

# Montana wins round in water lawsuit

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BILLINGS, Mont. -- Montana's lawsuit contending that Wyoming is violating terms of the Yellowstone River Compact by taking more than its share of the waters in the Tongue and Powder rivers advanced another step Wednesday.

A special master appointed by the U.S. Supreme Court issued an opinion saying that Wyoming's bid to have the lawsuit dismissed should be denied. Special Master Barton Thompson Jr. of Stanford, Calif., also ruled that the compact protects Montanans with water rights acquired before 1950 from Wyoming uses that began after the compact was ratified.

The case is being closely watched by Montana irrigators whose canals ran dry in the drought years of the past decade and by Wyoming's coal-bed methane industry, which fears that Montana's demands could mean the loss of groundwater critical to gas production.

"This opinion is very good news for all Montanans, but especially for those farmers and ranchers whose livelihoods rely on water from the Tongue and Powder rivers," Montana Attorney General Steve Bullock said. "This case is of historic importance to Montana, but it doesn't end with this decision."

Wyoming Attorney General Bruce Salzburg said, "It's a lengthy opinion and we're in the process of analyzing what it means for Wyoming water users. Obviously Wyoming won on some issues and didn't win on others."

Thompson invited attorneys for both states to submit briefs with additional arguments before he incorporates his ruling into an interim order. Salzburg said that once the order is issued, either side can take their exceptions to it to the Supreme Court.

Bullock said a conference with Thompson has been set for June 11 to discuss objections to the ruling and set a course for resolution of the case. It could be resolved by negotiations between the states or could proceed toward trial, Bullock said.

Both the Tongue and Powder rivers have their source in the Bighorn Mountains of Wyoming and flow into the Yellowstone River in Montana. The Yellowstone River Compact was negotiated among Montana, Wyoming and North Dakota in 1950. Its basic objective was to preserve existing water rights and define the division of unallocated water.

The compact specified a three-tier system. Those on the first tier are irrigators in both states with water rights dating before 1950. They have first call on water from the two rivers. The second tier includes post-1950 water rights granted to first-tier users. The third tier consists of new uses. Third-tier users supposedly get their water after first- and second-tier demands have been met.

But in dry years, not enough water crosses the state line to meet obligations of first-tier users in Montana, the state claims. Montana alleges that while its first-tier users go without, Wyoming has allowed users in the second and third tiers to receive water.

Montana charges in its complaint that Wyoming has built new storage reservoirs that impermissibly hold water that should drain into the rivers; that new acreage has been put in production in Wyoming since 1950; that groundwater pumping for irrigation and coal-bed methane production have reduced flows in the rivers; and that new, more efficient irrigation methods have reduced the amount of water that flows back into the rivers.

Wyoming disputes the claims and argues that Montana has never quantified water rights on the two streams and that groundwater and tributaries of the two rivers are not covered by the compact. The groundwater issue is critical because of Wyoming's coal-bed methane industry. Wyoming also maintains that irrigators are entitled to use their entire water allotment with new, more efficient systems that don't produce as much return water to streams as systems in used in 1950.

In his ruling, Thompson said that terms of the compact "generally protect pre-1950 appropriators in Montana from new surface and groundwater diversions by Wyoming, whether for direct use or for storage, that prevent adequate water from reaching those appropriators."

But Montana can't object to more efficient use of irrigation waters by Wyoming's first-tier users. Thompson also ruled that where possible, Montana must remedy any shortages to its first-tier users by reducing deliveries to its second- and third-tier users.

"Where this is not possible, however, the compact requires Wyoming to ensure that new diversions in Wyoming do not interfere with the pre-1950 appropriations," he said.

The case is still a long way from being resolved and Thompson's findings are not binding on the Supreme Court. But Bullock said Thompson has set out the law that will guide subsequent steps toward resolution.