

Getting to the River: A Look at Stream Access in Colorado, Montana, and Wyoming

12:35 - 1:35 PM

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Lawrence J. MacDonnell is an attorney and consultant in Boulder who recently retired as a professor of law at the University of Wyoming College of Law, where he taught water law, public land law and natural resources law. He is currently a Senior Fellow at the Getches-Wilkinson Center at the University of Colorado. He was the first director of the Natural Resources Law Center at the University of Colorado School of Law, a position he held between 1983 and 1994. Between 1995 and 2009 he worked as an attorney and consultant in Boulder, Colorado. His work focused primarily on water resources and on ways to make natural resource development more environmentally compatible. His publications include numerous books, law review articles, other journal articles and research reports. He has given over 250 invited presentations. He is married with three daughters.

Getting to the River: a Look at Stream Access and Use in Colorado, Montana, and Wyoming

Larry MacDonnell, Senior Fellow
Getches-Wilkinson Center

Wyoming Bar Association ENR
Section Summit, Casper 7/28/2016

Overview

- ▶ What rights do people have to use rivers and lakes?
- ▶ Under original American common law, rights of use depended on ownership/control of land riparian to surface water
- ▶ What are the rights of the public who don't own riparian land?

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Who owns our rivers and natural lakes?

- ▶ The United States?
- ▶ The state?
- ▶ The owner of adjacent land?
- ▶ No one?

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Some Familiar(?) Legal Principles

- ▶ Fee simple ownership
- ▶ Navigability for title
- ▶ Navigability for use
- ▶ Public trust

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Fee property ownership

- ▶ Ownership of the bed and banks of a river carries with it ownership of the land below and the space above
- ▶ Control of space above the bed include control of uses of overlying water while within the boundaries of the private land

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The problem of divided ownership

- ▶ Owner of adjacent (riparian) land may be public or private; lands on opposite sides of stream likely to owned by different parties
- ▶ Title “owner” of the water flowing in stream is the state or the people of the state in the West
- ▶ Ownership of streambeds depends on whether stream is considered navigable

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Navigability (federal)

- ▶ Daniel Ball (1870): “Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

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Navigability (federal)

- ▶ Assures a public right of passage on navigable rivers even through private lands
- ▶ Means that the underlying bed is owned by the state, not the riparian landowner
- ▶ Provides basis for federal regulation under the Interstate Commerce Clause

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Navigability (state)

- ▶ Many states have found a common law basis for enabling public passage on streams that might not meet the federal navigability standard
- ▶ Generally, these focus on whether the stream has been **used** or can be used for public passage, not necessarily for commerce
- ▶ Use can include canoes, rafts, etc.

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Public Trust Doctrine

- ▶ A common law doctrine providing authority for states to act as necessary to protect the public's ability to enjoy passage by water and to fish
- ▶ Limitation on state disposition of bed that limit public uses
- ▶ Originally tied to protection of navigation, some states have extended its reach to other uses of rivers and lakes, including recreational and ecological values

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Wyoming Law

- ▶ **Day v. Armstrong:** owner of land along the N. Platte River fenced the river, preventing recreational passage
- ▶ **Wyo. S. Ct.:**
 - N. Platte is nonnavigable under federal test so landowner owned the bed and banks.
 - Public “owned” the flowing water
 - Small craft can float river in this segment

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Day v. Armstrong

1. States control their waters and can establish rules for their use, including whether they are navigable
2. Private ownership of beds does not prevent state control of use of flowing water
3. State ownership of water held in trust for people
4. State impliedly holds easement through private lands enabling passage of water

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Day v. Armstrong

- ▶ Water available for uses by public; if they can float craft, they may be used for this purpose
- ▶ “When so floating craft, as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft. Even a right to disembark and pull, push or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public’s easement. “

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Day v. Armstrong

- ▶ “where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful.”
- ▶ “It is also the right of the public while so lawfully floating in the State’s waters to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful.”

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Montana Law

- ▶ Earlier case law allowed public use of beds of navigable-for-title streams between high and low water marks
- ▶ Montana Coalition for Stream Access v. Curran (1984): involved the Dearborn River, determined to be a navigable for title river

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Curran

“the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public”

“capability of use of the waters for recreational purposes determines their availability for recreational use by the public”

“Streambed ownership by a private party is irrelevant.”

“In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.”

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Montana Coalition for Stream Access v. Hildreth (1984)

- ▶ Clarified that the holding in *Curran* applied to all streams, whether navigable under federal standard or not
- ▶ public use based on public ownership of waters and ability to be used for recreation
- ▶ Ownership of underlying bed irrelevant
- ▶ Riparian landowners cannot prevent use
- ▶ Users cannot use private land to access stream

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Hildreth

- ▶ “The public has the right to use the waters and the bed and banks up to the ordinary high water mark. *Curran*, supra. Further, as we held in *Curran*, in case of barriers, the public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the adjacent owner’s property and his rights.”

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Colorado: People v. Emmert

- ▶ Rafters convicted of 3rd degree criminal trespass for floating through ranch without permission of landowner
- ▶ Parties stipulated that the river segment was nonnavigable for title, so bed private
- ▶ Court rejected public right to use public water
- ▶ Applied the *ad coelum* doctrine to rule that landowner controlled the space above his land, including that with water

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Emmert

- ▶ “the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations.”
- ▶ “It follows that whoever “breaks the close” intrudes upon the space above the surface of the land without the permission of the owner, whether it be for fishing or for other recreational purposes, such as floating, as in this case, commits a trespass.”

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Current status

- ▶ 1983 AG opinion: criminal trespass statute only prohibits touching private bed and banks; does not preclude floating without touching
- ▶ No successful legislation
- ▶ Litigation applying civil trespass law settled

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Summary

- ▶ Need to get to a stream using public access
- ▶ Right to float in all three states
- ▶ Ok to touch bottom incidentally in Wyoming and Montana
- ▶ Ok to fish while floating in Wyoming and Montana

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The Life and Times of the Yellowstone River Compact: Montana v. Wyoming & Beyond

1:45 - 2:45 PM

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Jason Anthony Robison is an Assistant Professor at the University of Wyoming (UW) College of Law. He teaches courses in water law and policy, international environmental and natural resources law and federal courts. Professor Robison joined the UW faculty in fall 2014 after completing his S.J.D. at Harvard Law School. His scholarship focuses mainly on intersovereign relations over water resources, particularly relations among federal, state and tribal sovereigns within the American West. Most of Professor Robison's recent writing, including his S.J.D. dissertation, addresses the elaborate legal framework governing the Colorado River system (the "Law of the River"). Professor Robison chaired the organizing committee for the Big Horn General Stream Adjudication Symposium held in September 2014 on the Wind River Indian Reservation. He also served as lead organizer for an Indigenous Water Justice Symposium convened this year at the University of Colorado Law School. Before joining the UW faculty, Professor Robison held various law and policy positions with the Oregon Department of Justice, Oregon Supreme Court, Harvard Emmett Environmental Law and Policy Clinic, Harvard Water Security Initiative, Harvard Kennedy School of Government, and Colorado River Governance Initiative at CU Law School.

The Life and Times of the Yellowstone River Compact: *Montana v. Wyoming* and Beyond



Thomas Moran, Grand Canyon of the Yellowstone



U.S. Supreme Court

Jason Anthony Robison
Associate Professor, UW College of Law
Wyoming State Bar ENR Section Summit
Casper, WY
July 28, 2016

Roadmap



Wyoming's Water Compacts



Yellowstone River Compact



Montana v. Wyoming & Beyond

Roadmap



Wyoming's Water Compacts



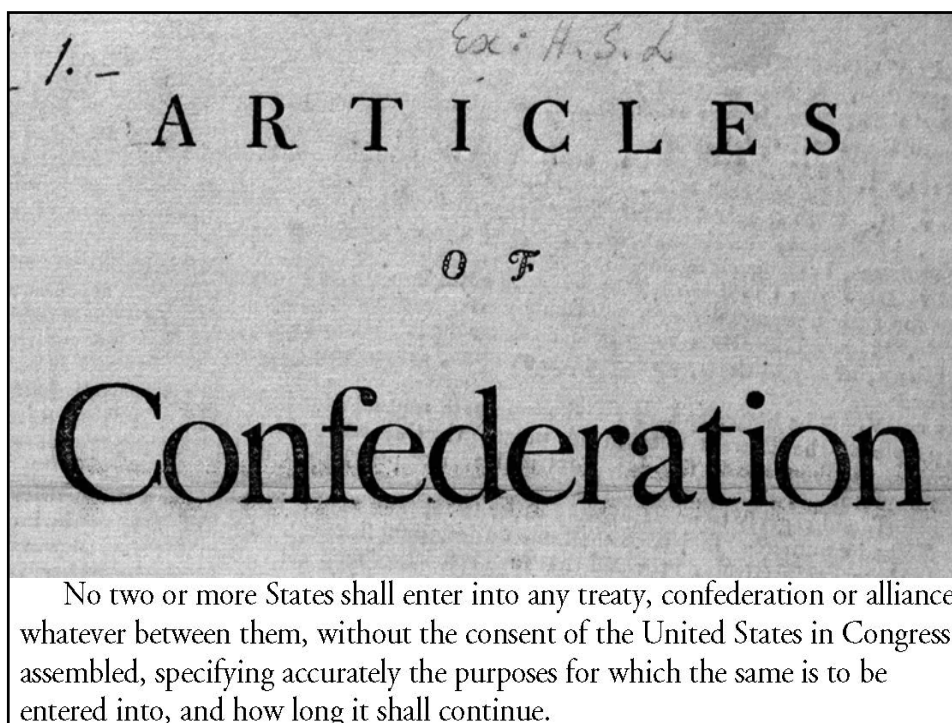
Yellowstone River Compact



Montana v. Wyoming & Beyond

Art. I, § 10, para. 3

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

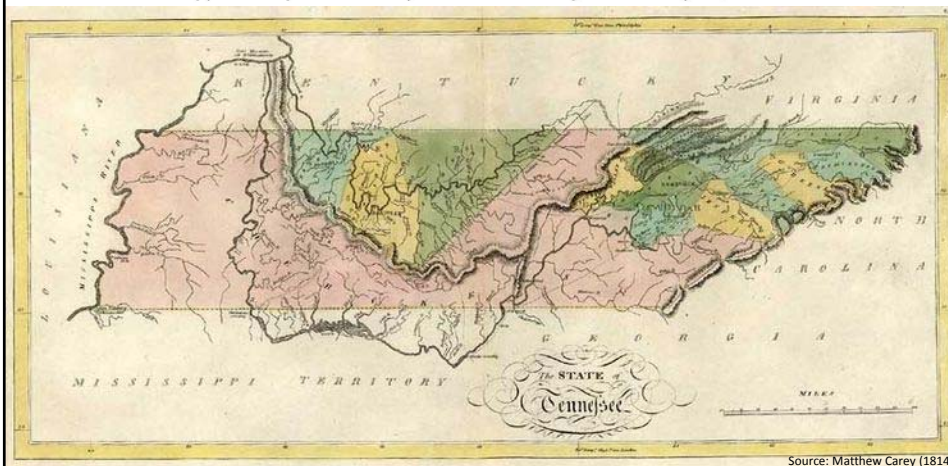


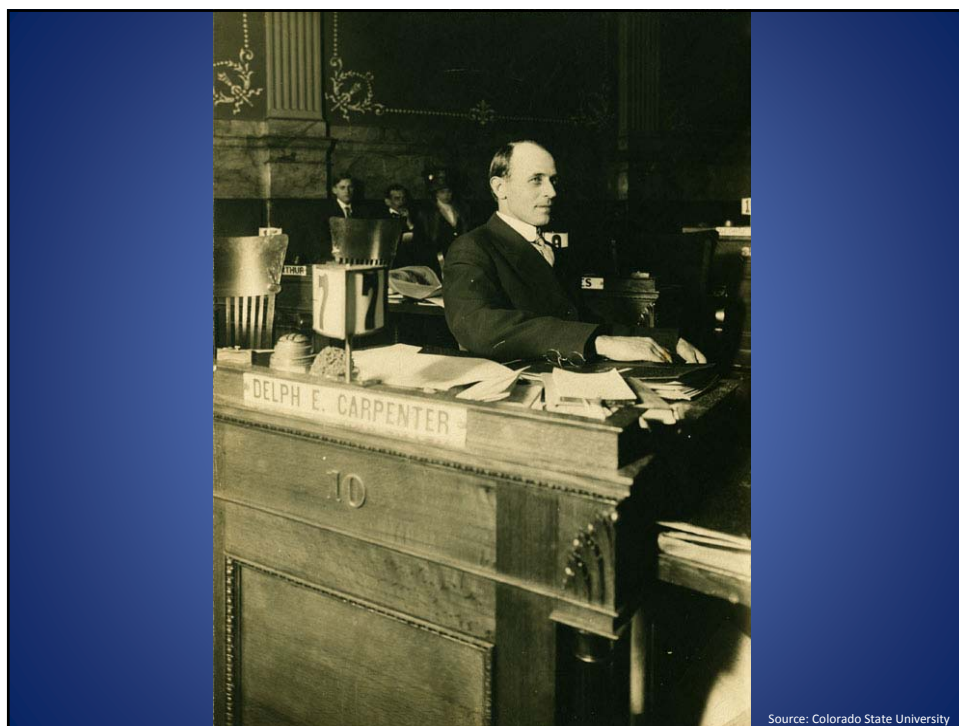
Ratification of TN Compact (1820)

CHAPTER DXLVI.

An Act to Ratify and Confirm the Adjustment of the Boundary Line between this State and the State of Tennessee, According to the Articles of Stipulation Entered into by the Commissioners Appointed by Both States.

Approved by the Kentucky General Assembly on February 11, 1820

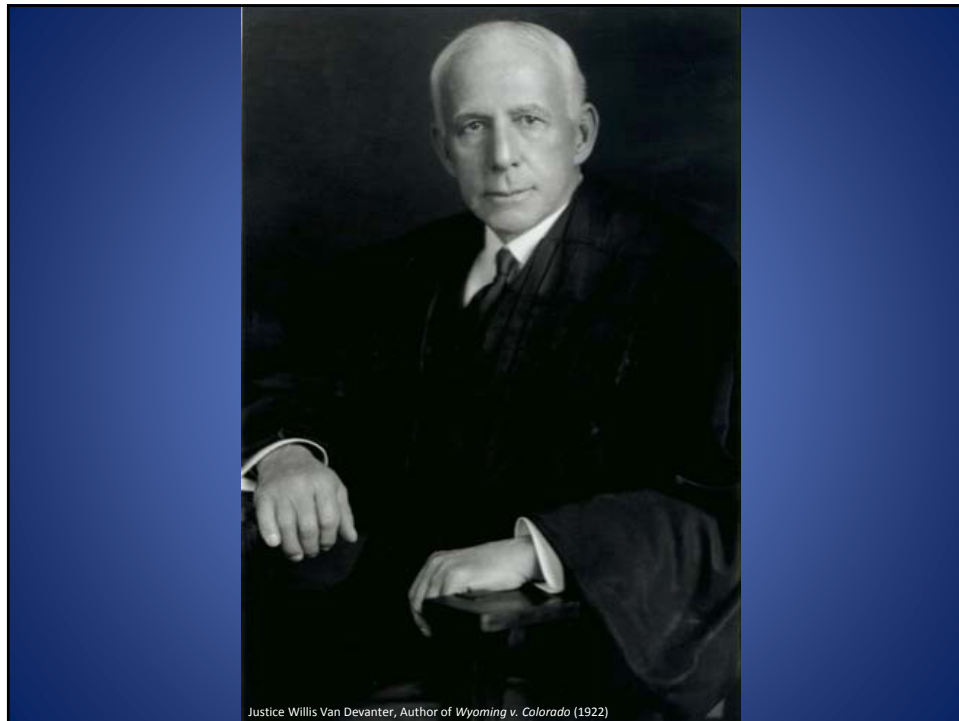




STATE OF WYOMING v. STATE OF COLORADO
ET AL.

IN EQUITY.



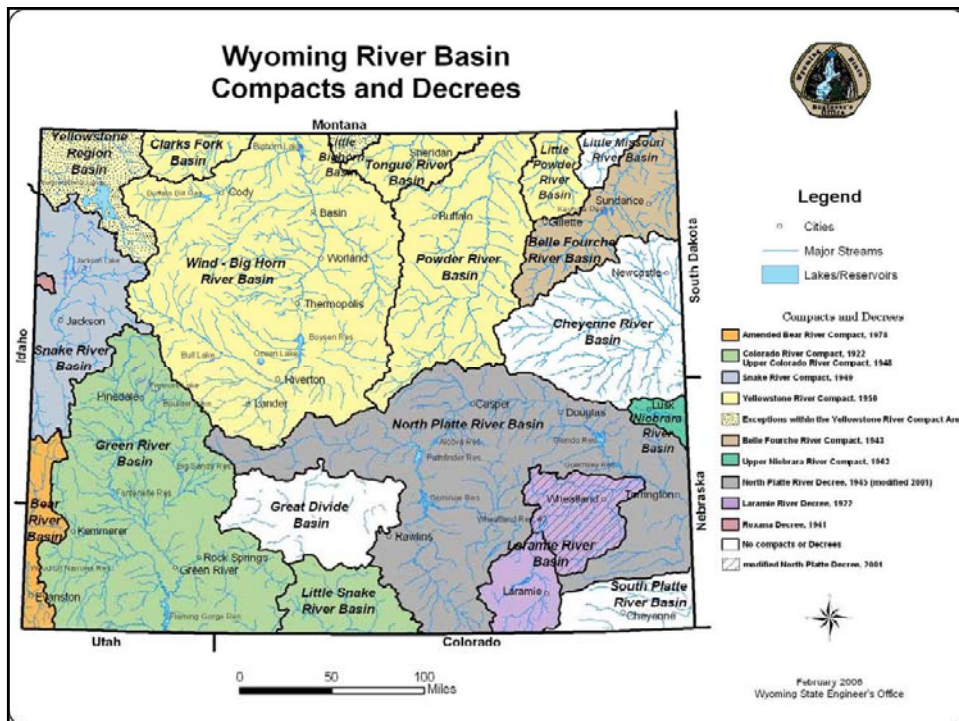
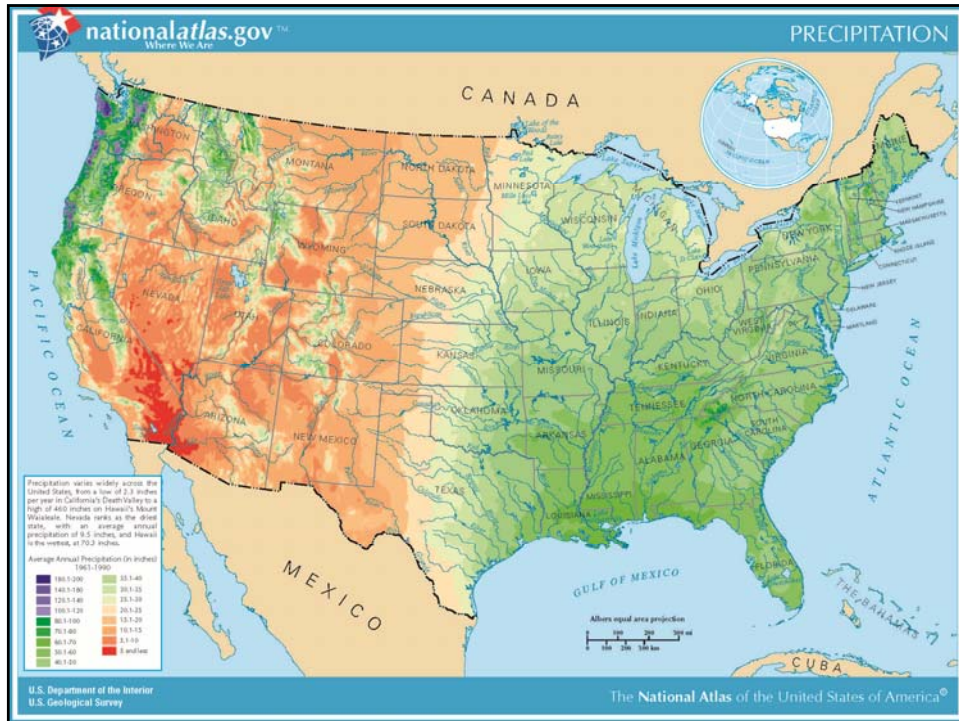




“[W]e simply must use every endeavor to bring about the conclusion of a compact at the next meeting . . . otherwise, we are badly exposed and may never again have a like opportunity.” Delph Carpenter.

Colorado River Commission





Decree	Citation
Laramie River Decree (1922 original; 1957 new)	353 U.S. 953 (1957)
North Platte Decree (1945 original; 2001 modified)	534 U.S. 40 (2001)
Roxana Canal Decree (1941)	D. Wyo. Equity Decree No. 2447

Compact	Wyo. Stat. Ann.
Colorado River Compact (1922)	§ 41-12-301 <i>et seq.</i>
Belle Fourche River Compact (1943)	§ 41-12-201 <i>et seq.</i>
Upper Colorado River Basin Compact (1948)	§ 41-12-401 <i>et seq.</i>
Snake River Compact (1949)	§ 41-12-501 <i>et seq.</i>
Yellowstone River Compact (1950)	§ 41-12-601 <i>et seq.</i>
Upper Niobrara River Compact (1962)	§ 41-12-701 <i>et seq.</i>
Amended Bear River Compact (1978)	§ 41-12-101 <i>et seq.</i>

Roadmap



Wyoming's Water Compacts



Yellowstone River Compact



Montana v. Wyoming & Beyond

YELLOWSTONE RIVER COMPACT, 1950

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck
A. W. Bradshaw
H. W. Bunston
John Herzoe
John M. Jarussi
Ashton Jones
Chris. Josephson
A. Wallace Kingsbury

P. F. Leonard
Walter M. McLaughlin
Dave M. Manning
Josenh Muesli
Chester E. Onstad
Ed F. Parriott
R. R. Renne
Keith W. Trout

For the State of North Dakota:

I. A. Acker
J. J. Walsh

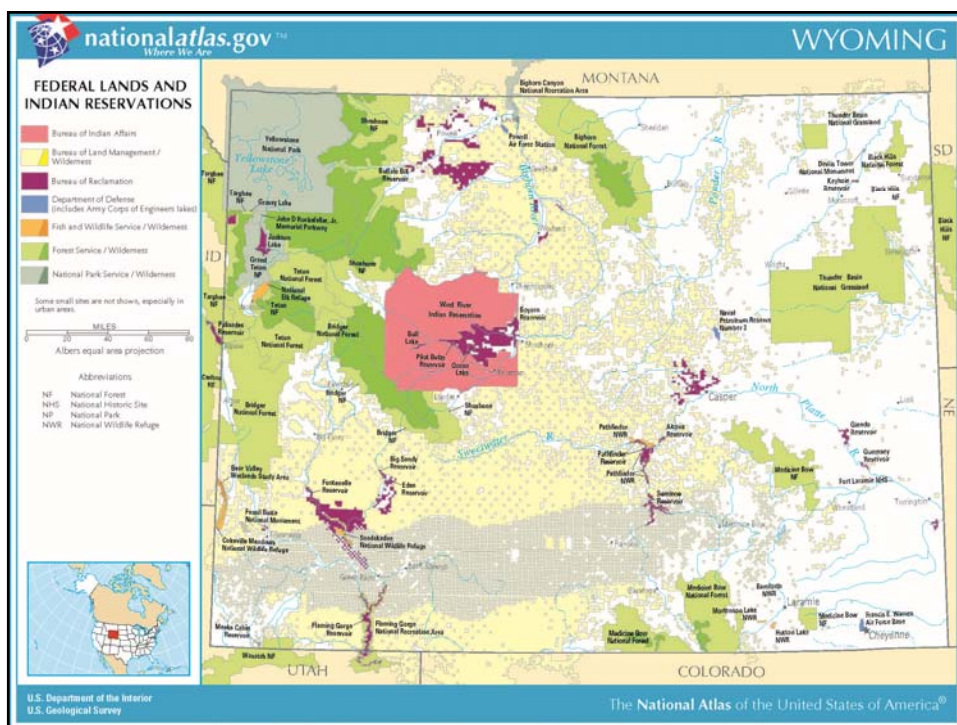
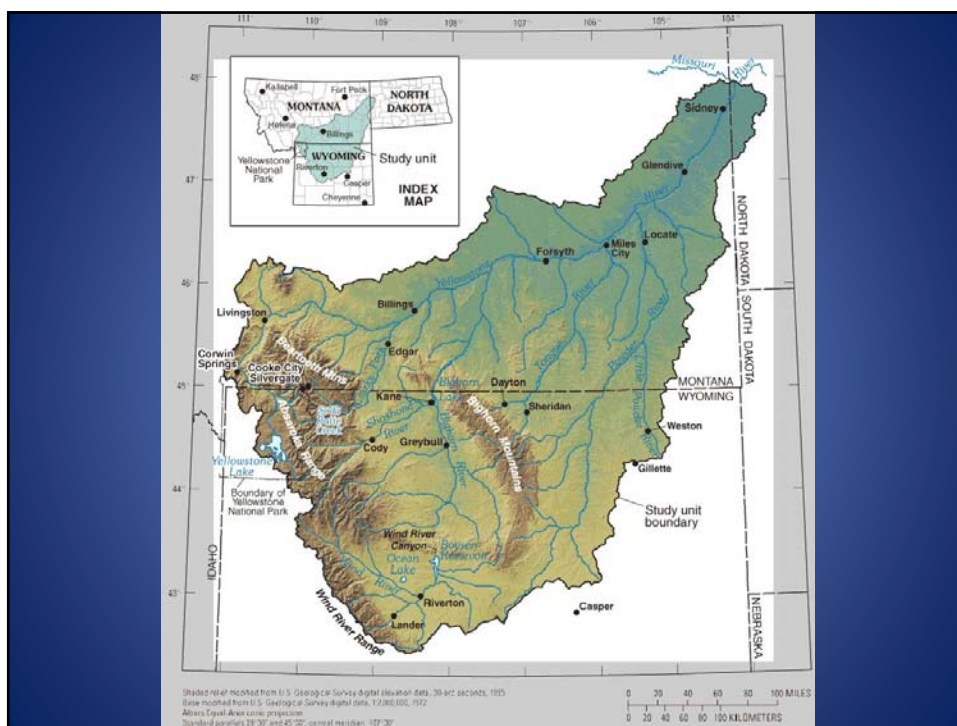
Einar H. Dahl

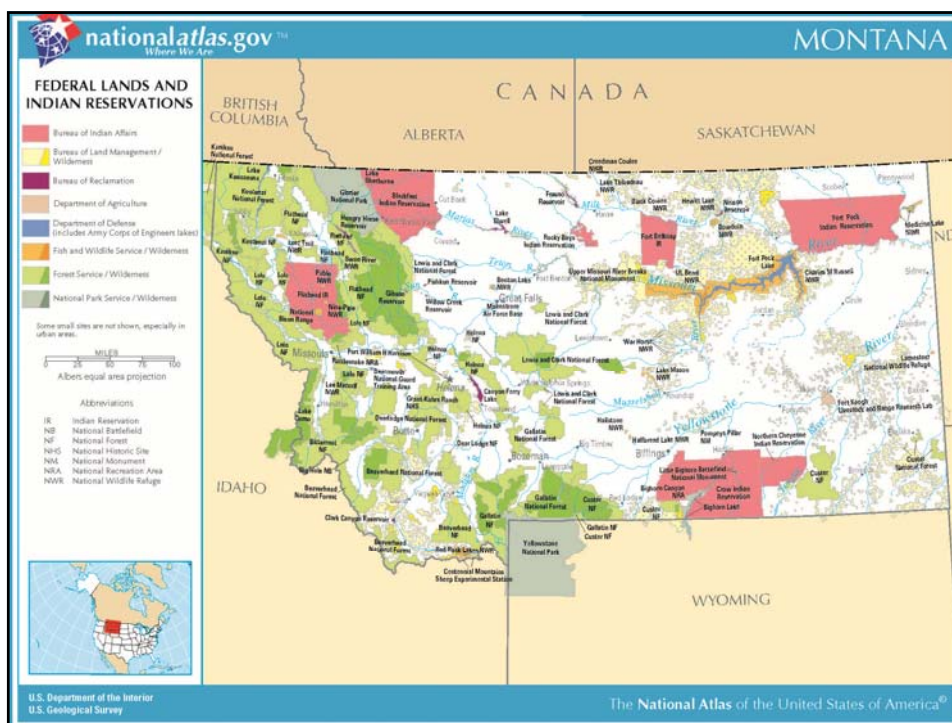
For the State of Wyoming:

L. C. Bishop
Earl T. Bower
J. Harold Cash
Ben F. Cochrane
Ernest J. Goppert
Richard L. Greene
E. C. Gwillim
E. J. Johnson
Lee E. Keith

N. V. Kurtz
Harry L. Littlefield
R. E. McNally
Will G. Metz
Mark N. Partridge
Alonzo R. Shreve
Charles M. Smith
Leonard F. Thornton
M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

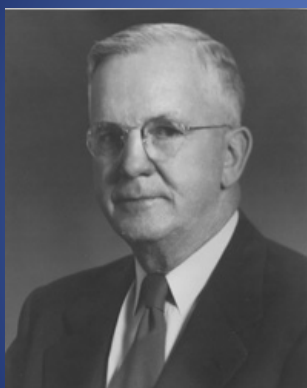




12342

CONGRESSIONAL RECORD—HOUSE

AUGUST 26



Montana Representative Wesley A. D'Ewart (1945-1955)

I received a letter, dated May 12, 1949, from a resident of Montana, from which letter I would like to quote pertinent paragraphs, as follows:

This particular compact appears to me to be about the same thing as one would experience in trying to negotiate a compact with Joe Stalin. As far as I am concerned, the two States have been involved in a cold war for some time. Wyoming's position is far

Compact Formation



Yellowstone Falls

Phase One: Jan. 1932-Jan. 1936

Phase Two: Feb. 1936-June 1943

Phase Three: March 1943-June 1947

Phase Four: Feb. 1949-Oct. 1951

72ND CONGRESS
1ST SESSION

H. R. 7914

IN THE HOUSE OF REPRESENTATIVES

JANUARY 18, 1932

Mr. LEAVITT introduced the following bill; which was referred to the Committee on Irrigation and Reclamation and ordered to be printed

A BILL

Granting the consent of Congress to the States of Montana and Wyoming to negotiate and enter into a compact or agreement for division of the waters of the Big Horn River.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That consent of Congress is hereby given to the States of
4 Montana and Wyoming to negotiate and enter into a com-
5 pact or agreement not later than January 1, 1936, providing
6 for an equitable division and apportionment between the
7 States of the water supply of the Big Horn River and of the
8 streams tributary thereto, upon condition that two suitable
9 persons, who shall be appointed by the President of the

Public Law 231

CHAPTER 629

AN ACT

Granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

October 30, 1951
[S. 1311]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress is hereby given to an interstate compact relating to the waters of the Yellowstone River which was signed (after negotiations in which a representative of the United States duly appointed by the President participated) by the Commissioners for the States of Montana, North Dakota, and Wyoming on December 8, 1950, at Billings, Montana, and which was thereafter ratified by the legislatures of each of the States aforesaid as provided by Public Law 83, Eighty-first Congress, approved June 2, 1949, which compact reads as follows:

Yellowstone River
compact.
Consent of Con-
gress.

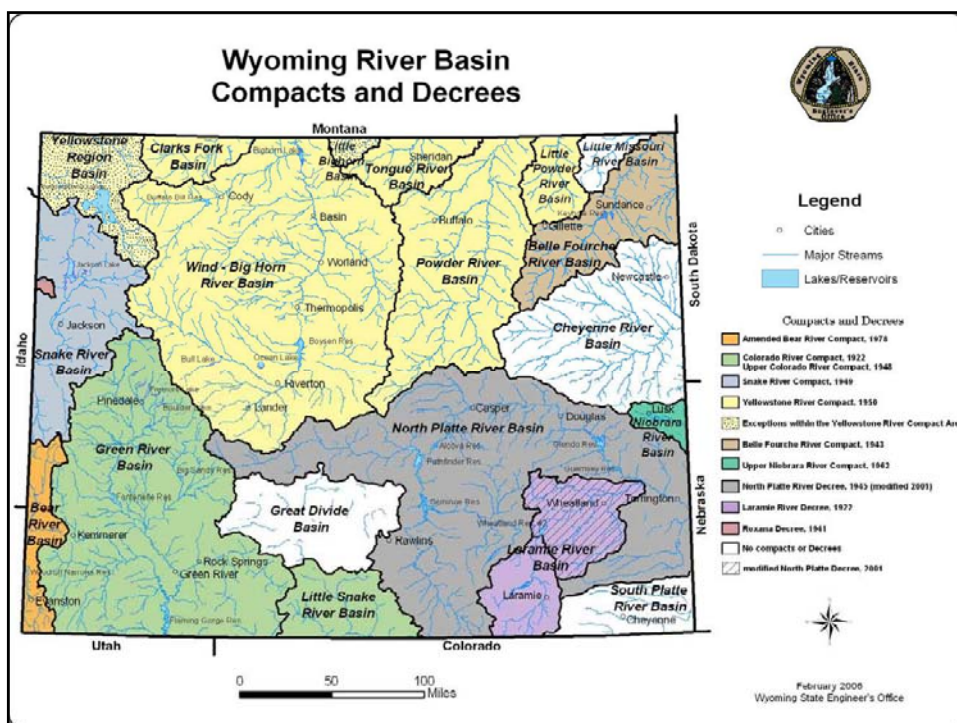
63 Stat. 152.

YELLOWSTONE RIVER COMPACT, 1950

ARTICLE II

D. The term "Yellowstone River System" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except the Little Bighorn River); the Tongue River; and the Powder River, whose confluences with the Yellowstone River are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the State of Montana.



YELLOWSTONE RIVER COMPACT, 1950

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.

YELLOWSTONE RIVER COMPACT, 1950

ARTICLE V

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

3. Tongue River

- a. To Wyoming.....40%
- To Montana.....60%

YELLOWSTONE RIVER COMPACT COMMISSION

WYOMING

MONTANA

NORTH DAKOTA



YELLOWSTONE RIVER COMPACT, 1950

ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

YELLOWSTONE RIVER COMPACT, 1950

ARTICLE III

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this Compact, then the member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the States of Wyoming and Montana and said member selected by the Director of the United States Geological Survey, each being entitled to one vote.

YELLOWSTONE RIVER COMPACT, 1950

ARTICLE III

C. In addition to other powers and duties herein conferred-upon the Commission and the members thereof, the jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to such States upon matters connected with the administration of this Compact, and the Commission may employ such services and make such

E. The Commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this Compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the State Engineer of each of the signatory States for public inspection.

Roadmap



Wyoming's Water Compacts



Yellowstone River Compact



Montana v. Wyoming & Beyond

Art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - [between a State and Citizens of another State;]* between Citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof;- and foreign States, Citizens or Subjects.]*

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the

476 U.S. 1163, 90 L.Ed.2d 729

**INTAKE WATER COMPANY, petitioner,
v. YELLOWSTONE RIVER COMPACT
COMMISSION, et al. No. 85-1349.**

Case below, 590 F.Supp. 293; 769 F.2d 568.

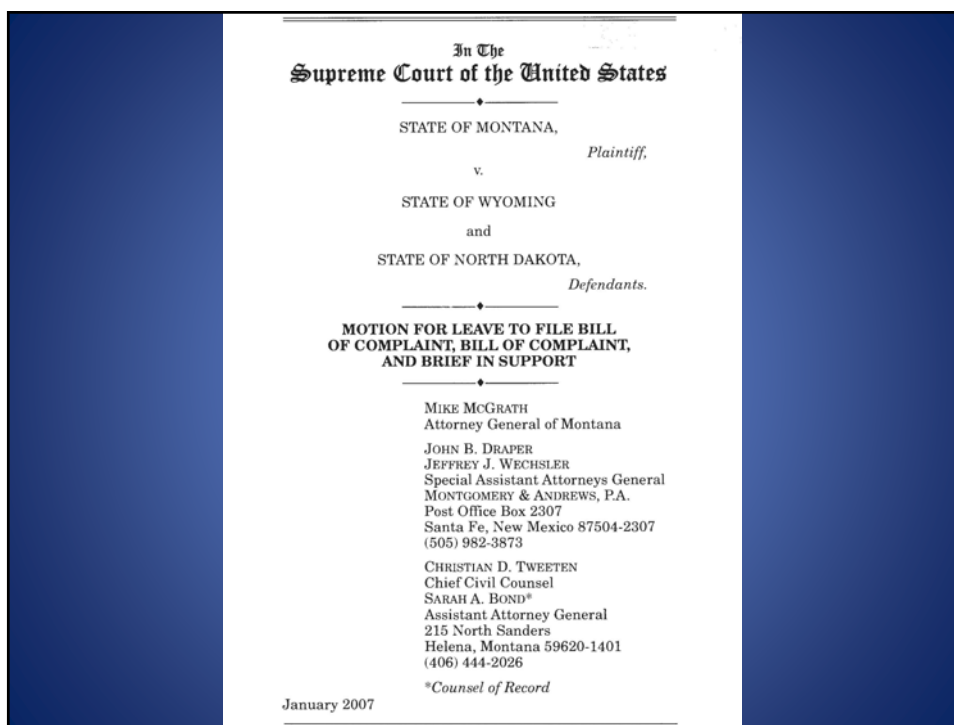
June 2, 1986. The motion of Yellowstone Pipeline Co. Inc., et al. for leave to file a brief as *amici curiae* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

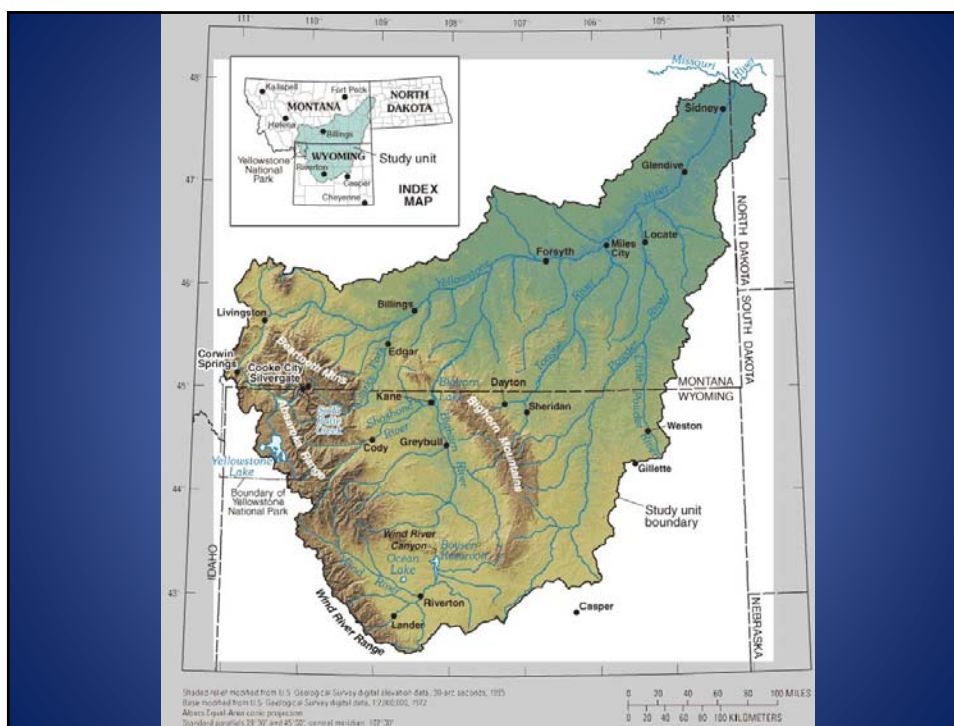
ARTICLE X

No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. In the event water from another river basin shall be imported into the Yellowstone River Basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefore in determining its share of the water apportioned in accordance with Article V herein.

Chronology

- Jan. 31, 2007: Montana's Bill of Complaint.
- Feb. 10, 2010: Special Master's First Interim Report.
- May 2, 2011: *Montana v. Wyoming*, 563 U.S. 368 (2011).
- Dec. 29, 2014: Special Master's Second Interim Report.
- March 21, 2016: *Montana v. Wyoming*, 136 S. Ct. 1034 (2016).





8. Wyoming refuses to curtail consumption of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950, whenever the amount of water necessary to satisfy Montana's uses of such waters existing as of that date is not passing the Wyoming-Montana stateline, in violation of Montana's rights under Article V of the Compact.



Special Master Barton ("Buzz") Thompson

IN THE
Supreme Court of the United States

STATE OF MONTANA,
Plaintiff,
v.
STATE OF WYOMING
and
STATE OF NORTH DAKOTA,
Defendants.

**On Motion to Dismiss the Bill of Complaint,
Motion for Partial Summary Judgment, and
Motion to Intervene**

**FIRST INTERIM REPORT OF THE
SPECIAL MASTER**

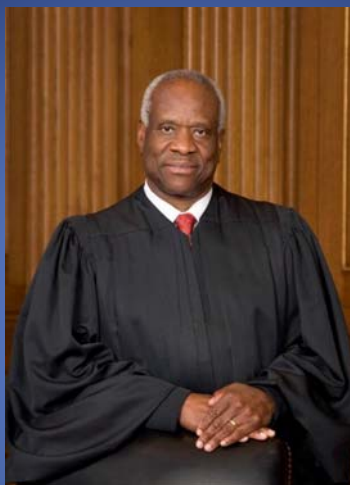
BARTON H. THOMPSON, JR.
Special Master
Stanford, California

February 10, 2010

Overview

- Article V(A) Protection for MT's Pre-1950 Water Rights.
- Article V(A) and Intrastate Remedy Obligation of MT.
- Article V(A) Inclusion of Tributary Groundwater.

8. Article V(A) of the Compact does not prohibit Wyoming from allowing its pre-1950 appropriators to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands that they were irrigating as of January 1, 1950, even when the increased consumption interferes with pre-1950 uses in Montana. Uses of



Justice Clarence Thomas

MONTANA v. WYOMING ET AL.

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 137, Orig. Argued January 10, 2011—Decided May 2, 2011

We conclude that the plain terms of the Compact protect ordinary “[a]ppropriative rights to the beneficial uses of [water] . . . existing in each signatory State as of January 1, 1950.” Art. V(A), *ibid.* And the best evidence we have shows that the doctrine of appropriation in Wyoming and Montana allows appropriators to improve the efficiency of their irrigation systems, even to the detriment of downstream appropriators. Montana’s allegation that Wyoming



Federal District Court, Billings, MT



Special Master Barton ("Buzz") Thompson

<p style="text-align: center;">IN THE Supreme Court of the United States</p> <hr/> <p style="text-align: center;">October Term 2014</p> <hr/> <p style="text-align: center;">STATE OF MONTANA, <i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p style="text-align: center;">STATE OF WYOMING and STATE OF NORTH DAKOTA, <i>Defendants.</i></p> <hr/> <p style="text-align: center;">SECOND INTERIM REPORT OF THE SPECIAL MASTER (LIABILITY ISSUES)</p> <hr/> <p style="text-align: right;">BARTON H. THOMPSON, JR. Special Master Stanford, California</p> <p style="text-align: left;">December 29, 2014</p>	<p style="text-align: center;"><u>Overview</u></p> <ul style="list-style-type: none"> • MT Notice Requirement • MT Pre-1950 Shortages • WY Post-1950 Diversions / Storage and Impacts • MT Intrastate Remedy • MT Individualized Harm
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3. The Court should find that Wyoming is liable to Montana in the amount of 1,300 af for 2004. This represents the impact of Wyoming's post-1950 uses and storage during the 2004 notice period on the flow of the Tongue River at the Stateline.

4. The Court should find that Wyoming is liable to Montana in the amount of 56 af for 2006. This represents the impact of Wyoming's post-1950 uses during the 2006 notice period on the flow of the Tongue River at the Stateline.

I therefore recommend that, if the Court agrees with the above recommendations and finds that Montana has been injured, the Court remand for the determination of damages and other appropriate relief. Given the narrowed focus of the case, proceedings can and should be short.



3. Wyoming is liable to Montana for reducing the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1,300 acre-feet in 2004.

4. Wyoming is liable to Montana for reducing the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 56 acre-feet in 2006.

5. The case is remanded to the Special Master for determination of damages and other appropriate relief.

Remedies Phase

March 28, 2016: Status Conference.

April 25, 2016: Joint Memorandum.

April 27, 2016: Case Mgmt. Order No. 17.

July 27, 2016: Summary Judgment Hearing.

Note: Interspersed Settlement Efforts.



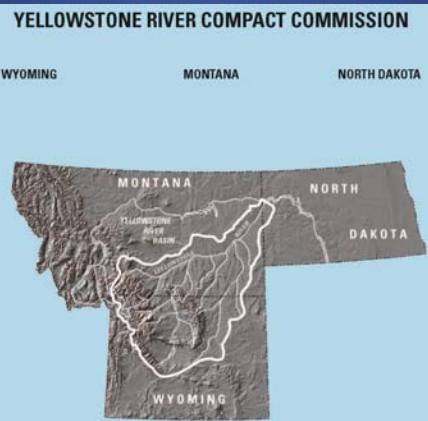
Special Master Barton ("Buzz") Thompson

I. STATEMENT OF ISSUES TO BE RESOLVED IN THE REMEDIES PHASE

A. Joint Statement of Issues

The States have conferred, and agree that the following issues should be resolved in the Remedies Phase:

1. The amount of **damages** to which Montana is entitled based on Wyoming's liability for 2004 and 2006.
2. How should **costs** be allocated in this proceeding?
3. Should the Court issue **affirmative relief**, and if so, what should it be?




ARTICLE III

F. In case of the **failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this Compact**, then the **member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote** of the representatives of the States of Wyoming and Montana and said member selected by the Director of the United States Geological Survey, each being entitled to one vote.

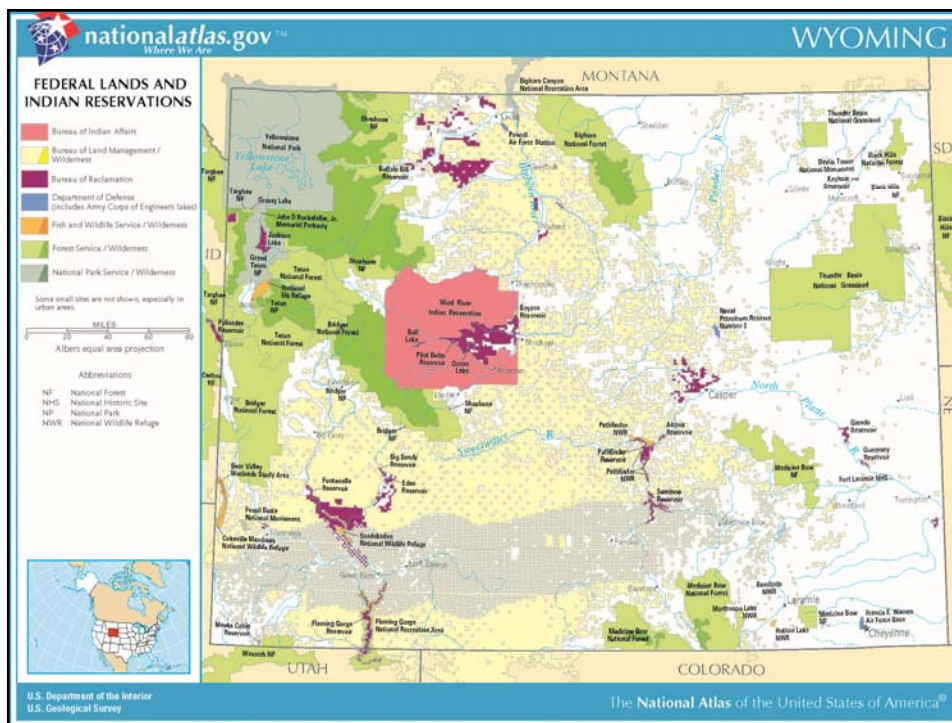
YELLOWSTONE RIVER COMPACT COMMISSION

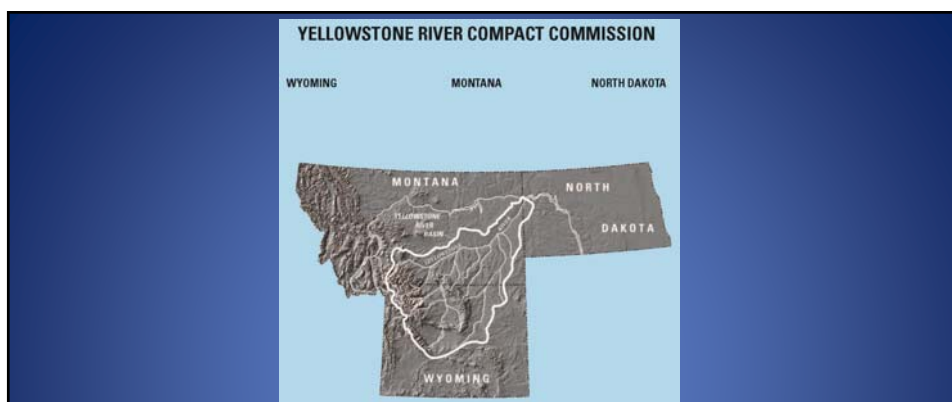
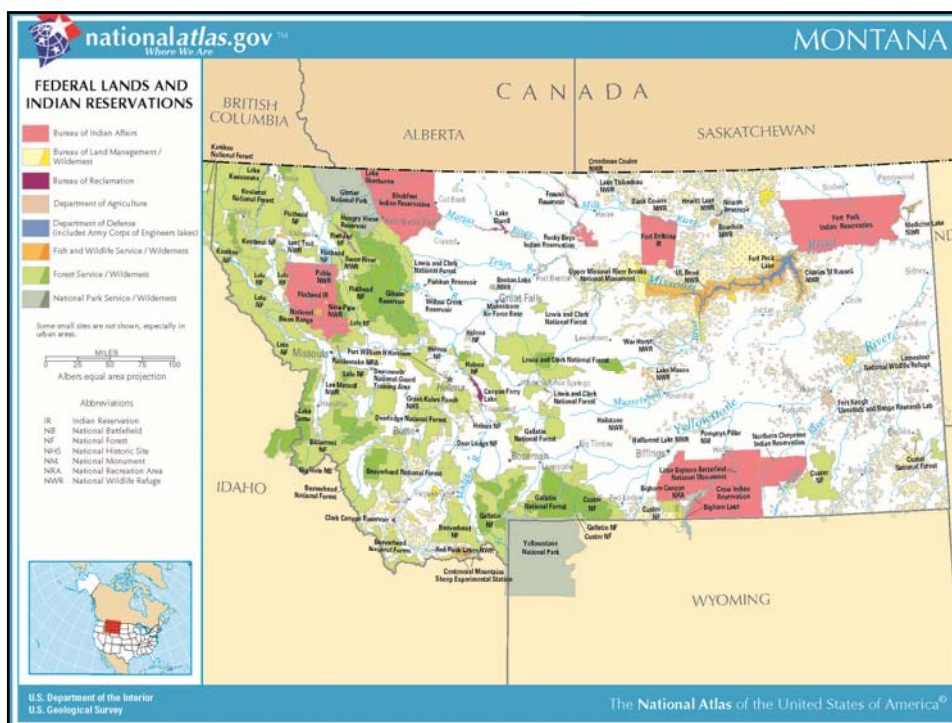
WYOMING MONTANA NORTH DAKOTA



ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of **one representative from the State of Wyoming and one representative from the State of Montana**, to be selected by the Governors of said States as such States may choose, and **one representative selected by the Director of the United States Geological Survey** or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him **at the request of the States** to sit with the Commission and who shall, when present, act as Chairman of the Commission **without vote, except as herein provided.**





ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

YELLOWSTONE RIVER COMPACT, 1950

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.

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

Thank You!



BLM's Newly Proposed Venting & Flaring Rule: Primer and Potential Impacts

3:00 - 4:00 PM

Robert Charles Mathes
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Rob Mathes is a partner in the Natural Resources Department of Davis Graham & Stubbs LLP, where his practice focuses on public land law including environmental compliance and federal land use and planning. Mr. Mathes has considerable experience before the Interior Board of Land Appeals as well as land management and other regulatory agencies associated with natural resource development at both the state and federal levels. Additionally, he has significant litigation experience in both the state and federal courts. Mr. Mathes has authored articles on federal land withdrawals under the Federal Land Policy and Management Act and surface use stipulations on federal oil and gas leases.

Prior to joining DGS, Mr. Mathes was a shareholder with a boutique law firm in Denver, Colorado. He earned his J.D. from the University of Wyoming College of Law, where he served as editor-in-chief of the Land and Water Law Review. Upon graduation from law school, Mr. Mathes worked as a law clerk to U.S. Magistrate Judge William C. Beaman in Cheyenne, Wyoming. Mr. Mathes is actively involved with the Rocky Mountain Mineral Law Foundation and teaches at the biennial Federal Oil and Gas Leasing Short Course, is the Chair of the Special Institute Committee, reports on federal oil and gas issues for the Foundation's Mineral Law Newsletter and served as the Public Lands Chair for the 56th Annual Rocky Mountain Mineral Law Institute. Mr. Mathes is also a member of the University of Wyoming College of Arts & Sciences Board of Visitors.

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Eric Waeckerlin is a partner in the Natural Resources, Environmental Law, Energy and Cleantech & Climate Law Groups of Davis Graham & Stubbs LLP. Mr. Waeckerlin counsels clients throughout the country on a number of complex environmental matters under the Clean Air Act, the Clean Water Act, CERCLA, NEPA, RCRA, and the Safe Drinking Water Act, as well as their state equivalents. Mr. Waeckerlin's experience includes environmental risk management counseling for numerous industries undergoing internal audits and government investigations and he frequently counsels clients concerning environmental liabilities for a wide range of transactional matters. He has represented clients in major federal and state rulemakings, national litigation before the D.C. Circuit Court of Appeals, and a variety of regulatory and enforcement matters before the Environmental Protection Agency and state administrative agencies.

THE NEW BLM PROPOSED RULES FOR VENTING & FLARING

PRESENTED BY: ROB MATHES AND ERIC WAECKERLIN
PARTNERS, DAVIS GRAHAM & STUBBS LLP

JULY 28, 2016
2016 ENR SECTION SUMMIT

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UP FOR DISCUSSION

- Introduction: How did we get here?
- BLM's legal authority to regulate air quality
- Major components of the proposed rule
- Initial thoughts and concerns with the proposed rule
- Q&A

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PROPOSED RULE

- 81 Fed. Reg. 6,616 (February 8, 2016) proposes to:
 - Replace NTL-4a, which addresses venting, flaring, and royalty-free use of production
 - Revise 43 C.F.R. part 3160 (APDs)
 - Add new 43 C.F.R. parts 3178 (royalty-free uses) and 3179 (waste prevention/air quality controls)



NTL-4A (EST. 1980)

- Defined “avoidably” and “unavoidably” lost
- Allowed royalty-free flaring for initial production tests for 30 days or 50 MMcf
- Defined “beneficial purposes” of oil and gas that do not incur royalty
- Required case-by-case approvals



GAO (RELEASED NOVEMBER 2010)

GAO U.S. Government Accountability Office

Keyword or Report #
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FEDERAL OIL AND GAS LEASES:
Opportunities Exist to Capture Vented and Flared Natural Gas, Which Would Increase Royalty Payments and Reduce Greenhouse Gases
GAO-11-34. Published: Oct 29, 2010. Publicly Released: Nov 29, 2010.

HIGHLIGHTS RECOMMENDATIONS VIEW REPORT (PDF, 57 PAGES)

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The Department of the Interior (Interior) leases public lands for oil and natural gas development, which generated about \$9 billion in royalties in 2009. Some gas produced on these leases cannot be easily captured and is released (vented) directly to the atmosphere or is burned (flared). This vented and flared gas represents potential lost royalties for Interior and contributes to greenhouse gas emissions. GAO was asked to (1) examine available estimates of the vented and flared natural gas on federal leases, (2) estimate the potential to capture additional gas with available technologies and associated potential increases in royalty payments and decreases in greenhouse gas emissions, and (3) assess the federal role in reducing venting and flaring. In addressing these objectives, GAO analyzed data from Interior, the Environmental Protection Agency (EPA), and others and interviewed agency and industry officials.

Estimates of vented and flared natural gas for federal leases vary considerably, and GAO found that data collected by Interior to track venting and flaring on federal leases likely underestimate venting and flaring because they do not account for all sources of lost gas. For onshore federal leases, operators reported to Interior that about 0.13 percent of produced gas was vented or flared. Estimates from EPA and the Western Regional Air Partnership (WRAP) showed volumes as high as 30 times higher. Similarly, for offshore federal leases, operators reported that 0.5 percent of the natural gas produced was vented and flared, while data from an Interior offshore air quality study showed that volume to be about 1.4 percent, and estimates from EPA showed it to be about 2.3 percent. GAO found that the volumes operators reported to Interior do not fully account for some ongoing losses such as the emissions from gas dehydration equipment or from thousands of valves—key sources in the EPA, WRAP, and Interior offshore air quality studies. Data from EPA,

Multimedia:

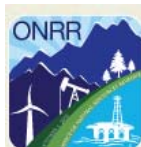


VIDEO: Vented Gas Visible Through Infrared Camera



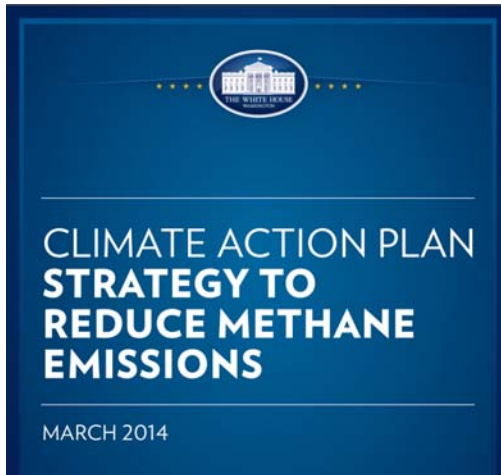
ONRR DATA (2009-2014)

- Federal and Indian onshore lessees and operators lost 375 billion cubic feet of natural gas 2009-2014 (see 81 Fed. Reg. at 6,616).



Office of Natural Resources Revenue
U.S. Department of the Interior

OBAMA'S CLIMATE ACTION PLAN (MARCH 2014)



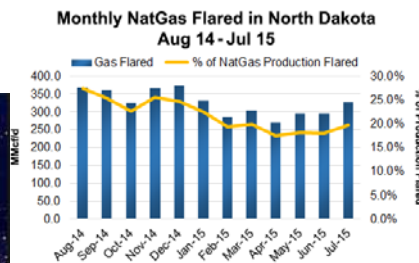
- “Targeted strategy” to cut methane emissions from “key sources”:
 - Landfills
 - Coal mines
 - Agriculture
 - Oil and gas

EPA WHITE PAPERS (APRIL 2014)

- EPA releases five technical white papers for external peer review on “potentially significant sources of emissions in the oil and gas sector” in response to President Obama’s Climate Action Plan.

- Compressors
- Completions
- Leaks
- Liquids unloading
- Pneumatic devices

ATTENTION TURNS TO FLARING IN NORTH DAKOTA



Source: North Dakota Industrial Commission data, NGI's Shale Daily calculations

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EPA . . . NOW BLM

Federal Register / Vol. 80, No. 181 / Friday, September 18, 2015 / Proposed Rules **56593**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60
[EPA-HQ-OAR-2010-0505; FRL-9925-75-OAR]
RIN 2060-AS30

Oil and Natural Gas Sector: Emission Standards for New and Modified Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes to amend the new source performance standards (NSPS) for the oil and natural gas source category by setting standards for both methane and volatile organic compounds (VOC) for certain equipment, processes and activities across this source category. The Environmental Protection Agency (EPA) is including requirements for methane emissions in this proposal because before November 17, 2015, the EPA will hold public hearings on the proposal. Details will be announced in a separate announcement.

ADDRESSES: Submit your comments, identified by docket ID Number EPA-HQ-OAR-2010-0505, to the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the docket.

you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. If you send an email comment directly to the EPA without going through www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. Electronic files should avoid the use of special characters, any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at: www.epa.gov/epahome/dockets.htm. Docket: The EPA has established a docket for this rulemaking under Docket ID Number EPA-HQ-OAR-2010-0505. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute.

February 2016

6816 Federal Register / Vol. 81, No. 25 / Monday, February 8, 2016 / Proposed Rules

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3100, 3160, and 3170
[15XLLW0300000.13100000.NB0000]
RIN 1004-AE14

Waste Prevention, Production Subject to Royalties, and Resource Conservation

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM) is proposing new regulations to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases. The regulations would also clarify when produced gas lost through venting, flaring, or leaks is subject to royalties, and when oil and gas production used on site would be royalty-free. These proposed regulations would be codified at new 43 CFR subparts 3178 and 3179. They would

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions at this Web site.

Comments on the information collection burdens: Fax: Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, Desk Officer for the Department of the Interior, fax 202-395-6966. Electronic mail: OMB_Submission@omb.eop.gov. Please indicate "Attention: OMB Control Number 1004-XXXX."

For further information: Submit comments on the information collection burdens. If you submit comments on the information collection burdens, you should provide the BLM with a copy, at one of the addresses shown earlier in this section, so that we can summarize all written comments and address them in the final rule preamble.

FOR FURTHER INFORMATION CONTACT: Eric Jones at the BLM Moab Field Office, 82 East Dogwood Ave., Moab, UT 84032, or by telephone at 435-259-2117; or Timothy Spisak at the BLM Washington Office, 20 M Street SE., Room 2134LM, Washington, DC 20003, or by telephone at 202-612-7111. For questions relating to regulatory process issues, contact

and States, and reduce environmental damage from venting and flaring. The BLM's onshore oil and gas management program is a major contributor to our nation's oil and gas production. The BLM manages more than 245 million acres of land and 700 million acres of subsurface estate, making up nearly a third of the nation's mineral estate. Domestic production from over 100,000 Federal onshore oil and gas wells accounts for 11 percent of the Nation's natural gas supply and 5 percent of its oil. In Fiscal Year (FY) 2014, operators produced 294.6 million barrels (bbl) of oil, 2 trillion cubic feet (Tcf) of natural gas, and 3.1 billion gallons of natural gas liquids (NGL) from onshore Federal and Indian oil and gas leases. The production value of this oil and gas exceeded \$27.2 billion and generated approximately \$3.1 billion in royalties.¹

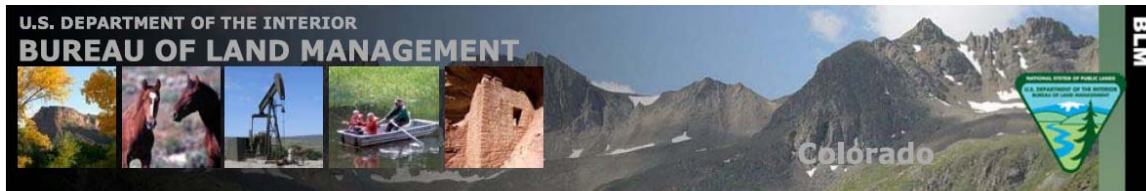
Over the past decade, the United States has experienced a dramatic increase in oil and natural gas production due to technological advances, such as hydraulic fracturing combined with directional and/or horizontal drilling. This boost in

September 2015

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BLM'S STATUTORY AUTHORITY



BLM>Colorado>Information>NEPA>Air Quality

Print Page

Air Resources

Colorado

- + What We Do
- + Visit Us
- + Information Center
- + Field Offices
- + Get Involved
- + Contact Us

The BLM analyzes and protects air resources within its multiple use and sustained mission. This involves carrying out the Federal Land Policy and Management Act of 1976 and ensuring that all activities the BLM conducts or authorizes comply with the Clean Air Act and other air pollution laws and regulations.

The Colorado Department of Public Health and Environment (CDPHE) and the Environmental Protection Agency have the authority under the Clean Air Act to regulate and maintain air quality standards within Colorado. The BLM does not regulate air quality.

The BLM cooperates with these agencies to ensure activities it authorizes are in accordance with applicable regulations. The BLM will also participate in a cooperative effort with industry and other agencies to establish, operate and maintain an air monitoring network.

Air Resources

- CARPP
- Air Quality and Energy
- NEPA for Air Quality
- Air Monitoring
- CARMMS

Quick Links

Fast Facts

BLM'S STATUTORY AUTHORITY

- No direct statutory authority to require air pollution controls (technological- or performance-based)
- BLM air quality-related authority is limited
 - BLM authorized activities must comply with NAAQS
 - Coordinate with EPA on major source permitting
 - Emissions inventories/monitoring/modeling
 - Address air quality through the NEPA process
 - Transportation conformity analysis w/in NAAs
- Relying on MLA and FLPMA authority



ROADMAP OF THE PROPOSED RULE

1. Establishing flaring limits
2. Defining “avoidable” vs. “unavoidable” loss
3. “Waste prevention” through air quality requirements
4. Defining royalty-free uses
5. Adjustment to royalty rate



FLARING LIMITS

- 7,200 mcf/month – one year after final rule
- 3,600 mcf/month – two years after final rule
- 1,800 mcf/month – three years after final rule
- Alternative limits available through sundry application



“UNAVOIDABLY LOST” – 3179

- Operator has not been negligent
- Operator complied with laws, regulations, lease terms, approved operating plan, or BLM written orders
- Oil or gas lost during certain operations identified in rule and cannot be recovered in the normal course of operations, where the operator has taken prudent and reasonable steps to avoid waste
- Produced gas flared or vented from well not connected to pipelines



“UNAVOIDABLY LOST” – 3179

Well drilling	Well completion
Initial production tests	Subsequent well tests
Exploratory CBM dewatering	Emergencies
Evaporation from storage vessels	Downhole well maintenance
Liquids unloading	Leaks
Releases from pneumatic controllers and pumps	



AIR QUALITY RELATED PROVISIONS – 3179

- 3179.6 – venting instead of flaring allowed in limited circumstances (emergencies, Quad O exempt, pneumatics)
- Potential “design” element embedded in definition of emergencies (3179.105)



AIR QUALITY RELATED PROVISIONS – 3179

- 3179.201/202 (pneumatic controllers/pumps)
 - Replace with low-bleed within 1 year (limited exceptions, including if already s.t. EPA regulations)
- 3179.203 (storage vessels)
 - Same 6 tpy as Quad O/4 tpy take-off
 - Must route all tank vapor gas to a flare or sales line
 - Exception if costs cause operator to cease production and abandon significant recoverable reserves



AIR QUALITY RELATED PROVISIONS – 3179

- 3179.204 (liquids unloading)
 - BMPs except where technically infeasible or unduly costly
 - Prohibits purging of new wells (limited exceptions)
 - If purging, must be present on-site or automated
 - Extensive recordkeeping and reporting
 - Watch for ambiguous standards – “unduly costly,” “practically necessary,” “maximize recovery” etc.



AIR QUALITY RELATED PROVISIONS – 3179

- 3179.301 *et seq.* (leak detection and repair)

Applicability	Features
All equipment and equipment components at wellhead	Semi-annual
All facilities	OGI/FLIR or other BLM-approved method or program
All compressors	Repair and follow-up inspection
	Recordkeeping



AIR QUALITY RELATED PROVISIONS – 3179

- Things to look for under LDAR
 - “Equipment” broadly defined, includes storage tanks
 - May comply w Quad Oa in lieu of BLM rule
 - Step-up and step-down is problematic
 - No modified LDAR approach for stripper wells
 - Cost/benefit only works through value of saved methane (based on SCM)



STATE AND TRIBAL VARIANCES - 3179

- Can be granted by State Director
- BLM determines if the state or tribal rule meets or exceeds these rules
- Not subject to appeal



ROYALTY-FREE USE OF PRODUCTION - 3178

- Royalty is not due on oil or gas produced from a lease, CA, or unit PA and is used for operations and production on the same lease, CA, or unit PA without being removed from the lease, CA, or unit PA
- BLM distinguishes between uses that require BLM's prior written approval



ROYALTY-FREE USE OF PRODUCTION – 3178

On Lease Uses that Do Not Require BLM's Approval

Use of fuel to power artificial lift equipment

Use of fuel to power enhanced recovery equipment

Use of fuel to power drilling rigs

Use of gas to actuate pneumatic controllers or operate pneumatic pumps at production facilities

Use of fuel to heat, separate, or dehydrate production

Use of fuel to compress gas to place it in marketable condition

Hot oil treatment



ROYALTY-FREE USE OF PRODUCTION – 3178

On Lease Uses that Require BLM's Approval

Using oil as a circulating medium in drilling operations

Injecting gas to increase recovery of oil or gas

Using oil or gas removed from the pipeline at a local downstream of the approved facility measuring point when both removal and use occur on the lease, unit, or CA

Using produced gas for operations after gas is returned from off-site treatment or proceeding to address a physical characteristic of the gas



ROYALTY-FREE USE OF PRODUCTION – 3178

- Off lease uses that do not require BLM's approval:
 - Well is directionally drilled, wellhead not located on lease, unit or CA but produced oil or gas is used on the same well pad for that well
 - Oil and gas piped between non-contiguous areas of lease, unit, or CA for use without oil or gas being added to or removed from the pipeline



ROYALTY-FREE USE OF PRODUCTION – 3178

- Off lease use that requires BLM's approval:
 - Equipment or facility is located off lease, unit, or CA for engineering, economic, resource-protection, or physical accessibility reasons and the operations are upstream of the FMP



ROYALTY RATE – 3103

- Royalty rate for competitive leases fixed at 12.5%
- Advanced Notice of Proposed Rulemaking published April 2014
- “Base” royalty would be “not less than” 12.5%
- BLM seeking comment on proposal of 4% fluctuating increase depending on flaring levels



APD SUBMISSIONS – 3160

- Anticipated gas production – decline curve
- Map of existing infrastructure
- Processing plants, regional tie-ins
- Current capacity/throughput



CONSIDERATIONS

- Cost-benefit analysis needs scrutiny
- Clear jurisdictional issues
- Existing state/EPA air programs – collaboration or carve out?
- Enforcement of air quality provisions

CONSIDERATIONS

- Recent decision on BLM HF Rule
 - “[T]he threshold issue before this Court is a Constitutional one—has Congress [] delegated its legal authority to the DOI to regulate hydraulic fracturing . . . Congress does not regulate in a vacuum.”
 - “[C]hevron involved a challenge to an agency construction of a *specific* statutory provision where the agency had clearly been granted regulatory authority over the activity in question.”
 - “If this Court were to accept [BLM’s] argument, there would be no limit to the scope or extent of Congressionally delegated authority BLM has, regardless of topic or subject matter.”

COMPOUNDING REGULATORY EFFORTS

- Venting/flaring final rule expected soon
- BLM Planning Rule, 81 Fed. Reg. 9673 (Feb. 25, 2016) – April 25, 2016
- FWS Mitigation Policy, 81 Fed. Reg. 12,380 (Mar. 8, 2016) – May 9, 2016





QUESTIONS?

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EPA'S RULE ON "WATERS OF THE U.S."

Eric Waeckerlin
Partner, Davis Graham & Stubbs LLP

Wyoming ENR Section Summit
July 28, 2016



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INITIAL CONSIDERATIONS

- The Scope Federal Jurisdiction Over "Waters of the United States" Affects Many CWA Sections, but 404 is the Focus (wetlands etc.)
- CWA Section 404 is Highly Unique with Two Federal Agencies with Overlapping Jurisdiction (USACE and EPA)
- Long History of Confusion and Litigation Stemming from Unhelpful CWA Statutory Language

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2015 CLEAN WATER RULE

- New Rule Adds Substantial Details to Existing Vague Rules Defining “Waters of the U.S.” Regulated Under the CWA
 - Published in the *Federal Register* on June 29, 2015
 - Became Effective on August 28, 2015 (stayed in 13 States by Late-August, Nationwide by Mid-October)
 - Applies to all Later and Pending “Jurisdictional Determinations” of Regulated WOTUS



GENERAL STRUCTURE OF CLEAN WATER RULE

Classifies Waters in Three General Categories:

1. Waters that are Jurisdictional by Rule
 - No Additional Site-Specific Review
2. Waters that are Excluded by Rule
 - No Additional Site-Specific Review
3. Waters That Require a Site-Specific “Significant Nexus” Analysis
 - To Meet the Test by Justice Kennedy in *Rapanos*



WATERS LISTED AS JURISDICTIONAL BY RULE

1. Traditional Navigable Waters
2. Interstate Waters
3. Territorial Seas
4. Impoundments of Jurisdictional Waters
5. “Tributaries” (as Newly Defined)
6. “Adjacent” Waters (as Newly Defined)

“Tributaries” and “Adjacent” Waters Constituting WOTUS are Two of the Most Controversial Aspects of the New Rule



WATERS LISTED AS EXCLUDED BY RULE

1. Groundwater (Never Previously Excluded by Rule)
2. Artificially Irrigated Areas
3. Artificial Lakes/Ponds in Dry Land
4. Water-Filled Depressions in Dry Land Related to Mining or Construction
5. Erosional Features (That are Not “Tributaries”)
6. Stormwater Control Features Created in Dry Land
7. Wastewater Recycling Structures in Dry Land
8. Prior Converted Cropland
9. Puddles!
10. Certain Ditches



WATERS REQUIRING SITE-SPECIFIC SIGNIFICANT NEXUS ANALYSIS

- Two Categories of Waters Requiring Significant Nexus Evaluation
- Waters Deemed “Similarly Situated” *by Rule*
 - Must be Combined to Evaluate Aggregate Significant Nexus to Nearest Downstream Jurisdictional WOTUS
 - Five Listed Waters Include: Prairie Potholes, Western Vernal Pools (in California), Texas Coastal Prairie Wetlands, and East Coast Bays and Pocosins
 - Aggregation Approach Strongly Opposed by Industry and Strongly Supported by Environmental Groups
 - Likely Focus of Litigation



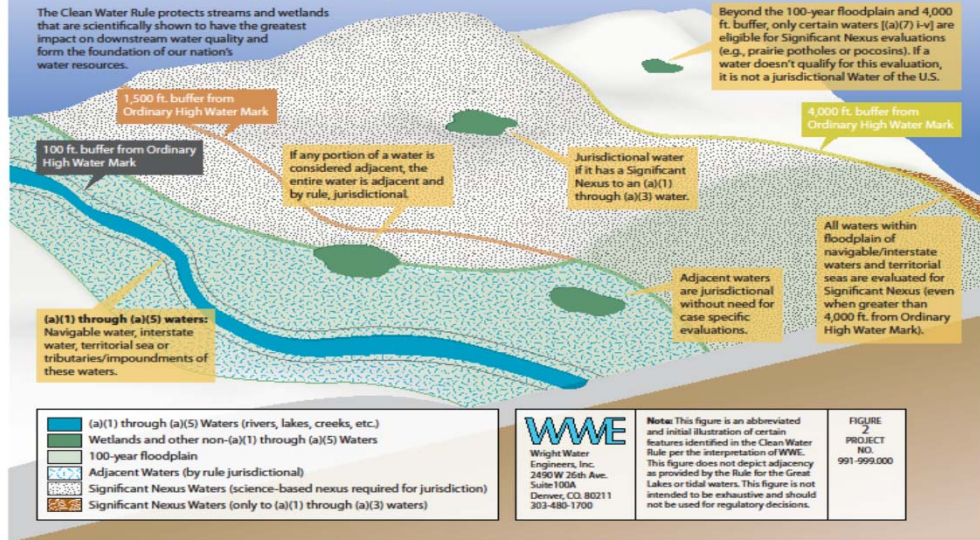
WATERS REQUIRING SITE-SPECIFIC SIGNIFICANT NEXUS ANALYSIS (CONTINUED)

- Second Category: Waters Requiring Individual Analysis
 - Waters Within 100-year Floodplain of WOTUS
 - Waters Within 4,000 Feet of Ordinary High Water Mark (OHWM) of WOTUS
 - Combine With Parameters for Determining “Adjacent” and “Neighboring” Waters to Create Complex Criteria
 - Entire Water Is WOTUS If There is a Significant Nexus and Any Portion is Located in 100-Year Floodplain or 4,000 Feet From OHWM
 - But May Not Combine with Adjacent Waters to Determine Significant Nexus
 - These Fixed Parameters Also Contested

Adjacent and significant nexus waters

2015 Clean Water Rule initial interpretation by WWE

The Clean Water Rule protects streams and wetlands that are scientifically shown to have the greatest impact on downstream water quality and form the foundation of our nation's water resources.



STATUS OF THE CLEAN WATER RULE LITIGATION

- **In October, 6th Cir. Stayed Rule Nationwide (Without Deciding Whether it has Jurisdiction)**
 - Superseded the N.D. Stay of the Rule
- **6th Cir. Ruled Appellate Courts Have Jurisdiction (Feb. 2016)**
 - Briefing Schedule Set (Administrative Record and Merits Briefing; Final Briefing not Done Until Feb. 2017)
- **10th Cir. Appeal to Overturn N.D. Oklahoma Dismissal**
 - Briefing Schedule Set (July 1 Opening Briefs)
- **11th Cir. Appeal Reviewing S.D. Ga. Dismissal of Challenge by 11 Southern States on Jurisdictional Grounds**
 - Asking the 11th Cir. To Rule That D. Cts. Should Hear The Case, Despite 6th Cir. Ruling
 - Oral Argument Occurred July 8, 2016
- **American Exploration & Mining Association (AEMA) Filed “Protective” Suit in U.S. Dist. Ct. (DC) on June 23, 2016**



LEGAL CHALLENGES

- *USACE V. Hawkes* (Decided May 31, 2016)
- Issue: Whether the USACE's Decision on an Approved Jurisdictional Determination is Judicially Reviewable Under the Administrative Procedure Act (APA)
- 8-0 USSC Decision
- The USACE's Regulations (33 C.F.R. Sec. 320.1(a)(6)) Concede Final Agency Action; The Disagreement was the Nature of the Consequences That Flowed From the JD:
 - Final "Affirmative" JD Removes The 5-year "Safe-harbor" Afforded By a Negative JD and Carries the Risk of Significant Criminal and Civil Penalties; and
 - There is no Adequate Remedy
 - Parties Need Not Await Enforcement Proceedings with Serious Criminal/Civil Penalties; and
 - It is Not Adequate to Apply for a Permit and Seek Judicial Review of an Unfavorable Decision (Time Consuming and Expensive)



KEY TAKEAWAYS

- USACE 2008 Guidance Remains in Effect for Determining Jurisdictional WOTUS
- Clean Water Rule is Stayed Nationwide, with the Sixth Circuit in the Lead
- The Rule Expands Jurisdiction, Particularly for Western Tributaries
- Can now Seek Judicial Review for Final Jurisdictional Determinations



PRESENTER



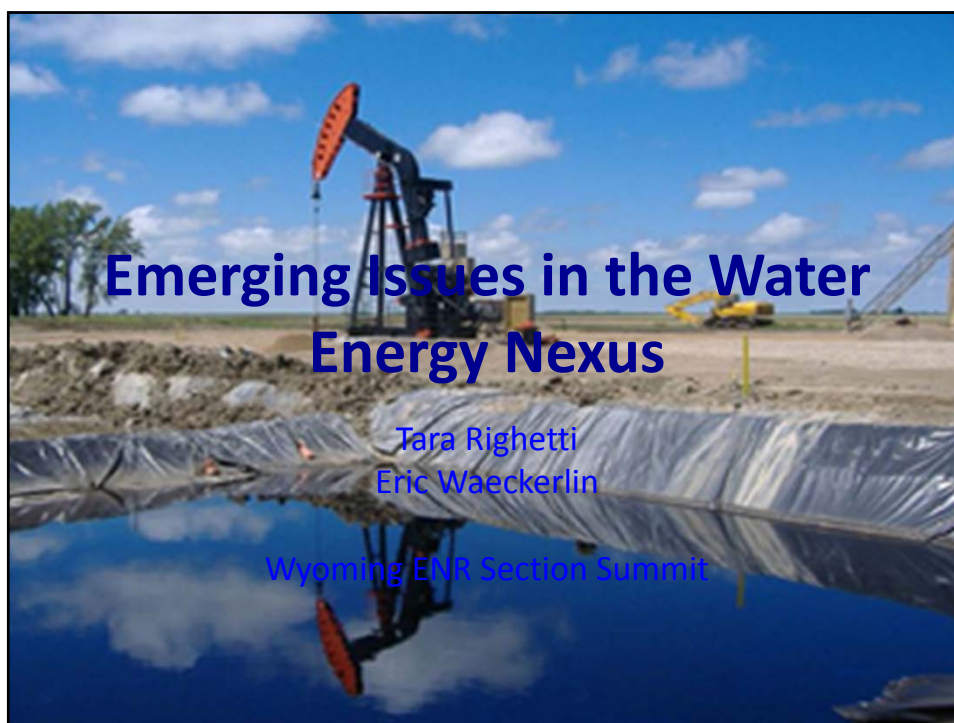
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Emerging Issues in the Water-Energy Nexus

4:15 – 5:15 PM

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Righetti joined the University of Wyoming College of Law faculty in the fall of 2014. Previously, she served as CEO and general counsel of a privately held upstream oil and gas company with operations in six states and on the outer continental shelf. She is a member of the State Bars of Texas and California. Professor Righetti teaches classes on oil and gas law and energy transactions and finance. Her other areas of interest include state owned oil enterprises, pipeline law and the environmental design of energy man camps. Professor Righetti's research focuses on legal issues related to oil and gas development on split estates.



Getting Water?



Or Getting Rid of It?



What is Produced Water?



- Produced with hydrocarbons from the hydrocarbon reservoir
- Briny and non-potable
- Contains remaining hydrocarbons and other soluble minerals
- May be environmentally damaging

By-Product Water

- Water which has not been put to beneficial use, and which is a by-product of some non-water related economic activity and has been developed only as a result of such activity.
 - regulated by WOGCC (disposal) and WDEQ (water quality relating to disposal)
- Production of CBM Water may be a beneficial use
 - Obtain permit from state water engineer office to appropriate

Surface Evaporation



- On split estates - Must acquire right of surface use from surface owner
 - Likely outside scope of implied easement
- Requires a permit from state agency or BLM
- Potential issues related to air quality and migratory birds

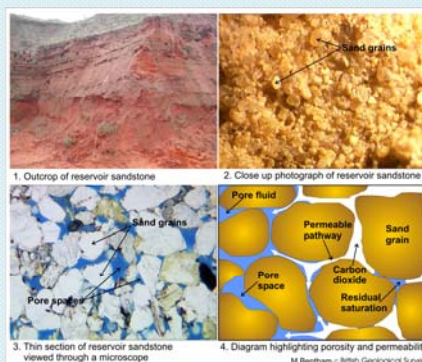
Underground Injection

- Most popular method of disposal
- Cheaper than treatment
- Less threat of liability for mistakes than surface treatment
- Not always possible – may be limited by availability of suitable injection reservoir



Where does it go?

- Pore space likely owned by surface owner
- Best practice is to have both a mineral lease and a surface use agreement expressly authorizing injection
- May not be able to contain injected fluids – subsurface migration



Permitting a Disposal Well

- Class II well – covers injection of oil and gas produced water
- Obtain UIC permit from EPA
 - Must be into an exempt aquifer
 - Water quality must be of poorer or equal quality to disposed produced water, or of such quality that there is no practical use thereof
 - Demonstrate mechanical integrity prior to injection
- Drilling/Operation requires state permit

Issues with Subsurface Disposal

- Migration of disposed water outside lease boundaries... ie. Subsurface Trespass
- If mechanical failure – may result in groundwater contamination
- Induced Seismicity – nuisance, negligence, strict liability, and trespass

Induced Seismicity

Regulation

- At least 8 states considering regulation
- Traffic Light System
- Evaluation of Seismic Risk during permitting
- Prohibition on certain zones or depths
- Likely to have challenges under NEPA

Litigation

- Negligence
- Strict Liability
- ~~Public Nuisance~~
- ~~Emotional Distress~~
- Private Nuisance
- Trespass

Treatment and Surface Discharge



- CWA controls surface discharges into waters of the US
- Must not violate applicable water quality standards or be detrimental to downstream users
- NPDES or 404 program

Treatment and Beneficial Use



- The Federal “Livestock Loophole”
 - RCRA exempts produced water is exempted as a “special waste” under land disposal rules
 - Can be disposed of on land and used as livestock water
 - EPA prohibits water based disposal of chemicals in produced water, but allows use for agriculture and wildlife west of the 98th meridian
- Irrigation

Ownership of Treated Wastewater

- Mineral Deed does not grant ownership to water in reservoir
 - Use as necessary to production is okay, but doesn't convey ownership
 - The fact that an unrelated activity improves economics of production is not enough
 - Like Pore Space, Gravel, or early days of CBM
- Can be used in drilling or other operations – If, it is both produced and used on same track
- Storage for later commercial use would not be permitted as part of implied easement

Issues with Treatment for Beneficial Use

- Treatment to commercial use standards is more expensive than disposal – and thus is unlikely where other options for disposal exist without a benefit to the producer
- Not clear whether non-CBM water can be appropriated under Wyoming rule, or whether such appropriation would yield an adjudicated water right, and, if so, to whom
- In Colorado, “developed water” may be free from the call of the river and subject to appropriation

Questions?

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