rights" in 2004, it actually furnished Wyoming with written notice. Letter from Jack Stults to Patrick T. Tyrrell, May 18, 2004, Exhibit A to the Declaration of Richard M. Moy, Sept. 22, 2011. The notice specifically referred to the notice as a "call, under the terms of the compact":

> As Compact Commissioner for Montana, and as directed by Governor Martz, I am notifying you that *this letter constitutes Montana's call, under the terms of the compact*, for our valid and protected pre-1950 water rights on the Tongue River and Powder Rivers. We are calling for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 [sic] water on the Tongue and Powder Rivers.

Id., p. 2 (emphasis added). When Montana became concerned about the adequacy of the water reaching it in 2006, it again notified Wyoming in writing. Letter from Jack Stults to Patrick T. Tyrrell, July 28, 2006, Exhibit B to the Declaration of Richard M. Moy, Sept. 22, 2011. Unlike the 2004 letter, however, the 2006 letter – perhaps anticipating possible litigation – denied that any notification was needed:

[5] As Wyoming notes, it would seem particularly unfair for Montana to agree in the early 1980s that it would provide notice to Wyoming if it was receiving inadequate water to meet its pre-1950 water uses and then to argue that such notice was unnecessary in order to pursue damages or other relief. Wyoming's Reply Brief in Support of its Motion for Partial Summary Judgment, p. 9. Because I conclude that notice was required for other reasons, I do not reach the question of whether Montana is stopped from arguing that no notice is required.

> Although this letter is not required by the Compact, as Compact Commissioner for Montana, and as directed by Governor Schweitzer, this 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.

Id., p. 2.

For all of these reasons, I conclude that Montana generally cannot seek damages for years in which it did not notify Wyoming that it was receiving inadequate water to meet its pre-1950 appropriative rights. Except in those situations described further below, Montana's failure to provide such notice precludes Montana from seeking damages or other relief.

Contrary to Wyoming's suggestion in its brief in support of its motion, Montana's notice to Wyoming did not have to take any particular shape or form. While Wyoming argues that the notice must have been in writing, there is no reason (other than ease of proof) that oral notice would not have been adequate. See Tucker v. Missoula Light & Water Co., 250 P. 11, 13 (Mont. 1926) (indicating that oral calls are acceptable). Similarly, the notice need not have contained any specific information other than that Montana did not believe that it was receiving sufficient water under the Compact.[6] Nor must any particular Montana official have provided the notice.[7] The key requirement is simply that Montana have placed Wyoming on adequate notice that

[6] Contrary to Wyoming's suggestion (Wyoming's Brief in Support of its Motion for Partial Summary Judgment, p. 22), neither the Compact nor prior appropriation law would require that Montana have notified Wyoming not only that it was receiving insufficient water to satisfy its pre-1950 appropriations, but also that the "holders of those rights will make beneficial use of additional water that would be released if Wyoming curtails post-1950 diversions." Wyoming seems to recognize this because it notes elsewhere that a "call should simply allege an existing or imminent shortage in the downstream state and a request that the upstream state take timely action if an investigation warrants it." Id., p. 27.

[7] Thus, there is no basis for Wyoming's suggestion that any notice or call come "from one voice – the voice of Montana's compact commissioner." Wyoming's Brief in Support of its Motion for Partial Summary Judgment, p. 22.

Montana was not receiving sufficient water to meet the requirements of Article V(A) of the Compact.[8]

Montana's notice also did not need to be instantaneous. As noted earlier, Wyoming seeks partial summary judgment that Montana is "precluded from claiming damages or other relief for those days [in any year in which notice was provided] *that preceded Montana's notification*." Wyoming's Motion for Partial Summary Judgment, Sept. 12, 2011, p. 1 (emphasis added). However, in many cases, pre-1950 users in Montana may not have immediately realized that they were receiving inadequate water because of Wyoming's failure to comply with Article V of the Compact, a general period of investigation might have been required to determine the nature of the shortage, and information cannot be expected to have travelled instantaneously from water users to Montana officials to Wyoming. So long as Montana acted diligently in learning of pre-1950 deficiencies and notifying Wyoming of those deficiencies, the notice typically should permit Montana to seek damages for the entire year. Although this places Wyoming at risk of paying damages for periods in which it was not on notice of Montana's deficiency, neither party is knowingly at fault in this situation. Given that Wyoming enjoyed the use of the excess water during these periods and had the affirmative obligation under the Compact to avoid post-January 1, 1950 uses that denied Montana adequate water to meet its pre-1950 appropriations, it is appropriate that Wyoming should compensate Montana for the loss of such water when notice was diligently provided.

As noted earlier, there are several exceptions to the rule that Montana generally must have notified Wyoming of violations for which it now seeks damages. First, the rule should not apply in any year in which Wyoming had made it clear that it would not alter its water use in

[8] A separate issue might be raised if Montana in any given year notified Wyoming of a shortage and Wyoming then sought but was denied additional information regarding the nature and extent of the shortage.

response to Montana's concerns and therefore notice would have been futile. In this situation, Montana argues persuasively that it should be excused from any notice or call requirement under the doctrines of estoppel and futility. Montana's Brief in Opposition to Wyoming's Motion for Partial Summary Judgment, pp. 22-26. The concept of futility seems particularly applicable, although no case appears to have applied it to the call requirement under prior appropriation law (nor is the issue likely to often arise).[9] Futility is an established exception to the requirement of exhaustion of administrative remedies. See McCarthy v. Madigan, 503 U.S. 140, 146-148 (1992) (exhaustion of administrative remedies is unnecessary "where the administrative body is shown to be biased or has otherwise predetermined the issue before it"). And the requirement that administrative remedies be exhausted prior to seeking judicial relief is closely akin to the requirement that a call be made before seeking judicial relief under the prior appropriation doctrine.

Second, Montana should be free to pursue damages or other relief, despite its failure to provide notice to Wyoming, during any period when Wyoming had other sufficient reason to believe or know that insufficient water was reaching Montana to satisfy Montana's pre-1950 appropriative rights.[10] In such situations, the purposes animating the call requirement would have been met, and a call thus would have been unnecessary. Although the factual record is not now in front of me to determine when this exception would apply, low stream flows by themselves would not seem sufficient to put Wyoming on effective notice absent information at least about the general quantity of Montana's pre-1950 water uses. However, there may have

[9] As Wyoming notes, the quite different concept of "futile call" provides that an upstream junior appropriator need not reduce its water use even in the face of a call by a downstream senior when the reduction would not provide the downstream senior with the water that it needs. See Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources: Cases and Materials 128 & n. 7 (4th ed. 2006).

[10] Similarly, the notice requirement might not apply if there were evidence that Wyoming prevented the adoption of a rule or process for enforcing Montana's rights under Article V(A) without the need for a call or notice.

been years in which Wyoming had adequate information to know that insufficient water would reach Montana to satisfy Montana's pre-1950 appropriations if Wyoming did not curtail post-January 1, 1950 uses in Wyoming.

Montana argues that any notice requirement would violate the rule that the Court should not add provisions to a compact to which the parties have not originally agreed. See Alabama v. North Carolina, 130 S. Ct. 2295 (2010) (noting reluctance "to read terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented"). The notice requirement set out in this Memorandum Opinion does not add a new provision to the Compact. As noted earlier, a call might not be necessary once all the data needed to implement and enforce the Compact is available. Until such data is available, however, the doctrine of prior appropriation, as incorporated by Article V of the Compact, generally requires some form of notice or call as explained above.

Montana also argues that any notice requirement would be unprecedented. As Montana notes, however, "each Compact is unique." Montana's Brief in Opposition to Wyoming's Motion for Partial Summary Judgment, Sept. 23, 2011, p. 20. The Compact in this case does not specify a pre-quantified amount of water to be delivered at state line. Instead, the Compact commands the parties to ensure that "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, … continue to be enjoyed." Compact, art. V(A). And the Compact 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." Id.

Finally, Montana objects that it would have been impossible for many years of the Compact's existence for Montana to determine whether any insufficiency of water was the result of post-January 1, 1950 uses in Wyoming. However, as already noted, Wyoming was in exactly the reverse situation; it had no way of determining whether additional water was needed for pre-1950 uses in Montana. In that situation, Montana was generally under an obligation, subject to the exceptions discussed above, to let Wyoming know that insufficient water was reaching it to satisfy pre-1950 appropriations in Montana. To do this, Montana did not need to determine the reason for the water insufficiency. Instead, once notice was provided, the burden would have been on Wyoming to determine whether the insufficiency was the result of post-January 1, 1950 uses in Wyoming in violation of Article V of the Compact.

## II. Determining Years During Which Montana Can Seek Damages

Having reviewed the affidavits filed by both parties, I also conclude that I should delay making a final ruling, pending further discovery, on the years for which Montana can seek damages. As Montana emphasizes, summary judgment typically is appropriate only after adequate opportunity for discovery on key factual issues. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257(1986).

Although a ruling should await limited additional discovery, some comments on the record as it stands today are in order. First, Wyoming concedes that Montana gave notification in 2004 and 2006. See Wyoming's Motion for Partial Summary Judgment, Sept. 12, 2011, p. 2. The only question remaining in those years, therefore, is whether Montana was sufficiently diligent in providing the notice to claim damages for injuries suffered prior to the date of the notice.

Second, the May 24, 2004 letter from Patrick Tyrrell to Jack Stults would appear to deny any responsibility on the part of Wyoming to curtail post-January 1, 1950 uses when needed to ensure that sufficient water reached Montana to satisfy its pre-1950 appropriations. If that is the case, the letter would seem to excuse Montana from providing future calls to Wyoming. According to Mr. Stults, "the Compact makes no provision for any state to make a call on a river." Letter from Patrick Tyrrell to Jack Stults, May 24, 2004, p. 2. Mr. Stults further states, consistent with Wyoming's arguments in its earlier motion to dismiss in this proceeding, that "Article V. Section A, especially when read in conjunction with Article XVIII, simply expresses that the status quo of January 1, 1950 within each state is preserved." Id. However, because additional evidence may place Mr. Tyrell's letter in a different light, a final ruling on the relevance of the letter cannot be made at this time.

All other factual questions will be reserved for further proceedings after a reasonable period of discovery. In accordance with the agreement of Montana and Wyoming, Wyoming may file a renewed Motion for Partial Summary Judgment on or before June 15, 2002. Montana may file its Response to the renewed motion on or before July 13, 2002. Wyoming may file a Reply in support of its renewed motion on or before July 27, 2002.