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BEFORE SPECIAL MASTER BARTON H. THOMPSON, JR.

HEARING RE: MONTANA'S RIGHT TO V(B) CLAIMS

September 30, 2011

IN THE MATTER OF

MONTANA

VS.

WYOMING AND NORTH DAKOTA

NO. 220137 ORG

The above-entitled matter came on for hearing on September 30, 2011, at 9:47 AM at the Byron White US Courthouse, 1823 Stout Street, Denver, Colorado, before Martha Loomis, Certified Shorthand reporter and Colorado Notary Public, Court Reporting Office of Agren Blando Court Reporting & Video, Inc, 216 - 16th Street, Denver, Colorado 80202.

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1 P R O C E E D I N G S

2 SPECIAL MASTER THOMPSON: Let us turn then to the
3 second issue for today. And that's a hearing on Montana's right
4 to raise Article V(B) claims.

5 And so in this case we will start with Montana. So
6 Mr. Draper, I assume you'll be arguing this one.

7 MR. DRAPER: I will. Thank you, Your Honor.

8 SPECIAL MASTER THOMPSON: Let me again, I'm going to
9 start out and interrupt you again. I've read the briefs.

10 So let me try and give you some sense for where I am
11 right now with respect to this particular issue. So I want to
12 separate out really two things which is, first of all, the
13 question of making arguments under Article V(A) on the one hand
14 and Article V(B) on the other.

15 The second issue are claims with respect to water that
16 was not received by pre 1950 appropriators in Montana on one
17 hand, and any claims that post 1950 appropriators in Montana
18 might have.

19 Without making any type of decision at this point I'm
20 more comfortable with the notion that in addressing the rights
21 of pre 1950 appropriators in Montana that they can invoke both
22 Article V(A) and V(B) because, as we've discussed already,
23 Articles V(A) and V(B) are difficult to totally segregate out
24 when we're talking about those pre 1950 appropriators.

25 I'm more comfortable with that than what I think

1 Montana is also arguing, which is that it has the right to also
2 conduct discovery and pursue claims with respect to post 1950
3 appropriators in Montana under any section of Article V,
4 although obviously Article V(A) wouldn't be relevant to that
5 because it didn't directly address those post 1950
6 appropriators.

7 So in other words, the thing that I am more interested
8 in with regard to an Article V(A) versus an Article V(B) issue
9 is claims with respect to the pre 1950 appropriators, which I
10 think you set out quite clearly in your Complaint, and any
11 causes of action with respect to the post 1950 appropriators,
12 which I will, just for argument's sake at the moment, suggest is
13 more opaque in Montana's Complaint.

14 Part of my concern here is that in the case of the
15 pre 1950 appropriators there's clearly been a set of arguments
16 that Montana has made over past years before the commission and
17 elsewhere, so this is a suit that has been developing over time.
18 It was quite clear in all the various papers to date what the
19 nature of that particular dispute is, and therefore it's fairly
20 clear what the discovery is.

21 When you move over to the post 1950 appropriators,
22 though, there really hasn't been any development of any issues
23 with respect to them at the moment.

24 So one could argue that it looks like what Montana
25 really wants to do is a little bit of the veritable fishing

1 expedition to conduct discovery, see whether or not there's any
2 problem with respect to the post 1950 rights of Montana, and
3 then figure out what the cause of action is.

4 So that's just background so you have a kind of sense
5 of what I see as the key issues -- and I could be totally wrong
6 about that -- and what my concerns are.

7 So now, let me ask you to turn to, or let me ask you
8 to stop there for a moment and just ask, am I correct in
9 understanding that what Montana would like to be able to do as
10 part of its discovery, and what discovery shows in any
11 dispositive motion in this case, is to raise claims on behalf of
12 not its pre 1950 appropriators but its post 1950 appropriators?

13 MR. DRAPER: Your Honor, the way you phrased the last
14 question, I need to respond to that. And that is, this is a
15 compact between states, not between individuals.

16 The states of Montana and Wyoming have their
17 respective allocations. They're set out in Article V. They're
18 set out in a couple of several different ways. There's the
19 Article V allocations of each state and then the Article V(B)
20 allocation as to each state. Those are different parts of the
21 same thing. Each state has its own allocation.

22 The states are signatories to the Compact, not any
23 individual water users or water users association or anything
24 like that.

25 SPECIAL MASTER THOMPSON: So I understand, and you've

1 really made this quite clear from the very beginning, that
2 Montana's view of this is about the rights of the states and,
3 you know, is a compact between states, not a compact between the
4 individual appropriator. So let me rephrase in case I was
5 unclear.

6 So Montana's clearly making an argument with respect
7 to the rights under Article V(A) and V(B) that deal with the
8 allocation of water which it is entitled to under the Compact in
9 order to be able to meet the needs of the pre 1950
10 appropriators.

11 In other words, one allocation made under Article V(A)
12 is in order to ensure that pre 1950 rights continued to be
13 enjoyed. There's that allocation.

14 But there's also another allocation, which is a
15 fraction of the remaining waters. And those particular rights
16 are rights that Montana can then use for post 1950
17 appropriators.

18 So is it Montana's desire in terms of its discovery
19 and ability to pursue claims in the future, are you arguing that
20 the Complaint includes not only the first allocation of water,
21 which is that allocation under Article V(A), but also the
22 percentage allocation under Article V(B)?

23 And that what you want to be able to do is to conduct
24 discovery on whether or not Montana has received from Wyoming
25 the allocation of water which is a fraction of the remaining

1 water after Article V(A) is met?

2 MR. DRAPER: We don't see them as separate
3 allocations; we see them as a unified allocation but different
4 aspects. But I think that may be more semantics than anything
5 else.

6 SPECIAL MASTER THOMPSON: Express it any way. Just
7 explain for me what you want to do under Article V(B).

8 MR. DRAPER: Under Article V(B) those are the post
9 January 1, 1950 rights in both states. And they can be
10 exercised, and we specified in the Complaint that there are
11 three types of actions at that point that we're pursuing.

12 The three actions that we specified that we believe
13 are causing a violation of Article V(A) are the increased
14 storage, the increased groundwater pumping and coalbed methane
15 operations, and did I mention increased acreage?

16 SPECIAL MASTER THOMPSON: Yes.

17 MR. DRAPER: Anyway, those three. And we believe
18 those are violating our rights under Article V. And we don't
19 believe there's any need to parse out between the Article V part
20 of the same allocation or Article V(B) entitlements.

21 We said literally, and this in the Complaint that I
22 think Your Honor recognizes, is Article V, those are our claims,
23 Article V. We have not sought to parse those out.

24 Wyoming would like to parse those out. They'd like to
25 go in there and, Let's see if we can cut off part of this suit

1 to begin with.

2 The assumption is that there's going to be a lot more
3 discovery. That's absolutely wrong. It's the same operation.
4 Reservoirs, increased storage, increased operations, it's the
5 same. Well pumping. It's the same. Increased acreage. Those
6 are, those are alleged to be causing violations of the Compact
7 under Article V without parsing them out.

8 And for some reason Wyoming, now that things have been
9 straightened out by yourself and by the Court, wants to say,
10 Well, he must read this reference to Article V to be only V(A).
11 And that's something that's totally contrary to, at least in the
12 district courts, what you look to to decide the scope of the
13 claim. You look to the Complaint.

14 Now, the argument here is that now, in the additional
15 procedure we go through in the original cases, we're going to
16 find a way to narrow that standard that's applied to the
17 district courts. We're going to have a narrower standard.

18 We have a way of limiting claims in the original
19 jurisdiction that you can't exercise in district courts because
20 the parties seeking to file has to file a motion and brief.

21 And if we can find some, at best, implication that the
22 Complaint is not as broad as it says it is, we can ask the Court
23 to come back, or the Special Master in this case, and limit the
24 complaint, something you couldn't have at district court.

25 It flies in the face of the Supreme Court's rulings

1 over the years that the rules need to be exercised in a way that
2 makes sure that all the facts are developed and all the claims
3 are determined for the states to go forward with resolution of
4 disputes.

5 SPECIAL MASTER THOMPSON: I just have to be absolutely
6 clear on this. I'm still a little unclear.

7 If you take Article V, if Article V(A) which the
8 Supreme Court has held and I also provided in the first interim
9 report that provides an allocation of water to Montana, okay?

10 So if you just look at Article V, does that
11 Article V(B), as I mentioned in the first interim report,
12 support that? Because Article V(B) talks about the unused and
13 unappropriated waters of the interstate tributary.

14 So there's an Article V(A) portion. And Article V(B)
15 seems to take what's left after you validate Article V(A) and
16 says, Okay, this is for first, supplemental rights, and second
17 of all, for various new rights.

18 As I understand what Montana wants to do is to be able
19 to conduct discovery and make claims not only with respect to
20 what in the first interim report I was talking about as the
21 allocation of water that would go to Montana in order to be able
22 to continue to enjoy pre 1950 rights, but in addition to that
23 maybe also make claims and certainly conduct discovery on
24 whether or not the unused and unappropriated waters of the
25 interstate tributaries, which Article V(B) addresses, that maybe

1 Montana has not been getting all of the percentage of the unused
2 and unappropriated waters that it's entitled to.

3 Is that right?

4 MR. DRAPER: Yes.

5 SPECIAL MASTER THOMPSON: Thanks.

6 MR. DRAPER: And I would point out as I give that
7 answer that, as became clear in the discussion on the previous
8 motion, that dividing line between the V(A) allocations and the
9 V(B) allocation has not been determined yet; it's hoped that
10 will be determined in this case. Those are good determinates.

11 And if water is thought to be due under V(A) but it
12 turns out the V(A) allocation is a little bit lower than what
13 you thought, then that amount -- let's say it was a hundred acre
14 feet in question. Now it's in the V(B) category and that has to
15 be split 60 -40 if you're on the Tongue River. It's subject to
16 that allocation.

17 And to try to squeeze down the general wording in our
18 Complaint so that if you get to that hundred acre feet then
19 Montana says, Well, you didn't make claim for that. You don't
20 even calculate whether you guys are sixty acre feet out of the
21 hundred because that's beyond the scope of your Complaint, I
22 would submit it is not.

23 SPECIAL MASTER THOMPSON: So let me just ask you from a
24 factual standpoint is there any reason to believe there's a
25 disagreement between Montana and Wyoming, once the allocation of

1 Article V(A) has been determined, as to how Article V(B) will
2 then be applied?

3 MR. DRAPER: As Justice Frankfurter once said, All
4 avoidance of dispute is beyond human capability.

5 So I would not be sure that I could answer yes on
6 that.

7 SPECIAL MASTER THOMPSON: Has there been any
8 disagreement, to your knowledge, between states on that
9 question?

10 MR. DRAPER: Your Honor, we have complained that we
11 have not been getting our water. As you may know, the Tongue
12 River reservoir, which is just below the state line, has a
13 pre January 1, 1950 and post January 1, 1950 aspect to its
14 storage. We've had trouble some years filling that right as an
15 example.

16 We've complained about it. Have we ever gotten a drop
17 of water in response to those complaints? No.

18 To that extent yes, there's an ongoing dispute about
19 when we're getting our water out of this Complaint. And Wyoming
20 should not be allowed to parse this down and say, It's only a
21 V(A) allocation; even though they credit all of Article V
22 somehow they're going to put a clamp on the scope of this case
23 that you could not do in district court.

24 SPECIAL MASTER THOMPSON: So let me turn to a legal
25 stand here for a moment.

1 So as I see where this stands at the moment, Montana
2 filed for leave to file a Complaint before the Supreme Court,
3 and the Supreme Court granted Montana leave to file this
4 particular complaint. So from a purely legal standpoint, the
5 issue at this stage needs to be what is within this Complaint.

6 What's the standard that I should use in looking at
7 the Complaint and determining what's actually in the Complaint
8 and what's not?

9 MR. DRAPER: As Your Honor indicates, the first
10 primary place to look is the Complaint. Does it include V(B) or
11 not?

12 And in answering that question that the Court posed in
13 the Nebraska v Wyoming case in 1993 was Article V(B) within the
14 fair contemplation of the Court when it granted the motion.

15 SPECIAL MASTER THOMPSON: So let me stop there. So
16 Nebraska versus Wyoming could be quite relevant here.

17 If I look at the 1995 Supreme Court decision in the
18 Nebraska versus Wyoming case, and this is language that appears
19 to be on page 8. I'm going to quote here.

20 That, quote, the proposed pleading amendments must be
21 scrutinized closely in the first instance to see whether
22 they will take the litigation beyond what we reasonably
23 anticipated when we granted leave to file the initial
24 pleadings.

25 I'm just wondering, and that's one particular, one

1 possible standard, you know. Do I look at the pleadings and ask
2 what the Court reasonably anticipated, looking at the pleadings,
3 was going to be the nature of the case at the time it granted
4 leave to file the Complaint?

5 MR. DRAPER: As a general matter, yes. And you can
6 see they looked in the first place to the Complaint, the
7 Complaint that was filed.

8 And also they did look at the brief in support. And
9 they found -- and this is really harkening back to the cases I
10 think, one of the most directly on point, which is what the
11 scope of the Complaint in that case as was considered in the
12 1993 case.

13 There they identified directly contrary statements to
14 the scope that the Plaintiff was asserting. And that did not
15 stop the Court from saying, No. The broader interpretation is
16 where we come out, even though there were some specifically
17 contrary statements.

18 You notice Wyoming stays away from the 1993 decision,
19 Nebraska versus Wyoming. It's toxic to their position.

20 In that case, even though there were contrary
21 statements found by the Court that might narrow the case, the
22 Court chose not to base its decision on those.

23 Here you don't have contrary statements. Here the
24 best that Wyoming can do is argue that there's an implication
25 that when you say your claim is your central claim, that means

1 it's your only claim. And that is to do some violence to the
2 English language if I may say so.

3 If something is your central claim it means there are
4 other claims out there, but it's your most fundamental. That is
5 total contrary to saying that is your only claim. You can't do
6 that with the English language.

7 So it seems to me that the 1993 case, Nebraska vs.
8 Wyoming, really disposes of this quite easily.

9 SPECIAL MASTER THOMPSON: So let me actually turn to
10 the Complaint. And let me walk through it and give one possible
11 take on this Complaint, and then ask you to respond to it.

12 So if you look at the Complaint, first of all, you
13 know it's quite clear in the Complaint you only refer to
14 Article V. You don't specifically talk about Article V(A) or
15 Article V(B).

16 But you then in paragraph 8 of the Complaint, which is
17 the first paragraph, which really gets in to what Montana's
18 concerns are -- previous ones really are setting out sort of
19 basic facts of the Compact.

20 In paragraph 8, Montana notes that Wyoming refuses to
21 curtail consumption of the waters of the Tongue and Powder
22 rivers, in excess of Wyoming's consumption of such waters
23 existing as of January 1, 1950, whenever the amount of
24 water necessary to satisfy Montana's use of such water is
25 existing as of that date is not passing the

1 Wyoming-Montana state line.

2 Okay. That's in violation of Article V.

3 Then after that there are the four more specific
4 paragraphs, each of which starts, Since January 1, 1950, which
5 note explicit ways in which Wyoming has been using water since
6 1950.

7 And then there's paragraph 13 that says, By
8 undertaking and allowing the aforementioned actions the
9 state of Wyoming has depleted and therefore threatened the
10 waters of the Tongue and Power rivers allocated in the
11 state of Montana under Article V in the Compact.

12 If the question is what the Supreme Court in reading
13 this Complaint would have reasonably anticipated this action was
14 about, doesn't this language suggest they would reasonably have
15 anticipated it would be all about whether or not Montana was
16 receiving the allocations of water necessary so that under
17 Article V(A) those pre 1950 appropriator rights could continue
18 to be enjoyed?

19 Is there anything in here that would have led the
20 Supreme Court to reasonably anticipate it was also about post
21 1950 appropriative rights and the allocation of water under
22 Article V(B) of the unused and unapportioned waters?

23 MR. DRAPER: Yes.

24 SPECIAL MASTER THOMPSON: Can you explain where it is?
25 How could someone reasonably anticipate it?

1 MR. DRAPER: I would direct your attention to
2 Article IX, paragraph 9 that says, Since January 1, 1950,
3 Wyoming has allowed restriction and use of new and extended
4 water storage facilities in Tongue and Powder River Basin
5 in violation of Montana's rights under the Article V of the
6 Compact.

7 That refers explicitly to actions since 1950. Of
8 course Article V(B) is all about all actions since 1950.

9 And it is an allocation as part of each state's
10 allocations. And those are, on both sides of the state line,
11 those are post January 1, 1950 uses.

12 And to say, Well, this suggests we should only look at
13 one, and cut it in half and say, Well, this isn't referring to
14 Article V as it applies to actions since January 1, 1950 with
15 respect to what Montana has done, there's no justification to
16 read paragraph 9 to exclude protection of Montana's rights under
17 Article V(B).

18 You see it refers specifically to Montana's rights
19 under Article V. Why would we say Article V(A) and V(B)? Five
20 should cover it, going back to the English language. Five
21 covers V(A) and V(B).

22 And this is a complaint about new and expanded storage
23 in Wyoming since January 1, 1950. And that obviously has an
24 impact as allocated in V(B). That's all about post 1950 actions
25 in both states.

1 And to say that somehow there's an implication here
2 that we were not referring to anything but our Article V(A)
3 rights, when we studiously avoided such a reference, would be to
4 do violence to the language of the Complaint.

5 SPECIAL MASTER THOMPSON: So as I understand what
6 you're saying is that paragraph 8 talks about the failure of
7 Wyoming to curtail post 1950 uses when there's not sufficient
8 water passing the Wyoming-Montana state line or to satisfy those
9 earlier rights.

10 But that the later ones are really much more general,
11 and you have to read those paragraphs separately as just raising
12 a general complaint that Wyoming is using too much water through
13 post 1950 appropriators, and that's injuring both pre 1950
14 appropriators and post 1950 appropriators.

15 MR. DRAPER: The answer is emphatically yes, Your
16 Honor.

17 Let me just point out, you're talking about that same
18 approach is taken in the subsequent paragraphs 10 and 11 and 12.
19 You can see where if you wanted to refer back to paragraph 8 and
20 9 through 12 we can do that. And we did that in 13 where it
21 starts out, By undertaking and allowing the aforementioned
22 action.

23 You don't find that language in 9, 10, 11, and 12.
24 Obviously 13 is to be read in the context of the prior
25 paragraphs of the Complaint. But there's a contrary indication

1 in paragraphs 9, 10, 11, and 12.

2 SPECIAL MASTER THOMPSON: So the next question is, and
3 I think you've answered this question already, is that if I'm to
4 understand what was reasonably anticipated in the Supreme
5 Court's granting Montana leave to file this bill of complaint,
6 what's in this bill of complaint, the first place you look is in
7 the bill of complaint.

8 Under what circumstances should I also look at the
9 various supporting briefs? For example, the brief in support of
10 Montana's motion and the other briefs in connection with the
11 motion to file the bill of complaint, what other documents, if
12 any, can I look at in interpreting this Complaint?

13 MR. DRAPER: Well, I think the Supreme Court opinions,
14 the opinion in the 1993 Nebraska versus Wyoming case because you
15 can look at the brief in support of the motion for leave to
16 file.

17 But I would suggest in the context of the Court's
18 jurisprudence in this area, you don't look at it in order to
19 take a more niggardly view of the Complaint than you would if
20 you were the district judge. That's what Wyoming wants.

21 Let's go to the documents the district court wouldn't
22 have before it. There's no requirement for the motion to leave.
23 But we have one here, so let's refer to it.

24 Let's use it in their approach to limit the complaint
25 in a way that we could never even raise with a district judge.

1 And so I would suggest that to the extent you do look at the
2 briefs it's to find whether there's justification for reading
3 the complaint more broadly than you might if you were a district
4 judge.

5 You can see in those briefs, for instance in Wyoming's
6 responsive brief there, they thought this case was all about
7 violating Montana's V(B) rights; that's what was in front of the
8 Court.

9 And of course we do have a substantial aspect of our
10 claim is V(A). So for them to say, Well, it's only V(B), that
11 was the argument we had to refute. But here we have an argument
12 going on between the parties in the briefing around the bill of
13 complaint when the Court considered it.

14 One party's saying it's all about V(B) and the other
15 party saying, Our most fundamental claim is actually V(A). And
16 to say that they didn't anticipate that V(B) could be part of
17 this, especially the use of V(B) that's particularly drawing
18 attention to, and that is the percentage sharing that would
19 protect post 1950, January 1, 1950 rights in Montana.

20 It was all laid out there in the briefs. Those things
21 were, right or wrong, that's what was before the Court at that
22 time. And if it had so chosen it could have limited its grant
23 of motion for leave, but it did not.

24 When you combine that with the general wording of the
25 Complaint, it seems to me there's no way the Court would be

1 comfortable with us now having that restriction put on the
2 Complaint.

3 SPECIAL MASTER THOMPSON: So then I look at the
4 Complaint. That's the place I start. I can also look at some
5 of the briefs that were filed in connection of that.

6 The next question is, is it relevant, the arguments
7 that were made in the motion to dismiss? Or is that irrelevant
8 in this action?

9 MR. DRAPER: I'd say to the question we're talking
10 about, yes.

11 SPECIAL MASTER THOMPSON: Yes irrelevant, or yes
12 relevant?

13 MR. DRAPER: Yes, it's irrelevant.

14 You look at the initial pleading. That's what the
15 courts told us. There have been issues discussed in the motion
16 to dismiss this issue that started to come up during that
17 process.

18 So the history of the post granting of the motion for
19 leave to file includes the motion to dismiss briefing.

20 But as to whether that is the criterion on which you
21 should make a decision, I would say no.

22 SPECIAL MASTER THOMPSON : Then you also raised a
23 variety of other points in both your initial brief and your
24 reply brief.

25 For example, in your initial brief you suggest that

1 you should at least be allowed discovery. In your reply brief
2 you talk about the value of the judicial economy and, As long as
3 we're looking at this total information anyway in connection
4 with Article V(A) it makes sense to go ahead and look at V(B).

5 Is any of that relevant? Isn't the question simply
6 whether or not the Complaint would reasonably anticipate this
7 line of argument?

8 MR. DRAPER: Yes. But to the extent that you find
9 that ambiguous I think that these are considerations that have
10 motivated the Court Special Masters in these cases.

11 And I would point out also that we're alleging in
12 terms of sufficiency at least we're alleging the same specific
13 problematic activities in Wyoming: the storage, the increased
14 acreage, and the groundwater pumping as to both aspects of our
15 allocations.

16 The Complaint, the criticisms that we're subject to
17 from Wyoming don't take into account that the same activities
18 are creating these problems.

19 And as we've seen, just where that dividing line
20 between V(A) and V(B) will fall in this sharing of water has not
21 been determined. That will be determined initially by yourself
22 and ultimately by the Court in this case.

23 So to say that, when you allege these same activities
24 are violating our rights under Article V to say, Well, those
25 same activities, we should say, Well, we're not going to

1 consider whether these reservoir operations violate your rights
2 under V(B), it seems to me that judicial economy would argue
3 strongly against that.

4 And we're going to have to know all about those
5 reservoir operations, capacity, area capacity, all the things
6 that you get in to whether V(B) is in there or not.

7 There's not going to be a substantial amount of extra
8 discovery. If you, as we recommend, find that V(B) is within
9 the scope of our Complaint we're going to be looking at the same
10 reservoir operations. It's not a new area of discovery. It's
11 the same cause and operations.

12 And there will be a determination by the Special
13 Master and by the Court, Was that a violation of V(A)? Was it a
14 violation of V(B)? The discovery in the factual basis will be
15 essentially identical.

16 SPECIAL MASTER THOMPSON: So let me go back to the
17 concern that I expressed at the very outset, and let me try to
18 rephrase and expand a bit on that concern.

19 So if you take the issues with respect to Article V(A)
20 that we have spent most of our time talking about, when the
21 Court was looking at Montana's motion for leave to file a
22 Complaint, what they had in front of them was a situation where
23 there had been prior discussions between Montana and Wyoming
24 over exactly what Wyoming's obligations and Montana's rights
25 were under Article V(A).

1 There was a clear disagreement between the parties
2 over the application of Article V(A). As you've pointed out in
3 your brief in connection with Wyoming's motion for partial
4 summary judgment, this was also an issue that the parties had
5 discussed previously as part of the commission proceedings.

6 So it was something that the Court could have
7 reasonably anticipated as something where there was a live
8 controversy between parties where the two states couldn't agree
9 over the interpretation of the Compact entered into. Where
10 there were facts that were not totally clear, at least there
11 would be, a clear set of facts would be developed.

12 If I move over to Article V(B) claims with respect to
13 the unused and unapportioned laws, at least when I look at the
14 record I don't see any evidence of any legal disagreement
15 between the two states.

16 And so, you know, I guess I have a fundamental
17 question as to whether or not, if that had been all that Montana
18 had, if they filed a Complaint and simply said, We don't think
19 we're getting enough water under Article V(B) and that was all
20 that they said, whether or not the Supreme Court would have
21 thought that the case was sufficiently important and right to
22 actually hear.

23 So could you -- and it's an open-ended question. But could
24 you help to relieve my concern that it looks like, as I say, a
25 proverbial fishing expedition where what Montana wants to do is

1 to conduct some discovery and see whether or not there might be
2 violation there and disagreement between parties, rather than
3 the way in which these things I would think normally arise,
4 which is there's a disagreement between parties, and you then
5 bring it to the Supreme Court and say, We can't resolve it
6 ourselves. The only place we can resolve it now is the Supreme
7 Court?

8 MR. DRAPER: Well, there are number of ways I can make
9 you feel more comfortable with our position.

10 SPECIAL MASTER THOMPSON: Okay.

11 MR. DRAPER: Those disputes about us not getting
12 water, they're not always confined -- in fact, in more -- most
13 cases than not confined to Article V(A). There were references
14 in these most recent exchange of letters, but it was generally
15 we weren't getting our water.

16 Now exactly why? Whether it was a violation of either
17 V(A) or V(B) was frankly something of a mystery until there was
18 a authoritative quantification of the two states' respective
19 rights.

20 I would suggest that it doesn't make sense in this
21 context to allow your decision to be affected by consideration
22 of whether an Article V(B) claim by itself would have justified
23 the exercise of the Court's original jurisdiction; that's not
24 the question before you.

25 The question before you is, when somebody has pled

1 Article V, should you cut out part of that? Should you cut out
2 part of that in the face of the fact that, although mention is
3 made of a protection of the pre 1950 rights, it's never
4 suggested that in the briefing filed by the Plaintiff that there
5 should be any downsizing of the scope that is clearly set out in
6 the Complaint?

7 And so you're looking at a situation -- and I notice
8 you adopted this expression of Wyoming's, "fishing expedition."
9 That, I think, is a mischaracterization.

10 We're not talking about any substantial additional
11 discovery. A fishing expedition, I know what Wyoming's trying
12 to bring to mind is that is somebody who goes out into an area
13 where they have no basis for a claim, and harasses some other
14 litigant.

15 That's not at all the situation here. They should not
16 be using that term. This is not a situation -- if you look at
17 the scope of discovery in only V(A) versus also includes V(B),
18 there's no substantial difference; it's the same operation of
19 the reservoir, same acreage. It's the same and only marginal at
20 best. That's because of the unity of the allegations in the
21 Complaint.

22 Those three remaining allegations, those are combined
23 and apply to Article V(A) as a whole. We didn't parse it out
24 and say, Certain things violate V(B) and certain things violate
25 5(1). No. The same actions violate our allocation under 5 as a

1 whole. And that includes both.

2 And as I think the parties recognize, the dividing
3 line is not definitely determined just as it wasn't determined
4 in the litigation. That is something that the parties need to
5 look to this Court to do. And until it's done you don't know
6 whether the allocation is a V(A) or V(B) question.

7 SPECIAL MASTER THOMPSON: Okay. So again, I've used
8 up all of your time.

9 MR. DRAPER: That's perfectly all right.

10 SPECIAL MASTER THOMPSON: We'll save five minutes. Is
11 there anything else you want to say at this point?

12 Again, it's well briefed. I think i understand the
13 argument. But is there something new?

14 MR. DRAPER: I'll reserve the rest of my time.

15 SPECIAL MASTER THOMPSON: Thanks. I appreciate that.

16 Mr. Michael, you've moved to the middle of the table
17 so I assume your co-counsel is going to be arguing this.

18 MR. MICHAEL: Yes, Your Honor.

19 SPECIAL MASTER THOMPSON: For the court reporter's
20 sake --

21 (Discussion off the record.)

22 SPECIAL MASTER THOMPSON: For the court reporter's
23 sake, please identify yourself. I know Mr. Michael has
24 introduced everybody earlier.

25 MR. WILLMS: Yes, Your Honor.

1 May it please the Court, my name is David Willms,
2 Senior Assistant Attorney General for the State of Wyoming.

3 SPECIAL MASTER THOMPSON: I shouldn't break my
4 pattern. So I'll just start out by asking what is it that I
5 should be determining as part of this particular issue?

6 As I suggested to Mr. Draper during his argument, if I
7 look at the language in Nebraska versus Wyoming it seems to
8 suggest that the question would be whether or not in granting
9 leave to file Montana's bill of complaint, the Supreme Court
10 would have reasonably anticipated the discovery and claims that
11 Montana wants to pursue.

12 Is that the issue that's before me?

13 MR. WILLMS: Yes, Your Honor. I think that's exactly
14 what's before you.

15 We need to know whether Montana pled both an
16 Article V(A) and V(B) case, and whether the Supreme Court
17 granted the leave to file the motion for a bill of complaint.
18 When it granted that leave, was it reasonably anticipated?

19 I think you can actually turn to the Court's decision,
20 May 2011 decision. And it's on page 3 in its summary of the
21 course of the proceedings. To date it shed a little bit of
22 light on what the Court actually did reasonably anticipate.

23 In that very first paragraph it's going through the
24 course of the proceedings when the Court granted leave to file,
25 and going through the bill of complaint identifying Montana's

1 allegations under the bill of complaint.

2 And in the last sentence after going through the
3 allegations it says, According to Montana's Complaint the
4 Compact did not permit Wyoming to use water for any of these
5 practices as long as Montana's pre '50 users' rights remain
6 unfulfilled.

7 And so right there immediately --

8 SPECIAL MASTER THOMPSON: Just so you know, there's
9 also the sentence before that you didn't read it strikes me as
10 also potentially relevant here that specifically Montana claimed
11 that Wyoming is appropriating use of a number of new uses, and
12 then it went on.

13 MR. WILLMS: Correct. Really I think that last
14 sentence is summarizing the allegations of the Complaint.

15 In the very next paragraph the first sentence says, In
16 response, Wyoming filed a motion to dismiss the complaint. It
17 doesn't say "a portion of the complaint" or "Montana's
18 Article V(A) claims." It says "the complaint."

19 So when you read that together it appears on its face
20 that the Court reasonably anticipated that this claim, this case
21 was dealing with a V(A) claim, even though Montana never used
22 V(A) in its Complaint itself and pled Article V. So I think you
23 can turn there immediately.

24 But beyond that I believe you have, and the original
25 jurisdiction of the Supreme Court has asked that you file briefs

1 accompanying your motion for leave to file. And that means
2 something. That has to mean something.

3 And that's a means for the Court to help clarify what
4 they're doing to invoke their original jurisdiction, to
5 affirmatively use that gatekeeping function to allow a case
6 against another sovereign to proceed.

7 It has to be able to look at those briefings to do
8 that. It wouldn't require those otherwise. And in Montana's
9 very first brief it says, The gravamen of our claim, the
10 gravamen of our claim.

11 In Black's Law that's the essence of your Complaint.
12 The essence of our Complaint is that Wyoming is preventing our
13 pre '50 appropriators from receiving water because of post '50
14 water not taking priority.

15 So it looks like you have --

16 SPECIAL MASTER THOMPSON: I'm going to jump in here.

17 So putting aside for a moment the Supreme Court's 2011
18 decision in Montana versus Wyoming, and I'm not saying it's not
19 relevant, but I think your point there is quite clear.

20 If you actually look at, for example, the Complaint
21 and all of the briefs that Montana filed in connection with the
22 Complaint, I'm trying to find a paragraph which, you know, is
23 the proverbial smoking gun, right? The paragraph that says,
24 This is it.

25 And at least so far I haven't found it, so that

1 Montana's argument is that if you look at Paragraph 9 to 12,
2 although they don't specifically say that any of that concerns
3 the pre 1950 rights.

4 Now, each of the various paragraphs, with the
5 exception of paragraph 8, every single one of them seems to be
6 written relatively broadly. So, you know, paragraph 18, Unless
7 relief is granted by the Court, water in the state of Wyoming in
8 excess of its equitable share will continue and increase.

9 Paragraph 16, State of Wyoming refuses to comply with
10 Article V of the Yellowstone River Compact.

11 As you point out, there is the language about the
12 gravamen of the Complaint. And I'll find that specific --

13 MR. WILLMS: It's on page 22.

14 SPECIAL MASTER THOMPSON: Thank you.

15 On 22, what it specifically says is that the gravamen
16 of Montana's Article V claims is that Wyoming is violating the
17 Compact by failing to curtail its post January 1, 1950 water use
18 to protect Montana's rights under the Compact.

19 So my guess is Mr. Draper will probably say, when he
20 gets back up, that that doesn't say, To protect Montana's rights
21 under Article V(A); it says to protect Montana's rights under
22 the Compact. And that could be to protect the rights that it
23 gets under Article V(A) or protect the rights it's entitled to
24 under Article V(B).

25 Then when I look at Montana's reply brief, Montana

1 seems to qualify virtually every term that it uses. So it
2 doesn't say, Wyoming misstates Montana's claim; it says, you
3 know, with respect to the pre 1950 rights -- and this is at
4 page 1 of Montana's reply brief -- it says, Wyoming misstates
5 Montana's basic claim.

6 Then on the next page, and this is on page 2 it says,
7 Wyoming's entire brief is framed largely in reference to third
8 tier water uses making much of the Wyoming brief essentially
9 irrelevant and nonresponsive to Montana's most fundamental
10 claim, which focuses on protection of Montana's first tier water
11 rights.

12 So it seems like every time that Montana talks about
13 its claim under Article V(A) it refers to it as the most
14 fundamental or most basic claim, not sort of the whole package.

15 So I'm looking again for help. Is there anywhere you
16 can find in the Complaint or in Montana's papers where it
17 specifically says, This is about, only about those pre 1950,
18 allocation for pre 1950 rights under Article V?

19 MR. WILLMS: Your Honor, I don't believe you'll find a
20 place where it says that absolutely, you know, explicitly, This
21 is only V(A). This is not V(B).

22 But what I think you have to do is look at the context
23 of what we're saying. When they responded, This is our most
24 fundamental claim or ignores our most fundamental claim, and
25 these types of qualifying words, they don't also come back and

1 say, But to the extent that they have a V(B) claim that should
2 be left to proceed as well.

3 They ignore everything that's ever been said about
4 V(B) and say it was largely irrelevant and nonresponsive. Then
5 they come back and focus on V(A).

6 They don't give any indication that they actually plan
7 to continue with the V(B) claim by dispelling any of our
8 arguments with respect to V(B).

9 And then also littered throughout, even though the
10 work seemed to be carefully crafted to say, as you point out,
11 the gravamen of Montana's Article V claims violating the Compact
12 by failing to curtail.

13 In other places in that same briefing, for example on
14 page 2, Montana claims Wyoming disregarded Wyoming's obligation
15 under Article V of the Compact including, among others, the
16 obligation to curtail consumption of the Powder River Basin in
17 excess of Wyoming's pre January 1, 1950 consumption of such
18 water beyond water that's necessary to satisfy Montana's
19 pre 1950 water not passing the border of Montana's state line.

20 And of course Montana responds to that by saying, We
21 include this qualifier among others.

22 But, you know, at some point the point is Twombly
23 requires, the Twombly case and state law required some level of
24 factual allegation. You can't just have blind assertions like,
25 We allege or pled a V, Article V case, so everything should be

1 allowed to proceed.

2 You have to somewhere in this pleading or somewhere in
3 the accompanying brief allege some sort of supporting facts to
4 allow such a claim to proceed.

5 And the only fact that you can see in the Complaint
6 seems to point toward the possibility of a V(A) violation
7 because, as you know, the Compact, we've all agreed the Compact
8 is a three tier system, a three separate tiered system.

9 The final tier is, instead of acting under a prior
10 appropriation is a percentage allocation. And pleading facts
11 under a percentage allocation versus a prior appropriation
12 violation require different things.

13 We just haven't seen that. We're nearly five years
14 into a case and we haven't seen any evidence or any support at
15 all that they actually pled or intended to plead a V(B) claim.

16 SPECIAL MASTER THOMPSON: So as I understand it, your
17 argument is twofold.

18 The first one is is that maybe you can't find a
19 specific sentence that says, This is just about and only about
20 an allocation for our pre 1950 prior appropriators. But that if
21 you read the documents as a whole, then anyone reading them
22 would reasonably anticipate that this was only about the
23 Article V(A) allocation.

24 MR. WILLMS: That's correct.

25 SPECIAL MASTER THOMPSON: Okay. And in addition to

1 that, I think I also heard you say a moment ago, that if you
2 look at the Supreme Court's Twombly decision and look at its
3 decision in the Ashcroft case in 2009, that if this case had
4 been filed just about the Article V(B) issues, that it wouldn't
5 have actually met those particular standards, let alone the
6 higher standard that needs to be met for original jurisdiction.

7 MR. WILLMS: That's correct.

8 SPECIAL MASTER THOMPSON: So let me turn to the
9 judicial economy argument that Montana makes.

10 As I understand the argument, it's basically a
11 discovery. And if I were to rule that this is just about
12 Article V(A) and the allocation for the pre 1950 appropriation
13 rights, the Supreme Court might disagree with me at some stage,
14 and then we'd have to come all the way back again and have more
15 discovery and another proceeding.

16 So shouldn't I err in favor of permitting any
17 discovery at all, and then rule on this at trial? And then if
18 the Supreme Court disagrees with me, at least the record is
19 complete.

20 What's the response to that?

21 MR. WILLMS: For one thing, I think you can turn it on
22 its head completely right off the bat completely. The reverse
23 might be true.

24 You might determine there's no need to proceed with
25 discovery under V(B) because they haven't pled V(B), and the

1 Supreme Court could affirm that. And we haven't gone down this
2 road of what actually will be, especially if you decide in our
3 favor on the call issue would be a much larger scale.

4 Instead of two years we're looking at 60 years.
5 Instead of a prior appropriation across state lines, what were
6 Montana's pre '50 rights in not receiving their water, we have
7 to look at every single post '50 rights in both states and
8 identify the diversion, the amount of water they were taking.

9 It would turn out to be a fairly large undertaking,
10 especially if you're looking at it over the course of 60 years
11 instead of two.

12 And if they haven't pled any facts to support that
13 claim, and it truly appears as though -- and they have said it
14 themselves, We need to do discovery in order to find out if
15 there's anything to support a claim under V(B), it's putting a
16 great burden and expense on the Defendant especially to engage
17 in unnecessary discovery to only find out the end result that
18 there wasn't a V(B) claim.

19 I just think the reverse can be true. You can have,
20 you can increase judicial economy at this stage by eliminating a
21 claim that hadn't been, one, pled at all and two, even if you
22 decide it has been pled, have supported -- provided no factual
23 basis.

24 They haven't responded to or -- they were asked to --
25 request for specific violations you are alleging under V(B).

1 That's been asked multiple times over the course of the past
2 several years. We still don't have an answer on that.

3 How can we engage in discovery when we don't even know
4 what the discovery will be? Judicial economy supports
5 eliminating issues that appear to be irrelevant to resolving the
6 case.

7 That's how I respond.

8 SPECIAL MASTER THOMPSON: Okay, thanks. Let me again
9 turn back and take issues a little out of order here.

10 Again, I definitely need to look at the Complaint. I
11 should look at the various briefs that were filed in connection
12 with the Complaint in making my determination.

13 Are the briefs in connection with the motion to
14 dismiss relevant? Or should I really just be focused on the
15 question of what the Court would have anticipated at the time it
16 granted leave to file the Complaint?

17 MR. WILLMS: I think the relevant -- at first you have
18 to get past the gatekeeping function. Did they actually plead a
19 V(B) claim?

20 For the purposes of being able to proceed into
21 discovery, I think the briefing motion to dismiss is fair to
22 look at, if they ever intended to go down this route, the intent
23 of the parties, even though in the motion to dismiss they raise
24 for the first time the possibility of their wanting to maintain
25 a V(B) defense.

1 We filed this motion to dismiss in response to what
2 Montana represented in its motion for relief, that they weren't
3 making a V(B) claim. And as a result, any attempt that we made
4 on addressing V(B) was largely irrelevant and unresponsive to
5 their claim. So we focussed our motion to dismiss on V(A).

6 So because we were focused at that point when we made
7 that briefing they made comments about the nature of the case at
8 this point is, Do we have a, you know, our pre '50 water rights
9 not receiving water?

10 That's relevant; that's showing the intent of the
11 party and how they intend to pursue litigation. I think it's
12 worth looking at, being able to fully understand what the
13 party's intent was.

14 You get to what I think is in the bill of complaint,
15 the motion there, you get to what the Court reasonably
16 anticipated when it granted leave to file.

17 Now, from a case management standpoint, where are we
18 going from here? You can certainly look at the question of the
19 motion to dismiss and other pleadings as far as whether there's
20 even a V(B) claim, whether they ever intended to pursue that.

21 SPECIAL MASTER THOMPSON: Next is just a factual
22 question. This is one that I asked Mr. Draper.

23 To your knowledge have there been any disagreements
24 between the two states for discussions between the two states as
25 to how to apply Article V(B) once you resolve the question of

1 the allocation under section or paragraph V(A)?

2 MR. WILLMS: In short, no.

3 I think we've had discussions about how -- and I think
4 it started back in the '80s -- discussions about how to conduct
5 the allocation. I think Mr. Michael discussed that in his
6 argument.

7 But there haven't been disagreements about it. And
8 there certainly haven't been any disagreements about, or
9 situations where Montana has told Wyoming, We think you're
10 exceeding your percentage allocation on the Tongue River. And
11 you need to get in compliance. There have been no complaints
12 about compliance with Article V(B).

13 I'm not entirely certain, but I believe there have
14 been discussions about how, on a realtime basis, how we're going
15 to administer V(B). But those have just been discussions
16 amongst compact states. It hasn't been a disagreement or one
17 state notifying the other that they think there's an exceeding
18 of this allocation percentage.

19 SPECIAL MASTER THOMPSON: Okay. So if I understand
20 Mr. Draper's argument, it's basically that, you know, if you
21 just, if all the Supreme Court did in this particular case was
22 to resolve the Article V(A) arguments that have been resolved to
23 date, you know, if there's still questions about, Well, how do
24 you administer Article V(B)? What's the process for enforcing
25 each state's rights? And that needs to be resolved here also.

1 And so I guess my question is, is that something that
2 the Court needs to resolve? Or is that something that the
3 states can resolve on their own? Is there any reason to believe
4 the states can't resolve this on their own once the Article V(A)
5 issues --

6 MR. WILLMS: No. There's no reason to believe the
7 states can't resolve that once the V(A) issue is resolved.
8 There's been no disagreements in the past.

9 The states all agree there's a percentage allocation.
10 There's a very specific formula. There's never been any
11 disagreement of how the formula should operate.

12 At this point all the states, and I think part of the
13 hang-up for it to be discussed is that Montana hadn't
14 adjudicated, finished adjudicating the Tongue and Powder
15 rivers -- I think the Tongue River until after this litigation
16 started. So it didn't even know what the state's appropriation
17 rights were.

18 Once the adjudication is completed, and we understand
19 what the post '50 rights are in the state, there's never been
20 any disagreement about what the formula is and how that formula
21 should be applied.

22 It's a question of how do we administer it, the
23 personnel, moving pieces, how do we make it happen. That's
24 something that I think can be resolved by the states.

25 It hasn't been an issue that warrants the Court's

1 involvement at this point.

2 SPECIAL MASTER THOMPSON: And then let me ask one
3 final question, which is let's just assume that I were to decide
4 that in fact Article V(B) arguments were reasonably anticipated
5 by the complaint that Montana filed.

6 As you point out, though I've asked on a number of
7 occasions as to exactly what the nature of Montana's V(B)
8 complaints are, Montana's responded with relatively general
9 statements.

10 And I'll express a little bit of frustration that the
11 statements of V(B) claims have been as general as they have
12 been.

13 Is it your argument that if I believe that the
14 Article V(B) claims were within the pleading, and that they were
15 reasonably anticipated, do I have any ability to limit the
16 discovery at this stage and what claims Montana can bring based
17 on the general quality of the statement of those V(B) claims to
18 date?

19 MR. WILLMS: Absolutely.

20 SPECIAL MASTER THOMPSON: What's my authority?

21 MR. WILLMS: Rule 16 under the Federal Rules of Civil
22 Procedure.

23 Although the Supreme Court uses the Rules of Civil
24 Procedure as the guide, certainly it's free to apply them. And
25 Rule 16 allows a Special Master or a judicial officer to manage

1 the case, and get rid of -- limit discovery maybe to the extent
2 of no discovery, limit issues, eliminate issues that it appears
3 are not necessary to resolve the claim.

4 That's, I think that's the absolute, that's an
5 absolute place where you look to it.

6 And you're absolutely right. I think it was in 2009
7 you asked Montana, What are your, tell me some specifics. What
8 are your claims under this case? They were put on notice two
9 years ago, What are your claims under this? And at that point
10 they asserted work product, which presumed that they had some
11 facts to support that.

12 But now they're saying, We need full discovery in
13 order to file a claim. They were put on notice by the Special
14 Master two years ago that they needed to be able to provide some
15 facts.

16 Here we are two years later and I asked the same
17 question on the precipice of discovery, large scale discovery,
18 Before I go into discovery I need proof that this isn't a
19 fishing expedition; I need proof that the day before you filed
20 your Complaint you had some evidence to support a V(B) claim.
21 That's what's anticipated when you file a Complaint, you have
22 some evidence. Tell me what that, what some of those facts are.
23 It's the same broad generalizations.

24 At some point from a case management standpoint it
25 doesn't make sense to allow a party, and in fact it would be

1 improper to allow a party to engage in full scale discovery to
2 try to support a claim that it hasn't presented any factual
3 basis that there had ever been a foundation.

4 I think under Rule 16 you certainly can do that.

5 SPECIAL MASTER THOMPSON: And I know you mentioned
6 Rule 16 but you didn't mention any cases. So case law,
7 situations where courts have actually limited the party's
8 discovery and claim because the actual description of what they
9 wanted to pursue was too general.

10 MR. WILLMS: You know, I can't think of any case law
11 off the top of my head except in the Twombly case in which
12 Justice Stevens said, If I were a district court judge I would
13 not let discovery proceed on this vaguely alleged allegation.

14 I think we can look to Justice Stevens in his dissent
15 in that even though he disagreed with the majority in requiring
16 so many additional facts in the mediating stage, under Rule A,
17 his reason for disagreeing with that, as he said, Case
18 management allows us to do that. If I were a district court
19 judge I'd exercise my authority and limit the discovery.

20 SPECIAL MASTER THOMPSON: Okay. So I've used up all
21 your time.

22 Is there anything else that you wanted to raise in our
23 oral argument that's not in the briefs?

24 MR. WILLMS: I don't think so, Your Honor.

25 SPECIAL MASTER THOMPSON: Thank you very much.

1 Mr. Draper, I'd be surprised if you didn't want to say
2 something.

3 MR. DRAPER: Thank you, Your Honor.

4 If I may, I think Mr. Willms and you discussed at the
5 beginning of his argument the language used by the Court on
6 page 3 of the opinion.

7 In my view he was taking that out of context and
8 carefully avoiding the first sentence in the paragraph that was
9 being discussed, the second sentence.

10 The two sentences read in February 2008 required
11 Montana leave to file a bill of complaint against Wyoming for
12 breach of the Compact.

13 Montana alleged that Wyoming had breached the Compact
14 by consuming more than its share of the Tongue and Powder
15 Rivers.

16 The bill of complaint, page 3, paragraph 8, the very
17 paragraph you and I were discussing, it reads that paragraph in
18 a general way. I think in this context this section you were
19 suggesting that I think was perhaps one reason for squeezing
20 down on the otherwise language of the Complaint, the Court did
21 not read it summarily.

22 SPECIAL MASTER THOMPSON: I want to give you the full
23 time to respond to any of the points that you want to.

24 But let me just ask, so after the bill of complaint
25 was filed, Wyoming files its motion to dismiss.

1 If in fact the claims that Wyoming's motion to dismiss
2 were focused on were just part of what everybody anticipated
3 would be the scope of this action, why didn't Montana, in its
4 opposition say, We don't have to worry at all about anything
5 that Montana's saying here because we actually have the
6 Article V(B). Montana doesn't address that. So there's no
7 grounds for motion to dismiss here because they're only
8 addressing a part of our action?

9 MR. DRAPER: Well, I think one of the important things
10 to recognize there is that Montana mistakenly read our Complaint
11 as being necessarily limited to V(B).

12 SPECIAL MASTER THOMPSON: Wyoming mistakenly?

13 MR. DRAPER: I'm sorry, yes. Wyoming read our
14 Complaint as necessarily only applying to our V(B), V(B) aspect
15 of our allocation. That's what we were responding to in our
16 reply.

17 And to say that when they accuse us on something we
18 feel that they have totally misread things that in responding to
19 that they can then come back in the cold light of later time and
20 say, Well, when we were responding to their position on V(B),
21 and point out that, Your fundamental, most fundamental claim was
22 actually V(A), which was totally disregarded, to say then that
23 later in the cold light, Well, when they were responding to a
24 point we raised they didn't then step back and say, Now, don't
25 get the wrong idea. There's these other claims out there, that

1 that somehow indicated a relinquishment of the broad range in
2 the Complaint I think is not a fair way to read the pleadings.

3 SPECIAL MASTER THOMPSON: So it's not a question of
4 relinquishment, I guess. What I'm trying to think about is what
5 the parties actually not simply thought, but what the parties
6 reasonably anticipated this case was about in the first couple
7 of years of its life.

8 Again, I would think that if Article V(B) had this
9 independent relevance to the action that Montana, in its
10 opposition to Wyoming's motion to dismiss, would have said not
11 only all the things they obviously wanted to preserve your
12 Article V(A) claims, but that you would have also said, But
13 furthermore, even if you agree with all of this, we still don't
14 think we're getting enough water under Article V(B) Wyoming
15 hasn't said anything about that, and therefore there's no way
16 you can dismiss this action.

17 And yet, at least the way I read the briefs, there's
18 no mention of that.

19 MR. DRAPER: Well, in a reply brief you don't have a
20 lot of room so you need to focus on the basis that is being used
21 to oppose the filing.

22 And I must say that from our point of view the total
23 reinterpretation of the Compact that's been accomplished by you
24 as Special Master and the Court to reject their motion there
25 were no rights, no allocation under V(A), is a tremendous step

1 in the right direction here. I don't think we should forget
2 that.

3 We're now off in kind of a sideshow here on V(B). But
4 that was a tremendous development here. It's been accepted by
5 Wyoming, and is a great basis on which to resolve this case.

6 But now we're looking at something that really wasn't
7 under discussion specifically in the phase where they were
8 saying, Well, the reason you can't succeed in your motion is
9 because you didn't, you can't attach V(B) claims and didn't.

10 It was incumbent upon us, and the Court ultimately
11 agreed that we have rights that can be protected under V(A).
12 And so to suggest in the cold light of afterthought, Why did you
13 not do something more than respond directly to the assertions
14 that were being made to try to kill off the case at that stage
15 where the case had not been accepted yet? Why didn't you go to
16 other things that weren't in dispute, I think the answer is a
17 party needs to concentrate on the issues raised by its opponents
18 if they have some likelihood that they might persuade the Court
19 to rule against them.

20 And it is unfair to the Plaintiff to say, Well, if
21 they took umbrage at one part of their Complaint and you answer
22 that and only answer that, the rest of your Complaint is now
23 going to be dismissed through a Rule 16 type operation in the
24 case before the Master.

25 That seems totally inappropriate at this time.

1 SPECIAL MASTER THOMPSON: I apologize for taking you
2 off the course of your reply. I wanted to ask that specific
3 question. So I'll try to be quiet for a moment and let you
4 address the other points.

5 MR. DRAPER: It's perfectly fine. If you would rather
6 ask me questions I'm always happy to, and prefer to make sure I
7 answer your question before I go forward with my prepared
8 remarks.

9 As Mr. Willms pointed out that or argued on the basis
10 of the Twombly pleading requirements in alleging that we have
11 not pled this sufficiently, the fact is we pled both V(A) and
12 V(B) together and necessarily have pled them with the same
13 specificity. It's the same.

14 They argue, Wyoming argued during one of their other
15 arguments during the motion for relief case that we
16 insufficiently pled our case. The Court obviously rejected
17 that.

18 Even Wyoming would have to agree as, at least as of
19 V(A) they rejected it. And if the pleading is exactly the same
20 with respect to the V(B), which is now being parsed out -- and
21 it's not parsing that we propose -- now they're saying, Well,
22 you should have said more on V(B).

23 Well, we said the same as the V(A). They're not
24 claiming -- and obviously the Court found the pleading that we
25 had done sufficient -- so at least the V(A) pleading is

1 sufficient.

2 And they're linked; they're part of the same pleading,
3 the same basis, the same specificity are there as to V(A) and
4 V(B).

5 SPECIAL MASTER THOMPSON: So let me just probe that a
6 minute.

7 If I understand your point that generally you're
8 referring to Article V throughout the Complaint. The
9 specificity for V(A) is similar if not identical to the
10 specificity for Article V(B).

11 But in the case of the Article V(A) allocation, you do
12 have this paragraph 18 that specifically mentions that Wyoming
13 refuses to curtail consumption of waters that it started to use
14 after January 1, 1950.

15 There are times when there aren't sufficient waters
16 passing the state line in order to meet Montana's water
17 allocation with its pre 1950. You have paragraph 8 that really
18 specifies what the nature of that Article V(A) concern was.

19 But then if you look at everything else there are a
20 number of paragraphs that say, Well, Wyoming has expanded
21 storage in violation of Article V(B). Or I'm sorry, Article V.
22 It has allowed waste in violation of Article V.

23 But what is not there is anything similar to what you
24 have in the case of the Article V(A) allocation saying, you
25 know, They have taken more than their percentage, something that

1 actually talks about why that is a violation of the Compact.

2 So if I understand what Wyoming's argument is
3 basically it's that, you know, it's basically some conclusions
4 about violation of Article V, and then it doesn't meet the type
5 of requirement that Twombly seems to set out of saying, of
6 alleging facts that make a violation.

7 And I agree with you that this makes it a little bit
8 of an odd setting that my determination is not whether or not
9 the Complaint is adequate; the Supreme Court has already made
10 that decision in permitting you to file your Complaint. But in
11 thinking about what was reasonably anticipated it strikes me as
12 relevant to think about whether or not the Court would have been
13 troubled if they actually looked at this as an Article V(B) that
14 maybe the Complaint wasn't accurate.

15 It strikes me as certainly relevant in figuring out
16 what would have been reasonably anticipated as to whether or not
17 the Complaint is adequate.

18 MR. DRAPER: I think the comparison you made of
19 paragraphs is simply consistent with our statement from the
20 beginning that our most fundamental claim is to protect those
21 V(A) rights, which Wyoming said received no protection.

22 You and the Court have made it clear that was a
23 complete misinterpretation error. That's the situation we were
24 in when we filed this.

25 They said, Yeah, V(B)? Sure, you've got rights under

1 that. Those percentages. There was no dispute that there was a
2 V(B) allocation.

3 The fundamental turnabout that's taken place so far in
4 this case is to recognize that V(A) actually does protect
5 Montana's rights; it's part of Montana's allocation. That was
6 something that was really being denied by Wyoming. And they
7 make no bones about it. They misunderstood the Compact.

8 But when that is one of your major problems -- we've
9 got problems under V(B) but they're not denying that there's no
10 allocation under V(A). They were denying there was any
11 allocation at all.

12 To have it, one paragraph devoted to that fundamental
13 problem that we were having interpreting the Compact I do not
14 think is a sufficient or fair basis on which to say, Well, we
15 should disregard the general wording of the Complaint, and they
16 in fact say that is the only thing that was included in the
17 Complaint.

18 SPECIAL MASTER THOMPSON: I know there's a variety of
19 things you probably want to respond to, but let me also ask,
20 since I talked to Wyoming about this theory of their argument,
21 Wyoming seems to argue that even if I find that Article V(B),
22 sort of independent issues under Article V are reasonably
23 anticipated by the bill of complaint, that I could still limit
24 discovery and what evidence Montana presents at this stage under
25 Rule 16 because of Montana's failure to be more specific in what

1 the nature of those Article V(B) claims are.

2 Can you address that?

3 MR. DRAPER: We absolutely disagree with that point,
4 Your Honor. And as you've indicated, there's no facts that
5 would support them to effectively dismiss a claim through a
6 Rule 16 case management order. It's just astounding that they
7 would suggest that.

8 I think it would be considered improper to, once you
9 decide the case is properly pled, to restrict discovery to a
10 narrower scope than the admitted scope of the Complaint. That
11 clearly to me would be inconsistent with the way the district
12 courts handle cases.

13 It would be totally contrary to the broad development
14 of the facts that the United States Supreme Court has insisted
15 upon in these original interstate cases.

16 So I don't think there would be any basis for that.

17 SPECIAL MASTER THOMPSON: Is there anything else you
18 want to address?

19 MR. DRAPER: Just quickly.

20 SPECIAL MASTER THOMPSON: Yes.

21 MR. DRAPER: There was a suggestion that there could
22 be substantial extra discovery with a V(B) claim. That's not
23 right.

24 The same facts that we've alleged and have been held
25 sufficient by the Court for V(A), the same facts and really no

1 more operations -- how many CM wells are out there? What are
2 their effects on the stream? Those are affecting V(A) and V(B)
3 rights depending on how the facts sort out.

4 But to truncate discovery and not even allow the
5 states to investigate the facts would be totally contrary to
6 this Court's whole ethos of treatment of interstate controversy
7 under the Constitution.

8 V(A) and V(B) are intellectually intertwined as we
9 discussed. And to go in there and try to parse out, either by
10 interpreting the Complaint or by somehow limiting discovery,
11 would be contrary to the particular situation we have here where
12 they are co-determinants. When this Court decides just where
13 that terminus is it's going to show us whether it was a V(A)
14 issue or a V(B) issue. To say, Oh, you can't get into that,
15 Plaintiff, would be unworkable.

16 Further, as you mentioned, implications for future
17 remedy. For a remedy in this case to come out and deal with it
18 just the V(A) issues when intertwined with that is V(B) and say,
19 Well, we're going to try to fashion a decree that excludes any
20 V(B) consideration, protection of V(B) rights, I think would be
21 certainly less than what the Court thought it was doing when it
22 granted this motion for leave.

23 We alleged Article V allocates the water between the
24 states; it's being violated; we're asking for a decree you've
25 seen in our prayer that will ensure our Article V rights are

1 protected in the future.

2 And to come back and say, Here's a decree that doesn't
3 cover all of Article V I think would be a disappointment to the
4 Court.

5 As you further mentioned, Mr. Willms agreed that
6 perhaps these Article V(B) claims could be settled by agreement,
7 and that there wasn't much of a dispute about those.

8 But as we cited in our brief -- and I'll just refer
9 you to the Oklahoma versus New Mexico decree it was stated by a
10 unanimous Court that once the case is here the Court feels the
11 responsibility to decide all issues, all issues presented. And
12 it was in that case where Special Master Muys, M-u-y-s --

13 SPECIAL MASTER THOMPSON: Where in the briefs do you
14 talk about that?

15 MR. DRAPER: Page 28.

16 SPECIAL MASTER THOMPSON: Of the initial brief?

17 MR. DRAPER: Of the reply brief.

18 SPECIAL MASTER THOMPSON: That's why I'm not finding
19 it.

20 MR. DRAPER: Yes, middle paragraph.

21 SPECIAL MASTER THOMPSON: Okay.

22 MR. DRAPER: We quote the Court as saying, Once the
23 Court grants leave to file and the states themselves are
24 before the Court for determination of a controversy between
25 them, neither can determine the rights under cessat, the

1 Court must pass on every question essential to such a
2 determination.

3 This was in response to a suggestion by the Special
4 Master in that case on the Canadian River that a certain issue
5 regarding the de-silting pool be returned to the Canadian River
6 Commission rather than being decided by the Supreme Court. And
7 this was the Court's response.

8 Thank you very much.

9 SPECIAL MASTER THOMPSON: Okay, thank you.

10 Actually, before we finish this particular hearing let
11 me just ask several things. First of all, I suggested when I
12 was talking with counsel for Wyoming I've been a little bit
13 frustrated by the fact that I've been, or it's been difficult to
14 figure out exactly what the nature of the V(B) claims were of
15 Montana. And I realize that discovery has not been conducted
16 yet.

17 You were getting more specific when you submitted
18 your list of issues of law and fact. Then in connection with
19 this particular motion I asked you to be specific, and you
20 actually got more general again.

21 Without saying at all how I'm ultimately going to rule
22 and how the Supreme Court might ultimately resolve the question
23 as to whether or not Article V(B) was reasonably anticipated by
24 the Complaint, I would find it very helpful if Montana were to
25 actually try to set out in a page or so more specifically

1 exactly what you want to pursue in the way of Article V(B)
2 investigations.

3 I still have no idea when you're elaborating about the
4 discovery what it would be looking at; what issues of fact do
5 you believe you actually could develop.

6 So it would be very useful for me to have more
7 specific statements on the issues of fact and law under
8 Article V(B) that you believe are incorporated into your
9 Complaint, recognizing that after discovery you might decide
10 that some of those cannot be pursued. But if you're going to go
11 into discovery presumably you have some sense of the specifics
12 of it.

13 So would you be willing to, would Montana be willing
14 to furnish me with that statement? Again, it might be furnished
15 and I still decide that you can't pursue the V(B) claims. But
16 it would be useful.

17 MR. DRAPER: We'll be glad to do that.

18 SPECIAL MASTER THOMPSON: Okay. So here's what I'd
19 like to do. I realize this is a short timeframe, but I would
20 like that statement, say, a week from today. So by next Friday
21 I would like that statement of Article V(B) issues of law and
22 fact.

23 On the Wyoming side I would like by next Friday -- and
24 this could be in the form of a letter brief. It doesn't need to
25 be elaborate -- would you raise this argument under Rule 16 that

1 if the claims are not specific enough that I can limit discovery
2 with respect to this. I would appreciate any case law that's
3 relevant on that particular point.

4 And Montana, if Wyoming does provide that letter brief
5 a week from today, I would appreciate a week after that any type
6 of reply that you want to make to that. I'll give you an
7 opportunity to respond to any case law that Wyoming might state
8 is relevant.

9 If Wyoming comes back and says, you know, We still
10 believe in our Rule 16 argument but we can't find any relevant
11 case law, obviously there's nothing for you to respond to. But
12 if they come back with specific cases, I'll leave one week from
13 that day for you to respond to that; otherwise, I'll consider
14 this particular issue to be submitted, and I would then rule on
15 it after those various documents have been provided to me.

16 Mr. Michael, it looks like you'd like to ask something
17 or to complain about something.

18 MR. MICHAEL: Just a question, Your Honor, in terms of
19 our filing a week from today.

20 A list of cases? Or would you like a quick summary of
21 what we see the holding? You want pinpoint cites I'm sure where
22 we find the holding.

23 SPECIAL MASTER THOMPSON: Yes. What I would like is
24 whatever you consider to be any relevant cases that would
25 support my ability to use Rule 16 in order to limit the

1 discovery for failure to state specifically what the claims are
2 under Article V(B). You know, again, I don't want anything
3 elaborate.

4 I'll tell you as soon as I get it I will read whatever
5 cases that you cite. But at the same time it certainly would
6 not hurt to have maybe a paragraph on each of the cases telling
7 me what you think it holds.

8 MR. MICHAEL: Okay. Thank you, Your Honor.

9 SPECIAL MASTER THOMPSON: Then again Montana a week
10 after that can submit something again in a relatively short
11 letter brief that you have either disagreeing with Wyoming as to
12 what those cases hold or distinguishing them.

13 You also well may, if you want to at that point, cite
14 any cases that you think show that the Supreme Court doesn't
15 have that particular authority. And that will be due, those two
16 documents a week from today.

17 At the same time Wyoming files its supplemental letter
18 brief if could you file a statement specifically of what the
19 Article V(B) issues of fact and law are that you would like to
20 pursue as part of this case.

21 MR. DRAPER: Very good. Thank you, Your Honor

22 SPECIAL MASTER THOMPSON: Okay. Is that clear to
23 everybody?

24 MR. MICHAEL: Yes, Your Honor.

25 SPECIAL MASTER THOMPSON: I think with respect to the

1 other motion, which is Wyoming's motion for summary judgment, I
2 have everything I need with respect to that particular matter.

3 Again, the arguments on both sides in this proceeding
4 have again been very helpful to me as have the briefs. All
5 parties have done a great job.

6 Let's take again like a five minute break and come
7 back for a short, hopefully, short status conference.

8

9 (Whereupon the within proceedings adjourned at 11:27 AM.)

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C E R T I F I C A T I O N

I, Martha Loomis, Certified Shorthand Reporter,
appointed to take the within proceedings hereby
certify that the proceedings was taken by me, then reduced to
typewritten form by means of computer-aided transcription; that
the foregoing is a true transcript of the proceedings had
subject to my ability to hear and understand, and that I have no
interest in the proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand
on October 11, 2011.

Martha Loomis
Certified Shorthand Reporter

Proofread by D. Drake