

Water Wars in the United States Supreme Court: Why Should Agriculture Care?



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““A dispute between States over the rights to water” is a serious matter- so serious, in fact, that it might be “grounds for war if the States were truly sovereign.””

Citing

South Carolina v. North Carolina, 558 U.S. 256, 289 (2010)

Overview

- Three Interstate Water Wars Presently Before SCOTUS:
Mississippi v. Tennessee
Florida v. Georgia
Texas v. New Mexico
- One recently concluded:
- Wyoming v. New Mexico
- We will:
Introduce equitable apportionment
Discuss each case
Explain why agriculture is at the center of these disputes

Equitable Apportionment

- SCOTUS has original jurisdiction in suits between states
- Principal means of resolving interstate water disputes where negotiation fails
- *Kansas v. Colorado* (1907) was the first: “equality of right”
- *New Jersey v. New York* (1921): “the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence”; greater than “injury-in-fact”
- United States government may be an indispensable party

Equitable Apportionment Factors

- Physical and climatic conditions
- Consumptive use of water
- Character and rate of return flows
- Extent of established uses
- Availability of storage water
- Practical effect of wasteful uses on downstream areas
- Damage to upstream areas as compared to the benefits to downstream areas if limitation is imposed on the former



Mississippi v. Tennessee- Background

- Memphis Light, Gas & Water (“MLGW”) provides water utility services to residents of Memphis
- Between 1965 and 1985, groundwater pumping increased from 72 MGD to 131 MGD
- Pumping from well within 3 miles of Mississippi border increased from 4 MGD to over 21 MGD and two additional wells developed within 3 miles of the border, collectively pumping about 11.5 MGD

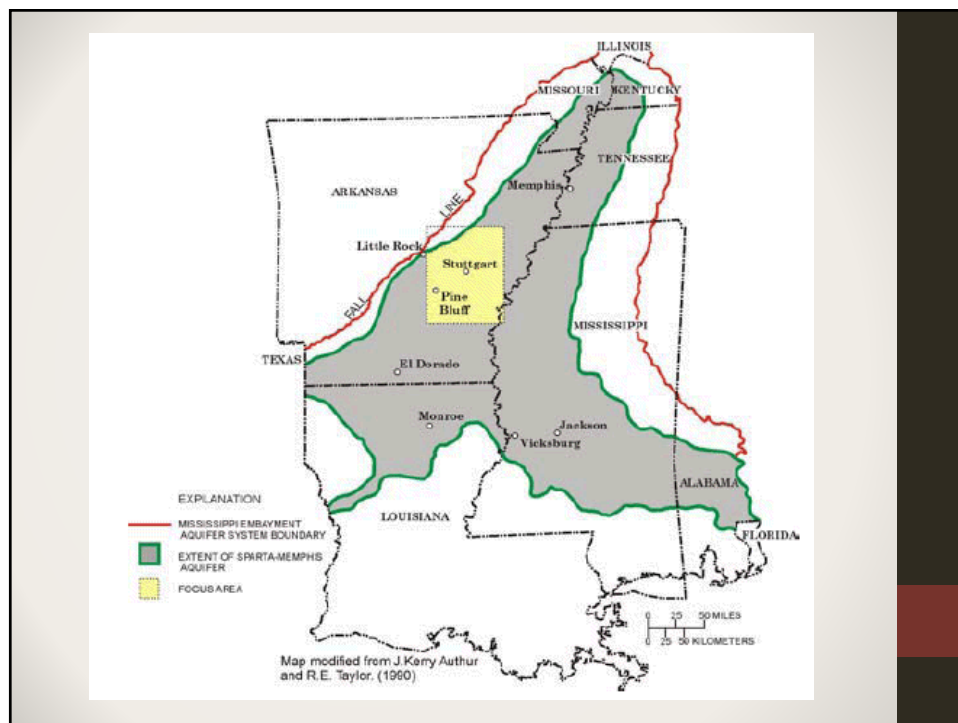
History

- Mississippi filed suit against Memphis and Memphis Light, Gas & Water (“MLGW”) in 2005 in United States District Court pleading conversion, trespass, unjust enrichment, constructive trust and nuisance based on MLGW’s pumping of groundwater
- In 2008, case dismissed by USDC for failure to join Tennessee- equitable apportionment
- Fifth Circuit Court of Appeals affirmed in 2009
- SCOTUS denied cert and motion to leave to file amended complaint in 2010

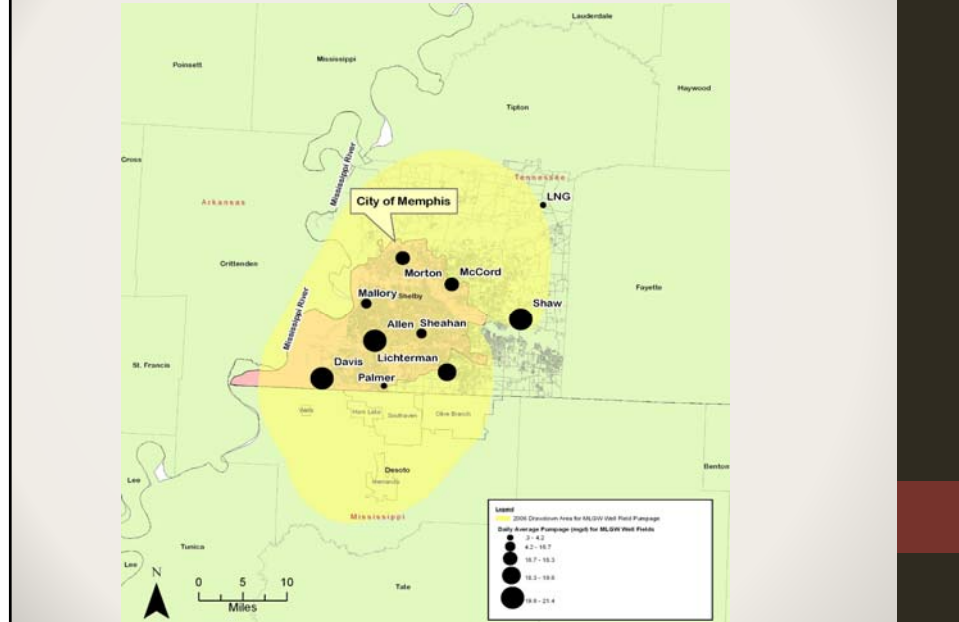
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Sparta Sand Aquifer

- Begins at a surface outcrop within north Mississippi and descends with an east-to-west/southwest slope while thickening as it moves towards the Mississippi River
- Rainwater falling within Mississippi collects on the outcrops and is drawn into the aquifer and stored within Mississippi
- Mississippi admits that the Aquifer extends into Western Tennessee and that the Memphis Sand Aquifer was supplied in large part by the Sparta Sand



Cameron (2009)



The Present Litigation

- June 6, 2014- Mississippi filed a motion for leave to file a bill of complaint with SCOTUS
- Tennessee, Memphis, MLGW and the United States oppose motion, but motion is granted
- Mississippi alleges that defendants have “forcibly siphoned into Tennessee hundreds of billions of gallons of high quality groundwater owned by Mississippi and held by Mississippi for its people”
- Mississippi claims “sovereign right, title and exclusive interest in the groundwater”
- Seeks declaratory and injunctive relief, along with damages of not less than \$615 million

Mississippi's Theory of the Case

Groundwater at issue

- Is a “finite, confined intrastate natural resource” that would remain in Mississippi under natural conditions
- “was naturally collected and stored in a distinct deep sandstone geological formation...sandwiched between upper and lower clay formations [that] are impermeable, or of very low permeability”

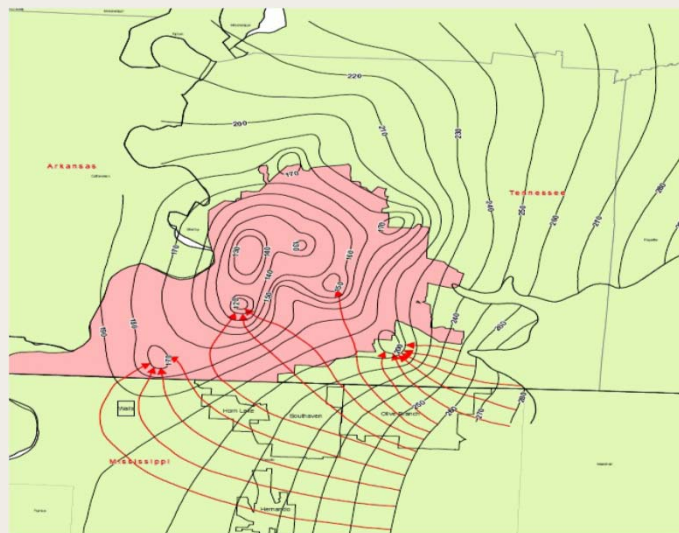
Mississippi's Theory of the Case

- Aquifer “saturated with ...groundwater stored as a fairly constant volume residing under significant hydrostatic pressure within Mississippi's borders”
- The mechanical pumping operations wrongfully draw the water from Mississippi into Tennessee
- Cone of depression in Mississippi- imposes greater costs on groundwater users in Mississippi

Mississippi's Theory of the Case

- Distinction between the Aquifer's geological formation on the one hand (extends into Tennessee) and the source, location and hydrologic characteristics of the groundwater stored in the formation under natural conditions
- MLGW taking between 20 MGD and 27 MGD of Mississippi's groundwater storage out of the Sparta Sand, resulting in a substantial drop in pressure and corresponding drawdown of stored water in the Sparta Sand

Memphis Sand Aquifer Flow Net showing Groundwater Movement (red arrows) from Mississippi to MLGW Well Fields Note: Natural Flow is Generally East to West (from Campana)



[Cameron 2009]

Mississippi's Theory of the Case

As between Mississippi and Tennessee, (a) since its admission into the United States, Mississippi has owned and continues to own all right, title and interest in groundwater stored naturally in the Sparta Sand formation underneath Mississippi's borders which does not cross into Tennessee under natural predevelopment conditions; and, (b) since its admission into the United States, Tennessee has owned and continues to own all right, title and interest in groundwater stored naturally in the Sparta Sand formation underneath Tennessee's borders which does not cross into Mississippi under natural predevelopment conditions

Causes of Action

- Trespass: enter the owner's land or property without property
- Conversion: a civil wrong (tort) in which one converts another's property to his/her own use
- Tortious Interference includes trespass, conversion and nuisance
- Nuisance: causing a substantial and unreasonable interference with someone's property or the use or enjoyment of that property

Key Issue

- Is the resource INTERstate or INTRAsate?
- If INTERstate, equitable apportionment is the only remedy
- If INTRAsate, Mississippi's claims can go forward
- Mississippi goes to great lengths to portray the aquifer as INTRAsate

Does Equitable Apportionment Apply to Groundwater?

- No court ruling on the issue
- Surface water similar to groundwater
- Equitable apportionment should apply to groundwater

Equal Footing Doctrine

- Mississippi claims that the equal footing doctrine applies instead- upon entry into the Union, each state becomes vested with all the legal characteristics and capabilities of the first state
- Equal footing applies to beds of streams and other waters, not the water itself

Why is Mississippi Proceeding in this Way?

- Would Mississippi prevail under Equitable Apportionment?
- If Mississippi did prevail in an Equitable Apportionment action, what would the remedy be?

Equitable Apportionment

- Physical and climatic conditions
- Consumptive use of water
- Character and rate of return flows
- Extent of established uses
- Availability of storage water
- Practical effect of wasteful uses on downstream areas
- Damage to upstream areas as compared to the benefits to downstream areas if limitation is imposed on the upstream users

Special Master's Conclusions

- Order filed August 12, 2016
- Complaint “fail[s] to plausibly allege that the Sparta Sand Aquifer or the water in it is not an interstate resource”
- Equitable apportionment is necessary in absence of a compact
- Evidentiary hearing to be held on the limited issue of whether the Aquifer is interstate

Conclusions

- Tennessee likely to prevail
- Mississippi may be acting rationally given the likely result of Equitable Apportionment
- What incentives does this give to states?
- Compare to claims between private parties
- Will this prompt changes in water law?



Florida v. Georgia

- Dispute over Georgia's of water in the Apalachicola-Chattahoochee-Flint River Basin that encompasses portions of Alabama, Florida and Georgia
- Three decades of fighting
- Five Federal Dams controlled by Corps of Engineers
- Florida seeks equitable apportionment

Florida v. Georgia

- Unique in that Florida is not asking for water for cities or industry
- Florida claims that Georgia's water use damages the ecosystem and seafood industry
- Apalachicola Bay was recognized by the United Nations for its uniqueness and used to produce 10% of the nation's oyster
- Florida wants water to help parts of the state stay as they are



Florida v. Georgia

- Equitable apportionment is only available to a state that has suffered “real and substantial injury” as a result of proposed or actual upstream water use
- Additionally, injury must be redressable by the Court
- Will caps on Georgia’s consumption benefit Florida?

Florida v. Georgia

- Special Master’s report (February 14, 2017) finds that substantial injury exists- water use for agriculture- but recommends that Florida’s request be denied because Corps of Engineers is essential party
- “There is little question that Florida has suffered harm from decreased flows in the River. Florida experienced an unprecedented collapse of its oyster fisheries in 2012. In late 2012, oyster mortality reached devastating levels, leaving many previously-productive oyster reefs virtually empty.”

Florida v. Georgia

It also appears that Georgia’s upstream agricultural water use has been – and continues to be – largely unrestrained. Agricultural irrigation has increased dramatically in Georgia since 1970. By Florida’s count, Georgia’s irrigated acreage has increased from under 75,000 acres in 1970 to more than 825,000 acres in 2014. Georgia’s own estimates show a dramatic growth in consumptive water use for agricultural purposes. In the face of this sharp increase in water use, Georgia has taken few measures to limit consumptive water use for agricultural irrigation. Agricultural permits contain no limitations on the amount of irrigation water that can be used by farmers.

Florida v. Georgia

Georgia's position – practically, politically, and legally – can be summarized as follows: Georgia's agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin.

Florida v. Georgia

- However, according to the Special Master, without involvement of the Corps of Engineers, Court cannot affect Corps' actions, thereby cannot give relief to Florida
- SCOTUS heard oral arguments on January 8, 2018
- Justices appear to want to allow Florida's case to move forward
- Justice Kagan "you [Georgia] have common sense on your side"
- Will the Special Master be overturned?

Prior Appropriation

- Basically, a first come, first served approach to water.
- Common across most of the western United States.
- Senior rights have priority over junior rights.
- In times of shortage, senior right holders can “call” the river by notifying state officials they are not receiving the water to which they are entitled to, and the State can then reduce or cut off junior users as necessary.
- Doctrine is limited by idea of beneficial use.

Texas v. New Mexico: Quick Look

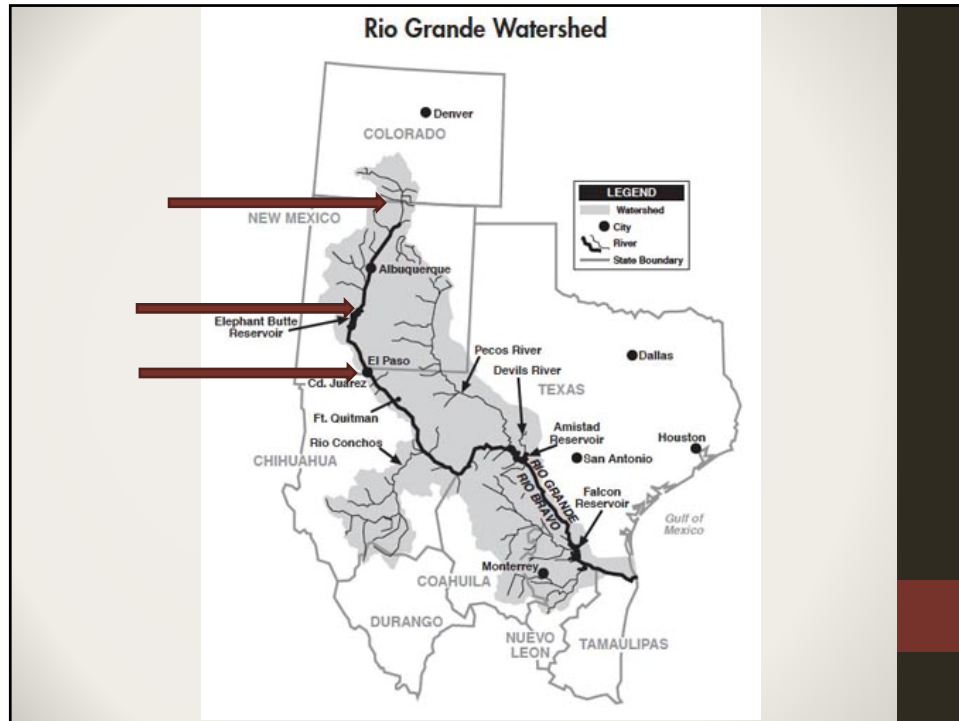
- NM water law governed by prior appropriation; TX law is prior appropriation for surface water and rule of capture for groundwater.
- Rio Grande in CO, NM, and TX governed by the Rio Grand Compact (1938).
- Dispute here is over delivery obligations of New Mexico and diversions between delivery point and state line.
- US has been allowed to intervene as a party.
- Motion to Dismiss has been denied.

TX v. NM: Background Info

- Bureau of Reclamation begins building Rio Grande Project infrastructure in 1904.
- US and Mexico sign Treaty in 1906 requiring US to deliver 60,000 AF/year to Mexico.
- To do this, US builds Elephant Butte Reservoir, 105 miles north of TX state line as part of Rio Grande Project.
- Federal government agreed to supply downstream irrigation & water districts (EBID in NM and EPCWID1 in TX) with water out of Elephant Butte.

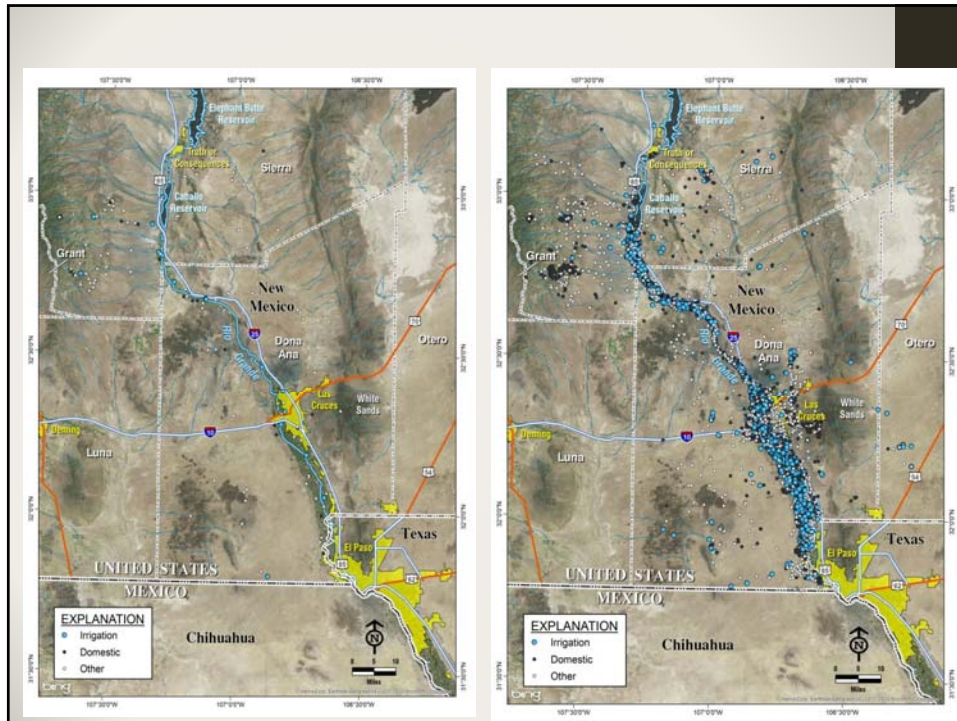
TX v. NM: The Compact

- Rio Grande Compact signed in 1938 between CO, NM, & TX.
- Purpose: to effect an “equitable apportionment” of the waters of the Rio Grande above Fort Quitman, TX.
- Sets water delivery requirements (based on percentage of water at various gauging stations) for CO at state line, for NM at Elephant Butte.
- Water delivered by NM to Elephant Butte used to fulfill the Project requirements for the downstream contract-holders.



TX v. NM: Texas' Arguments

- "Spirit and purpose" of the Compact!
- Texas is entitled to the water delivered to Elephant Butte and it's not getting to Texas.
- 2,500 new wells have been drilled between Elephant Butte and the state line since 1938.
- NM must relinquish ownership and control of water it delivers—it has no right to re-capture it back (or authorize users to do so) downstream of Elephant Butte.



TX v. NM: NM's Arguments

- Read the Compact language!
- Met the Compact requirements when delivered to Elephant Butte.
- The Compact does not address groundwater wells—that's NM state law.



Motion to Dismiss Denied

- NM does relinquish control of water upon delivery & cannot recapture downstream.
- Compact basically incorporates Project downstream contracts.
- Equitable apportionment prohibits NM recapturing water.
- NM water law does not govern the water delivered under the compact.

SCOTUS Decision

- US wanted to intervene as a party, not just be an *amicus* as is more common.
- Seek to make essentially the same arguments as TX, but also to protect federal interests in having water for required deliveries to Mexico.
- Unanimous Court allows the US to intervene
 - No automatic right in every Compact lawsuit, only where “distinctively federal interests” are at stake.
 - US serves as sort-of agent for Compact deliveries downstream.
 - US has interest in being sure they can comply with Treaty obligations.

New Special Master

- In April, SCOTUS abruptly removed current Special Master, Gregory Grimsal (attorney, New Orleans) and appointed Hon. Michael J. Melloy (8th Circuit) as replacement.

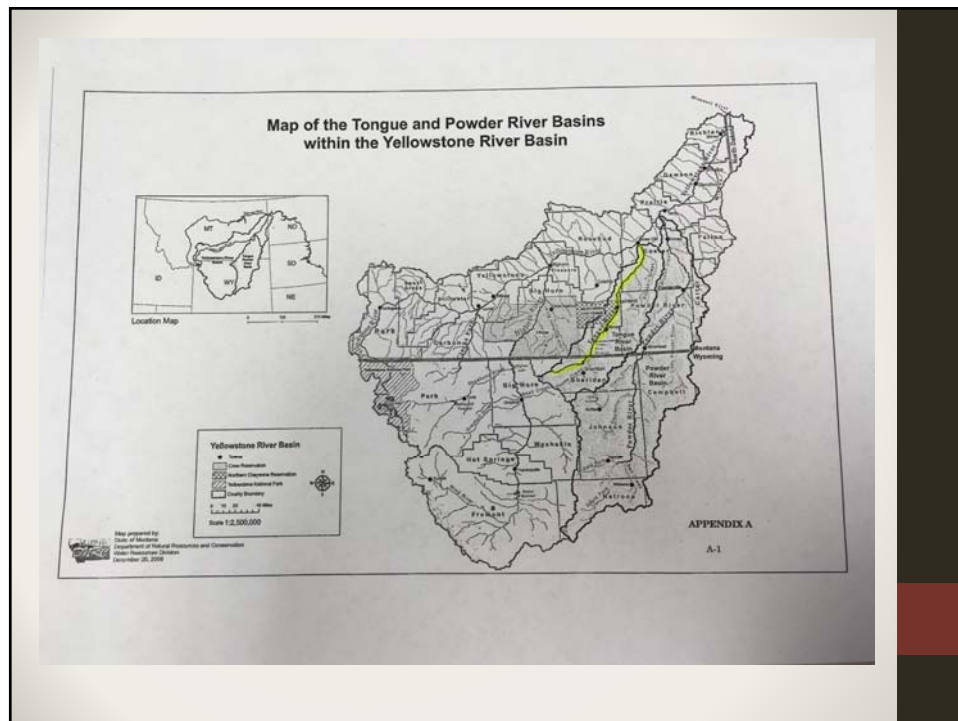


Montana v. Wyoming: Quick Look

- Both states' water law governed by prior appropriation.
- Yellowstone Basin governed by the 1951 Yellowstone River Compact (WY, MT, ND).
- Dispute here over Tongue River tributary, and, specifically, storage in Tongue River Reservoir.
- SCOTUS held that WY violated Compact in 2004 & 2006 by diverging 1,356 AF that should have gone to MT.
- Special Master recommends award of \$20K and \$67K in legal costs; and declaratory relief to address ongoing disputes over compact. Supreme Court entered Opinion adopting this.

MT v. WY: The Tongue River

- Tongue River is tributary to Yellowstone River.
- Begins in WY and flows north into MT, into the Tongue River Reservoir, and then on to the Yellowstone River.
- In both MT & WY, water primarily used for agricultural irrigation (grass, alfalfa, some corn in MT).
 - 57,000 acres of irrigated land in WY.
 - 25,000 acres of irrigated land in MT.
- Significant variation in flows (both seasonally and year-to-year) makes storage an important issue.



MT v. WY: The Reservoir

- Tongue River Reservoir, located 15 miles from WY border is largest in watershed.
- Described as “critical source of water for MT farmers and ranchers” during fall season where there are lower flows in the River.
- Built by MT in 1940 at 72,500 AF, holds a 1937 water right.

MT v. WY: The Yellowstone River Compact

- Signed in 1951 by WY, MT, ND to govern all waters of the Yellowstone River system.
- Key provision is Article V(A): “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 appropriation.”
- Basically, three tiers:
 - Pre-1950 appropriated rights.
 - Of remaining water, each state gets water to provide “supplemental water supplies” to pre-1950 users.
 - Any unused/unappropriated water in each tributary is divided between states based on agreed percentages.

MT v. WY: Summary of the Compact

- “Unfortunately, the Compact is not exemplary legal writing.”
- “The nature of the Compact makes it difficult to avoid all future disputes. 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.”



MT v. WY: The Lawsuit

- MT sues in 2008 claiming WY violated Article V(A) by diverting and storing water for uses that did not enjoy pre-1950 rights, while pre-1950 rights in MT went unmet.
- Three types of diversions at issue:
 - Direct diversions by post-1950 rightsholders;
 - Storage of water in reservoirs under post-1950 rights; and
 - Pumping groundwater in connection with CBM gas production.
- Court appoints Barton H. Thompson, Jr., Stanford University School of Law Natural Resource Professor as Special Master.
- Bifurcates case into liability phase and remedies phase.

MT v. WY: Liability Phase

- In order to prove WY violation, MT must prove:
 - MT provided adequate notice to WY that MT received insufficient water to enjoy pre-1950 appropriate rights;
 - MT did not receive sufficient water to enjoy pre-1950 rights;
 - WY allowed post-1950 storage or use of water while MT was suffering a pre-1950 shortage; and
 - WY's post-1950 use reduced amount of water available to MT at the state line of the Tongue River.

MT v. WY: Liability Phase (cont).

- MT only provided effective notice to WY three times: 1981, 2004, and 2006.
- Amount of water wrongfully diverted each year was found to be:
 - 1981: None
 - 2004: 1,300 AF
 - 2006: 56 AF

MT v. WY: Remedies Phase

- Three major issues addressed:
 - Monetary damages owed to MT;
 - Costs owed to MT; and
 - Declaratory/Injunctive relief.

- Monetary damages awarded: \$20,340. Special master capped this here (\$15/acre) because that was price at which MT users could have purchased replacement water.

- Costs awarded: \$67,270.87 legal fees covering only first phase of lawsuit.

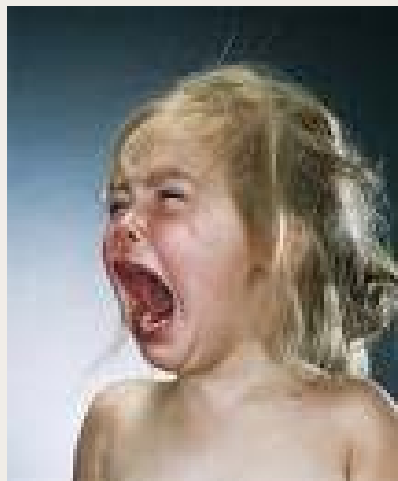
MT v. WY: Remedies Phase (cont.)

- Declaratory Relief
 - MT has pre-1950 appropriate right to store up to 72,500 AF (original capacity) in the Tongue River Reservoir.
 - MT must place a call if the compact is violated, WY not liable if no call is in effect.
 - MT can issue a call when it “reasonably believes, based on substantial evidence, that the Reservoir might not fill.”
 - Compact does not address form or details of call, but it should be “sufficient to place WY on clear notice.”
 - With regard to groundwater, WY shall respond to calls by ensuring post-1950 withdrawals are not interfering with pre-1950 rights in MT.
 - The Compact assigns same seniority level to pre-1950 users in MT and WY. Exercise of pre-1950 rights in WY do not violate the Compact rights of pre-1950 rights in MT.

Overarching Issues

- Agriculture is fighting the water battle on all fronts.
- Differences in state water law versus other sources of law such as compacts and Equitable Apportionment causes a good deal of controversy.
- Compacts designed to avoid disputes are doing the opposite.
- Static Compacts and dynamic environments.
- Groundwater is involved in each of these cases, despite focus in most being on surface water.
- Final summary of today's discussion...

MINE!



Thank you!



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