

# Feds oppose Wyo request to dismiss water suit

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CHEYENNE -- A top federal government lawyer recommends that the U.S. Supreme Court deny Wyoming's request to dismiss a lawsuit filed by Montana that claims it's not getting enough water from two rivers that flow north across the state line.

U.S. Solicitor General Paul D. Clement filed a "friend of the court" brief with the Supreme Court last week. He recommended the court deny Wyoming's request to dismiss Montana's lawsuit over water flows in the Tongue and Powder rivers.

A 1950 compact agreement among Wyoming, Montana and North Dakota spells out how water from the rivers is supposed to be divided. Montana claims that increased use of groundwater and construction of reservoirs in Wyoming since the agreement was signed has prevented Montana from receiving its fair share of water.

Wyoming Attorney General Bruce Salzburg last month asked the Supreme Court to dismiss Montana's lawsuit, calling it "fundamentally flawed."

Wyoming argues that the compact only applies to surface water, while Montana contends that the compact covers water pumped from underground aquifers for irrigation or during coal-bed methane drilling.

Montana Attorney General Mike McGrath filed papers of his own earlier this month urging the court not to dismiss his state's lawsuit. He maintains that the compact requires that Montana's water uses must be satisfied before Wyoming can use more water.

"Wyoming thinks they can take all the water they want to satisfy their needs," McGrath said earlier this month. "Our position is that you can't take that water if it shortchanges Montana water users of the water they used prior to 1950."

Clement stated in his court papers that there might be merit in three of Montana's four main arguments. He said that proceeding with the case would establish whether Montana is correct when it argues that Wyoming since 1950 has constructed new reservoir storage space on the rivers, placed more acreage under irrigation and increased groundwater pumping for irrigation and other uses, including coal-bed methane production.

But Clement suggested that the Supreme Court reject Montana's argument that Wyoming water users have increased their water usage by adopting more efficient irrigation methods that result in less water flowing off of fields and back into the rivers. Clement said that making more efficient use of water doesn't mean that Wyoming has been increasing its use.

Salzburg said Monday that he's still reviewing Clement's brief. He said his office will file

a response to it.

"Our position is going to be in the reply that our filing was correct," Salzburg said. "Whether all or a part of the claim survives remains to be seen."

If some of Montana's lawsuit survives Wyoming's motion to dismiss it, Salzburg said he expects the case will be assigned to a special master who will preside over it and make recommendations to the court.