

TELEPHONIC STATUS HEARING HEARING
BEFORE SPECIAL MASTER BARTON THOMPSON
CAUSE NO.: 220137 ORG
July 29, 2011

Reported by: LINDA K. POOL, CSR 8941, CCRR

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APPEARANCES :

(ALL APPEARANCES TELEPHONIC)

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1 APPEARANCES: (CONTINUED)

2

3 FOR THE STATE OF NORTH DAKOTA:

4 JENNIFER VERLEGER

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6 FOR THE UNITED STATES:

7 WILLIAM JAY

8 JIM DUBOIS

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10 FOR AMICUS NORTHERN CHEYENNE TRIBE:

11 JEANNE WHITEING

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13 FOR THE AMICUS ANADARKO:

14 MICHAEL WINGMORE

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1 TELEPHONIC STATUS HEARING

2 reported at 2224 Third Avenue, San Diego, California
3 92101, commencing on Friday, July 29, 2011, at
4 10:00 a.m., before Linda K. Pool, Certified Shorthand
5 Reporter in and for the state of California, California
6 Certified Realtime Reporter.

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1 SAN DIEGO, CALIFORNIA; FRIDAY, JULY 29, 2011

2 10:00 A.M.

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4 MR. THOMPSON: Let's begin. And in a minute,
5 I will have counsel for each of the parties identify
6 themselves.

7 I need to apologize at the very outset to
8 everyone that I just got back from Kenya on Wednesday
9 evening. And as always, the jet lag has kicked in on
10 the second day. But I have had an opportunity to
11 thoroughly review all of the papers that were submitted
12 while I was gone and have found them quite useful. And
13 so again, I just want to apologize if I sound a little
14 bit sleepy, you'll understand why.

15 So why don't we begin with identification of
16 counsel for the parties.

17 So is counsel for Montana on the line?

18 MR. DRAPER: Yes, Your Honor. This is
19 John Draper. Also on the line with us is Jeffrey J.
20 Wexler,
21 Jennifer Anders, and Andrew Huff, H-u-f-f.

22 MR. THOMPSON: Thank you, Mr. Draper.

23 So next, counsel for Wyoming.

24 MR. MICHAEL: Yes, Your Honor. Peter Michael.
25 And with me here at the conference room is Jay Jerde,

1 Andrew Kuhlmann, Kaycee McMullin, David Willms, and a
2 student intern, Curran Trick.

3 THE REPORTER: I am going to need help with
4 the spellings of those names.

5 MR. MICHAEL: Certainly. I can give you my
6 phone number as well, let me do that, in case there's a
7 spelling later on. (307) 777-6196.

8 And Peter Michael is Peter, normal spelling,
9 and Michael, just like you would spell the first name,
10 M-i-c-h-a-e-l. Jay Jerde is J-a-y J-e-r-d-e.
11 Andrew Kuhlmann is normal spelling for Andrew, and last
12 name is K-u-h-l-m-a-n-n. David Willms, normal spelling
13 for David, and the last name is W-i-l-l-m-s.
14 Kaycee McMullin is K-a-y-c-e-e M-c-M-u-l-l-i-n. And the
15 final name is Curran Trick. That's C-u-r-r-a-n, and the
16 last name is T-r-i-c-k.

17 MR. THOMPSON: And next is counsel for North
18 Dakota on the line?

19 MS. VERLEGER: This is Jennifer Verleger. And
20 to finish my phone number from before for the court
21 reporter, it's (701) 328-3640.

22 MR. THOMPSON: And next is counsel for the
23 United States, which is Amicus in this case, on the
24 line.

25 MR. JAY: This is William Jay, assistant to

1 the Solicitor General from the United States. Last name
2 is spelled J-a-y. Also on the phone is Jim Dubois.

3 MR. THOMPSON: Thank you, Mr. Jay.

4 And next is any counsel for Amicus Northern
5 Cheyenne tribe on the line?

6 MS. WHITEING: Yes, Your Honor. My name is
7 Jeanne Whiteing, J-e-a-n-n-e, last name W-h-i-t-e-i-n-g.

8 MR. THOMPSON: And then finally is there any
9 counsel for Amicus Anadarko?

10 MR. WINGMORE: Yes, Your Honor. This is
11 Michael Wingmore, M-i-c-h-a-e-l W-i-n-g-m-o-r-e, on the
12 line for Anadarko. I'm with Bingham B-i-n-g-h-m-a-n,
13 McCutchen M-c-C-u-t-c-h-e-n.

14 MR. THOMPSON: Okay. Thank you. And is there
15 anyone else on the line who has not been identified?
16 Okay. Great.

17 So there are four specific items on my agenda
18 for the telephone conference this morning. And in the
19 order I'd like to discuss them, the first is the issue
20 that I posed in case management, Order No. 7, as to
21 whether Montana's argument that Wyoming has a set
22 delivery obligation that varies only with water supply
23 conditions is precluded by the Supreme Court's May 2nd,
24 2011, decision and/or my first interim report.

25 The second item on the agenda is the parties'

1 lists of issues of fact of law, and I have some
2 questions regarding those lists, and then I would also
3 like the parties' reactions to other parties' lists.

4 Then the third item is an identification of
5 any legal issues that might be resolved at this stage in
6 order to expedite for focused discovery, or that might
7 otherwise expedite resolution of this case.

8 Then the fourth and final item on my agenda is
9 the proposed case management plan. And then after that,
10 if the parties have any other issues that they would
11 like to address, we can turn to those.

12 So let me ask whether or not any of the
13 parties have any comments on that agenda or would like
14 to take it in any different order? I'll take that an
15 ascent, then.

16 So let me start out with the issue which I've
17 posed in this Case Management Order No. 7. As I
18 mentioned, I had an opportunity now to read both
19 Montana's and Wyoming's letter briefs regarding the
20 question, and I've also had an opportunity to read the
21 United States' letter brief on the issue of July 27th of
22 2011.

23 I've also gone back and reviewed both the
24 Supreme Court's May 2nd decision and also my own first
25 interim report. And rather than asking people to repeat

1 the arguments that they've already made, let me just
2 tell you what my current thinking is regarding the issue
3 that I've posed and then let the parties, and after
4 that, any of the Amicus make any comments or give any
5 authorities regarding my current thinking.

6 So I can look at everything. My current
7 thinking is that it's both fundamental to, and in many
8 cases explicit in, both the first interim report and the
9 Supreme Court's May 2nd, 2011, decision, that Article
10 5(a) of the compact ensures that Montana receive
11 sufficient water to satisfy its pre-1950 appropriative
12 rights and does not necessarily guarantee Montana a set
13 amount of water that varies only with water supply
14 conditions.

15 So stating that slightly differently, Article
16 5(a) does not necessarily require Wyoming to deliver the
17 amount of water that its pre-1950 appropriators were
18 using in 1950, which is what I understand Montana's
19 argument to be. Instead -- and again, I think both the
20 first interim report and Supreme Court's May 2, 2011,
21 decision clearly states what Article 5(a) requires is
22 simply that Wyoming delivers sufficient water so that
23 the pre-1950 appropriative right can continue to be
24 enjoyed.

25 That conclusion would seem to me to lead to

1 several other conclusions regarding liability in this
2 case, which hopefully will help in discovery and then in
3 any factual resolutions in this case.

4 The first conclusion is that in order to show
5 that Wyoming has violated the compact in any particular
6 year, Montana would need to show that at least some
7 pre-1950 appropriative rights went unsatisfied. And if
8 all pre-1950 appropriative rights in Montana were
9 satisfied, then Wyoming's obligations under Article 5(a)
10 of the compact would seem to be met.

11 Second of all -- and this is where I see this
12 issue being potentially relevant, is where a pre-1950
13 appropriative right has been abandoned and no longer
14 exists. There would not appear to be any obligation to
15 deliver the amount of water that was originally used
16 under that right. Now, this cuts both ways. So
17 it would mean that Montana would not -- under the
18 conclusions that I think are pretty clear in both the
19 first interim report and the Supreme Court's decision --
20 Montana wouldn't be able to demand water that was no
21 longer needed under any continuing pre-1950
22 appropriative right. But similarly Wyoming wouldn't be
23 able to claim under Article 5(a) a right to water that
24 was originally used by a pre-1950 appropriator in that
25 state, but that's since been abandoned. So I think that

1 actually cuts in both directions, although I know
2 Montana is most concerned about it.

3 Now, those are the things that that conclusion
4 seems to be most relevant to. But the conclusion would
5 also seem to be relevant to but does not directly answer
6 a variety of other questions that still need to be
7 resolved. And I want to emphasize, you know, the
8 limited nature of what I think has already been decided.

9 So one question that still needs to be
10 resolved -- and again, the Supreme Court's opinions of
11 my first interim report I think speak to this but don't
12 necessarily resolve it, is what exactly Montana must
13 demonstrate in order to prove a violation of Article
14 5(a).

15 As I mentioned a moment ago, I think both
16 explicit to and fundamental in the first interim report
17 in the Supreme Court's decision is the requirement that
18 Montana show that a pre-1950 appropriative right has not
19 been satisfied. But the Supreme Court's decision in the
20 first interim report doesn't necessarily resolve, for
21 example, the questions raised by Wyoming in its June
22 2008 letter brief, as to whether or not Montana would
23 need to show damages by individual appropriators,
24 whether or not Montana needs to notify Wyoming ahead of
25 time that they believe that a pre-1950 appropriator is

1 not receiving sufficient water, whether or not Wyoming
2 can assert a claim of futility, and exactly what, if
3 any, intrastate remedies Montana has to turn to before
4 asserting a claim against Wyoming.

5 So those questions still need to be resolved.
6 Although, again, the first interim report and the
7 Supreme Court's opinion certainly are relevant to those.

8 A second issue that still needs to be resolved
9 is what the appropriate remedy is for any past
10 violations.

11 A third question is the appropriate relief to
12 ensure that there are no future violations. And I
13 realize that at this point I'm -- I'm simply trying to
14 illustrate what, for example, Montana might be able to
15 argue.

16 As to appropriate relief regarding future
17 violations, Montana might be able to -- well,
18 successfully argue that the appropriate approach in the
19 future is for Montana to let Wyoming know what pre-1950
20 appropriative rights exist and the quantities needed to
21 satisfy them and that that could then form the bases for
22 state line deliveries, which is somewhat similar to, I
23 think, what Montana might be arguing right now.

24 You know, I think that question as to what the
25 nature of that future relief would be like is I think

1 still open. Although again, the Supreme Court's opinion
2 in the first interim report are relevant to it.

3 Then a fourth issue which I think is still
4 open is what happens if there are any changes in the
5 pre-1950 appropriative rights. As I mentioned a moment
6 ago, if an appropriate right has been abandoned, then I
7 think it's clear in both the first interim report and
8 Supreme Court's opinion that you can't argue that you're
9 still entitled to water because the pre-1950
10 appropriative right doesn't exist anymore.

11 But, for example, you could have water
12 transfers. And so if somebody ordered a pre-1950
13 appropriative right transfer to somebody else, it would
14 seem that the pre-1950 appropriative right still exists.

15 So I mention all of those issues with a little
16 bit of elucidation not to suggest a particular
17 conclusion, but simply to say that I don't think that is
18 an issue -- or those are issues that have been resolved
19 yet. But I do think that both the first interim report
20 and the Supreme Court's May 2nd opinion clearly state
21 that what Article 5(a) protects are the pre-1950
22 appropriative rights and don't guarantee Montana a set
23 amount of water that varies only with water supply
24 conditions.

25 That's my current thinking, and I am open to

1 comments by counsel for both Montana and Wyoming to
2 start as to their thoughts on that.

3 So let's start out with Mr. Draper.

4 MR. DRAPER: Thank you, Your Honor. This is
5 John Draper.

6 Our thought on the question of the A-line
7 delivery obligation is whether it can be at -- vary only
8 with water conditions, is I think what our purpose here
9 is.

10 (Pause in the proceedings.)

11 MR. THOMPSON: I'm still here. Let me just
12 make sure. Mr. Michael, are you still there?

13 MR. MICHAEL: Yes, we're still here, Your
14 Honor.

15 MR. THOMPSON: Is the court reporter still
16 there?

17 THE REPORTER: Yes, I'm still here.

18 MR. THOMPSON: I'm going to assume for the
19 moment that everyone is on the line. And if anyone has
20 dropped off, they can come back on. But I'm most
21 concerned to make sure the court reporter and counsel
22 for Wyoming and Montana are on the line.

23 So I'm sorry, Mr. Draper, for that
24 interruption.

25 MR. DRAPER: Thank you, Your Honor.

1 Our purpose in bringing this action in part
2 was to establish what you referred as an appropriate
3 remedy for future compliance, one that is workable --

4 MR. JAY: Joining the meeting.

5 MR. THOMPSON: Sorry, Mr. Jay. You haven't
6 missed very much.

7 MR. JAY: Sorry. I was getting a lot of
8 static on the line, and then the conference system or my
9 own phone threw me off.

10 MR. THOMPSON: No problem. So again,
11 Mr. Draper. You were talking about the purpose of
12 Montana bringing the action.

13 MR. DRAPER: Yes.

14 -- was in large part to obtain a remedy for
15 future compliance consistent with the compact, one that
16 can be administered into practical matter and is simple
17 to apply. We tend to think of that in terms of a state
18 line delivery obligation. That's where the two states
19 meet on this river. We do not want to impose
20 any internal restrictions on water administration in
21 Wyoming that are not necessary as long as Wyoming is
22 meeting its obligations under the compact.

23 We have seen in the first interim report and
24 in the Court's decision that the element -- one of the
25 four elements that we alleged was causing insufficient

1 water past the state line is not recognizable as a cause
2 of action with respect to the increased assumption on
3 existing irrigated acreage, but we did not understand
4 that to limit our allegations in -- in the Bill of
5 Complaint.

6 I think Wyoming pointed out in Paragraph 8 of
7 our Bill of Complaint, we had specifically referred to
8 the obligation that we believe exists for a certain
9 amount of water under specific conditions to be passed
10 through the State line. We have seen that that can vary
11 by virtue of a change in consumption on lands that were
12 being irrigated as of January 1, 1950.

13 It may be that it can vary for other reasons,
14 such as the ones that Your Honor has just mentioned if
15 your notions on that turn out to be final ruling. But
16 we believe it's important to be seeking a remedy here,
17 and I think this is in the interest of all the parties
18 and of the Court, that it's simple to apply, does not
19 require further intervention by the Court in the future
20 once this case reaches that remedy, and can be applied
21 with a minimum of conditions and interrelated actions
22 that have a strong potential for making the interstate
23 relationship on these rivers impractical.

24 If there are -- if there are ways that the
25 allocation between the States can vary, other than the

1 increased consumption on the irrigated lands such as the
2 abandonment possibilities that Your Honor mentioned,
3 first I think, and it's my way of thinking, that can be
4 taken into account in setting a state line delivery
5 requirement.

6 If those notions are in here in the compact
7 and do have an effect on what the obligations are on
8 Wyoming, those can be adjusted from time to time as
9 those circumstances change. But at any given time, any
10 given year, I would hope that we end up here with a
11 remedy that is easy to apply and that can be applied
12 real time so that in a given year there is the ability
13 for Montana to enjoy the water that is protected by the
14 compact be delivered to it.

15 So the notion of a delivery protocol, I don't
16 think is inconsistent with that. I didn't understand
17 the court to be saying that it was; that our allegation
18 in Paragraph 8 was somehow deficient in that regard with
19 respect to the other three alleged types of violations.

20 I think that that is not inconsistent with
21 what Your Honor has mentioned in terms of your initial
22 thinking on these issues. I do believe that it is
23 appropriate for the state to be allowed to directly
24 confront the issue which has not been put to bed in
25 terms of whether there is such a loan and on what

1 conditions it can vary, and the Special Master has been
2 very careful in that regard not to apply a decision to
3 the State without direct briefing.

4 I recall that the Special Master withdrew the
5 initial decision on the tributary question raised by
6 Wyoming when Wyoming objected that it hadn't had an
7 opportunity to fully brief that issue, and then it was
8 subsequently handled through a motion of summary
9 judgment.

10 So I think in sum that it is appropriate for
11 the Special Master to allow briefing on the issue of the
12 State line delivery requirement and what it -- what it
13 consists of, and the Master can then guide the parties
14 directly to what that is going to be determined to be,
15 and it will set the limits for the first phase of
16 discovery, which is to determine whether the compact has
17 been violated and, if so, to what extent in terms of
18 acre feet leading to the second phase, the question of
19 what remedies are appropriate under those circumstances.

20 MR. THOMPSON: Mr. Michael?

21 MR. MICHAEL: Yes, Your Honor. Just a few
22 comments on what you had said.

23 I just kind of repeat back to you what I
24 understood what you were saying was that you essentially
25 agree with the position that Wyoming and the United

1 States have taken with respect to this concept of a set
2 quantity variable only by hydrologic conditions being
3 the interpretation of 5(a). I'm hearing you say that
4 you believe that's been decided against Montana.

5 And where we were at our last case management
6 conference was -- the question was should this issue be
7 further briefed on its merits? We've done our
8 preliminary briefing, and if what you just said -- I
9 understand what you just said correctly, then we
10 certainly have no reason to brief that issue again.
11 It's been decided.

12 There are some issues that you identified
13 which pretty much I go through the list and I agree with
14 every one of them that are still out there. And the one
15 that I guess I see that maybe is causing a little
16 confusion here is the issue under remedy -- or after
17 remedy you talk about relief for future violations. You
18 mention State line deliveries. And, of course,
19 under the concept of a pre-1950 Wyoming -- or a pre-1950
20 Montana right not being satisfied if Montana were to
21 notify Wyoming that's not happening, Wyoming does need
22 to curtail posted uses in Wyoming under the -- what we
23 are now bound by. That's the Court's theory in the
24 case, which we did not take exception to.

25 So there is in a sense a -- maybe I can call

1 it a State line delivery with a small v, which is
2 Wyoming has the capability of only operating -- having
3 its administrators operate within our jurisdiction. We
4 can't send our hydrographer commissioners into Montana
5 to shepherd water from the State line to a Montana
6 irrigator that's not receiving their water.

7 But under the circumstance of relief for
8 future violations, surely one of the things that needs
9 to happen in this case is if on a constant basis was, I
10 think, the phrase you used, Your Honor, in your first
11 interim report -- if on a constant basis Montana could
12 show that in a particular water year at a particular
13 time it was not receiving or notified Wyoming in its
14 pre-1950 water use was not getting water and Wyoming had
15 post-'50s on, Wyoming would have to cut that post-'50
16 water user off, and the water presumably would make its
17 way to the State line and obviously if it's picked up by
18 another pre-'50 in Wyoming maybe it's a futile call.
19 That's an issue for another day, I think.

20 So there is this concept of this State line
21 delivery in the relief part of the case remaining, but
22 it's not a State line delivery of a mass quantity of
23 water dictated by overall hydrology. It's simply a
24 delivery that occurs through operation of this prior
25 appropriation scheme that the Supreme Court identified

1 on Page 6 of its decision. We have a scheme by which a
2 pre-'50 Montana can be satisfied if the Wyoming post-'50
3 needs to be shut off to do so.

4 So I want to make that distinction, I guess.
5 I think you had it in mind when you talk about the
6 future concept of the State line delivery, that that's
7 not the concept we just fought about and that the Court
8 has already decided.

9 So I just wanted to make that little proviso.
10 I think it's my understanding of where we are with what
11 you said, and I agree with what you said about the
12 overall issue of preclusion. Thank you.

13 MR. THOMPSON: So let me try and state again
14 what my current thinking is and address specifically
15 your question, Mr. Michael, and hopefully also be
16 responsive to the particular concerns that Mr. Draper
17 raised.

18 So again, I think it's clear on both the first
19 interim report and the Supreme Court's May 2, 2011,
20 decision, that what Article 5(a) of the compact is all
21 about is ensuring the pre-1950 appropriative rights are
22 satisfied, and if they're satisfied, then at the end of
23 the -- of the issue under Article 5(a). I think that,
24 as I say, is both fundamental to and explicit in both
25 the first interim, the Supreme Court's May 2, 2011,

1 decision. At the moment I see no reason for rebriefing
2 or reconsidering that particular question.

3 So that would seem to preclude what I thought
4 was Montana's alternative argument, which is basically
5 that what the -- what section or what Article 5(a) of
6 the compact did was guarantee to Montana delivery of
7 that amount of water that was being used by pre-1950
8 appropriators prior to the compact.

9 So it's not a set amount of water that varies
10 from year to year only based on hydrological conditions.
11 It is focused specifically on what is necessary to
12 satisfy the rights of the pre-1950 appropriators in
13 Montana, and that is the obligation under the compact to
14 Montana.

15 As Mr. Draper mentioned, however, the remedy
16 for future compliance, which is an issue for resolution
17 later in this case, hopefully will be one which as
18 Mr. Draper pointed out is workable and practicable for
19 the parties and obviously needs to be consistent with
20 the terms of the compact itself.

21 What I'm suggesting is still an open question
22 is the nature of that remedy. So one possibility which,
23 Mr. Michael, I know Wyoming has raised in its papers
24 would be one that is basically sort of a straightforward
25 call on the river. So if Montana discovers in any

1 particular year that at some point its pre-1950
2 appropriators are not getting sufficient water, they
3 would call up Wyoming, say, "You know, we're not getting
4 sufficient water to these particular users," and then
5 Wyoming would need to reoperate its own diversion
6 systems in order to ensure that sufficient water goes
7 down to Montana to meet those pre-1950 rights.

8 And, of course, that's reserving a variety of
9 questions that you've also raised regarding potential
10 claim of futility, a claim that Montana really doesn't
11 need the water because it's consolidated through an
12 intrastate remedy. That would be one approach.

13 A second approach, which I could see
14 Mr. Michael arguing for Montana, might be instead one
15 that says what Montana would supply to Wyoming would be
16 a list of pre-1950 appropriative rights in Montana and
17 the amount of water necessary to satisfy those
18 particular rights, and then Wyoming would have an
19 obligation from the outset to ensure that sufficient
20 water was going down to meet that amount of water, and
21 Montana would not have to wait until somebody in Montana
22 complained that they weren't getting sufficient water
23 for Wyoming to initially take action to ensure that
24 those Montana appropriations are met.

25 Now, I'm saying that particular question I

1 think still needs to be decided, and I don't want to
2 preclude Mr. Michael from arguing for a type of remedy
3 which, again, focuses specifically on ensuring that
4 existing pre-1950 appropriative rights are still met,
5 which I think is what both the decision and the interim
6 report both emphasize.

7 So it's still linked to that but could be a
8 different approach which is similar to one Mr. Draper is
9 arguing. And I can see him arguing that that's, you
10 know, a more workable and practicable approach. So I'm
11 just saying that particular question I think is still
12 open.

13 But it would be linked to protection of
14 pre-1950 appropriators, not to the notion that the
15 compact guarantees a specific amount that only varies
16 the hydrologic conditions and has nothing to do with
17 the -- what our remaining pre-1950 appropriative rights
18 and the amount of water needed to satisfy those rights.

19 So, Mr. Michael, does that help and does that
20 cause you concern?

21 MR. MICHAEL: I understand what you just said.

22 I guess the question it does raise, though --
23 and, again, I'm understanding you're saying that in the
24 context of injunctive relief.

25 MR. THOMPSON: That's right. Thinking about

1 future relief in terms of any past injuries, there as I
2 said I think under both the May 2 decision and also the
3 first interim report, it would be incumbent upon Montana
4 to show that at least some pre-1950 appropriative rights
5 went unsatisfied in particular years. That would be a
6 minimum.

7 And then the question is, you know, what in
8 addition to that Montana would have to show.

9 MR. MICHAEL: I think we've made it quite
10 clear -- this is Pete Michael again -- from Wyoming's
11 standpoint that the other part of that is they would
12 have to show it was caused by Wyoming satisfying some
13 kind of a post-'50 at a time it had an impact. It
14 couldn't be based on a pre-'50 and Wyoming having simply
15 satisfied their rights.

16 MR. THOMPSON: That's correct under Article
17 5(a). But what is -- what would still be open is the
18 question of if they had not notified Wyoming, for
19 example, in a particular year that a pre-1950
20 appropriator had not received the water to which they
21 are entitled in the compact, would that preclude any
22 claim for damages or other relief for that prior year.
23 Or, again, you know, the kind of issues you raised in
24 your June 28 letter brief would still be open.

25 So you're absolutely right. They would have

1 to show at a minimum both at least some 1950
2 appropriative rights are unsatisfied and that they went
3 unsatisfied because Wyoming instead delivered that water
4 to post-1950 appropriators.

5 MR. MICHAEL: I'll just finish my thought and
6 then I hear Mr. Draper wants to step in, of course.

7 As far as the future violation or remedies or
8 injunctive type of future stuff, as far as I'm
9 concerned, I'm perfectly satisfied to have -- that that
10 has not been determined, that that's wide open;
11 inconsistent with the compact, of course, and wide open
12 in the sense that both parties can argue what would be
13 consistent with the compact and also what we think would
14 be advisable and appropriate.

15 So obviously that issue is still open, what it
16 may be and I considered that such. So I don't have any
17 concerns in that regard.

18 MR. THOMPSON: Okay. And Mr. Draper?

19 MR. DRAPER: Yes, Your Honor. This is
20 John Draper.

21 I think the concept that you outlined is
22 largely consistent with our thinking. I would point out
23 that with -- that there is, I think, a strong argument
24 that this -- this compact can be administered and
25 enforced without the need in a given year for Montana

1 water officials to be going up into Wyoming and making
2 an assessment of whether any post-'50 rights are on a
3 particular day diverting water, and this goes hand in
4 hand with the fact that as you begin a water year, you
5 don't know what the water supply conditions are going to
6 be on any given day. So you need a protocol that allows
7 the State to understand what their obligations are as
8 those water supply conditions vary.

9 It seems to me that it is a practical thing to
10 determine and -- something that we expect to determine
11 in this proceeding, to under -- under a range of water
12 supply conditions what the pre-1950 Wyoming water rights
13 are using and under both conditions what is passing the
14 State line that's available for Montana pre-1950 users
15 and that that protocol, it makes up things like
16 abandonment, then those can be taken into account at the
17 beginning of the season.

18 But that as the water supply conditions vary
19 during the season, there is -- there is a protocol that
20 allows Wyoming to know what its obligations are. And on
21 the other hand, it also means that without the necessity
22 for daily calls that come on and off the river that
23 Montana can expect that the water that should be coming
24 to it under the ruling of the Court as to what the
25 extent of its allocation is under the compact will

1 arrive in a self-executing manner and that there is not
2 a need for either the State as a whole or individuals to
3 be placing calls against Wyoming as a state or as
4 individuals in Wyoming.

5 It seems to me that your concept is more than
6 consistent with our thinking, as long as it's understood
7 that for any given season there is -- at least there is
8 an expectation of what needs to be supplied under
9 whatever water conditions turn out to exist in that --
10 in that season, and that concept is not inconsistent
11 with your notion that abandoned water rights on either
12 side of the line could affect that protocol.

13 And yet the idea that there might be a need to
14 go into Wyoming, state representatives from Montana, on
15 an ongoing basis to check post-'50 uses and to put in a
16 call in order to be entitled to receive the water that
17 is necessary seem to go beyond what the compact
18 requires.

19 MR. THOMPSON: Okay. Thank you.

20 So I think I understand, you know, what you're
21 arguing for, Mr. Draper. And what I'm suggesting is
22 that I think the question of how the compact should be
23 administered in the future in order to ensure that
24 Montana's rights under Article 5(a) are met is a
25 question that still needs to be resolved.

1 So you are free, as the remedy states, to
2 argue that it is both consistent with the powers of the
3 Supreme Court and consistent with the terms of the
4 compact that there be a protocol that provides some
5 foresight as to what Wyoming would need to provide in
6 Montana in order to meet those pre-1950 appropriative
7 rights of Montana.

8 Mr. Draper is free to argue that it should be
9 based purely on a call system where Montana alerts
10 Wyoming to the degree that Montana's rights under
11 Article 5(a) are not being met.

12 And this is the key thing: Whatever that
13 remedy be, it needs to be focused on ensuring that
14 pre-1950 appropriative rights in Montana are satisfied
15 and is not determined by some specific amount that
16 varies according to hydrological conditions but does not
17 deal with what water is currently necessary in order to
18 satisfy those pre-1950 appropriative rights.

19 Furthermore, again, thinking about any past
20 injuries, those past injuries in order to establish a
21 past injury, Montana would need to show that at least
22 some pre-1950 appropriative rights were not satisfied in
23 a given year; furthermore, that they were not satisfied
24 because of one of the specific allegations in Montana's
25 complaint that -- that remains in this case. So, in

1 other words, delivery of water to post-1950 appropriator
2 ground water diversions and the like.

3 So again, I think the exact relief is
4 something which is still open for future discussion and
5 decision. But again, this all needs to focus on those
6 pre-1950 appropriative rights and not the amount the
7 water, for example, that Montana was using in those
8 pre-1950 appropriative rights at the time of the
9 compact.

10 Any other comments from first Mr. Draper or
11 Mr. Michael?

12 MR. DRAPER: Your Honor, this is John Draper.
13 We have been talking in terms of future remedies. You
14 turned our attention appropriately to the past remedy,
15 and there is an overlap there. For instance, if there
16 is a call requirement and that's something that has to
17 be presumably established as having occurred in the
18 past.

19 So these issues do relate to the past damages,
20 past alleged violations, and whether -- whether there's
21 been some economic injury in those past years to water
22 users as a result of not receiving their water, whether
23 that's a relevant consideration which needs to be a part
24 of what Wyoming is alleging, those factors have to be
25 determined, I think.

1 MR. THOMPSON: So Mr. Draper, I agree with
2 you, I think, as I understood what you said, with the
3 question that those issues still remain to be resolved.
4 But again, what I think is clear is that with respect to
5 past injury is at a minimum, Montana needs to show that
6 at least some pre-1950 appropriative rights went
7 unsatisfied, and second of all, they went unsatisfied
8 because of deliveries to post-1950 appropriators or
9 ground water users in Wyoming.

10 And as to whether or not there would be any
11 additional requirements for Montana to establish
12 liability for prior years, those are questions which I
13 believe still remain to be resolved and have not been
14 explicitly decided by either the Supreme Court's
15 decision or my first interim report, although obviously
16 elements of both the opinion or the first interim report
17 might speak to or be relevant in the time at issue.

18 MR. DRAPER: Your Honor, this is John Draper.
19 I agree with what you just said.

20 MR. MICHAEL: Your Honor, Peter Michael. I
21 also agree with that. There are some issues that
22 obviously have been spoken to and fully briefed and
23 argued, and we know what those are. It was our initial
24 theory of the compact it's been taken care of and we've
25 lost. And also the issue of groundwater has been fully

1 briefed and Wyoming's lost, and we've taken our lumps
2 and not taken exception.

3 But I agree on the other issues that you've
4 mentioned, that absolutely they are for future
5 determination with respect to past violations.

6 MR. THOMPSON: Okay. Do you any of the --
7 does either North Dakota or any of the Amicus want to
8 add anything?

9 MS. VERLEGER: Nothing from North Dakota, Your
10 Honor.

11 MS. WHITEING: Your Honor, this is Jeanne
12 Whiteing for the Northern Cheyenne tribe.

13 I just want to point out that there is a group
14 of water rights that are not involved in this current
15 case that are also addressed in the compact, and that is
16 the reserved water rights of Indian tribes. And the
17 extent to which either state may have obligations
18 relating to those water rights, as I understand it, are
19 not at issue in this case, but to the extent that the
20 parties to this proceeding are expecting that there will
21 be a full resolution of how the compact works from this
22 point forward, I just want to point out that those are
23 issues that would have to be addressed at some point in
24 the future.

25 MR. THOMPSON: Thank you, Ms. Whiteing. I

1 agree with you entirely on that, and I think it's
2 important to make clear that Article 6 of the compact
3 explicitly states that nothing in the compact can be
4 construed or interpreted as adversely affecting any
5 rights to the use of waters of the Yellowstone River and
6 its tributaries held by Indian tribes and its
7 reservation.

8 So what we have been discussing so far has
9 involved only the state pre-1950 appropriative rights
10 that are addressed in Article 5(a) of the compact, and
11 that obviously any remedy with respect to Montana's Bill
12 of Complaint do not address all of the water rights to
13 the Yellowstone River. Because, as you point out again,
14 Indian water rights are not addressed by the compact,
15 and nothing in the compact should be interpreted as
16 adversely affecting it.

17 MS. WHITEING: The only thing I would add,
18 Your Honor -- this is Jeanne Whiteing -- they actually
19 are addressed insofar as they say that the compact shall
20 not be interpreted to adversely affect those rights.

21 MR. THOMPSON: That's fair. That's fair
22 enough. I stand corrected in my specific comment.

23 Any other comments on this? So what I would
24 propose doing is probably putting what we have discussed
25 down in just a very short memorandum opinion so that

1 there's no confusion whatsoever on this particular
2 point, and I will do that and circulate that within the
3 next week.

4 So hopefully that will resolve the specific
5 issue, as I said, I pose in Case Management Order No. 7,
6 and in this I will explicitly note what I think are
7 issues which are still open and will need to be resolved
8 later in this case. Okay?

9 So why don't we turn, then, to the second item
10 on the agenda, which are the two parties' initial lists
11 of issues of law and fact.

12 Why don't I start out by asking both parties
13 whether they've been able to see the other parties'
14 issues of law and fact and whether they have any
15 concerns.

16 MR. DRAPER: Your Honor, this is John Draper.
17 I frankly have not had a chance to do a close
18 comparison. There are many areas I think where they
19 overlap and will be affected by the order that you're
20 going to be vetting out and will be refined in light of
21 that other.

22 So I don't have any other comment at this
23 point other than that.

24 MR. THOMPSON: I'm just writing down initial
25 reactions.

1 MR. MICHAEL: This is Peter Michael. I
2 actually have several that I did want to mention.

3 MR. THOMPSON: I thought you might.

4 MR. MICHAEL: Page 2 of Montana's issues of
5 law -- I'm sorry. No. 17 on the question of whether
6 Wyoming has violated Article 5(a), the question of
7 whether it could be a pre-'50 call from Montana on a
8 pre-'50 water right in Wyoming, that's the way I read
9 Montana's Issue No. 17. They're referenced to Beam
10 versus Morris, for example.

11 And I think that issue is gone from the case,
12 and I think that should not be identified as an issue
13 going forward.

14 The Court on Page 6 of its Slip Opinion
15 mentioned that explicitly and, in fact, referenced
16 Montana's brief on exceptions, you know, noting that
17 Montana -- indicating that Montana conceded that point.
18 And we go all the way back to the beginning of the case
19 when Montana conceded in the very first pleading before
20 you were involved.

21 So I guess what we've got to put on the table
22 in some fashion, because I don't think we can keep
23 relitigating that. I shouldn't say "relitigating."
24 It's never been litigated. It was conceded from the
25 beginning of the case. That's No. 1.

1 Then the second one follows immediately on
2 Page 2, which is the question, Has Wyoming violated
3 Article 5(b)? And I think in our last case management
4 conference that came up. I maybe mentioned it in
5 passing, but back when we had our argument at Stanford
6 on a motion for summary judgment -- partial summary
7 judgment, there was a lot of discussion about 5(b). My
8 recollection is at this point -- and I think again it's
9 in your interim report about where we stand there, that
10 Montana -- I think everybody kind of stood down, was
11 kind of what happened there. In other words, there
12 wasn't a clear decision or -- or decision by you or
13 recommendation by you as to whether Montana had actually
14 pled a 5(b) violation.

15 I think your tendency was to say the pleading
16 was broad enough to include a 5(b) violation. And I
17 remember you questioned Mr. Draper several times on that
18 asking him if Montana intended to proceed with the 5(b)
19 violation at this point.

20 I think the United States' position on 5(b)
21 was that it was not included in the pleadings and should
22 not be something that we should be litigating in this
23 case, and Montana would have to amend its pleading,
24 which I guess is frowned upon by the Supreme Court if
25 the case has been going on for a while.

1 So I see this question coming up again. It
2 kind of stirs up all that. And I guess the question
3 then stands at this point, it's not my question, but I
4 wonder if Montana does intend at this point to proceed
5 with a 5(b) claim as well as a 5(a), because obviously
6 that will have a huge impact on discovery in case
7 management.

8 MR. DRAPER: These were issues that we listed
9 as issues that will or may need to be resolved. The
10 question of whether there's been an allocation among the
11 Article 5(a) rights in here, say, has been questioned by
12 implication at least by some of the filings in this
13 case. If what I read is correct, our understanding of
14 the case is that the allocation was that at the time of
15 the compact, and it's not subject to the point of
16 interstate litigation that we have seen across state
17 lines. But depending on how that issue is resolved, we
18 included that.

19 As to the question about Article 5(b)
20 violations, we've always strongly rejected the notion
21 that we are somehow limited to 5(a), and I think the
22 understanding the Master has set out this morning that
23 water rights under 5(a) can be abandoned. What that
24 does, if that's true, is it pushes more water into the
25 5(b) area.

1 I mean if, for instance, all the water rights
2 in a extreme area in Montana/Wyoming were abandoned on
3 both sides of the state line, we'd only be dealing with
4 5(b) water. So these are dynamically interrelated
5 sections of the compact. You cannot divorce them. We
6 have pled this and expect to raise any specific 5(b)
7 violations as discovery shows that that is appropriate.

8 The Master has noted certainly on the face of
9 our Bill of Complaint, I've said it probably enough, to
10 pursue that and not be in some kind of straight jacket
11 would say that if there's violations of 5(b), that
12 those -- that has not been pled and it's not a basis of
13 which the Court granted our motion for lead.

14 We stated it clearly in our motions, and the
15 Court granted it without exception to that -- to the
16 breadth of that pleading.

17 So I think the discussion this morning has
18 elucidated how those sections of Article 5 are
19 interrelated. And depending on what the ultimate legal
20 rulings are as to how the amount of 5(a) water that
21 continues to exist, how that can change and everything
22 else by the terms of the compact if it's not in 5(a)
23 it's in 5(b), and so water can shift between those two
24 sections, as to how it's treated under the compact
25 depending on what's found with respect to the continuing

1 existence an amount of Article 5(a) rights.

2 In sum, that's why, in part anyway, that the
3 Article 5(b) questions were included in our list of
4 possible issues.

5 MR. THOMPSON: So it sounds to me as if with
6 respect to Paragraph 17, at least at the moment there's
7 no dispute among the parties on that question. But just
8 to make clear, it does seem to me that the U.S. Supreme
9 Court in its May 2, 2011, opinion explicitly addressed
10 that particular question.

11 Mr. Michael pointed out on Page 6 in the final
12 paragraph where the Court noted that for the Court's
13 purposes Montana's pre-1950 water users are similar to
14 junior appropriators. As between the states, the
15 compact assigned the same seniority levels to all
16 pre-1950 water users in Montana and Wyoming, and I think
17 that's consistent with the first interim report,
18 consistent with the history of the -- of the compact,
19 and what the parties have agreed in the past.

20 So I do not see Paragraph 17 as one that will
21 require any additional resolution. I think the issue in
22 Paragraph 17 has been addressed.

23 With respect to Article 5(b), as I mentioned
24 at the hearing in December of 2009 that was here at
25 Stanford, I could imagine stipulations in theory with

1 Article 5 might be relevant. For example, if Wyoming
2 were to argue that Montana has some kind of an
3 intrastate remedy that it could impose -- sorry -- that
4 Montana has an intrastate remedy that it could use to
5 satisfy the needs of pre-1950 appropriators, if that
6 particular remedy were then to in some way undermine
7 Montana's rights under Article 5(b), then that wouldn't
8 seem to be a -- a viable approach to meeting the need of
9 a pre-1950 appropriative right.

10 Article 5(b) I think has also been relevant in
11 interpreting Article 5(a). So at least at the moment,
12 I'm not concerned about the mention of Article 5(b). I
13 do have concerns, though, that several of the issues of
14 law which are listed under that Subsection (c) would
15 seem to go beyond the complaints, focus on those
16 pre-1950 appropriative rights. So particular
17 Paragraphs 20 to 22, it's not clear to me how those are
18 relevant to determining the rights of those pre-1950 --
19 the rights of Montana to sufficient water to satisfy the
20 needs of those pre-1950 appropriators.

21 I want to make it very clear that this case is
22 not about water rights generally under Article 5 but
23 instead is about the rights under a prior corporation
24 doctrine in Montana that existed as of January 1, 1950.

25 And if there's any difference of opinion on

1 that, that's something that we need to have a discussion
2 with on that.

3 MR. DRAPER: Your Honor, this is John Draper.
4 I would stand by what I said at the hearing in December
5 of 2009 at Stanford. We read this action broadly enough
6 under 5 to include all violations of the compact under
7 Article 5. And if -- if the discovery in this case
8 reveals that there are obligations under 5(b) that
9 Wyoming has breached, we have pled this sufficiently to
10 pursue those breaches.

11 MR. THOMPSON: Okay. I'm trying to -- this
12 probably isn't the most appropriate place for resolving
13 this particular question, and I understand you to be
14 saying right now that you are not making the argument at
15 the moment. Is that correct?

16 MR. DRAPER: This is John Draper. Could you
17 clarify your question?

18 MR. THOMPSON: So as I understood what you
19 just said, you just said that you think the complaint is
20 broad enough that if you saw a violation of Article 5(b)
21 with respect to water rights that postdate January 1,
22 1950, you believe that the Bill of Complaint is broad
23 enough to encompass that, but you're not saying that
24 right now you are planning to necessarily make that
25 claim. Depends on what you find?

1 MR. DRAPER: That's correct, Your Honor.

2 MR. THOMPSON: But does this suggest that you
3 then intend to conduct discovery on satisfaction of
4 water rights that postdate January 1, 1950?

5 MR. DRAPER: Your Honor, this is John Draper.
6 The answer -- the short answer is yes. We're going to
7 need to investigate the post-'50 uses in Wyoming. Those
8 are the ones that on the one hand threaten a violation
9 of our Article 5(a) rights. And at the same time, it
10 follows the accounting that's necessary and done,
11 there's the potential that it will have violated a right
12 that Montana enjoys under Article 5(b).

13 I don't see it as being a separate area of
14 discovery. It's simply an area that has to be
15 investigated. And as Your Honor has pointed out
16 repeatedly, it's -- one of the key elements under 5(a)
17 is the extensive use of articles of 5(b), i.e., post
18 January 1, 1950, water in -- or rights in Wyoming and
19 what impact they have on Montana that you focused on,
20 the Article 5(a) pre-1950 uses, and they will also
21 become apparent what those impacts have been on uses
22 generally.

23 MR. MICHAEL: Your Honor, may I comment? This
24 is Peter Michael.

25 MR. THOMPSON: Yes.

1 MR. MICHAEL: I understand that your first
2 lead into this issue where you discuss the areas where
3 Montana's 5(b) rights could be relevant in terms of
4 interpretation tool or also on the proviso that if they
5 haven't satisfied their water rights with interested
6 remedies, they shouldn't have to do that if it would put
7 them unfairly behind under 5(b), and I understand that
8 completely, and I think that's totally correct.

9 The problem I face when we go on and say now
10 this case is a 5(b) case, is it doesn't just affect what
11 discovery Montana does, it affects what discovery
12 Wyoming does. Because if it was a 5(a) case, I don't
13 really care -- well, there's a possibility we may care
14 about 5(b) uses in the context you mentioned. We may
15 care whether a post-'50 water right in Montana was still
16 on when pre-'50 Montana was not getting sufficient
17 water. Again, that's in the 5(a) context. We might
18 want to find that out.

19 But we really wouldn't care about all the 5(b)
20 users on the Tongue and Powder River in Montana from
21 1950 to the present and ask Montana to tell us every
22 drop of water that was diverted because, of course, as
23 you know, 5(b) is based on quantity diverted to come up
24 with the numbers through a particular date in a water
25 year.

1 So if we're going to be looking for that kind
2 of a violation, we not only need to know what post-'50
3 rights in Wyoming were diverted in various times, we
4 also need to know what post-'50 rights were diverted in
5 Montana at various times. And, in fact, under 5(b),
6 presumably Montana could prove a violation from any day
7 from 1950 to the present, unless there's some kind of
8 laches argument or something on our behalf.

9 But in a 5(a) case, as I mentioned in our last
10 case management call, if we move forward and decide
11 whether Montana had to notify Wyoming, we may be
12 reducing this case down to a very small case on just
13 several years where Montana did notify Wyoming, for
14 example, 2004 and 2006.

15 But if it's a 5(b) case, it's wide open for an
16 enormous amount of discovery, if it's a direct 5(b)
17 case. And we're not just worried about 5(b) case as a
18 tangent to the 5(a) issue. So that's vital to have this
19 resolved. I don't see any way around it.

20 MR. THOMPSON: I agree entirely that I think
21 it needs to be resolved before we move into discovery.
22 And let me use that into a segue into what I identified
23 as the third item on the agenda, which is identification
24 of any other legal issues that could be resolved at this
25 stage that could expedite or focus discovery or

1 otherwise expedite the resolution of the case.

2 MR. DRAPER: This is John Draper, Your Honor.
3 If I may, since we are leaving that 5(b) discussion,
4 point out that nothing I heard Mr. Michael say expanded
5 the investigation of 5(b) uses beyond what is going to
6 happen at B in any event. There's no extra 5(b)
7 discovery that needs to be done. It will all be sorted
8 out. There's allegations -- or the possibility has been
9 suggested, well, Montana has let post-'50 users use the
10 water, and that's why the pre-1950 users were not
11 getting the water.

12 So that all requires post January 1, 1950,
13 uses to be quantified and determines whether they're
14 interfering in either state with pre-1950 users.

15 So I don't see any additional discovery here
16 at all. I just wanted to mention that for the record.
17 Thank you.

18 MR. THOMPSON: Thank you. So let me again
19 turn to the third question, which was identification of
20 other legal issues.

21 MR. MICHAEL: This is Peter Michael. The one
22 that I've already mentioned, obviously last week or when
23 we had our last case management conference a couple
24 weeks ago, was this issue of notification or call. I do
25 think that is one.

1 I think many of the other issues, no. The
2 ones you've identified at the beginning of this
3 conference, I think most of those are going to -- we'll
4 just discover those and move forward in the normal
5 course of events.

6 But I think this call issue really has the
7 potential to really trim this case down and really save
8 a lot of resources. The reason, again, is what I just
9 said. If it is required as a matter of law for Montana
10 to have notified Wyoming sometime between 1950 and 2011
11 as far as the past violation as a condition of that --
12 of their claim that they had to give some notification
13 to Wyoming, I think that's a really important issue.
14 Because if it's -- if it's decided there was a
15 notification requirement and then it turns out that
16 Montana didn't do so and, in fact, I'll just reference
17 the Court.

18 In our argument back in Denver in early 2009
19 on the motion to dismiss, I notice when I was looking
20 through that transcript, Montana's attorney Sarah Vaughn
21 mentioned in response to specific questions from you
22 when or if Montana made a call, she mentioned 2004.

23 I don't think she mentioned 2006. But I'm not
24 aware of any other year. So boy, could that trim this
25 case down if that issue is decided and save the parties

1 enormous amount of discovery. And that was the point I
2 was making a minute ago about the 5(b) argument.

3 If the 5(b) argument is related -- is linked
4 to the 5(a) argument, then the 5(b) argument would only
5 apply in -- we'd only look at post-'50 uses in the years
6 when Montana made a call, which would be 2004 and 2006,
7 to my awareness.

8 And if that were the case, then we really
9 wouldn't be looking at a massive amount of discovery on
10 5(b) diversions. We'd only be looking at two years.
11 That's the one I really think needs serious
12 consideration as a preliminary issue to save the parties
13 a lot of time and maybe move this case along a lot
14 faster, ultimately a lot faster. It would slow it down
15 in the short term but faster in the long term.

16 MR. THOMPSON: Assuming it's resolved in your
17 favor, right?

18 MR. MICHAEL: Assuming it was, right. If it
19 wasn't, you know, it wouldn't have had much impact.

20 MR. THOMPSON: Mr. Draper?

21 MR. DRAPER: I don't disagree that if -- if
22 it's a possibility that a call had to be made that we
23 need to resolve that initially because that will -- if
24 it were determined that Montana has no rights here
25 unless it makes a contemporaneous call, that would limit

1 the past claim for past violations considerably.

2 MR. THOMPSON: So in addition to the thoughts
3 of Mr. Draper and Mr. Michael, any thoughts from any of
4 the Amicus or from North Dakota?

5 MR. WINGMORE: Your Honor, this is
6 Michael Wingmore on behalf of Anadarko. The one issue
7 that I think could also help to narrow the scope of
8 discovery is it was pointed out in both Wyoming and
9 Montana's statement of issues that there are remaining
10 and legal factual issues relating to groundwater. And
11 as Mr. Michael had noted, I think the Special Master has
12 determined that some groundwaters may be covered by the
13 compact. It is not -- the compact is not limited solely
14 to surface water diversion.

15 Given that groundwater is likely to continue
16 to be a significant issue in this case, the way we see
17 it is that there -- it may be beneficial for the Special
18 Master to initially rule on which of the groundwaters
19 may implicate Montana's compact rights because then the
20 discovery can be limited to those types of groundwaters.

21 For example, if, you know, just looking at
22 opposite ends of the spectrum, you know, if the Special
23 Master rules that only alluvial groundwaters are
24 covered, that takes out a lot of issues with respect to
25 not alluvial ground waters. While, on the other hand,

1 if all Montana would have to show some hydrological
2 connection, that certainly covers a much greater extent
3 of the Yellowstone River Basin.

4 So I think it may be beneficial to initially
5 resolve from a legal standpoint which groundwaters may
6 be covered by the compact because then the factual
7 issues of what groundwaters, in fact, satisfy that
8 threshold are the only ones that are relevant to the
9 case.

10 MR. THOMPSON: Thank you, Mr. Wingmore.

11 Anyone else? Okay.

12 So my initial thoughts would be that it
13 certainly at this stage would be valuable to resolve at
14 least two of those questions at the outset. One is the
15 question that you raised, Mr. Michael, with respect to
16 whether or not to establish a prior violation of the
17 compact it would have been incumbent upon Montana to
18 have issued a call against Wyoming.

19 I think that is an issue that could be
20 resolved without any type of -- of factual discovery, at
21 least it sounds like it from both you and Mr. Draper's
22 comments, and that that could potentially help in
23 focusing and narrowing discovery.

24 The second issue that I'm inclined to try to
25 resolve at this stage is the extent of claims that

1 Montana could make under Article 5(b). As I mentioned a
2 moment ago, and I understand, Mr. Michael, you don't
3 have any objection, that certainly there could be issues
4 of Article 5(b) which are relevant in understanding what
5 Wyoming's obligations are with respect to pre-1950
6 appropriators, but then there's the additional question
7 as to whether or not under Montana's Bill of Complaint
8 it also can raise issues with respect to water rights in
9 Montana other than pre-1950 appropriative rights under
10 Article 5(b).

11 And I think it's important that we resolve
12 that question now so that both for purposes of discovery
13 and for purposes of both parties preparing ultimately
14 for trial that that particular condition be resolved.

15 With respect to Mr. Wingmore's suggestion that
16 we try to resolve the groundwater question at the
17 outset, the concern I have there is the same concern
18 that I had in initially addressing Wyoming's motion to
19 dismiss, and in my first interim report, that I find it
20 hard to address that request without some factual
21 investigation and background. I mean it's a difficult
22 question to address purely on the law and in the
23 abstract, but I would be interested in the thoughts of
24 both Mr. Michael and Mr. Draper on that particular
25 question as well as North Dakota and the other Amicus.

1 So why don't I just go down and get the
2 thoughts of counsel on what I've just suggested which
3 is, you know, that we try to resolve at the outset the
4 extent of the Article 5(b) questions and the question
5 about whether or not Montana has to notify Wyoming that
6 pre-1950 prior appropriators were not receiving the
7 water to which Montana believes they were entitled.

8 Second of all, as I said, I would be
9 interested in people's thoughts as to whether or not
10 it's feasible to address the groundwater issue prior to
11 at least some discovery on that issue.

12 So why don't I start out with you, Mr. Draper.

13 MR. DRAPER: Thank you, Your Honor. That's --
14 that approach sounds fine to us, to treat the two issues
15 you specified now in terms of briefing, and to wait
16 until we know more about the facts relating to the
17 groundwater before trying to resolve that issue.

18 MR. THOMPSON: Mr. Michael?

19 MR. MICHAEL: Yes, Your Honor. Peter Michael.

20 I tend to agree, I guess, with what Mr. Draper
21 said. I think the groundwater is the chicken and the
22 egg problem. And to not have any facts on the table, I
23 understand how valuable it would be to move on that, but
24 I think you've got to have some facts. I guess I
25 disagree with Mr. Wingmore on that.

1 On the other two, though, I think you've got
2 it just right, and I agree with that.

3 MR. THOMPSON: North Dakota?

4 MS. VERLEGER: I agree with everything that's
5 said.

6 MR. THOMPSON: Many of the Amicus, and I
7 understand, Mr. Wingmore, you know, why you would like
8 to resolve the groundwater issue at the outset. If we
9 could, then you would no longer need to participate in
10 status conference calls or otherwise think about the
11 case if the groundwater issue were resolved in a way
12 that's favorable to you. But having thought about this
13 extensively in connection with my memorandum opinion on
14 the motion to dismiss and then again in putting together
15 the first interim report, I'm pretty firm that it's
16 difficult to address that question without at least some
17 factual background.

18 MR. WINGMORE: This is Michael Wingmore.

19 We appreciate that, Your Honor. We understand
20 it is a very complex issue. That would be fine with us.
21 I think at some point we may seek to try and have that
22 issue resolved once there is some factual development
23 along those lines.

24 MR. THOMPSON: Okay. Either Northern Cheyenne
25 Tribe or United States?

1 MS. WHITEING: This is Jeanne Whiteing. We
2 don't have any additional issues to suggest, other than
3 what has been laid out here.

4 MR. JAY: This is William Jay. We don't have
5 anything further to add at this point to what Your Honor
6 and the parties have already.

7 MR. THOMPSON: Okay. So in a moment, I want
8 to come back, then, and talk about how we might brief
9 both of the two questions that, as I suggested, I think
10 we need to resolve at this point, both the Article 5(b)
11 question and then the notification question.

12 But before that, let me just go on to proposed
13 case management plan. So I've reviewed that, and one of
14 my concerns under it is the amount of time that it
15 contemplates for the -- of discovery on this first phase
16 of the case which, as I understand it, would be one year
17 after the date for the initial disclosures under
18 Paragraph 8B(1), and then it looks like possibly
19 something in the nature of six months or more after that
20 for expert witnesses.

21 And the need to resolve these two issues
22 before at least some of the discovery is conducted could
23 delay this even -- even further, although I know
24 resolution of it could shorten the amount of time
25 needed.

1 So I can tell you right now that what I want
2 to do is try to shorten the amount of time that the
3 proposed order provides for discovery. And in
4 connection with that, I want to try to resolve these two
5 issues as quickly as possible, and it sounds to me,
6 particularly given the issue with respect to
7 notification by Montana, that it might be difficult to
8 even begin discovery to initially have those disclosures
9 and begin discovery until that issue is resolved.

10 Let me rephrase that as a question, which
11 is -- and this is to Mr. Draper and Mr. Michael: Do you
12 see discovery beginning? And that would include the
13 disclosures under Paragraph 8B(1) before we can resolve
14 those first two questions?

15 MR. DRAPER: Your Honor, this is John Draper.

16 First, I'd like to clarify that the time frame
17 that the parties have agreed here to suggest to you,
18 that time period, the deadline set there is for
19 producing not only expert reports but also other
20 exhibits and witnesses. So it's the whole -- it's
21 everything. They are not just some partial disclosure
22 at the end of that period of preparation of expert
23 reports and so on.

24 So that contemplation of the parties as we
25 proposed this to you is that time frame that we sit

1 there as one year would include all of that, preparation
2 of exhibits other than expert, of course, identifying
3 all the witnesses.

4 So to your specific question, I think it -- it
5 would be most efficient to resolve those two issues that
6 you've mentioned first, and that would make sure we
7 didn't get off into areas of discovery and disputes over
8 that. That would be unnecessary if we were to know your
9 rulings on these issues.

10 Perhaps something could be formulated to
11 handle resolution of those issues, and maybe in
12 conjunction with that, maybe shave some time off of the
13 periods that we have jointly proposed.

14 MR. THOMPSON: Okay. So let me see. Let me
15 start out with understanding the proposed case
16 management plan. So then the expert -- so as I
17 understood this, you had the initial disclosures that
18 are set out in Section 5(b)(1). After that, you would
19 have the discovery take place, and then I understood
20 Section 7A, the disclosure of the expert reports would
21 begin one year after the initial disclosure under
22 Section 5(b)(1).

23 And then there's a fair amount of time built
24 in for objections to the adequacy of Montana's expert
25 witness disclosures and in Wyoming's expert witness

1 disclosures and then any rebuttal experts. And so it
2 looked to me as if when you added everything up, by the
3 time you were able to finish discovery and have all of
4 the expert reports provided that it would be not one
5 year, but probably over a year and a half. Am I wrong
6 in my understanding?

7 MR. DRAPER: Your Honor, this is John Draper.
8 That's essentially correct, the one-year deadline is for
9 Montana to provide all of this, expert reports,
10 witnesses to Wyoming, and Wyoming would be then put on a
11 schedule to do its responsive reports and interview
12 witnesses.

13 MR. THOMPSON: Then after that, Montana
14 would -- there would be a date set for Montana, then, to
15 provide rebuttal testimony.

16 MR. DRAPER: That's correct. This is John
17 Draper again.

18 MR. THOMPSON: So as I said, that's what
19 concerned me, is when I added everything up, I began to
20 see us out in 2013, and I know these cases take a long
21 time to resolve, but I'm hoping to move this along a
22 little faster than that.

23 So let me, Mr. Michael, ask you, do you agree
24 with Mr. Draper that we really should hold off on the
25 initial disclosures in the beginning of discovery until

1 we resolve these two issues?

2 MR. MICHAEL: Yes, I agree with that, Your
3 Honor, but I would also agree, and maybe he also said
4 this, is that Montana initially, you know, thought that
5 about a year for it to do its discovery and get its
6 experts in order, and that all depends on the scope of
7 the case, of course. And now with your decision today,
8 discussion of state line delivery thing, that we maybe
9 have trimmed it already. And then with the other two
10 issues that we're going to be trying to get rid of,
11 clear out the underbrush here shortly, seems to me that
12 maximum flexibility would be in order and, in fact, this
13 management order should not commit to the initial time
14 period.

15 I understand why Montana wanted that, and I
16 was amenable to that. But I think probably imposing
17 flexibility again on that makes sense given your other
18 rulings today. And we get back together after we decide
19 what the scope of the case is and decide how much -- and
20 Montana can ask. They will have a better position to
21 say how much time they think they need for their case.

22 We had always taken the position, and Montana
23 had agreed with us, that we would leave flexibility open
24 for the responsive experts so that if we looked at
25 Montana's expert reports and we decided that they were

1 fine, that we weren't going to hire our own experts, we
2 could move things very quickly, but if we needed to hire
3 experts and respond, we wanted to have the chance to ask
4 you for the amount of time we thought we needed, but we
5 didn't want to commit to that. We wanted to maintain
6 flexibility, and Montana agreed with that.

7 So I would impose more flexibility here and
8 leave -- you know, leave the first time frame open until
9 we get these several issues resolved.

10 MR. THOMPSON: Let me just ask a couple
11 questions regarding the case management plan. So the
12 first is -- and in my jet lag condition, I might simply
13 have missed it -- is there a date for the disclosures
14 required under Article 8(b)(1)? I didn't see any time
15 requirement on that.

16 MR. DRAPER: Your Honor, this is John Draper.
17 In Page 8 of my printout, there's a submission of
18 substantive discovery, subheading Written Discovery and
19 under that Initial Disclosures.

20 MR. THOMPSON: Okay. No later than 90 days.
21 Yes. Okay. Thank you.

22 And then also in Paragraph 8 -- so going to
23 the -- to the 8(c)(3), and this is in -- so this is the
24 section on Expert Reports. I just want to clarify in
25 Section (3)(a), last sentence says, "On or before the

1 date certain 45 days following the prior date certain."
2 So I assume that prior date certain as you contemplated
3 it was one year after the initial disclosure under
4 Section 5 -- under Section 8(b)(1). Is that correct?

5 MR. DRAPER: Your Honor, this is Mr. Draper.
6 I'd have to take a closer look at that. I'm not quite
7 sure how to interpret that, quite frankly.

8 MR. THOMPSON: I think what you were
9 suggesting here was that Montana would provide its
10 disclosure of expert testimony, and that under Section
11 (7)(a) requires that it be one year after the initial
12 disclosures, and then within 45 days, Wyoming would need
13 to file its objections if they needed the advocacy of
14 Montana's expert witness disclosures.

15 MR. DRAPER: Yes, I think that's correct, Your
16 Honor. This is John Draper again.

17 MR. THOMPSON: Okay. So let's turn back,
18 then, to the dates for a hearing on those initial two
19 legal questions. Again, the section -- I'm sorry -- the
20 Article 5(b) and then the notification, those two
21 questions.

22 I remember everybody's about to leave on
23 vacation. So why don't we start out by asking what
24 people's vacation schedules are. Mr. Draper?

25 MR. DRAPER: Your Honor, as I mentioned in an

1 earlier filing, I'm here next week, but I'll be leaving
2 the country at the end of the week. I get back on the
3 25th. So any consideration that can be given would be
4 much appreciated.

5 MR. THOMPSON: And Mr. Michael?

6 MR. MICHAEL: I'm leaving tomorrow for just
7 one week, Your Honor. So nothing significant. I don't
8 have any other plans after that.

9 MR. THOMPSON: Okay. And if I remember
10 correctly, also, we have -- the next telephonic status
11 conference is set for September 29th. And let me also
12 ask the parties, you know, I think these are important
13 enough issues that I'm certainly willing to have a
14 hearing in Denver on the question; or if the parties are
15 willing, we can do it by telephone. I will ask whether
16 either of you would like a formal, in-person hearing on
17 this.

18 MR. DRAPER: Your Honor, this is John Draper.
19 I think an in-person hearing would be appropriate. And
20 either Denver, or if it's more convenient, we're
21 certainly happy to come to Stanford.

22 MR. THOMPSON: Mr. Michael?

23 MR. MICHAEL: Your Honor, I have no
24 preference. I think the telephone hearing, given the
25 fact they're all legal issues, would be adequate but no

1 strong preference.

2 MR. THOMPSON: Okay. Let me, only because I
3 actually -- although I find these would be quite
4 valuable and today's, I think, has worked quite well. I
5 actually do think that a formal in-person hearing would
6 be in order on these initial questions. Because as you
7 pointed out, Mr. Michael, they would and they could
8 significantly narrow the case. I think both of them
9 raise some fundamental issues.

10 So what I would propose is that I have
11 Susan Carter phone around and see whether or not we can
12 find a date and a location somewhere in the vicinity of
13 when the next telephonic status conference was
14 originally scheduled for, September 29, in order to hear
15 these two questions and then set out a briefing schedule
16 consistent with that.

17 If for some reason it turns out it's going to
18 be difficult to find a date when we can actually all get
19 together in person, then we can move forward with a
20 telephonic hearing. And what I will also do prior to
21 the date of either the in-person hearing or the
22 telephonic status conference is -- what I will do, based
23 on the proposed case management plan the parties have
24 furnished to me, is to make a couple of additions, for
25 example, one of the things that I want to do is to

1 provide for regular -- I'm sorry -- to provide for
2 regular status reports and conferences during the period
3 of discovery. I will probably also try my own hand at
4 some proposed deadlines for various aspects of
5 discovery. And then at the end of the hearing that we
6 have either the end of September or the beginning of
7 October, you can give me any comments on that, and we
8 can see whether or not we can finalize that case
9 management plan and proceed immediately to the
10 disclosures and then to discovery.

11 Does that all sound satisfactory to people?

12 MR. DRAPER: This is John Draper. Yes, it
13 does, Your Honor.

14 MR. MICHAEL: This is Peter Michael. I do
15 have one comment when you're ready to take it about the
16 case management plan. There's one provision I wanted
17 you to be aware of.

18 MR. THOMPSON: Go ahead.

19 MR. MICHAEL: On Page 19, the next to the last
20 clause, Mr. Draper, when he printed this out, put a
21 bracket around "completion of pleadings." We discussed
22 it earlier this week, and then after our discussion, it
23 occurred to me that Wyoming really couldn't certify that
24 we weren't contemplating the possibility of amending a
25 pleading.

1 And the reason I say that is, given the
2 changes -- or the various rulings that have come down
3 the case, somewhere around in the future I think we may
4 want to add an affirmative defense of futile call,
5 because I think that's probably an affirmative defense
6 in the case. I haven't done my research on it. So I
7 didn't want that to be inaccurate and say that we had
8 not contemplated the possibility of an amendment. We
9 may be wanting to do that.

10 I sent an email to Mr. Draper on that one. I
11 think that's why he has a bracket around that
12 "completion of pleading" section. So I guess I would
13 suggest that we probably just remove it.

14 MR. DRAPER: Your Honor, this is John Draper.
15 Yes. We had a provision in there that's been in our
16 form that we were discussing starting in latter part of
17 May, and the afternoon before we had to submit it, Mr.
18 Michael did notify me that he wanted to pursue it along
19 the lines he just mentioned, so I just put brackets on
20 it to indicate that there was a question raised about
21 that.

22 It's normal in my experience in the
23 proceedings to complete the pleadings on a definite
24 schedule, and I had thought we were complete, but
25 if there is some respect in which Mr. Michael -- which

1 is the amended pleadings, I think we should do that in a
2 timely fashion so we know what we're up against. And we
3 need to keep in mind, also, that your rulings might
4 affect the posture of the parties. At this point we're
5 not aware of any.

6 MR. THOMPSON: So I think what I would be
7 inclined to do there is what you suggested, Mr. Draper,
8 to provide probably a deadline by which -- to ask the
9 parties if they are planning to amend any of the
10 pleadings, to do so.

11 So with that, then, again, what I'm proposing
12 is we'll set a date for either a hearing or if it's --
13 you know, if that just doesn't work out, or it's going
14 to be too long, then we'll do it by telephone. And then
15 in addition to that, I will, as I say, upon my hand, the
16 modifications of the case management plan including I
17 will grab something to replace Article XI of that plan.

18 I do not, by the way, just to emphasize,
19 expect to do anything significant other than, as I say,
20 provide for regular status reports and conferences and
21 to try modifying the timing in order to try to get
22 discovery completed and the case on to trial, at least
23 the first phase, as on a slightly more expedited basis,
24 other than I don't expect to modify anything other than,
25 I guess, now Article XI. But I'll circulate that ahead

1 of time for people's comments.

2 So any other thoughts at this point regarding
3 either the hearing or the case management plan?

4 MS. VERLEGER: Your Honor, this is Jen
5 Verleger from North Dakota. I just wanted to clarify,
6 and maybe it got lost in the transition between Mr.
7 Sattler and myself, but I had something on my calendar
8 for August 24th, another conference call. Is that off
9 the table at this point?

10 MR. THOMPSON: Yes, it is. I believe it was
11 Mr. Draper submitted a request to modify the original
12 version of Case Management Order No. 6. If I remember
13 correctly, Mr. Draper also had a conflict. And so as a
14 result, I eliminated the August status conference.

15 So at the moment, there is no status
16 conference scheduled other than that one on September
17 29th, and I would ask the -- that all the parties keep
18 that on their calendar for the moment so that if we
19 can't find the date for an in-person hearing, we will go
20 forward with a hearing on the two issues on September
21 29th.

22 MS. VERLEGER: Thank you.

23 MR. THOMPSON: Any other comments? Okay. Any
24 other issues that anyone wants to raise?

25 Then if not, here are the various things that

1 will happen at this stage. So Susan Carter will be in
2 touch with people to see whether or not we can find a
3 date, have an in-person hearing either in Denver or at
4 Stanford in the late September/early October time frame.
5 If we can't find a time, then we will hold the
6 telephonic status conference at the time for which it's
7 currently set, which is 10 a.m. to noon on September
8 29th, 2011. So everyone should keep that on their
9 calendar.

10 If we can find a date for an in-person
11 hearing, however, we will cancel that telephonic status
12 conference at that point and simply have a status
13 conference at the end of the hearing.

14 I will issue a memorandum opinion which
15 summarizes my holdings from the first part of this
16 status conference with respect to the issue which I have
17 raised in the last case management order. I will also,
18 once we have a date for the hearing, issue a new case
19 management order that specifically sets out two
20 questions for resolution at that hearing as well as a
21 briefing schedule for those issues.

22 I will also at the same time issue a proposed
23 case management plan based on the proposed case
24 management plan of the parties but modified, as I
25 suggested earlier.

1 County of San Diego,)
2 State of California.)
3

4 I, Linda K. Pool, Certified Shorthand Reporter
5 No. 8941, State of California, do hereby certify:

6 That said proceedings were taken at the time
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11 And I further certify that I am a
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16 The dismantling, unsealing, or unbinding of
17 the original transcript will render the reporter's
18 certificate null and void.

19 IN WITNESS WHEREOF, I have hereunto set my
20 hand this 11th day of August 2011.

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Linda K. Pool, CSR No. 8941, CCRR