

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 Special Master Barton H. Thompson, Jr.

---

**MONTANA'S INITIAL LIST OF  
ISSUES OF LAW AND FACT**

STEVE BULLOCK  
Attorney General of Montana

JENNIFER ANDERS  
ANDREW HUFF  
Assistant Attorneys General  
215 North Sanders  
Helena, Montana 59620-1401

JOHN B. DRAPER\*  
JEFFREY J. WECHSLER  
Special Assistant Attorneys General  
MONTGOMERY & ANDREWS, P.A.  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
*\*Counsel of Record*

July 20, 2011

Pursuant to Case Management Order No. 6, the State of Montana submits this list of issues of fact and law that it currently believes the Supreme Court will need to resolve in reaching a final decision in this case. Montana reserves the right to raise additional issues that arise in this litigation. The following issues will or may need to be resolved at some point in the litigation.

## **I. ISSUES OF LAW**

### **A. Compact Rights and Obligations Generally**

1. Does the Yellowstone River Compact ("Compact") allocate among the States all of the waters of the Yellowstone River and its tributaries, other than the waters within the Yellowstone National Park?
2. What are the Compact allocations to Montana and Wyoming?
3. Is the Compact self-executing or is additional action by Montana and/or the Court required?
4. If the Compact is not self-executing, how does Montana enforce its rights under the Compact?
5. Does the Compact impose a stateline delivery obligation on Wyoming so that Montana can anticipate, at any given point in time, the water available from Wyoming for beneficial use in Montana?
6. If there is no stateline delivery obligation, how is the Compact administered?
7. How are compact violations determined?
8. Are Wyoming's Compact delivery obligations dependent on Montana's intrastate administration of water rights?
9. Must Montana place an interstate call in order to be entitled to receive water from Wyoming under the Compact? If so, how and under what circumstances?
10. Does the abandonment of a water right by an individual water user change the allocation between the States?

11. To the extent that the Compact incorporates the doctrine of prior appropriation, is it the doctrine as it existed at the time the Compact was negotiated, or the doctrine as it exists when a dispute arises?

12. To the extent that the doctrine of prior appropriation in Montana and Wyoming are different, which rule governs the Compact?

13. Can one State impact the Compact allocation by unilaterally changing some aspect of prior appropriation law in that State?

#### **B. Has Wyoming Violated Article V(A)?**

14. What is the measure of protection for pre-1950 appropriative rights in Montana and Wyoming?

15. What are the circumstances and forms of groundwater pumping that dates from after January 1, 1950 where the groundwater is hydrologically connected to the surface channels of the Yellowstone River and its tributaries, that violate Article V(A)? Cf. First Interim Report 90, ¶ 7.

16. Can Wyoming demand an accounting of Montana's intrastate water use from Montana before it must comply with Article V(A)?

17. Given the Supreme Court's ruling that "Article V(A) does not change the scope of the pre-1950 appropriative rights that it protects in both States," *Montana v. Wyoming*, No. 137 Orig., 563 U.S. \_\_\_, Slip. Op. at 18 (2011), and in light of *Bean v. Morris*, 221 U.S. 485 (1911) and *Willey v. Decker*, 73 P. 210 (Wyo. 1903), does the Compact protect the right of Montana water users to receive water in priority without regard to the stateline?

#### **C. Has Wyoming Violated Article V(B)?**

18. What is the measure of "unused and unappropriated" water in Article V(B)?

19. Is it a violation of Article V(B) to take water that was either "used" or "appropriated" as of January 1, 1950?

20. Do supplemental water rights have priority without regard to the stateline?

21. Does the allocation of water between the States under Article V(B) change based on the individual actions of water users?

22. What is the accounting period for Article V(B) uses?

**D. Remedies: What is the Appropriate Relief?**

23. If Wyoming has violated the Compact, what injunctive relief is appropriate to ensure future compliance?

24. Should the Court appoint a River Master to ensure Compact compliance?

25. What is the proper form and amount of damages for past violations?

26. Is Montana entitled to pre-judgment interest?

**II. ISSUES OF FACT**

The issues of fact will depend on the rulings on legal issues. Accordingly, the following is only a tentative list of factual issues.

**A. Pre-1950 Uses**

1. What prior appropriation water rights were in use in Montana and Wyoming as of January 1, 1950?

2. What are the nature and extent of the pre-1950 rights in Montana and Wyoming?

3. What was the pre-1950 storage capacity protected by the Compact in each State?

4. What was the nature and extent of groundwater pumping in Wyoming prior to 1950?

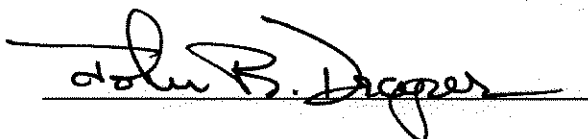
**B. Post-January 1, 1950 Uses**

5. To what extent have pre-1950 irrigation rights in Montana or Wyoming changed the method of irrigation and consumptive use?
6. What is the nature and extent of supplemental post-January 1, 1950 ("post-1950") rights in Montana and Wyoming?
7. What are the nature and extent of new post-1950 rights in Montana and Wyoming?
8. How much water was available for use in Montana and Wyoming in each year beginning in 1950?
9. Since January 1, 1950, has Wyoming permitted new water diversions and withdrawals that interfere with earlier pre-1950 appropriative rights in Montana?
10. To what extent has new or expanded storage been built in each State since January 1, 1950?
11. During each year beginning in 1950, how much water did Wyoming store in post-1950 storage capacity at a time when insufficient water was reaching Montana to satisfy its pre-1950 uses?
12. What post-1950 groundwater pumping has occurred in Wyoming?
13. Is there a hydrologic connection between groundwater and surface water such that withdrawals of groundwater in Wyoming have caused a Compact violation?
14. To what extent has post-1950 groundwater pumping depleted Montana's share of water under the Compact?
15. To what extent have water users in Wyoming used water saved from a change in irrigation method for new uses or on new lands?

Respectfully submitted,

STEVE BULLOCK  
Attorney General of Montana

JENNIFER ANDERS  
ANDREW HUFF  
Assistant Attorneys General  
215 North Sanders  
Helena, Montana 59620-1401

A handwritten signature in black ink, reading "John B. Draper", is written over a horizontal line.

JOHN B. DRAPER\*  
JEFFREY J. WECHSLER  
Special Assistant Attorneys General  
MONTGOMERY & ANDREWS, P.A.  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
*\*Counsel of Record*

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 Initial List Of Issues Of Law And Fact was served by electronic mail and by placing the same in the United States mail, postage paid, this 20th day of July, 2011, to the following:

Peter K. Michael  
The State of Wyoming  
Senior Assistant Attorney General  
123 Capitol Building  
Cheyenne, WY 82002  
[pmicha@state.wy.us](mailto:pmicha@state.wy.us)

James Joseph Dragna  
Michael Wigmore  
Bingham, McCutchen LLP  
355 South Grand Avenue Suite 4400  
Los Angeles, CA 90071  
[michael.wigmore@hingham.com](mailto:michael.wigmore@hingham.com)

Jeanne S. Whiteing  
Attorney at Law  
1628 5<sup>th</sup> Street  
Boulder, CO 80302  
[jwhiteing@whiteinglaw.com](mailto:jwhiteing@whiteinglaw.com)

Todd Adam Sattler  
North Dakota Attorney General's Office  
500 North Ninth Street  
Bismarck, ND 58501  
[tsattler@nd.gov](mailto:tsattler@nd.gov)

William M. Jay  
Solicitor General  
United State Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001  
[william.m.jay@usdoj.gov](mailto:william.m.jay@usdoj.gov)

James DuBois  
United States Department of Justice  
Environmental and Natural Resources  
Division of Natural Resources Section  
999 18<sup>th</sup> St. #370 South Terrace  
Denver, CO 80202  
[james.dubois@usdoj.gov](mailto:james.dubois@usdoj.gov)

Barton H. Thompson, Jr., Special Master  
Susan Carter, Assistant  
Jerry Yang and Akiko Yamazaki  
Environment & Energy Building, MC-4205  
473 Via Ortega  
Stanford, CA 94305-4205  
[susan.carter@stanford.edu](mailto:susan.carter@stanford.edu)

  
John B. Draper