No. 137, Original

In the

Supreme Court of the United States

STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, Defendants

MEMORANDUM OPINION OF THE SPECIAL MASTER

ON WYOMING'S MOTION TO DISMISS BILL OF COMPLAINT

BARTON H. THOMPSON, JR.
Special Master
Jerry Yang & Akiko Yamazaki Environment
& Energy Building
473 Via Ortega
MC: 4205
Stanford, California 94305

June 2, 2009

MEMORANDUM OPINION OF THE SPECIAL MASTER ON WYOMING'S MOTION TO DISMISS BILL OF COMPLAINT

The issue in this case is when, if at all, the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (the "Compact"), protects the holders of pre-1950 appropriative rights in Montana on the Powder and Tongue Rivers from diversions, storage, and consumption of water in Wyoming that date from after January 1, 1950. Although North Dakota is a signatory to the Compact and is a formal defendant to Montana's Bill of Complaint (the "Complaint"), the only questions directly at issue in this case concern the relative rights of water users in Montana and Wyoming.

Wyoming moves to dismiss the Complaint on the ground that the Complaint fails to state a claim upon which relief can be granted under the terms of the Compact. Wyoming's Motion to Dismiss Bill of Complaint (the "Motion to Dismiss"). I conclude that Article V of the Compact generally protects pre-1950 appropriators in Montana from new surface and groundwater diversions in Wyoming, whether for direct use or for storage, that prevent adequate water from reaching those appropriators. Montana, however, cannot insist that Wyoming release storage water for the benefit of pre-1950 appropriators in Montana where the water was stored at a time when there was adequate water available for those appropriators. Nor can Montana object to efficiency improvements by pre-1950 appropriators in Wyoming where the Wyoming appropriators put the conserved water to use on their existing acreage. Moreover, where Montana can remedy the shortages of pre-1950 appropriators through purely intrastate means (e.g., by reducing deliveries to post-1950 appropriators in Montana) that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires Wyoming to ensure that new diversions in Wyoming do not interfere with the pre-1950 appropriations.

Although some of Montana's specific allegations do not state a claim for relief, Montana sets out several alternative factual bases for its claim of a violation of the Compact. I therefore conclude that the Motion to Dismiss should be denied.

I. PROCEDURAL HISTORY

On February 19, 2008, the Supreme Court granted leave to Montana to file its Complaint and simultaneously allowed Wyoming 45 days to file a motion to dismiss. ___ U.S. ___ (2008). Wyoming filed its Motion to Dismiss on April 4, 2008. After the motion was briefed, the Supreme Court appointed me to serve as Special Master in this matter on October 20, 2008 and referred the Motion to Dismiss to me to resolve. ___ U.S. ___ (2008).

North Dakota is named as a defendant to Montana's cause of action because it is a signatory to the Compact. Bill of Complaint ¶ 4. Montana seeks no relief against North Dakota in its complaint. Brief in Support of Motion for Leave to File Bill of Complaint at 3. As a result, North Dakota has not filed any briefs in this case, although it has participated in status conferences.

The United States is not a party to this case. Although federal lands (such as Yellowstone National Park) and Indian reservations (such as the Northern Cheyenne Indian Reservation) are in the greater Yellowstone River basin, the Compact expressly states that its provisions should not be construed to impact either Indian water rights (Compact, Art. VI) or water rights of the United States (id., Art. XVI). Because compacts possess the status of federal law once approved by Congress and because the United States administers water projects in the Yellowstone River basin that this case could affect, the views of the United States in this case are still important. The Supreme Court invited the Solicitor General to file a brief addressing Montana's motion for leave to file a bill of complaint (550 U.S. at 732). The United States has subsequently filed a brief as amicus in opposition to Wyoming's Motion to Dismiss and, at my invitation, participated in the oral argument on the Motion to Dismiss.

Briefs were filed on the Motion to Dismiss by Montana and Wyoming, as well as by three *amici* – the United States and the Northern Cheyenne Tribe (both in opposition

to the Motion to Dismiss) and Anadarko Petroleum Corporation (in support of the Motion to Dismiss).[1] In response to my request, the parties filed a Joint Appendix of all documents on which they rely or that they believe are relevant in connection with the Motion to Dismiss.[2] Council for Montana, Wyoming, and the United States presented oral arguments at a three-hour hearing on the Motion to Dismiss held in Denver, Colorado on February 3, 2009. In considering the Motion to Dismiss, I have thoroughly reviewed the briefs on the Motion to Dismiss, the other pleadings filed in this case, the documents included in the Joint Appendix, and the relevant law.

II. BACKGROUND

A. The Yellowstone River System

Although visitors and fishermen revere the Yellowstone River system for its scenic beauty and fish runs, Montana and Wyoming have extensively developed the river system for irrigation, setting the stage for this dispute. The Yellowstone River runs in a generally northern direction for almost 700 miles from the slopes of Yount Peak in Wyoming through Montana and into North Dakota to its confluence with the Missouri River soon after crossing the North Dakota border. The Yellowstone River has four principal tributaries – the Bighorn, Clarks Fork, Powder, and Tongue rivers – all of which cross the border between Wyoming and Montana before joining the main stem in Montana. The Yellowstone River and its tributaries together drain a large area of approximately 70,000 square miles.

This case focuses on the Powder and Tongue rivers. Both tributaries begin in the Big Horn Mountains of Wyoming and then travel into Montana where they ultimately join the main stem of the Yellowstone River. The Tongue River basin is approximately

[1] Counsel for all parties consented to the filing of the Northern Cheyenne Tribe's *amicus* brief. Because Montana did not consent to the filing of Anadarko Petroleum Corporation's *amicus* brief, Anadarko moved for leave to file its brief. The Supreme Court referred that motion to me (___ U.S. ___), and I granted the motion. Case Management Order No. 1, ¶ 6 (Nov. 25, 2008).

[2] In this Memorandum Opinion, documents in the Joint Appendix are referenced as Joint App., followed by the relevant page numbers of the documents. References to the transcript of the hearing on the Motion to Dismiss are indicated by Hearing Trans., followed by the relevant pages and lines of the transcript.

5400 square miles in size, while the Powder River basin covers over 13,000 square miles. Irrigation is the primary use of the waters of the tributaries in both states. According to the Bill of Complaint, the production of coalbed methane has also led to sharp increases in recent years in the pumping of groundwater in the portion of the Powder River basin lying in Wyoming. Bill of Complaint ¶ 11; see also Brief in Support of Motion for Leave to File Bill of Complaint at 4. Although Montana's Bill of Complaint alleges violations of the Compact only on the Powder and Tongue rivers, the Compact covers the Yellowstone River and all of its tributaries, and resolution of this case could have implications for water rights throughout the Yellowstone River system.

B. Background Principles of Water Law

Like most western states, Montana and Wyoming follow the law of prior appropriation in allocating both surface water and groundwater. 6 Waters and Water Rights 473 & 865 (Robert E. Beck, ed., 1994 repl. vol.). Under the prior appropriation doctrine, water uses that are prior in time are generally prior in right. As the Wyoming State Constitution has provided since statehood, "Priority of appropriation for beneficial uses shall give the better right." Wyoming Const., Art. 8, § 3.

The specific rules and institutions of the prior-appropriation systems in Montana and Wyoming, however, have at various points in time differed in particular respects. Wyoming, for example, was the first state in the nation to adopt an administrative structure for administering appropriative rights; under this system, water users must apply for and obtain a permit from the State Engineer. See Wyo. Stat. Ann. §§ 41-4-501 to -502; 6 Waters and Water Rights 865-866 (Robert E. Beck, ed., 1994 repl. vol.). In Montana, by contrast, water users could acquire rights on most streams before 1973 merely by putting the water to a beneficial use. Where a court had determined and "adjudicated" the water rights on a particular stream, new water rights could be obtained by filing a petition in the court that had conducted the adjudication. 6 Waters and Water Rights 473 (Robert E. Beck, ed., 1994 repl. vol.). Determining the existing rights on a

waterway in Montana prior to 1973, therefore, was often a complex task. Montana finally adopted a permit system for appropriative water rights in 1973.

C. The Yellowstone River Compact

1. Negotiations & Approval.

Montana and Wyoming attempted several times to agree on a compact to govern the waters of the Yellowstone River before they finally succeeded in 1951. As the Senate Committee on Interior and Insular Affairs noted in its report on the Compact, the "compelling reason" for negotiating an agreement was to open the way for getting federal assistance for new water storage facilities in the basin. Senate Rep. No. 883, 82d Cong., 1st Sess. 6 (1951), Joint App. at 17. As in other instances around the nation, Congress wanted agreement on the division of the waters among the states before building or funding new storage projects.

Congress first gave its consent to Montana and Wyoming to negotiate a compact in 1932. Act of June 14, 1932, 47 Stat. 306. Negotiators for the two states and the federal government agreed to a proposed compact on February 6, 1935 (the "1935 Draft Compact"). See 1935 Draft Yellowstone River Compact between the States of Wyoming and Montana, Joint App. at 274. The proposed compact allocated water among users of the two states under the doctrine of prior appropriation. Water use was to be "subject to appropriation for beneficial use under the laws of the separate states and under general water-right law as interpreted by the Courts." 1935 Draft Compact, supra, Art. V(a), Joint App. at 278. Each existing appropriator was to be entitled to the beneficial use of the stream flow that he enjoyed "when he appropriated, undiminished by the use of any later appropriator or by any increased use of earlier priority." Id., Art. V(b), Joint App. at 278-279. Neither the Montana nor Wyoming legislature ever approved the 1935 Draft Compact. See Senate Rep. 883, supra, at 5, Joint App. at 16.

After obtaining Congress' permission to restart negotiations (50 Stat. 551 (1937)), negotiators for all three states agreed to a new proposed compact on December 31, 1942 (the 1942 Draft Compact). See 1942 Draft Yellowstone River Compact, Joint App. at 253. The new draft took a different approach to apportioning the waters of the Yellowstone River system. Article V(A) of the 1942 Draft Compact apportioned to each state specified percentages of the "divertable daily flow" of the main stem and each major tributary of the Yellowstone River. Id. at 261-264. Article VI "recognized" present vested rights in each state, but emphasized that all "rights to the beneficial use of the waters of the Yellowstone River System, heretofore and hereafter established under the laws of any signatory State, shall be satisfied solely from the proportion of the water allotted to that State as provided in Article V." Id. at 266-267. The 1942 Draft Compact faired no better in gaining legislative approval than had the 1935 Draft Compact, as the Wyoming legislature failed to approve the 1942 Draft Compact as agreed to among the negotiators. Senate Rep. No. 883, supra, at 5, Joint App. at 16.

In 1944, Congress again authorized the three states to negotiate a compact (58 Stat. 117), leading to the negotiation and signing of a new compact on December 18, 1944 (the 1944 Draft Compact). See 1944 Draft Yellowstone River Compact, Joint App. at 238. The 1944 Draft Compact was similar in most key respects to the 1942 Draft Compact. Article V(A) again apportioned to each state specified percentages of the "divertable daily flow" of the main stem and each major tributary of the Yellowstone River. Joint App. at 244-246. Article VI again "recognized" present vested rights and provided that they would be "administered by the proper officials of the respective States." Id. at 247. As before, all such rights were to be "satisfied solely from the proportion of the water allotted to [each] State as provided in Article V." Id. Although the legislatures of all three states voted to ratify the proposed compact, the governor of Wyoming vetoed the proposed compact. Senate Rep. 833, supra, at 5, Joint App. at 16.

In 1949, Congress yet again gave its consent to the three states to negotiate a compact "providing for an equitable division or apportionment between the States of the water supply of the Yellowstone River and of the streams tributary thereto." Act of June

2, 1949, 63 Stat. 152. Soon thereafter, Montana, North Dakota, and Wyoming appointed a negotiating commission, known as the Yellowstone River Compact Commission and consisting of representatives of the three states, as well as a number of federal agencies. See Yellowstone River Compact Commission, Meeting Minutes of November 29, 1949, Joint App. at 92, 108-112. The negotiating commission first met on November 29, 1949 in Billings, Montana. Id. at 91. An Engineering Committee, consisting of engineers from the three states and various federal agencies, did much of the work for the negotiating commission. See Senate Rep. No. 883, supra, at 6, Joint App. at 17. During the negotiations, the commission considered a number of different draft compacts, including the Burke Draft, dated April 14, 1950 (Joint App. at 124), the Myers Draft, dated September 18, 1950 (id. at 195), and the Engineering Committee Draft, undated (id. at 160). After a year of negotiations, the commission agreed to and signed the final version of the Compact on December 8, 1950. Yellowstone River Compact Commission, Meeting Minutes of Dec. 7-8, 1950, at 13-14, Joint App. at 50-51. The three states each ratified the Compact in early 1951. Act of Feb. 13, 1951, ch. 39, 1951 Mont. Laws 58 (codified at Mont. Code Ann. § 85-20-101 (2005)); Act of March 7, 1951, ch. 339, 1951 N.D. Laws 505 (codified at N.D. Cent. Code § 61-23-01 (2005)); Act of Jan. 27, 1951, ch. 10, 1951 Wyo. Sess. Laws 7 (codified at Wyo. Stat. Ann. § 41-12-601 (2005)). Congress consented to the Compact later that same year. Act of Oct. 30, 1951, ch. 629, 65 Stat. 663.

2. The Compact.

Although the Compact dealt broadly with the rights of all three states to the waters of the Yellowstone River system, the "real problem" addressed by the Compact was how to apportion the waters of the principal tributaries between Montana and Wyoming. Senate Rep. No. 883, supra, at 6, Joint App. at 17. Unlike the tributaries, the main stem of the Yellowstone River lies "almost entirely in Montana," and the negotiators believed that its water supply was "adequate for feasible developments along its course." Id. And while North Dakota participated in negotiating the Compact and various provisions of the Compact protect its interests, North Dakota's "real interest" was

"minor on account of the very small part of the drainage basin that is within its borders." Id. See also Yellowstone River Compact Commission, Meeting Minutes of November 29, 1949, at 6, Joint App. at 97 (statement of North Dakota representative).

The preamble to the Compact notes the desire of Montana, North Dakota, and Wyoming to "remove all causes of present and future controversy between states and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries." The preamble also notes the states' desire to "provide for an equitable division and apportionment of such waters."

The key substantive provision of the Compact is Article V. Article V(A) addresses appropriative rights existing on January 1, 1950:

> Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State, as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Article V(B) apportions "the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950." Article V(B) first allocates to each state

> such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Article V(B) then allocates fixed percentages of "the remainder of the unused and unappropriated water" of each tributary to Montana and Wyoming "for storage or direct

diversions for beneficial use on new lands or for other purposes." Under Article V(C), these percentages are to be applied on a yearly basis to the algebraic sum of:

> (1) diversions "for irrigation, municipal, and industrial uses … developed after January 1, 1950,"
>
> (2) the "net change in storage … in all reservoirs … completed subsequent to January 1, 1950,"
>
> (3) the "net change in storage … in existing reservoirs … which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950," and
>
> (4) the instream flow at a "point of measurement" below the last diversion from the tributary before its confluence with the main stem of the Yellowstone River.

III. ANALYSIS

Montana alleges that Wyoming has violated Article V of the Compact by refusing to "curtail consumption of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950," whenever the water is needed to meet Montana's pre-1950 water rights. Bill of Complaint ¶ 8. Montana more specifically alleges that Montana has violated Montana's rights under Article V by allowing:

- Irrigation of new acres (id. ¶ 10),
- Construction and use of "new and expanded storage facilities" (id. ¶ 9),

- New groundwater withdrawals and "the pumping of groundwater associated with coalbed methane production" (id. ¶ 11), and

- Increased consumption of water on existing acres (id. ¶ 12).

Wyoming in its Motion to Dismiss asserts that the Compact does not require Wyoming to provide sufficient water at the state line of the Powder and Tongue Rivers to meet Montana's pre-1950 water rights – even if the water is not needed to meet Wyoming's pre-1950 water rights. Wyoming also argues that none of the specific actions that Montana alleges in its Bill of Complaint can violate the Compact.

A. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides guidance in ruling on Wyoming's Motion to Dismiss. In particular, the factual allegations of Montana's Bill of Complaint should be assumed to be true. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-563 (2007); Neitzke v. Williams, 490 U.S. 319, 326-327 (1989). And the Bill of Complaint should be construed in favor of Montana. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

The Supreme Court's rules for interpreting interstate compacts are also clear. An interstate compact that has been approved by Congress is both a contract and a federal statute. Oklahoma v. New Mexico, 501 U.S. 221, 225 n.5 (1991); Texas v. New Mexico, 482 U.S. 124, 128 (1987). If the text of a compact is unambiguous when placed in context, the text is conclusive. New Jersey v. New York, 523 U.S 767, 811 (1998); Kansas v. Colorado, 514 U.S. 673, 690 (1995); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992). If the text is ambiguous, it is "appropriate to look to extrinsic evidence of the negotiation history of the Compact" and to the legislative history before Congress. Oklahoma v. New Mexico, 501 U.S. 221, 225 n.5 (1991). See also Texas v. new Mexico, 462 U.S. 554, 568 n.14 (1983); Arizona v. California, 292 U.S. 341, 359-360 (1934) It is also a "fundamental tenet of contract law that parties to a contract are

deemed to have contracted with reference to principles of law existing at the time the contract was made." Kansas v. Colorado, 533 U.S. 1, 89 (O'Connor, J., dissenting), citing Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129-130 (1991).

B. Article V of the Compact Protects Pre-1950 Water Rights in Montana

1. The language of Article V is clear and unambiguous.

Article V of the Compact unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950. Article V(A) provides that pre-1950 rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." This language is instructive in two important respects. First, it mandates the *continued enjoyment* of pre-1950 rights. According to *Webster's New World Law Dictionary*, the word "enjoy" means "[t]o have the *undisturbed use* or possession of something, particularly real property." Webster's New World Law Dictionary (2006) (emphasis added). The Compact, moreover, pairs the term "enjoyed" with the mandatory term "shall" – requiring that action be taken under the Compact to ensure the continued enjoyment of pre-1950 appropriative rights. Montana water users could scarcely "continue to … enjoy[]" pre-1950 water rights, under the common and straightforward meaning of those words, if Wyoming were free to allow new diversions or withdrawals that interfere with pre-1950 Montana appropriations. Confirming the natural meaning of this language, the Compact uses similar language to provide for the acquisition and protection of supplemental water rights. See Compact, Art. V(B) ("such supplemental rights to be acquired *and enjoyed* in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation" (emphasis added)).

Second, Article V(A) provides for continued enjoyment *under the appropriation doctrine*. The essence of the appropriation doctrine is the concept of first in time, first in right, under which earlier or "senior" appropriators are protected from the actions of later or "junior" appropriators. As the Supreme Court explained in an early equitable

apportionment action involving the appropriation doctrine, "The cardinal rule of the doctrine is that priority of appropriation gives superiority of right." Wyoming v. Colorado, 259 U.S. 419, 470 (1922). The reference in Article V(A) to the "doctrine of appropriation" would be stripped of its defining characteristic if Wyoming could permit new water diversions and withdrawals that interfere with earlier pre-1950 appropriative rights in Montana.

Article V(B) further confirms the Compact's intent by providing that supplemental water supplies for land already under irrigation, as well as "storage and direct diversions for beneficial use on new lands or for other purposes," are to be allocated from the "*unused* and *unappropriated* waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950" (emphasis added). Under Article V(B), new water uses are not to interfere with pre-1950 water rights but must draw from those waters that were unappropriated as of January 1, 1950.

Read together, Articles V(A) and V(B) of the Compact establish a three-level hierarchy.

> (1) First, pre-1950 appropriative rights (i.e., those rights pre-dating the Compact) are to "continue to be enjoyed." Compact, art. V(A). These pre-1950 rights receive the highest priority under the Compact.
>
> (2) "Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950," water goes next to "provide supplemental water supplies" for pre-1950 right holders. Compact, Art. V(B), first clause. Although the Compact does not specifically define "supplemental water," the term refers to rights obtained "from a new source of supply for application to lands for which an appropriation of water from a primary source already exists." Wyo. Stat. § 41-3-113. As noted above, supplemental water rights, like pre-1950 rights, are to be "enjoyed in accordance with the laws governing the

acquisition and use of water under the doctrine of appropriation." Compact, Art. V(B), first clause.

(3) Finally, the "remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes" according to the percentages specified for each tributary. Compact, Art. V(B).

2. Wyoming's arguments are inconsistent with the clear and unambiguous meaning of Article V(A).

a. Article V(A) does not simply recognize pre-1950 rights, but affirmatively protects such rights from interstate interference.

Wyoming argues that Article V(A) merely recognizes pre-1950 water rights under each state's water laws, without requiring Wyoming to protect pre-1950 right holders in Montana. According to Wyoming, "the drafters intentionally withheld from the Compact any directive or mechanism by which a water user in Montana could make an interstate 'call' to shut down the diversion whose rights were junior to a Montana user's right." Motion to Dismiss at 37. Wyoming claims that the drafters instead "intended the states to regulate … pre-1950 diversions … under their own laws, unimpaired by the Compact." Id. at 43. Under Wyoming's reading of the Compact, Montana would administer its pre-1950 uses, and Wyoming would administer its pre-1950 uses, but Montana, the downstream state, could not demand that Wyoming provide sufficient water to meet the needs of Montana's pre-1950 uses.

The fundamental flaw in Wyoming's argument is that the language of the Compact is not so limited. Prior negotiators knew how to merely recognize the water rights of each state without protecting those rights from subsequent water uses in the other state. The 1942 Draft Compact, for example, provided simply that present vested rights "are recognized by this Compact," without using any words of affirmative

protection. 1942 Draft Compact, Art. VI, Joint App. at 266. The 1944 Draft Compact similarly "recognized" present vested rights and provided that such rights would be "administered by the proper officials of the respective States." 1944 Draft Compact, Art. VI, Joint App. at 247. The final Compact, by comparison, provided not for the *recognition* but for the *continued enjoyment* of pre-1950 rights, and it provided that such rights would be "enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation," not under the separate laws of Montana and Wyoming. Compact, Art. V(A).

A comparison of the underlying structures of the final Compact and the various draft compacts is also instructive. Both the 1942 and 1944 draft compacts attempted to apportion tributary waters among the three states by (1) awarding both Montana and Wyoming a percentage of a base flow of each tributary, and (2) providing for the appropriation of any additional, "unappropriated" flows under the law of each state. The draft compacts protected pre-existing rights in both Montana and Wyoming by taking the size of those rights into account in setting the percentage of the base flows awarded to each state. The 1942 Draft Compact, for example, allocated the great bulk of the first 4,600 acre-feet of divertible daily flows from the Powder River between May 1 and September 30 to Wyoming: 96 ½ percent of the first 2,000 acre-feet would have gone to Wyoming, and only 3 ½ percent to Montana; 60% of the next 2,600 acre-feet would have gone to Wyoming, and 40% to Montana. 1942 Draft Compact, Art. V(A)(4), Joint App. at 246. The drafters allocated more water from the Powder River to Wyoming because it had the senior irrigation rights in the basin at that time. Federal Power Comm'n, Preliminary Report on Yellowstone River Basin (Dec. 1940). Water for all existing rights were to be "satisfied solely" from these amounts. 1942 Draft Compact, Art. VI, Joint App. at 247. Unappropriated divertible daily flows in excess of these allocated amounts, as well as all unappropriated flows from October 1 to April 30, were "subject to future appropriation … in Wyoming, Montana, and North Dakota in accordance with the laws of said respective States." Id., Art. V(A)(4), Joint App. at 246.

The final Compact, by contrast, takes a quite different approach. Rather than dividing base flows of the tributaries and providing for appropriation of the remaining amounts, the final Compact provides for percentage apportionments of the "unused and unappropriated water" remaining after satisfying appropriative rights existing as of January 1, 1950 and any supplemental water supplies needed for such rights. Compact, Art. V(B). Because Article V(A) protects existing rights, moreover, Article V(B) allocates smaller percentages of the remaining unappropriated waters to Wyoming than the percentages used by the draft 1942 and 1944 compacts. Id. The final Compact essentially flips the approach of the earlier drafts. The earlier drafts apportioned base flows, taking into account existing rights, and provided for the open appropriation of any additional, unappropriated amounts; the final draft provides block protection for existing, pre-1950 appropriations, as well as the right to make supplemental appropriations for lands already under irrigation, and then apportions the amount that remains. The decision not to include pre-1950 rights in the division of waters avoided the "huge and time-consuming task" of quantifying such rights. Senate Rep. No. 883, 82d Cong, supra, at 6, Joint. App. at 17.

Another problem with Wyoming's interpretation of Article V(A) is that it would render Article V(A) superfluous. Federal statutes, and thus interstate compacts, should be read, "where possible, so as to avoid rendering superfluous any parts thereof." Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991). See also Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003). Both Montana and Wyoming already recognized and protected their own pre-1950 rights. Unless Article V(A) requires each state to recognize and protect pre-1950 rights existing in the other state, the provision would appear to do nothing that existing law did not already provide – rendering it mere surplusage.

Under Wyoming's reading of the Compact, moreover, interference with pre-1950 rights would remain a potentially significant source of future controversy. As noted earlier, the parties to the Compact emphasized in its preamble that it was their desire to "remove *all* causes of present and future controversy between said States and between

persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries" (emphasis added). If Article V(A) merely recognizes without protecting pre-1950 rights, the Compact would leave open potential controversies between pre-1950 right holders in one state and new water users in another – defeating the Compact's express goal to remove all such causes of controversy. Although the preamble by itself is not conclusive, it provides further support for the clear and natural reading of Article V(A). Cf. Virginia v. Maryland, 540 U.S. 56, 68-69 (2003) (using the preamble of an interstate compact as an interpretive aid).

Wyoming suggests that Article V(A) does serve a unique function in the Compact and helps resolve all future controversy by barring any future litigation over the pre-1950 rights. According to Wyoming, Article V(A) bars Montana and its pre-1950 appropriators from seeking any relief against diversions and withdrawals in Wyoming that interfere with the pre-1950 appropriations. At the hearing on the Motion to Dismiss, I asked counsel for Wyoming whether Article V(A), under its interpretation, achieves anything more than if the drafters had simply left pre-1950 appropriative rights out of the Compact completely. Counsel responded:

> It does. Because if you exclude them from the Compact, then Montana is free to bring an equitable apportionment claim at a later date. …. [What the negotiators] wanted to do was to pre-empt, which is to try to reduce all causes of future controversy with respect to the water in the Yellowstone River, and do an equitable division.

Feb. 3, 2009 Hearing Transcript, p. 25, lines 15-18, & p. 26, lines 8-11.

The language of the Compact, however, does not support this reading of Article V(A). Rather than precluding the future protection of pre-1950 appropriative rights across state lines, Article V(A) expressly mandates their continued enjoyment. It strains credulity, moreover, to argue that Montana was willing to give up all interstate protection of its pre-1950 appropriative rights in entering into the Compact. Prior to the Compact,

individual appropriators in Montana were free to bring actions in federal or state court to block new water uses in Wyoming that interfered with their prior appropriative rights. See Bean v. Morris, 221 U.S. 874 (1911) (allowing an action by a Wyoming appropriator against a Montana appropriator in federal court); Willey v. Decker, 73 P. 210, 224 (Wyo. 1903). If the interference was severe enough, Montana could also have brought an equitable apportionment action in the United States Supreme Court. See, e.g., Nebraska v. Wyoming, 325 U.S. 589 (1945). Under Wyoming's interpretation of Article V, however, Montana gave up these rights and left its citizens' pre-1950 appropriative rights totally exposed to potential interference from new uses in Wyoming.

b. Article V(A) is necessary to ensure that pre-1950 appropriative rights in Montana are protected.

Wyoming argues that the "drafters rejected any interstate demands because the percentage allocation scheme of Section B and C [of Article V of the Compact] obviates the need for such demands." Wyoming's Reply Brief in Support of its Motion to Dismiss Bill of Complaint at 11. As Wyoming notes, if new diversions in Wyoming deprive a pre-1950 appropriator in Montana of some or all of its water, the pre-1950 appropriator may have some intrastate remedies: the appropriator may be able to make a "call" on more junior appropriators in Montana, draw on post-1950 storage, or divert water that would otherwise flow out the mouth of the tributary. Id. at 14. To the extent this changes the proportion of tier-3 water used by Montana and Wyoming, the Compact may require Wyoming to reduce its post-1950 appropriations in order to stay within the percentage allocations set out in Article V(B) for new appropriations and storage. See id. at 14-15. In Wyoming's view, the Compact thereby "self-corrects" by forcing Wyoming to reduce post-1950 appropriations under Article V(B). Id.

To understand Wyoming's argument, it is useful to work through a simple hypothetical.[3] As described above, Article V(B) allocates fixed percentages of "unused and unappropriated water" (the "divertible flow") in each tributary to Montana and

[3] To keep the numbers simple, the hypothetical assumes no storage or return flow.

Wyoming. Under Article V(C), the divertible flow is determined on a yearly basis by summing post-1950 diversions and storage, as well as instream flows at the base of the tributaries. Assume that, over the course of a given calendar year, there is 10,000 acre-feet of divertible flow available in a tributary and that both Montana and Wyoming would normally fully use their allocations of this water. If Montana is entitled to 60% and Wyoming 40%, new users in Montana would use 6,000 acre-feet, and new users in Wyoming would use 4,000 acre-feet.

Assume next that a new Wyoming user starts to use 500 acre-feet a year of water that is required to meet the needs of pre-1950 appropriators in Montana and that there are sufficient post-1950 appropriations in Montana to meet the shortfall. The pre-1950 appropriators can "call" the river in Montana and force the post-1950 appropriators in Montana to reduce their withdrawals by 500 acre feet. The new post-1950 diversion in Wyoming increases divertible flow by 500 acre feet under the calculation methodology of Article V(C), but the reduced withdrawals by the post-1950 appropriators in Montana would decrease divertible flow by a like amount. As a result, divertible flow under Article V(C) remains the same, but Wyoming is now using 4,500 acre feet of water, which exceeds its percentage allocation. Wyoming would need to reduce its post-1950 diversions by the end of the year, bringing the overall system back into balance without the need for an interstate water call under Article V(A).

Under these circumstances, Wyoming contends that the Compact "self-corrects across state lines." Wyoming's Reply Brief, supra, at 14. Intrastate remedies and Article V(B), however, do not help pre-1950 appropriators when there is insufficient water passing the state line even to meet the needs of pre-1950 Montana appropriators and when there is no post-1950 storage in Montana from which to draw. In that situation, pre-1950 appropriators in Montana would not be able to remedy their deficiencies within the Montana system and would be forced to rely on the interstate protections of Article V(A). Although Wyoming suggests that the answer is to build more storage in Montana, the Compact does not require Montana to add more storage capacity, and there is no evidence that Montana gave up the right to protect pre-1950 appropriators from new uses

in Wyoming on the mere hope that storage capacity in Montana would always be adequate.

Although Wyoming's "self-correction" argument does not undermine either the meaning or the need for Article V(A), the argument illustrates that Montana may not always need to make an interstate "call" in order to protect pre-1950 appropriators who are facing a water shortage. Under what circumstances Wyoming must respond to shortages suffered by pre-1950 appropriators in Montana by reducing post-1950 diversions or withdrawals in Wyoming is a factual inquiry. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means (e.g., by reducing deliveries to post-1950 appropriators in Montana) that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that new diversions in Wyoming do not interfere with pre-1950 appropriative rights in Montana. Interstate "calls" on the tributaries should generally be a remedy of last resort, but Article V(A) requires them where necessary. Later proceedings in this action can determine, if necessary, when "intrastate" remedies are adequate under the Compact and, alternatively, when interstate "calls" on the tributaries are necessary.

c. The drafters' decision to allocate unappropriated water on the basis of modified divertible flows is not inconsistent with the clear protection of pre-1950 rights under Article V(A).

Wyoming also argues that the Compact's approach to apportioning the "unused and unappropriated water" of the tributaries under Articles V(B) and V(C) is inconstant with reading Article V(A) to protect pre-1950 appropriators in Montana from interference in Wyoming. As Wyoming notes, the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana (an approach taken by Article III(d) of the Colorado River Compact) or to limit Wyoming to a specific level of consumptive use (an approach taken by the Upper Colorado River Compact). Instead, the drafters chose an approach under which the two states, after

providing for pre-1950 appropriators and supplemental water rights, share any remaining divertible flow of the tributaries by fixed percentages (a "divertible-flow approach"). See Compact, Art. V(B); Senate Rep. No. 883, supra, at 7, Joint App. at 18. The drafters, moreover, chose to calculate the percentages based on cumulative flows and diversions over the course of a year, rather than daily flows and diversions. See id., Art. V(C). Protection of pre-1950 appropriations under Article V(A), by contrast, requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 uses in Montana. Wyoming therefore argues that the drafters could not have intended that Article V(A) would protect pre-1950 appropriations in Montana. Wyoming's Brief in Support of Motion to Dismiss Bill of Complaint at 43-50.

The modified divertible-flow approach applies only to the "quantity of water subject to the percentage allocations" in Article V(B). Compact, Art. V(C). There is nothing inconsistent in protecting pre-1950 appropriative rights through the typical process for protecting senior appropriative rights under the appropriation doctrine, while allocating the "unused and unappropriated water" of the tributaries under a modified divertible-flow approach. Both steps can be taken under the Compact without creating any conflicts. Western states regularly deal with "calls" on their rivers, in which senior appropriators seek to protect their water rights from the withdrawals of upstream, junior appropriators. Article V(A) merely establishes a similar, interstate system for the waters of the Yellowstone River tributaries in those situations where it is necessary to protect pre-1950 appropriators. Articles V(A) and V(B) of the Compact, in summary, address different tasks and, as a result, take different but consistent approaches.

3. The history of the Compact supports the unambiguous meaning of Article V.

The language of Article V(A) clearly and unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming that interfere with those rights. As a result, I need go no further in resolving the first part of

Wyoming's Motion to Dismiss. See, e.g., Kansas v. Colorado, 514 U.S. 673, 690 (1995) (clear language is conclusive). Even if the language were less clear, however, the history of the Compact would lead me to the same conclusion. From the very outset of the negotiations that led to the final Compact, several major themes emerged. The first theme was the importance of protecting existing water rights. Second, however, the parties agreed that it would be exceptionally difficult and ultimately unnecessary to try to integrate and prioritize all existing appropriative rights throughout the Yellowstone River system and across state lines. See, e.g., Engineering Committee Letter to R.J. Newell, Oct. 23, 1950, at 2, Joint App. at 32 ("It would be a major research project to place existing rights in all States on an equivalent basis"). As a result, the final Compact protects pre-1950 appropriative rights but does not attempt to set up a system for administering all such rights on an integrated, interstate basis.

At a discussion in February 1950 of the principles to be used in developing the Compact, several speakers spoke of the importance of protecting existing rights. See, e.g., Yellowstone River Compact Commission, Meeting Minutes of Feb. 1-2, 1950, at 3, Joint App. at 78 (comments of H.R. Person) (existing rights should be "recognized and remain unimpaired); id. at 5, Joint App. at 80 (comments of R.E. McNally on behalf of the Wyoming members of the Tongue River committee) (Wyoming commissioners want all existing rights recognized in both states).[4] Throughout the negotiations, Montana representatives repeatedly insisted on the protection of existing rights under the doctrine of prior appropriation. See, e.g., Yellowstone River Compact Commission, Meeting Minutes of Oct. 24-25, 1950, at 6-7, 11, & 13, Joint App. at 60-61, 65, & 67; Yellowstone River Compact Commission, Meeting Minutes of Feb. 1-2, 1950, at 3, Joint App. at 78. Wyoming representatives were no less vocal in their call for protecting established appropriative rights. See, e.g., Letter from R.E. McNally to Wyoming Members of the Yellowstone River Compact Commission, Oct. 3, 1950, Joint App. at 285.

[4] Copies of the meeting minutes were not included with the Congressional reports on the Compact, but copies were "furnished for the official files of the appropriate committees of Congress and for the General Services Administration of the United States for filing with the original of the compact." Senate Rep. No. 883, supra, at 6, Joint App. at 17.

The key phrasing found in Article V(A) of the final Compact first appeared in an April 14, 1950 draft of a proposed compact prepared by W.J. Burke of the United States Bureau of Reclamation. The draft provided that appropriative rights existing as of January 1, 1950 in the Tongue River "shall continue to be enjoyed under the laws governing the acquisition and use of water under the doctrine of appropriation." Burke Draft, Art. V(A)(3), Joint App. at 137. The "unappropriated waters of the Tongue River System subsequent to January 1, 1950" were then to be split between Montana (receiving 60%) and Wyoming (40%). Id.

The negotiators spent considerable time discussing existing rights at the October 24-25, 1950 meeting of the Yellowstone River Compact Commission. A wide variety of views were expressed. As noted by W.J. Burke of the Bureau of Reclamation, however, "there seemed to be no question about recognizing existing rights, that the question was what body would enforce those rights, the Courts or a Compact Commission." Yellowstone River Compact Commission, Meeting Minutes of Oct. 24-25, 1950, at 7, Joint. App. at 61. At the meeting session on October 25, the negotiating commission turned its attention to detailed drafting of the compact and voted to take the language quoted above from the Burke Draft and apply it to all the waters of the Yellowstone River system, rather than just to the waters of the Tongue River. Id. at 17, Joint App. at 71. See also Engineering Committee Draft, Art. V(A), Joint. App. at 171 (containing the final language of Article V(A)).

At the same meeting, however, the negotiators rejected the idea of having a compact commission administer existing appropriative rights as one integrated prior-appropriation system without regard to state line. One of Montana's commissioners moved to amend the language of the Burke draft to provide that existing appropriative rights would be administered by "the principle of priority, regardless of state line." Yellowstone River Compact Commission, Meeting Minutes of Oct. 24-25, 1950, at 17, Joint App. at 71. Following discussion, however, the proposed amendment was dropped. Wyoming stated that it would not agree to such "interstate administration" of existing

appropriative rights. See, e.g., id. at 13, Joint App. at 67 (comments of Mr. McNally of Wyoming).

At least one proposed draft of the compact would not have affirmatively protected pre-1950 water rights, but would have excluded them entirely from the compact's coverage. In September 1950, Carl L. Myers, who worked for the Bureau of Reclamation and chaired the Engineering Committee, sent a "rough draft of a possible Compact" to representatives of the three states. Letter from Carl L. Myers to Fred Buck et al., Sept. 19, 1950, Joint App. at 196. The first principle on which the draft was based was that "[e]xisting rights [should] be undisturbed and not administered under the Compact." Id. Pursuant to this principle, Article V(D) of the draft compact "excluded" from the compact's provisions, "Existing rights to the beneficial use of water in each signatating [sic] State existing on January 1, 1951." Engineering Committee Draft, Art. V(D), Joint App. at 207. The apportionment provisions of the draft compact, in turn, stated that the apportionments were to be "exclusive of established rights … coming within the provisions of paragraph D." Rather than taking this approach, however, the drafters adopted the language that is now found in Article V(A) of the Compact.

Discussion at the final negotiating session on December 7-8, 1950 confirms the intent of the negotiators to protect pre-1950 appropriative rights. In discussing article V(B) of the proposed compact, for example, W.J. Burke of the Bureau of Reclamation

> discussed the basis on which the Compact was drafted and the general theory of the Compact. Yields of the basin are to be *burdened* by (1) existing appropriative rights and (2) supplemental water for existing developments. The remainder, the *unappropriated* and unused water, or residual water, is to be compacted.

Yellowstone River Compact Commission, Meeting Minutes of Dec. 7-8, 1950, at 4, Joint. App. at 41 (emphasis added).

The House and Senate committee reports on the Compact make it clear that the drafters of the Compact did not intend to create an integrated system for administering all pre-1950 appropriative rights. The drafters saw little need for the Compact to resolve disputes among pre-1950 appropriators. According to the Congressional reports, the drafters apparently believed that there was sufficient water to meet all pre-1950 appropriative rights if the water were "properly conserved by storage." Senate Rep. No. 883, supra, at 6-7, Joint App. at 17. As a result, "little could be gained, from a water supply standpoint, by attempting in the compact, the regulation and administration of existing appropriative rights in the signatory States." Id. at 11, Joint. App. at 22. See also House Rep. No. 1118, 82d Cong., 1st Sess. at 2 (1951), Joint App. at 26.

At the same time, however, the Congressional reports make clear that it was the intent of the Compact to protect pre-1950 appropriative rights in one state from interference by post-1950 diversions and withdrawals in another. The reports emphasize that Article V(A) recognizes pre-1950 rights and "permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Senate Rep. No. 883, supra, at 11, Joint App. at 22; House Rep. No. 1118, supra, at 3, Joint App. at 27. New and supplemental rights under Article V(B) are to come from residual waters remaining after pre-1950 rights are satisfied. "The unused and unappropriated waters of the interstate tributaries only are treated; i.e., the waters that are residual to those *required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.*" Senate Rep. No. 883, supra, at 11, Joint App. at 22 (emphasis added). See also House Rep. No. 1118, at 3, Joint App. at 27 (same).

Both Congressional reports also addressed concerns that the Compact did not adequately protect the interests of the United States in the waters of the Yellowstone River system. These discussions again show that the intent of the Compact was to protect pre-1950 rights. In response to the concern that the Compact would not adequately protect rights in the lower Yellowstone River reclamation project, for example, the House Committee on Interior and Insular Affairs noted that Article V(D), "*[c]onsidered with*

paragraph A of Article V, … gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing on January 1, 1950."[5] House Rep. No. 1118, supra, at 3, Joint App. at 27 (emphasis added). And in response to concerns that Article V(B)'s allocation of "unused and unappropriated waters" between Montana and Wyoming might injure the United States, the Senate Committee on Interior and Insular Affairs responded that, "Article V-B, it is true, allocates to the States the 'unused and unappropriated waters,' but this follows V-A which recognizes all existing beneficial uses as of January 1, 1950." Senate Rep. No. 883, supra at 3, Joint App. at 14.

Various comments in both the Congressional reports and the minutes of the Compact negotiations emphasize the intent of the drafters not to "regulate" or "administer" pre-1950 water rights. See, e.g., Senate Rep. No. 883, supra, at 2, Joint App. 13 ("No regulation of the supply is mentioned for the satisfaction of those rights"); id. at 11, Joint App. at 22 ("little could be gained … by attempting in the compact, the regulation and administration of existing appropriative rights"); House Rep. No. 1118, 82d Cong., 1st Sess. 2 (1951), Joint App. at 26 (same); Yellowstone River Compact Commission, Meeting Minutes of October 24-25, 1950, at 6, Joint App. at 60 (same); id. (Wyoming did not want administrative commission to administer existing rights); id. at 13, Joint App. at 67 ("Wyoming would not agree to interstate administration"). Read in context, however, these comments refer to the decisions (1) not to include pre-1950 appropriations in the percentage allocations of divertible flow, and (2) not to subject all pre-1950 water rights, no matter where located, to a unified and integrated regulatory system under the management of the Yellowstone River Compact Commission. None of the comments suggests that the drafter or Congress intended to leave pre-1950 appropriators in one state unprotected from interference by new diversions or withdrawals in another state.

[5] Article V(D) provides, "All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact." Joint. App. at 6.

4. **Summary.**

Wyoming's argument ultimately boils down to the contention that Montana has no means of protecting pre-1950 appropriative rights in its state against new diversions of water in Wyoming that prevent sufficient water from reaching the pre-1950 appropriators. If a new Montana water user interferes with a pre-1950 appropriator in Montana, the appropriator would be entitled to block that use in state court. But under Wyoming's interpretation of the Compact, Montana gave up all right to block water diversions by a new user who sits on the other side of the border. Article V(A), however, clearly and unambiguously protects pre-1950 appropriative rights in Montana from new diversions in Wyoming that prevent sufficient water from reaching the appropriators.

C. Montana's Specific Allegations

Resolution of the initial question of whether Article V(A) protects pre-1950 appropriators across state lines, however, does not determine what types of actions come within Article V(A)'s reach – a question to which this opinion now turns. As discussed below, answering this question often depends, at least in part, on Article V(A)'s provision that pre-1950 water rights shall continue to be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Article V(A) does not refer to the "laws of the separate states," as the 1935 Draft Compact did. See Draft Compact, Art. V(a), Joint App. at 278. Nor does it refer to the laws at any particular point in time, such as the date that the Compact went into effect. Instead, Article V(A) of the final Compact refers generically to "the laws governing the acquisition and use of water under the doctrine of appropriation." In applying Article V(A) to particular allegations, I have therefore looked first but not exclusively to the laws of Montana and Wyoming, and have also examined (1) decisions of the United States Supreme Court regarding the appropriation doctrine, and (2) general practice in applying appropriation law in other western states. Thankfully, these "sources" of appropriation doctrine point largely in the same direction in this case and provide clear answers to the

issues posed by Wyoming's Motion to Dismiss. In no cases do they point in opposite directions.

1. Irrigation of new acreage in Wyoming can violate Article V of the Compact.

Wyoming contends that the irrigation of new acreage in Wyoming cannot violate the protections of Article V(A). Motion to Dismiss at 54. Wyoming's contention largely relies on the same arguments discussed in Part III-B of this opinion, which have no greater weight here than before. Article V(A) clearly protects pre-1950 appropriations in Montana from irrigation of new acreage in Wyoming if that irrigation prevents sufficient water from reaching the pre-1950 users. Indeed, Article V(B) explicitly subordinates "direct diversions for beneficial use on new lands" to both pre-1950 appropriations and "supplemental water supplies." Wyoming correctly observes that one of the purposes of the Compact "was to encourage the compacting states to proceed with irrigation of new acreage by establishing a firm understanding of how divertible flow would be allocated to such new acreage." Motion to Dismiss at 54. But the Compact did not intend to encourage the irrigation of new acreage at the cost of pre-1950 appropriators losing the security of their rights.

2. Construction and use of new and expanded water storage facilities can violate Article V of the Compact.

Wyoming also argues that the construction and use of new and expanded water storage facilities cannot violate the Compact. Motion to Dismiss at 50-54. As Wyoming correctly observes, the Compact "does not restrict the construction of reservoirs, but instead, encourages it in both states." Id. at 50. Article V(A) of the Compact, however, proscribes diversions of water into storage facilities in Wyoming for new beneficial uses beginning after January 1, 1950 if those diversions prevent adequate water from reaching pre-1950 appropriators in Montana. Under Articles V(A) and V(B), diversions of water into storage for either beneficial uses on new land or "supplemental water supplies" on

existing acreage are to come only from "unused and unappropriated water," after protecting pre-1950 appropriations.

Montana, however, cannot demand that Wyoming release water from its reservoirs to meet the needs of pre-1950 appropriators in Montana if the water was stored at a time when the needs of the pre-1950 appropriators were fully met. As Wyoming notes, the law of prior appropriation in both Wyoming and Montana provides that the key question in determining the lawfulness of storage is whether water was stored "in priority," not whether senior appropriators need water after the water has been stored. See, e.g., Federal Land Bank v. Morris, 116 P.2d 1007, 1011-1012 (Mont. 1941); Kearney Lake Land & Reservoir Co. v. Lake DeSmet Reservoir Co., 475 P.l2d 548, 551 (Wyo. 1970). Counsel for Montana conceded this point at the February 3 hearing on Wyoming's Motion to Dismiss. Hearing Trans., p. 59, line 22 to p. 60, line 1 ("we agree with Wyoming that the general rule of prior appropriation provides that, if you store in priority, you may use out of the priority").

Wyoming also argues that Montana cannot complain about any reservoirs that are on tributaries to the Powder and Tongue rivers, rather than on the main stems of those rivers. Hearing Trans. at 125, line 21 to 127 line 20. According to Wyoming, Article V "only allocates to each state the post-1950 storage rights … for waters of the 'Interstate Tributaries,'" which "are defined to include the main stems of the Powder and Tongue, not their tributaries." Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at 21. Contrary to Wyoming's contention, however, Article V(A) protects against new diversions for storage in reservoirs on the tributaries to the Powder and Tongue rivers. As Wyoming notes, Article V(B) refers to "Interstate Tributaries," which Wyoming believes does not refer to tributaries to tributaries.[6] Id. at 21-22. Article V(A), however, applies to "[a]ppropriative rights to the beneficial uses of the water of the

[6] Article II(F) provides that the "term 'Interstate Tributaries' means the Clarks Fork; Yellowstone River; the Bighorn River (except Little Bighorn River); the Tongue River; and the Powder River …." Joint App. at 4. Although Article II(F) does not expressly say that tributaries to these rivers are included in the term "Interstate Tributaries," it also does not exclude them. Both the fact that the definition explicitly excludes one specific tributary (the Little Bighorn River) and the fact that the definition of the more general term "tributary" includes tributaries to tributaries (Compact, Art. II(E)) suggest that tributaries are included.

Yellowstone River System." The Yellowstone River System, in turn, is defined as the "Yellowstone River and all of its tributaries" (Compact, Art. II(D)), and Article II(E) defines the term "tributary" as "including interstate tributaries and tributaries thereto." Article V(A) thus prohibits new diversions of water for storage facilities on tributaries to the Powder and Tongue rivers if the diversions interfere with pre-1950 appropriative rights in Montana.

3. Groundwater development in Wyoming can in some situations violate Article V of the Compact.

Whether groundwater withdrawals in Wyoming can violate Article V(A) of the Compact is a more difficult question. According to Montana, Wyoming has depleted the flow of the Powder and Tongue rivers to the detriment of pre-1950 appropriators in Montana both by constructing and using groundwater wells for irrigation and other uses and by allowing "the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins." Complaint, ¶ 11, at 3. Wyoming responds that the Compact governs "surface water, not groundwater." Wyoming's Motion to Dismiss Bill of Complaint, at p. 59.

The Compact never uses the term "groundwater." This does not end the inquiry, however, because the United States Supreme Court has found that several other interstate river compacts regulate at least some groundwater withdrawals even though they never use the word. See Kansas v. Colorado, 543 U.S. 86, 90-91 (2004) (1949 Arkansas River Compact); Kansas v. Nebraska, 530 U.S. 1272 (2000) (Republican River Compact); see also Texas v. New Mexico, 462 U.S. 554, 559-560 (1983) & 482 U.S. 124, 127-128 (Pecos River Compact) (approving formula for determining violations that takes groundwater use into account). In determining whether interstate river compacts regulate groundwater extractions, the Supreme Court and prior special masters have looked first to determine whether the language of the compact is sufficiently broad and inclusive to encompass groundwater even though groundwater is never explicitly mentioned. See,

e.g., Kansas v. Nebraska, First Report of the Special Master, Jan. 28, 2000, at 19-23. If the language is clear, that is the end of the inquiry. See, e.g., id. at 23.

The starting point for resolving the question in this case is again Article V(A) of the Compact:

> Appropriative rights to the beneficial uses of the water of the *Yellowstone River System* existing in each signatory State, as of January 1, 1950, shall continue to be enjoyed *in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.*

Compact, Art. V(A) (emphasis added). As the italicized language indicates, there are two key parts of Article V(A) in determining whether pre-1950 appropriative rights are protected from groundwater withdrawals starting after January 1, 1950: (1) the term "Yellowstone River System," and (2) the phrase "laws governing the acquisition and use of water under the doctrine of appropriation."

Article II(D) of the Compact defines the term "Yellowstone River System," in relevant part, as "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River." Compact, Art. II(D), Joint App. at 3. This language is sufficiently broad to include at least some groundwater that is hydrologically connected to the surface channels of the Yellowstone River and its tributaries. The language reflects a clear intent to cover all sources of water for the Yellowstone River and its tributaries both by its explicit inclusion of "springs and swamps" and by its explicit reference to the "sources" of the river and tributaries. A "spring" is simply

> a location where *groundwater naturally emerges from the Earth's subsurface* in a defined flow and in an amount large enough to form a pool or stream-like flow. Springs can discharge fresh groundwater either onto the ground surface, *directly into the beds of rivers or streams*, or directly

> into the ocean below sea level. Springs form the headwaters of some streams.

Water Encyclopedia: Science and Issues, www.waterencyclopedia.com (emphasis added). A "swamp," in turn, is an older name for a "wetland," which is merely "an area that is periodically or permanently saturated or covered by surface water or *groundwater*." Id. (emphasis added). As scientists and courts recognized for decades prior to the negotiation of the Compact, groundwater is also a significant source of water for the surface channel of many waterways. See, e.g., Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co., 260 U.S. 596, 598 (1923) (explaining how groundwater finds its way into the surface channels of streams).

More important than the definition of "Yellowstone River Basin" is Article V(A)'s mandate that pre-1950 appropriative rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Beginning with cases in the late 19th century, courts employing the appropriation doctrine have generally managed the surface channel of a river jointly with groundwater established to be hydrologically interconnected to the surface channel. One of the most frequently cited treatises on western water law during the first half of the 20th century was Samuel C. Wiel, Water Rights in the Western States (3d ed. 1911). As Wiel explained, where groundwater was "directly connected with the flow of a definite stream, the western cases … usually regarded the stream rights as the principal, and the ground water as but incident to the stream, subordinating the ground-water claimants to the stream claimants." 2 Id. § 1076, at 1010. The courts gave differing names to such groundwater, depending on the particular facts: "underground streams," the "subflow of a stream," and "percolations tributary to watercourses." No matter what the name, however, the cases generally treated the groundwater as part of any hydrologically interconnected surface channel and barred groundwater withdrawals that interfered with senior surface appropriators. See id. § 1077, at 1011-1012 (underground streams), §§ 1078-1081, at 1012-1021 (subflow of a stream), § 1082, at 1022-1025 (percolations tributary to surface watercourses).

The Supreme Court of the United States recognized that groundwater can be hydrologically interconnected with a surface channel and should in at least some instances be treated as part of that channel in its first equitable apportionment case, Kansas v. Colorado, 206 U.S. 46 (1907). One issue in that case was the proper treatment of groundwater that flowed alongside the Arkansas River. According to the Court, this water was properly treated as the

> accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. …. If the entire volume of water passing down the surface was taken away the subsurface water would gradually disappear, and in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water, it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the further it will reach in its percolations on either side, as well as more distinct will be its movement down the course of the stream. The testimony therefore given in reference to this subsurface water, its amount and its flow, bears only upon the question of the diminution of the flow from Colorado into Kansas caused by the appropriation in the former state of the waters for the purposes of irrigation.

Id. at 1015. See also Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co., 260 U.S. 596, 598 (1923) (holding that, as a matter of Utah appropriation law, a mining company could not intercept and collect groundwater that otherwise would have flowed to surface appropriators).

Particularly relevant for this case is the groundwater that Wiel labeled "percolations tributary to surface waterways" – groundwater that does not lie beneath or alongside the bed of a waterway but that ultimately feeds the surface channel. 2 Wiel,

supra, § 1082, at 1022-1025. As Wiel explained, the law initially treated such groundwater as separate from surface channels because the linkage between the two was unclear. By the time that Wiel wrote his treatise, however:

> More recent scientific investigation has dispelled much of this mystery concerning the movement of underground water. …. If, on the proof, the percolations are shown to be tributary to the spring or watercourse in a material degree, the loss of them causing a substantial diminution of the spring or watercourse, they are now treated as a component part of the watercourse, and follow rights on the watercourse, and rights therein are not regarded as underground rights separate therefrom.

Id. at 1022-1023. See also id. § 337, at 358-359 (stream appropriators have a right to block hostile diversions from "underground percolations tributary" to the surface channel); C.F. Tolman & Amy C. Stipp, Analysis of Legal Concepts of Subflow and Percolating Waters, 21 Or L. Rev. 113 (1942); Samuel C. Wiel, Need of Unified Law for Surface and Underground Water, 2 S. Cal. L. Rev. 358, 362 (1921).

Forty years prior to the negotiation of the Compact, the Montana Supreme Court recognized the scientific and legal linkage between surface waterways and tributary groundwater. In Smith v. Duff, 102 P. 984, 986 (Mont. 1909), the Montana Supreme Court wrote, "It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules." When Montana adopted a permit system for appropriative rights in 1973, it applied the system to both surface and groundwater. See Mont. Code Ann. §§ 85-2-12(19); see also Douglas L. Grant, The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine, 22 Land & Water L. Rev. 63, 64 (1987). Under Montana's water provisions, junior uses may not impair or adversely affect senior rights. See Mont. Code Ann. § 85-2-311(1)(b).

Wyoming law was less clear on the issue of interconnected groundwater and surface water at the time the Compact was negotiated, but it was not inconsistent with Montana law. At that time, Wyoming courts had apparently never dealt with the question of hydrological interconnections between groundwater and surface water. Hearing Trans. at pp. 44-45. The Wyoming legislature had recently passed a groundwater statute that subjected all new groundwater withdrawals to the prior appropriation system, but was silent on whether and how to integrate groundwater withdrawals with hydrologically interconnected surface channels. See 1947 Wyo. Sess. Laws ch. 107. When Montana passed a new groundwater statute in 1957, however, it explicitly provided for the legal integration of hydrologically interconnected groundwater and surface water:

> Where … underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply

Wyo. Stat. Ann. § 41-3-916. See also id. § 41-3-915 (providing corrective measures for cases of interference, including ordering junior appropriators to cease or reduce withdrawals); Lawrence J. Wolfe & Jennifer G. Hager, Wyoming's Groundwater Laws: Quantity and Quality Regulation, 24 Land & Water L. Rev. 39, 61-62 (1989) (providing examples of the coordination of groundwater and surface water in Wyoming).

Given the language of the Compact and the general treatment of hydrologically interconnected groundwater under the doctrine of appropriation both at the time the Compact was negotiated and subsequently, I conclude that the Compact protects pre-1950 appropriators from interference by at least some forms of groundwater pumping that date from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its surface tributaries. The failure of the Compact to specifically reference the term "groundwater" is not surprising given that the negotiators did not believe that groundwater was likely to be a significant issue in

managing the Yellowstone River system. Federal Power Comm'n, Preliminary Report on Yellowstone River Basin 45, Joint App. at 559 (Dec. 1940) ("it may be assumed that irrigation from underground pumping will not have a significant effect on stream diversions within the calculable future").

The Compact's definition of diversion appears to provide further support for this conclusion. As discussed above, Article V(B) provides that "diversions for beneficial use on new lands" are to come from "unused and unappropriated" waters, not from waters belonging to pre-1950 appropriators. Article II(G) provides that the term "diversion" means "the *taking* or *removing* of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken" (emphasis added). The United States makes a strong case that the pumping of groundwater that is hydrologically interconnected to the surface channel of a tributary is encompassed by this definition. Brief for the United States as Amicus Curiae In Opposition to the Motion to Dismiss at 24-26. Such groundwater pumping, by preventing the water from reaching the channel of the tributary, would appear to quite literally "take" or "remove" water from that tributary. Because I conclude for the reasons discussed above that Article V(A) of the Compact addresses groundwater, however, it is unnecessary to determine whether groundwater pumping is included in the term "diversion" as used in Articles V(B) and V(C). The meaning of the term "diversion" has implications for the application of these sections of the Compact that go beyond the Complaint in this case, and I therefore do not decide in this Memorandum Opinion whether the term "diversion," as used in Articles V(B) and V(C), encompasses groundwater pumping.

Recognizing the potential implications of holding that Article V(A) does not address withdrawals of interconnected groundwater, Wyoming argues that Montana is not without redress. According to Wyoming, Montana can ask Wyoming to negotiate an amendment to the existing Compact, start negotiations with Wyoming for a new compact, or bring an equitable apportionment action in the Supreme Court to apportion groundwater. Montana's Reply Brief in Support of its Motion to Dismiss Bill of

Complaint at 29. As the preamble to the Compact emphasizes, however, the Compact was designed to avoid exactly such additional negotiations and disputes. The Compact was meant to "remove all causes of present and future controversy … with respect to the waters of the Yellowstone River and its tributaries" and "provide for an equitable division and apportionment of such waters." Article V(A) does this by protecting pre-1950 appropriators in Montana against all interference by new users, whether by surface or groundwater diversion. Given the purposes of the Compact, "neither the parties to the Compact, nor the Congress and the President who approved it, could have intended that an upstream State could, with impunity, unilaterally enlarge its allocation by taking some of the virgin water supply before it reached the stream flow." First Report of the Special Master, Kansas v. Nebraska, Original No. 126, at 21 (Jan. 28, 2000).

Resolution of the question whether Article V(A) covers some groundwater withdrawals does not answer the subsidiary issue of the exact circumstances under which groundwater pumping violates Article V(A). Because it is not necessary to answer that issue in order to resolve Wyoming's Motion to Dismiss and because the parties did not brief the issue, I do not resolve the issue in this Memorandum Opinion but leave it for resolution in subsequent proceedings in this case.

4. Consumption of water on acreage irrigated prior to January 1, 1950 can be increased through efficiency measures without violating the Compact.

The final question is whether Article V(A) of the Compact protects pre-1950 appropriators in Montana against improvements in efficiency on lands in Wyoming that were irrigated prior to January 1, 1950 if the efficiency improvements lead to increased consumption. According to Montana, some pre-1950 irrigators in Wyoming have converted from flood irrigation to sprinkler irrigation and used the water savings to increase their water consumption. See Brief in Support of Motion for Leave to File Bill of Complaint at 15-16. In Montana's view, this additional consumption of water by pre-1950 appropriators in Wyoming does not fall within the first tier of rights protected under

Article V(A). Instead, any increase of consumption constitutes a "supplemental water supply" and falls under the second tier of rights protected by Article V(B).

Unlike the other issues raised by Montana's Complaint, this issue presents a conflict between two sets of pre-1950 appropriators, those in Montana and those in Wyoming, all of whom are protected by Article V(A) of the Compact.[7] Because Article V(A) provides that pre-1950 rights are to "continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of prior appropriation," the critical issue is whether such laws permit or prohibit efficiency improvements that harm downstream appropriators. As explained below, I conclude that the laws governing the use of water under the doctrine of appropriation, and thus Article V(A), permit efficiency improvements where the salvaged water is used on existing lands.

The question of whether a senior appropriator can increase his or her efficiency to the detriment of a junior appropriator is unfortunately one of the murkier areas of prior appropriation law. As one treatise notes, judicial cases state two seemingly inconsistent rules. The first rule is that "an appropriator is entitled to rely on the stream as the appropriator finds it." 2 Waters & Water Rights § 13.03, at 13-9 (Robert E. Beck ed., 2001 repl. vol.). Under this rule, junior appropriators are protected from changes by upstream appropriators that reduce the amount of water returning to the stream and thus available to the junior appropriators. This rule forms the basis for the law of virtually every state that an appropriator cannot change the purpose or place of his or her use if that would injure junior appropriators by decreasing return flows. See, e.g., Mont. Code Ann. § 85-2-402; Wyo. Stat. Ann. § 41-3-104. The second rule is that "an appropriator cannot be forced to continue wasting water in order to continue supplying a subsequent user of that water." Id. at 13-15. Under this rule, senior appropriators are free to increase their water efficiency without regard for the impact on junior appropriators.

[7] Because the irrigators in Wyoming are using water on acreage irrigated before January 1, 1950, they are entitled just like the Montana appropriators to "continue to … enjoy[]" their appropriative rights "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Compact, Art. V(A).

The Wyoming Supreme Court has addressed this issue in several cases, although none has involved facts on all fours with those alleged in the Complaint in this case. In Binning v. Miller, 102 P.2d 54 (Wyo. 1940), George Glover had captured water that was seeping off the property of Burleigh Binning before that "seepage water" reached a natural stream. The court began its opinion by holding as a matter of Wyoming law that one cannot obtain a legal right to seepage water requiring the owner of the land from which the water flows to continue that flow. Id. at 61. The court also found, however, that the swale from which the seepage water was diverted ultimately became a natural waterway, at which point the "water running in the stream was … subject to appropriation." Id. at 63. According to the Montana Supreme Court, any right to that water was "subject to the usual rights of landowners, namely, the right of Binning and his successors in interest to use the water … for beneficial purposes upon the land for which the seepage water was appropriated, should such beneficial purpose be possible." Id.

Bower v. Big Horn Canal Ass'n, 307 P.2d 593 (Wyo. 1957), again dealt with rights to seepage water. The court concluded that *Binning* had not held that seepage water could not be appropriated. According to the court, "all that was really decided in the *Binning* case was that a person seeking to appropriate seepage water could not do so and thereby secure a permanent right to continue to receive the water." Id. at 601. And the court suggested that this holding was part of a more general rule allowing appropriators to improve their irrigation efficiency without worrying about the impact on other water users:

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolaton [sic] to the river, no other appropriator can complain.

Id. at 601. See also Fuss v. Franks, 610 P.2d 17, 20 (Wyo. 1980).

The relevant prior appropriation law in Wyoming can be summarized as follows: Appropriators cannot change the purpose or place of their water use if that change would injure downstream appropriators by decreasing downstream flow. Wyo. Stat. Ann. § 41-3-104. Downstream water users have no ground for complaint, however, where the appropriator increases its water efficiency (e.g., by improving its irrigation techniques) and uses the saved water for the same use on the same land. Bower v. Big Horn Canal Ass'n, 307 P.2d 593, 601 (Wyo. 1957). Under *Bower*, however, the appropriator enjoys the "right to use and reuse – capture and recapture – such waste waters for use only 'upon the land for which the water forming the seepage was originally appropriated." Fuss v. Franks, 610 P.2d 17, 20 (Wyo. 1980). See generally Mark Squillace, A Critical Look at Wyoming Water Law, 24 Land & Water L. Rev. 307, 331-332 (1989).

Although the Montana courts have never addressed this issue, Montana statutory law appears today to be consistent with the Wyoming rules. Under statutory provisions passed in 1973, anyone seeking to change the place or purpose of use of their appropriation must obtain the approval of the Department of Natural Resources and Conservation, and the department cannot approve the change if the change would adverse affect the use of existing water rights by others. Mont. Code Ann. §§ 85-2-102(6) & 85-2-402. Appropriators, however, can salvage water and make beneficial use of that salvaged water without seeking a change if there is no change in place or purpose of use. Id. § 85-2-419. Salvage is defined as making "water available for beneficial use from an existing valid appropriation through application of water-saving methods." Id. § 85-2-102(20). See generally 2 Waters & Water Rights § 13.03, at 13-18 (Robert E. Beck ed., 2001 repl. vol.) (noting Montana's policy to provide an incentive to water users to salvage wasted water); In the Matter of Application for Change of Appropriation Water Rights, 1999 Mont. Dist. LEXIS 433 (Mt. Dist. Ct. 1999).

There also is nothing in the decisions of the United States Supreme Court or the general laws of prior appropriation to suggest that the drafters of the Compact intended to

employ any alternative rule in applying Article V(A) to resolve disputes between pre-1950 appropriators in Montana and Wyoming. Any other rule would provide pre-1950 appropriators in Wyoming with fewer use rights under the Compact than they would otherwise enjoy under state law. While protecting other appropriators from changes in the nature and place of use, the rules set out above also encourage the conservation and full use of water – a goal to which all of the signatories to the Compact subscribe. See, e.g., Montana Code Ann. § 85-2-101 & 85-2-419 (declared policy of Montana to "encourage the conservation and full use of water"); In the Matter of Application for Change of Appropriation Water Rights, supra (the Montana Act "provides all water users an incentive to conserve water by rewarding efficient watering practices with the right to utilize any salvaged water").

In summary, Article V(A) does not prohibit pre-1950 appropriators in Wyoming from conserving water through the adoption of improved irrigation techniques and then using that water to irrigate the lands that they were irrigating as of January 1, 1950. Uses of conserved water for "beneficial use on new lands or for other purposes," by contrast, fall within Article V(B) and are subject to the same restrictions discussed earlier for post-1950 water uses.

IV. CONCLUSIONS

For the reasons discussed above, I conclude:

1. The Compact unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950.

2. Even if the language of the Compact were less clear, the history of the Compact negotiations shows that the Compact was intended to protect pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950.

3. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means (e.g., by reducing deliveries to post-1950 appropriators in Montana) that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that new diversions or withdrawals in Wyoming not interfere with pre-1950 appropriative rights in Montana.

4. Article V of the Compact clearly protects pre-1950 appropriations in Montana from irrigation of new acreage in Wyoming if that irrigation prevents sufficient water from reaching the pre-1950 users.

5. Under Articles V of the Compact, diversions of water into storage for either beneficial uses on new land or "supplemental water supplies" on existing acreage are to come only from "unused and unappropriated water," after protecting pre-1950 appropriations.

6. Montana, however, cannot demand that Wyoming release water from its reservoirs to meet the needs of pre-1950 appropriators in Montana if the water was stored at a time when the needs of the pre-1950 appropriators were fully met.

7. The Compact protects pre-1950 appropriators from interference by at least some forms of groundwater pumping that dates from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its surface tributaries. The question of the exact circumstances under which groundwater pumping violates Article V(A) is appropriately left to subsequent proceedings in this case.

8. Article V(A) of the Compact does not prohibit pre-1950 appropriators in Wyoming from conserving water through the adoption of improved irrigation techniques and then using that water to irrigate the lands that they were irrigating as of January 1,

1950. Uses of conserved water for "beneficial use on new lands or for other purposes," by contrast, fall within Article V(B) of the Compact and are subject to the same restrictions discussed earlier for post-1950 water uses.

For all these reasons, it is my conclusion that Wyoming's Motion to Dismiss should be denied.