# A DEAL IS A DEAL IN THE WEST, OR IS IT? *MONTANA V. WYOMING* AND THE YELLOWSTONE RIVER COMPACT

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## I. INTRODUCTION

In 2002, the United Nations reported that by 2025, freshwater shortages will affect almost half of the world's population.[1] In fact, the western United States is already feeling the effects of water shortages on the region's environment and economy.[2] In 1950, Montana, Wyoming, and North Dakota attempted to avoid the adverse impact of water shortages by entering into an interstate compact that governed their shared access to the Yellowstone River.[3] The Yellowstone River Compact's (Compact) preamble expressly stated that its goal is to "remove all causes of present and future controversy between said States . . . with respect to the waters of the Yellowstone River and its tributaries."[4]

After almost sixty years of relative quiet among the Compact's signatories, the States find themselves litigating the permissibility of improved irrigation techniques that adversely affect other water users.[5] In Montana v. Wyoming,[6] the Supreme Court will address

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1. United Nations, Global Challenge, Global Opportunity: Trends in Sustainable Development 11 (Johannesburg Summit 2002), *available at* http://www.un.org/jsummit/html/documents/summit_docs/criticaltrends_1408.pdf.

2. *See* David S. Brookshire et al., *Western Urban Water Demand*, 42 NAT. RES. J. 873, 873–75 (2002) (noting increased water demand on already limited supplies and its distributional consequences in the West); Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361, 361–62 (2001) (discussing the inevitable conflict between increased human demands on water and declining aquatic populations).

3. Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951).

4. *Id.* pmbl.

5. Brief in Support of Montana's Exception at 3–4, Montana v. Wyoming, No. 137 (U.S. May 13, 2010).

whether the upstream state, Wyoming, violated the Compact by using more efficient irrigation methods that consume more water and leave less to flow to users downstream in Montana. The Court agreed to hear the case pursuant to its original jurisdiction.[7] As Chief Justice John Roberts articulated in a recent interstate water rights case, "[o]ur original jurisdiction over actions between States is concerned with disputes so serious that they would be grounds for war if the States were truly sovereign. A dispute between States over rights to water fits that bill . . . ."[8]

## II. FACTS

The Yellowstone River Basin is an approximately 70,100-square-mile watershed encompassing parts of Montana, Wyoming, and North Dakota.[9] The main stream of the Basin rises in Yellowstone National Park and flows north out of Wyoming and into Montana.[10] Each of the four main tributaries flows through Montana and Wyoming and joins the Yellowstone River in Montana.[11] The waters of these tributaries are used primarily for irrigation.[12]

On December 8, 1950, Montana, Wyoming, and North Dakota entered into the Compact, which provided for an equitable division and apportionment of the Yellowstone River's water supply and its tributaries among the States.[13] The key provision of the Compact, Article V, governs the appropriation and allocation of water among the States, differentiating between pre- and post-1950 water users and their respective rights under the Compact.[14] Article V(A), which governs pre-1950 rights and is the operative section for the dispute at issue, states that pre-1950 users possess appropriative rights to the

6. Montana v. Wyoming, No. 137 (U.S. argued Jan. 10, 2011).

7. *See* U.S. CONST. art. III, § 2 ("[T]he judicial Power shall extend to all Cases, in Law and Equity . . . to Controversies between two or more States . . . .").

8. South Carolina v. North Carolina, 130 S. Ct. 854, 876 (2010) (Roberts, J., concurring) (citation omitted).

9. Brief for the United States as Amicus Curiae at 2, Montana v. Wyoming, No. 137 (U.S. Jan. 2, 2008). North Dakota is named as a party to the case because it was a signatory to the Compact, but is not taking part in the dispute. Montana's Bill of Complaint at 3, Montana v. Wyoming, No. 137 (U.S. Jan. 31, 2007).

10. Brief for the United States, *supra* note 9, at 2.

11. *Id.*

12. *Id.* at 3 (the States artificially apply water to the soil to assist in the growth of agricultural crops, especially during arid periods).

13. Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951).

14. *Id.* art. V.

beneficial uses of the river water.[15] Article V(B) governs "unused and appropriated waters" as of January 1, 1950 and provides a quantitative calculation for purposes of allocating water based on post-1950 uses.[16]

At the time the Compact was adopted, the main method of irrigation involved flooding crop fields. This method resulted in a majority of the water soaking into the irrigated land or evaporating. This process left about a third of the appropriated water to flow back into the source rivers, where the water originated.[17] Now, more efficient methods of irrigation allow ten percent or less of the appropriated water to flow back into the tributaries and to downstream users.[18] In effect, users in Wyoming divert the same amount of water they diverted when the Compact originated in 1950, but now they use more of it, leaving less to flow to downstream users in Montana.

Montana asserts that the new efficient irrigation techniques adopted by Wyoming violate its pre-1950 rights under the Compact.[19] Montana filed other complaints against Wyoming contending that its post-1950 uses also reduce water flow and thus infringe on Montana's rights under the Compact.[20] The Court did not grant certiorari with respect to the post-1950 claims.[21]

This case began in January 2007 when Montana filed a motion for leave to file a bill of complaint with the Supreme Court.[22] A year later, the Court granted leave to Montana to file its complaint and simultaneously allowed Wyoming to file a motion to dismiss.[23] In its motion to dismiss, Wyoming argued that the Compact did not impose consumption limits for pre-1950 water uses as alleged by Montana.[24] The Court appointed a Special Master—as it often does in original

15. *Id.*
16. *Id.*
17. Brief in Support of Montana's Exception, *supra* note 5, at 3.
18. *Id.*
19. Montana's Bill of Complaint, *supra* note 9, at ¶ 8.
20. *Id.* ¶¶ 9–11. Montana's other three theories of compact breach involve alleged interference with Montana's pre-1950 rights through use of new storage reservoirs, irrigation of new acreage, and reductions of water caused by groundwater pumping in Wyoming. *Id.*
21. Montana v. Wyoming, 131 S. Ct. 497 (2010). A Special Master was assigned by the Court to resolve post-1950 claims. *Id.*
22. Montana's Bill of Complaint, *supra* note 9.
23. Montana v. Wyoming, 552 U.S. 1175 (2008).
24. Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at 19–20, Montana v. Wyoming, No. 137 (U.S. Apr. 3, 2007).

jurisdiction cases—to resolve the motion to dismiss.[25] The Special Master concluded that Wyoming's motion to dismiss should be denied.[26] He agreed that the Compact "unambiguously protects pre-1950 appropriative rights" from post-1950 uses,[27] but rejected Montana's argument that the Compact prohibits pre-1950 appropriators from conserving water through the adoption of improved irrigation techniques.[28] The Court's jurisdiction to hear this case derives from the Compact Clause of the Constitution.[29] Under the Compact Clause, jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact."[30] The Court agreed to hear arguments on the sole issue of whether Wyoming's improved irrigation techniques violated Montana's pre-1950 users' water rights.[31]

## III. LEGAL BACKGROUND

The Supreme Court recognizes three methods of allocating water among the states: (1) a suit in the original jurisdiction of the Supreme Court; (2) an act of Congress; and (3) an interstate compact.[32] Interstate compacts have been the major mechanism for defining states' rights to divert and use water that crosses or comprises their borders.[33] There are currently twenty-three interstate water compacts,[34] in contrast to only two congressional allocations[35] and three Supreme Court decrees.[36]

A compact is an interstate agreement that has been approved by Congress and is both a contract between the States and a federal statute.[37] For the purposes of interpreting such a compact, the text is

25. Montana v. Wyoming, 129 S. Ct. 480 (2008).
26. First Interim Report of the Special Master at 15, Montana v. Wyoming, No. 137 (U.S. Feb. 10, 2009).
27. *Id.* at 37.
28. *Id.* at 86–87.
29. U.S. CONST. art. III, § 2, cl. 2.
30. Texas v. New Mexico, 462 U.S. 551, 567 (1983) (citing Virginia v. West Virginia, 206 U.S. 290, 317–19 (1907)).
31. Montana v. Wyoming, 131 S. Ct. 497, No. 137 (2010).
32. John B. Draper & Jeffrey J. Wechsler, *Gunboats on the Colorado: Interstate Water Controversies, Past and Present*, 55 ROCKY MT. MIN. L. INST. 18-1, § 18.03 (2009).
33. 3 WATERS AND WATER RIGHTS § 46.01 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2010).
34. *Id.* § 46.01.
35. *Id.* § 47.01(b).
36. *Id.* § 45.07(a).
37. Texas v. New Mexico, 482 U.S. 124, 128 (1987).

conclusive if unambiguous.[38] Otherwise, "it is appropriate to look to extrinsic evidence of the negotiation history of the Compact . . . ."[39]

The prior appropriation doctrine referenced in the Compact dictates that water uses that are "prior in time are also prior in right."[40] The Supreme Court has explained that, "[t]he cardinal rule of the doctrine [of prior appropriation] is that priority of appropriation gives superiority of right."[41] Under the doctrine of prior appropriation, a person acquires a right by diverting the water and putting it to a beneficial use. The lack of beneficial use of all or part of a water right may result in forfeiture of that right.[42] If the entire amount diverted from the waterway is "beneficially used"—put to valuable use and not wasted—then that entire amount becomes the measure of the appropriative right.[43]

Historically, the prior-appropriation doctrine protected downstream appropriators, like Montana, from changes in upstream water uses that resulted in a reduced return flow.[44] It is a "well-established" principle that "junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations" and therefore can complain of changes in water use that "adversely affect[] their rights."[45] Both Wyoming and Montana have "no injury" statutes that prohibit appropriators from changing the purpose or place of their water use.[46] "No injury" statutes protect against formal changes in water rights. The presence of "no injury" statutes is not controlling in this case because Montana is not alleging that Wyoming appropriators have

38. *See* Kansas v. Colorado, 514 U.S. 673, 690 (1995) (noting that "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with it express terms") (citing Texas v. New Mexico, 462 U.S. 554, 564 (1983)).

39. Oklahoma v. New Mexico, 501 U.S. 221, 235 n.5.

40. *See* SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 299, at 307 (3d ed. 1911) (the date of appropriation determines the appropriator's priority to use the water, with the earlier user having the superior right).

41. Wyoming v. Colorado, 259 U.S. 419, 470 (1922).

42. *See* WIEL, *supra* note 40, at 504 (3d ed. 1911) ("An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use.").

43. *See id.* at 502 (stating that an appropriator is entitled to the quantity of water actually diverted and used for a beneficial purpose).

44. Report of the Special Master, *supra* note 26, at 66.

45. Farmer's Highline Canal v. Golden, 272 P.2d 629, 631–32 (Colo. 1954) (citations omitted).

46. WYO. STAT. ANN. §41-3-104; MONT. CODE ANN. § 85-2-402. Report of the Special Master, *supra* note 26, at 67 (exceptions to this "no-injury" rule have been introduced where states concluded that the benefits of permitting a change outweigh the cost to downstream water users).

changed any formal water right like the place of use or type of use.[47]

Both Montana and Wyoming follow the prior appropriation doctrine in allocating both surface water and groundwater, as do most western states.[48] It is unclear under the doctrine of prior appropriation, however, whether and to what extent an appropriator can increase its consumption to the detriment of a downstream appropriator.[49] Montana observes that it 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."[50] Neither party, however, cited a case to the contrary.[51] No court in any jurisdiction, has adjudicated a case where—"(1) an agricultural appropriator, (2) increases his or her consumption of water, (3) on the same irrigated acreage to which the appropriative right attaches, (4) to the detriment of downstream appropriators, (5) in the same water system from which the water was originally withdrawn."[52] Since sprinkler irrigation, like the kind used by Wyoming, was in its infancy when the Compact was signed in 1950, there have been no cases decided on whether an irrigator could limit a downstream user's water right by adopting higher-efficiency sprinkler irrigation.[53]

There are, however, a few cases in both Montana and Wyoming that deal with an appropriator's right to reduce water waste. Under Wyoming law, "[n]o appropriator can compel any other appropriator to continue the waste of water which benefits the former."[54] Although the Supreme Court of Wyoming has only decided cases on the rights to "seepage or waste water," it has consistently taken an expansive view of these rights and held that appropriators have a right to reduce water waste even to the detriment of downstream users who have

47. *See* Report of Special Master, *supra* note 26, at 15 (arguing that Wyoming is increasing water consumption of the *same* acreage and for the *same* use as before).

48. *Id.* at 5.

49. *See* Frank J. Trelease, *Reclamation Water Rights,* 32 ROCKY MTN. L. REV. 464, 469 (1960) ("Perhaps no area of the doctrine of prior appropriation is so confused as is the law pertaining to seepage or return flows.").

50. Montana's Letter Brief re Memorandum Opinion on Motion to Dismiss at 8, Montana v. Wyoming, No. 137 (U.S. July 17, 2009).

51. Report of Special Master, *supra* note 26, at 66.

52. *Id.*

53. Wyoming's Reply to Montana's Exception at 35, Montana v. Wyoming, No. 137 (U.S. June 15, 2010).

54. Bower v. Big Horn Canal Ass'n, 307 P.2d 593, 601 (Wyo. 1957).

become reliant on the runoff.[55] Historically, Montana law has held that appropriators cannot change the type of water use if it modifies return flow to the detriment of downstream users.[56] This law is not dispositive because it refers to a change in water use, which is not alleged in this case. Wyoming originally used water to irrigate and its use remains unchanged.[57] Montana law is thus inconclusive on the key issue of whether an appropriator may consume more of the water initially diverted by switching from flood to sprinkler irrigation systems.[58]

## IV. HOLDING

The Special Master concluded that the Compact "unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950."[59] But, the Special Master also found that the Compact does not exclude increased efficiency gains from the scope of pre-1950 rights.[60] He rationalized that any such requirement would "almost certainly lead to additional regulation of Wyoming's pre-1950 appropriators."[61] And that, the Special Master found, would read an additional requirement into the Compact that is not there.[62]

The Special Master determined that Article V(A), which allocates post-1950 uses of water, "establishes only the amount of water that can be diverted, not consumed, by pre-1950 uses in Wyoming."[63] His reading of the Compact's definition of "beneficial use" mirrored the commonly understood meaning of the term in western water law—it permits any use that actually depletes a waterway to be the basis for

55. *See* Binning v. Miller, 102 P.2d 54, 60 (Wyo. 1957) ("[T]he lower owner using such water merely takes his chances that the supply will be kept up; that he has no right thereto, no matter how long he may have used it."); *Bower,* 307 P.2d at 601 ("If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed . . . and no waste water returns by seepage or percolation to the river, no other appropriator can complain."); Fuss v. Franks, 610 P.2d 17, 20 (Wyo. 1980) ("[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.'").

56. *See, e.g.*, Cate v. Hargrave, 680 P.2d 952, 956 (Mont. 1984) (stating that the change in place of use is permissible only if other users are unharmed).

57. Report of the Special Master, *supra* note 26, at 55.

58. *Id.* at 84.

59. *Id.* at 16.

60. *Id.* at 86.

61. *Id.* at 58.

62. *Id.* at 58–59.

63. *Id.* at 60.

an appropriative right.[64] That use must *involve* depletion, but the beneficial user is not confined to the depletion itself; the beneficial use requirement is met even if some of the water later indirectly makes it back into the river system.[65] Even when Wyoming's initial diversions resulted in some return flow, the initial diversion for purposes of irrigation is a beneficial use under the law and merits protection. He concluded that the reference to depletion in the Compact refers to a settled principle of western water law that to acquire a property right to use water, the appropriator must remove that water from the stream.[66]

Ultimately, the Special Master noted that allowing Wyoming to retain the benefits of its improved efficiency is reasonable because "it encourages increased conservation" by creating "an incentive . . . to invest in improved irrigation techniques."[67] The Special Master concluded that the significance of this decision is "inherently limited," because it applies to a very particular set of facts; efficiency gains that are realized and used on the same lands that were being irrigated as of 1950—not for new lands or new purposes.[68]

## V. ARGUMENTS

### *A. Montana's Arguments*

Montana's arguments rest on the basic proposition that the Compact is a water allocation agreement under which Montana is guaranteed enough water to meet its pre-1950 demands, and it is up to Wyoming to deliver that minimum amount of water to Montana.[69] Montana does not argue that the increased efficiency–irrigation practices are a violation of the Compact per se, rather it argues that Wyoming violates the Compact by diminishing the water flow

64. *See id.* at 61(noting that traditional prior appropriation law requires that appropriators actually divert water from a stream for consumptive use); BECK & KELLEY, *supra* note 33, § 12.02(c)(1).

65. *See* Report of Special Master, *supra* note 26, at 60 ("So long as the as the water diverted is put to a valuable use and not wasted (*i.e.*, is 'beneficially used'), the entire amount diverted is the measure of the appropriative right.").

66. *Id.* at 61. *See* BECK & KELLEY, *supra* note 33, § 12.02(c)(1) (stating that a water right is contingent on diversion from a waterway in many western jurisdictions).

67. *Id.* at 87.

68. *Id.*

69. Brief in Support of Montana's Exception, *supra* note 5, at 11.

necessary to maintain Montana's pre-1950 claims.[70] This violation in turn has caused, and will continue to cause, direct and irreparable injury to Montana.[71] Wyoming must ensure its increased consumption does not limit the return flow needed to satisfy its pre-1950 uses.[72] Because Montana's pre-1950 rights depend on the return flow, Wyoming's increased consumption, resulting from increased water efficiency techniques, violates Article V of the Compact, which governs water allocation among the signatories.[73]

Montana claims that the Compact dictates that its pre-1950 uses are protected from increases in Wyoming's consumption, not just increases in diversion. Montana relies on the Compact's use of the term "depleted" in its definition of "beneficial use."[74] The Compact's plain language protects pre-1950 "beneficial uses," which are defined in terms of depletion of the water supply.[75] The Special Master erred in interpreting "beneficial use" to require an actual diversion of water, rather than relying on the definition provided.[76] Montana distinguishes between "diversion" and "depletion" by equating the latter to consumption that diminished the "return flow upon which Montanans rely."[77]

Alternatively, Montana contends that, even if the Compact is ambiguous and requires interpretation, the drafters' intent was for the Compact to create a permanent allocation of water, thereby precluding increased consumption beyond levels set by any party in 1950. The 1950 Senate Report accompanying the Compact establishes that "a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing."[78] Montana also urges the Court to ignore reference to prior appropriation in the Compact, because the law of prior appropriation

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70. Montana's Letter Brief, *supra* note 50, at 12–13.

71. Montana's Bill of Complaint, *supra* note 19, ¶ 14–15.

72. Montana's Letter Brief, *supra* note 50, at 12–13.

73. Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint at 47, Montana v. Wyoming, No. 137 (U.S. May 1, 2008).

74. Brief in Support of Montana's Exception, *supra* note 5, at 11.

75. Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663, art. II (H) ("The term 'Beneficial Use' is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.").

76. Brief in Support of Montana's Exception, *supra* note 5, at 25–26.

77. Transcript of Oral Argument at 5, Montana v. Wyoming, No. 137 (U.S. January 10, 2011).

78. S. REP. No. 883, at 2 (1951).

as described by the Special Master is inconclusive as it relates to adoption of efficient irrigation techniques, and therefore the allocation set forth in the Compact should govern.[79] The Special Master's allowance of increased consumption on pre-Compact irrigated lands in Wyoming amounts to a transfer of crop production from Montana to Wyoming, in effect undoing the negotiated apportionment among the States.[80]

*B. Wyoming's Arguments*

Wyoming argues that Article V(A) of the Compact does not guarantee any specific volume of water to flow downstream to Montana.[81] Rather, Article V(A) incorporates the doctrine of prior appropriation and the "beneficial use" requirement refers to the *types* of uses rather than the amount of water used.[82] Therefore, Wyoming irrigators with pre-1950 rights may increase their water usage by employing more efficient irrigation methods because the type of use—irrigation—remains beneficial.[83] Wyoming's reading of the Compact comports with prior appropriation law, where "depleted" means only what has been withdrawn.[84] This interpretation mirrors both the Special Master's findings and the way western states have defined beneficial uses.[85]

Wyoming also points to the Compact's structure as evidence that water allocation for pre-1950 users is to be governed by the doctrine of prior appropriation and not by a permanent allocation. The tiered approach of allocation in the Compact explicitly differentiates between the treatment of pre-1950 water rights and the treatment of water rights that would be created by new diversions and storage projects in each state after 1950. The post-1950 rights were subject to the cumulative divertible-flow methodology of Sections (B) and (C) of Article V, which provide quantitative calculations for determining allocation.[86]

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79. Brief in Support of Montana's Exception, *supra* note 5 at 32–33 (relying on Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)).
80. *Id.* at 16.
81. Wyoming's Reply Brief, *supra* note 53, at 5.
82. *Id.*
83. *Id.*
84. *Id.* at 22 (Wyoming equates "withdrawal" with "beneficial use.").
85. *Id.* at 13.
86. *Id.* at 11.

The Compact established that "Montana and Wyoming will interact as dictated by the various rules of the doctrine of appropriation" and did not create "any hard and fast amount of water to which [appropriative] rights will be either entitled or limited."[87] Wyoming argues that prior appropriation rights are defined in terms of "depletion" in the Compact in order to prevent States from acquiring rights to non-depletive uses, such as mill use on a river.[88] As the Solicitor General elaborated during oral arguments, the drafters chose to use the word "depletion" rather than "diversion" because depletion is a "criterion for beneficial use,"[89] not because depletion equates with consumption.[90] Had the drafters intended that beneficial use be limited to consumption, they would have expressed their intention in clear and express terms.[91] Other compacts that impose quantitative limits like that which Montana proposes contain express provisions to that effect.[92]

### *C. United States' Argument*

The United States has considerable interest in this case because it administers water projects throughout the Yellowstone River Basin that may be affected by the Court's construction of the Compact.[93] Both because of the United States' role as administrator of water projects in the Basin and because compacts possess the status of federal law once approved by Congress, the Court invited the United States to participate.[94] The Solicitor General of the United States sided with Wyoming and stated that increased efficiency irrigation techniques by Wyoming do not constitute a violation of the Compact.[95] The Solicitor General's main argument is that the Compact is governed by the background principle of prior appropriation, which is concerned with the amount of water diverted for beneficial use, not the amount of water consumed.[96]

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87. *Id.*
88. *Id.* at 21 (such a use would divert, but not consume, water).
89. Transcript of Oral Argument, *supra* note 77, at 50.
90. *Id.* at 50–51.
91. Wyoming's Reply Brief, *supra* note 53, at 22.
92. *See, e.g.*, Republican River Basin Compact art. III, 57 Stat. 86 (1943) (providing for the allocation of water based as a percentage of an annual computed water supply).
93. Brief for the United States, *supra* note 9, at 1.
94. *Id.*
95. *Id.*
96. Brief for the United States as Amicus Curiae in Opposition to the Motion to Dismiss at 29, Montana v. Wyoming, No. 137 (U.S. May 1, 2008).

## VI. DISPOSITION

The Court must determine what the correct meaning of "beneficial use" is in the Compact. Montana argues that it refers to the net use of water[97]— the amount of water diverted subtracted by the amount of water returned to the river. Wyoming and the U.S. argue that it refers to "a calculation of what is taken without reference to what returns."[98]

The Special Master concluded that, according to the doctrine of prior appropriation, the Compact does not prohibit Wyoming from increasing its consumption by adopting improved irrigation methods.[99] His interpretation of the doctrine comports with Wyoming law[100] and does not contradict Montana law's version of the doctrine, which is itself conflicted.[101] Though this case may be of limited applicability because the Compact is somewhat unusual in its allocation of water, it is unlikely that the Court would want to reach a decision that would discourage more efficient water practices in the increasingly arid West.[102]

During oral arguments, the Court primarily focused on deciphering the meaning of "beneficial use" in the Compact.[103] The Justices, with the exception of Justice Scalia, appeared wholly unconvinced that "depletion" is the same as "consumption," given the history of prior appropriation law.[104] Justice Scalia refused to accept Wyoming's argument that depletion is the same as diversion because

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97. Brief in Support of Montana's Exception, *supra* note 5, at 18–19.

98. Transcript of Oral Argument, *supra* note 77, at 33.

99. Report of Special Master, *supra* note 26, at 90.

100. *See* note 55 and accompanying text (Wyoming law permits water users to curb runoff even when downstream users have become reliant on the runoff.).

101. *See e.g.*, Cate v. Hargrave, 680 P.2d 952, 956 (Mont. 1984) (holding that appropriators cannot change their place or type of use if it would detrimentally affect downstream users); *but see e.g.*, Rock Creek Ditch & Flume Co. v. Miller, 17 P.2d 1074, 1080 (Mont. 1933) (holding that an appropriator may collect or recapture runoff "*before it leaves his possession*, but, after it gets beyond his control it thus becomes waste and is subject to the appropriation of another") (emphasis added).

102. *See id.* at 37 (Unlike many other interstate water compacts, Article V(A) of the Yellowstone River Compact does not establish an allocation based on a quantity of water.).

103. *See generally* Transcript of Oral Argument, *supra* note 77.

104. *Compare id.* at 9 (Chief Justice Roberts: "[T]he way water law worked in the West . . . is you have the right to take out however much you were taking out, and the fact that less comes back, that's something different. That doesn't affect your appropriation.") *with id.* at 28 (Justice Scalia: "[W]hat is guaranteed is not the diversion right that existed pre-1950, but the beneficial use right, which is the net use of the water—not the total amount diverted."). Justice Kagan took no part in deciding this case.

he did not understand why the drafters would choose to use the term "depletion" rather than "diversion," if that was what they meant.[105] The prevailing attitude among the Justices, however, was much more receptive to Wyoming's analysis. Wyoming's analysis neatly comports with the fundamentals of western water law; it is the straightforward understanding that water users have a right to take out however much they were taking out at the time of the appropriation, and the fact that less returns does not affect the users' appropriation. Because this argument falls squarely in line with the Justices' view of western water law, Wyoming likely will win this case.

Furthermore, Montana's position proved particularly unpersuasive to the Justices due to the practical constraints it would impose. During oral arguments, both Justice Breyer and Sotomayor seemed particularly troubled with the consequences of applying a consumption metric—i.e. one that calculates the water right based on how much water was actually consumed, rather than diverted—to appropriative rights.[106] By adopting consumption as the metric, states would have to monitor and require reporting of any change in crop or method of irrigation because such a change would cause a difference in return flow.[107] It is unlikely the Compact intended to impose such requirements, as the Compact itself states that its "provisions are easily administered, and require no elaborate organization."[108] Additionally, equating "beneficial use" with the amount of water consumed would require actual knowledge of how much each individual irrigator returns to the river in Wyoming.[109] Even Wyoming acknowledged that there is no way of knowing whether each individual irrigator could measure how much he returned to the River.[110]

Justice Breyer asked the Solicitor General whether there was a "fair way to decide this case?"[111] The Solicitor General responded that the fairest way to resolve the dispute between Montana and Wyoming is by enforcing what the States signed up for.[112] According to the text of the Compact, the history of prior appropriation and the current

105. *Id.* at 28.
106. Transcript of Oral Argument, *supra* note 77 at 7, 10–11.
107. Report of Special Master, *supra* note 26, at 87–88.
108. S. REP., *supra* note 78, at 1.
109. Transcript of Oral Argument, *supra* note 77, at 11.
110. *Id.* at 11.
111. *Id.* at 43.
112. *Id.*

trend of protecting appropriators who limit waste, the Supreme Court likely will return to the central dogma of western water law—"prior in time, prior in right,"[113] and find that Wyoming is entitled to the amount of water that it has diverted since 1950, without any regard to what flows back.

113. WIEL, *supra* note 40, at 307.