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BEFORE SPECIAL MASTER BARTON H. THOMPSON, JR.

HEARING RE: WYOMING'S MOTION FOR SUMMARY JUDGMENT

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 8:00 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: Everyone can remain seated.

3 This is quite an interesting courtroom. I sort of
4 feel like I should be in a meeting of the Philosophical Society
5 rather than a hearing.

6 So this is a hearing in the case of the State of
7 Montana versus the State of Wyoming and the State of North
8 Dakota, No. 137 Original in the Supreme Court of the United
9 States.

10 Let me just pause.

11 (Discussion off the record.)

12 So we are here this morning for three different
13 things. First of all we will start out with a hearing on
14 Wyoming's motion for partial summary judgment.

15 Following that, we will have a hearing on the question
16 of Montana's right to raise Article V(B) claims. And then
17 finally we will have a relatively brief conference of the
18 parties. My hope is that we will be finished by 11:30 or
19 11:45. I'm not sure we're going to need the entire four hours.

20 I'll try and take a brief break between each of the
21 various parts of the proceeding this morning so that everybody
22 can use the facilities here, and take care of whatever other
23 responsibilities they have.

24 So let's again start out with Wyoming's motion for
25 partial summary judgment. As I mentioned in the note that my

1 assistant sent around yesterday, we can have up to about an hour
2 and a half to discuss this particular motion. And each side can
3 have approximately 45 minutes for their argument.

4 Let's start out with the State of Wyoming's argument.
5 And if both states, when they start out, can identify
6 themselves.

7 MR. MICHAEL: Thank you, Your Honor.

8 May it please the Court, my name is Peter Michael,
9 Chief Deputy Attorney General, State of Wyoming. With me at
10 counsel table is David Willms, Senior Assistant Attorney
11 General, and Andy Kuhlmann, Assistant Attorney General, who
12 assisted me on the briefings.

13 SPECIAL MASTER THOMPSON: Thank you very much,
14 Mr. Michael.

15 Can I start out, even before you go into your
16 argument, one of the things I will really appreciate from both
17 you and Mr. Draper this morning is a better understanding of
18 exactly how the Compact has been administered to date.

19 In particular I'm curious, given that no one seems to
20 be exactly sure how to administer the Article V(A) portion of
21 the Compact, how the three states have gone about trying to
22 figure out how to administer the Articles V(B) and V(C) portion
23 of the Compact.

24 So if you could just start out by giving me a sense of
25 exactly how the states have gone about trying to figure out how

1 much water each of the two states has been entitled to, that
2 will very helpful background for me.

3 MR. MICHAEL: Yes, sir. I will proceed right to that.

4 Generally with respect to, I would say that the record
5 shows and the reports show that with respect to V(B), with
6 respect to both V(A) and V(B), there was no real administrative
7 effort until probably the early 1980s.

8 We have annual reports during the period of LC Bishop,
9 Fred Buck, the two commissioners in the '50s. The reports go
10 through those years saying there's not enough development in
11 Wyoming to be concerned about, basically.

12 That occurs, and in fact is I think it was '81 or '82.
13 And the theme goes right up into the beginning of the '80s where
14 there's not enough development in Wyoming to administer. So we
15 really have no activity for the first what, three decades, in
16 terms of administering anything.

17 Then in the early '80s I think we pointed out in our
18 briefing that Montana, especially I think it was the '82 and '83
19 annual reports mention that they were starting to be concerned.
20 Their concern there was they had almost not been able to fill
21 the reservoir in '81. And there had been several bad years,
22 '80 and '81, bad years, drought years.

23 So at that point there was an effort by both states.
24 And there's a lot of correspondence. There was an effort by
25 both states to start thinking, How do we administer V(B)?

1 I think most of the effort at that time was V(B). I
2 don't think Montana mentioned the V(A) problem until '92. We
3 see that in the '92 annual report. It was an outlier. The only
4 time it was said was in '92.

5 Maybe I should go back. I think in '82 Montana said,
6 We have a concern that we're not receiving, we may not be
7 receiving water for our pre '50 rights. We will notify Wyoming
8 that occurred. That was I think in the '82 report.

9 So what happened was --

10 SPECIAL MASTER THOMPSON: Just to pause.

11 MR. MICHAEL: Yes. You have that in front of you.

12 SPECIAL MASTER THOMPSON: Yes. This I'm actually
13 taking from Montana's Brief in Opposition.

14 They say it's in the 1981 annual report. It states
15 the problem that continues to be a major element of concern is a
16 lack of proper quantitation of all existing waterlines.

17 And then Montana voiced its concern in 1982, so the
18 following year, that during low flow years Wyoming needs to
19 regulate its post 1950 water rights more carefully so that
20 Montana can use its pre 1950 water.

21 MR. MICHAEL: That's the one I was referring to.

22 SPECIAL MASTER THOMPSON: I understand. Let me just
23 take a pause on that.

24 I understand various points in time starting in the
25 early 1980s Montana expressed concern about whether or not its

1 pre 1950 appropriators were getting sufficient water, and
2 whether or not that might be the case with post 1950 users in
3 Wyoming.

4 What I don't understand is how do people go about
5 actually trying to administer the Section V(B), the Paragraph
6 V(B) portion of the Compact given that the V(B) allocations were
7 of water that wasn't being used by the pre 1950 appropriators?

8 How did people figure out what the post 1950 rights
9 were, how those were supposed to be administered?

10 MR. MICHAEL: Well, I think the problem shows up in
11 the portion you just mentioned, Roman 4 of the letter to the
12 governors in '82.

13 Right below that part about Montana voicing its
14 concern is a notification -- he skips a paragraph.

15 Discussions were held on the need to document pre- and
16 post '50 water rights. Wyoming had concluded its
17 adjudication of pre '50 rights. Montana is still in the
18 process of adjudicating its water rights.

19 I think that was a real, real problem. In other
20 words, Montana had not adjudicated its water rights and didn't
21 know what its water rights were in those rivers.

22 Now, they've done that very recently. I think that
23 one, off the annual reports in 2000 or 2002, in that range, says
24 Montana was very close to adjudication. I think they're done;
25 maybe not the jury, but the fact that it's finished on both the

1 Tongue and Powder.

2 So there's been a long period where Montana did not
3 have its water rights adjudicated so they couldn't identify pre-
4 '50 and post '50, which of course is critical under V(B).

5 Measuring devices have always been, for purposes of
6 this compact, measuring devices at the base of the Powder and
7 Tongue having been in place prior to '50. So the building, the
8 measure, the denominator of the V(B) equation, the largest
9 component of that has been in place. The problem is measuring
10 the use of post '50 rights.

11 So Wyoming had the ability, the quote I just read you,
12 to measure the -- when Wyoming went to the regulation in a year
13 it was tight -- Wyoming went to regulation, we actually had
14 records, had volumes of records where they'll send reports to
15 the Sheridan office in the water division of Wyoming to the
16 Tongue and Powder, the hydrologist sending reports saying, This
17 is how much we can cut back areas irrigated, including post '50
18 irrigation.

19 There are not that many; mostly pre '50, but all the
20 pre '50 rights are documented as well in our system so the
21 documentation was there in Wyoming to, if regulation needed to
22 occur.

23 The question would be, How do you develop the -- what
24 happened in the early '80s was there was a couple of people
25 whose names come up during this case. One's name was Ashenberg

1 from Montana and a fellow named Lou Allen from Wyoming and John
2 Buyak who were commissioners, water people in the state of
3 Wyoming.

4 There was a lot of correspondence in the early '80s
5 about how can we do V(B) when we don't have the water rights
6 adjudicated in Montana. And they have this calculation,
7 engineer calculation, delta this, delta that, divided by this
8 and that, trying to propose some kind of modeling way of going
9 about doing this.

10 So we see references in the January report trying to
11 get something done in the early '80s. I think Mr. Tyrrell wrote
12 a letter. In one of his letters of 2004 or 2006 -- I forget
13 which one -- Mr. Tyrrell responded to the call by Gary Fritz, or
14 I'm sorry, from Jack Stults, the Wyoming commissioner -- Montana
15 commissioner.

16 He referenced back to the efforts in the 1980s, and
17 that was V(B) efforts to determine how are we going to go about
18 measuring on a given date how much water has been diverted post
19 '50 rights.

20 That includes of course, as you know, the reservoir
21 calculations, what the reservoir levels were on October 1
22 compared to the reservoir levels -- then of course you also need
23 to know what the reservoirs are, because a reservoir that was
24 built before 1950 is excluded from the V(B) calculation.

25 The reservoirs that were developed after 1950, it

1 depends what the rights are, pre '50 rights or post '50 rights;
2 the post '50 rights on the reservoir, contracts use in the
3 reservoirs, the reservoir levels were counted in the calculation
4 so it gets down to that level of detail.

5 The reservoirs, the parties over the years, over all
6 those years, for many years -- I think it's been at least 15 or
7 20 years -- in the annual reports you'll see reservoir, sharing
8 reservoir. This issue of reservoirs calculation, especially the
9 Wyoming reservoirs. Montana has just basically the Tongue River
10 reservoir. They don't have any -- they have a couple but
11 they're small.

12 Wyoming has 15 or 20 on the Powder and Tongue Rivers.
13 They're fairly small. But all water levels are reported to the
14 commission. And so they have the water reservoir levels.

15 The question was, another question involved was, we
16 have to measure them on October 1 every year. And then somebody
17 has had to go up with a staff gauge or some other measuring
18 device to get to those reservoirs and measure them on a given
19 day.

20 If Montana is complaining that Wyoming is in violation
21 of V(B) -- and this has never happened, but if they did do
22 that -- on July 15, say, somebody from Wyoming had to go to each
23 of the relevant reservoirs on the river and see what the level
24 is, given the calculation.

25 The biggest problem here was, in that kind of

1 regulatory system, was having our boots on the ground was
2 another problem because it just costs a lot of money to do that
3 kind of, keep that kind of records, and then have that available
4 on a given date.

5 So one of the other discussions they had in the
6 '80s was, would it be good enough to have reports on a weekly
7 basis and sort of extrapolate from that because, you know, the
8 Compact says on any given date one side could be in violation
9 based on going over the percentage.

10 But that's not really very practical, I think, and
11 that's what they understood at that time. None of that's in the
12 records of this, you know. Those documents, the ones I've seen,
13 they're not in the records of this motion, you know, the V(B)
14 question you asked.

15 There was a fair amount of effort made on the V(B)
16 effort in those years, probably about a three to four year
17 effort was made on that.

18 Then the issue, I think, did come up again in the
19 early 2000s that we ought to reinvigorate that effort. So when
20 we mentioned in our brief, in our last brief, I think it was
21 Footnote 2 referring back to some other documents that are in
22 the records, in this case Mr. Tyrrell's original affidavit when
23 the lead file was being disputed here that Wyoming had
24 appropriated in 2006 \$100,000 for the study.

25 Mr. Moy and Sue Lowry, Wyoming's commissioners, had

1 discussed, there were discussions about appropriating money to
2 study how each, where each state has gotten to. Because Montana
3 was much closer at that point of having done their adjudication
4 and now they can say which rights they had pre '50 and post '50.

5 Montana had that statute in 1953 to require an
6 appropriation study. From reading the record I've seen what I
7 think in Montana there was a problem with that, from what I
8 could tell.

9 So I think there was a problem with that, and I think
10 it was a resource problem. Montana just didn't have the
11 resources for a commission and for a hydrologist system that --
12 like they had on the Wyoming side. And that's in the records.
13 We can see that in the report from Montana that, We wish we had
14 a system.

15 I think Mr. Stults said that they didn't have the
16 personnel to, to really police our post '50 rights internally
17 the way -- of course the adjudication still happened.

18 SPECIAL MASTER THOMPSON: So is it fair then to say
19 that up until today, and continuing today, that although there's
20 information that's now available regarding rights in both
21 Montana and Wyoming, even though there are, there's at least, I
22 guess, the one measuring date or the multiple measuring dates --
23 it's multiple measuring dates --

24 MR. MICHAEL: It's multiple gauges. The one that
25 matters is for the river compact purposes.

1 SPECIAL MASTER THOMPSON: All right. I did know that
2 information is available. But there's no active evaluation of
3 that information by sort of a daily or weekly or monthly basis
4 by a commission or anyone else to figure out whether or not the
5 parties are actually dividing up V(B) water by particular
6 percentages set out in V(B)?

7 MR. MICHAEL: I'd say that hasn't been done. There's
8 been lots of talk about doing it. Montana has said, We'll try
9 to get \$100,000 from our legislature to get this V(B) in place.

10 When they got to the 2000 drafts they realized that,
11 We better get this in place. They tried to gauge the future
12 drought, and then it fell by the way budgetarily.

13 That's a V(B) issue.

14 SPECIAL MASTER THOMPSON: I understand.

15 MR. MICHAEL: And V(A) is quite different. I think
16 that's much simpler because Montana had those pre '50 rights and
17 knew a lot of them, or knew enough to submit affidavits in
18 2004 showing that their pre '50s on a certain date were not
19 getting water. Wyoming had its information on the post '50. So
20 that, the ability to do that is different.

21 The ability to do that been available since I think
22 1950 because Wyoming had a handle on all of its new development.
23 You'll see that in the annual reports.

24 Wyoming had -- I think there's even a report in the
25 mid '50s, LC Bishop maybe in fourth or fifth year, '55, maybe

1 '56, saying Wyoming has developed its information on the new
2 development keeping track of that.

3 Being able to call it post '50 in Wyoming would
4 possibly be doable to be done. We do it all the time, of course
5 intrastate, so it is doable if there's any law, of course.

6 It's our contention that Montana is not getting
7 pre '50 water. We're cut back to 1880. So it's kind of an
8 academic exercise really, and it's best for later in the case.

9 SPECIAL MASTER THOMPSON: Okay. And then, in just
10 trying to understand the overall record and the way in which
11 things have proceeded, so as Montana -- you note this also --
12 that 1982, Montana expressed concern about whether or not during
13 low flow years it's getting water per its pre 1950 users, and
14 suggests maybe Wyoming needs to regulate its post 1950 water
15 rights.

16 What was Wyoming's response at that point?

17 MR. MICHAEL: Oh, to the annual report? I don't think
18 we know. Mr. Christopulos is not with us so we can't ask him.

19 I think you find actually there is a clue. In '85
20 there was an annual report in '85. As you mentioned, back in
21 that report, that Montana had complained a few years earlier.

22 And Mr. Christopulos had said, Well -- so Montana I
23 guess had raised the complaint again in '85 referring back to
24 the prior complaint.

25 But no, my understanding is nothing was done. It was

1 raised at the annual meeting. And Montana said if this occurs
2 again we'll notify you. Presumably, we'll tell you when it's
3 happening. That's the way I read it of course is, We'll tell
4 you when it's happening and you can take some action.

5 SPECIAL MASTER THOMPSON: Okay.

6 MR. MICHAEL: There's no indication that ever happened
7 until 2004.

8 SPECIAL MASTER THOMPSON: And is there any indication
9 at that point in time, so either in 1982 or 1985, as to whether
10 or not Wyoming at that point said, Well that is a good point.
11 We need to do something about this, or responded instead, We
12 don't have any obligation?

13 MR. MICHAEL: There's no indication that Wyoming
14 responded, We have no obligation. Though I don't know what
15 Mr. Christopoulos, what the interpretation of the Compact was at
16 that point as a V(A) claim, a V(A) claim.

17 The one thing that does come up later, Your Honor, is
18 '92. Mr. Fassett was -- and he's alive. We have his affidavit.
19 In '92 Montana's commissioner Gary Fritz, in that year Mr. Fritz
20 had reported that his staff had compiled information on pre and
21 post '50 water use in Wyoming. So they had actually made an
22 effort to look at what was going on in Wyoming -- Montana.

23 Based on that information, he concluded the pre '50
24 use impacts Montana. And evidence suggests that a post '50 use
25 also affects Montana's utilization of water in the basin. He

1 noted that the impacts had not occurred every year, but they do
2 occur.

3 He suggests -- I go down further. He suggests that
4 the commission consider the potential problems before they
5 become major and urgent issues.

6 So apparently it wasn't major that year. When montana
7 takes a look at the pre '50-post '50, they start being concerned
8 with development in Wyoming.

9 So remember, as I said earlier, in the early '80s even
10 at that time the reports indicated there wasn't enough
11 development in Wyoming to be concerned. But by '92 Montana was
12 starting to say, Wait a minute. There's enough development in
13 Wyoming we should be concerned about the pre '50 rights.

14 In the notes of that meeting -- this is December 1
15 '92 -- this is Mr. Fassett's response as stated here.

16 Mr. Fassett's comment is he was not aware the topic
17 would be on the agenda of the meeting and consequently was not
18 prepared to discuss it.

19 He stated he was worried about the issues, the issues
20 that Montana raised. He asked if Montana could cite specific
21 examples of injury. He stated he saw little benefit from
22 resolved issues in the abstract and agreed that real issues
23 should be addressed.

24 So Wyoming was open to follow this up further. But
25 I'm not aware -- I think what you see probably is this roller

1 coaster. You have a bad year, everybody gets up in arms,
2 irrigators complain to the commission, the commissioners.

3 And then there's discussion at the Compact commission
4 meeting at the end of the year, and then the next year it's a
5 good water year and everybody stands down, I think that's
6 probably what you see, my interpretation of kind of how things
7 worked over the years.

8 I'm not aware from later annual reports between
9 '92 and 2000 that Montana, you know, took the bull by the horns
10 and said, We want to do more to develop a methodology, although
11 again the methodology I think is pretty simple.

12 You complain, you say, We're not getting pre '50
13 water, and Wyoming's got control over post '50s, if there's a
14 law, which we think there wouldn't be, and we have the ability
15 to shut off the 50s if we get the call.

16 Did that answer the question?

17 SPECIAL MASTER THOMPSON: Yes, I think you did. Let
18 me rephrase it and let me make sure that I totally understand.

19 So as you know, one of Montana's arguments in
20 opposition to the motion is that Wyoming basically should be
21 estopped from requiring a call in prior years because Wyoming
22 basically said, You don't have any obligation to Montana with
23 respect to those pre 1950 rights.

24 And certainly that was the position that you've taken
25 earlier in this proceeding --

1 MR. MICHAEL: In 2000 --

2 SPECIAL MASTER THOMPSON: -- and I was wondering when
3 Wyoming expressed that point.

4 MR. MICHAEL: In 2006.

5 SPECIAL MASTER THOMPSON: In 2006?

6 MR. MICHAEL: In 2006. Mr. Tyrrel's letter expressed
7 that we didn't think we had an -- because it didn't develop in
8 2004 because in 2004 Montana had give Wyoming pre '50 rights.

9 Presumably I expect the reason Mr. Stults said that in
10 his letter was Montana understood when Montana's pre '50 rights
11 weren't getting water to these rivers, Wyoming was cut back well
12 before 1950 rights, so there weren't any post '50 rights.

13 So if you're going to call, you might as well call
14 something that would use less water. So I think that's probably
15 why.

16 It wasn't until 2006 that Montana -- well, I would say
17 one other thing. In 2004 Montana asked Wyoming, they said,
18 Wyoming, You have 214,000 acre feet that was being referred to
19 in this letter on the Powder available. And you have 9,000
20 acre feet of storage, from what we understand, in storage at the
21 time on May 18, 2004 on the Tongue River Basin, and you should
22 release that water to us.

23 And of course we've talked about that earlier in the
24 proceeding how reservoirs work. And Wyoming did not do that.

25 But so I guess you could say to some extent there

1 might've been a pre '50-post '50 claim by Montana in 2004 it was
2 with respect to reservoirs.

3 In 2006 they claim the pre '50 and shut off the post
4 '50. We point out we were cut back to 1880. In Mr. Tyrrell's
5 letter he still denied that -- that was the first time Wyoming
6 denied that. By then we thought V(A) created a right of pre
7 '50s going off post '50s.

8 SPECIAL MASTER THOMPSON: Thank you. That's very
9 helpful.

10 So let me turn now to the main argument of your
11 motion. As I understand it, it is that the Compact itself
12 requires that Montana make a call. Put aside for the moment the
13 nature of that call. The Compact itself requires Montana to
14 make a call on Wyoming in order to satisfy its pre 1950
15 appropriate rights.

16 And that in order to show that, you start with the
17 actual language of the Compact, and in particular, the language
18 of Article V(A) that provides that the pre 1950 appropriate
19 rights shall continue to be enjoyed in accordance with the laws
20 governing the acquisition and use of water under the Doctrine of
21 Appropriation.

22 The first part of the argument, look at that language,
23 look at the Doctrine of Appropriation in the United States and
24 that requires a call. So that you can certainly stop with the
25 language of the Compact and prior appropriation law. But that

1 then, in addition to that, the structure of the Compact requires
2 a call.

3 I understand the first part of the argument. Can you
4 go into a little more the second part? In other words, I find
5 that language ambiguous as to whether or not it requires a call.

6 What do I look to in order to try to resolve that?

7 MR. MICHAEL: One of the issues that we faced earlier
8 on, if you recall in our argument, was that -- and we had
9 interpreted earlier in this case -- and we were totally wrong
10 about that and accepted that -- is that Article V(A) in
11 accordance with the Doctrine of Appropriation means each state
12 regulates itself on its own. That's what that was referring to.

13 You and the Court both told us, No, the Doctrine of
14 Appropriation applies to the three-tiered structure, and allows
15 this kind of a claim, you know, pre '50 Montana claim, reaching
16 across state lines to post '50 Montana.

17 Our question is, our argument is that if you have a
18 compact that creates a commission, and you have a commission
19 that has the duty to investigate, do these kinds of things, and
20 since the common law under V(A) of appropriate rights says that
21 the only way this works, the only way you have beneficial use
22 and prevent waste -- because this compact, like any other
23 appropriate compact, wants to encourage beneficial use and
24 prevent waste. The only way to do that is by having
25 communication.

1 And this compact doesn't say, as we said before --
2 you've said an integrated system of regulators crossing state
3 lines communicating with each other on a daily basis, did not do
4 that. And so pre '50s don't call off pre '50s.

5 But in order to have this work, a compact with
6 cooperative structure that deals with real water. Doesn't deal
7 with lawsuits that somebody files later to get damages. But
8 really tries to keep the crops from burning up in Montana, if
9 they legitimately aren't getting pre '50 water, have a post '50s
10 water call. But there must be this mechanism.

11 When you look at the rest of the Compact and see in
12 Article III(C)and (E) that you have a commission, and they have
13 the powers and duties to investigate, compile data, and to
14 administer and if there's a vote, if there is a deadlock, the
15 federal representative as the third party is to vote and break
16 the deadlock at the end of c -- of 3 rather, Article III.

17 You have that development that generally it's creating
18 a cooperative structure. And if as the Court has said and you
19 have said, there is a right to do that, we're saying that then
20 the cooperative theme of the Compact would require the parties
21 to work to make this come to fruition and actually function.

22 And the way to make that function and work in a
23 cooperative structure is to have the parties make this
24 communication, as Montana did in 2004 and 2006; have their
25 commissioners gather the information, convey it to Wyoming.

1 If more information is needed and they can't get it,
2 the United States is duty bound to participate and gather the
3 information in the Compact.

4 Again, if the parties are having trouble with an
5 administrative structure, do what Wyoming did, appropriate
6 \$100,000 on the condition that Montana come up with like sums,
7 and develop the information if you don't have the information
8 you need. That was 5 analysis primarily, do that if you need to
9 do it looking forward.

10 So it kind of goes back to the preamble of the
11 Compact, that this Compact is designed with irrigation in mind.
12 If you recall, irrigation is mentioned in the preamble.

13 This Compact is designed to have the parties work
14 together and cooperate to make this function. And so it's a
15 more general argument; it's not as focused as the Doctrine of
16 Appropriation under V(A), which the Court has found to be
17 critical.

18 But that's the other argument I think summarized in my
19 brief. Those are the other parts of the Compact where we look
20 to find that, if that makes sense, the common law should be
21 incorporated.

22 SPECIAL MASTER THOMPSON: And could, just trying to
23 extend this a little bit, if the commission sat down and wanted
24 to come up with a different approach for administering the
25 Article V(A) obligations, for example if the commission decided

1 that one way of doing this would be to try to quantify what
2 Montana's current pre 1950 appropriate rights are, and say,
3 Wyoming, you have to make sure that these are met, enough water
4 is flowing into Montana before you give any water to your pre
5 19 -- I'm sorry, post 1950 appropriators, would the commission
6 be free to do that? Or in your view could Wyoming say, No. We
7 have to set up a call system?

8 MR. MICHAEL: I guess if the parties agree to a
9 surrogate for a call. That what you're describing is a
10 surrogate for call.

11 We can't tell -- we don't have to -- a call isn't
12 necessary because we provided the alternative. In fact, I would
13 almost call it a call system. It's a surrogate for it. It has
14 to be realtime.

15 The courts, you know, the courts told us at V(A),
16 Montana is entitled to this until they're not getting their
17 water. That's the Doctrine of Appropriation. The Court told us
18 that we have to work in realtime.

19 I guess if the parties decided to create a surrogate
20 for that, I don't think that there would be anything that would
21 prevent that from happening. I don't know how you would do it,
22 but it doesn't seem very practical.

23 I wouldn't say the Compact bars that from happening.
24 But the Doctrine of Appropriation, in the absence of a surrogate
25 for a call, says that the junior is required to let the water go

1 without knowing whether there's going to be beneficial use.

2 We have to have that assurance in some fashion as a
3 surrogate.

4 SPECIAL MASTER THOMPSON: I realize this is a motion
5 for partial summary judgment with respect to damage claims that
6 Montana might have for prior years, so we're not explicitly
7 dealing at the moment with respect to prospective --

8 MR. MICHAEL: Right.

9 SPECIAL MASTER THOMPSON: -- relief that the Court
10 might want to order.

11 MR. MICHAEL: Right.

12 SPECIAL MASTER THOMPSON: But in your view, in thinking
13 prospectively, does the Compact require that any prospective
14 relief incorporate some type of call requirement? Or could the
15 Court, in trying to assure that Montana's Article V(A) rights
16 are met in the future, establish some alternative type of
17 review?

18 I realize that --

19 MR. MICHAEL: The Doctrine of Appropriation, in my
20 view, requires a senior water right to make a call. Every state
21 requires that states are unable -- I think the states could
22 change the doctrine statutorily to allow some other system, some
23 other way.

24 I don't think they'd want to do it. Senior should
25 always call on the junior. The junior can't be clairvoyant. I

1 don't think that would happen, but I think they're free to do
2 that. I think that meets that part of the doctrine.

3 But the incorporated doctrine -- let me state a
4 question that's come up in this case before. That is, is it
5 frozen in time in 1950? Or is it a living -- a doctrine that
6 adjusts to the times?

7 We can have some kind of telemetry system so that
8 Wyoming, which isn't able to put boots on the ground in Wyoming
9 could, through telemetry, find out whether Montana's pre 1950
10 water rights were not being -- they're not getting their water
11 at a head gate.

12 Could the commission set up something that works that
13 way as a surrogate? Again, I think that raises -- I think they
14 could in the Compact.

15 The Doctrine of Appropriation is -- to date the cases,
16 the Worley case and others, the concept is the senior needs to
17 make the call. Wyoming says that in the statute. Montana says
18 the same thing. It requires the written call. They have a
19 form. They require people to make calls within the state.

20 If something else were practical, could that be done
21 to make sure that that was done fairly? I don't know why the
22 states couldn't agree to that necessarily.

23 SPECIAL MASTER THOMPSON: So let me then ask a
24 slightly different question.

25 So again, I understand that your argument is that the

1 Compact itself requires a call both in terms of its language and
2 also in terms its structure pending an established commission to
3 administer the rights between Montana and Wyoming.

4 MR. MICHAEL: Right.

5 SPECIAL MASTER THOMPSON: If I were to conclude or if
6 the Court were to conclude that if you look at the Compact,
7 actually the Compact doesn't address this particular point. And
8 I'm not saying that either I or the Court would reach that
9 conclusion.

10 MR. MICHAEL: I understand.

11 SPECIAL MASTER THOMPSON: Just assume that's the case.

12 Is there any other reason why at that point, if the
13 Compact seems to be silent and it appears as if the parties
14 established these rights, but then maybe because they never
15 expected it to be a problem and didn't really think about what
16 the administration process would be, are there any other reasons
17 why you believe that Wyoming needs to be placed on some type of
18 notice in order to be liable for the damages?

19 I'm just wondering whether or not, for example, you
20 believe there's any type of a general mitigation required or
21 anything of that nature in these type of cases.

22 MR. MICHAEL: Well, I think there is. I believe I
23 made the distinction in my opening brief on this issue between
24 the water law concept and the call and the concept we see
25 throughout the law, if a party is damaged or expecting to be

1 damaged in the certain circumstances they need to notify the
2 other party who otherwise has no way of knowing.

3 Throughout the law we have that. And we also have the
4 situation where we have notifications that have to occur to
5 maintain a lawsuit.

6 For example, in this case if we were to go forward in
7 this case and you deny this motion, and we're dealing with some
8 claim from 1953, I'm sure we're going to have a good laches
9 defense. The witnesses are dead; the streams were adjudicated.
10 How could we prove anything that happened in 1953?

11 So that is a defense. That's different than what
12 you're saying. But the notification requirement, you know,
13 persists throughout the law of fair notice. I think that is the
14 reason for the call requirement. I think that's one of the
15 reasons. The beneficial use and waste concept is the other
16 reason.

17 But fairness of the party that has control over the
18 data -- and again, the critical information that triggers
19 anything under V(A) of this compact is that the rights in
20 Montana are at risk of not continued to be enjoyed; they're at
21 risk.

22 And as we pointed out in our brief, the rights of
23 Montana were not that Wyoming doesn't have the ability or
24 even -- we don't have the ability, and we put in on our
25 affidavits, to trespass in Montana and send our commissioners

1 across the state line and discover that Montana rights are not
2 being satisfied. So just basic fairness under this compact.

3 The Compact doesn't provide, as you've pointed out and
4 the Court's pointed out, does not provide an integrated
5 administration across state lines. And that creates a massive
6 fairness problem for Wyoming being told five years later, By the
7 way, five years ago we weren't getting our water and we didn't
8 notify you.

9 As I said, of course, again, I think we're getting
10 right back into the call. The reasons for the rule of call is
11 that the junior shouldn't be required to ask the senior, call
12 the senior up on the telephone every day, Do you need any water?
13 Do you need any water? Do you need any water?

14 No. The senior has to -- knows when they want water
15 and when they need water. And the onus is on them to make the
16 notification.

17 That applies in spades here because this is not within
18 a state where, you know, the regulators from Wyoming could drive
19 down the stream and see who is doing what. I know in the west
20 there are situations where the hydrographers and commissioners
21 are so attuned to what's going on in a stream everybody just
22 does everything the same way every year. And so it's, The
23 stream's at this level. We'll just change the head gate and do
24 this.

25 There's situations where that occurs, where it's a

1 highly regulated stream. Everybody knows. All the ranchers are
2 together and the irrigation districts are together and they know
3 how the system works and they just work it.

4 That's not possible here. There's no integrated
5 scheme, as you said. And our people can't go into Montana and
6 discover these things, and can't build that kind of a system.

7 So in fairness, yes. In fairness, the whole concept
8 of this is fairness. And it extends over the top of the call,
9 of the particular call concept.

10 SPECIAL MASTER THOMPSON: Okay. Thanks. That was
11 very responsive to my question. I'd have been disappointed if
12 you hadn't given that particular answer.

13 Let me then ask, Mr. Draper says in Montana's brief
14 that he knows of no Supreme Court original jurisdiction case in
15 which the Supreme Court has ever required a call or any type of
16 notification ahead of time in order to establish a right for
17 prior years when one state did not receive water that the
18 Compact guaranteed.

19 Do you know of any case?

20 MR. MICHAEL: I do not know of any. I do not know of
21 any compacts interpreted to have an interstate prior
22 appropriation theme.

23 I think the La Platta Compact in that water case has a
24 scheme where the water at a certain stage gets to a certain
25 level the New Mexico and Colorado officials -- I think New

1 Mexico, they're to get together. I don't know which one
2 notifies the other one, but I know they get together.

3 The state engineers then put in a schedule of the
4 water week by week. So the water users in Colorado will be shut
5 off for a week on the La Platta and then -- I think it was the
6 La Platta, and the New Mexico water users get it for a week and
7 they flip back.

8 But there has to be a trigger in that compact to do
9 that. And it's a gauge, it's reading a gauge. I think that
10 the, if I recall from the Hinderlider case, I don't know exactly
11 who reads the gauge and who notifies the other state. I suspect
12 New Mexico, being a downstream state, is the one who wants to
13 notify Colorado they want to start doing this.

14 But that's the closest I can think of to a situation
15 like that. It starts to get looking like an interstate scheme,
16 appropriation scheme.

17 But I'm not aware of any one like this because certain
18 rights in one state as a block, or if they're short, the other
19 state has to respond. I don't know that there's anyplace we can
20 find an analogy.

21 SPECIAL MASTER THOMPSON: So again, Montana, in its
22 brief, mentions two other cases it talks about. It talks about
23 the Kansas versus Colorado case whereas it points out that the
24 Compact requirement is waters of the Arkansas River shall not be
25 materially depleted, and that useful quantity are available for

1 use of the water users in Colorado or Kansas under the Compact
2 of future development and construction.

3 They also refer to the Texas versus New Mexico case,
4 in particular the 1987 decision. And in that case New Mexico
5 had not believed it was in violation of the Compact given the
6 way it calculated the Compact.

7 So in Montana's view, those are very similar facts;
8 there's no requirement of a notice or call there and therefore
9 it goes to a strong precedent for its position.

10 I just want to give you an opportunity, if you want
11 now, to respond to that. I know you didn't respond in your
12 reply.

13 MR. MICHAEL: I don't think they're a similar fact.
14 Well, I know the Pecos Compact involves the reservoir, which I
15 think by default it was regulated by the Bureau of Reclamation.

16 So I think the complaint about the two, the Texas and
17 New Mexico, was groundwater as I recall, use of groundwater.
18 And the question was, was it depleting the water at the state
19 line based on the 1949 condition, if I recall.

20 And so I don't think you had this clear-cut water
21 rights with a particular priority down to the state not getting
22 the water, which is what we have here.

23 I mean, we have a situation here where Montana is the
24 only one that knows they have -- for example, they made a call
25 to Wyoming. They had the 1914 decree, and sent it to Wyoming

1 and said, Here. See? We have pre '50 water rights on the
2 Tongue River. And they sent affidavits that certain people,
3 their head gates aren't getting water.

4 So there was no mass delivery situation. It's we look
5 to what our individual water users are -- happening in realtime
6 in that compact. It's not, You will guarantee that you will
7 maintain mass deliveries at the state line where you go in
8 violation. That's what the Pecos does.

9 So basically you have a case with a state line gauge
10 and the state simply goes to the state line gauge and reads it,
11 and by the end of the water year they haven't got enough water
12 to go past the state line, then the argument is just about ours
13 because the state defense of the Pecos, New Mexico's defense is,
14 Well, yeah. Not enough water passed the state line. We know
15 that because the gauge said not enough water passed the state
16 line, but there wasn't enough hydrologists for that at the state
17 line, so it wasn't our act that caused it; it was Mother Nature
18 that caused it.

19 And then Texas says, No. It would have passed the
20 state line but you developed all these groundwater wells up
21 there. So that is a case if you have a mass state line gauge
22 and the obligation of the upstream state to ensure the quantity
23 to go past the state line is enforceable without a call because
24 you don't have to know what's happening downstream; you don't
25 have to know the pre '50, in our case, downstream aren't getting

1 water. All you need to know is the quantity didn't pass the
2 state line.

3 So I don't think it is comparable, a comparable
4 situation. If the Yellowstone River Compact said Wyoming can
5 ensure a certain amount of water past the state line, which is
6 Montana's argument, which has been declined, rejected by the
7 Court in this case, then Wyoming wouldn't need a call from
8 Montana. It would monitor the gauge.

9 But here, this is unique in my view. And I don't
10 think those are applicable.

11 SPECIAL MASTER THOMPSON: I've taken up basically your
12 entire time asking you questions. So let me just, before
13 turning to Mr. Draper -- and I'll let you have another five
14 minutes later to respond to anything that Mr. Draper has to
15 say.

16 But I also want to give you an opportunity if there is
17 anything else you wanted to say during the oral argument that
18 you haven't said already in your brief, I certainly want to give
19 you that opportunity.

20 MR. MICHAEL: The only thing, Your Honor, that is --
21 and maybe this is something we can actually take up in the case
22 management conference later -- but the idea of where we go from
23 here, because Montana has a section of the brief saying, We need
24 more witnesses. We need to find more people.

25 We responded to that to a degree. But I think it's

1 something that needs further discussion. I leave that asterisk
2 there on that issue.

3 SPECIAL MASTER THOMPSON: Yes. That was on my list of
4 questions also. I was hoping to get to it during this hearing,
5 but it's clear we're not going to have time to do that.

6 I would suggest we save it until the status
7 conference, the question of assuming that I were to agree with
8 Wyoming and hold that either some type of requirement of call or
9 some type of requirement of notification to Wyoming that there
10 was a problem, then what do we need in the way of additional
11 discovery before we can actually resolve that particular
12 question?

13 And so I would love to have both yours and
14 Mr. Draper's thoughts on that particular question, but I think
15 you're right. It fits really nicely into the status conference
16 of the question of how we move forward with discovery at this
17 point because I don't want to spend three or four months trying
18 to resolve that issue, and then after three or four months on
19 that then we finally begin discovery, and then it's another year
20 after that before we finally finish discovery and all the expert
21 witnesses.

22 So I would love people's thoughts on that, to save
23 time, in the status conference.

24 MR. MICHAEL: Thank you, Your Honor.

25 SPECIAL MASTER THOMPSON: Thank you.

1 Mr. Draper?

2 MR. DRAPER: Thank you, Your Honor. May it please the
3 Court, good morning.

4 SPECIAL MASTER THOMPSON: Good morning.

5 MR. DRAPER: I have with me Jennifer Anders from the
6 Montana Attorney general's OOffice, and my colleague Jeff
7 Wechsler from Montgomery and Andrews.

8 SPECIAL MASTER THOMPSON: Welcome to everyone this
9 morning.

10 Since I didn't let Mr. Michael get a word in before I
11 asked a question, why don't I do exactly the same with you.

12 And as you know, I started out with Mr. Michael by
13 asking for a little bit more clarity as to how the commission
14 has actually tried to administer with any of the elements of
15 this particular compact to date.

16 And then in addition to that, when it is that Montana
17 has raised any concerns, even whether inform or not, regarding
18 the pre 1950 appropriators in Montana, and what Wyoming's
19 response to that was.

20 So you heard Mr. Michael's response. And I would love
21 to get your thoughts as to whether or not you agree with
22 Mr. Michael's summary. And if not, any additional information
23 that you may have.

24 MR. DRAPER: That's only fair, Your Honor.

25 I'll start out in answering that question, I think

1 Wyoming agrees that there have been discussions over the years
2 regarding Montana's concerns that it was not getting its water
3 under the Compact.

4 One thing to be kept in mind is that, although there
5 have been discussions and complaints, some noted in the record,
6 some not, those are testified to in the declarations of
7 Mr. Moy, for instance, Wyoming has never delivered one drop of
8 water out of this compact in order to comply with the Compact.

9 It has never responded in any concrete way by
10 delivering any water over the period since 1950 in response to
11 any of the complaints that have been made.

12 They're glad to study things; they'd like to have more
13 information; they'd like to appropriate money and study things
14 further. But if it comes to a question of actually delivering
15 any water, it's never happened, Your Honor.

16 SPECIAL MASTER THOMPSON: Let me just clarify that.

17 So Wyoming certainly delivered water over the border
18 to Montana. I assume what you're saying is that in response to
19 any concerns expressed by Montana, Wyoming has never changed the
20 way in which it's administering its rights. Is that what you're
21 saying?

22 MR. DRAPER: Yes. It has never curtailed rights in
23 Wyoming in order to deliver water under the Compact from Wyoming
24 to Montana.

25 SPECIAL MASTER THOMPSON: And has the, you know,

1 again, as I understand what Mr. Michael has said, there's not
2 been any active administration of the Compact by the commission
3 in terms of actually figuring out how much was being delivered,
4 and whether or not the amount that is going over the border
5 between Wyoming and Montana satisfies any of Article V.

6 There has been no effort to actually administer that
7 on an active basis; is that correct?

8 MR. DRAPER: It's good to keep in mind as we discuss
9 this, Your Honor, the difference between enforcement and
10 administration as we see in Article III of the Compact.

11 Also remember the Compact commission is not authorized
12 to enforce the Compact; it is authorized to collect data,
13 correlate it, report it, and share it. But this is not an
14 enforcement organ.

15 We consider it a very useful organ because it allows
16 two parties to a compact to share information, share complaints
17 if there are any.

18 As we've seen over the years, if you look at Mr. Moy's
19 declaration in particular, he is the person who is involved from
20 the early 1980s to 2008, and testifies in his declaration to the
21 numerous claims that, other than other evidence we have from '04
22 and '06 at that point, about the lack of water coming across the
23 state line and concerns that the Compact is not being complied
24 with.

25 And as he further states, Wyoming has always had a

1 reason why it should be compliant. And frankly I think your
2 question raises something that has and is part of it here that
3 has some validity, and that is did the parties really know
4 enough about the respective rights, the comparable pre '50
5 rights, in order to know whether those rights were being
6 utilized in a way that was, and supplied in a way consistent
7 with the Compact.

8 Much has been said about the earlier Wyoming
9 documentation of water rights as compared to Montana. But it's
10 clear that the question of which water rights are recognized on
11 a comparable basis is something that's defined by this compact.

12 We know, for instance, that there are many rights on
13 the books in Wyoming that have not been of beneficial use, and
14 so-called paper rights. Those we believe, although they may be
15 of record and the State of Wyoming may have its own opinion
16 about whether those are recognizable or not, they're not
17 recognizable under the Compact.

18 So even though you've got some documentation, and
19 impressive documentation on the Wyoming side, it doesn't resolve
20 the question of whether that documentation is inclusive as to
21 what rights can be exercised as part of its 1950, pre 1950
22 entitlement.

23 So there's the question, and I'll say a little bit
24 more about it in answer to your question. There have been
25 substantial uncertainties as to what the water rights are in

1 each state. That should be recognized for the purposes of the
2 Compact.

3 The record is replete with statements along those
4 lines at the time of the compact's adoption that to quantify
5 those rights in a comparable way on both sides of the state line
6 as it existed as of the date of compact, January 1, 1950, was a
7 daunting task that states agreed would not be undertaken at that
8 time.

9 But the principles would be as stated in the Compact
10 in Article V(A), which would then allow them to address the
11 urgent problem of how do you divide water as they become
12 available through the new federal projects.

13 So right at the beginning the lack of definition,
14 quantitative definition of comparable rights on either side of
15 the state line pre 1950 was acknowledged to be a problem. We
16 didn't have, the states did not have that knowledge.

17 And as it's clear from the record, that knowledge has
18 not been developed still even to this point. In fact, it is our
19 hope that one of the important things that will be done in the
20 course of this case is that an authoritative quantification will
21 be made so that the states will know their respective rights and
22 obligations under the Compact.

23 So in some ways I sympathize with the Wyoming calls
24 for more information. But those calls came equally frequently,
25 perhaps more so, from Montana seeking to find some way of, as

1 they said, administering the Compact.

2 During a number of the meetings this desire was
3 expressed, particularly in the 1980s. I think both states
4 acknowledge that there was discussion of that. But ultimately
5 that effort was not undertaken at that time.

6 So when you get to the idea of a call, it's hard to
7 imagine a call if the parties both giving the call and receiving
8 the call are unsure of their rights.

9 The call assumes that you know exactly what your
10 rights are in terms of applying and priority. If there was
11 doubt about that, which there admittedly was, it's hard to
12 conceive that those parties would have said, A call was
13 necessary before any remedy for past overuse upstream can be
14 heard.

15 It doesn't fit with those facts.

16 SPECIAL MASTER THOMPSON: So let me ask to stop you
17 for a moment there.

18 So is it Montana's view that the Compact basically
19 sets up absent liability system? So in other words, let's
20 assume that Montana hadn't said anything to Wyoming over the
21 last 60 years about the pre 1950 rights, but then came before
22 the Court and said, you know, Our pre 1950 rights were not met,
23 and Wyoming needs to provide either monetary damages or some
24 type of water. Would that be fine?

25 In other words, basically Wyoming needed to just try

1 and do what it could do, and if they were wrong they were
2 liable?

3 MR. DRAPER: Your Honor, I don't think the Compact
4 sets up any requirement that a call or notice be given. Just as
5 the Court said with respect to the Pecos River Compact when New
6 Mexico protested, that it thought it was complying with the
7 contact all along; therefore, no remedy for past violations
8 should be heard. It would be unfair. They hadn't been told by
9 Texas that they weren't getting, weren't getting their water.

10 And of course as Mr. Michael mentioned, that was
11 really at the heart of that particular litigation. And as Your
12 Honor is aware, the effect in amount of timing of groundwater
13 pumping from various wells of varying distances separated by
14 various hydrologic formations is sometimes a hard task to
15 decipher.

16 And yet even under those circumstances the Court
17 rejected New Mexico's argument that it had no reason to believe
18 that it wasn't complying; that it shouldn't be liable for not
19 complying if that was determined later.

20 And the Court said, Well just like under any contract,
21 you may find out you didn't comply and you will be required to
22 submit to an appropriate remedy determined by this Court.
23 That's our job.

24 There was a contract between the parties. It doesn't
25 mention anything about remedies, which is true here. And it's

1 the Court's job to determine what the proper remedy is.

2 And the, I think these compacts, those were adopted
3 about the same time. One of the common characteristics you see
4 in them is they don't deal with remedies for violations. They
5 set up the standards for allocating the water and leave it at
6 that, basically.

7 They do provide an issue usually. And sometimes
8 explicitly, as you saw, as we see here in the Yellowstone case
9 or the Pecos case. Sometimes implicitly as you can see in the
10 Republican River case.

11 But in any event, in all those compacts like this one,
12 there's no, there's no effort to address what happens if the
13 Compact is not complied with. And the Court is not put off by
14 that; that's the job of the Court. And they note it in the
15 litigation that these general principles that have been set out
16 in the Compact were interpreted in a 1947 condition that was key
17 in that case as determined in that litigation by the Court
18 itself as to what it actually meant.

19 And there's some echoes of what we're doing here there
20 as to what exactly are those V(A) entitlements on both sides of
21 the border here. What's the 1940 condition requirement in the
22 Pecos River Compact?

23 During the course of that litigation many years after
24 the Compact was adopted that standard for compliance was finally
25 determined. The parties didn't know it until then.

1 And then New Mexico took the position that, Well, we
2 just found out what the standard is. We can't be held liable
3 for that. And in answer the court said, No. These are
4 obligations. You have the responsibility to meet your
5 obligation. And we will find fair and equitable remedy not only
6 going forward but with respect to past violations.

7 SPECIAL MASTER THOMPSON: So let me ask you just to
8 pause there for a second and talk a little bit more about the
9 Texas versus New Mexico case.

10 So agreed that one of the issues there was that no one
11 knew exactly what the exact quantity was, or even how to
12 calculate that. That was one of the things that the Court
13 ultimately resolved.

14 And so New Mexico was ultimately held liable for a
15 quantity of water that it could only guess at prior to the
16 Supreme Court's decision.

17 In that case -- and I'm asking because I haven't gone
18 back and looked at the facts -- wasn't New Mexico however aware
19 that Texas disagreed with the amount of water that New Mexico
20 was delivering so at least they knew there was a live
21 controversy even though they might not have known that the
22 amount of water that they were delivering was the proper amount
23 at that time?

24 Doesn't that differentiate from this case?

25 MR. DRAPER: There were various aspects of the Compact

1 that were discussed in the form of the Pecos River Commission
2 over the years leading up to the litigation.

3 In some cases the parties agreed that there had been a
4 violation and a certain amount. And they agreed to that. The
5 Court held the parties to that.

6 There was agreement but eventually they came to an
7 impasse. And so there was disagreement, as there is in this
8 case, leading up to the filing by the downstream state of the
9 case in the Supreme Court.

10 Perhaps you could try that question again. I'm not
11 sure if I've totally answered the question you were interested
12 in.

13 SPECIAL MASTER THOMPSON: So let me try explaining it
14 this way. I'm going to make an argument for Wyoming at this
15 stage.

16 So in the Texas versus New Mexico case you have the
17 Supreme Court providing for effectively past damages because of
18 New Mexico's failure to deliver enough water across the border
19 as was required under the Compact.

20 And as you point out, because there was a disagreement
21 over exactly how that could be calculated, you know, New Mexico
22 was really having to make a calculated decision, you know, Do we
23 deliver more? Or do we deliver less, take the chance that
24 ultimately we will be held liable and then be responsible for
25 providing some type of damages for that?

1 But if I'm Wyoming I would argue that there are
2 potentially two differences between the Texas versus New Mexico
3 case and this case.

4 The first one would be -- and this is where I haven't
5 looked back, but my memory was that there was, in the years for
6 which New Mexico was held liable in that case, that there was an
7 active dispute between New Mexico and Texas over the amount of
8 water that needed to be delivered so that at least New Mexico
9 knew that Texas believed that it was entitled to more water.

10 Whereas here, Wyoming would argue that, except in
11 those years where Montana raised the issue, it had no idea
12 whether or not Montana was concerned; as far as it could tell,
13 Montana was perfectly happy with the amount of water that was
14 being provided. That would be one difference.

15 The second difference, my guess is that Wyoming would
16 argue that in this particular case as the Special, as the
17 Supreme Court and I have held in the past, ultimately what this
18 is about is ensuring that there's adequate water going over the
19 border to meet pre 1950 appropriate rights of Montana.

20 In the past I know you've argued that what the states
21 should really be about is a set quantity of water. But
22 ultimately it's about meeting those pre 1950 rights.

23 Although you may not know exactly how much the
24 quantity of those rights were, because Montana hadn't quantified
25 that, at least Montana should've known whether or not its

1 pre 1950 appropriators were complaining. If they were
2 complaining they should have told Wyoming.

3 If no one was complaining then, you know, how does
4 Wyoming know that it can't use that water for its post 1950
5 appropriators, and why should it now be held liable for not
6 providing enough water when no one told them that the pre 1950
7 appropriators were not getting enough water?

8 There are two distinctions, all right? One is that at
9 least in the Texas versus New Mexico, New Mexico knew in those
10 years there was a dispute. And second of all, here the
11 information that's key to Wyoming knowing that it should put
12 more water cross the border was really uniquely in Montana's
13 case.

14 MR. DRAPER: Your Honor, on the first question, the
15 answer is no. There was, there were, there was a period of
16 34 years that New Mexico was found to have to violated the Pecos
17 River Compact, 34 years.

18 It was not, particularly in early years there was no
19 realization as often is the case when you have a pumping,
20 groundwater pumping situation that is taking water from the
21 river, the compacted river in a way that is not immediately
22 obvious to anybody.

23 So there were many years, in my recollection, where
24 there was no discussion. Gradually it got to be, as in this
25 case, an issue between the parties.

1 So there was a real dispute by the time that -- it had
2 come to a head by the time they filed. There were many years,
3 in my recollection, of those 34 where nothing was said about it.

4 SPECIAL MASTER THOMPSON: Okay. I'll go back and take
5 a look at that. Thanks.

6 So what about the second question? Really this is,
7 you, know a situation that the way the compact has been
8 interpreted is about pre 1950 appropriate right, and whether the
9 pre 1950 appropriate rights in Montana were being met, which is
10 really uniquely in Montana's hands.

11 MR. DRAPER: Your Honor, I think the general question
12 of the standard compact compliance evolves to the same thing.
13 There's a different way of getting to it in this case.

14 Talk about the 1947 condition, the people didn't know
15 what that was until the Supreme Court determined what that was.
16 It was the standard that we needed to apply. It's something
17 that's changed every year.

18 And here we have something that, we have some notions
19 the states have some conditions that -- we're in the process of
20 adjudicating our rights. They have a filing system in Wyoming
21 that at least documents the claims for rights there. So we have
22 some notions.

23 Just like the 1947 issue you might have had some
24 notion. And you knew that there was some standard out there
25 that was capable of being quantified. But it fell to the

1 Supreme Court itself to determine what that quantification was
2 then.

3 And that's what we're looking at here that we have, we
4 have quantity and priority and a use issue with respect to the
5 rights on both sides.

6 And in order to know whether there's a justification
7 for notifying Wyoming of a violation of a compact, you have to
8 know what those rights were; what they take. Can they take
9 water that can go to a reservoir that was a pre-compact filing
10 but had never been built? Is that part of it?

11 Certainly Wyoming would say, That's part of our
12 recognized water rights and it should be respected. But it's
13 not clear at all to us that that's true.

14 So you have to know the rights of both parties. And
15 as Mr. Michael pointed out, they are in possession of major data
16 here. They know their own rights.

17 SPECIAL MASTER THOMPSON: Which data?

18 MR. DRAPER: The most important data. And I think he
19 was referring to the hydrologic data what's going on in Wyoming.

20 We don't have any direct way of knowing that. As he
21 said, there's some difficulties coming across and moving around
22 in other states.

23 And just as they would have problems going into
24 Montana and doing that, we have the same problems to determine,
25 Well, there's not much water showing up at the state line. Why

1 is that? Is it Mother Nature? Or is it a valid pre-compact
2 right in Wyoming? What is the quantification of that, the real
3 quantification as recognized by V(A)? We don't know.

4 So while there's information that Montana has that's
5 part of this whole equation it's only one part, and by itself it
6 does not provide the basis for a call. The parties recognized
7 that right from the outset.

8 And while I think it could be said the states have
9 hoped that would be resolved at some point in the near future,
10 here we are in 2011 and it has not been investigated and
11 determined as to what the comparable rights are, what rights are
12 entitled to be protected in both states, what are the valid
13 pre 1950 rights.

14 In my view you can have a pre 1950 right that might
15 have been expanded to new acreage or some other expansion. And
16 to me, that's a post '50 use. You have to sort all of that out.

17 Are these present uses, is that really the use that
18 was going on at the time of the Compact? They really have
19 100 acres there, or really 50? All of those things have to be
20 sorted out.

21 To say that, you know, at least one of the states
22 bears the burden of figuring all that out on both sides of the
23 state line I think is inconsistent with the admitted status of
24 things at the time of the Compact.

25 SPECIAL MASTER THOMPSON: Let me ask you a different

1 question along these lines. And this is not what Wyoming has
2 argued in its current motion. And I think it will require
3 definitely more discovery in order to resolve this question.

4 But as I believe you noted in your brief a compact is
5 like a contract except it's a contract between sovereign
6 governments.

7 And as I talked about with Mr. Michael, sort of the
8 standard aspect of a contract law is one of mitigation.

9 So is there requirement that Montana, to the degree
10 that this is information available that pre 1950 appropriators
11 are not getting sufficient water, to have told Wyoming that?

12 In other words, is there a requirement that at least
13 Montana provide Wyoming with what information it has that's
14 germane to the pre 1950 appropriators so that Wyoming, if in
15 fact pre 1950 appropriators are not getting sufficient water,
16 Wyoming has the opportunity to do something about it if it can?

17 MR. DRAPER: Well, in fact we have done that as you
18 can see in your attachments to the letters, so on. That
19 information is publicly available. And of course it's provided
20 whenever it's asked for.

21 As far as mitigation, I don't believe the Supreme
22 Court has determined how that might apply in compact enforcement
23 cases. It has come up a few times in my experience where it was
24 disposed of by the Special Master in terms of the facts, so it
25 has reached the legal question of whether the doctrine of

1 mitigation would apply.

2 I don't believe those facts are present here. We
3 don't have a basis to know with any certainty that another
4 sovereign government is violating or failing to live up to its
5 obligation that there would be a situation to justify
6 application of the doctrine under those circumstances. I don't
7 think the facts are really there for that.

8 SPECIAL MASTER THOMPSON: I understand entirely that
9 if you look at the facts that have been, or if you look at the
10 affidavits in support of Wyoming's motion, I don't think you
11 have those facts of being almost exactly what Montana knew and
12 how much of that was provided to Wyoming.

13 So what I was really asking was just a legal question
14 sort of anticipating where things might go in the future.

15 Let me turn specifically to Wyoming's arguments. So
16 Wyoming, as I understand it again, is basically arguing that it
17 is part of the Compact that there's a call requirement. So this
18 is not mitigation of an issue; it is an interpretation of the
19 Compact.

20 And to start out, as you know, with Article V(A), and
21 again this language that we talked about on a number of
22 occasions that provides under Article V(A) that pre 1950
23 appropriate rights shall continue to be enjoyed.

24 And then the key language is, quote, In accordance
25 with the laws governing the acquisition and use of the water

1 under the Doctrine of Appropriation, close quote.

2 Wyoming's argument is prior appropriation provides for
3 calls. And therefore there's a requirement under the Compact
4 that there be a call on Wyoming before any liability can be
5 established.

6 So what's your response specifically to that argument?

7 MR. DRAPER: Your Honor, I think we can all agree that
8 there's no specific reference to a call being required. We can
9 start there. There's no statement that a call explicitly is
10 required.

11 The question is, is it implied by the reference to the
12 prior appropriation doctrine. And I would suggest that it is
13 not.

14 If you look at Article III you can see the result of
15 the states' desire to avoid some kind of active interstate
16 administration. They have created a body with very limited
17 powers to collect, report, correlate data, make recommendations
18 to the states.

19 So that to me shows right on the face of the Compact
20 that there's no intent for the administration of water through a
21 call enforcement, really, enforcement of rights under the
22 Compact through a call mechanism.

23 The obvious place to put it would be right there in
24 Article III. That's the interstate body. And it's not there.
25 It's very clear. You can't read into those powers the right to

1 shut down water rights in one state on the basis of a call or to
2 receive calls and force them, anything like that. It's not
3 there.

4 SPECIAL MASTER THOMPSON: So I don't think this is
5 Wyoming's argument, but doesn't the fact that Article III
6 doesn't set up any type of an active interstate enforcement
7 mechanism simply reinforce the argument that, well, Article V,
8 in its reference to the Doctrine of Appropriation, must have
9 required a call?

10 Because the only way in which you could actually
11 administer this, given that there's not any enforcement entity
12 set up, is for one state to say to the other state, We need more
13 water under the Compact.

14 MR. DRAPER: I'll just repeat my previous answer as
15 part of my answer here that without knowledge of the water
16 rights that are being called out, and the water rights on which
17 the call is based, on a comparable basis you don't have the
18 information necessary for a call. That was very clear to the
19 states as they went into this compact.

20 I think it's also clear from the structure of the
21 Compact that a call is not contemplated. I think you were
22 asking Mr. Michael about this.

23 What is it that you've looked at, the language, what
24 was it about the structure if anything that sheds light on
25 whether a call is contemplated? I would say that the division

1 into pre-compact and post-compact rights that are allocated in a
2 different way does that.

3 In other words, if we have a lack of water in Montana
4 to satisfy our pre 1950 entitlement, we must look to the post
5 compact uses of water in Wyoming to see if they are interfering
6 with our supply.

7 In other words, if there are pre-compact uses, valid
8 pre-compact uses in Wyoming, those are, those have an equal
9 priority, as the Court has said, with us. And you can't have a
10 call against an equal priority.

11 If this call that is being posited here and discussed
12 is not a call against pre 1950 right in Wyoming, it's a call
13 against post January 1, 1950 rights.

14 How were they allocated? Are they allocated by the
15 prior appropriation system? No. They're done by percentage.
16 Percentage is not a prior appropriation way of allocating water.

17 To say that rights that are being exercised
18 purportedly under a percentage allocation system had nothing to
19 do with prior allocation but somehow subject to a prior
20 appropriation technique just structurally doesn't work.

21 It couldn't have been an intent to call out or make a
22 requirement that there be a prior appropriation style call
23 either to bring water down to pre 1950 rights in Montana or
24 post 1950 rights.

25 That's going against one right that's exactly about

1 prior appropriation as far as this compact allocation is
2 concerned. It was a nonappropriation right. The whole idea of
3 this call doesn't fit with it.

4 SPECIAL MASTER THOMPSON: So let me, so we've been
5 talking about what Wyoming's argument is with respect to what
6 the Compact requires.

7 Is it Montana's view that the Compact is silent with
8 respect to how Montana's rights are being enforced?

9 MR. DRAPER: I would say the answer to that, Your
10 Honor, is yes.

11 Just like these other compacts, the Court did not
12 delve into the Compact itself to decide what the proper remedy
13 should be. It looked for, it looked to the Compact to establish
14 what the mutual rights and obligations were, and then it took it
15 upon itself, a time honored role for the courts, to determine,
16 particularly in this kind of case, what the fair and equitable
17 remedy of the circumstances would be for violation of those
18 obligations.

19 It's not impossible that a compact could specify that.
20 And I think if the Compact did specify what happens if there's a
21 violation, I think the Court would observe that.

22 The Court sees its job as interpreting and enforcing
23 these compacts. And I'm sure that it would follow a directive
24 that had been agreed to by the states and congress as to how it
25 should be enforced.

1 But here we don't have that, just as we don't have any
2 other compacts that were adopted about the same time. The Court
3 has shown that it's very comfortable in take those compacts and
4 apply contract remedies adopted to the sovereign nature of the
5 compacts and the parties involved.

6 SPECIAL MASTER THOMPSON: In this particular
7 proceeding we were just talking about damages for prior years.

8 But under then Montana's view of the Compact, does
9 that mean that when we address the question of what is the
10 appropriate remedy for the future that the Supreme Court is free
11 to develop a fair and equitable approach to enforcing Montana's
12 right in the future?

13 In other words, does the Supreme Court have latitude
14 within again that standard that is to be fair and equitable and
15 consistent with the Compact?

16 MR. DRAPER: Your Honor, just to emphasize again, the
17 Court would use that as its loadstar for the Compact itself and
18 would take those general principles and fashion a remedy based
19 on the, primarily on the Compact.

20 But taking those general principles as it has done in
21 other compact enforcement cases, it would then fashion an
22 appropriate remedy so that those principles would be observed in
23 the future.

24 I think it would do it so that there wouldn't be
25 further disputes; so that it would take care of itself in the

1 future just as we've done in some of these other cases.

2 On the Arkansas River, on the Republican River, you
3 can see this it's not dependent on some commissioner calling
4 another commissioner in the middle of the night saying, I can't
5 wait until the Compact meeting in December. It's January 15 and
6 I just got a call and you need to go down there. You need to
7 get out of bed go and go down there and make sure somebody turns
8 off the water if they're vertical.

9 That's not the approach the Court is taking. It's
10 taking an approach that's more attuned to the sovereign nature
11 of the parties. They have these obligations. It's determined
12 how to implement those in realtime in the real world going
13 forward.

14 They have set certain procedures, quantifications,
15 even very technical quantifications if necessary. We've seen
16 groundwater models included in decrees in electronic form so
17 that those can be a guide that both the upstream and downstream
18 states can rely on.

19 And the upstream state doesn't have -- as long as it's
20 done its homework and followed that decree it's not going to
21 worry about that midnight call. It knows it's complying with
22 its duties under the Compact because through that intervening
23 litigation the Court has quantified that, and made it a realtime
24 implementable standard.

25 SPECIAL MASTER THOMPSON: So then, Mr. Draper, taking

1 this step by step, it's Montana's views that for prior years
2 that there was no requirement that Montana provide any type of
3 call on Wyoming.

4 And that to the degree that there were pre 1950
5 appropriative rights that remained unsatisfied in Montana
6 because of post 1950 uses in Wyoming, that Wyoming would be
7 liable for that. Is that correct? Just stopping there.

8 MR. DRAPER: Yes.

9 SPECIAL MASTER THOMPSON: Okay.

10 MR. DRAPER: Yes.

11 SPECIAL MASTER THOMPSON: But that going into the
12 future that the Supreme Court could structure an approach for
13 enforcing Montana's rights under the Compact that would ensure
14 that in the future Wyoming wouldn't have to guess as to whether
15 or not it needed to provide water across the border, but would
16 actually be able to determine ahead of time whether it was
17 compliant. Is that correct?

18 MR. DRAPER: Yes.

19 SPECIAL MASTER THOMPSON: So again I've used up all of
20 your time by asking you questions. So let me give you the offer
21 to add anything else that's not covered in the briefs -- I've
22 read all of those -- that you wanted to make sure I'm aware of.

23 MR. DRAPER: Your Honor, I'll just refer Your Honor
24 also to the historical record on these issues, which is also
25 consistent with what we read in plain language on the Compact of

1 the structure.

2 You can see that nobody wanted an active
3 across-state-line administration, which is exactly what's being
4 proposed here, calls across the state line realtime.

5 And as Mr. Michael pointed out, they can change from
6 day to day. By the time you've investigated, well, maybe the
7 river's come up and everything's fine and it was all for naught.

8 All of that was contemplated by the negotiators. And
9 you could see clear evidence that they wanted to avoid that.
10 And that's expressed in Article III.

11 I would just mention also that I think it's clear that
12 given the affidavits that Montana has submitted with respect to
13 the complaints that were made over the years, and the failure of
14 Wyoming to cover all the years in the first place, that there
15 are disputes of material fact if one is looking to the summary
16 judgment standard, and that simply for that reason the motion
17 should be denied.

18 SPECIAL MASTER THOMPSON: Okay. Thank you very much,
19 Mr. Draper.

20 MR. DRAPER: Thank you.

21 SPECIAL MASTER THOMPSON: So Mr. Michael, I told you
22 I'd save some time for you to make a reply. So I assume you'd
23 like to.

24 MR. MICHAEL: Yes, Your Honor.

25 SPECIAL MASTER THOMPSON: You looked like you were

1 trying to get up.

2 MR. MICHAEL: I couldn't keep a poker face, Your
3 Honor. Thank you.

4 I do want to get to the, back to the main point that
5 you've been talking about this morning, and you questioned
6 Mr. Draper on that.

7 I think maybe a good way to look at this, you know, I
8 used the phrase earlier "surrogate for the call." And what I'm
9 really talking about is a trigger.

10 In other words, we have a compact here that says,
11 Appropriate rights in Montana, pre '50 rights. An 1880 water
12 right under the Tongue River decree is not getting its water,
13 the TR irrigation district or somewhere downriver. So these
14 joined under the laws covering, governing the acquisition.

15 So I guess the question is, under the Doctrine of
16 Appropriation there's a trigger. You asked me the question
17 about, Well, could there be other ways to deal with this? And I
18 answered, I think what -- the trigger starts what goes on. And
19 this is typical.

20 Mr. Draper said, You have to know what's happening
21 upstream. I disagree with that wholeheartedly about the
22 Doctrine of Appropriation. The senior appropriator in an
23 interstate system, the state's senior appropriator makes the
24 call.

25 You have the water commission in one case as you have

1 in most cases, but the senior appropriator simply goes to the
2 commission and says, I want this river regulated back to my
3 date, 1890.

4 He doesn't care whether the juniors have or have not
5 been using the water upstream; the commissioner goes up there
6 and takes care of it depending on the situation.

7 If the juniors upstream are already off, he says,
8 Regulated back to 1890, that's not going to get you any more
9 water because they're already off the stream. And Mother Nature
10 is causing this. So there has to be a trigger.

11 Now, if Montana -- the trigger's pulled for Montana's
12 commissioner to contact the Wyoming commissioner. At that point
13 there's a question of -- and you've raised the question even in
14 your report that Montana would have to show potentially that
15 they have taken care of -- at least if they wanted to get a
16 damage claim later -- that they took care of the pre '50 rights
17 with intrastate means. They called off the -- they were
18 regulating their system properly; put their own house in order
19 before they reached out to Wyoming. That would be for the
20 damage claim.

21 But could compact commissioners develop rules which
22 they're enabled to do under the Compact, under the Compact
23 itself, that says if Montana triggers it, makes a call on us,
24 and they give us information that says, We have this situation.
25 We don't have to show you photographs; we don't have to show you

1 this; we have X information to confirm that, this is how the
2 Compact commissioners worked out the legitimacy of the claim.

3 And the same thing could be true. They could come up
4 with the trigger. Wyoming would have to provide this kind of
5 information about the post '50. But the trigger's still the
6 trigger.

7 And a senior, in a prior appropriations scheme, which
8 is what the courts said this is. It's not the Pecos; this is
9 not a mass allocations scheme. This is -- we can't go to a
10 gauge and say we're not owed X water to the state line.

11 What we need to know is what our pre '50 right of
12 Montana's -- what if half of Montana's pre '50 rights decide to
13 abandon themselves. And we find out that next year Montana's
14 half as much pre '50 demand downstream.

15 Does Wyoming have to -- we've already been through
16 that. There's no mass allocations scheme so you have to have a
17 trigger.

18 Now, after the trigger happens there's going to be
19 process, okay? And the idea of the states obviously is to
20 expedite that process so that -- Wyoming's going to want to
21 expedite the process because they had a call made on them.

22 When the call's been made and they don't respond to
23 it -- they say, Sorry. We don't agree with your legal theory.
24 Or, Sorry, Montana. We don't have any post '50 rights we're
25 honoring right now, and it turns out Wyoming's wrong, Wyoming

1 can be sued later and be liable, and that's what we're here for
2 today, and that's why there's still a case here under 2004 and
3 2006 because Montana did pull the trigger. But you have to have
4 the trigger.

5 So when I talk about surrogates I'm really talking
6 about what could happen, what could the Compact folks do, the
7 commissions do to create a system that would make that trigger,
8 then make the system work for realtime water, very well
9 recognizing the rights.

10 But I don't think you can get rid of the Doctrine of
11 Appropriation in that call. I think you have that in some form.
12 Because as I said, for all the reasons I said, you can't,
13 Wyoming cannot go down in Montana and see what the current
14 pre '50 water rights there are, whether somebody's head gate's
15 being worked on and they don't want the water or need the water.

16 That's what the Doctrine of Appropriation provides. I
17 think that puts it in that situation. That's why Wyoming is
18 entitled to partial summary judgment but is exposed to liability
19 if they can prove it for the years that they pulled the trigger.

20 That was my response to that, Your Honor, if there are
21 no further questions.

22 SPECIAL MASTER THOMPSON: Actually let me ask one
23 other question.

24 MR. MICHAEL: Yes.

25 SPECIAL MASTER THOMPSON: I'm trying to parse

1 language.

2 If I look at Article V in the language that talks
3 about the pre- 1950 rights continued to be enjoyed in accordance
4 with the laws governing acquisition and use of water under the
5 Doctrine of Appropriation, is it meaningful at all where it
6 says, In accordance with the laws governing the appropriation
7 and use of water, but doesn't saying anything about
8 administration?

9 MR. MICHAEL: Says the laws governing the acquisition
10 and use of water. The acquisition and use of water.

11 Use of water. The laws governing the use of water are
12 under the Doctrine of Appropriation and includes the call
13 concept.

14 SPECIAL MASTER THOMPSON: Okay. It's your view that
15 the call concept is part of your use? That in other words, you
16 know, in order to be able to claim use of it you need to call
17 it. If you don't call it then it's somebody else's use?

18 MR. MICHAEL: Right. That's the Worley case, and its
19 predecessor, the Cook case.

20 SPECIAL MASTER THOMPSON: Great. Thank you. We went
21 about ten minutes over. We can hopefully make up the time
22 later.

23 Let's take a five-minute break so when we start again
24 we're not confused as to which particular hearing we're in. And
25 hopefully it'll give you all an opportunity to use the

1 facilities, so we'll take a five-minute break.

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3 (Whereupon the within proceedings adjourned at 9:40 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