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# A Water Story With Original Jurisdiction and a Doctrine For Changing Uses

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# A WATER STORY WITH ORIGINAL JURISDICTION AND A DOCTRINE FOR CHANGING USES

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## I. INTRODUCTION

This is a story of how two rivers in the remote reaches of Wyoming and Montana, and the underlying water, became a federal case before the United States Supreme Court. It is an account of a local water dispute whose resolution will likely impact the course of water law, and more importantly, water throughout the entire country. The story is common in the American West and around the world wherever the demand for water has surpassed the supply; perhaps this is a never-ending story. Yet the outcome was never predictable. The uncertainty was heightened by the fact that the dispute came to the Supreme Court without the benefit of any lower court's analysis of the issues raised. There were also matters of first impression; the possibilities for interpreting longstanding doctrines to determine the legality of new ways of using water and new water uses seemed wide open. In the chronicle that follows, the authors present their assessments of the conflict, the outcomes thus far, and the opportunities to continue developing the story. There are morals of the story too; there are recommendations for wiser regulation and clearer articulation of applicable legal doctrines. These Articles impart a sober warning that without the Supreme Court's timely guidance, the most important natural resource, water, could suffer grave and irreversible consequences.

Long before the dispute became important, the actors involved—Montana and Wyoming—signed an agreement with each other and with

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North Dakota that allocated the rights to use the waters of their interstate rivers.[1] They hoped that the 1950 Yellowstone River Compact would "remove all causes of present and future controversy."[2] Perhaps the relatively uneventful course of agricultural "business as usual" in the Yellowstone Basin can be attributed to a plentiful water supply that never before compelled a need for judicial enforcement of the Compact's terms.[3] But in 2007, the very instrument that sought to avoid conflict, the Compact, became the subject of conflict when Montana accused Wyoming of violating the Compact's terms. Montana's allegations were fourfold: Wyoming misappropriated water by increasing its irrigation efficiency and therefore increasing its water consumption; Wyoming's groundwater withdrawals in connection with coalbed methane mining were illegal; Wyoming impermissibly built new water storage facilities; and Wyoming's irrigation of new acreage was prohibited.[4] Unsatisfied with Wyoming's denial of any wrongdoing, Montana filed an action under the Supreme Court's original jurisdiction. The Court accepted the case.[5] To assist in the proceeding, the Court appointed a Special Master who reviewed the facts surrounding the dispute, analyzed applicable laws, and made recommendations to the Court. The rest is history in the making, as discussed in the Articles that follow.[6] Specifically, the authors focus on Montana's first two allegations regarding irrigation efficiency and coalbed methane water withdrawals. But first, it is worth reviewing some legal background behind the Supreme Court's unique handling of interstate water disputes in general.

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[1] *See* Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951).

[2] *Id.*; *see also* Michelle Bryan Mudd, Montana v. Wyoming: *An Opportunity to Right the Course for Coalbed Methane Development and Prior Appropriation*, 5 GOLDEN GATE U. ENVTL. L.J. 297 (2012).

[3] *See, e.g.*, YELLOWSTONE RIVER COMPACT COMMISSION, THIRTEENTH ANNUAL REPORT 1 (1964), *available at* yrcc.usgs.gov/support.docs/YRCCAnnualReport1964b.pdf ("No matters of allocation came to the Commission's attention during the year. The two state representatives were of the opinion that no determination of allocation of water between Wyoming and Montana was necessary."); YELLOWSTONE RIVER COMPACT COMMISSION, TWENTY-NINTH ANNUAL REPORT III (1980), *available at* yrcc.usgs.gov/support.docs/YRCCAnnualReport1980.pdf ("No incidents during the year required administration of the water in accordance with the provisions of the Compact.").

[4] Montana Bill of Complaint at 3, ¶¶ 8–11, Montana v. Wyoming, 131 S. Ct. 1765 (2011) (No. 137, Orig.); *see also* Lawrence J. MacDonnell, Montana v. Wyoming*: Sprinklers, Irrigation Water Use Efficiency, and the Doctrine of Recapture*, 5 GOLDEN GATE U. ENVTL. L.J. 265 (2011).

[5] Montana v. Wyoming, 552 U.S. 1175 (2008) (granting Montana leave to file its complaint).

[6] *See* MacDonnell, *supra* note 4; Mudd, *supra* note 2.

## II. LEGAL BACKGROUND

While the Supreme Court most often serves as the final appellate decision maker in reviewing a lower court's decision, under Article III of the Constitution the Supreme Court also has original jurisdiction "in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[7] In an action between states, the Court's original jurisdiction is exclusive.[8] Thus, a complaining state in an original action must bring its grievance directly to the Supreme Court, demonstrating satisfaction of a heightened standard for substantial injury.[9] Should the Court, with its discretionary powers to decline any case for review,[10] accept the case under its original jurisdiction, it must function as both a trial and an appellate court.[11] In so doing, the Supreme Court initially hears the case, reviewing the evidence for the first time, and renders final decisions that are not subject to review by any higher court.[12]

To remedy the unprepared and unprocessed state in which an original jurisdiction case arrives at the Supreme Court, a special master is often appointed.[13] The special master may be a retired judge or an individual who is an expert in the field from which the dispute arises.[14] The special master helps gather and present facts, formulates analyses of how relevant laws apply to the facts, and recommends decisions for the Court's consideration.[15] These tasks may be challenging, especially when legal conclusions depend on a mastery of the specific and complex facts at hand; such is the case with disputes involving water rights.[16] It is

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[7] U.S. CONST. art. III, § 2, cl. 2.

[8] 28 U.S.C.A. § 1251(a) (Westlaw 2012) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

[9] 17 CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4054 (3d ed. 2011) ("The initial pleading must be accompanied by a motion for leave to file, which may be accompanied by a brief. . . . If leave to file is granted, additional pleadings and subsequent proceedings are ordered by direction of the Court."); Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated and Restated*, 56 U. Colo. L. Rev. 381 391 1984-1985.

[10] *Id*. § 4042.

[11] Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 656 (2002) ("The delegation of trial tasks to a Special Master, followed by review by the Supreme Court, allows the Court to operate facilely in the manner in which it is most accustomed—that of an appellate court scrutinizing the facts and conclusions of an inferior actor or body.").

[12] WRIGHT ET AL., *supra* note 9.

[13] *Id*.

[14] Carstens, *supra* note 11, at 648.

[15] WRIGHT ET AL., *supra* note 9; Carstens, *supra* note 11, at 654.

[16] WRIGHT ET AL., *supra* note 9, § 4042; Robert Jerome Glennon & Thomas Maddock, III, *The Concept of Capture: The Hydrology and Law of Stream/Aquifer Interactions*, 43 ROCKY MTN.

the Court's ultimate responsibility to affirm, reject, or modify the special master's recommendations.[17]

The Supreme Court seldom exercises its discretion to resolve a dispute under its original jurisdiction,[18] but it has done so for a number of cases involving the apportionment of interstate waters.[19] Traditionally, interstate water disputes are resolved not only through litigation, but also through interstate compacts and, on rare occasions, federal legislation.[20] But when the latter two methods have not been applied or do not sufficiently address the dispute, or when the parties have competing interpretations of some terms or provisions, the Supreme Court accepts interstate water disputes with relative ease.[21] Still, the Court will exercise its original jurisdiction over such disputes only if they are sufficiently severe.

In petitioning the Supreme Court for adjudication of an interstate water dispute, normally a state must show by "clear and convincing" evidence that the dispute is of a "serious magnitude."[22] If a water

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MIN. L. INST. 22, § 22.01 (1997) ("Water law traditionally involves state issues that are quite fact specific and nuanced.").

[17] Carstens, *supra* note 11, at 655 ("Once the Special Master's report is transmitted to the Court, the Court exercises its authority in reviewing the report and revising or approving the Master's findings, conclusions, or recommendations in whole or in part."); *see* Colorado v. New Mexico, 467 U.S. 310, 317 (1984) (a "Master's findings . . . deserve respect and a tacit presumption of correctness").

[18] *See* WRIGHT ET AL., *supra* note 9, § 4042. In the 2009-2010 Term, the Court issued a decision in two original actions; in 2008-2009 it issued a decision in one original action; in 2006-2007 it did not dispose of a single original action. *See id.*

[19] *See, e.g.*, South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (exercising original jurisdiction over action to compel equitable apportionment of waters of an interstate stream); Oklahoma v. New Mexico, 501 U.S. 221 (1991) (adjudicating a dispute over an interstate water compact); Texas v. New Mexico, 462 U.S. 554, 567–68 (1983) (holding that the Court had original jurisdiction to enforce the Pecos River Compact); Arizona v. California, 373 U.S. 546, 564 (1963) (noting that the Court "does have a serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States"); New Jersey v. New York, 283 U.S. 336, 342 (1931) (Holmes, J.) ("A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."); Kansas v. Colorado, 185 U.S. 125, 145 (1902) (exercising original jurisdiction over suit to enjoin Colorado from diverting the Arkansas River).

[20] John B. Draper & Jeffrey J. Wechsler, *Gunboats on the Colorado: Interstate Water Controversies, Past and Present*, 55 ROCKY MTN. MIN. L. INST. 18-1, § 18.03 (2009).

[21] *See, e.g.*, Montana v. Wyoming, 131 S. Ct. 1765, 1773 n.5 (2011) ("Our original jurisdiction over cases between States brings us this dispute between Montana and Wyoming about the meaning of their congressionally approved Yellowstone River Compact.").

[22] New York v. New Jersey, 256 U.S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."); *see also* Colorado v. New Mexico, 459 U.S. 176, 188 (1982);

compact or federal legislation does not provide the controlling law to be applied, the Court applies a set of federal common law rules, or rather principles of equitable apportionment.[23] In so doing, the Court balances equities between the states.[24] This analysis includes a review of past judicial decisions and each state's water laws; other considerations are as varied as physical and climatic conditions, water consumption, stream flows, established use, harms and benefits, and water conservation.[25] If a water compact does exist and is deemed sufficient to address a particular interstate water dispute, the Court looks directly to the terms of the compact.[26] A compact is not only an interstate agreement for defining states' rights to divert and use the waters within their borders; it is a contract between states approved by Congress and embodied in a federal statute.[27] Negotiators of an interstate compact establish the compact's terms to serve the needs of the parties, and in so doing may incorporate preexisting doctrines of common law.[28] In these instances, looking directly to the terms of the compact is not enough. The Yellowstone River Compact is an example of such a compact, as it expressly adopted principles of prior appropriation law.[29] A basic understanding of prior appropriation law is necessary, therefore, to appreciate Montana's complaint against Wyoming, the Special Master's recommendations, and the Supreme Court decision.

In the 1800s, western states rejected the then- and now-predominant system in the United States for allocating water rights.[30] For the western states, the riparian water rights system, in which landowners have the right to reasonably use any bodies of water adjoining their lands, was too limiting on their ability to withdrawal water, especially for uses on non-

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Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931).

[23] *See* WRIGHT ET AL., *supra* note 9, § 4052; Kansas v. Colorado, 206 U.S. 46, 98 (1907) (referring to the applicable law in the first disposition of an interstate water apportionment case as "interstate common law").

[24] WRIGHT ET AL., *supra* note 9, § 4052.

[25] *Id*.; New Jersey v. New York, 283 U.S. 336, 343 (1931) ("The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas.").

[26] *See* Kansas v. Colorado, 514 U.S. 673, 690 (1995) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.") (quoting Texas v. New Mexico, 462 U.S. 554, 564 (1983)).

[27] *See* 4 WATERS AND WATER RIGHTS § 46.01 (Amy L. Kelley, ed., 3d ed. 2011). The first interstate water compact was approved by Congress in 1925. There are currently twenty-three interstate water compacts. *Id.*

[28] *See, e.g.*, Yellowstone River Compact, Pub. L. No. 82-231 art. V, 65 Stat. 663 (1951).

[29] *Id.* art. I.

[30] 2 WATERS AND WATER RIGHTS § 11.01 (Amy L. Kelley, ed., 3d ed. 2011).

adjoining lands.[31] The system of prior appropriation was thought more suited to the water scarce lands of the West, and that system developed under the common law of each separate state.[32] Variations in the prior-appropriation doctrine from state to state existed then and persist today, as prior-appropriation law has become largely statutory.[33] Still, some general principles apply across states.

The doctrine of prior appropriation is often expressed as "first in time, first in right."[34] This means that a person in time who appropriates some water for a beneficial use has the right to continued use for that purpose, with priority over later appropriators.[35] A water user with an earlier priority date can compel a user with a later priority date to refrain from use until the senior user has fulfilled her water needs for her established purpose.[36] Still, the senior user's rights are not unlimited. A beneficial use is commonly defined as agriculture, industrial, ecological, or household; however, waste is excluded.[37] All water users are also under the obligation not to harm other users' water supplies by changing their points of diversion, purposes, or places of water use.[38] Water appropriators can require each other to use water strictly within the confines of their rights."[39] Yet even when the confines are legally clear, the practical application of one's rights can lead to water disputes of

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[31] *Id*. Eighteen states now follow the prior appropriation system; some of those states include groundwater to varying degrees. *Id*.

[32] *Id*.

[33] *Id*.

[34] 2 WATERS AND WATER RIGHTS § 12.02 (Amy L. Kelley, ed., 3d ed. 2011).

[35] *See* CHARLES J. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM 4 (1971) ( "A property right in the use of water is created by diversion of the water from a stream (or lake) and its application to a beneficial use. Water can be used at any location, without regard to the position of place of use in relation to the stream. In the event of a shortage of supply, water will be supplied up to a limit of the right in order of temporal priority: the last man to divert and make use of the stream is the first to have his supply cut off."), *quoted in* 2 WATERS AND WATER RIGHTS § 12.01 (Amy L. Kelley, ed., 3d ed. 2011).

[36] *See* 2 WATERS AND WATER RIGHTS §§ 12.01, 12.02 (Amy L. Kelley, ed., 3d ed. 2011).

[37] *See, e.g.*, MONT. CODE ANN. § 85-2-102(4) (Westlaw 2011) (defining beneficial use); *see also* Frank Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L. J. 1, 16 (1957) ("In rather recent times these concepts have been merged into a new rule—that a particular use must not only be embraced within the general class of uses held to be beneficial, or must not only be of benefit to the appropriator but it must also be a reasonable and economic use of the water in view of other present and future demands upon the source of supply."); Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 921 n.1 ("Though the codes differed in coverage and detail, all of them incorporated certain basic concepts, including beneficial use as the basis of a water right . . . and prohibitions against waste.").

[38] *See* MacDonnell, *supra* note 4, at 274 (referring to the "no-injury rule").

[39] *Id*.

great significance.

And so the story goes. With original jurisdiction over the Montana and Wyoming's interstate water dispute, the Supreme Court and its Special Master looked to the Yellowstone River Compact. They applied principles of prior appropriation law and rendered their conclusions. An evaluation of those conclusions and recommendations for further conclusions is now in order.