

Montana v. Wyoming and North Dakota **U.S. Supreme Court to Hear Yellowstone Compact Case**

The United States Supreme Court has agreed to hear Montana's complaint that Wyoming and North Dakota are violating the Yellowstone compact by taking more water than they are due. Specifically Montana complains that Wyoming has disregarded its obligations under Article V of the Compact to curtail water diversions in excess of pre-1950 consumption levels in the Tongue and Powder River Basins in order to provide Montana with sufficient water to satisfy its pre-1950 uses of water. Despite Wyoming's opposition by claiming that Wyoming is delivering its compact required water to Montana and that Montana has not been harmed, on October 20, 2008, the U.S. Supreme Court appointed a special master from Stanford, California to take testimony, oversee discovery and make factual findings.

The purpose of this article is to discuss water compacts in general and the Yellowstone Compact in particular and to present the initial arguments of the parties to the Yellowstone Compact case.

I. Water Compacts Generally

A compact is defined as an agreement between persons, nations or states; a contract between parties which creates obligations and rights capable of being enforced. Blacks Law Dictionary, 6th Ed. at 255. Compacts between states regarding water allocation must be ratified by Congress pursuant to section 10 of the U.S. Constitution which states, "No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another state . . ." U.S. Const. Art. 10, Cl. 3.

The US Supreme Court has long recognized and encouraged states to enter into compacts regarding allocation of water use, rather than settling disputes through equitable apportionment by the Supreme Court. Colorado v. Kansas, 320 U.S. 383, 392 (1943). Once a compact is ratified, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact. Poole v. Fleegeer, 11 Pet. 185, 209, 9 L.Ed. 680. Once Congress ratifies a compact, it operates as a treaty between sovereign nations. Rhode Island v. Massachusetts, 12 Pet. 657, 725, 9 L.Ed. 1233.

II. Wyoming/Montana Major River Drainages and Allocations

A. Montana

Montana has divided the state into six major drainage basins and fifteen sub-major drainage basins. See Montana Water Resources Board, An Atlas of Water Resources in Montana by Hydrologic Basins, Inventory Series Report No. 11 at 2, available at http://dnrc.mt.gov/wrd/water_rts/default.asp. The three major drainages

containing waters flowing from Wyoming are the Missouri, Yellowstone, and Little Missouri. The sub-major drainages containing waters flowing from Wyoming are the Upper Missouri (contains the Madison and Gallatin Rivers), Lower Yellowstone (contains the Little Powder River and the Powder River below Clear Creek), Little Missouri (contains the Little Missouri River), Upper Yellowstone (contains the Clarks Fork River), and Middle Yellowstone (contains the Little Bighorn River, the Tongue River, and the Shoshone River). *Id.* at 3. The Gallatin/Madison River Basin in Wyoming appears to correspond with the Upper Missouri River Basin in Montana. The Bighorn/Wind River Basin in Wyoming corresponds with the Middle Yellowstone River Basin in Montana. The Tongue/Powder River Basin in Wyoming corresponds with the Lower Yellowstone and Middle Yellowstone River Basins in Montana. The Yellowstone/Clarks Fork River Basin corresponds with the Upper Yellowstone River Basin in Montana. Finally, the Little Missouri River is part of the Little Missouri River Basins in both states.

B. Wyoming

The major drainages between Wyoming and Montana are the Yellowstone/Clarks Fork River Basin, the Bighorn/Wind River Basin, the Tongue/Powder River Basin, the Gallatin/Madison River Basin, and the Little Missouri River Basin. See <http://waterplan.state.wy.us>. The rivers in these drainages originate in Wyoming and flow north into Montana, with the exception of the Clarks Fork, which originates in Montana, flows into Wyoming, and then flows back into Montana. *Id.*

Yellowstone/Clarks Fork River Basin

- The Yellowstone River flows north out of southeastern Yellowstone National Park and the Absaroka Range for approximately 90 miles before entering Montana.
- The Clarks Fork tributary originates to the west and outside of the park boundaries in Montana, flows southeasterly into Wyoming, then reenters Montana and eventually joins the Yellowstone River.
- The Yellowstone River Compact allocates forty percent of the unused and unappropriated water on the Clarks Fork to Montana and sixty percent to Wyoming.

Bighorn/Wind River Basin

- The mainstem of this river basin is made up of the Bighorn and Wind Rivers.
- The Wind River originates in the mountainous area between the Absaroka and Wind River Ranges and flows southeast through the Wind River Indian Reservation.
- The Wind River joins the Bighorn near Thermopolis, Wyoming and then continues north and eventually enters Bighorn Lake on the Montana/Wyoming border.
- The Little Bighorn River, which is part of the hydrologic unit, flows northeast from the east slope of the Bighorn mountains before entering Montana. This river eventually joins the mainstem Bighorn to the north.
- The Yellowstone River Compact allocated eighty percent of the Bighorn River flow to Wyoming. The Compact does not allocate flows on the Little Bighorn River.

Tongue/Powder River Basin

- The Tongue and Powder Rivers are major tributaries to the Yellowstone River.
- The Powder River originates in east-central Wyoming and flows north to Montana.
- The Yellowstone River Compact allocates forty percent of the unused and unappropriated water of Tongue River to Wyoming and forty-two percent of the unused and unappropriated waters of the Powder River to Wyoming.

Gallatin/Madison River Basin

- The Gallatin River flows northwest from Yellowstone National Park in the extreme Northwest of Wyoming into Montana, where it eventually becomes part of the Missouri River.
- The Madison River also flows from Yellowstone National Park in the extreme Northwest of Wyoming, but takes more of a west and south route before turning north to joint the Gallatin at the Missouri headwaters.

- The basin is entirely within Yellowstone National Park and is not governed by any compacts or decrees.

Little Missouri River Basin

- This basin is small and flows northeast from Crook County, Wyoming into Montana.
- The streams in this basin are ephemeral or seasonal and are supplied by spring snowmelt on the plains, summer thunderstorms, and groundwater.
- There are no relevant and binding compacts or decrees related to this basin.

The states have negotiated twenty-six water allocation compacts, although Congress has not ratified one of the compacts. See Douglas L. Grant, Limiting Liability for Long-Continued Breach of Interstate Water Allocation Compacts, 43 Nat. Resources J. 373 (2003) (“Various combinations of states have negotiated 26 water allocation compacts); United States Fish and Wildlife Service, Digest of Federal Natural Resources Laws, available at <http://www.fws.gov/laws/lawsdigest/interstatecompacts.htm> (last visited Sept. 12, 2008). These interstate compacts are:

1. Alabama-Coosa-Tallapoosa (ACT) River Basin Compact, Pub. L. 105-105.
2. Animas-La Plata Project Compact, Pub. L. 90-537
3. Apalachicola-Chattahoochee-Flint (ACF) River Basin Compact, Pub. L. 105-104
4. Arkansas River Basin Compact of 1970, 87 Stat. 569
5. Arkansas River Compact of 1949, 63 Stat. 145-152
6. Arkansas River Compact of 1965, P.L. 89-789, 80 Stat. 1409
7. Bear River Compact, 72 Stat. 38
8. Belle Fourche River Compact, 58 Stat. 94
9. Big Blue River Compact, 86 Stat. 193
10. Canadian River Compact, 64 Stat. 93; 66 Stat. 74
11. Colorado River Compact, 45 Stat. 1057-64
12. Connecticut River Compact, P.L. 98-138, as amended, Oct. 28, 1983, 97 Stat. 866
13. Costilla Creek Compact, 60 Stat. 246; 77 Stat. 350
14. Klamath River Compact, 69 Stat. 613
15. La Plata River Compact, 43 Stat. 796
16. Pecos River Compact, 63 Stat. 159
17. Red River Compact, P.L. 96-564; 94 Stat. 3305
18. Republican River Compact, P.L. 78-60
19. Rio Grande Interstate Compact, 53 Stat. 785
20. Sabine River Compact, 65 Stat. 736; 68 Stat. 690
21. Snake River Compact, 62 Stat. 294, 64 Stat. 29

22. South Platte River Compact, 44 Stat. 195
23. Upper Colorado River Basin Compact, 63 Stat. 31
24. Upper Niobrara River Compact, 83 Stat. 86
25. Yellowstone River Compact, 63 Stat. 152; 65 Stat. 663

Id. Additionally, California and Nevada have both ratified the California-Nevada Interstate Compact, although Congress has not ratified it.

III. Yellowstone River Compact

On December 8, 1950, the Wyoming state engineer and the commissioners for the states of Wyoming, Montana and North Dakota signed the Yellowstone River Compact. See Wyo. Stat. § 14-12-601. Congress approved the Compact in October 1951. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663. The Yellowstone River Compact addresses water allocation issues between Wyoming and Montana with regard to the interstate tributaries to the Yellowstone River, with the exception of waters within or contributing to the flow of streams within Yellowstone National Park. Id. at Art. V.

The Compact discusses three categories of water rights: 1) pre-1950 appropriative water rights; 2) post-1950 appropriative water rights used to supplement pre-1950 water rights; and 3) the remaining unused and unappropriated waters in the interstate tributaries to the Yellowstone River. See id. The Compact recognizes “[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,” and provides that those rights “shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.” Id. at Art. V.A. It then allocates to each “signatory state such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described [above]” from the unused and unappropriated waters of the interstate tributaries of the Yellowstone River. Id. at Art. V.B. Such rights were to be acquired by prior appropriation. Id. Finally, from the remainder of the unused and unappropriated water, the Compact allocates to “each state for storage or direct diversions for beneficial use on new lands or for other purposes as follows:” 1) for the Clarks Fork, Yellowstone River, 60 % to Wyoming and 40 % to Montana; 2) for the Bighorn River (exclusive of the Little Bighorn River), 80 % to Wyoming and 20 % to Montana; 3) for the Tongue River, 40 % to Wyoming and 60 % to Montana; 4) to the Powder River (including the Little Powder River, 42 % to Wyoming and 58 % to Montana. Id. The Compact outlines the points on the river at which the percentages are to be measured and the manner in which they are to be measured. Id. at Art. V.B, V.C.

The Compact specifically excludes existing and future domestic and stock water uses, although the storage capacity for any stock water reservoirs cannot exceed twenty acre feet. Id. at Art. V.E. It also excludes devices and facilities for the control and regulation of surface waters. Id. The Compact also does not cover the rights of Native Americans to the waters of the Yellowstone River or its tributaries. Id. at Art. VI. The

Compact prohibits the diversion of water from the Yellowstone River basin without the unanimous consent of all of the signatory states. Id. at Art. X. If water is diverted into the Yellowstone River basin or transferred from one basin to another, the state having the right to the use of the water shall be given proper credit in determining its share of the water apportioned under the Compact. Id.

The Compact provides that a lower signatory state can file an application for a permit to appropriate water with an upper signatory state for waters not specifically apportioned to or appropriated by the upper state under Article V of the Compact. Id. at Art. VII.A. Lower signatory states also have the right to “construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper state for the purpose of conserving and regulating water that may be apportioned or appropriated by the lower state,” although the upper state retains the right to control, regulate and use the water apportioned to or appropriated by it. Id. An upper state also has the right to elect to share in the use of facilities constructed by a “lower state to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance.” Id. The same provisions allowing a lower state to acquire rights in an upper state applies equally to upper states acquiring rights in lower states. Id. Any facilities constructed in another state are subject to that state’s laws regarding construction, operation, repairs and replacements. Id. at Art. IX.

The Compact also allows a lower signatory state to acquire by purchase or the power of eminent domain, lands, easements, and rights-of-way in the upper states for the “construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower state.” Id. at VIII. The same is true with regard to upper states acquiring lands in lower states. Id.

Any claim for an appropriation of water in a signatory state for use in another signatory state after the date of the Compact must be filed in the “office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.” Id. at Art. VII.B. The water diverted is subject to adjudication in the state in which the water is diverted, and where the water is used to irrigate lands in another signatory state, it shall also be confirmed in that state by the proper authority. Id. at Art. VII.C. “Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.” Id. The use of water allocated to the respective states above after the date of the Compact by the United States, its agencies and instrumentalities, is charged as a use by the state in which the use is made, except where the use of the water is incident to the diversion, impounding, or conveyance of water in one state for use in another state, in which case the use is charged to the latter state. Id. at Art. VII.D.

The Compact created a commission to administer the Compact and divide the waters between the states of Wyoming and Montana. Id. at Art. III.A. The commission is composed of one representative from Wyoming and one representative from Montana, each selected by their respective governors, and a representative selected by the director of the United States Geological Survey or its successor. Id. The U.S. representative is to serve when requested by the states, and is to act as the commission's chairman without vote, except as necessary to break a tie between Wyoming and Montana. Id.; see also Art. III.F. The commission has jurisdiction over the "collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this compact, and recommendation to such states upon matters connected with the administration of this compact." Id. at Art. III.C. It is required to compile an annual report for the governors of the signatory states. Id. The commission also has the authority to make rules and regulations, employ services and make expenditures within the limits of the money provided by the states as is reasonable and necessary, and sue and be sued. Id. at Art. III.C, III.E, III.G. The Secretary of the Army, the Secretary of the Interior, the Secretary of Agriculture, the Chairman of the Federal Power Commission, the Secretary of Commerce, and other comparable officers and their successors are directed to cooperate with the commission in "the collection, correlation, and publication of records and data necessary for the proper administration of the compact." Id. at Art. III.D. Finally, the commission is responsible for the establishment, maintenance and operation of gauging and evaporation stations as are necessary to carry out the Compact. Id. at Art. IV.

Montana and Wyoming are currently in litigation over the meaning of Article V of the Compact as it pertains to the water from the Tongue and Powder Rivers. This litigation is discussed below.

IV. Other Agreements Addressing Water Allocation Between Wyoming and Montana

The Yellowstone River Compact is the only agreement regarding water allocation between Wyoming and Montana. Wyoming does have a statute authorizing the state engineer to grant applications to appropriate water from the Little Missouri River for beneficial use in Montana. See Wyo. Stat. § 41-3-103. The legislature also authorized the board of control to issue certificates of appropriation under permits issued by the Wyoming state engineer "upon certification from the state of Montana that the waters appropriated have been put to beneficial uses set forth in the permit." Id. However, the state engineer is only authorized to grant a permit to a Montana appropriator if it does not impair or injure an existing water right in the state of Wyoming. Id.

V. Yellowstone River Compact Litigation

On January 31, 2007, the state of Montana filed a motion for leave to file a bill of complaint, a brief in support of the motion, and a complaint against the states of Wyoming and North Dakota in the United States Supreme Court, seeking to invoke the

Court's original jurisdiction to determine and enforce Montana's rights in the Tongue and Powder Rivers against the state of Wyoming in accordance with the Yellowstone River Compact. See Brief in Support of Motion for Leave to File Bill of Complaint 1 (Jan. 31, 2007). On February 19, 2008, the United States Supreme Court granted the Motion and allowed Wyoming forty-five days in which to file a Motion to Dismiss. See <http://www.supremecourtus.gov/docket/22o137.htm>. Wyoming filed a Motion to Dismiss on April 4, 2008, with the State of Montana filing a response brief on May 9 and Wyoming filing a reply brief on May 27. *Id.* Amicus curiae United States, Anadarko Petroleum Corporation, and Northern Cheyenne Tribe have also filed briefs. *Id.* The Supreme Court has distributed the Motion for conference on September 29, 2008. *Id.*

A. *The Complaint*

Montana claims that Wyoming has disregarded its obligations under Article V of the Compact to curtail water diversions in excess of pre-1950 consumption levels in the Tongue and Powder River Basins in order to provide Montana with sufficient water to satisfy its pre-1950 uses of water. Bill of Complaint ¶ 8 (Jan. 31, 2007); Brief in Support of Motion for Leave to File Bill of Complaint at 2. Specifically, Montana claims that Wyoming has constructed or enlarged fifteen reservoirs in the Tongue and Powder River Basins since the Compact's adoption. Bill of Complaint at ¶ 9; Brief in Support of Motion for Leave to File Bill of Complaint at 14. It also claims that Wyoming has increased the amount of irrigated lands in the Tongue and Powder River Basins which, when Wyoming fails to curtail uses on these lands to protect Montana's rights under the Compact, violates the Compact. Bill of Complaint at ¶ 10; Brief in Support of Motion for Leave to File Bill of Complaint at 14. Montana claims that Wyoming has increased the use of groundwater wells for irrigation, coalbed methane production, and other purposes since the Compact was adopted. Bill of Complaint at ¶ 11; Brief in Support of Motion for Leave to File Bill of Complaint at 15. This groundwater pumping has the potential to deplete the compacted waters of the Powder and Tongue Rivers, which would violate the Compact. *Id.* Furthermore, Wyoming has allowed significant increases in consumption of water by converting from flood irrigation to sprinkler irrigation, which reduces return flows to streams. Bill of Complaint at ¶ 12; Brief in Support of Motion for Leave to File Bill of Complaint at 15-16. "All of these developments since the adoption of the Compact have the potential, in some cases the strong potential, to increase the consumption of water in Wyoming. Wyoming refuses, however, to manage or curtail such activities for the purposes of protecting the rights of Montana under the Yellowstone River Compact." Brief in Support of Motion for Leave to File Bill of Complaint at 16.

Montana claims that the present controversy surrounds the proper interpretation of the Compact. *Id.* According to Montana, Article V.A apportions water to the states that were in actual use at the time of the Compact pursuant to the doctrine of prior appropriation, yet Wyoming claims that the Compact did not even address pre-1950 water rights. *Id.* Montana argues that, although it "cannot demand water at the stateline that is needed to supply the valid Wyoming upstream rights that were in use on

January 1, 1950 . . . neither can Wyoming deny Montana water that should be available for Montana’s pre-1950 water uses by supplying supplemental water to pre-1950 Wyoming uses or by supplying water to new acreages or other post-January 1, 1950 uses in Wyoming. In disregarding these principles, Wyoming has failed to deliver water to which Montana is entitled.” Id. at 19.

Montana claims that only the Supreme Court can provide a remedy for the breach of the Compact and not the Yellowstone River Compact Commission. Id. at 24. Additionally, Montana and Wyoming have been deadlocked in their disputes since the United States representative has never exercised his right to vote. Id. at 27.

B. *Wyoming’s Motion to Dismiss*

In Wyoming’s Motion to Dismiss, it argues that Montana incorrectly asserts that the Compact is a depletion Compact, under which Wyoming cannot deplete the two rivers more than it depleted them as of January 1, 1950. Wyoming’s Motion to Dismiss at 2-3, 26 (April 4, 2008). Wyoming argues that the language of the Compact and the history of its drafting makes clear that the commissioners intended to create a divertible flow compact, whereby water diversions serving post-1950 water rights would be calculated on a cumulative annual basis, rather than a daily mean basis. Id. at 3; 36-37. Pre-1950 water rights, and water rights supplemental to pre-1950 water rights were excluded from coverage under the Compact and were to be regulated by each state under its water laws. Id. at 36. Since allocations were calculated on a cumulative annual basis, the drafters anticipated that Montana would store water earlier in the season to satisfy pre-1950 water rights later in the season. Id. at 46. The drafters explicitly rejected an interstate system whereby Montana could make a “call” on water from Wyoming. Id. at 37.

In arguing that Wyoming has used groundwater irrigation, irrigated new acreage, and switched to more consumptive irrigation methods, Montana again incorrectly assumes that the Compact is based on depletion rather than diversion principles. Id. at 36. Furthermore, the language of the Compact refers to surface waters and not to groundwater. Id. at 59. With regard to the claim that Wyoming is irrigating new acreage, this fact alone would not violate the Compact unless Wyoming had violated the allocation formula in the Compact. Id. at 54. Nor does the Compact discuss the method Wyoming irrigators can use to irrigate their crops (i.e., sprinkler irrigation versus flood irrigation). Id. at 55.

C. *Montana’s Response*

Montana responded to Wyoming’s Motion to Dismiss by arguing that, for purposes of the Motion to Dismiss, the Court must assume that Wyoming is depleting the Tongue and Powder Rivers and thereby causing Montana injury as specified above. Montana’s Brief in Response to Wyoming’s Motion to Dismiss Bill of Complaint 13 (May 9, 2008). The legal question is whether such actions violate Article V of the Compact.

Id. Wyoming has admitted that, if its post-1950 cumulative water diversions and net gains in storage exceed its allocated amount, it has violated the Compact and Montana's complaint, read broadly, makes that allegation. Id. at 17-18.

Montana further argues that Wyoming's interpretation of the Compact is incorrect. Id. at 19. Wyoming's Motion to Dismiss improperly relies on documents and factual matters outside of the pleadings. Id. at 22-23. Next, Montana argues that the Yellowstone Compact provides a cause of action for depletion of the waters apportioned to Montana. Id. at 23. The Compact is all-inclusive, and apportioned all waters not specifically excluded. Id. at 23-27. Wyoming's view that the Compact only allocates water for new uses ignores the express purpose of the Compact, which is to effect a complete apportionment of the waters from the four tributaries and to remove all present and future sources of controversy. Id. at 25-26. Furthermore, the "Senate Report indicates Congress did intend a state line call to be the appropriate remedy for excessive depletions by an upstream State." Id. at 27.

Montana also argues that the Compact apportioned all waters in use at the time the Compact was adopted, thus allowing the unused water to be stored or put to other beneficial uses. Id. at 27-28. Article V.B allocates those waters that were unused and unapportioned at the time of the Compact. Id. at 35. Under the Compact,

pre-Compact rights in all three states take first priority. They are protected in whatever amount was then being put to beneficial use. Anything leftover after pre-1950 rights are satisfied may first be used for supplemental rights described in V.A, and the final remainder is divided by specific percentages for new uses.

Id. at 36. Thus, by providing that pre-Compact rights "shall continue to be enjoyed" and by allocating only those waters that were unused and unapportioned at the time of the Compact, the States are prohibited from depleting another State's apportioned pre-Compact water supply. Id. at 38-39. "If Wyoming's post-Compact uses impair Montana's pre-Compact water supply, Wyoming is exceeding its allocation in V.B and is thereby violating Article V.B." Id. at 39.

"Wyoming may not deplete the waters necessary to supply Montana's pre-Compact rights if that water was available to Montana under the state of development existing at the time of the Compact." Id. at 40. The term "beneficial uses" refers to the water supply of a drainage basin that is depleted. Id. at 40. The divertible flow principle only applies to the unused and unapportioned water allocations, and not to pre-Compact water rights. Id. at 41. One of the reports to Congress noted that the allocations take into account return flow and uses of return flow. Id. at 43.

Montana further argues that any post-Compact use, including irrigating additional acres, or storing additional water, that consumes part of the water supply for Montana's pre-Compact uses violates the Compact. Id. at 43-46. Additionally,

Wyoming's increased consumption on pre-Compact acreage (e.g., through more efficient irrigation methods) may violate the Compact because Article V.A. specifically incorporates "depletion" into the definition of "beneficial use" and Article V.B incorporates return flows into the accounting. Id. at 48. If there is no restriction on increasing consumption of pre-Compact acreage, there would be no purpose for the clause allocating supplemental water rights to pre-Compact uses. Id. at 49.

Finally, Montana has stated a claim based on the increase in groundwater pumping. Id. at 49. Pumping can impact surface flows in the same basin. Id. at 50. The Supreme Court has interpreted other compacts to include groundwater, even though the compact did not mention groundwater. Id. at 53. Wyoming argues, in essence, that even if it pumped groundwater to the point of drying up the Tongue and the Powder Rivers, Montana would have no remedy under the Compact. Id. at 54. That interpretation defeats the purpose of having an interstate apportionment by compact. Id. In response to Anadarko's argument (see below), Montana argues that the Court has interpreted "diversion" to include groundwater, and any factual dispute regarding whether the groundwater pumping is actually depleting the surface waters is a factual argument that cannot be resolved on a Motion to Dismiss. Id. at 55-56.

D. *Amici Briefs*

Several parties have filed *amicus curiae* briefs in this case. Anadarko Petroleum Corporation (“Anadarko”), a corporation engaged in coalbed methane production, filed an *amicus* brief in support of Wyoming’s motion to dismiss, arguing that the Compact does not cover groundwater generally or, even if it does cover groundwater generally, it does not cover groundwater pumping used for coalbed methane production. See Motion of Anadarko Petroleum Corp. for Leave to File *Amicus* Brief and *Amicus* Brief in Support of Respondent State of Wyoming (April 25, 2008). According to Anadarko, the purpose of the Compact was to allocate surface waters and facilitate construction projects. Id. at 3. Anadarko argues that the plain language of the Compact makes clear that it only covers surface water, because it only applies to the unused and unallocated tributaries of the Yellowstone River (and a tributary is defined in terms of surface water), none of the terms are defined to include groundwater and it does not contain an anti-depletion clause. Id. However, even if the Compact does include some groundwater, it should not be read to include groundwater used for coalbed methane production because that water is in deep seams and typically does not reach the surface without pumping. Id. at 4.

The Northern Cheyenne Tribe filed an *amicus* brief in support of Montana, arguing that the Tribe’s water rights are protected by the Compact and urging the Court to deny Wyoming’s Motion to Dismiss. See Brief for *Amicus Curiae* Northern Cheyenne Tribe in Support of Plaintiff State of Montana (May 16, 2008). The Tribe argues that, under the structure of the Compact, Montana’s pre-Compact uses are protected from Wyoming’s expanded and new uses. Id. at 8. The pre-1950 uses create a baseline for the Compact, and unless the pre-Compact rights are fulfilled, there is no “unused and unallocated” waters subject to the percentage allocation. Id. at 9. Additionally, the Tribe argues that the baseline for the Compact is the amount of water actually being used as of January 1, 1950, and not the full amount that was permitted or appropriated. Id. Unless the Compact is tied to the pre-1950 water that was actually being used, the baseline would be a moving baseline and it would be impossible to determine the amount of unused and unallocated water for purposes of Article V.B. Id.

The United States filed an *amicus* brief, arguing that Montana is correct in its assertion that when pre-1950 Montana water rights holders are short of water, there is no “unused and unappropriated water” under the Compact, and “the ‘appropriated’ water must flow to the pre-1950 users who appropriated it.” Brief for the United States as *Amicus Curiae* in Opposition to the Motion to Dismiss 8 (May 16, 2008). However, in order to obtain redress, Montana must show that its pre-1950 users are not receiving sufficient water and Wyoming water users are diverting water to post-1950 purposes. Id. “Wyoming’s position—that pre-1950 rights received no protection *at all* under the Compact—cannot be squared with the text and history of Article V(A).” Id. Wyoming’s alleged post-1950 use of water for storage, irrigation of new acreage, and groundwater pumping for irrigation or industrial use” could all violate the Compact. Id. However, because the Compact protects pre-1950 water rights, and Wyoming water law allows

users to change to more efficient irrigation methods, Montana cannot state a claim based on decreasing return flows. *Id.* at 9.

The United States argues that Montana's claim does not depend on depletion principles, nor does it require Wyoming to deliver a certain quantity of water to Montana. *Id.* at 20. Rather, Wyoming has an obligation to curtail post-1950 water uses when needed for Montana's pre-1950 water uses. *Id.* To survive the Motion to Dismiss, "Montana need[s] [only to] allege [] that, at a time when there is no 'unused and unappropriated' water, Wyoming is making diversions to post-1950 uses, in violation of Montana's first-tier rights under the Compact," which it has done. *Id.* at 23.

E. *Wyoming's Reply*

Wyoming, in its reply brief, again argues that the Compact is not a "depletion" Compact and Montana water users with pre-1950 water rights do not have the right to make a demand on post-1950 diversions or storage in Wyoming. *Id.* at 2. The basic dispute is over the timing of the water flows, and if Wyoming remains within its allocated percentage, it is not responsible to resolve Montana's timing issues. *Id.* at 3. The Compact's solution to Montana's timing problem is to build reservoirs. *Id.* at 55. The Compact does not guarantee a specific quantity of water at the state line, but rather allowed the states to continue to regulate pre-1950 water uses. *Id.* at 16.

However, if Montana properly moves water from its post-1950 diversions to serve pre-1950 rights that are in need, the Compact automatically forces Wyoming to reduce its post-1950 diversions when necessary to keep Wyoming within its percentage limit. All flows in Wyoming that would cause Wyoming to exceed its share if diverted to post-1950 rights must be passed to Montana. *Id.* The only claim Montana can make under the Compact is a claim that Wyoming exceeded its allocated percentage. *Id.* Pre-compact rights are not protected outside of intra-state water law. *Id.* at 10.

Finally, in discussing whether the Compact regulates groundwater pumping, Montana and the United States improperly rely on compacts from other states that are not similar to the Yellowstone River Compact. *Id.* at 3-4. The Yellowstone River Compact's language is clearly limited to surface waters. *Id.* at 24. The Compact is not designed to address groundwater in its allocation scheme, and any attempts to do so would cause calculation problems. *Id.* at 28. Montana has several other options to obtain redress for any alleged harm caused by groundwater pumping, such as asking Wyoming to negotiate an amendment to the Yellowstone River Compact, asking Wyoming to negotiate an additional compact or bringing an equitable apportionment case to apportion the groundwater. *Id.* at 29.

F. *Next Steps*

As stated above, on October 20, 2008, the U.S. Supreme Court determined that the case should be transferred to a Special Master to take testimony, govern discovery

and make finding of fact. The Special Master will follow the Federal Rules of Civil Procedure as a guide, and thus the case may follow the same progression as other civil cases brought in federal court. See Sup. Ct. R. 17.2 (“The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.”). At this point, no scheduling order has been issued. However, what is clear for both states is that the process will be long and time-consuming as the parties seek to protect their positions and use of the Yellowstone River.