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Editor's Note: This issue analyzes the United States Supreme Court decision in *Montana v. Wyoming*, a water rights case addressing whether junior users can prevent senior users from increasing the efficiency of their irrigation techniques, thus decreasing return flows.

We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those who prefer to view this article in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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Montana v. Wyoming et al.

Supreme Court of the United States, No. 137, Orig.; 2011 WL 1631038
Decided May 2, 2011

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Background

The Yellowstone River System, which includes the Yellowstone River and its tributaries, generally flows from its headwaters in Wyoming into Montana and then into North Dakota, where the Yellowstone River joins the Missouri River. In the early 1900s the river system became heavily utilized for irrigation, necessitating storage facilities to stabilize the amount of water available each year for that purpose.

Before Congress would fund water storage facilities, it required that Wyoming, Montana and North Dakota execute a water allocation agreement for the Yellowstone River System. Congress granted permission to the states to enter into a compact in 1932, and the Yellowstone River Compact was executed by the states and ratified by Congress in 1951. 65 Stat. 663.

The Yellowstone River Compact provides: "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of prior appropriation." Article V(A). The Compact secondarily allocates to each state the quantity of water necessary to provide supplemental water supplies for the pre-1950 uses (Article V(B)), and thirdly allocates any remaining water by percentage based on the water source.

Summary

In February of 2008 Montana filed a bill of complaint against Wyoming in the Supreme Court, alleging that Wyoming breached the Compact by consuming more than the state's share of the Tongue and Powder Rivers, which are tributaries to the Yellowstone River. Specific to this case, Montana alleged that pre-1950 appropriators had increased the efficiency of their irrigation practices by switching from flood irrigation to sprinkler systems, thereby consuming more water (because less water was "wasted" by flowing back into the water system), and depriving downstream appropriators in Montana. Wyoming filed a motion to dismiss the complaint, and the Supreme Court appointed a Special Master to hear the motion.

The Special Master determined that Montana's allegation did not state a valid claim for relief and should thus be dismissed. Montana took exception to the finding. The Supreme Court, in a 7-1 decision, agreed with the finding of the Special Master on the basis of the prior appropriation doctrine, the no injury rule, and the recapture principle, which are common tenets of water law in the western states.

Legal Opinion

Although the Yellowstone River Compact allocates water among Wyoming, Montana and North Dakota, the Compact incorporates the prior appropriation doctrine. Therefore, the Supreme Court looked to the doctrine within those states, and more generally in the West.

The Court identified that, in the West, the prior appropriation doctrine creates a system of water rights based on seniority, by which junior uses are subject to satisfaction of senior rights before the junior rights may be fulfilled. However, junior right holders are not without any recourse, and the no-injury rule allows juniors to prevent seniors from making changes which would harm existing uses, including junior uses.

The issue in this case is whether the increased efficiency of irrigation practices, which reduces return flows and raises water consumption rates, may be prevented by junior users under the no-injury rule. The Supreme Court recognized that the law of return flows is an unsettled area of law in every western state, but held that junior users have no right to prevent senior users from increasing the efficiency of their irrigation techniques, thus decreasing return flows.

The Court determined that the no-injury rule is not absolute, and only applies to certain types of changes that cause harm, including changes to points of diversion, places of use and purposes for use. Therefore, the Court held that the scope of appropriative rights includes the right to make efficiency improvements, so long as the water is not used to irrigate additional acreage. The Court espoused that its conclusion is further supported by the rule of recapture, which allows appropriators to collect and reuse water while it remains on the appropriators' lands.

Montana additionally argued its claim based on the Compact's definition of "beneficial use," which defines the term as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Article II(H). The majority found that the

definition did not support Montana's position that the drafters intended to fix the level of depletion by the pre-1950 appropriators. Justice Scalia agreed with Montana's argument on this point, and thus dissented from the majority decision.

Conclusions

Montana v. Wyoming will have longer-reaching effects than in just those states. The Supreme Court's decision is based on general principles of western water law which have been adopted by the majority of, if not all, western states. The decision addresses an unsettled area of water law, i.e., the right to return flows, and decides that junior appropriators cannot prevent senior appropriators from decreasing return flows by increasing efficiency and water consumption rates.

This decision directly affects Oregon appropriators, because Oregon, like Montana and Wyoming, has adopted the prior appropriation system, the no-injury rule, and the rule of recapture. *Cleaver v. Judd*, 238 Or. 266, 270-72 (1964); *Jones v. Warm Springs Irr. Dist.*, 162 Or. 186, 196 (1939); *Wood v. Woodcock*, 276 Or. 49, 59 (1976).

Finally, there are lessons to be learned from the Yellowstone River Compact. Any efforts that might be made to put a compact on the Columbia River may be well-served by determining a percentage of flow to which each state is entitled. Proper measurement under a flow regime may eliminate the dispute that arose here.

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If you would like to contribute or have comments, please contact the E-Outlook Editor, Patrick Rowe, at prowe@sussmanshank.com or (503) 243-1651.