

On January 10, the Special Master submitted his final report to the U.S. Supreme Court on *Montana v. Wyoming* (No. 137). The Yellowstone River Compact provides for the continued enjoyment of Montana's downstream appropriative rights existing as of 1950. Montana filed suit in 2008 over Wyoming diversions on the Tongue River, an interstate tributary to the Yellowstone River with multiple reservoirs that store extremely variable flows. The case was bifurcated into liability and remedy phases. The U.S. Supreme Court determined in 2016 that Wyoming violated the Compact, and was liable for the withdrawal of 1,300 acre-feet in 2004, and 56 acre-feet in 2006.

"This Report deals with the remedies that the Court should provide to Montana." In addition to monetary damages of \$20,340 and certain costs of bringing the lawsuit, the Special Master recommended declaratory relief to "provide the parties with critical guidelines for their future management of the Tongue River and hopefully help avoid future disputes. I recommend against injunctive relief. Wyoming has repeatedly stated that it will comply with the Court's orders and rulings and, although there is little history of cooperation between Montana and Wyoming in managing the Tongue River, the record fails to show a significant chance of repeat violations in the future."

The Special Master added that the nature of the Compact makes it difficult to avoid all future disputes. The two states made good faith efforts to settle the dispute, but as they pointed out to the Special Master, water in the West is "too controversial and too important to the people in both states for decision makers to compromise." He noted that, "The Compact does not guarantee Montana a fixed quantity or flow of water, nor does it set out clear procedures for protecting Montana's rights." The continued enjoyment of pre-1950 rights is "in accordance with the laws governing acquisition and use of water under the doctrine of prior appropriation." This doctrine is sometimes unclear, using vague concepts of reasonableness and beneficial use. "Although the general contours of the prior appropriation system are the same in all western states, the specific details of each state's system can differ, sometimes substantially, from those of other states. For example, the states have adopted very different systems for administering appropriative rights. Wyoming closely polices the water use of prior appropriators, while Montana relies more on judicial enforcement and oversight. Montana and Wyoming also follow very different rules with respect to water storage, leading to quite different views on how the Compact handles reservoirs. Neither Wyoming's nor Montana's procedures and rules are inherently better, nor are they outliers in the western United States." The Compact is also vague about quantities of water necessary for supplemental water supplies.

The report recommended that Montana be entitled under its pre-1950 appropriative rights to store up to 72,500 acre-feet in the Tongue River Reservoir, the original capacity of the reservoir, subject to various restrictions and conditions. The reservoir has only rarely held more than 32,000 acre-feet for several decades, due in part to sedimentation and Montana's water rights compact agreement with the Northern Cheyenne Tribe. Wyoming argued that the declaratory relief should be kept to the minimum necessary for the present lawsuit, and the issue of storage should be resolved if and when Montana seeks to fill the reservoir beyond 32,000 acre-feet over Wyoming's anticipated objections.

The Special Master noted that most of the disagreements between the two states concern appropriate procedures for "calling the river," and that a concise decree providing guidance on rights and responsibilities would benefit both parties. Consequently, the proposed decree submitted to the Supreme Court includes details on: (1) how the States handle a call on the river going forward; (2) the effects of conservation through improved irrigation techniques on pre-1950 water rights; (3) various rights of the States to store water in reservoirs and to operate and manage the reservoirs under their respective laws and rules; and (4) the exchange of information, including pre-1950 water rights, relevant to implementation of the Compact. The Special Master indicated that this declaratory relief should help the parties reduce future controversy, however "effective implementation of the Compact and avoidance of future disputes will depend on both Montana's and Wyoming's good-faith cooperation." (See WSW #1830 and #1929).