

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.

MOTIONS HEARING
Thursday, August 29, 2013

Before the Honorable Barton H. Thompson, JR.
Special Master

AGREN BLANDO COURT REPORTING & VIDEO INC

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21 Also Present: Timothy Fox, Esq., Attorney General,
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23 Peter Michael, Esq. Attorney
24 General, State of Wyoming

25 James Dubois, Esq.
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1 P R O C E E D I N G S

2 SPECIAL MASTER: Let's go on the record
3 then. So this is a hearing on four different
4 motions in No. 137, Original, in the Supreme Court
5 of the United States, Montana versus Wyoming. And
6 why don't we begin with introductions from
7 counsel. And so we'll start with the State of
8 Montana. Mr. Draper, do you want to introduce
9 yourself and your other counsel?

10 MR. DRAPER: Yes. Thank you, Your
11 Honor. I'm John Draper, counsel of record for
12 Montana. I have with me today the Attorney
13 General of Montana, Tim Fox, who would like to
14 have an opportunity to address the Court as we get
15 started, if that's possible.

16 We also have with us Deputy Attorney
17 General Corey Swanson.

18 MR. SWANSON: Good morning, Your Honor.

19 SPECIAL MASTER: Good morning.

20 MR. DRAPER: Also Assistant Attorney
21 General Jay Weiner.

22 MR. WEINER: Good morning.

23 SPECIAL MASTER: Good morning.

24 MR. DRAPER: And my colleague Jeff
25 Wechsler.

1 MR. WECHSLER: Good morning.

2 SPECIAL MASTER: Good morning.

3 MR. DRAPER: Thank you.

4 SPECIAL MASTER: Thank you, Mr. Draper.

5 So, Mr. Kaste for Wyoming. I notice Mr. Peter
6 Michael is here also, but you're sitting in the
7 lead chair, so I figure you've got the lead this
8 morning?

9 MR. KASTE: That's right. Because of
10 Mr. Michael's continuing and extending duties on
11 behalf of the State of Wyoming, I'm handling the
12 arguments here today with Mr. Brown.

13 MR. BROWN: Good morning.

14 SPECIAL MASTER: Good morning.

15 MR. KASTE: And we also have Mike
16 Wigmore from Anadarko. We brought some folks from
17 our office to watch the proceedings today. Of
18 course, you know Mr. Matthias Sayer from our
19 office, and Andrew Kuhlmann from our office, who
20 have entered appearances in this case and have
21 done a tremendous amount of work in the last six
22 months taking depositions and doing discovery. We
23 also brought a couple of new faces from our
24 office. We have Abigail Boudewyns. She's a new
25 lawyer in our office, came to us from the State of

1 Kansas. And Jeremy Gross, who is a very recent
2 graduate of the University of Wyoming. Hopefully,
3 he's going to pass the bar in the next couple of
4 weeks. But they are here to hopefully learn
5 something today, and we appreciate you letting
6 them come and watch. Thank you.

7 SPECIAL MASTER: That's my pleasure.
8 So welcome to all of you. And, Mr. Michael, I'm
9 just curious, the role of interim Attorney General
10 is still yours?

11 MR. MICHAEL: Yes, it is, Your Honor.

12 SPECIAL MASTER: I hope you retain that
13 position for a while.

14 MR. MICHAELS: Thank you.

15 SPECIAL MASTER: So then the
16 various amici. I notice Mr. Dubois in the back.

17 MR. DUBOIS: Good morning, Your Honor.
18 James Dubois for the United States.

19 SPECIAL MASTER: Good morning. And
20 then Ms. Whiteing?

21 MS. WHITEING: Good morning, Your
22 Honor. I'm Jeanne Whiteing for the Northern
23 Cheyenne Tribe.

24 SPECIAL MASTER: Thank you. And Mr.
25 Wigmore was already introduced. Do you want to

1 introduce yourself?

2 MR. WIGMORE: Good morning, Your Honor.
3 Michael Wigmore for Anadarko Petroleum Corporation
4 and with me today are Julie Jones from Anadarko,
5 Marlin Jones from Anadarko -- they switched
6 around. No relation. And then Ryan Elmer
7 (phonetic), also from Anadarko.

8 SPECIAL MASTER: Thank you very much.
9 So just one administrative matter -- oh, I'm
10 sorry.

11 MS. VERLEGER: Jennifer Verleger from
12 North Dakota.

13 SPECIAL MASTER: So North Dakota is
14 actually another named party, and so I'm very
15 sorry, and I didn't mean to overlook the great
16 State of North Dakota. So welcome to Ms.
17 Verleger.

18 So just one administrative matter at
19 the very outset. The court reporter asks that
20 because of the fact that this courtroom echoes,
21 and so it's sometimes difficult to hear people
22 when they speak, if people could, "except, for
23 example, I just asked everyone to introduce
24 themselves," if you can speak from the podium this
25 morning. And particularly if one of the various

1 representatives of the amici or the State of North
2 Dakota who are in back of the bar, if you could
3 introduce yourself also to the members in the back
4 and who you are. And, in fact, I guess that's
5 probably true for virtually everybody up here.

6 So I sent out two days ago, and
7 hopefully everyone received, a schedule of the
8 order in which I plan to take the various motions
9 this morning. I plan to start with the two
10 motions to strike, then hear Wyoming's motion for
11 summary judgment, then hear Montana's motion for
12 summary judgment, and then a status conference.

13 But before we actually begin with the
14 first motion, Mr. Fox, you asked if you could
15 address the Court.

16 MR. FOX: Good morning, Your Honor.

17 SPECIAL MASTER: Good morning.

18 MR. FOX: And I would like to also say
19 congratulations to my colleague Pete Michael for
20 his ascension to the Attorney General's position
21 in Wyoming.

22 May I first preface my comments by
23 saying that we appreciate our neighbors. We
24 appreciate our neighbors in Wyoming, and we
25 appreciate our neighbors in North Dakota and the

1 surrounding states. I am privileged to represent
2 the People of the State of Montana as their
3 attorney general, and we appreciate the
4 opportunity, Your Honor, to move this case forward
5 here today toward resolution of some longstanding
6 issues that concern the water compact
7 administration.

8 In my short eight months as Montana's
9 attorney general, many important matters have
10 crossed my desk. Few, if any, however, are as
11 important as this case to Montana. This case
12 directly affects real people in profound ways, in
13 many, many ways over the years and will affect
14 them in the future as well. And as an Eastern
15 Montanan whose family owns property just a few
16 miles from the Tongue River, no one knows the
17 importance of this case more than I do. Montana
18 looks forward to a vigorous argument here today,
19 and the people of Montana appreciate your careful
20 consideration of the issues in this case, and we
21 wish to thank Your Honor for the time that you've
22 put into this. We look forward to a resolution.
23 Hopefully, we will appreciate our neighbors much,
24 much more in the future. Thank you.

25 SPECIAL MASTER: Thank you very much,

1 Mr. Fox. I appreciate your comments. I think the
2 United States Supreme Court recognizes that these
3 types of interstate water disputes are extremely
4 important to the states that are involved, and
5 they frequently involve more than specifically an
6 acre-foot here, an acre-foot there. This is an
7 issue of each state's ability to control the water
8 which belongs to them. So thank you very much for
9 your comments.

10 So with that, again, what I'd like to
11 do is turn to the two motions to strike. I don't
12 think either of these motions are likely to take
13 very long. And what I would propose is that in
14 each case I give you a sense of where I currently
15 stand on each of the various motions. And then if
16 either side wants to say anything more at that
17 point, you're more than welcome to do so.

18 So let's start with the motion of
19 Wyoming to strike the report and exclude the
20 testimony of Douglas R. Littlefield, Ph.D. So
21 Wyoming's argument in this particular motion is
22 that the testimony includes a variety of legal
23 conclusions on ultimate issues of law that is
24 inappropriate for an expert witness to address. I
25 think that Wyoming's concerns are well taken.

1 There's been, I think, a movement in courts to let
2 people address ultimate issues of law that
3 ultimately are issues for a court to decide rather
4 than for an expert opinion.

5 At the same time, I think that
6 Mr. Littlefield can testify. Historical insight
7 can be valuable in these types of proceedings. As
8 Chief Justice Renquist pointed out in the Hunter
9 vs. Underwood case, coming from a university where
10 there are also lots of extremely good historians,
11 I think I would be probably mistaken if I did not
12 recognize that they are experts in their own
13 rights.

14 At the same time, however, it is going
15 to be very important that Mr. Littlefield not
16 testify regarding either the meanings of
17 particular provisions of the compact, that is
18 ultimately an issue of law; or testify as to what
19 the intent was of the states and negotiators and
20 the members of Congress in agreeing to a
21 particular point. And I think if you look at the
22 various portions of Mr. Littlefield's testimony
23 that were ultimately struck by Arthur Littleworth
24 in the Kansas vs. Colorado case, which was No.
25 105, Original, in the United States Supreme Court,

1 you'll see that virtually all of those various
2 provisions went to one or another of those types
3 of testimony. They were either testimony saying
4 that in that particular case that a particular
5 article meant X; or that the parties, in using a
6 particular phrase, intended Y.

7 Now, on the other hand, as an
8 historian, I think that Mr. Littlefield can
9 testify regarding particular events or actions,
10 and can also testify as to various indicators of
11 intent. For example, what commonly understood
12 meanings were of particular phrases at a
13 particular point in time. Similarly, I think it
14 would be appropriate for an historian to testify
15 as to the context within a particular provision
16 was negotiated. And I actually don't think
17 differentiating between those two categories is
18 that difficult. There could be some lines drawn
19 if it's necessary, but I don't think as a general
20 matter that that would be very difficult to
21 distinguish between them.

22 So then the question becomes: How do
23 we approach the testimony of Mr. Littlefield.
24 Rather than just letting him testify and then
25 letting Mr. Kaste decide what he wants to object

1 to, my preference would be that, Mr. Draper, you
2 or whoever it is that is questioning
3 Mr. Littlefield when he is on the stand be very
4 conscious of that distinction and not ask
5 questions that will naturally lead him to the area
6 that is reserved for a court rather than for an
7 expert witness. And I will leave that actually up
8 to Mr. Kaste whether or not you would prefer, on
9 the one hand, just to keep your objections to a
10 variant, or object every time you hear a question
11 or an answer which you think is illegitimate. You
12 can do it one way or the other, but not both. So
13 that would be the way I would propose to resolve
14 this. I will embody that in a short decision on
15 this that counsel can refer to as to what is
16 appropriate and what is not appropriate. But I
17 think there's a clear dividing line, and I think
18 that would permit Mr. Littlefield to provide all
19 of the valuable expertise that the United States
20 Supreme Court may ultimately want to refer to in
21 deciding this particular case without slopping
22 over into the ultimate role of the Supreme Court
23 itself.

24 So with that, Mr. Kaste, it's your
25 motion, and maybe you can address that for me.

1 MR. KASTE: Thank you, Your Honor. I
2 don't have much to say, other than if I get to
3 pick the process, I choose to object at the time,
4 in the moment. It saves me a lot of work on the
5 back end, and I just think that process always
6 makes more sense.

7 And then with regard to the substance
8 of your ruling, I honestly think we're going to
9 avoid this problem in the main because the
10 relevance of the historical testimony may end up
11 falling away as a result of the rulings that you
12 make on summary judgment. Because if nothing
13 else, it sort of teed up the essential question
14 Dr. Littlefield was looking at for resolution on
15 summary judgment. And in the course of your
16 ruling, I think you're going to say one way or the
17 other, and the historical background may not
18 necessarily be all that relevant by the time we
19 get to trial. So it may not really be much of an
20 issue at all, but the way in which you propose to
21 resolve it is great for us. Thank you.

22 SPECIAL MASTER: You're welcome. And
23 again, whether or not the testimony of
24 Mr. Littlefield is ultimately relevant in the
25 trial, I happen to think this will move relatively

1 well, because I think Mr. Draper would certainly
2 want a distinction to make sure that
3 Mr. Littlefield doesn't again cross over the line.

4 So, Mr. Draper?

5 MR. DRAPER: Thank you, Your Honor.

6 And I'd just like to confirm that I will be very
7 assiduous in observing the distinction that I
8 think you very definitely drew this morning.
9 Thank you.

10 SPECIAL MASTER: Thank you. So the
11 next motion then is Montana's motion to strike a
12 portion of the affidavit of Patrick T. Tyrell. So
13 this is also a motion that requires line drawing.
14 And if we go back to the April 23 order in this
15 particular case which provides specifically that
16 the fact witnesses may testify as to personal
17 actions, experiences, and observations in the
18 normal course of their employment without being
19 designated as an expert witness, even if their
20 work involved scientific, technical, or other
21 specialized knowledge or skills.

22 And in this particular instance,
23 Montana seeks to strike Paragraph 7 of
24 Mr. Tyrell's affidavit on the grounds that it
25 appears to be addressing an expert issue without

1 establishing that this is a personal action or
2 observation of Mr. Tyrell in the course of his
3 work. And again, I think that Montana's concern
4 in this particular case has some merit. The two
5 problems that I see with Paragraph 7 is that
6 although I realize that it addresses and uses
7 explicitly the language of the Wyoming statute
8 dealing with integration of surface water and the
9 groundwater, it can be read as an expert opinion
10 as to the degree of interconnection of groundwater
11 and surface water.

12 And second of all, there is no context
13 in the affidavit as to how Mr. Tyrell came to this
14 particular conclusion. It is, ultimately, a
15 conclusion. So there is nothing in the affidavit
16 itself that says, for example, that Mr. Tyrell was
17 at some point required to make a decision as to
18 whether or not the CBM groundwater in the Tongue
19 River watershed was so connected with the Tongue
20 River or a surface stream as to constitute, in
21 fact, one source of supply; or even more
22 generally, that he has decided in his role as the
23 Wyoming state engineer that CBM groundwater is
24 generally not so interconnected with surface
25 streams as to constitute, in fact, one source of

1 supply.

2 Now, at trial, my guess is, is that
3 these type of issues are going to be readily
4 resolvable if they come up, because at trial if
5 Mr. Draper raises this particular question and
6 it's a legitimate concern, then I assume Mr. Kaste
7 will simply ask Mr. Tyrell a couple more
8 questions. And at that point, this could probably
9 become, or I could easily imagine a situation
10 where language very similar to this would be
11 something that would be perfectly legitimate
12 because it would be something Mr. Tyrell would be
13 testifying to in the context of a personal action
14 or observation that he has made in the course of
15 his work. The problem here is, is that it's not
16 in the affidavit, and we're in a summary judgment
17 context.

18 So what I would propose in this
19 particular case is that what I would do is to, at
20 the moment, strike all of Paragraph 7 except for
21 the final sentence -- or the final sentence except
22 for the word "accordingly," which would no longer
23 make any sense; but also if Wyoming believes it is
24 necessary in support of its summary judgment
25 motion in this particular case to submit a revised

1 affidavit that provides the necessary background
2 information and make clear that this is not simply
3 an expert opinion, that this is actually an
4 opinion of a recipient witness, and in particular,
5 the Wyoming state engineer, I would entertain a
6 revised affidavit. Subject, of course, to
7 Mr. Draper objecting to that if he doesn't think
8 that passes the bar.

9 In some ways, I sort of feel as if I'm
10 being hypertechnical here, but at the same time I
11 expect that this is going to be an issue that is
12 going to come up at the trial, assuming we should
13 go to trial. And I want to make sure, therefore,
14 from the very onset, that we have clear ground
15 rules as to what it is that a recipient witness
16 can testify to, and what would be impermissible
17 expert opinion that goes beyond that particular
18 witness's work experience and observations.

19 So with that as background, again,
20 Mr. Draper, I'll hear from you first, and then
21 Mr. Kaste.

22 MR. DRAPER: Thank you, Your Honor. I
23 think your action this morning takes care of our
24 issue. The language that was struck, including
25 the word "accordingly," which purportedly gives

1 the expert basis for that, and now what is in the
2 affidavit is something that we believe is proper,
3 simply stating a condition of a regulation in
4 Wyoming by a person who has personal knowledge of
5 that. Thank you.

6 SPECIAL MASTER: Thank you. So,
7 Mr. Kaste, I guess the only other thing I would
8 state at this point is, it's not clear, other than
9 what's addressed in that particular paragraph,
10 whether it's relevant to your motion for summary
11 judgment.

12 MR. KASTE: It's not, and I'm not going
13 to seek to supplement or fix our affidavit. That
14 paragraph is sort of a lead-in to the real meat
15 and what is relevant, which is Paragraph 8. And
16 we could have provided more context, but, of
17 course, in our opinion, what Pat Tyrell said,
18 given that he's been working with CBM for 10
19 years, is essentially saying, "I've made my
20 decision because the sky is blue." That's not a
21 terribly controversial statement in Paragraph 7.
22 But nevertheless, when we get to trial, you're
23 right. We're going to have to have the
24 appropriate foundation for any kind of an opinion,
25 and we're prepared to do that, and we'll be happy

1 to do that. We're fine with the resolution that
2 you've made today. Thank you.

3 SPECIAL MASTER: Thank you, Mr. Kaste.
4 And one thing that all of you should probably keep
5 in mind, although when we go to trial and this
6 could change over the course of the trial, is that
7 things that seem obvious to all of you are not
8 always obvious to me, and I have to make sure that
9 not only do I understand the context and the
10 background; but furthermore, that when this record
11 gets to the United States Supreme Court, they
12 understand it also so there is no chance of any
13 particular statements being taken out of context.

14 Again, thank you very much. And so
15 let's turn then to Wyoming's motion for summary
16 judgment. And the other thing that you should
17 have received on Tuesday was just a list of
18 comments and questions that I had in this
19 particular case. And normally, as you know, I
20 haven't done this, but I thought particularly
21 given the importance of these motions, that it
22 would be useful for you to have some of the
23 questions that rose in my mind as I read through
24 the various materials, and then in some cases
25 where you didn't know the answer before, you would

1 hopefully know the answer by now.

2 I should also let you know that I've
3 read through all of the briefs with respect to
4 both this motion and Montana's motion. So assume
5 that I'm pretty well read on those. It doesn't
6 mean you can't repeat yourself, but I think I'm
7 pretty aware of what are in those papers.

8 In addition to that, I have read, I
9 think, the major exhibits and affidavits that were
10 attached. Now, that's not easy to really
11 determine. What I determined was some major -- I
12 can tell you, for example, I've read through all
13 of the expert witness reports, and I've read
14 through the affidavits that were prepared
15 specifically for this particular proceeding. I
16 haven't, however, read all of the materials that
17 you sent me, which was a fair amount. And I will
18 plan to take a look at those before I rule. But
19 at the same time, if there are particular things
20 you believe I should be taking a look at in those
21 materials, pointing those out to me today would be
22 very helpful because I'll make sure then that I
23 specifically look as those.

24 So with that as background, what I
25 would suggest we do next is, I'll have counsel

1 present their arguments. I'm not going to go
2 through my particular questions. But at the end
3 of the argument, I will take a look back. And if
4 I see things that have been missed, then we can go
5 back and talk about those things.

6 So, Mr. Kaste?

7 MR. KASTE: Thank you, Your Honor. My
8 plan, or what I plan to do is to give you my
9 argument, and then address each of your questions
10 that I don't think that I had during the course of
11 my argument, because some of them sort of fall
12 outside of what Wyoming has necessarily argued in
13 the course of its motion. And that's fine, but
14 they just sort of fall better at the end, if
15 that's all right with you.

16 SPECIAL MASTER: That's fine with me.
17 The other thing I should point out is that at
18 least right now, I'm not maintaining any
19 particular time constraints, and that's because I
20 think that both of these motions are very
21 important, and so I don't want to unnecessarily
22 limit you.

23 At the same time, if I think at some
24 point that we're going into material that is
25 really unnecessary and it's covered, then I'll let

1 you know.

2 Ms. Verleger, if I don't talk directly
3 into the mic, you can't hear that?

4 MS. VERLEGER: Yes.

5 SPECIAL MASTER: Okay. I will try and
6 do better.

7 MS. VERLEGER: Mr. Kaste is hard to
8 hear also.

9 SPECIAL MASTER: We will both try to do
10 better. And if anyone cannot hear at any
11 particular point in time, just raise your hand,
12 and I'm going to assume that's why you raise your
13 hand.

14 MR. KASTE: All right. May it please
15 the Court. These motions are important. They're
16 very important. There are some pretty significant
17 legal issues that the parties have raised.
18 Nevertheless, my argument's going to be fairly
19 brief because I think that the answer to these
20 questions is fairly simple, fairly
21 straightforward, and is well grounded in the
22 Doctrine of Appropriation.

23 We've been conducting discovery in this
24 case for about a year, maybe a little longer, and
25 it's becoming clear this case is not about

1 violations of the Yellowstone River Compact by
2 Wyoming, but rather it is about Montana refusing
3 to live up to either of its agreements with
4 Wyoming in order to remedy a problem caused by its
5 agreement with the Northern Cheyenne Tribe.
6 Montana's theories in this case are wrong as a
7 matter of law. Their expert testimony is based on
8 a theory of the law which is wrong. And it is
9 based entirely on the application of a double
10 standard across the state line that is nowhere to
11 be found in the compact.

12 Now, Montana has given you a humongous
13 pile of paper in an attempt to convince you that
14 there must be some question of material fact out
15 there that warrants a trial in this case. There
16 is not.

17 Now, for our argument, we begin, as we
18 must, with the Yellowstone River Compact. The
19 compact defines the parties' relationship by
20 incorporating the laws governing the acquisition
21 and use of water under the Doctrine of
22 Appropriation. The Doctrine of Appropriation has
23 a couple of fundamental principles: First in
24 time, first in right. Beneficial use without
25 waste is the basis, the measure, and the limit of

1 the right. Beneficial use reflects actual use,
2 not theoretical paper rights. This is the law
3 across the West, it's the law in Wyoming, and it's
4 the law in Montana. And in order to dispel
5 Montana's assertion that the compact does not
6 contemplate that the parties would take action
7 based on actual demand, I want to read three
8 quotes to you from three Montana cases that ought
9 to be the end of this debate.

10 In the case of Quigley vs. McIntosh,
11 290 P. 266, a Montana case from 1930, the District
12 Court in that case set up a trigger flow mechanism
13 based on paper rights. And he said to the
14 complaining party, whenever "the senior water
15 users," whenever the water gets below the
16 accumulation of all their paper rights, you,
17 junior water user, must shut off. You have to
18 curtail whether they're using that water or not.
19 That went to the Montana Supreme Court and they
20 reversed, saying that the District Court
21 misconceived the intent and purpose of the statute
22 relating to the appropriation of water in
23 adjudicated streams. In reaching this conclusion,
24 the Court quoted from the original decree which it
25 found to be an accurate representation of the law

1 of Montana. And the Court in the decree said
2 this: "The original decree provided consistently
3 with Section 7097, Revised Codes 1921, that the
4 owner or owners of the several ditches and water
5 rights enumerated herein shall turn the water back
6 into the contributing stream or other source of
7 supply from whence the same is not being actually
8 needed and used for some beneficial and useful
9 purpose. Whenever the owners of the superior
10 water rights in this decree have no use for the
11 water or are not making use of it for useful and
12 beneficial purpose, it is the right of the
13 plaintiff here to use the same by virtue of his
14 junior appropriation. He may divert and use the
15 water to which he is entitled as of the date April
16 14, 1928, when he does not interfere with the
17 superior rights of others."

18 That seems to me to be a fairly
19 noncontroversial proposition of Western water law,
20 and it's not controversial. In fact, the Montana
21 Court says it again in Cook vs. Hudson.

22 SPECIAL MASTER: So if I could
23 interrupt you there. Could you point me back to
24 the citation on that?

25 MR. KASTE: It is 290 Pacific Reporter,

1 Page 266, and the quote I read to you is from Page
2 268.

3 SPECIAL MASTER: Thank you. And do you
4 recall the context in which that particular case
5 arose?

6 MR. KASTE: The junior appropriator had
7 appropriated some rights, wanted to use them, and
8 was told: No, because we have these paper rights
9 downstream, largely for -- I believe it was some
10 mines. And the District Court agreed with the
11 seniors who were getting water that the mines
12 weren't using and said: The paper rights say
13 they're entitled to this amount of water
14 downstream, and you have to make sure that amount
15 of water goes downstream, and it doesn't matter
16 whether they're using it. They have a decree
17 right with a piece of paper that says they're
18 entitled to this flow, and by God, you've got to
19 let them have it. And the Supreme Court said:
20 Absolutely not. You have to use the water in
21 order to have a right to it regardless of your
22 piece of paper. Your piece of paper places a
23 ceiling on the amount you can divert at any given
24 time, and it tells you where you can apply that
25 water and for what purpose. But that's not the

1 basis, the measure, or the limit of your right.
2 That's beneficial use, and that's actual use.
3 There is a reason why we use the word "use" often
4 in Western water, and not so much a paper right.
5 One of them has meaning, and the other does not.
6 One of them's recognized by laws of the Western
7 states, and one of them is not. It's worth
8 noting --

9 SPECIAL MASTER: So several things,
10 actually. Actually, Mr. Draper held his hand up
11 first, and initially I thought that maybe he was
12 putting up his hand because he actually wanted to
13 immediately interrupt and make his argument, but I
14 think it's just because he can't hear, because now
15 other people are raising their hands also. So I
16 think you and I are both going to have to be
17 really careful on that particular point.

18 MR. KASTE: I will do my best to be
19 cognizant of the other people in the room,
20 although it goes against my nature to speak really
21 loud.

22 SPECIAL MASTER: Okay. Actually, I
23 think earlier, Ms. Verleger was putting up her
24 hand.

25 MS. VERLEGER: I think if you speak

1 right into the microphone. I can hear Mr. Draper.
2 He spoke through the microphone.

3 SPECIAL MASTER: Maybe if we move the
4 mic right up in front of your face.

5 MR. KASTE: Is that better?

6 SPECIAL MASTER: I can certainly hear
7 you better.

8 MR. KASTE: It makes the echo,
9 though.

10 SPECIAL MASTER: Actually, let me just
11 go back for a second. And again, I'll take a
12 look, obviously, at any of the citations that you
13 can provide me. But there are at least two
14 questions here that I'd like to be able to
15 differentiate on beneficial uses, and also in
16 terms of Montana's motion. And so one issue is
17 whether or not you can insist on your senior right
18 even if you're not planning on utilizing the
19 water, or even if you're planning on utilizing the
20 water in a wasteful fashion. So that's Issue No.
21 1, which as I understand it, is really what you
22 are addressing and citing to the Quigley vs.
23 McIntosh case.

24 The second question, though, is more of
25 a procedural question; and in addition to that, as

1 a burden-of-proof question as to who raises the
2 issue of whether or not you're actually going to
3 be putting the water to use, or whether the burden
4 of showing that someone is not putting the water
5 to use, or is using it in a wasteful fashion.

6 And so let me ask you, just to switch
7 over for a second, to the way in which Wyoming
8 handles this. Assume that you have somebody who's
9 a senior upstream, and the senior says, "I have a
10 water right to X amount of water, and right now
11 I'm not getting X CSF of water; and therefore, I'd
12 like you to call the junior appropriator." And in
13 that situation, if there is somebody from the
14 Wyoming State Engineer's Office who's actually
15 regulating that particular call, will they call
16 the junior appropriator at that point, or do they
17 go to the senior appropriator and say, "Well,
18 before I do this, I have to just ask, are you
19 going to be using this particular water?" Or does
20 the junior at that point say, "Hey, you know, I
21 don't think they're actually utilizing this water,
22 and therefore, you shouldn't regulate it." And
23 similarly, in this particular case, assuming that
24 this is, in fact, an issue, is this an issue where
25 Montana is going to have to show not only that

1 there's a water right, but furthermore, that their
2 users actually are utilizing it, or is this
3 something that Wyoming is going to have to say,
4 "Hey, you know, they might have that right, but
5 they weren't using it, and here's the evidence for
6 that"?

7 MR. KASTE: Can you read that back?

8 Well, both. There was a question in there to
9 which I think the answer is both. In Wyoming,
10 what do we do? When the person calls up the
11 hydrographer commissioner and says, "Hey, I got a
12 right for this, and I'm not getting it," I
13 guarantee you as part of that conversation he
14 starts complaining about how his hay is dying.
15 It's just inherent in the communication, probably
16 on almost every basis. The hydrographer
17 commissioner goes out, takes a look at his
18 diversion, makes an assessment of what's going on
19 there, and then he starts heading up the river.
20 And then at that time the junior can say, "He's
21 not irrigating, he's just letting all that go out
22 the bottom of his ditch." And so at both points,
23 we can make an assessment of beneficial use, and
24 we can curtail wasteful use, or we can refuse to
25 regulate where it's being showed that the water is

1 not being placed to beneficial use.

2 And I think the same holds true here.
3 Because we're looking at what happened in the
4 past, we have to look at what information is
5 Montana giving us about beneficial use in Montana.
6 And this is where my argument was going to go.
7 But essentially, what they're giving us is, "We
8 don't have to tell you. It doesn't matter to you
9 whether we beneficially use it. We've got a list
10 of paper rights, and we added up all the numbers,
11 and it came to this flow. And if you don't give
12 us what's in that flow, you've got to start
13 shutting off your users."

14 Now, I think in this situation,
15 obviously, we should have an opportunity to, one,
16 trust the neighbors who we love so much to
17 actually call us when they have a need and an
18 ability to put this water to beneficial use, and
19 then we have the opportunity later on our end to
20 say, "Wait a minute. We see something there
21 that's inconsistent with your representation."
22 Because beneficial use is so important to the
23 administration of our water rights, we have the
24 power on both ends to take a look at it and say,
25 "This isn't right, and we're not going to make a

1 change based on the circumstances that we see."

2 Our whole point in the case with
3 regard to Montana's demand for direct diversions
4 is, "You can't show us -- you never made an
5 attempt to show us that you put the water to
6 beneficial use. And, in fact, you don't make an
7 attempt because you don't -- it's just not an
8 efficient way for you to operate," I guess.

9 You know, you've been to the dam.
10 Montana's operation procedure is, open up the dam,
11 send out a bunch of water. Until somebody
12 complains, we must be good. Then some of it goes
13 past into the Yellowstone River, and some of it
14 goes to hither and yon, and that's fine. And
15 that's not necessarily a bad system if it works
16 for everybody. But once you come to the state
17 line and you ask us to do something differently,
18 we have a right to expect you will live up to the
19 obligations in the compact, and that obligation is
20 defined by the Doctrine of Appropriation. And all
21 that means for Montana is in the past to make
22 damage claims today, or in the future when they
23 call us in the future, they're going to have to do
24 some math, and they're going to have to go out and
25 figure out where the water is going.

1 It's important to remember that you
2 cannot tell whether or not there's an actual
3 shortage in Montana anywhere along that river by
4 the flow at the state line. First of all, we have
5 the problem of need. Who needs it? Does anybody
6 need it? I don't know. And until we make that
7 assessment, it's hard to do the rest of the math.
8 We have to figure out who needs it, where are
9 they, and then we have to figure out what's
10 happening with the change from stored water to
11 surface water as it makes its way down river. As
12 you know, a whole bunch of stored water comes out.
13 There might be a little bit of surface water at
14 the beginning and a whole lot of storage water.
15 And as it makes its way down the river, those
16 storage deliveries get applied to a particular
17 piece of land, and some portion of that makes its
18 way down back into the river, and that water
19 becomes appropriable by a senior water user along
20 the line.

21 Now, Montana never figures out what's
22 what with regard to surface and storage. And
23 that's really important, because you can get to a
24 situation by way of return flows where you have 63
25 CFS coming into the reservoir at the state line,

1 and you have 150-some going through the T&Y Canal,
2 and the guy who runs the canal says, "I've never
3 made a call for storage water." Because all of
4 that water turned into appropriable water during
5 the 170-mile journey it makes from the reservoir
6 to the T&Y Canal. And it may very well be that
7 not all of that water is storage water and not all
8 of that water is surface water, but we don't know.
9 And we cannot be asked to turn off very specific
10 rights in Wyoming that people -- you're asking us
11 to turn off someone's livelihood based on no
12 assessment of actual need in Montana, and that is
13 not consistent with the compact in any measure.
14 It's just not.

15 And when Montana comes to us and says,
16 "Every time the flow gets to a certain point, you
17 have to shut all these people off, and we don't
18 care where the water goes in Montana, and it can
19 go out to the Yellowstone, and it's too bad for
20 you, Wyoming," that is not consistent with the
21 Doctrine of Appropriation. And that's what
22 Montana is asking you to base your decisions on in
23 this case, and that's not right. And that's not
24 what we agreed to in 1950, and that's not what we
25 expect for the damages portion of this cases, or

1 for the future administration of this compact. We
2 expect them to live up to their agreements, and
3 they're not doing it.

4 And their agreements are wholly
5 consistent with Montana law. I'm not going to
6 read you the quotes because they say essentially
7 the same thing. But if you look at Cook vs.
8 Hudson --

9 SPECIAL MASTER: I'm sorry to cut you
10 off again. I just want to resolve this one
11 question. So in liability phase, there are at
12 least two different approaches that I would imagine
13 take you to the question of beneficial use,
14 assuming that, in fact, it's relevant. The first
15 is to say, okay, it is Montana's obligation in
16 this particular matter to show not only that there
17 were rights to a set amount of amount of water on
18 behalf of pre-1950 appropriators that were not
19 met; and furthermore, that, in fact, those
20 pre-1950 appropriators were using all the water
21 that was there, and they actually needed more, and
22 they had fields that they needed to put the water
23 on, and damn it, they were going to put water on
24 them. So in other words, not only was there a
25 right in terms of a certain amount of water that

1 went unmet, but that furthermore, there was an
2 actual need for that. That's one possibility.

3 The second possibility is that Montana
4 has to show in terms of X CFS of water, there was
5 an X CFS of water and then it is Wyoming's defense
6 at that particular point in time to say, "Hey, but
7 did you actually look at this particular evidence
8 they didn't use? Because they actually weren't
9 using any of the water that they had at that
10 particular point in time." It's just really
11 beneficial use, but I think this is going to be an
12 issue that comes up repeatedly. And so I'm just
13 curious as to which direction or which of those
14 two positions Wyoming takes. And I realize that
15 there are other issues as to the accounting and
16 stored water uses. Which position?

17 MR. KASTE: The first one. And let me
18 tell you why. I'm not just making that up just
19 because it's better for me. But I want you to
20 listen to a sentence from Cook vs. Hudson.

21 SPECIAL MASTER: All right. And Cook
22 vs. Hudson, give me the citation.

23 MR. KASTE: 103 P.2, 137 at Page 146.
24 It's a Montana case from 1940. I had a longer
25 quote, but this one answers your question, I

1 think. It says, "When one holding" --

2 SPECIAL MASTER: Sorry, you need to --

3 MR. KASTE: I'm trying. "When one
4 holding the prior right does not need the water,
5 such prior right is temporarily suspended, and the
6 next right or rights in the order of priority may
7 use the water until such time as the prior
8 appropriator's needs justify his demanding that
9 the junior appropriator or appropriators give way
10 to his superior claim."

11 Montana doesn't have a right to this
12 water when they don't need it. That's pretty
13 simple stuff. So they do have to show before they
14 come to Wyoming that they need the water. Now,
15 Montana wants you to believe that's really, really
16 hard. No. And we don't expect to have a Montana
17 state employee on every hay meadow every single
18 day peeking to see whether or not they're actually
19 using the water. That's ridiculous. Obviously,
20 we all agreed to a system that is reasonable.
21 What that means is, we need to do some measuring.
22 We need to do some communicating with our
23 irrigators to know what's really going on and we
24 need to do some accounting to know what is storage
25 and what is surface. And frankly, Wyoming

1 probably doesn't have a big problem with the idea
2 that there's going to come a time in late July
3 every single year where Montana's needs for
4 surface water outstrip what's flowing into the
5 river and outstrip what's returning as return
6 flows. There's just not enough water, and that's
7 a long stretch of river.

8 The problem in this case and why you
9 can't award Montana damages in this case for those
10 things in the past is that we don't have any
11 evidence showing those things. But there is going
12 to come a time in the future, and there's going to
13 come a time every July -- and I have an exhibit
14 you might find helpful.

15 MR. DRAPER: Your Honor, we could not
16 hear the name of the case that he was referring
17 to.

18 MR. KASTE: Cook vs. Hudson.

19 SPECIAL MASTER: It was Cook vs.
20 Hudson, and it's at 103 P.2, 137, and the page he
21 was quoting from was Page 146.

22 MR. DRAPER: Thank you.

23 MR. KASTE: May I approach, Your Honor?

24 SPECIAL MASTER: Yes, you may.

25 MR. KASTE: This is an exhibit to the

1 affidavit and report of Mr. Hinckley. It's just a
2 graphical representation of the aggregate average
3 flow pattern for the Tongue River from 1991 to
4 2009. And this is a nice representation of what
5 happens with this river every single year. You
6 have the winter flows, not very much. Then you
7 have the spring runoffs beginning sometime in May
8 where we get a tremendous amount of flow, and it
9 drops off very rapidly sometime in July-ish. And
10 it's going to get to a point after that runoff
11 ends sometime in July where it's very likely that
12 if you actually did the communications and
13 accounting and measuring in Montana, you could
14 fairly say in an easy fashion our need outstrips
15 the source of supply from surface sources. It's
16 going to happen over the course of a couple of
17 days. And if we just had that kind of
18 representation, and if we had that kind of
19 evidence in this case, well, we'd be in a
20 different position. Wyoming would be forced under
21 those circumstances to go to its post-1950 users
22 and regulate them off. And we understand that
23 that is the ruling of this court in this case. In
24 the future, when a call that has that kind of
25 information comes to us, we have to shut our

1 people off, and we will, and then Montana will
2 have nothing to complain about. It probably isn't
3 going to result in very much water getting to the
4 state line. I mean, very little water is held in
5 post-'50 rights that isn't already regulated off
6 by the State of Wyoming by the time the hydrograph
7 reaches these lower points late in the summer. At
8 that point in time, we're back to our Territorial
9 rights on almost every single bit of river in
10 Wyoming. There is a little bit on the main stem
11 of the Tongue where there are no senior downstream
12 Wyoming rights that hasn't been historically
13 regulated because the only senior rights are
14 across the state line. And we now know that under
15 certain conditions we do have to regulate those in
16 priority with the pre-'50 appropriators in
17 Montana.

18 The problem, of course, that you face
19 is, we need that evidence today in order to
20 preclude the entry of summary judgment. This case
21 is based on evidence, and that evidence just
22 simply doesn't exist in this case. And instead of
23 providing evidence, what Montana provides you is
24 this flow model. The flow model, of course, is
25 just based on paper rights, not based on what

1 anybody actually did, and that's not good enough.
2 That's not good enough to preclude the entry of
3 summary judgment in this case. In the absence of
4 a demonstration, however meager it may be, of
5 actual need in Montana, they can't show beneficial
6 use, and they can't call us.

7 Now, if we eliminate the flow model
8 from this case, just say that is based on an
9 incorrect legal standard -- and it is, it's based
10 on paper rights versus beneficial use -- that
11 takes out this 1961 through 2006, we still have
12 claims part of the case, because all of those
13 claims are based on application of the flow model;
14 that in every one of those years, at some point
15 state line flows got below the flow model that
16 we've created, and therefore, Wyoming violated the
17 compact. When you get rid of that because it's
18 based on an incorrect legal standard, what we're
19 left with are the nine years that made it through
20 the previous proceedings on summary judgment and
21 there are five of those years that I probably
22 don't think are even an issue. Five of them,
23 there is no expert testimony at all establishing
24 breach or causation. 1987, '88, '89, 2000, and
25 2003. And in the absence of expert testimony, and

1 we really need expert testimony on breach and
2 causation here because there must be some
3 development of the temporal nexus between
4 Montana's need and our violation, our failure to
5 turn off our post-'50 rights; and in the absence
6 of some expert telling us, we can't just see that.
7 None of us can just see that correlation. So we
8 need somebody to develop that for us, and Montana
9 knows that. That's why they hired their experts.
10 But they only limited their opinions to four
11 years, 2000, 2002, 2003, 2004. Those other five
12 years, they need to be dismissed. In the absence
13 of expert testimony, they cannot withstand summary
14 judgment.

15 So we're really down to four years.
16 And it's worth noting that the four years is
17 really two because, 2004 and 2006, what Montana
18 did is, they took those years where they have
19 actual data, averaged them, and said, "Well, the
20 same thing must have happened in 2001 and 2002,"
21 which is insane, kind of, because no year is the
22 same, and we know that because, 2004 and 2006,
23 where we have actual data, they're not the same.
24 Nevertheless, we have these four years 2001, 2002.

25 And you asked us in the course of your

1 questions to, "give me some idea what amount of
2 water is really at issue." And I have another
3 exhibit that might be helpful for you. This is
4 actually Table 3 to Mr. Book's rebuttal report.
5 Let me approach, if I might.

6 SPECIAL MASTER: You can. And
7 actually -- well, I was actually going to ask, so
8 this figure -- the exhibit you had out earlier,
9 that's Figure 3 of Mr. Hinckley's report; is that
10 correct?

11 MR. KASTE: Yes, sir. And that is
12 attached to the summary judgment motions. I won't
13 hand you anything today we didn't attach unless I
14 think I can get away with it.

15 Now, this Table 3 is the revised table
16 that Mr. Book put together in his rebuttal report.
17 And I think, when you get down to the bottom under
18 "Summary," and having gone through his report, I
19 assume that this table makes all sorts of sense to
20 you because it's fairly easy to follow. The
21 amount of water we're looking at in the various
22 years is, at most, looks like 3,000 acre-feet in
23 2006 and 860 in 2001. That's from his very bottom
24 line. Montana's made an effort to put all that
25 stuff in acre-feet so they can at least get to the

1 thousands. But when you put that into CFS, it's
2 under 4 CFS in a river that runs hundreds and
3 thousands of CFS during the course of the year. I
4 don't know that we could actually measure 4 CFS
5 over the whole distance of this river. It's sort
6 of within the noise of this river. It's a very
7 small amount. Nevertheless, that's what's at
8 issue.

9 You asked also, you know, what are the
10 various roles of the experts in this case.
11 Obviously, Montana has an expert named Steve
12 Larson, who is a groundwater expert, and he made
13 an assessment of what he believes to be the coal
14 bed methane impacts on the river. They have Mr.
15 Allen, and I don't know what he is. I didn't
16 take his deposition. But he has this fancy model
17 called Metric, and it evaluates evapotranspiration
18 in various areas, and he did that for 2004 and
19 2006. What it does, for purposes of this case, I
20 have no idea. It's never really related to any of
21 the numbers that you see in Table 3. I honestly
22 think that Montana purchased that information when
23 this was a consumptive use case, and it made a lot
24 of sense to look at the Metric results in Wyoming.
25 When this was based on change in consumptive use,

1 that information was really relevant. It has
2 fallen by the wayside, in my opinion, and you
3 don't see any numbers in Mr. Book's report based
4 on the Metric, so that's why I didn't include his
5 report in our summary judgment motion.

6 And then you have Mr. Book, who is a
7 civil engineer, and his job's to kind of assemble
8 all the data and created the flow model, and he
9 looked at the reservoir operations, and he's come
10 up by incorporating the CBM information from Mr.
11 Larson with this table which summarizes the
12 alleged depletions from activities in Wyoming. So
13 Mr. Book tried to assess what post-1950 rights
14 received water at some point during the year in
15 Wyoming that would potentially be subject to
16 regulation by Montana.

17 SPECIAL MASTER: So can I just ask for
18 one piece of clarification. So you have suggested
19 that there was no connection between Mr. Allen's
20 report, which was the calculation of
21 evapotranspiration using the Metric model, and
22 Mr. Book's report, and you have stated you're more
23 familiar with these reports than I am, and
24 presumably cross-examined Mr. Book and Mr. Allen.
25 What I have assumed when I was reading this, is at

1 the very end of Mr. Allen's report, it says that,
2 "Based on a thorough analysis of the satellite
3 data and the standard that needs to have been
4 applied, it is my opinion that the values of
5 evapotranspiration associated with irrigation in
6 the area are active and reliable for the purposes
7 for which water engineers can use them."

8 MR. DRAPER: That's right. I made a
9 mistake. Mr. Book does use some of that
10 evapotranspiration information to try and figure
11 out what the surface diversions were on specific
12 pieces of property in Wyoming. You see that on
13 Tables 11A and 11B of his report. I misspoke. I
14 apologize. I don't understand most of this stuff
15 myself, so I'm behind the 8-ball in a lot of the
16 science here, but I do understand a few things
17 about the law. First, I understand the amount of
18 water at stake in this case is remarkably small.
19 Nevertheless, I understand that if you want to
20 prove a contract case, you've got to prove breach.
21 And in order to do that in this case, you've got
22 to prove a correlation between the need in Montana
23 and the use in Wyoming, and there isn't any expert
24 testimony doing that in this case. We have a flow
25 model that says: We kind of need this all the

1 time; and we have an opinion by Mr. Book and
2 Mr. Allen about. Well, water was used in Wyoming
3 at some point during the year, but I can't tell
4 you when. And when is really important, and
5 that's a problem in this case. There's no when,
6 because it matters a lot to the guy in Wyoming
7 who's trying to irrigate a crop and get a cutting
8 of hay. If you shut him off today, or if you shut
9 him off next Monday, it matters a whole lot to
10 him. And we need to have a development and
11 establishment of that temporal nexus in order to
12 find liability on Wyoming's part. That's why the
13 date of the call is kind of important. The date
14 when you say "shut off" is really important, and
15 it's really important to be able to measure your
16 need and our use at that time to assess our
17 liability. We can't do that with the evidence
18 you've been presented by Montana in this case.
19 There is no evidence correlating post-1950 use in
20 Wyoming and actual need in Montana. And without
21 that, we should be done. That's the end of the
22 inquiry. No breach.

23 SPECIAL MASTER: Before you go on to
24 your next point, I interrupted you at the very
25 outset. You then said there were three cases, and

1 then you then talked about two of them. And even
2 if you're not going to talk about the third one, I
3 would like to have the citation in the case.

4 MR. DRAPER: We have talked about these
5 before, so they're not a surprise, too. The third
6 one was McDonald vs. State, 722 P.2d 598. It's a
7 1986 case from Montana again requiring actual use
8 before Montana law recognizes the right to curtail
9 an upstream junior. And I wanted to get all three
10 cases in, mostly because you have the pre- and
11 post-Montana constitution. The law is the same.
12 Nothing changed in 1973 for Montana as a result of
13 their new constitution.

14 SPECIAL MASTER: And again, let me get
15 back to this question. It was the question of who
16 has the burden on this particular issue. So in
17 any of the three cases that you talk about, I'll
18 go back, and I'll look at the facts now. One of
19 the important questions for me is whether or not
20 in these cases is the situation where there is a
21 junior who was about to be shut off who said,
22 "Hey, you can't cut me off until you come up there
23 and check that guy to make sure he's actually
24 needing this water," or whether or not these are
25 situations in the junior said, "Hey, I have some

1 information. That guy's not using his water, and
2 therefore, you can't cut me off." So the actual
3 process strikes me as an important issue in
4 addition to the central principle of whether or
5 not beneficial use is something that you look to
6 decide whether or not to call.

7 MR. DRAPER: To the best of my
8 recollection, and that's probably wrong, the cases
9 deal with the junior who got shut off, saying that
10 wasn't right. Now, there are three different
11 ones, and I'm really bad at committing facts like
12 that to memory, but I want to say this: For
13 purposes of your decision today, it doesn't matter
14 because we're dealing with events in the past and
15 not in the moment, not in the present tense where
16 you, acting as maybe a hydrographer commissioner,
17 is standing between two landowners saying: Well,
18 you know, what should I do in response to your
19 statement. We're standing in the present looking
20 back at the past, and neither of those events
21 really occur. We don't have any information from
22 Montana indicating present need, right? And we
23 don't have the ability to complain about it now.
24 I mean, Montana had that information in their
25 possession, if anyone did, and they don't have it

1 now. And I think it's their burden in this case,
2 if they want to prove a violation in the past, to
3 bring that evidence to you today, and they don't
4 have it. That's a problem because I don't have
5 it. How can I assess their actual need? I can't
6 cross the state line and regulate their rivers for
7 them.

8 So in order to prevail today, they've
9 got to come forward with the evidence. The burden
10 is on them in these proceedings to demonstrate
11 actual need. Then the burden could shift to me to
12 say, "No, it would be futile." Futility is kind
13 of the upstream junior's burden. But the actual
14 demand on their side, that's their burden. And we
15 can't meet it. There's just no way we can go back
16 in time unless we talk to the individual
17 irrigators and say, "Hey, did you need water?"
18 Montana could have done that in this case. You
19 don't see any affidavits from any irrigators all
20 up and down the stream saying, "Hey, I needed
21 water, and I didn't get it, and I did the
22 accounting right, and they communicated to me, and
23 my crops died." You have our case, and you have
24 Mr. Muggley. Mr. Muggley has no idea what he's
25 getting, and there really is no connection for

1 this complaint and anything on the ground. He
2 just says, "Yeah, I think we were short, you
3 know." "Were you not able to water your crops?
4 Did you have less than you needed?" He didn't
5 say. We don't have any of that in evidence that
6 would justify holding Wyoming liable to Montana
7 for failing to supply water because they had a
8 need that they didn't get met. The burden is on
9 them in this case.

10 In the future, like I said, I think
11 Montana can come to us with a very simple
12 statement, a very simple communication to us in
13 whatever form makes them happy that says, "We have
14 a need, we know it because we measured. We know
15 it because we talked to these people, regulate,"
16 and we will regulate. We have to. We're not
17 going to disrespect the order of the Court saying
18 we must. We will do that. But in order to do
19 that, before we turn off somebody's livelihood in
20 Wyoming, we need some information that it's
21 actually going to go to beneficial use and not off
22 the bottom of that river. And we will regulate,
23 and then we will decide if we need to make a
24 futility argument after we turn off the valves,
25 like every junior water user should. That's the

1 way it ought to work. The junior water ought to
2 shut off, and then it ought to complain about
3 futility, and we'll do that.

4 Now, what we have left in this case, I
5 think, is CBM, and we have the reservoir in four
6 years, 2000, 2001, 2002, 2004, and Montana's
7 injury, the only actual injury they claim. So
8 aside from that fact that there aren't a whole
9 bunch of affidavits from Montana water users, they
10 never claim an injury to those people that isn't
11 based on their flow model, which is wrong as a
12 matter of law. The only injury they claim is to
13 the reservoir right in four years, and, of course,
14 two of them are averages. In these four years,
15 our reservoir got hurt because it didn't fill.
16 Okay. I think I agree with the proposition
17 potentially that filling the reservoir or not
18 filling the reservoir could be the source of an
19 injury to Montana. Okay, fine. Well, let's look
20 at what really happened.

21 First of all, how we determine how the
22 reservoir fills is critically important, and it's
23 really important for this case. And Wyoming has
24 always known that, and we entered into an
25 agreement to ensure that we all knew what the

1 rules were with regard to filling this reservoir.
2 In 1992 we had an agreement. You've read the
3 briefs. You read the agreement. You understand
4 that we incorporated a specific model with
5 specific parameters about reservoir operation and
6 water allocation. And we were assured by the
7 State of Montana that that model is just as much a
8 part of the compact and just as legally binding as
9 anything else in it. Mr. Fritz told us that. We
10 didn't believe him, or we didn't believe Montana
11 might live up to their bargain. So we got an
12 agreement to try and hold them to that. We got a
13 1992 agreement.

14 Now, we've expressed some concern about
15 the governor's authority to enter into these kind
16 of agreements, spoke to the governor yesterday
17 and, of course, he said, "I absolutely do, and my
18 predecessors don't do things that are void."
19 Nevertheless, Wyoming actually has a specific
20 statute authorizing the governor to get into all
21 sorts agreements. You can find that at Wyoming
22 Statutes 16-1-101.

23 SPECIAL MASTER: I'm sorry, say that
24 again?

25 MR. KASTE: 16-1-101. That's our

1 intergovernmental cooperation statute. And as a
2 practical matter, governors and the agencies of
3 the executive branches of the states make these
4 kinds of agreements on a host of issues all the
5 time. Several states have overlapping interests
6 in innumerable areas. We have habitat that crosses
7 state lines. We have rivers, we have roads, we
8 have fires, we have law enforcement issues, and
9 they all cross state lines, and we don't
10 necessarily need an interstate compact to deal
11 with all of those things. Interstate compacts
12 under the compact laws are limited to sort of
13 really important agreements between the states
14 that tend to increase their sovereignty, that tend
15 to scare the United States in some way that the
16 States are ganging up. This isn't one of those.
17 Governors do this all the time. And,
18 in fact, after these kind of interstate water
19 compacts are made, the people involved in those
20 interstate compacts agree to all kinds of things
21 in the future. I know you're familiar with
22 operating agreements amongst compacting parties.
23 There are probably a hundred different agreements
24 on the Colorado River up and down that river that
25 aren't in the compact that are interpretive and

1 implementing. And that's all the 1992 agreement
2 is, an interpretive and implementing agreement
3 between the states that the governors have the
4 power and authority to enter into. That's all it
5 is.

6 SPECIAL MASTER: Can I stop you there?

7 MR. KASTE: Absolutely.

8 SPECIAL MASTER: Okay. So is it your
9 position then that in the case of the Colorado
10 River -- and I realize that with the Colorado
11 River, we have the further complexity that,
12 according to the United States Supreme Court at
13 least with respect to the decree, more basin
14 states that the Bureau of Reclamation has the
15 discretion under the Oldercane (phonetic) Project
16 Act. But let's put that aside and assume that the
17 bureau is not involved, that the governors of, for
18 example, Colorado and California could agree to a
19 way of operating the river that's inconsistent
20 with the compact without actually going through
21 the process of amending the compact as well.

22 MR. KASTE: No, no. And that's not
23 what our agreement does in this case.

24 SPECIAL MASTER: So explain how this
25 particular case, interpreting the compact rather

1 than actually changing the terms of the compact,
2 assuming, in fact, that the 1992 agreement, that
3 the assumptions in it are part of what the states
4 have agreed to.

5 MR. KASTE: Sure. Well, the 1992
6 agreement is just -- well, for instance, it
7 incorporates the model, which has a set of
8 parameters and says: These are the set of
9 assumptions we're going to use, as we do the
10 accounting, for this reservoir right. So whose
11 water is what, how does the reservoir operate.
12 It's a set of assumptions that help you do the
13 accounting for that one right. And for purposes,
14 for ease, and expedience, they put the pre-1980
15 water rights in the pre-1950 category and said:
16 We're just going to quantify it in this way, and,
17 hey, wouldn't it be cool if we take all of this
18 brand-spanking new water that Montana's going to
19 catch with an enlargement, and we'll put that in
20 that same V(A) category.

21 You know, the thing to remember here is
22 that there's give and take in this agreement, and
23 that enlargement is fiction that it is a 1937
24 right. Completely. That's a brand-spanking new
25 chunk of water that should have a brand-spanking

1 new priority base. And if this 1992 agreement
2 doesn't hold water in your opinion, then we go
3 back to reality, and that reality is, there's
4 10,000 acre-feet of reservoir water in there with
5 a 1990 priority base, not a 1937, and that's the
6 end of Montana's case about this reservoir,
7 because I don't care how you do the math, with
8 that 10,000 acre-feet of post-'50 water, that
9 reservoir fills every year.

10 Now, we're a good neighbor and entered
11 into an agreement with our neighbors to recognize
12 the fictitious circumstance that that enlargement
13 can be treated as if it was a pre-compact right.
14 In exchange for that, we got some certainty on our
15 end that our rights wouldn't be harmed by this
16 change in circumstance that this created by the
17 enlargement. It is all just a quantification for
18 accounting purposes for ease by the parties. It
19 was easy for the parties in the Tribal compact to
20 use this model. It's easy for us to use this
21 model. And everybody is a party to that model.
22 It's in the Northern Cheyenne Tribe Compact. It
23 binds the Tribe, the State, the United States, and
24 binds us and Montana to the 1992 agreement. We
25 all agreed on these parameters. If Montana wants

1 to renege on that, there has to be consequences to
2 that because we got something in our bargain. We
3 got some certainty in our bargain. And Montana
4 got something as well, and I'm frankly surprised
5 that they don't want to live up to the terms of
6 this agreement. It inured to their benefit, and
7 it certainly helped them get this compact passed
8 through Congress.

9 SPECIAL MASTER: So let me just
10 interrupt there again. Number one, I agree that
11 if the 1992 agreement is not binding, that's just
12 one of the issues that goes back to 1992
13 agreement. If it's not binding, then that has
14 potential consequences for both sides that,
15 unfortunately, has been put in front of me. So
16 that would have to inure to both sides.
17 Unfortunately, I haven't made a determination
18 without thinking about that, and then we can move
19 forward in whatever determination is with respect
20 to the 1992 agreement.

21 MR. KASTE: Lucky for you, I win either
22 way.

23 SPECIAL MASTER: It might be lucky for
24 you.

25 MR. KASTE: I'm just saying it's easy

1 for you.

2 SPECIAL MASTER: Well, I have to make a
3 decision. And again, I'm just thinking about it
4 from the standpoint of the Colorado River. So the
5 Colorado River Compact provides that each year the
6 northern basin is supposed to permit -- I'm going
7 to say 7.5 million acre-feet of water to flow down
8 to the lower basin. I'm sure everyone in this
9 case wishes there were that much water in the
10 Tongue and Yellowstone Rivers. If the Colorado
11 and California governors sat down and said: You
12 know, we want to do an operating agreement, and
13 it's just too complex to have to keep track of
14 that water every year, and so we'll just assume
15 that that's how much water Colorado lets down, and
16 that's satisfying the compact. I would think that
17 at that point if anyone challenged that particular
18 agreement, that it wouldn't hold up as just an
19 agreement between two governors given that it
20 would run contrary to a compact that had to be
21 agreed to not only by the governors, but by the
22 Legislature and by Congress.

23 And so here I understand your point,
24 that if the agreement is simply an interpretation
25 of the compact, that then maybe that is something

1 that two governors could agree to on their own.
2 But to the degree that it actually would run
3 contrary to the actual language of the compact,
4 that's a different issue. So I would think, at
5 least my question is, one of the things I have to
6 decide in order to resolve this is whether or not
7 the 1992 agreement is an interpretation of the
8 compact, or whether or not it actually runs
9 contrary to the language of the compact.

10 MR. KASTE: I think that's right. I
11 think you could look -- Chuck Dalby did a report.
12 We've included it. He works for the DNRC in
13 Montana. He has his little hydrology cited in our
14 brief. He said we reached an interpretation of
15 the agreement. That's what the parties thought at
16 the time. And they knew that there was an
17 interpretation because when they put in that last
18 section in 4 and said, "Hey, but, you know, if we
19 ever get into a big to-do about this, we're not
20 bound to any particular interpretation. Because
21 we've agreed with it for this purpose, that
22 doesn't bind us to an interpretation for anything
23 else." And that's what Paragraph 4 of the 1992
24 agreement is for. The parties understood that
25 they were doing an interpretation and not changing

1 the compact, and then they put Paragraph 4 in to
2 say: But only for this little purpose, only for
3 the reservoir, only for these new circumstances.

4 SPECIAL MASTER: Okay. So if you could
5 then, with respect to the 1992 agreement -- and
6 I'm looking right now for the document which
7 actually -- does that sound better? I don't know
8 what I did.

9 MR. KASTE: It's a test to the
10 affidavit of Jeff Fassett.

11 SPECIAL MASTER: I put these in
12 different orders in this particular case, so that
13 was the binding that I was looking at yesterday.

14 But if I understand the agreement, it
15 doesn't provide that the assumptions behind the
16 model were not changed, but it provides that
17 Montana will not change the model without the
18 prior consent of Wyoming. So I'm going to go to
19 two of my questions that I sent out earlier.
20 Number one, could you explain what that particular
21 language means in the context of this particular
22 case? And if the argument is, is that somehow the
23 assumptions are bound up in the model in a way
24 that prohibits Montana from asking that
25 appropriations between 1950 and 1980 cease

1 diverting if there's not enough water for the
2 pre-1950 appropriators in Montana, how that is in
3 the model, because the model gets far too complex
4 to --

5 MR. KASTE: Not the appropriators. Not
6 appropriators. It only deals with the reservoirs.
7 It doesn't deal with any other downstream rights.
8 All we're talking about is the reservoirs. The
9 only -- and that's why it's important that we get
10 down to, before I come to this part of our
11 argument, only the reservoir is claimed to be
12 injured.

13 SPECIAL MASTER: I understand.

14 MR. KASTE: Now, the model has a bunch
15 of assumptions. The agreement says specifically,
16 and the model contains the assumptions -- well,
17 let me start: Whereas -- it's on Page 1 of the
18 two-page agreement. "The Northern Cheyenne
19 Compact's allocation of water to the Tribe from
20 the Tongue River is based on a water model which
21 is incorporated in the Northern Cheyenne Compact
22 and this agreement by reference." So the model is
23 in this agreement, all of it. And the model
24 contains the assumption that existing and
25 supplemental water use in Wyoming is deducted from

1 Tongue River flows. Prior to the allocation, it
2 flows between Montana and Wyoming under the
3 Yellowstone River Compact, and that Wyoming's
4 entitlements under the Yellowstone River Compact
5 are deducted prior to the models in relation of
6 Tongue River Reservoir operations." And there's a
7 whereas clause.

8 So while the model is in this
9 agreement, all of it, and its specific assumptions
10 are called out in the whereas clause --

11 SPECIAL MASTER: Let me stop you there.
12 All of this model?

13 MR. KASTE: Yes. Attached to Jeff
14 Fasset's second affidavit, it says Tongue River
15 Modeling Cite dated 1990.

16 SPECIAL MASTER: July 20, 1990.

17 MR. KASTE: That's the model that's
18 specifically identified in the Northern Cheyenne
19 Tribe Compact. That's it. Now, there's also some
20 weird computer model that is written in Fortran
21 that does the math. I didn't attach that. I
22 can't read it. If you can, that's pretty cool,
23 but I can't.

24 SPECIAL MASTER: I probably could have
25 30 years ago, but I can't anymore.

1 MR. KASTE: That is not really
2 important. The final report that you're looking
3 at is specifically incorporated into the Northern
4 Cheyenne Tribe Compact.

5 SPECIAL MASTER: If I can again just
6 stop you there. If we look to the Northern
7 Cheyenne Compact, and we look at the definitions
8 in there, it says that the Tongue River water
9 model means the Tongue River Reservoir operations
10 computer model. So --

11 MR. KASTE: Well, you've got to keep
12 reading, though. There's a lot more to that
13 definition. You can't stop there. And, in fact,
14 the final sentence says, "The final report," which
15 you're looking at, "and any provisions are
16 incorporated herein by reference as though set
17 forth in full." That report in your hands, and
18 all of it, is in this compact.

19 SPECIAL MASTER: So your view is, is
20 that even though it explicitly says in the
21 beginning, that the Tongue River model means the
22 Tongue River Reservoir operations computer model,
23 that the second sentence that says the final
24 report and any provisions are incorporated herein
25 by reference as set forth in full, includes the

1 allocation model in addition to the operations
2 model?

3 MR. KASTE: Well --

4 SPECIAL MASTER: This is where I'm
5 going to need help.

6 MR. KASTE: The operations model --
7 here's what this model does.

8 SPECIAL MASTER: Explain this model.
9 So maybe we should start at the outset, explain
10 the two models to me.

11 MR. KASTE: All right. There's a
12 series of parameters set up at the beginning of
13 the model.

14 SPECIAL MASTER: Understood.

15 MR. KASTE: And there's some
16 assumptions. Those assumptions never change. For
17 example, winter bypass never changes. The amount
18 of water that comes off the top from Wyoming never
19 changes. That forms the basis of the various --
20 the beginnings of the various models. Then what
21 the modelers did is, they said: Let's look at
22 some various scenarios and give the parties to the
23 Northern Cheyenne Compact the information from
24 which they could make an informed decision about
25 what to put as the final allocation in here. So

1 they look at if this, then that, if this, then
2 that, if this, then that. Cool. All of those
3 things are just various scenarios, and the
4 Northern Cheyenne Tribe Compact evidences the one
5 they pick.

6 The model itself, the beginning part
7 that never changes, that's still in effect. And
8 that part is important because when you look at
9 those things, that's how you determine shortages
10 and excess, in part, in the Northern Cheyenne
11 Tribe Compact. When you look in Article 2 under
12 "Shortages," it references the Tongue River model
13 as the basis by which to determine what shortages
14 or for which purposes and so forth. So it has
15 some continuing relevance to the operation of the
16 Northern Cheyenne Compact. Whether they're doing
17 that or not, I don't know. For our purposes, we
18 don't care what they're doing with the model in
19 Montana. What we care is that when Montana and
20 Wyoming come to settle up, that they use the
21 parameters that we agreed on, and those specific
22 parameters are called out in this agreement.

23 SPECIAL MASTER: So let me just go
24 back, and then you can point me to the agreement.
25 And this is where you guys have been living this

1 particular case for a long time now, and you have
2 to recognize that although I've been involved in
3 overseeing the discovery and dealing with various
4 summary judgment motions, this is the first time
5 that I've actually had to deal with this
6 particular model as well as the Northern Cheyenne
7 agreement.

8 So if I understand the way in which --
9 what's the more important overall question, which
10 model is actually incorporated here, although I'm
11 still puzzled about that. But as I understand it,
12 the model was initially used for purposes of
13 negotiating the compact with the Northern Cheyenne
14 Tribe to determine how much water might be
15 available and, therefore, what the potential terms
16 would be that would be satisfactory to all sides.

17 I also understand that the model is
18 incorporated into the compact with the Northern
19 Cheyenne Tribe, and that it is incorporated in
20 there for purposes of making various
21 determinations as part of that agreement. So, for
22 example, if there is a shortage, it determines how
23 that shortage is going to be divided. It
24 determines when there is excess water that the
25 Northern Cheyenne Tribe would then be entitled to.

1 But when I look at the Northern
2 Cheyenne Compact and the ways in which the
3 operating agreement is incorporated in there, none
4 of that seems relevant to me to this particular
5 case unless the amount of water that the Northern
6 Cheyenne Tribe is getting under the compact is
7 relevant in some way, and I don't see that.

8 So that pushes me back to assuming that
9 the only way in which the model could be relevant
10 is because of some assumptions that were built
11 into the model, and what you want to bind Montana
12 to is the assumptions rather than the actual
13 operating implications of the model.

14 MR. KASTE: Well, the operating model
15 is the assumptions. That is the assumptions. The
16 allocation model is what happens under various
17 scenarios. The operations model sets the baseline
18 of how much is going to go out, how is it going to
19 be stored. Those parameters are the regular
20 operations model. That sticks. And they are
21 specifically called out in our agreement with
22 Montana. Our expectation, and they knew it, was
23 that they would account for this water based on
24 those parameters until the model for the compact
25 changes. That's what they assured us, and that's

1 what this is. And that's why it says you can't
2 change the rules without our consent. The rules
3 are important. They have meaning. They have
4 prospective operative effect. Why else would we
5 agree to this if it didn't have any effect in the
6 real world in the future? It does. And Montana
7 doesn't want to live up to the bargain that it
8 made with us because it's become inconvenient.

9 SPECIAL MASTER: So let me give you
10 another example. And you're addressing my
11 question, although I'm not sure that I have
12 anything yet that's convincing to me, so that's
13 why I'm asking these questions.

14 So let's assume that I'm selling some
15 type of a product to a manufacturer. So I have a
16 component, I'm selling that component to a
17 manufacturer, and the manufacturer is then selling
18 it to some retailers. And I have a particular set
19 of prices that I charge for the component. The
20 retailer buys this on sort of a cost-plus basis,
21 and the person that I'm selling it to, the
22 manufacturer, has an agreement with the retailer
23 that says: You know, we need to calculate exactly
24 how much we're paying for each of the various
25 components. But to simplify things, what we're

1 going to do is, we're going to make an agreement
2 that says that in figuring out how much to charge
3 in retail for this particular product, this is
4 what we're going to assume the prices of all the
5 various components to be.

6 And let's further assume that I enter
7 into an agreement with the manufacturer of the
8 component, and we can't change that agreement
9 without any consent first. As far as I know, that
10 doesn't mean I can't change the price that I paid
11 for the components. If I can negotiate down a
12 lower price as the manufacturer, I think I can do
13 that because I'm not changing the agreement.
14 There was an assumption that I made in the
15 agreement that's sort of an integral part of the
16 agreement, but I'm not changing the agreement.
17 I'm still, in that particular case, charging a
18 price to the retailer based on the assumed cost of
19 the components. And so this seems very similar to
20 me.

21 And so for me, the question is, again,
22 I don't see anywhere in here an agreement that the
23 assumptions, that we will be bound by the
24 assumptions in the operating model, but instead
25 it's simply something that says we're not going to

1 change the operating model.

2 Now, you raised a question a moment
3 ago, which is, well, does this agreement make very
4 much sense unless that's what it means. And
5 that's something I would actually be interested in
6 Montana's views on. Is there a reason why if the
7 assumptions aren't binding, that it's just the
8 operating agreement itself that uses these
9 assumptions that he can't change, is there a
10 reason why Wyoming would want that?

11 MR. KASTE: No. Obviously, from a
12 common-sense perspective, if it doesn't do what we
13 say it does, it has no effect, and it would be a
14 waste of paper. And that violates pretty basic
15 contract law, that we would interpret a contract
16 to have no meaning, to have no effect. It would
17 be a worthless exercise. That's ridiculous. And
18 governors don't usually do a lot of worthless
19 exercises that aren't called proclamations. And I
20 didn't draft this document or this agreement. I
21 would hope I would have done a better job. But
22 the language you have to work with that states
23 that the assumptions in the model are binding on
24 the parties, as in the whereas clause that I just
25 read to you, that isn't the best language in the

1 world, I concede that. It's kind of awful. But
2 when you're interpreting the contract between
3 parties, you have to look at the language as a
4 whole, the purpose for which the agreement was
5 created, the intent of the parties, and that can
6 be fairly gleaned from this agreement. We
7 intended to do the accounting on this reservoir
8 based on the parameters and assumptions in that
9 model, and Montana doesn't want to do that
10 anymore. We do. We want to live up to our
11 agreement. We're a good neighbor.

12 Now, like I said, it doesn't matter for
13 purposes of your decision today which way you go
14 on that. The 1992 agreement applies or it
15 doesn't. Either way, Montana cannot maintain a
16 claim for an injury to the reservoir in this case
17 because either way, when you look at the 1992
18 agreement and you apply those parameters, the
19 reservoir fills in all the years except for 2002
20 and 2004. And when you apply -- when you go back
21 to Mr. Book's table, the reservoir inflows having
22 eliminated the pre-1980 rights, you get down to
23 essentially nothing. You get down to .015
24 acre-feet of water in only 2004.

25 If the converse is true, if the 1992

1 agreement doesn't apply, then Wyoming is entitled
2 to the benefit of our other bargain with Montana,
3 and that is -- deals with the new compact, and
4 that means beneficial use is the basis of measure,
5 limit of the right, first in time, first in right,
6 all that good stuff. And what it means is, we're
7 entitled and Montana is entitled to continue to
8 enjoy the pre-1950 rights. What they're not
9 entitled to do is build a whole new reservoir.
10 And in reality, that's what they're doing, they're
11 building a new reservoir, 10,000 acre-feet, and
12 giving it a fictitious backdate to 1937. Whether
13 the United States is in on it, whether the Tribe
14 is in on it, it doesn't matter. They cannot do
15 that without violating our rights under the
16 Yellowstone River Compact. And by the way, the
17 Northern Cheyenne Tribe Compact does not assign a
18 priority date to that enlargement at all.

19 So if the 1992 agreement doesn't apply,
20 doesn't need water, then the reservoir fills in
21 each and every year. And we know that because
22 it's only 69,000 acre-feet. We did the math. We
23 did the math for you. And we know that Montana is
24 only allowed to dump out a certain amount of water
25 and for certain reasons out of that reservoir

1 under the Doctrine of Appropriation. And the only
2 quantification that you'll see in the amount of
3 water that they can dump out of that reservoir all
4 winter long under the Doctrine of Beneficial Use
5 is 50 CFS. You'll find that in Mr. Hinckley's
6 report. Because the only water they can
7 legitimately dump out of that reservoir consistent
8 with beneficial use is water for downstream
9 seniors to satisfy their rights, and there's some
10 stock water rights over the course of the winter,
11 and you need about 50 CFS to carry that water down
12 there. So if you use that reservoir outflow, and
13 you have the actual carrying capacity and 69,000
14 acre-feet, that sucker fills every single year,
15 every single year, and Montana is never injured.

16 Montana is going to come to you and
17 say: Well, but reservoir operations are
18 important. We've got a dam we've got to operate
19 safely. And I agree. I certainly don't want to
20 do anything that would cause them to run their
21 reservoir in a reckless way and cause flooding or
22 injure their dam. But I'm only responsible from
23 an accounting standpoint for beneficial uses
24 downstream. So when we do the accounting, what
25 constitutes safe operations. And what they did in

1 reality, that's on Montana. That's their burden.
2 I'm sorry. It's their dam, and I can only do so
3 much. They built it. It's not my problem. And
4 they can't dump water out of the bottom of their
5 reservoir all winter long for non-beneficial use
6 purposes, non-depleted uses and the compact
7 defines beneficial uses they can't do that all
8 winter long and expect me to pay the bill. That
9 violates the compact. And that's kind of what
10 they're asking you to do, is to say, we can
11 operate our dam and be irresponsible, or
12 responsible, depending on how you look at it from
13 a waste perspective or from a safety perspective
14 any way we want, and then we're just going to call
15 you and say: Make up the difference, buddy. No,
16 that isn't right. That's not what the compact
17 provides.

18 SPECIAL MASTER: So there's two
19 questions at this point. The first one is, on
20 this argument that Montana has basically been
21 wasting water that they could have stored and
22 provided to their pre-1950 appropriators later in
23 the year by letting that water run through during
24 the winter, I understand your argument entirely on
25 that particular point.

1 But included in the record on summary
2 judgment is both the rebuttal expert report of
3 Kevin Smith; and then in addition to that, there's
4 the report of Mr. Aycock. And so the question is
5 on summary judgment, what will I do about them?
6 Because the report then cites that's exactly what
7 we should be doing.

8 MR. KASTE: Well, their opinions about
9 what we should be doing for safe operations are
10 great. For the reality of safe operations, I have
11 no problem with their opinions. They're not
12 relevant to a determination of beneficial use.
13 They're completely right about what might be the
14 safe operation of the reservoir. I'm not in a
15 position to say they're wrong. None of us are.
16 That's their job. Good for them. I don't care.
17 It's irrelevant to the determination of beneficial
18 use. And we are going to do our accounting
19 because it says so in the compact on the basis of
20 beneficial use under the Doctrine of
21 Appropriation. And their big problem in their
22 rebuttal reports, one thing you've got to be aware
23 of is, they sneak in maximum winter carryover.
24 Maximum winter carryover. We can't fill because
25 we're at a maximum winter carryover. Even though

1 there's all kinds of space in our reservoir, we're
2 going to let water go by. And that makes perfect
3 sense from a reservoir operations standpoint.
4 Great. If you decided that that's the safe place
5 to operate their reservoir over the course of the
6 winter, wonderful. But if you let water go by
7 that you could have stored, I get credit for it.
8 You can't come to me later in the year, having let
9 all that water go down the way and say, "Hey, why
10 don't you pick up the tab."

11 So to the extent those rebuttal reports
12 make a claim that the reservoir doesn't fill, it's
13 because it's based on a maximum winter carryover
14 capacity, not present in the Doctrine of
15 Appropriation or the concept of beneficial use.
16 That's something that they have, in a sense,
17 self-imposed for very good legitimate reasons.
18 And those very good legitimate reasons are just
19 inconsequential to the determination that you have
20 to make here today, which is what did we agree to
21 in the Yellowstone River Compact. Because it
22 doesn't say anything about reasonable reservoir
23 operations. It's limited to the Doctrine of
24 Appropriations, which necessarily incorporates the
25 concept of beneficial use, and those are the only

1 things we get to count. That seems fair, and that
2 seems like what we agreed to back in 1950, and
3 we'd sure like to live up to our end of the
4 bargain, but Montana's got to do the same.

5 SPECIAL MASTER: So if I can just
6 interrupt again for a second. So assume we never
7 had the expansion of the reservoir, and that the
8 land which the reservoir, as it stood in 1950,
9 continued over in time so we have the same winter
10 pass-through --

11 MR. KASTE: You mean in excess of
12 downstream beneficial uses; is that what you're
13 getting at?

14 SPECIAL MASTER: Yes. So it's done for
15 safety reasons. So let's assume that there were
16 good reasons to do it in 1950, and perhaps
17 continuing to do it today. Under those
18 circumstances, would you say that that water is
19 not part of Montana's pre-1950 rights?

20 MR. KASTE: Yes. That's on their side
21 of the ledger, not mine. If it was released for
22 something other than a beneficial use for
23 appropriative purposes, then it's on their side of
24 the ledger even though it may be released for
25 other good purposes. But they're not beneficial

1 uses. If there wasn't anybody to catch that water
2 that they were releasing for safety reasons all
3 the way down the river, that just flows into the
4 Yellowstone. I'm not responsible for that side of
5 the ledger. Montana has to be.

6 SPECIAL MASTER: So your view is, is
7 that beneficial use is only a consumptive use?

8 MR. KASTE: I'm pretty sure that's what
9 the compact says, and I'm pretty sure that's what
10 the Supreme Court said.

11 SPECIAL MASTER: I just wanted to make
12 sure.

13 MR. KASTE: And that's why the compact
14 doesn't protect fish. If there are any in-stream
15 flows, things like that, that's not in the
16 compact. And if you want to do that for the
17 protection of your habitat in your state, great, I
18 will come and fish in your river. But you can't
19 put that on my side of the ledger when we come to
20 the accounting for the Yellowstone River Compact.

21 Now, the Yellowstone River Compact, it
22 really does -- it creates your ledger and my
23 ledger. And what Montana wants to do is, they
24 want to put some things that belong in their
25 ledger in my ledger, and we just don't think

1 that's right.

2 SPECIAL MASTER: So now, let me just
3 come back for a moment to the issue of the
4 expansion in the 1990s. To my knowledge, Montana
5 has not directly addressed that in their brief,
6 although they might today, and I might not be
7 remembering if it was in the brief. But looking
8 at some of the expert witness reports, there
9 seemed to be the suggestion in there that though
10 the reservoir has been expanded, that actually
11 that water is basically all spoken for by the
12 Northern Cheyenne Tribe. In other words, you have
13 expanded the reservoir, but you haven't expanded
14 it as much as the rights of the Northern Cheyenne
15 Tribe. So actually, we're in a worse position
16 rather than a better position before in terms of
17 the amount of water we can store.

18 MR. KASTE: Well, Montana lost water
19 out of that reservoir for sure, when it entered
20 into that Northern Cheyenne Tribe Compact. I
21 think Kevin Smith told you that when we were
22 standing on the dam. And that's why I say this
23 whole case is about them trying to get me to pay
24 for their deal. And I understand that there was a
25 need to quantify the Tribal right to get that

1 matter settled. And we don't have any quarrel
2 with the contents of that compact. I think it's
3 wonderful that we've got that matter settled for
4 them. But we can't take that as subsequent
5 circumstances, pretend like they happened before
6 1950, and in a sense increase Montana's V(A)
7 allocation at the expense of Wyoming, and that's
8 what it would do. If you take this water, and you
9 take this brand-spanking new water, and you give
10 it a pre-'50 priority, you make it V(A) water, to
11 the detriment of Wyoming without our consent, and
12 in the violation of the Yellowstone River Compact.
13 The Yellowstone River Compact, we can't violate
14 that. And the compacting parties to the Northern
15 Cheyenne Tribe Compact said we are not changing or
16 violating the compact. So that must mean that
17 enlargement has a new water right unless, as a
18 matter of interpretation and implementation, the
19 parties agree, like we did in the 1992 agreement,
20 that it would be more expedient just to handle
21 this accounting in a particular way. Otherwise,
22 that water is new, and it cannot increase
23 Montana's V(A) allocation. That's not what we
24 agreed to in 1950. There's nothing in the compact
25 that says Montana can do something in the future

1 and relate it back in time 70 years, or whatever
2 it is. That's not what we saw when we signed on
3 the dotted line. We saw a reservoir with 69,000
4 acre-feet of storage, and we had a provision in
5 the contract that says you get to continue to
6 enjoy that in accordance with the Doctrine of
7 Appropriation, not that plus something else. And
8 without the 10,000 acre-feet of storage in that
9 reservoir, and you do the accounting, it fills
10 every single year. There's no injury, there's no
11 causation, there's no grievance, there's no case.
12 There's nothing.

13 Except my last thing, which is CBM.
14 And if you're ready, we'll move into CBM. I'm
15 just trying to work my way from 1961 to 2006 down
16 to nothing, because where I think we get. CBM --
17 Montana hired an expert, Steve Larson, who used a
18 BLM model to try to figure out what the effects of
19 CBM production of Wyoming water are on the surface
20 waters of the Tongue River. For purpose of
21 summary judgment, despite the fact that we have
22 all sorts of problems with his analysis, we have
23 to accept what he says is true. There's a
24 hydrological connection, and it creates a small
25 depletion in the Tongue River surface waters that

1 peaks, I think, in mid-2000s at .92 CFS, and
2 trails off out into infinity. We have to assume
3 that that's true. There is some hydrological
4 connection resulting in the depletion.

5 Nevertheless, the question you need to
6 answer is, does the Yellowstone River Compact
7 reach those depletions? Does it reach that
8 groundwater production? And, of course, it
9 doesn't say anything in particular about this
10 situation. You know, while the drafting parties
11 said we want to fix all the problems now and in
12 the future, surely they realized that there would
13 be emerging technologies, and there would be new
14 problems that the states would encounter, and CBM
15 was one of those problems. It's new, it's
16 different, it's not the kind of alluvial
17 groundwater pumping that I think the compact
18 drafters probably envisioned when they did think
19 about groundwater. They envisioned an immediate
20 hydrologic connection and they were very close.
21 This is different than that.

22 Now, does the compact reach it? No.
23 No, it does not. And there has to be an element
24 of materiality into the issue of hydrologic
25 connection. What hydrologic connection is

1 sufficient to warrant regulation under the
2 compact, or for the compact to reach every single
3 molecule of water in the basin. I don't think it
4 does that. It reaches some material amount. And
5 you don't have to draw that perfect line today in
6 order to decide this case and say this is forever
7 and all times, that line. That probably doesn't
8 make sense because we're going to encounter in the
9 future even more new and emerging technologies
10 that cause us even more headaches.

11 But what you can look at is, what are
12 the states doing today, and does that have any
13 impact on how we interpret the compact, and it
14 surely does. Neither one of these states
15 regulates their CBM waters in priority with their
16 surface water. So if Montana at some point in the
17 future gets to a situation where they say we're in
18 a position to make a call in Wyoming and they
19 call, we're not going to turn off our CBM wells.
20 And it doesn't make any sense to do that, of
21 course, because it takes so long to get there.

22 And similarly, when Montana's water
23 rights holders in the Tongue River Basin say we're
24 running low on water, Montana doesn't run out and
25 shut off its CBM production. They don't even have

1 permits. They decided they don't even need a
2 permit. They're completely outside the scope of
3 their appropriative system, right?

4 So the conduct of the parties is a
5 pretty good indication of what they think the
6 Yellowstone River Compact means, and they don't
7 think it means that CBM production, as it exists
8 at this point, is covered by the Yellowstone River
9 Compact. And I don't think we can second-guess
10 the parties who even in their own states have said
11 this connection, whatever it may be -- and for our
12 purposes, it's what Mr. Larson says it is -- it is
13 not material enough for us to put the full weight
14 of our appropriative system into place on this
15 groundwater pumping. That would be a big deal,
16 and it's not warranted by the connection, and both
17 states have said that. And if that's the case, it
18 cannot be that the drafters of the Yellowstone
19 River Compact would second-guess that.

20 Now, you've asked, well, what happens
21 if in Wyoming -- let me see if I can get to your
22 question. What would happen if a surface water
23 user in the Tongue and Powder River basins in
24 Wyoming complained to the State that local CBM
25 pumping is interfering with his or her water

1 supply. We have a statute in Wyoming. It's
2 Wyoming Statute 41-3-911(b), and it says that any
3 appropriator of either surface or underground
4 water may file a written complaint alleging
5 interference with his water right by a junior
6 right. So the surface water could file a
7 complaint, as stated here. And after filing a
8 complaint and filing the appropriate fee, which is
9 \$100 to have them work a complaint, the state
10 engineer shall undertake an investigation to
11 determine if the alleged interference does exist.
12 Following the investigation, the state engineer
13 shall issue a report to all interested parties
14 stating his findings. The report may suggest
15 various means of stopping, rectifying, or
16 ameliorating the interference or damage caused
17 thereby.

18 So the first thing you do -- it doesn't
19 seem like the first thing you do -- is say, I'm
20 regulating in priority. You're going to look at
21 various means. The statute doesn't specify
22 exactly what those are. If the appropriator
23 doesn't like the resolution reached by the state
24 engineer, there is an appeals process that could
25 take him to the Wyoming Supreme Court.

1 Now, you asked also, well, what if this
2 was a basin in which the state engineer had
3 determined that the waters are so interconnected
4 with the surface as to constitute one source of
5 supply? And that's handled a little bit
6 differently. We have another statute. It's
7 Wyoming Statute 41-3-916. And that one says if
8 the state engineer determines that they're so
9 interconnected as to constitute, in fact, one
10 source of supply, priorities of the rights to the
11 use of all such interconnected waters would be
12 correlated, and such single schedule of priorities
13 would relate to the whole common water supply.

14 Or the state engineer may also order --
15 or may also by order adopt any of the corrective
16 controls specified in Wyoming Statute 41-3-915.
17 So he could regulate them on a single schedule of
18 priorities. But, of course, a lot of times it
19 doesn't make any sense with groundwater. So he
20 has some other tools available to him, and they
21 are: He could close the area to further
22 appropriations; he could determine the permissible
23 total withdrawal of water from the area for each
24 day, month, or year, apportioning the total
25 withdrawal among appropriators in accordance with

1 their relative priority base; he could order
2 cessation or reduction of withdrawals --

3 SPECIAL MASTER: Could you slow down
4 for the court reporter? Sorry.

5 MR. KASTE: He could order cessation or
6 reduction of withdrawals by junior appropriators
7 when their withdrawals have a material and adverse
8 effect upon the supply available for and needed by
9 senior appropriators; he can require and specify a
10 system of rotation of use within the area if
11 cessation or reduction of withdrawals by junior
12 appropriators will not result in proportionate
13 benefits to senior appropriators; and he could
14 institute well spacing requirements directly to do
15 with wells. So our statutes recognize that
16 groundwater regulating necessarily under a single
17 schedule of priorities may not make the best
18 sense, and that gives the state engineer some
19 freedom to try and implement a corrective measure
20 that does make good sense and that does benefit as
21 many people as possible.

22 But I think what's really interesting,
23 as you read through that statute, you hear the
24 word "material" more than once. There needs to be
25 a material depletion, and then I think that that

1 concept probably flows right into the Yellowstone
2 River Compact. I really doubt that the drafters
3 intended to force the states to regulate and take
4 a whole host of potentially onerous actions on
5 their irrigators based on one molecule of water.
6 And whatever the language they have to draw,
7 saying that this is or is not sufficiently
8 hydrologically connected, I don't know that you
9 have to specify for all times what it is, but you
10 do, I think, have the means at your disposal to
11 say this is not it. What I've been presented with
12 by the parties here today and in the materials for
13 summary judgment, that isn't it. That isn't
14 hydrologically -- that's some hydrologically
15 connected groundwater that you talked about that
16 may be subject to the compact, this isn't it.
17 What it is, I don't think you have to decide
18 today, and I don't think you should because we
19 don't know what the future holds. And as
20 technologies change, our understanding of the
21 mechanics of water are going to change over time.
22 And like I say, for purposes of today, the answer
23 is not this water.
24 And with that, there is no more water
25 at issue in this case. If you follow the logic of

1 my argument, or illogic, such as it may be,
2 eliminating the flow model because it's based on
3 the wrong legal standard, throwing out those years
4 because there's no expert testimony to support
5 them, finding that there's been no injury to the
6 reservoir when we use the proper accounting
7 method, and not including CBM production as it
8 exists in the evidence before you in those waters
9 that are connected such that they are governed by
10 the Yellowstone River Compact, there is no case.

11 And you asked, I think, an interesting
12 question in the course of your questions about
13 does there comes a point where the Supreme Court
14 could look at a case and say this has become so
15 small and so tiny in its scope that it's no longer
16 fit for resolution in the United States Supreme
17 Court, which is an interesting question. I hadn't
18 thought about it. I framed it, I think, and I put
19 it down in my brief as de minimis, and the
20 contract doctrine of de minimis non curat lex,
21 which I thought that was pretty cool.

22 This is probably a more appropriate
23 question that you asked when this case was filed,
24 and you said it must be very urgent, really
25 important issues for the Court to resolve, and you

1 and the Court have resolved many of them. And
2 what we're left with in the aftermath of those
3 various decisions is something really small. And
4 the only standard you cited us to, Connecticut vs.
5 Massachusetts, I look around a little bit, and I
6 see basically the same standard applied in all of
7 the other cases, and it's the one that the Court
8 looks at when it determines whether or it has --
9 it should exercise its discretion and take an
10 original action case, and that is the serious
11 indignity of the matter, and whether there isn't
12 another appropriate forum. And you see that
13 throughout the cases, and I don't see any case
14 that looks like this where a case may have had
15 sufficient dignity to warrant the Supreme Court's
16 attention at the outset. But because of various
17 rulings of the Court, it had shrunk down to a
18 point where it doesn't make sense for the Court to
19 continue to exercise its original jurisdiction.
20 If there was ever a case that the Court ought to
21 reassess its jurisdiction, this might be it,
22 because it really has whittled down to essentially
23 a foot or two of water here, and amongst a river
24 where we -- we just put water all the over the
25 place. There's a lot of wiggle room along this

1 river over its course. And in the grand scheme of
2 things, this is a very, very tiny amount of water.
3 And the Supreme Court is no different than any
4 other federal court. It has to assess its
5 jurisdiction all the time, and it can do that at
6 any stage of the proceedings, and it would
7 probably be appropriate for it to do so here.

8 Now, I think the one thing that the
9 State of Montana might say in response to that I
10 think is wrong in saying wait a minute, we've got
11 this case that says any injury. Look at that
12 Wyoming vs. Colorado case. It says any injury is
13 good enough that's a violation of the compact, by
14 gosh, and it should be in the front of the Supreme
15 Court. Of course, in that case, that was a case
16 in which Colorado was obligated to give -- to only
17 use a fixed quantity of water and after that shut
18 off, and it did shut off, and then it went let's
19 back on, and they used a whole bunch of water that
20 it wasn't entitled to and then promised never to
21 do it again, and the Supreme Court said okay.
22 That was their remedy, their promise never to do
23 it again.

24 But that doesn't really stand for the
25 proposition that any injury, no matter how small,

1 is sufficient to warrant the Court's discretion to
2 exercise its original jurisdiction. This is too
3 small for the Court to exercise its original
4 jurisdiction. And you've probably got to reassess
5 that and probably ought to dismiss this case on
6 those grounds, because if it's lost jurisdiction,
7 it's lost jurisdiction.

8 I think and I hope that I have
9 answered, in the course of our discussion, all of
10 the questions that you have posed, either
11 primarily to the State of Wyoming or to both
12 states. But -- and I assume you have a list of
13 findings. So if there is one or another burning
14 question in your mind?

15 SPECIAL MASTER: No, I think that's
16 fine. Let me ask you, though, and ask a couple of
17 follow-up questions that weren't on my initial
18 list. The first, just going back to the Wyoming
19 statutory provision for review of claims of
20 interference with groundwater and surface water,
21 and that they are not managed as one body of
22 water. And if I remember, is that Section
23 41-3-911(b)?

24 MR. KASTE: Yes.

25 SPECIAL MASTER: Is there a standard

1 included in there as to when the state engineer
2 should take action?

3 MR. KASTE: I believe it says to
4 determine if interference exists. So the standard
5 is interference. And I would be willing to bet
6 you that Mr. Brown, who is the state's actual
7 water lawyer, would have a better understanding
8 than I do of what actual interference entails.
9 And if you would permit him to discuss that --
10 he's going address Montana's motion for summary
11 judgment. I can sit down and ask him if he can
12 address that question now, or we could wait until
13 he pops up later in the day.

14 SPECIAL MASTER: I'll give you a chance
15 later on to reply, if that's what you want, so you
16 can consult with Mr. Brown in the meantime.

17 Another question, though, along these same
18 lines. So if I remember right, I think it was in
19 Mr. Tyrell's affidavit, he said that they
20 actually -- Wyoming had never received a written
21 complaint with respect to interference. And when
22 I read that, I remember some deposition testimony
23 I also read that seemed to be talking about some
24 complaints that had been made but it hadn't
25 attached any exhibits. So were those not

1 complaints? Were they oral complaints rather than
2 complaints in writing, and were they resolved?

3 MR. KASTE: Yeah. I think that the
4 parties are talking past each other a little bit
5 there. And Mr. Tyrell's affidavit says, "At no
6 time has any surface water appropriator in Wyoming
7 filed a written complaint with my office alleging
8 interference with his right by coal bed methane
9 groundwater right." And that's kind of the issue
10 that we're dealing with, not kind of. That is the
11 issue we're dealing with, is what effect does coal
12 bed methane have on surface. Now, there have been
13 in the Tongue and Power River basins a couple of
14 complaints by groundwater users. And, of course,
15 the groundwater users' complaint is: My neighbor
16 over there is pumping his CBM nonstop, and it is
17 affecting my well within this distance. And
18 that's a pretty darn different question than is
19 CBM pumping having depletive effects on the
20 surface waters. And so Mr. Tyrell's affidavit is
21 limited to that more relevant question. It is
22 true, however, that we have some groundwater
23 complaints in those basins related to pumping in
24 proximity.

25 SPECIAL MASTER: So let me go back now

1 and just ask a couple of just very quick factual
2 questions, and in the process I will probably show
3 that I need some help in understanding the exact
4 claims with respect to interference on Wyoming to
5 Montana pre-1950 water rights.

6 The first one is, let's assume that I
7 ultimately agree with you that in looking at
8 interference with the storage rights, that I
9 should look at the amount of water that was
10 storable in the Tongue River Reservoir prior to
11 the expansion. And as I understand it, your claim
12 is basically in every year it fills up to that
13 amount. If I were to rule for you on that but
14 rule against you on everything else, do you win?

15 MR. KASTE: Yes, if that's the only
16 injury they allege.

17 SPECIAL MASTER: So therefore, that's
18 one possibility is that you win there.

19 MR. KASTE: All possibilities lead to
20 our win.

21 SPECIAL MASTER: So in addition to
22 that, if I were to hold that it's Montana's
23 responsibility to show not only that there was
24 insufficient water -- well, if it's all about
25 reservoir water right, why do we even care about

1 the question of whether anyone can actually show
2 that they needed the water?

3 MR. KASTE: Oh, well, that's why I had
4 the last argument in my original briefing. I
5 don't know why this flow model is in here because
6 it doesn't seem related to anybody's injuries.
7 But Montana clarified in its response saying,
8 well, we do claim that every time you violated
9 that flow model, all of our surface water rights
10 were hurt, and so we want some prospective relief
11 as a result of those violations.

12 SPECIAL MASTER: So then it would be
13 your position, taking that argument, that if
14 Montana has to show both that water users were
15 deprived of water to which they had a paper right,
16 and also have to show that they actually needed
17 that water, that they were prepared and ready to
18 put that water to use, if I hold that, but I hold
19 against you on every other issue, your attitude --
20 your view is, is that you win there also?

21 I'm looking at the linchpin issues, and
22 it would appear from your argument that the
23 storage question is a linchpin issue. Is this
24 also a linchpin issue?

25 MR. KASTE: Yes, but I don't know that

1 it would mean the entire case would go away just
2 by finding that the actual use is the measure
3 because the storage right is still out there. I
4 hate to say this, but I think they probably have
5 shown we have space in our reservoir and -- well,
6 obviously, we would have filled it up. If it came
7 down, we would have tried to catch it, and then
8 except for reservoir operations purposes, then the
9 absence of water in the reservoir and open space
10 seems to me at least sufficient to establish a
11 prima facie case that would get us to trial to
12 discuss the reservoir issues. And that the
13 actual -- that question between theoretical and
14 actual use really related to the surface water
15 issues in the case, more so than the reservoir
16 right.

17 SPECIAL MASTER: Okay. So I'm just
18 trying to structure a decision here a lot more
19 than decision three. So the first decision is a
20 question -- the question that you raised with
21 respect to storage. And if I rule for you on
22 that, then your position is you should win at that
23 stage because, in your view, the only claim that
24 Montana is bringing is really an interference with
25 the storage right, and they can disagree with that

1 if they want to. But your view is, is that that's
2 a decisive issue.

3 And then after that, in order to rule
4 for you on summary judgment where I then have to
5 rule in your favor on enough issues in order to
6 whittle that water down to a stage where I
7 conclude that either the Supreme Court doesn't
8 have or shouldn't retain jurisdiction because it
9 just is not enough for it to continue to warrant
10 the Court's jurisdiction; or alternatively, for
11 example, your contract view, and at some point you
12 get down to a de minimis amount that you can't
13 complain about?

14 MR. KASTE: Yes. You know, we only get
15 to that point when there's some little bit left
16 over if the '92 agreement applies and we follow
17 it, and we apply its provisions to Mr. Book's
18 analysis, then we get to a point where we just
19 have that little dribble of water that's in -- I
20 figured it out to be about 6 acre-feet of water,
21 using Montana's needing the water. And yes, in
22 that circumstance, if you go down that road to the
23 point where you say the 1992 agreement applies and
24 I apply the parameters as Wyoming asks, and it's a
25 tiny bit of water left over, should we go to trial

1 on that? Should the United States Court decide
2 whether that 6 acres in 2004 warrants a trial?
3 You're going to have to make that decision. The
4 answer to that is, obviously, no. We'll promise
5 to not do it again, just like Colorado did. I
6 mean, that is such a minuscule, tiny amount of
7 water as between the states on a river of this
8 size, that to continue the Court's jurisdiction
9 would be an utter waste of both states' and the
10 Court's time. I cannot imagine standing in front
11 of the United States Supreme Court talking about
12 0.15 CFS of water without them laughing at me.

13 SPECIAL MASTER: And just anticipating
14 what argument probably should be replied to, if
15 one of the responses to that -- and who knows
16 whether we get to that particular stage, but we've
17 gone to the stage of asking whether or not the
18 case should go forward on a small amount, a small
19 number of acre-feet of volume. One possible
20 response from Montana is, well, this isn't just
21 about retrospective liability. This is also about
22 prospective relief to make sure this doesn't
23 happen again. What would be your response to
24 that?

25 MR. KASTE: Well, I think I already got

1 it. We already have rulings by yourself and by
2 the Supreme Court indicating that we have to
3 respond to protect their pre-1950 rights under the
4 right circumstances. They got the relief that
5 they intended to get, I think, when they came in
6 saying: Our pre-1950 rights are protected by this
7 compact. Court, you tell Wyoming that that's the
8 case, and it did. And we will respond
9 appropriately to the appropriate call in the
10 future. They won. I'm mystified by why we're
11 still here. They already won this case on the big
12 issue. On the thing that really matters,
13 Montana's already prevailed. We have accepted
14 that, and we will abide by the Court's decision.

15 SPECIAL MASTER: Thank you.

16 MR. KASTE: Thank you.

17 SPECIAL MASTER: So it is now almost
18 quarter after 12, and everybody has remained in
19 their seats, which is actually pretty amazing. So
20 what I would suggest is, we take -- would 10
21 minutes be enough, Mr. Draper, or would you like
22 15?

23 MR. DRAPER: 10 minutes would be
24 enough, Your Honor.

25 SPECIAL MASTER: So I will take a

1 ten-minute break. I'll probably just remain here
2 on the bench and call things back to order at
3 about 25 after the hour. And what I would propose
4 is that unless people are opposed to a late lunch,
5 that I'll wait until after Mr. Draper is finished
6 to break for lunch, unless your oral argument is a
7 lot faster than I expect it to be.

8 MR. DRAPER: We can see how that goes,
9 Your Honor. Actually, Mr. Wechsler is going to be
10 presenting the argument on most, but not all of
11 the issues involved in their motion for summary
12 judgment.

13 SPECIAL MASTER: Okay. Thank you.
14 We'll take a ten-minute break. Thank you.

15 (Recess from 11:15 a.m. to 11:27 a.m.)

16 SPECIAL MASTER: So we're back on the
17 record. We're still on Wyoming's motion for
18 summary judgment. I'm going to make a slight
19 change in the schedule. So Mr. Wigmore will go on
20 next on behalf of Amicus Anadarko Petroleum, and
21 then after that we will turn to Mr. Draper. Or,
22 Mr. Draper, are you going first?

23 MR. DRAPER: Mr. Wechsler.

24 SPECIAL MASTER: Okay. To Mr. Wechsler
25 first on behalf of Montana.

1 So, Mr. Wigmore?

2 MR. WIGMORE: Thank you, Your Honor.

3 I'm Michael Wigmore on behalf of Anadarko
4 Petroleum Corporation. Again, we appreciate the
5 opportunity to provide argument here, and I'll try
6 and be brief to discuss and limit my discussion to
7 just the issue related to the coal bed methane
8 groundwater Anadarko has an interest in.

9 First, let me just address a point that
10 Mr. Kaste did not touch on in his argument, and
11 that is Montana's argument that the Court has
12 already addressed the issue of CBM and is somehow
13 bound by the doctrine of finality. That is
14 certainly not the case. In fact, in the first
15 interim report, going back in memory, the opinion
16 of June 2009 that was upheld by the Supreme Court,
17 this Court has held that some forms of groundwater
18 that are hydrologically connected to surface
19 waters are covered by the compact. And in the
20 context of Wyoming's motion to dismiss on grounds
21 of all groundwater, that was denied. But the
22 issues specifically presented to the Court today
23 as to whether coal bed methane groundwater is
24 covered by the compact has not been addressed by
25 the Court.

1 SPECIAL MASTER: So let me just clarify
2 for everyone. I agree with you that I think the
3 specific issue with respect to CBM groundwater has
4 not been addressed, nor has the specific standard
5 to be used has been addressed. And so both of
6 those are questions that this motion on summary
7 judgment raises and need to be addressed.

8 MR. WIGMORE: I agree. And I'll try
9 and touch on both those issues. And in light of
10 that, the first step is, the Court must determine
11 the scope of the Yellowstone River Compact and
12 what standard does apply, and that's for two
13 reasons. Number one, initially it's a legal issue
14 that the Court has to decide as a matter of law.
15 The Court has to say what the law applies to. And
16 the other reason is because in analyzing
17 Montana's -- whether Montana has met its burden in
18 defeating Wyoming's motion for summary judgment,
19 the first step in that is, the Court has to
20 determine what substantive law applies to
21 determine whether or not Montana has, in fact,
22 raised a genuine issue of material fact that's in
23 dispute sufficient to overcome summary judgment.
24 And that's a case that, in fact, Montana cites in
25 its brief, Anderson vs. Liberty Lobby, 477 U.S.

1 242, which states that the substantive law
2 applies, identifies which facts are critical and
3 which facts are irrelevant. So for two reasons,
4 the first step the Court has to address here, is
5 what standard with respect to coal bed methane.

6 Now, Anadarko's position is that -- and
7 I'll go through this quickly because Mr. Kaste did
8 address this -- is that the Court should conclude
9 as a matter of law that the Yellowstone River
10 Compact does not cover CBM water. It's not the
11 types of hydrologically connected groundwaters
12 that are governed by the compact. Article V of
13 the compact is governed by the Doctrine of
14 Appropriation, and Article V(A) protects
15 appropriative rights to beneficial uses.

16 And so as Mr. Kaste explained, and as
17 this Court held in its first interim report, the
18 first step is to look and see what the laws of
19 each state does. And I'll get into this in more
20 detail, but as Mr. Kaste explained, neither state
21 in this context regulates coal bed methane
22 groundwater pumping under the Doctrine of
23 Appropriation, as tributary to surface waters.

24 Now, Montana makes an argument. The
25 second reason is that as a matter of law that the

1 Court should conclude that CBM isn't covered is
2 that there is just no way to implement CBM pumping
3 in the context of this compact. And that becomes
4 very clear when you look at Article V(B). Now,
5 Montana argues in its opposition that it's only
6 raising claims under V(A). But if CBM is covered
7 by the compact, it is covered for both purposes of
8 V(A) and V(B). And in the context V(B), you have
9 to know on an annual basis, really it's
10 implemented on a daily basis because it's a
11 rolling percentage, the specific percentage
12 allocations to each state in specific interstate
13 tributaries, and there is just no easy way to do
14 that when you're talking about CBM groundwater
15 pumping. And because of that, the compact is
16 fundamentally inconsistent with the regulation of
17 CBM groundwater, and it's further evidence that as
18 a matter of law, the compact was never intended to
19 cover CBM, because to do so, you need to know
20 where the depletions may occur, and you have to
21 know when they occur. And I'll get into this in
22 the context of Montana's opposition to the motion
23 for summary judgment. But there's no evidence in
24 this case with respect to either one of those
25 issues.

1 The third reason as a matter of law,
2 and Mr. Kaste talked about this a little bit, is
3 that even if you presumed that some CBM pumping
4 may be covered by the compact, it results in de
5 minimis and speculative impacts at best. And this
6 was an issue that we addressed in our amicus
7 brief. As a result of that, at least with respect
8 to the CBM claims raised by the State of Montana,
9 it's not an appropriate issue for original
10 jurisdiction, and the Court can grant summary
11 judgment with respect to CBM claims on that basis
12 alone. And the case that we cited is Washington
13 vs. Oregon, 297 U.S. 526, where the Court
14 dismissed a complaint where the injury was,
15 "unsubstantial and uncertain," and that's the
16 issue here with respect to CBM.

17 Mr. Larson (sic) also talked about the
18 fact that these depletions, to the extent they
19 even do occur, are de minimis, and I won't get
20 into that further other than to recognize that
21 Montana, in fact, has a statute that sets a level
22 for de minimis withdrawals and, in fact,
23 recognizes the fact that de minimis -- under the
24 Doctrine of Appropriation, de minimis withdrawals
25 are not at issue.

1 Finally, from a legal standpoint,
2 because of the Futile Call Doctrine, which is
3 recognized in both states, trying to apply this
4 compact to CBM is inconsistent with the language
5 of the compact because it would be futile. The
6 Futile Call Doctrine is, again, recognized by both
7 states. And essentially what it says is, shutting
8 down or diverting by a junior appropriator does
9 not make water available to a senior when it is
10 needed with junior appropriator for continuous
11 use. The evidence that Montana has presented in
12 this case, taking it in the best light, as the
13 Court must do at this point, doesn't talk about --
14 it talks about possible depletions over the course
15 of years or even decades. So there is no evidence
16 in this case, and Mr. Kaste alluded to this, that
17 shutting down CBM pumping would make water
18 available to a senior or pre-1950 appropriator in
19 Montana.

20 I just want to touch on this quickly on
21 the Arkansas River and Republican River Compact
22 because that was addressed. And while clearly
23 those two compacts may shed light on whether some
24 groundwater is covered, it doesn't shed any light
25 on the issue that's presented to the Court now as

1 whether CBM groundwater is covered, but Montana
2 continues to rely on those two compacts for the
3 preposition that the Yellowstone River Compact or
4 the CBM, that neither one of those compacts
5 address that issue at all.

6 So essentially, we believe that from a
7 legal -- as a matter of law, the Court can
8 interpret the compact as not addressing any CBM
9 water. But even if the Court interprets the
10 compact as covering some CBM water as
11 hydrologically connected, Montana has not
12 satisfied its burden of demonstrating a genuine
13 issues of material fact in dispute sufficient to
14 overcome Wyoming's motion for summary judgment.
15 First, in the original jurisdiction case as well,
16 the federal rules don't apply by their terms. The
17 Supreme Court has adopted the standards under
18 Federal Rule of Civil Procedure 56 to apply in
19 this context. That's Alabama vs. North Carolina,
20 560 U.S. 330. And there's another case, Nebraska
21 vs. Wyoming, 507 U.S. 584. So the standards that
22 would apply in any other case under Rule 56 have
23 been adopted by the Supreme Court.

24 And here, because Montana has the
25 burden of proof on this issue, the actual standard

1 for granting -- to overcome the motion for summary
2 judgment, or when summary judgment may be granted
3 against the non-moving party that has the burden
4 of proof, is that the non-moving party fails to
5 make a showing sufficient to establish the
6 existence of an element essential to its case.
7 And that's *Celotex vs. Catrett*, 477 U.S. 317.

8 Now, Montana's theory in this case is
9 that apparently it only has to issue some evidence
10 of a hydrological connection, or any hydrological
11 connection in order to overcome a motion for
12 summary judgment. We don't believe that's the
13 case because we believe it relates to the standard
14 that should be applied with respect to CBM water,
15 which we believe should be that if you can
16 demonstrate that a post-1950 -- and I can't use
17 the word "appropriator" since neither state
18 regulates it as an appropriation. But if there's
19 some action that diverts water covered by the
20 compact, and it causes a material depletion of
21 water in the Yellowstone River system that would
22 otherwise be available for diversion to a pre-1950
23 user in Montana, and that appropriator has a
24 current need and can put the water to use, that's
25 what Montana would have to show. In fact, that's

1 consistent with the quote that Montana used in its
2 brief from you, that in order to establish a
3 compact violation, the Special Master has stated
4 that Montana must show, "At a minimum," at least
5 some pre-1950 appropriative rights are unsatisfied
6 in Montana, and that they went unsatisfied because
7 Wyoming instead delivered that water to a
8 post-1950 appropriator. And that's in Montana's
9 opposition to Wyoming's summary judgment at Page
10 60.

11 So in light of that standard, you have
12 to look at the evidence that Montana has presented
13 in this case. And the issue with respect to
14 groundwater is addressed in the report of
15 Mr. Larson, but Mr. Larson's report does not
16 create a general issue of material fact in
17 dispute. Even as a -- these are very significant
18 credibility issues that we relate to Mr. Larson's
19 report. Taken at its best, what the Larson report
20 then concludes is that if you aggregated all CBM
21 pumping in the basin, there is some minimum level
22 of depletion, which Mr. Larson calculates to be
23 1,000 acre-feet per year, but that depletion
24 applies throughout the entire Tongue River Basin.

25 Mr. Larson admits that he cannot say

1 exactly when any depletions occurred, and that's
2 in Mr. Larson's deposition on Pages 58 and 59; but
3 more importantly, he cannot say where any
4 depletion has occurred, not with respect to any
5 particular surface stream, and that's addressed in
6 his deposition on Page 58; not with respect to any
7 particular watershed, and that's in his deposition
8 on Pages 127 to 129; and not even with respect to
9 whether the depletion -- what state the depletion
10 may occur in. He can't say whether it's in
11 Montana or Wyoming. And that's in his deposition
12 at Page 75. In fact, he admits that in every --
13 under questioning from Mr. Brown, if every pump in
14 various watersheds -- and Mr. Brown raised the
15 Antelope and the Upper Bell portion of the
16 Cheyenne, every CBM pump -- and those sets were
17 pumping -- Mr. Larson could not say if there was a
18 depletion to the surface flow of the Tongue River.

19 And therefore, Montana's argument that
20 just to show some level of connectivity between
21 groundwater -- CBM groundwater and surface water
22 is not sufficient to create a genuine issue of
23 material fact to overcome the motion for summary
24 judgment. And that's the case two cases that I'd
25 cited to. So even if you take Mr. Larson's report

1 at its face and accept it's all true, because
2 those factual allegations cannot support a
3 violation of the compact, it does raise a material
4 issue, and those cases are *Burlevich vs. Airline*
5 *Pilots Association*, 894 F.2 346, it's the 9th
6 Circuit in 1990; and *Wilson vs. Seiter*, 893 F.2
7 861, and that's the 6th Circuit in 1990.

8 So in Montana's response to Anadarko's
9 amicus brief on this point, Montana cites to --
10 it's at Page 12 of its brief -- that Montana has
11 produced evidence that CBM pumping resulted in
12 losses at the state line, and that is absolutely
13 not true. There is no evidence in this case,
14 there's no facts in this case on which -- and
15 they're talking now about Mr. Book's report, his
16 rebuttal report on Page 27, Table 3. To be fair
17 to Mr. Book, Mr. Book is very clear that he only
18 received values from Mr. Larson. That's stated in
19 the Book report on Page 9, and also in Mr. Book's
20 deposition at Page 63, where he says he just
21 plugged in the values from Mr. Larson. Mr. Book
22 then makes very clear on Page 21 of his report
23 that the state line depletion is merely an
24 assumption. There's no factual record evidence as
25 to where these depletions may occur.

1 And so as a result of the Book report,
2 because it is simply an assumption, it is legally
3 insufficient to overcome a motion for summary
4 judgment in this context.

5 And in response to your questions that
6 you posed, I did some research. One of the cases
7 relating to the standards for summary judgment in
8 the context of an expert opinion is Mid-State
9 Fertilizer vs. Exchange National Bank, 877 F.2
10 1333, 1139, this point cite. That's a 7th Circuit
11 case from 1989. And this was a case where, same
12 thing, non-moving parties attempted to overcome a
13 motion for summary judgment. And the Court ruled
14 that the party opposing the summary judgment must,
15 quote, "Set forth specific facts," and that's the
16 language from Rule 56, "so that an expert's naked
17 opinions, while admissible at trial, may not be
18 sufficient to defeat summary judgment." So in
19 that case, summary judgment was granted over an
20 expert affidavit when the Court concluded that the
21 expert, "presented nothing but conclusions, no
22 facts, no hint of an inferential process, no
23 discussion of hypotheses." And the Court ruled
24 that an expert affidavit can overcome summary
25 judgment only if it shows, quote, "a process of

1 reasoning beginning from a firm foundation."

2 There are two other cases also on
3 point. One is In re: Agent Orange Product
4 Liability Litigation. That's 818 F.2, 187 --

5 SPECIAL MASTER: I'm sorry, what was
6 the cite again?

7 MR. WIGMORE: 818 F.2 187, discussion
8 on Page 193, that's the point cite. That's a 2nd
9 Circuit case, 1987 in which cert. was denied. And
10 that case stands that expert affidavits -- in
11 order to overcome the motion for summary judgment,
12 an expert affidavit cannot involve mere
13 speculation. Or another case which says an expert
14 affidavit cannot involve conclusory allegations is
15 Evers vs. General Motors, 770 F.2 984. The point
16 cite is 986. And that's an 11th Circuit case from
17 1985.

18 There's another case in the context of
19 patent law, and I think these cases are
20 particularly on point. This is a case called
21 Novartis vs. Ben Venue Labs. The cite is 271 F.3,
22 1043, the discussion is on Page 1051. It's a
23 United States Court of Appeals Decision in the
24 Federal Circuit in 2001. And the Court from that
25 case says, "In the context of summary judgment" --

1 let me just explain why I think it's appropriate.
2 Because the way patent appeals work is, first the
3 Court has to do what's called a claim
4 construction, and that's a legal issue to
5 determine what the scope of the patent is, and
6 it's very analogous in this instance to the Court
7 determining what the scope of the compact is. And
8 then once the substantive law is determined, then
9 the Court determines whether or not an expert
10 opinion can overcome a motion for summary
11 judgment. Because in that case in a patent, the
12 issue of infringement is like an issue here like a
13 violation of compact which relates to the facts in
14 the record. And the Court said, "In the context
15 of summary judgment motions" -- and it cited the
16 3rd Circuit case. "The 3rd Circuit has demanded
17 that the factual predicate of an expert's opinion
18 must find some support in the record and has
19 emphasized that mere 'theoretical speculations
20 lacking a basis in the record will not create a
21 genuine issue of fact.' Moreover, where an
22 expert's opinion is predicated on factual
23 assumptions, those assumptions must find some
24 support in the record. We must, therefore,
25 identify the assumptions made by Dr. Malmon,"

1 who's the expert in that case, "in his computer
2 model and ask whether they are supported by
3 evidence in the record. These include both the
4 theoretical principles and inform the model's
5 design, as well as the means by which its input
6 parameters are derived."

7 And in this case, the evidence that
8 Montana points to, in order to overcome a motion
9 for summary judgment as presenting a genuine issue
10 of material fact in dispute, is the Book report
11 and the fact that the Book report may provide
12 evidence of depletion at the state line. The Book
13 report is very clear that that is simply an
14 assumption by Mr. Book, and there is no factual
15 evidence supporting that assumption in the record
16 because Mr. Larson provides that. He does not say
17 where these depletions occur. And therefore, it
18 is insufficient as a matter of law to overcome
19 Wyoming's motion for summary judgment.

20 So in conclusion, we believe that as a
21 matter of law, as an initial matter, the Court can
22 rule that CBM is not governed by the Yellowstone
23 River Compact. But then even if the Court
24 determines that some CBM may be covered based on
25 some level of hydraulic connectivity, neither the

1 Larson not the Book reports satisfy Montana's
2 burden to demonstrate a genuine issue of material
3 fact in dispute sufficient to overcome Wyoming's
4 motion for summary judgment. And as a result,
5 Wyoming's motion for summary judgment with respect
6 to the claims related to CBM must be granted.
7 That's all I have at this point, and I can answer
8 any questions.

9 SPECIAL MASTER: Thank you. I just
10 have one question, which is going back to your
11 argument that the compact doesn't address CBM
12 groundwater expansions as a matter of law. So I'm
13 just going to your first point, which basically is
14 if the states don't deal with it and it's not
15 dealt with by the compact -- although I do have a
16 question there that either Mr. Brown or Mr. Kaste
17 might want to address later -- you said that
18 neither state treats it as an appropriation. And
19 what's unclear to me is whether under Wyoming law
20 it's not an appropriation, or it's just not an
21 appropriation which is integrated with the rest
22 of --

23 MR. WIGMORE: If I can clarify, what I
24 said was that it's not treated as being subject to
25 the Doctrine of Appropriation as a tributary to a

1 surface stream. I think that's...

2 SPECIAL MASTER: That was my
3 assumption. I just wanted to make sure that I was
4 not mistaken there.

5 Then the second question, though, you
6 said there were two reasons as a matter of law,
7 and that was the first one. And the second one
8 was that you said was not -- basically would not
9 be implementable.

10 MR. WIGMORE: Sure. The argument that
11 we've made is, if some CBM water or some CBM
12 pumping is subject to the compact, then it's
13 subject to the compact for all purposes. And so
14 you would have to figure out how to implement CBM
15 pumping not only with respect to V(A), which is
16 fairly straightforward, post-'50 -- materially
17 depleting the appropriative rights of a pre-'50
18 user. But it would also be -- not to say, in
19 fact, that Montana will say, well, we haven't made
20 any claim at this point. There's no claims other
21 than in V(A) left in the case. That's irrelevant,
22 because if CBM is in under the compact, it's all
23 in. And therefore, you would have to figure out
24 how to apply the provisions of V(B) to CBM, and it
25 just can't be done. When you look at how V(B)

1 works, which is on a day-to-day basis that you
2 have to know what percentage has been allocated to
3 each state with respect to specific stream
4 segments and then it resets every year, there's
5 just -- there's no feasible way to implement that
6 portion of the compact with respect to CBM
7 pumping. And it's further evidence that as a
8 matter of law, it was not intended to cover that
9 type of water. And I think, in addition to the
10 fact that it's de minimis, in addition to the fact
11 that it would be in the context of a futile call,
12 that is all evidence that neither -- none of the
13 parties to this Compact nor the United States
14 Congress that enacted this statute contemplated
15 CBM water as being among the types of
16 hydrologically connected groundwater that's
17 covered by the compact.

18 SPECIAL MASTER: So just one final
19 question. Isn't that a problem basically in any
20 case where there is groundwater pumping where it
21 is not so closely related to the surface water
22 stream that the impact is not, for all practical
23 purposes, immediate and --

24 MR. WIGMORE: Well, I think you have to
25 go to the language of the compact. If we're

1 talking about the Republican River Compact and the
2 Arkansas River Compact, they're very different
3 compacts. And they talk about depletion of a
4 virgin water supply and new material depletion
5 based on the activities of demand, you know, maybe
6 in that context some -- it seems that the issue of
7 alluvial groundwater is behind us and is covered
8 by the compact. But maybe in the context of the
9 language of those two compacts you can look at the
10 groundwater because of how the compact is set up.
11 This compact requires it to be implemented on an
12 annual water-year basis and requires you to know
13 what the diversions of the depletions are on a
14 daily basis and specific stream segments. And you
15 cannot -- we think as a matter of law, certainly
16 based on Mr. Larson's report, he can't say when
17 they occur or where they occur. So there's no
18 evidence in the record at a minimum to say how you
19 would implement this compact with respect to CBM.
20 But we think as a matter of law, it further
21 supports the conclusion that the compact was never
22 intended to cover CBM.

23 SPECIAL MASTER: Thank you.

24 MR. WIGMORE: Thank you.

25 MR. WECHSLER: Good morning, Your

1 Honor.

2 SPECIAL MASTER: Good morning.

3 MR. WECHSLER: I'll try to address the
4 issues in the order that Mr. Kaste did, although
5 as Mr. Draper identified, he will be addressing
6 the groundwater issue, and he will also be
7 addressing the question that you raised about
8 Connecticut vs. Massachusetts.

9 So what I'll first try and do is
10 describe a little bit about the basin here, which
11 I think is relevant, particularly on the summary
12 judgment motion, and then I'll address Wyoming's
13 contemporary-use demand argument, their timing
14 argument, and their 1992 agreement argument.
15 After that, I'll try and make sure I circle back
16 and I've covered all the questions that you asked,
17 at which point Mr. Draper will cover groundwater
18 and also that Connecticut vs. Massachusetts issue.

19 So I think it's very important as part
20 of this case to be focusing on what's actually
21 going on in this basin. And so starting first in
22 Montana, it is true right at the state line you
23 have the Tongue River Reservoir, which is a very
24 large reservoir with the pre-'50 priority needs.
25 It has a -- it is operated by an advisory

1 committee pursuant to the Northern Cheyenne Tribe
2 Compact, so it's pursuant to federal law. That
3 operating committee has determined that there is a
4 45,000 acre-foot maximum amount of storage. And
5 so both historically and also pursuant to the
6 operating agreement through the advisory
7 committee, the reservoir has stored water in
8 the -- typically in the spring runoff period.
9 Basically what happens is, the reservoir stores up
10 to about 45,000 acre-feet in the winter, and once
11 it hits in that range, there's safety and other
12 issues that require it to stop storage, and then
13 it continues the remainder of the storage in the
14 spring runoff period, which is basically March
15 through June, sometimes into July. Sometimes it
16 doesn't start until April, depending on the
17 conditions.

18 What you also have in Montana is the
19 direct-flow rights down below the reservoir.
20 Those direct-flow rights, I believe there are 77
21 pre-1950 water rights in Montana, all of which are
22 dependent on the Tongue River for irrigation and
23 various uses. The largest evaporative area is
24 that -- that largest right under that part of the
25 water diversion has a right of 187 CFS. It's the

1 second most senior right on the river, and it
2 basically is what is typically called under the
3 Prior Appropriation Doctrine the calling right.
4 The only senior right, that is the appropriation
5 of Mr. Nance, which is roughly 10 CFS.

6 There's evidence in the record from
7 both Mr. Hayes and Mr. Muggley, saying that in
8 order for the T&Y Diversion to satisfy its right,
9 it must be 200 CFS at the state line. And
10 basically, those two are in communication to make
11 that when the T&Y is not receiving its right,
12 there is communication that they basically -- it
13 automatically switches over to storage water,
14 which Mr. Hayes testifies or provides in his
15 affidavit, it's basically an instruction that he's
16 received from the Tongue River Water Users
17 Association that that should essentially be
18 received in connection, allowing for that
19 communication process, either from Mr. Muggley, or
20 in the years that -- there are water
21 commissioners, and the water commissioners -- and
22 I'll mention -- and I'll probably come back to
23 this several times. There were water
24 commissioners in every one of the years that
25 Montana quantified damages, so we know one of the

1 two that go forward in the state.

2 (Discussion off the record.)

3 MR. WIGMORE: And so I think we also
4 saw the Draft Figure 3 from Mr. Hinckley's report
5 that talks about the hydrograph on the river, and
6 it's a very steep hydrograph. And so basically
7 what happens on the Tongue River is, you have
8 sufficient water to satisfy pre-1950 rights in a
9 typical year, and then you hit this precipitous
10 drought, and then basically the only two rights
11 that are being satisfied are Mr. Nance and the
12 T&Y, and you move very quickly to stored water,
13 and so everybody is then working off of stored
14 water.

15 As I mentioned, in each of the years
16 that we quantified damages, that there was a water
17 commissioner. I started to say before I was
18 briefly interrupted that Wyoming responded saying,
19 well, during some of those years those water
20 commissioners -- their actual appointment was only
21 to administer stored water, and therefore, they
22 didn't do anything with the direct-flow right.
23 But the evidence is to the contrary. In fact, in
24 order to make sure that the only -- people are
25 only receiving their stored compact water, it's

1 also necessary to make sure that everybody is
2 getting their full supplies of water, and only
3 their full supply of water, including those
4 post-1950 direct-flow rights. Wyoming took the
5 deposition of the water commissioners, and they
6 all acknowledged that that was exactly true. And
7 so the normal --

8 SPECIAL MASTER: So can I just
9 interrupt you, because I think there are several
10 things that will be helpful to me. First of all,
11 although we don't need to do it right now, I would
12 love to have a reference from Montana with respect
13 to the role that the water commissioners played
14 with citations to whatever portion of the record
15 in front of me that actually addresses that. You
16 don't have to actually tell me what the record
17 says, but you can at least provide me citations as
18 to which portions of record you think is relevant
19 on that particular question, that would be very
20 useful so that I don't miss something in
21 addressing this portion of Wyoming's claim.
22 The -- then the fact I think it's better that not
23 in the area -- these areas in Wyoming might want
24 to provide counter narratives, and ultimately,
25 it's up to me to determine the facts on this.

1 Just giving citations of the section would really
2 be helpful.

3 The second thing is, is that one of the
4 things that complicates this case is the fact that
5 it complicates virtually all water law in the
6 Western United States, as we're now dealing not
7 only with direct flows, but we also have the
8 storage right that is involved in this particular
9 case. And my understanding of Wyoming's point is
10 that basically, this all comes down to a claim by
11 Montana that the storage rights in the Yellowstone
12 River Reservoir have been harmed or not been able
13 to get as much water as you're entitled to, just
14 post-1950 appropriators in Wyoming. Is that what
15 Montana's claiming, so can I just look at the
16 storage aspects of this, or is there also a direct
17 flow aspect; and if so -- that's Question No. 1.
18 I'll give you Question No. 2 so you can address it
19 all at the same time, though. Why does it matter
20 whether or not somebody's getting their direct
21 flow if they can simply turn to storage? So
22 doesn't it ultimately all come down to whether or
23 not there's enough storage there to meet
24 everybody's rights?

25 MR. WECHSLER: So the first question

1 is, it's not just a case that's about the storage.
2 The quantification of the damages in '01, '02,
3 '04, and '06 was a quantification of the damages
4 to the state line. And so that's why I explained
5 how the direct-flow rights work. And so what you
6 get in these years, and in other years as well,
7 but certainly in those four years, whatever is
8 the quantification of damages, is that there was a
9 shortage in Montana for pre-1950 rights the entire
10 season, beginning in the winter storage season
11 when we were unable to store at the reservoir, and
12 continuing until once storage releases began and
13 people are taking storage rights and there's no
14 further storage; in other words, when they
15 start -- the direct-flow rights run out, and so
16 they start taking contract water, there's no
17 longer any storage in the reservoir. At that
18 time, there's a shortage for the direct-flow
19 rights. In other words, there's a shortage either
20 for the reservoir at the beginning of the year,
21 and then when the reservoir starts releasing,
22 there's a shortage for the direct-flow rights, for
23 the pre-1950 direct-flow rights, because the T&Y
24 is not receiving sufficient water. Does that make
25 sense?

1 SPECIAL MASTER: So if I understand
2 what you're saying then, is that -- so you have a
3 flow which is streaming over the state line.
4 You're storing water during the winter months.
5 And one of Montana's claims is, is that because of
6 post-1950 appropriations or storage in Wyoming,
7 that the reservoir is not totally filling up?

8 MR. WECHSLER: Correct.

9 SPECIAL MASTER: Then in addition to
10 that, if you assume that the direct-flow rights
11 have come out of the amount of water which is
12 coming over the state line so, in fact, you can
13 actually sort of separate that from the amount of
14 stored water, that there's not enough coming over
15 later in the year from that direct flow to meet
16 the direct-flow rights in Montana. So your claim
17 is, that's a second injury to that set of pre-1950
18 rights that Montana enjoys under the compact; is
19 that correct?

20 MR. WECHSLER: That's correct. And so
21 then to address the second of your questions,
22 which I understood to be why does it matter if
23 those pre-1950 water rights can simply take
24 storage water, which it is true that most of those
25 pre-1950 rights do have a right to the reservoir,

1 it's necessary on the Tongue River in Montana for
2 that to be true. And the reason is, as the first
3 interim report indicates, and also as the Court
4 has essentially held, there are tiers or blocks of
5 water. And what Montana got as part of the V(A)
6 is block protection for all of its pre-1950 water
7 rights, not just the reservoir, which is a
8 pre-1950 water right, and not just its direct-flow
9 rights, but both. And so if you don't protect
10 both the -- or if you forced the pre-1950 water
11 rights to be taking water from the reservoir,
12 Montana would not be receiving all the water that
13 it received as of January, 1, 1950, which ends up
14 mattering. Some of those users may have to make
15 difficult decisions about how much storage they
16 have, when they'll actually be using water, and
17 how they'll apply that to crops. And so the only
18 way to keep Montana's rights whole is to ensure
19 that there's protection for all of its pre-1950
20 rights. SPECIAL MASTER: And
21 just to go back, and I realize that this gets into
22 the question also of exactly what Montana needs to
23 show. But is there any evidence in the record of
24 any Montana appropriator, pre-1950 appropriator,
25 who has to, at any point in time, stop utilizing

1 water or can't do as much as they would like to do
2 because they've run out of both direct flow and
3 storage?

4 MR. WECHSLER: You mean at some point
5 in the season they simply completely stop
6 irrigation?

7 SPECIAL MASTER: Well, not completely
8 stop, but they would do less than they would like
9 to.

10 MR. WECHSLER: I don't think that
11 there's evidence about that in the record. But
12 what I would say is, I really consider that to be
13 more of a question for damages. Now, what has
14 been -- what you have said are the elements of a
15 claim is that there is insufficient water entering
16 Montana to satisfy Montana's pre-1950 rights. And
17 on the other side of the ledger, you have Wyoming
18 allowing its post-1950 use to occur. And so what
19 you have is Wyoming overusing the water that
20 they're entitled to under Article V(A), and
21 Montana not receiving sufficient water. And so we
22 are able to show that, both with regards to the
23 use of the reservoir and the direct-flow rights,
24 so that we are not receiving our rights -- our
25 pre-1950 rights are not receiving the water to

1 which they're entitled.

2 SPECIAL MASTER: So two or three
3 additional questions then. So the first one is,
4 is the question of the difference between
5 liability and damages which comes up, I think, in
6 a variety of contexts. So I understand that this
7 phase is simply about liability, and then the next
8 phase is about remedies. And I also assume that
9 one of the reasons why Montana cares about the
10 liability issue is that they will be seeking --
11 assuming they can establish liability, they will
12 be seeking not only damages; but in addition to
13 that, prospective relief. And if there's not
14 liability, they don't get damages, and they don't
15 get prospective relief either. So I understand
16 the reason why liability would be important even
17 if you can't show damages.

18 But is it then your contention that for
19 liability, you don't need to show injury; that
20 injury is solely a question of damages and not
21 liability? That distinction between liability and
22 damages becomes difficult in this case, at least
23 for me.

24 MR. WECHSLER: And I think that the
25 Supreme Court has held that in a suit involving

1 either a decree, an equitable apportionment
2 decree, or a compact enforcement case, that the
3 question is, has the violating state violated the
4 compact, not whether or not there is an injury,
5 which is what I understand the amount of the
6 damages to be. And I agree with you that one of
7 the reasons we're interested in showing liability
8 is really for the prospective relief, which has
9 always been Montana's most pressing concern in
10 this case given the long history of the
11 disagreement between the states. And I'll quote
12 you the language which can be found in Montana's
13 reply on its summary judgment motion, and this is
14 at Page 13. And there the Court -- Wyoming
15 brought a suit against Colorado. This is for a
16 previous decree. And Colorado didn't dispute that
17 there was water used in excess of the
18 apportionment, but it argued: What's the problem,
19 Wyoming? You're not injured. There's no problem
20 here. And the Court said, "Colorado insists that
21 Wyoming has not been injured, but such a defense
22 is not admissible. After great consideration,
23 this Court fixed the amount of water from the
24 Laramie River and its tributaries to which
25 Colorado is entitled, and Colorado is bound by the

1 decree not to permit a greater withdrawal, and if
2 she does so, she violates the decree and is not
3 entitled to raise any question as to injuries to
4 Wyoming when the latter insists upon her
5 adjudicated rights. If nothing further was shown,
6 it would be our duty to grant the petition to
7 Wyoming and to adjudge Colorado in contempt for
8 violation of the decree." Now, that's a decree
9 case. The same has been applied in Nebraska vs.
10 Wyoming, which is a compact apportionment case,
11 where that allocation has also been set. And it's
12 really -- that is all that Montana has ever
13 claimed, is it wants its entitlement under Article
14 V(A), and that's why we have resisted the notion
15 that there must be injury shown to individual
16 water users.

17 SPECIAL MASTER: So the thing that I
18 think makes this case a little bit more difficult
19 is that unlike in the case of a decree where the
20 Supreme Court says you're entitled to X amount of
21 water, or in the case of a compact that explicitly
22 says you are entitled to X CFS or acre-feet of
23 water, this case is grounded on Article V which
24 provides that appropriative rights shall continue
25 to be enjoyed in accordance with the laws

1 governing the acquisition of this water under the
2 Doctrine of Appropriation, and I think there were
3 sort of two questions there. One is basically
4 what I think Mr. Kaste's argument is, which is in
5 these cases that actually show there has been a
6 violation of someone's appropriative right, you
7 need to go beyond simply that you didn't get a
8 certain quantity of water. You have to show that
9 you actually needed that particular water; that
10 you had a beneficial use for that particular
11 water. Which again gets me to the burden of proof
12 question, which I'm a little bit left hanging on
13 because I don't see any cases out there that
14 addresses that.

15 And I guess the other question is, you
16 know, it says shall continue to be enjoyed.
17 Again, it's a question of does "continue to be
18 enjoyed" mean that you get a certain amount of
19 water, and if you don't get that, then you
20 establish liability; or does "continued to be
21 enjoyed" mean that you have to show that you
22 actually needed water, didn't need it or enjoy it
23 as much. So there's those -- I think there's
24 those two different words or phrases that make
25 this a little more difficult than those Supreme

1 Court cases. The fact that this is all subject to
2 prior appropriation, and the fact that the
3 language is, those rights should continue to be
4 enjoyed.

5 MR. WECHSLER: Well, I would first say
6 that I agree that it is a little bit more
7 difficult than in a decree where you are given a
8 set amount of water, but I don't think that that
9 changes the underlying principle, and that is,
10 it's not necessary to show injury. I do recognize
11 that you have identified the elements of the claim
12 as Montana was not receiving the water to which it
13 was entitled to which its pre-'50 users needed at
14 a time when Wyoming was allowing its water users
15 to use post-'50 use. In other words, again,
16 Montana wasn't getting its share, and Wyoming was
17 overusing its share.

18 I will point out, there is not a pure
19 prior appropriation in the compact. What you have
20 is two states, Wyoming and Montana, and then it's
21 a little bit unusual because within each one of
22 those states, there's a whole number of
23 appropriators in both states, and so you have to
24 combine those things. And so when Wyoming turns
25 to very pure notions of the Prior Appropriation

1 Doctrine, I don't think that all of those are
2 directly applicable. And one way that you can see
3 that that is not directly applicable is, you can
4 say we know that there is not a priority as across
5 state lines. You know, Montana has plenty of
6 rights that are pre-1950 that are junior to other
7 pre-1950 rights in Wyoming, but those users get no
8 relief whatsoever. Instead, what you have here
9 is, you have two states with allocations allowed
10 to them which are defined by the prior
11 appropriation rights in each of the states.

12 But, I mean, all that is -- you know,
13 those are theoretical questions. I think when you
14 look at the -- Wyoming's argument is, we haven't
15 shown the need for water, and they have this sort
16 of notion about contemporary-use demand. And if
17 you prefer, I can go ahead and start addressing
18 that issue, which I think will get to the burdens.

19 SPECIAL MASTER: You know, why don't we
20 actually -- because I at least think I understand
21 the factual context of the entire case, and your
22 explanation has been helpful on that. Let me,
23 though, just raise one other questions which I
24 didn't raise with Wyoming, but in the back of my
25 mind it's been troubling me in terms of how this

1 all pieces together.

2 So if you look at the way in which the
3 compact was originally framed, the way in which
4 the Supreme Court has interpreted this is that
5 under Article V, you start out by taking that
6 through the pre-1950 appropriative rights, and
7 they're entitled to their amount of water. Let's
8 ignore for a moment the supplement rights only
9 because that further complicates things.

10 Within -- under Article V(B), you then get the
11 post-1950 appropriators, and that's divided up by
12 a percentage formula. And so -- and this is
13 probably a little bit more a question for Wyoming.
14 If, indeed, the way in which this entire compact
15 works is that you are sort of constantly looking
16 at not only what people's flow rights are at any
17 particular point in time but what their need is,
18 then how does Article V(B) ever work? Because it
19 would seem to suggest that under Article V(B),
20 you're constantly having to adjust the percentages
21 of a number which is constantly changing because
22 you're out there, and maybe one person doesn't
23 need all their water at a particular point, at
24 which point does that become Article V(B) water?

25 And furthermore, it makes it sound as

1 though the reading of the compact, is that the
2 Article V(A) water is a fixed amount of water, and
3 that then you can allocate everything else, and
4 that can vary back and forth over time. So I'm
5 just uncertain how Article V(A) operates in the
6 context of Article V(B) and what guidance that
7 provides on these particular questions.

8 MR. WECHSLER: And I'll do my best to
9 answer that. What I would say is I agree that
10 that's a better question for Wyoming because
11 Wyoming is pushing this sort of contemporaneous
12 demand by which they say you have to adjust the
13 demand based on whether someone's haying, whether
14 they're out of town, what they're doing on any
15 particular hour of the day. And I also agree that
16 that places tremendous burdens on both of the
17 states and the water users to be in communication
18 with people in Montana, and those people then in
19 communication with people in Wyoming, because you
20 have seven to 10 days to the top of the basin.
21 And so it would be necessary for someone to say,
22 well, you know what, on Sunday I'm not going to be
23 here. I'm going to be at my brother's football
24 game, and I'm not going to irrigating. That's
25 nine days in advance. So go ahead and tell the

1 Wyoming user up there that they can use water.
2 And that's the kind of administration that the
3 states were trying to avoid when they did that.

4 Now, as to the fact that there is some
5 adjustment between those two, I will -- I mean,
6 when we first brought this suit, it was Montana's
7 theory that really what had happened is, there was
8 a blocked allocation at the time of the compact in
9 1950, and that those uses can be -- could not be
10 changed; and therefore, under any set water supply
11 conditions there is set amount of water. And, of
12 course, that would be much easier to administer,
13 and we accept that you and the Court have adjusted
14 that, and so we're dealing with that as best we
15 can. That is one of the reasons that we think
16 that really the trigger-flow approach, which was
17 essentially used in Wyoming, is really the best
18 one.

19 And I'm a little bit puzzled by
20 Wyoming's resistance to that, and here's why. If
21 I understand what they're saying, essentially what
22 we have to be doing is making a call, when you
23 need it, which as I explained earlier, is
24 basically all the time. I think that the facts
25 very clearly show that there was either a

1 deficiency in the reservoir, or there was a
2 deficiency in the direct-flow rights at all times
3 in '01 and '02. And I also strongly resist the
4 notion that somehow Montana wasn't following the
5 Doctrine of Appropriation and was wasting water
6 somehow. Essentially, what they are asking is for
7 some sort of presumption that Montana was wasting
8 water until we show otherwise, when really there
9 is no evidence whatsoever that that was true. In
10 fact, the opposite is true. We had water
11 commissioners on the river. People were on stored
12 water, indicating that there was not sufficient
13 direct-flow water. There was less than 200 CFS at
14 the state line.

15 And then what's more, they seem to be
16 saying: Well, trigger flows involve also checking
17 to see that there's actually demand. Well, that
18 was done. I mean in '04, and '06, there were
19 letters sent to Wyoming. In '01 and '02 we
20 presented all the evidence on notification. And
21 the suggestion by Wyoming that, well, they just
22 told us we would somehow shut down post-'50 use,
23 that is incorrect. We told them. We identified
24 the fact that our pre-1950 rights were not being
25 satisfied, and we were ignored because of the

1 difference in the agreement, the difference in the
2 interpretation of Article V(A).

3 SPECIAL MASTER: So actually, and I
4 told you to go onto the next argument, and I still
5 have some factual questions that are going to be
6 helpful to me.

7 So first of all, I just want to verify
8 that there's not been any Article V(B) regulation
9 in -- actually anywhere in the Yellowstone River
10 system?

11 MR. WECHSLER: Correct.

12 SPECIAL MASTER: So is that basically
13 being ignored at the moment, or someday you'll
14 have to --

15 MR. WECHSLER: I hope that some day the
16 states will address Article V(B). The reality is
17 when they entered the compact, they recognized
18 that essentially, all of the rights were already
19 adjudicated; that it was almost a fully
20 appropriated stream. And that's why -- you know,
21 if you remember, the assumption was, well, there's
22 going to be additional storage, and really that
23 would have allowed Article V(B) to operate in
24 maybe a more logical fashion because then you
25 could be looking at storage on both sides of the

1 state line, and that would an amalgamated use.

2 But at this point, it's not -- Article
3 V(B) is not functioning. There have been efforts
4 during various times where Montana approached
5 Wyoming in an attempt to administer the compact,
6 and that would have included both V(A) and V(B),
7 but the states couldn't come to an agreement. And
8 from our perspective, we would have been rebuffed
9 at every turn.

10 But turning back to -- I didn't finish
11 why I found their triggerpoint -- the resistant to
12 the triggerpoint so surprising, is that -- so if
13 we have this need, you know, basically what
14 they're requiring Montana to do is to say, "as of
15 October 1 of every water year," is to say: Okay,
16 Wyoming, we're placing a call on the river, and
17 what that means for you is, you cannot store any
18 post-1950 rights in any of your post-compact
19 reservoirs. And then once we get to 45,000
20 acre-feet in the Tongue River Reservoir, we would
21 inform them and say: Okay, we're off of the call.
22 But as soon as the spring runoff began again, we
23 would then say: Wyoming, we're calling for water
24 again. We're not full and our pre-1950 rights are
25 not being satisfied. And what they would then

1 have to do is again shut off all post-compact
2 storage, and they'd also have to shut down all
3 post-'50 irrigation use.

4 And so having some sort of a
5 triggerpoint there really is of benefit to them
6 because what it allows to happen is, if a certain
7 flow is at the state line, then Wyoming is
8 entitled to be storing water, and we're not going
9 to -- there's no call placed on the river. But it
10 allows them more flexibility to deal with their
11 post-compact rights. Now, one of the things with
12 that post-compact storage, many of them are up in
13 the mountains and they're not even accessible
14 during the year, but Wyoming acknowledges that
15 essentially what you can do is, you can release
16 that stored water, the water that was stored out
17 of priority, down at a time once we realize that
18 the Tongue River Reservoir is not filled, then we
19 release the post-compact storage, and everybody's
20 happy. And really, that's all we asked for in
21 2006. And we informed them, for example, that the
22 reservoir had not filled, and that was the request
23 that was being made. But, of course, again,
24 because we couldn't agree on the interpretation of
25 it, it wasn't honored.

1 SPECIAL MASTER: So let me again just
2 ask a couple of factual questions. So the first
3 is, have you ever, in the case of the Tongue River
4 Reservoir, found it in a state where there just
5 isn't any water left to take out of it?

6 MR. WECHSLER: I think the answer is
7 no, but I don't know for sure.

8 SPECIAL MASTER: Okay. So again, I
9 guess I have the question of -- and I realize that
10 your point is that it meets their separate rights,
11 you don't need to show injury, we're simply
12 entitled to the water. But it would seem like on
13 a typical year, if you're an appropriator on the
14 Tongue River system north of the reservoir, you
15 started out with your direct-flow right, you use
16 that, then you turn to your storage right, and the
17 storage never runs out of water. So I'll just ask
18 you, why does anyone care?

19 MR. WECHSLER: Yeah. And I think that
20 part of the answer is, your question was, has the
21 reservoir ever run out. I think the answer is no.
22 But when there is less water in the reservoir than
23 a full supply, then the supply for each of the
24 contract users is lowered. And so you will see in
25 the affidavit of Mr. Muggley that he explains,

1 "One of the things that I do with my storage
2 rights is, I try and make sure that those last
3 over the full course of the year." And so what
4 that implies, each one of the water users is
5 making that decision on a regular basis. I have X
6 amount of water. If the reservoir is lower, then
7 there's less amount of water that I have available
8 for my acreage. And therefore, I'm going to be
9 making this decision as to when should I irrigate,
10 how much acreage can I actually plant, what crops
11 should I be growing. And so it does make a
12 difference to the State of Montana and to the
13 water users.

14 SPECIAL MASTER: So I'm actually
15 looking at Paragraph 8 of Mr. Muggley's
16 declaration, and that's where he talks about the
17 T&Y and the right to 5,280 acre-feet of stored
18 water, and then basically says at the bottom
19 paragraph, you manage the stored water so you can
20 spread that supply over the course of the
21 irrigation season. So your point is, basically,
22 it does matter --

23 MR. WECHSLER: Yes.

24 SPECIAL MASTER: -- how much direct
25 flow that T&Y receives, and how much stored water

1 they receive because once they run out of direct
2 flow, then they know they have a certain amount of
3 stored water. And presumably, if there's less
4 water stored in the reservoir in a particular
5 year, T&Y is entitled to less; is that correct?

6 MR. WECHSLER: Correct.

7 SPECIAL MASTER: Because, if I remember
8 correctly in the T&Y, it's all the rights are of
9 the same priority, and it's then prorated in a
10 period of shortage?

11 MR. WECHSLER: Correct.

12 SPECIAL MASTER: So then Mr. Muggley,
13 on behalf of T&Y, has to think ahead as to how
14 much water they're actually permitted to use?

15 MR. WECHSLER: Yes, that's correct.
16 And that's also true for every one of the other 76
17 pre-1950 users in Montana as well. They're making
18 the same kind of calculation based on the ability
19 of both direct-flow water and of water in the
20 river.

21 SPECIAL MASTER: Okay.

22 MR. WECHSLER: So turning to the
23 contemporary-use demand question, now, again, it
24 seems like it's Wyoming's suggestion that we ought
25 to presume that Montana is not needing its water

1 or using its water, and I think that that's
2 contrary to the Doctrine of Appropriation in a
3 number of ways. The rights in Montana are
4 adjudicated rights. In fact, the rights are
5 ongoing. It's not -- the adjudication is not
6 final. There isn't a decree for the 1914 rights,
7 which includes the Jay Nance and the T&Y, which is
8 also part of the ongoing adjudication, but there
9 is a -- there's a partial initial decree, and
10 there has been a claim on all of those rights.
11 And so to Montana, that means that those treated
12 as adjudicated rights.

13 Now, in prior appropriation states --
14 and this is true in both Wyoming and in Montana --
15 once you have done an adjudication, that's a
16 rebuttable presumed amount of water that's
17 necessary for those water users. And you can see
18 that that is a rebuttable presumption. And again,
19 in the Montana reply on its motion, we cite a case
20 called Parshall vs. Cowper, and I think that that
21 case shows that there the Wyoming state engineer
22 was challenging the amount of water that a water
23 right was entitled to, and the holding, or part of
24 the holding of the case was, well, for a Wyoming
25 state engineer, just like everybody else, the

1 adjudicated right is an amount that is presumed to
2 be correct. Now, the state engineer is free to
3 attempt to rebut that presumption, but that's
4 their burden that they share. And that's true --
5 I think we cite a case for Wyoming as well. We
6 cite one for New Mexico. I think that's generally
7 true.

8 It's also true that when the states go
9 to do an impairment analysis, for example, on
10 change proceeding, there's a presumption that all
11 of the water is used in order to figure out what
12 the impairment is. And, of course, we know that
13 under the Doctrine of Appropriation, one of the
14 cardinal aspects of it is, use it or lose it. If
15 you don't, it's abandoned. And so in some ways
16 it's kind of surprising that Wyoming is arguing
17 that: Hey, we should presume, Court, that Montana
18 is not using its water rights when, in fact, they
19 don't do that themselves. And I'll point you to
20 the Fritz report, and he has a somewhat lengthy
21 discussion on regulation and how that works, and
22 he talks about how water is available and people
23 are taking it. And he has this sentence there on
24 Page 13, he's talking about these recording
25 gauges, what we would call a trigger-flow level.

1 He says, "These locations are generally equipped
2 with recording gauges, and when the flow at these
3 locations exceeds a certain amount" -- and this is
4 the part I'm focused on -- "it is assumed that all
5 active water rights are being satisfied, and no
6 one is likely to call for regulation." And I
7 think that with those principles that I was
8 talking about, and also this discussion here by
9 Mr. Fritz, and Mr. Book reaches the same
10 conclusion based on the dates of regulation, goes
11 not only to the water use in Montana, it also goes
12 to the water use in Wyoming. One of the questions
13 that you had sent us had to do with, well, how do
14 we know that, for example, in that particular
15 argument we were talking about Big Goose Creek.
16 Now, there's plenty of other evidence of water
17 used in '04 and '06, and I don't think that's
18 contested, post-'50s use in Wyoming.

19 But the argument that Wyoming and
20 Montana was addressing in that particular section
21 had to do timing. Wyoming was arguing -- they
22 weren't arguing that we weren't using post-'50
23 use. They were just saying, well, when -- you
24 can't correlate the timing. And here you see Mr.
25 Fritz, and you have all these principles of the

1 Prior Appropriation Doctrine. You also have Mr.
2 Davis addressing this issue in Montana that
3 water is essentially -- the presumption is until
4 you're regulated, you're using the maximum value
5 of your water to the full extent that's been
6 adjudicated or decreed in your water rights.

7 Now, they point in their argument -- in
8 their oral argument, they pointed to Cook,
9 Quigley, and I think I missed the other one.
10 Those cases again are addressed in the reply on
11 Montana's summary judgment, and those are
12 addressed, I think, at Pages 10 and 11. I don't
13 think those cases are to the contrary. Those
14 don't stand for the notion that there should be
15 contemporaneous regulation. What they stand for
16 is simply the notion that you have -- a water user
17 is allowed -- there's a presumption that a water
18 user is allowed the full extent of their water
19 rights unless there's evidence to the contrary,
20 and then the actual beneficial use actually
21 applies. And in those cases, it's the -- the
22 burden on the one claiming otherwise to establish
23 that.

24 And I also -- I have some -- Mr. Kaste
25 was referencing this Cook case, and I didn't catch

1 exactly the portion that he was quoting. But that
2 case was overruled by Grimsley vs. The Estate of
3 Spencer. And I think in their motion, they put a
4 parenthetical that says it's on other grounds.
5 I'm not so sure that it's on other grounds. That
6 case really had to do with -- it held that
7 contrary to Cook, to obtain a prescriptive right
8 to use, the junior user had to show continuous,
9 uninterrupted, and hostile use. And so it didn't
10 really stand for the proposition that, hey, we
11 regulate water rights in Montana based on this
12 actually contemporaneous-use meaning. You know,
13 we adjust for haying, as really the major argument
14 that they've raised. And, in fact, I can't think
15 of a single prior appropriations state that really
16 does, unless it's a very complex system, say, like
17 a water master in electric -- the ability for a
18 control system to deal with that. And we know
19 that Wyoming doesn't do that either, as we can see
20 in the Fritz report, and you can also see from the
21 deposition that we cite of one of their water
22 commissioners, Mr. Schroeder.

23 SPECIAL MASTER: Let me just interrupt
24 for a second. So in Wyoming's reply brief on
25 their motion for summary judgment, they basically

1 dispute that, in fact, Wyoming uses a -- as it
2 turns out, it was a new term for me, trigger
3 problem. And they include the affidavit of
4 Mr. Knapp, which basically says that we know that
5 there is an actual demand available for
6 right-to-flow water and on the various said dates
7 and all times after the streams go into regulation
8 through constant communications with our
9 appropriators and personal observations.

10 So is it your contention that that's
11 exactly what Montana does also, or that actually
12 that's not what Wyoming does?

13 MR. WECHSLER: Well, I think it's a
14 little bit of both. From what I understand them
15 to be saying is, well, we confirm somehow, but
16 they don't adjust for haying or other practices
17 like that, which is a main component of what they
18 are suggesting the contemporaneous-use demand is.
19 And you can see that we've quoted the deposition
20 of Mr. Schroeder where he's saying, you know:

21 "Q After the river goes into
22 regulation, does it kind of stay in regulation the
23 remainder of the year?

24 A Yes.

25 Q Do all of the irrigators cut hay

1 at the same time?

2 A No.

3 Q Do they all inform you when they
4 are cutting hay?

5 A No, they don't.

6 Q Have you ever taken a river or a
7 headgate out of regulation because of haying?

8 A No."

9 So the most Wyoming accomplishes with
10 that little discussion is to create an issue of
11 material fact. But I don't think that -- to
12 answer your question as to what Montana does, yes,
13 Montana does that exact same thing. I mean, you
14 have the water commissioners. They're there on a
15 daily basis checking in with the water users and
16 making sure that that's happening. And, in fact,
17 if you extend that up to a larger -- you know, to
18 this case, again, that's exactly what Montana did.
19 If you look at the 2004 and 2006 call letters
20 which are attached to Mr. Stults' declaration,
21 what Montana did is, we said, well, we're not
22 getting sufficient water. We documented that with
23 affidavits from Mr. Hayes and Mr. Muggley included
24 in a letter to Wyoming saying we are not receiving
25 sufficient water, give us the evidentiary proof,

1 and away we went. Although I think that goes
2 beyond what the Doctrine of Appropriation
3 requires. It was done simply because there had
4 been this dispute between the two states under the
5 compact agreement.

6 SPECIAL MASTER: And the citation for
7 the quotation that you gave a moment ago was from?

8 MR. WECHSLER: Mr. Schroeder. And
9 that's on Page 64 of our response brief, and it's
10 at Pages 137 to 138 of Mr. Schroeder's deposition.

11 So turning back to the burning question
12 that -- but as I said, the burden is really on the
13 one challenging, saying there is not sufficient
14 water even necessary. And I also would point
15 to -- I think this is also consistent with your
16 rulings on the notice requirement for damages,
17 which I think --

18 SPECIAL MASTER: When you go over there
19 to get papers, people can't hear.

20 MR. WECHSLER: People can't hear and
21 are raising their hands.

22 SPECIAL MASTER: They're not raising
23 their hands. I think they're probably hungry for
24 lunch, but it will be another 15 minutes before we
25 break.

1 MR. KASTE: Yeah, I was going to say,
2 any time for break.

3 MR. WECHSLER: I hope to be done in 15
4 minutes.

5 SPECIAL MASTER: My hope is, is that
6 actually we'll be able to finish your argument,
7 and then we can break. And, Mr. Draper, you can
8 start immediately after lunch. Does that make
9 sense to you?

10 MR. DRAPER: Okay.

11 MR. WECHSLER: I was referring to your
12 ruling on the renewed summary judgment motion on
13 the notification for damages. And in that order
14 at Page 11, you indicated that Montana was
15 generally under an obligation to let Wyoming know
16 that it was receiving insufficient water, which we
17 did. And that to do that, Montana did not need to
18 determine the reason for the water insufficiency.
19 Instead, once notice was provided, the burden
20 would have been on Wyoming to determine whether
21 the insufficiency was a result of post-January 1,
22 1950 uses in Wyoming, in violation of Article V of
23 the compact. And so I think that's consistent
24 with that whole notion.

25 Other problems which we did list, again

1 working within the contemporary-user demand
2 motion, I think we've listed in our reply brief.
3 It does include the burdens and stuff we talked
4 about, but it's inconsistent with the notion that
5 the states had when we entered the compact in
6 order to reshape administration and no future
7 conflicts. And then I think I've talked a
8 little bit about even if you are basing it on
9 actual demand, that that argument, Mr. Kaste
10 conceded, really only goes to the direct-flow
11 issue, and I think that that is something that we
12 have shown. I want to make sure that I say, I
13 think they are mischaracterizing what it is that
14 Mr. Book has done. Mr. Book has gone, and he's
15 reviewed the pre-1950 acreage; he's compared that
16 to the current adjudication; and he has compared
17 that to the water rights in Montana; he's
18 evaluated irrigation that occurred in years where
19 there was more water -- I think it's '05, '01, and
20 maybe 2011 -- and determined that this acreage was
21 actually being irrigated. And then again, you
22 have this evidence of notice, you have the water
23 commissioners in Montana, and there's no evidence
24 whatsoever that I'm aware of that there was any
25 post-1950 user in Montana using direct flow in any

1 of the years that Montana quantified damages.

2 Turning briefly to the -- well, let me
3 turn to the 1992 agreement, and I know that you
4 have a number of questions about that. And I
5 think a little bit of context as to the agreement
6 is helpful. What the State of Montana and the
7 Northern Cheyenne Tribe were looking for there is,
8 what was the firm deal with the reservoir going to
9 be once it was rehabilitated. And the reason was,
10 they wanted to know would this water be available
11 to satisfy their right, and Montana wanted to make
12 sure that its rights were not going to be damaged.
13 And so they developed two models. They had an
14 allocation model, and they had a reservoir
15 operation model. And those are spelled out very
16 clearly in the documentation that Mr. Kaste
17 referred to. You can see it -- again, this is --
18 attached to Mr. Fassett's affidavit is the model
19 documentation. And in that, they talk about on
20 Page 6, a discussion for two basic models, the
21 water application model, and the reservoir
22 operations model. And so that was the purpose.
23 That was what the states were attempting to do.
24 Now, they understood there were some thorny
25 questions there. There were questions about --

1 that hadn't been answered. Wyoming and Montana
2 were at each other's throats about what the
3 compact actually did with regard to Article V(A).
4 And so you see in the model documentation, it
5 carries forward to the Northern Cheyenne Tribe
6 Compact, it's in the Ratification Act from
7 Congress, and it's also in the 1992 agreement
8 itself saying nothing here is intended to alter
9 the Yellowstone River Compact. In other words,
10 it's not meant to change the allocations between
11 the two. But for the purposes of the allocation
12 model, not the reservoir operations model, what
13 they did is they said: Okay, we know that in
14 order to figure out how much water is going to be
15 available, we need to make some assumptions, and
16 we should make those conservative assumptions --
17 you can see that in Ms. Barclay-Fagg's
18 declaration -- in order to make sure that that
19 water is going to be available in every single
20 year. And so one of the assumptions that they
21 made was: Well, we're going to treat water rights
22 between 1950 and 1980 as supplemental rights.
23 Now, the reason they weren't treated as, say,
24 Article V(A) rights was, if you remember at that
25 time and up until this case, Wyoming's position

1 was that Article V(A) does nothing. You get no
2 protection from that. So what the agreement
3 between the states was: Let's treat this as
4 supplemental right. And we set out in our brief
5 that that's clear throughout the model of
6 documentation, and in fact, that's the argument
7 that they raised in their brief.

8 And then they would -- then going
9 forward to the Northern Cheyenne Tribe Compact,
10 what they did is they -- the allocation model
11 became an input into the reservoir operations
12 model, and it had nothing -- those assumptions are
13 not carried forward, but rather, it's basically
14 the numbers, what's the historic flows that you
15 can count on. And then the reservoir operations
16 model figures out how that's going impact the
17 water users. And then what happens is, the
18 Northern Cheyenne Tribe Compact is entered. And
19 in that compact -- and we very much agreed with
20 the brief of the Northern Cheyenne Tribe Compact
21 and what that does. It essentially says, okay,
22 the Tribe has these water rights, and the water
23 right of the reservoir storage is bounded based on
24 the river operations model in that their shortages
25 are defined by reference to that model, and excess

1 water is defined by reference to that model. And
2 then the parties agreed, well, we're not going to
3 change this without having this consent. And
4 really, the reason was is, any changes to those
5 are going to impact the amount of water that the
6 Tribe was getting. You know, there was never any
7 contemplation about the amounts between Wyoming
8 and Montana. It was really about when there's not
9 going to be excess water to the Tribe, or when is
10 there going to be shortages.

11 You asked a question is the model
12 operational? The answer is no. Nobody operates
13 the model. I tried to find someone in Montana,
14 and they do not operate the model. I also checked
15 with the Northern Cheyenne Tribe, and they also do
16 not operate it. It's simply a reference to those
17 historic flows as was developed at that time as
18 part of the negotiation. And so when you go and
19 you look at, well, what is it that -- in 1992 that
20 the parties did. Well, I think it is clear that
21 Wyoming was hoping to do more. I mean, you see
22 the June 12, 1991, I think it was, letter from
23 Wyoming in which they're writing to Ms. Barclay
24 then, now Ms. Barclay-Fagg. And what they were
25 saying is, well, what we want to do is, we want to

1 protect all of our rights from any changes.
2 Nothing's going to be altered. That's not what
3 they did. They also sought to put that into the
4 Northern Cheyenne Compact Ratification Act, and
5 again, that was not done. Instead, what you get
6 is, I think as you pointed out, an agreement only
7 really explicitly not to change the model. And by
8 reference to the model, I think Mr. Kaste
9 recognizes that if you have to look at the
10 Northern Cheyenne Tribe Compact to figure out what
11 that is, and as you point out, the Northern
12 Cheyenne Tribe Compact very clearly says it is the
13 reservoir operations model.

14 But turning to the language of the
15 agreement, then you get the agreement not to
16 change the model you also get then Paragraph 4 of
17 the agreement which says, well, the parties are
18 affirming their intent that use of the Tongue
19 River model incorporated into the Northern
20 Cheyenne Compact and Wyoming's assent to the use
21 of that model shall not be deemed an admission by
22 either party as to the correct interpretation of
23 the Yellowstone River Compact.

24 Now, Mr. Kaste raises the question of
25 consideration. What did the two states get out of

1 this agreement. And the suggestion all along has
2 been, well, what Montana got out of that was,
3 Wyoming didn't oppose the Ratification Act. I
4 don't see that referenced anywhere in the
5 agreement whatsoever. I mean, there's no
6 agreement by Wyoming not to do that. But you
7 asked my -- what I believe that's based on those
8 two things, both of them got almost the same
9 thing. I mean, that was, what they agreed -- this
10 Northern Cheyenne Tribe Compact, we have these
11 differences of opinion, and we're going to agree
12 that this isn't going to impact them. We're
13 preserving our arguments about the allocation
14 under the Yellowstone River Compact.

15 I also think that what you've got, when
16 you look at this, there's no change to the model.
17 As I said, the total extent of the Tribal rights
18 is defined by shortages and excesses. Now, if you
19 were to go and change that, in other words, let's
20 say you incorporated in the years since 1992 up
21 until the present, well, we know those years
22 included many dry years. If you then incorporate
23 that into the model to determine -- you're really
24 impacting when, what flows, and what reservoir
25 levels would trigger a shortage or what level

1 would trigger an excess; and thereby, you're
2 approving in some ways altering the total amount
3 of water that the Tribe might be able to take and
4 how that water is rearranged.

5 And so one thing that Wyoming did get
6 out of that was some confidence that, okay, what's
7 set out in the Northern Cheyenne Tribe Compact,
8 that has some -- and we're not going to be able to
9 change that with Montana unless we give the
10 agreement.

11 SPECIAL MASTER: So I think this could
12 be ultimately relevant to the interpretation of
13 the 1992 agreement. What I'm still puzzling over
14 is not only the language in the 1992 agreement,
15 but what Wyoming actually thought they were
16 getting out of the 1992 agreement. So again, if I
17 actually read the agreement itself, all it says is
18 that the State of Montana will not consent to any
19 change, amendment, or modification of the Tongue
20 River water model. And on the face of it, it
21 doesn't say, hey, we're not going to change any of
22 the assumptions that are used. It's actually
23 talking about the model. But if, in fact, the
24 only thing that the model does is affect how much
25 water the Northern Cheyenne Tribe gets versus

1 Montana gets, why would Wyoming even care about
2 that part of it? Isn't the only thing that
3 Wyoming people should care about is the
4 assumptions behind the model?

5 MR. WECHSLER: If you can change the
6 compact by changing the model, then some of that
7 could have been changed. There could have been
8 different assumptions built into the operation
9 model. And also if, for example, the Tribe -- and
10 we know that the Yellowstone River Compact says
11 that nothing in this compact is going to adversely
12 affect the Tribal rights. And so the more water
13 that the Tribe is entitled to under this compact,
14 it could potentially impact Wyoming because the
15 Yellowstone River Compact is not impacted by
16 whatever the Tribal rights are.

17 And so then when you look to the
18 Northern Cheyenne Tribe Compact, the amount of
19 water that they get is impacted by -- whether by
20 reference to the model. So if there's a shortage,
21 in other words, there's not the amount of water
22 entering the reservoir that was part of the
23 assumption that led to that, then they have to
24 share that shortage, and there's some things that
25 are identified. If there's excess water, in other

1 words, there's a greater flow that's entering into
2 the reservoir, then they get an additional amount
3 of water, and that's part of their compact right.
4 And so I can imagine a scenario where Wyoming
5 would be worried that maybe that excess water goes
6 then to additional rights, and that that will
7 impact Wyoming.

8 But I really think ultimately what both
9 states were concerned about really is found in
10 Article 4 -- or Paragraph 4, and that's when you
11 also see in the Ratification Act which Wyoming has
12 some input to, and I think it's important to look
13 and see what did Montana get out of that, out of
14 this agreement. Although it doesn't say that
15 Wyoming agrees not to challenge the Ratification
16 Act. If we've been assuming that that was true,
17 that doesn't mean that the ratification wouldn't
18 pass. And so Montana wasn't really getting
19 anything out of this agreement, other than I think
20 Paragraph 4, which essentially was an agreement
21 that everybody is going to be able to assert their
22 rights under the Yellowstone River Compact.

23 MR. KASTE: Your Honor, can I ask?

24 SPECIAL MASTER: Mr. Kaste, normally, I
25 would not --

1 MR. KASTE: I apologize, and I beg the
2 Court's indulgence and Mr. Wechsler's in
3 particular, but I cannot make it any longer.

4 SPECIAL MASTER: Okay.

5 MR. KASTE: I'm absolutely dying, and I
6 would just appreciate just a couple-minute break.
7 And I apologize to everyone. But I can't hear a
8 word Jeff's saying at the moment.

9 SPECIAL MASTER: Why don't we take like
10 a two-minute break. And, Mr. Wechsler, if you
11 want to take advantage of it by conferring with
12 your colleagues, you're welcome to do that during
13 that period.

14 MR. WECHSLER: Thank you.

15 (Recess from 12:55 p.m. to 12:59 p.m.)

16 SPECIAL MASTER: Okay. Whenever we're
17 ready. Mr. Wechsler, I know you might want to say
18 more now about the 1992 agreement, but I also want
19 to ask a very specific question, which is assuming
20 that I interpreted the 1992 agreement to provide
21 that you cannot change the assumptions, and then
22 everything Montana does in the watershed, and they
23 have to abide by the assumptions that were made in
24 connection with the model, would you argue that
25 that was an agreement that the governors could not

1 enter into on their own? Or is it Montana's
2 position, you know, you don't want to touch the
3 question of the validity of the agreement, but
4 you're just arguing now the interpretation?

5 MR. WECHSLER: No. Making the
6 assumption that you have, and that essentially is
7 Wyoming's argument, that the agreement was not to
8 change the -- basically, to treat all water prior
9 to 1980 as not being palatable, I still think that
10 there's two reasons that that wouldn't result in
11 summary judgment here. The first is that, as you
12 suggest, no, the governors would not be able to
13 enter into that agreement. I think it's very
14 clear black letter law -- you asked Mr. Kaste some
15 questions about that -- that you can't change the
16 allocations between the states in the Yellowstone
17 River Compact. And our claims here are basically
18 that they were using pre-1950 rights -- I'm sorry,
19 post-1950 rights at a time we needed pre-'50
20 water. There's an allocation set in the
21 Yellowstone River Compact, and that allocation has
22 been confirmed by the Court. And so anything
23 that's going to alter that allocation, and if you
24 make the assumptions you're suggesting, that would
25 change the allocation. That's the very reason

1 that Wyoming is raising this. They're saying
2 don't worry about all these claims that they're
3 making under the Yellowstone River Compact because
4 the 1992 agreement changes that from 1950 water to
5 1980 water. So then you should be looking at 1980
6 and not 1950. And that fundamentally changes --
7 that's not a supplement to or a -- so it's an
8 actual modification of the most fundamental part
9 of the Yellowstone River Compact.

10 And now I said that there were two
11 reasons why I think that summary judgment still
12 would not be warranted. The second reason is, as
13 I explained, what the states agreed to was to
14 treat -- or making the assumption that they can do
15 that, and making the assumption that you
16 interpreted essentially the way Wyoming does, when
17 you look at the model of documentation, what those
18 assumptions are, is that water from 1950 to 1980
19 are supplemental rights. But we know that
20 supplemental rights come under Article V(B),
21 Clause 1. We have no Article V(B) claims. That
22 has been ruled by you, and we have not attempted
23 to amend our complaint. As I said, there's
24 reasons why the states didn't treat this as
25 Article V(A), and that's essentially what Wyoming

1 felt, that Article V(A) didn't have any impact.

2 But in order for -- even if you assume
3 everything that you're suggesting, in order for
4 that to have any impact on Montana's claims, those
5 have to be Article V(A) rights, which is our only
6 claim. And so I don't see how the 1992 agreement
7 has any relevance to this case.

8 Two other things that I will mention
9 is, unless you have other questions about the 1992
10 agreement, is Mr. Kaste suggests, well, even if
11 you -- let's say you get rid of the -- you don't
12 accept Wyoming's argument on the 1992 agreement.
13 His argument then is, well, we still win because
14 then you don't fill the reservoir -- or you do
15 fill the reservoir, rather, and there was no harm
16 to Montana. That is not what our experts are
17 saying. And I would point to you specifically to
18 Mr. Aycok. He is not saying that that won't
19 happen. I also think that what you end up with is
20 some clear disputes over material fact. You get
21 this dispute over whether or not the reservoir is
22 actually being filled. I think there might be
23 something in Mr. Book's -- towards the end of the
24 expert report as well, and I would refer you to
25 that.

1 But to turn back to the disputes over
2 material fact, you get a dispute over whether or
3 not the reservoir was filled at that time; you get
4 a dispute over the priority date; and, you know,
5 that they would be claiming, well -- that's a
6 pre-19 -- they essentially would be arguing that
7 the Northern Cheyenne Tribe Compact -- the
8 Northern Cheyenne Tribe right is a pre-'50 right.

9 And then you'd have a dispute over
10 material fact regarding the bypass flows and what
11 the appropriate level of those are. And so all
12 that needs to be resolved at trial.

13 SPECIAL MASTER: So if I can just --
14 and Mr. Kaste can explain when he gets up later,
15 just so I can give him an opportunity to respond.
16 And I'm just guessing at this, but I assume one of
17 the reasons why Mr. Kaste says if you were back to
18 the old reservoir size, so you didn't need that
19 10,000 acre-feet in addition, why at that point
20 your one worry is, is that all the numbers that
21 Mr. Book lists of the impact on the reservoir on
22 post-1950 appropriations in Montana are less than
23 10,000 acre-feet; and therefore, you wouldn't have
24 to worry.

25 MR. WECHSLER: Yeah. One of the

1 opinions that Mr. Hinckley had in his expert
2 report -- and I recognize you don't have his full
3 expert report before you. I think there's
4 portions that were attached. I don't think the
5 whole thing -- so apparently I'm wrong. Mr. Kaste
6 tells me the whole thing was. So one of
7 Mr. Hinckley's opinions was, well, Mr. Book should
8 have considered the timing of storage in his
9 analysis that he did in his initial report. And
10 when Montana saw that, we reviewed it and said,
11 you know what, that actually has some merit to it.

12 And so what you see in Mr. Aycock's
13 report is an attempt to take the timing of storage
14 into account. And so he shows both the timing of
15 post-'50 storage in Wyoming; he also shows the --
16 how that impacts the Tongue River Reservoir, given
17 that, as I explained, Montana fills the Tongue
18 River Reservoir up to 45,000 acre-feet in the
19 winter, but the bulk of the storage really gets
20 filled in the spring runoff period, which is March
21 to, say, June or July. So he takes that into
22 account and explains how that timing would impact
23 Montana's reservoir.

24 SPECIAL MASTER: So actually, maybe
25 this will be something that would be easiest for

1 both sides to address because it gets to factual
2 record, and it could be relevant, is if both sides
3 could just give me -- again, I'm not asking for
4 very much. I'm asking primarily for the citations
5 in the record. But on this question of -- as I
6 understand what you just said a moment ago, is
7 that even if Wyoming won on the 1992 -- well, even
8 if I rule against Wyoming on the 1992 agreement;
9 and furthermore, that Wyoming is correct that
10 under those circumstances you guys will lose the
11 10,000 acre-feet additional storage in the
12 reservoir because the only way that gets counted
13 as a pre-1950 appropriations is because of the
14 1992 agreement, I understand your contention is
15 that there is still evidence in the record that
16 would suggest, or at least raise a triable fact as
17 to whether or not the reservoir would have filled
18 during the years at issue; is that correct?

19 MR. WECHSLER: Yes, that's correct.

20 SPECIAL MASTER: If both sides could
21 just, as I say, submit something very brief that
22 just explains, in your case, why you think that's
23 still a triable fact; and in Wyoming's case, why
24 they think that basically resolves the case as a
25 factual issue. Does that make sense?

1 So again, just to be clear, just
2 because I can see a potential where this could be
3 relevant and, therefore, would be useful is, you
4 know, Wyoming's argument is, okay, if the 1992
5 agreement is wiped off the books, then at that
6 point you still -- Montana still loses because
7 they have 10,000 acre-feet less storage than they
8 do now that they can count as a pre-1950 storage
9 right.

10 And so what I'm curious for on both
11 sides is, what then in the record in the case of
12 Montana would show there's a triable fact that, in
13 fact, you still wouldn't have been able to fill
14 the reservoir in some of the years at issue; and
15 in Wyoming's case, it resolves their case because
16 Montana would have been able to fill the reservoir
17 in either of those various years

18 MR. WECHSLER: And I will do that. And
19 I will explain that part of that is, there is one
20 triable fact, and that is, what's the proper level
21 of winter bypass flows. And so when Mr. Kaste is
22 talking about those assumptions that Mr. Hinckley
23 is making, he's talking about 50 CFS and what
24 impact that would have, or 75 CFS. Historically,
25 that's not what occurred, and there are a number

1 of factual reasons why the appropriate bypass is
2 really some flexibility between 75 and 175. But I
3 think that Mr. Aycock's report shows that even if
4 you assumed it was 75, there are years that it
5 still would not have filled. So We will comply
6 with that.

7 SPECIAL MASTER: Okay. And let me just
8 ask on that particular point. So as I understand
9 what Mr. Kaste and Wyoming is arguing with respect
10 to the winter flows, it's that only a small amount
11 of those flows is actually being beneficially used
12 for consumptive purposes, and that Montana has
13 agreed to fill whatever reservoirs they want to on
14 their side of the border and operate them in any
15 way they want to. But if you're going to build
16 something and operate it so you're letting that
17 water flow through, then it's Wyoming's call that
18 you need to count any of that water that is
19 flowing through, basically forcing an amount of
20 water that Wyoming can go to. And so what's your
21 response to that?

22 MR. WECHSLER: My response is that the
23 Doctrine of Appropriation is not so rigid as
24 Wyoming suggests. When you have stored water, you
25 have to be able to operate the reservoir in a

1 manner that is a safe and fair -- not fair -- that
2 doesn't jeopardize both the reservoir itself and
3 other water users. And that water -- you can see
4 this in the expert reports, both the original and
5 the rebuttal reports of Mr. Smith and also in
6 Mr. Aycok, who explained the winter bypass rules,
7 that what you get in Montana is, that water is
8 used both for stock purposes; it's also used for
9 deicing purposes on the river, there's safety
10 reasons as far as the reservoir goes. And so you
11 also look at the historic flows which, in Montana,
12 creates what the actual water right is. And so
13 the water right for the Tongue River Reservoir
14 includes these bypass flows of -- I think really
15 historically, you're looking pre-1950 up to 200
16 CFS or more.

17 I think in that explanation, Mr. Kaste
18 was suggesting that the Court held that this
19 compact only deals with consumptive usage. I
20 thought that the Court said just the opposite.
21 What the Court held on that -- on Montana's
22 exception was that so as long as Wyoming was not
23 changing the amount that they diverted in 1950,
24 that they could consume more of that water. Our
25 argument was, well, you know, they can't go from

1 flood to sprinkler because what that does is, it
2 consumes more of the water; and, therefore,
3 there's less available to Montana, and the Court
4 said that's not correct. They're beneficially
5 using the water because they're diverting it, and
6 the Doctrine of Appropriation allows them to
7 change their method of irrigation even if that
8 means more consumptive use.

9 SPECIAL MASTER: Can I just ask a
10 couple of other questions and jump around, and
11 then I'm going to ask -- just embarrass everyone
12 sitting down and they're trying to get to lunch,
13 but maybe we can take a break. And when we come
14 back from the break, and if you have one two
15 additional points, that would be fine too.

16 The first one is, is Wyoming points out
17 the major years for which you have presented
18 expert testimony are 2001, 2002, 2004, and 2006.
19 So are the other years that are still remaining
20 under my ruling on Wyoming's motion for partial
21 summary judgment, are you still litigating those
22 as a matter of liability?

23 MR. WECHSLER: Well, we are. And let
24 me give a little bit of background. Those years,
25 '01, '02, '04, '06, those are the years that we

1 quantified the damages. And we tried to be
2 conservative in doing that on the quantification
3 that we did in selecting those years, again, in
4 part, because our most important concern is
5 getting prospective relief. And so we understand
6 your ruling on the notification requirements to
7 be, as it says in the title, Notification For
8 Purposes of Damages.

9 We also, in those other years, 1961 and
10 those other years, we think that the record shows
11 that in Montana there was insufficient water to
12 satisfy its pre-'50 rights. And you can see
13 that -- I know in your question you sort of
14 exclude the Book report, but I don't think you
15 can, for purposes of summary judgment, exclude
16 part of the evidence. But even assuming you do
17 that, I think what you can look at is the flow
18 levels at the state line, and you have the
19 evidence from Mr. Hayes saying, well, it takes 200
20 CFS to satisfy the T&Y. That's the second oldest
21 right on the river. And so you can see that both
22 the T&Y and all of the other 75 pre-'50 rights in
23 Montana aren't receiving water -- are also not
24 getting water. And then on Montana -- the Wyoming
25 side of the ledger, we know that the main stem on

1 the Tongue River has never been regulated. We can
2 also see the dates of the post-'50 storage. And
3 so I think that shows post-'50 use.

4 But to give you some of the background
5 as to why that's important to us, we're not
6 seeking additional relief for those claims. But
7 we do think that those many years where we think
8 it shows that the condition of the river in
9 Montana really is one of shortage. We are
10 constantly not able to satisfy our rights. And so
11 all of those years, and then we get into the
12 beginning of the '70s, the '80s, and '90s, there
13 were all these efforts trying to get Montana's
14 share of water, and so all of that evidence really
15 goes to whether or not the Court needs to
16 interject in order to make sure that this doesn't
17 happen again. And I know that Mr. Kaste said,
18 well, we already won. But the fact is, we don't
19 have a method for administering the compact.
20 We're still sort of arguing about these things.
21 And if it were such a small amount of water, as he
22 suggests, it seems like it ought to be easy for
23 them to sit down and say to the Yellowstone River
24 Compact Commission or something to work out an
25 administrative process that they can undertake

1 to -- you know, so far, we're still litigating
2 this matter.

3 And so with the evidence of those
4 additional years and those additional claims, I
5 really think it goes to prospective relief and the
6 need for that.

7 SPECIAL MASTER: Okay. So just so I
8 understand what you've just said, the first thing
9 is that I did have a parenthetical that include
10 the Book report because I knew that Book report
11 actually does address the issues, so I wanted to
12 use the Book report. But first, just to clarify,
13 in terms of the expert testimony, none of the
14 experts' testimony goes to those years other than
15 in the Book report, or am I missing something?

16 MR. WECHSLER: I think that's true,
17 except that -- if you mean none of other ones
18 quantify the use in Montana or the damages or -- I
19 should say the depletions caused by Wyoming, I do
20 agree with that. Now, there is some relevance,
21 for example, of Mr. Smith's discussions with the
22 Tongue River Reservoir, and Mr. Dalby, whose
23 expert report you haven't seen and discussions
24 about hydrology. But that's not -- I didn't take
25 your question to be asking about that, but really

1 about use in Montana and depletions in Wyoming.
2 And I think that's correct. I really think that
3 Mr. Book uses other years.

4 SPECIAL MASTER: And then the second
5 question which is on the Book report for Wyoming,
6 so I'm sure they're asking in this answer, so
7 Wyoming did bring a motion for partial summary
8 judgment with respect to damages, and so that's
9 raised in that use also. And I understand from
10 your papers on these motions, as well as some of
11 the questions that you asked when I made those
12 earlier rulings, that you are differentiating
13 between damages and liability in these cases. Are
14 you planning -- so when you go to trial on these
15 liability issues, are you planning on arguing that
16 I should reach conclusions with the United States
17 Supreme Court in all of the years?

18 MR. WECHSLER: Our ideal final order
19 would say there were violations in every year
20 since 1961 except for 1978, 19 -- well, I forget
21 the exact three years, but there were three years
22 that there was sufficient flow that would satisfy
23 Montana's pre-1950 rights. So our ideal order
24 would say there were violations. There were
25 quantifications of damages in '01, '02, '04, and

1 '06; here's the quantification for those damages.
2 For those years, Montana is entitled to
3 retrospective relief, and here's what it is, and
4 at this point we haven't decided what we would be
5 seeking retrospectively.

6 And more importantly, looking forward,
7 here is the prospective relief that Montana is
8 entitled to for all of those violations.

9 SPECIAL MASTER: At this time I would
10 suggest we take a break. And so let's -- it's
11 1:20. I have no idea where there are places to
12 eat around here, but I would like to limit this to
13 an hour so we make sure we finish by 5 o'clock. I
14 assume people have flights. And what I would
15 suggest is that we come back at 2:20; that we try
16 to resolve all of this by like about -- this first
17 part of the summary judgment motions by like 3
18 o'clock. I know that's really cranking people's
19 timeline. But this has been very -- I think we've
20 got most of the issues out at this particular
21 stage, and I want Mr. Draper's thoughts and
22 arguments they want to make on CBM and any reply.
23 I'm going to hold people to a very
24 tight schedule. I realize I don't give people a
25 lot of time to eat something, and it's a crucial

1 issue. Not to suggest that Montana's motion for
2 summary judgment is also not important, but I
3 think we will be able to resolve the questions in
4 a shorter of period of time. So there I would
5 suggest we probably will permit no more than like
6 a 30-minute argument on both sides. I'll try and
7 keep my argument to a minimum, and we'll have some
8 time for a status conference before we all dash to
9 the airport. Does that sound reasonable to
10 people?

11 MR. KASTE: Yes.

12 SPECIAL MASTER: Okay. So then,
13 Mr. Kaste, are you standing out of respect, or are
14 you up because you want to be to the door first,
15 or did you have something you wanted to say?

16 MR. KASTE: All of the above. I have a
17 number of things I want to say. I want to get out
18 first, I'm hungry.

19 SPECIAL MASTER: Sounds good. So we'll
20 take a break now. We'll be back in session at
21 2:20, and we'll adjourn no later than 5 o'clock.
22 So we're now adjourned.

23 (Recess from 1:22 p.m. to 2:24 p.m.)

24 SPECIAL MASTER: The people at counsel
25 tables are ready. Why don't we go ahead and go

1 back on the record, and let me tell you what I'd
2 like to do. So we'll continue on Wyoming's motion
3 for summary judgment. And what I would suggest
4 is, is that we -- I'm going to allow up until
5 about 3:30 on this. Ms. Whiteing, are you going
6 to say a few words?

7 MS. WHITEING: Very briefly, Your
8 Honor. I will say, I need to leave at 3:30 to
9 catch a flight.

10 SPECIAL MASTER: So I don't expect that
11 that's any problem at all. So what I would
12 suggest is that we give Montana like about another
13 25 minutes or so of argument, and then we can hear
14 you, Ms. Whiteing, and we can hear from Wyoming in
15 rebuttal. We can take a short break at that
16 point. And if we start the next argument by 3:30
17 or so, that will give us an hour or an hour and 10
18 minutes to deal with Wyoming's motion. And again,
19 I think we've dealt with a number of the issues
20 already in connection with that. So I think that
21 would permit us somewhere in the nature of a half
22 an hour, maybe a little bit less, for a status
23 conference. But my guess is, we're not going to
24 need a whole lot of time on the status conference,
25 which is really an added number of sort of

1 pretrial matters I want to briefly cover on that.

2 Just let me look at my notes and let me
3 just tell you a couple of things I want to make
4 sure we address, because you might be addressing
5 some of them, if possible, but Mr. Wechsler might
6 want to get back up and address a couple of them,
7 and the first couple are about my comments and
8 questions. First of all, with respect to the
9 years still at issue, we talked earlier about what
10 evidence there was in the record showing that
11 there was any pre-1950 shortages in Montana for
12 the years other than 2001, 2002, 2004, and 2006,
13 but there was also another question of what
14 evidence is there in the record regarding
15 post-1950 use in Wyoming in those particular
16 years. So that would be a question I would like
17 particularly Montana to address.

18 Second of all, I also asked a question
19 with respect to notice to Wyoming. As I mentioned
20 in the December 20, 2011 memorandum with respect
21 to a call or notice by Montana to Wyoming, that
22 that call could potentially reach back if Montana
23 had acted diligently in learning of pre-1950
24 deficiencies and notifying Wyoming of those
25 deficiencies. So in other words, if you gave a

1 notice on June 1, it wouldn't necessarily be the
2 only claimed damages for after June 1, but you
3 could -- or if you acted diligently in actually
4 learning of the problem and notifying Wyoming of
5 that, and I was just curious whether there's any
6 evidence in the record one way or the other on
7 that particular question.

8 And let me just say in connection with
9 that, that clearly as part the summary judgment
10 motion, I'm going to have to address the question
11 now of whether or not the notice goes just to
12 damages or also to liability. My current
13 inclination is to say it was to both damages and
14 liability because I'm not quite sure why it
15 shouldn't also go to liability if in some years
16 when there was -- you didn't even know exactly how
17 much water Montana needed, if there was no notice
18 to Wyoming so they didn't even know if they needed
19 to do anything, to say that there's any
20 retrospective or prospective relief which should
21 be due because of that, that strikes me as a
22 harder stretch. But that's my current
23 inclination, and I will clearly think about that
24 issue before I rule on it. But that's why that
25 question, I think, is still relevant.

1 And then also in the case of Montana, I
2 would appreciate your thoughts on the question of
3 whether or not at any point when that water is so
4 little, that the Supreme Court should retain
5 jurisdiction over the case. Wyoming's also
6 expressed that, but I'd also appreciate your
7 opinion on it.

8 And then there's, I guess, two other
9 questions, one which I just thought about over
10 lunch. So we talked earlier about questions of
11 whether or not if Montana, during the winter
12 months, permits a flow-through of water downstream
13 rather than filling up the reservoir, whether or
14 not that should count towards Wyoming or Montana.
15 And I'm just curious as to how an issue of that
16 nature would be dealt with in the two states if it
17 was purely an intrastate issue. You could imagine
18 that in coming out, someone wants to build a
19 storage reservoir, say, entirely in Wyoming or
20 entirely in Montana. And the way it was addressed
21 as far as going to operate it is, is that during
22 the winter months, in order to comply, or safety,
23 to make sure there's not ice damage, all the
24 reasons why Montana mentions in this particular
25 case they don't fill up the reservoir during the

1 winter months. But this particular reservoir
2 doesn't plan to fill up during the winter months
3 either but plans to fill a little bit up during
4 the winter and then fill up primarily in February
5 and March. Under the state law, how is that
6 handled? Is it a situation where you get a
7 storage right to fill your reservoir during
8 specific months? Is that the way in which it
9 works intrastate? Do you end up with the same
10 type of issue here where somebody in February or
11 March says, hey, you should have stored all your
12 water earlier, and you can't blame me because you
13 didn't store it earlier, and I want my water now.
14 So that's the same issue we've been talking about
15 in the interstate context in an intrastate
16 context, and I'm curious as to whether that has
17 come up in either Montana or Wyoming. And if you
18 don't know the answer to those questions right off
19 the bat, it might be another 10 minutes that would
20 be useful to have some quick briefing on after the
21 hearing.

22 And then sorry to be rattling off these
23 questions. But as I say, I want to make sure that
24 when I sit down and actually resolve these various
25 issues, I know how to address the various

1 questions I can imagine coming up as you certainly
2 deal with these issues.

3 And that is that -- so Wyoming's
4 argument with respect to the 1992 agreement is
5 that Montana can't have it both ways. So if the
6 agreement doesn't count with respect to the way in
7 which you deal with the 1950 to 1980 appropriators
8 in Wyoming, then you don't get a pre-1950 priority
9 date for that additional 100,000 acre-feet in the
10 reservoir.

11 Now, I want to make sure that I
12 understand all of Montana's responses to that
13 particular point. And I think I hear at least two
14 responses at the moment. One is that, actually,
15 if you look at the 1992 agreement, that the -- you
16 can interpret it in a way which benefits Montana
17 with respect to the 1950 or 1980 right without
18 having to abrogate the whole thing. And so that
19 would be that those 1950 to 1980 rights are both
20 supplemental rights, and the supplemental rights
21 come after the part of the findings. That's an
22 example.

23 The second argument is what I heard
24 Mr. Wechsler say, which was even if Montana had
25 100,000 acre-feet less, that the post-1950 users

1 in Wyoming would have still shorted the storage in
2 the reservoir, which is a factual question. And I
3 just want to know whether there are other
4 responses to Wyoming's point, because I could
5 certainly imagine a situation where I come down
6 basically saying: Look, you go by what the
7 compact says; you don't go by what the assumptions
8 were in the 1992 agreement. And if I go that
9 route, then I'm confronted by Wyoming's argument
10 that, well, if that's true, actually Montana is in
11 an even weaker situation than if you bought the
12 entire 1992 agreement. So I just want to make
13 sure I understand all of Montana's responses to
14 that particular argument.

15 So if you want to just -- I realize I
16 just threw a lot of questions out there. So,
17 Mr. Draper or Mr. Wechsler, if you want to just
18 take two or three minutes conferring on that as to
19 who's going to address each of those, feel free to
20 do it, and then we'll come back on the record when
21 you're ready, and we'll move forward with your two
22 arguments, then Mr. Wechsler, and then back to
23 Wyoming.

24 (Recess from 2:35 p.m. to 2:38 p.m.)

25 SPECIAL MASTER: So we are back on the

1 record. Mr. Draper, welcome.

2 MR. DRAPER: Thank you, Your Honor.

3 Let me start with your last question, if I may.

4 That had to do with the Wyoming argument that if
5 you do not accept their position on the 1992
6 agreement, that that means that the enlarged space
7 in the Tongue River Reservoir can't have a
8 pre-compact priority. That is not an issue that's
9 before you on summary judgment. It's not raised
10 by them in their motion for summary judgment. The
11 first time I'm hearing this was on Page 11 of
12 their reply brief, so we've never had a chance to
13 respond to it. I think there would be a lot of
14 responses, but we would need to have a full chance
15 to brief those and, of course, it could involve
16 the Tribe in a very central way.

17 The priority that you might assign to
18 the enlarged space in the Tongue River Reservoir
19 for purposes of this case is not linked to the
20 1992 agreement in any way. In their brief they
21 just say, well, if you don't accept our position
22 on the 1992, we don't consent anymore to having a
23 pre-compact priority. There's no argument on
24 their part, and, of course, the Tribe and the
25 State of Montana had no opportunity to address

1 that.

2 I would point out also that there are
3 facts that are irrelevant, and you heard in
4 previous arguments that the experts are addressing
5 what the difference is between assuming a
6 pre-compact or pre-enlargement storage capacity
7 versus both enlargement storage capacities.
8 That's been addressed to some extent by the
9 experts in their reports and would be addressed
10 during trial. This would help in determining
11 whether you need to make a decision on that for
12 purposes of this case. It's not clear to me that
13 you do. So I think that that whole issue is not
14 before you at this point.

15 As I say, we can think of many reasons
16 why it's not relevant. These are commingled
17 waters. There's no additional storage, according
18 to the State of Montana, by that enlargement, but
19 they're commingled waters all the way up to the
20 total storage of 79,000 acre-feet.

21 Let me just make one
22 clarification/correction with respect to a fact
23 that was stated in our brief in this area, and
24 that is there's been the assumption that the
25 pre-enlargement storage space in that reservoir

1 was 69,400 acre-feet. Mr. Aycock testified at his
2 deposition that he had discovered an earlier study
3 by the Bureau of Reclamation that had quantified
4 that initial storage capacity as 72,500, and
5 that's listed as a possibility in our filing, but
6 he stated in unequivocal terms in his deposition
7 to that effect. And that was not clear in our
8 filing, and I want to correct that.

9 SPECIAL MASTER: And just for
10 clarification, that was in the original Aycock
11 expert report?

12 MR. DRAPER: Just the rebuttal report.
13 And it's really the deposition that makes -- that
14 resolves that issue finally. He suggested in a
15 footnote there that he had indications that it was
16 somewhere up to 72,500. But by the time he gave
17 his deposition, he was able to confirm to Wyoming
18 the 72,500 acre-foot value.

19 The first question that you asked after
20 lunch regarding the years at issue, the many years
21 that are listed in Mr. Book's report at Table 5
22 where the flows that he determined necessary at
23 the state line in order to satisfy the pre-compact
24 rights in Montana were not met. And those, I
25 think as Mr. Wechsler said, are all the years

1 since 1961 are covered in that table except for
2 three.

3 Your question, I think, went to what is
4 there in the record at this point prior to trial
5 as to use in Wyoming by post-1950 water rights.

6 SPECIAL MASTER: That's correct.

7 MR. DRAPER: We can see that in the
8 years where we have actually been able to quantify
9 both sides of the state line, the impacts of the
10 Wyoming violations, that you are seeing actual use
11 by post-'50 rights, which is exactly what you
12 would expect, they would be subject to abandonment
13 if they were not exercised. The whole outpost of
14 the prior appropriation system is that if you're
15 legally entitled according to your own
16 administrator, and the water is physically
17 available, you divert that to your crop. And
18 to -- assuming anything different would be a
19 different assumption and pervades the very fabric
20 of the prior appropriations throughout the West.

21 This water gets used, and there are
22 court decisions even in Wyoming that give a
23 presumption or a conclusive effect to the question
24 of the degree of beneficial use under an
25 adjudicated right. So you see throughout the

1 West, in my experience, that there is a
2 presumption, either rebuttable or conclusive, that
3 an adjudicated right being put to beneficial use.
4 You will also see that come in transfer
5 proceedings where adjudicated rights is being
6 sought to be transferred, and the objector says,
7 well, they didn't put it to beneficial use. And
8 my experience is, is that in some states, of
9 course, they know and presume to be put to
10 beneficial use if it's adjudicated. Other states,
11 that is a presumption, but it can be rebutted.
12 Which all goes to that burden of proof question,
13 as you raised, which is when some of these things
14 aren't known -- and this is undocumented. They
15 don't keep records of diversions, for instance, no
16 documentation of those one way or another. So
17 you're left without what exists in a number of
18 systems around the West, where you have daily
19 records of when water was diverted and when it
20 wasn't. That doesn't exist here, for the most
21 part.

22 SPECIAL MASTER: Well, just to be
23 brief, my question to you was less a question of
24 what I might be able to presume with respect to
25 post-1950 uses in Wyoming, and looking at the

1 expert testimony that's in the record here. And I
2 think virtually all the expert reports are in
3 here; is that correct? Are there any that are
4 not?

5 MR. DRAPER: I think most, if not all,
6 yes.

7 SPECIAL MASTER: So there's nothing in
8 those expert reports specifically trying to
9 quantify post-1950 rights in -- I'm sorry,
10 post-1950 uses in Wyoming for the years other than
11 2001, 2002, 2004, and 2006?

12 MR. DRAPER: Well, there are the expert
13 opinions of Mr. Book and Mr. Fritz that water is
14 put to beneficial use unless it's regulated off in
15 Wyoming. That's their opinion.

16 SPECIAL MASTER: But there's no attempt
17 to actually quantify that?

18 MR. DRAPER: There are some total ditch
19 diversions that do exist and were included as a
20 part of Mr. Book's report in Appendix C.

21 SPECIAL MASTER: So that's Mr. Book's.
22 Is that his original expert report?

23 MR. DRAPER: Yes.

24 SPECIAL MASTER: Appendix C, thank you.

25 MR. DRAPER: With respect to the

1 diligence question that you asked in terms of
2 relating back to the notifications that might have
3 occurred, there are a few things that I can think
4 of right off. There may be others. But the fact
5 that water commissioners were being appointed in
6 the years that we quantified things and in a
7 number of years beginning in the year 2000, and
8 the affidavits attached to the letters that were
9 sent in 2004 and 2006 also indicate diligence in
10 investigating these questions. There may be
11 others, but those are the ones that occur to me at
12 the moment.

13 In terms of the notice question and
14 whether it goes just to damages or also to
15 liability, in other words, is there a violation or
16 not, that is something that hasn't been
17 specifically addressed here in the briefing, but
18 it's been lurking out there, I guess you could
19 say. And the decisions that you've made so far
20 with respect to the requirement of this have been
21 specific as to damages. And so the question would
22 be, for instance, take the main example in years
23 beginning in 1961 when there was, according to the
24 Montana expert, not enough water at the state
25 lines, and there should have been regulation of

1 those post-'50 rights in Wyoming, I think that it
2 should be addressed in this way. The question of
3 notice makes sense if you're going to be awarding
4 some kind of damages or a retrospective remedy.
5 If there is, on the other hand, evidence that
6 supports that without an appropriate
7 forward-looking remedy that the situation that
8 occurred in the past, which was that Montana was
9 not getting the water that its experts have
10 determined was necessary for their pre-'50 rights,
11 you have a situation where that water has been
12 allocated by the compact, according to the
13 decisions by you and the Court, to Montana; in
14 other words, that you cannot be taking post-'50
15 water in Montana if there are unsatisfied pre-'50
16 rights in Montana downstream. That's the
17 allocation. And it would be certainly
18 unprecedented to inject into the allocation
19 analysis the question of, okay, certain people had
20 to do certain things with respect to notice in
21 order to even have a -- exceed, so that allocation
22 on misappropriation allocation.

23 The reasons what is behind Your Honor's
24 decision on the damages notice question are not
25 there on the question of whether the allocation to

1 Montana was respected in those years by Wyoming.
2 In our view, based on our expert analysis, it was
3 not. We're not in a position to -- some of that's
4 too far back, and the records don't exist to make
5 it practical to assert any claim for a
6 retrospective remedy. But we do feel it's
7 important to show and have recognized that, in
8 fact, there was a misappropriation of our
9 allocation during those years, and that it is
10 necessary for the Court to address that going
11 forward. So I think the notice question is quite
12 different on that basis.

13 SPECIAL MASTER: So I appreciate that,
14 and I'll definitely think carefully about this
15 issue in the context of liability versus damages.
16 But just so you have the ability to respond to
17 this issue. So the concern on the other side is
18 that what motivated my original conclusion that
19 sometimes a notice or a call was required is that
20 otherwise, it would have been very difficult for
21 somebody in Wyoming's position to actually have
22 known whether or not they needed to release more
23 water down through the river system. And I'm not
24 sure this -- my guess is, it's not really going to
25 be relevant to whether or not we go to trial or

1 what proceeds after that. But if you didn't have
2 the evidence with respect to 2001 and 2004 -- I'm
3 sorry, 2001, 2002, 2004, and 2006, where in 2004
4 and 2006 there was a call clearly that's set down
5 in the record. 2001 and 2002, as I said, you are
6 able to proceed with trial. You know, none of
7 that was there. And all there was was, well, back
8 in 1960 to '65, we actually don't think we got
9 water by pre-1950 rights, but we never told
10 Wyoming we weren't getting the water back then.
11 It's hard for me to imagine that that would be the
12 basis not only for retrospective relief, but for a
13 claim of prospective relief that you actually have
14 to, in that type of situation, regulate what
15 Wyoming was doing, because there's no evidence
16 that a factually noticed problem, they won't run
17 anyway.

18 MR. DRAPER: Well, as I think you were
19 alluding to, they didn't accept the current
20 interpretation of the compact at all, so there
21 wouldn't have been any response to that, and you
22 addressed it, I think, and the futility of that
23 in your earlier order. But we certainly have the
24 argument that New Mexico made on Pecos against
25 Texas, when the litigation going on in the

1 original jurisdiction there, that New Mexico had
2 acted in good faith, didn't realize that it was
3 violating the compact and, therefore, should not
4 be held liable for past damages. And the Court
5 unanimously, as I recall, said: No, we find that
6 in a contract situation, sometimes we have not
7 done what we said we will do, and the Court will
8 tell us what our obligations are. So that's where
9 New Mexico has certainly made that argument very
10 strongly in that case, and the Court, just as
11 strongly, rejected that in that context.

12 You also asked us to address the
13 question about if the amount in question becomes
14 small, what is the effect of that. And I think
15 there are two areas where you're asking for a
16 response. One is, how does that work under the
17 original jurisdiction. There's some level in
18 prior compacts, one party can convince the Special
19 Master that it's small enough that you shouldn't
20 worry about it, and you should not go further.

21 The other is the argument with respect
22 to a CBM company, and the tenuousness, and the
23 claims that the impacts of the CBM companies are
24 very small and should, therefore, as a matter of
25 law, be disregarded by the Court, or be found as a

1 matter of law to be excluded from the compact back
2 in the 1950s.

3 As to the first issue, the one
4 regarding the exercise of the original
5 jurisdiction, Mr. Kaste pointed to the test that
6 the Court has to conduct a test for seriousness
7 and dignity of the claim, and the availability of
8 an alternative forum, and said that that should
9 control. I see it differently. That's the
10 threshold issue that the Court faces, and it makes
11 a determination in each of those areas. And once
12 it has made that decision and has accepted the
13 case, then the matter is quite different.

14 In the Oklahoma and Texas vs. New
15 Mexico decision in 1991, as Your Honor may recall,
16 there was a suggestion that one of the issues
17 didn't need be resolved by the Court, but would be
18 more efficient, I think it was Charlie Muys, the
19 Special Master, recommended to the Court that he
20 could -- the Court would be well served to return
21 an issue about the interpretation of the facility
22 and coal provision to the compact commission, with
23 the expectation that they could probably settle
24 that issue and not concern the Court about it.
25 And the Court said there, and I can quote just

1 briefly, "Where the States themselves are before
2 this Court for the determination of a controversy
3 between them, neither can determine the rights
4 inter sese, and this court must pass upon every
5 question essential to such a determination..." the
6 Court, "'does have a serious responsibility to
7 adjudicate cases where there are actual, existing
8 controversies' between the States over the waters
9 in interstate streams."

10 There is no doubt that just dispute
11 exists in this case. Oklahoma and Texas have
12 promptly invoked this Court's jurisdiction, and
13 there is no claim that the custodian pool issue
14 has not been properly presented. Thus, we see no
15 legal basis for the Master refusing to decide the
16 question and instead sending it to the
17 commission."

18 So there is at least a somewhat similar
19 situation where the question came up, here's a
20 dispute between the states that are before the
21 Master, and should the Master consider not
22 deciding some of those issues. And the Court
23 indicated there, as I read it, that once we take
24 it, we decide that there is an interstate
25 controversy that we need to resolve under our

1 constitutional obligations, and we will resolve
2 that. And I would submit that extends to all of
3 the issues here, including any that maybe Wyoming
4 argues, well, that's too small to worry about.
5 But you can see they're still here fighting us
6 about it, so it's not that small.

7 MR. KASTE: I'll go home.

8 MR. DRAPER: And we have had decades of
9 dispute here. And if the Court can resolve these
10 controversies for the states, it will open up, I
11 would venture to say, an era of cooperation
12 instead of continued disputes between the states
13 if these issues can be laid down and the
14 principles determined by the Special Master, and
15 ultimately by the Court.

16 I think I might pass to a number of
17 questions with respect to groundwater issues, if I
18 may.

19 SPECIAL MASTER: That sounds fine. I'm
20 getting worried about the time. I don't want to
21 cut you off, but if we can keep this -- put it
22 this way: I've read the records, so the most
23 important thing for me are to answer the questions
24 that I presume are...

25 MR. DRAPER: Okay. I will keep myself

1 strictly to those questions. I know I won't have
2 a chance of having as much time as Mr. Kaste, but
3 I understand.

4 SPECIAL MASTER: Well, that's true.

5 MR. DRAPER: You asked what the
6 appropriate standard for determining when
7 groundwater is subject to the compact, e.g., any
8 interconnection, material interconnection, or
9 standards used by the relevant states. Montana's
10 position is that any interconnection is the proper
11 standard. That's the standard that the Court has
12 used unequivocally in cases where this issue has
13 come before it. There is no de minimis or
14 tenuousness requirement that has to be dealt with
15 by the Court or the states. It's simply a matter
16 of what is the effect. And if the effect of
17 groundwater pumping like CBM, as the primary
18 example, is to reduce surface waters that would
19 otherwise go to pre-1950 users in Montana, then
20 it's counted. And there's no pre-sorting with
21 respect to whether it's in a range, and it's a
22 very simple matter that experts in this case have
23 done it. You have evidence. You probably noticed
24 in those expert reports there are specific
25 quantifications. And whatever that quantification

1 is, that is what the Court has held, certainly in
2 the Republican River case which was the subject of
3 the 2003 decree by the Court. The Court did not
4 put any de minimis threshold on it. It simply
5 accepted the report, the Special Master saying
6 that any depletion of the compacted waters has to
7 be accounted for. And that's the simple approach.
8 It's administrable. And wherever it come in on
9 the scale, that's it. It doesn't have to be of
10 any concern to the future for the states, or
11 people coming back to the Supreme Court for
12 resolution of issues. That's the simple answer.

13 I might mention that was also the
14 standard in the Arkansas River case between Kansas
15 and Colorado. The hydrologic institutional model
16 in that case that was discussed by the Court at
17 some length and litigated by the parties over a
18 period of 13 years makes no threshold exception.

19 SPECIAL MASTER: So just on that, just
20 again, I just want to be sure I'm hearing the
21 precedent, so you would cite both the Republican
22 and the Arkansas River cases? Those are the two
23 most relevant?

24 MR. DRAPER: Yes. And I would say that
25 the principle that the Court is applying there is

1 that once water has been allocated to one state,
2 the other state will not be allowed to deplete
3 that allocation by any means, including
4 groundwater pumping.

5 And one point of clarification I think
6 is confused by the Anadarko brief is this: They
7 used the terminology. They're arguing that CBM
8 pumping should not be covered by the compact.
9 Well, that's a very fuzzy term in this context.
10 What we're saying is something that's more than
11 lost in that. The water that's pumped by CBM
12 wells is not directly apportioned by the compact.
13 The water that's apportioned by the compact are
14 the surface flows, in this case of the Tongue
15 River Basin, which is one of the interstate
16 tributaries. And it's the effect of any other act
17 that's subject to regulation by Wyoming, by CBM
18 companies, is interfering with the enjoyment of
19 those compact rights, and that's why the Court has
20 said even though these interstate water compacts
21 all allocate surface water, groundwater pumping
22 can be very important. You can suck a river dry,
23 as Your Honor is well aware, and it's not
24 because -- the Court is not saying you have to
25 account for it because the groundwater was

1 allocated somehow between the states. The surface
2 water was allocated, and it's the effect of
3 another activity that's subject to state
4 regulation, namely pumping groundwater, that is
5 impairing that allocation, and it has to be
6 accounted for in the allocation.

7 You asked a question in your written
8 questions about a certain provision of the Montana
9 code that I believe you said does it require
10 mitigation only for potential interference with
11 groundwater. And I looked at that language, and
12 it does refer to protection of groundwater, and so
13 your question is very helpful. And what we should
14 have been citing to you there is the Montana Coal
15 Bed Methane Protection Act, which is found at
16 76-15-901 and sections following that, and that
17 includes findings that CBM pumping may result in
18 adverse impacts to land and to water quality and
19 availability, and describes a process for
20 determining the damage to land, surface water, or
21 groundwater, if any, caused by coal bed methane
22 development. I was just quoting, as I said, from
23 76-15-905 in that statute. So that was very
24 helpful in that supplement of the record.

25 SPECIAL MASTER: Can I just follow up

1 on that?

2 MR. DRAPER: Yes.

3 SPECIAL MASTER: Do you know -- I'll
4 look to this statutory provision. If there was
5 somebody saying in Montana on the Tongue River,
6 and they're concerned that, say, a CBM groundwater
7 operation in Montana upstream on the Tongue River
8 was interfering with their water quantity, do you
9 know what they can do, what would happen?

10 MR. DRAPER: Yes. They can file with
11 the local conservation districts that's referred
12 to in the Act and can seek protection in the form
13 of damages for impacts of coal bed methane on
14 water availability and water quality with respect
15 to both groundwater and surface water.

16 Your Honor, if you're ready to go to
17 another one of your questions. There was one that
18 referred to the case of Connecticut vs.
19 Massachusetts. I just want to make a couple
20 comments about that, if I may. That case was an
21 equitable apportionment case, as we would call it
22 today. The lingo has gradually been refined over
23 the years as a kind of procedure, so it's a much
24 different context than what we're in. The Court
25 has always drawn a very strong distinction between

1 a state coming into its jurisdiction unaided by
2 federal statute or some other enforceable
3 authority and simply asking for relief from some
4 public nuisance, or whatever it might be. And in
5 those cases where there was no comment or a
6 previous Supreme Court decree, for instance, where
7 you have nothing previous like that, the Court has
8 put a very high standard. It has placed a clear
9 and convincing standard of proof. And it has
10 required the showing of injury, which as you can
11 see, is a -- this is a much different standard
12 than what we're dealing with. On the one hand,
13 you have a case like Connecticut vs.
14 Massachusetts, and there are many others like it
15 where a court coming in, not to enforce a compact
16 or a decree, but just to seek the Court's help
17 under general equitable principles, that injury is
18 a significant, in fact, I think they say
19 substantial contributor. Whereas the cases that
20 have been cited to you today, they say the exact
21 opposite with respect to compact enforcement and
22 decree enforcement cases.

23 It was interesting, also, in reading
24 that case that there's already been a ruling in
25 that case by what would now be the Corps of

1 Engineers, Department of the Army, under what was
2 then called the Secretary of War and you can see
3 them performing the same kind of functions they do
4 on many rivers. They have put limitations on
5 Massachusetts' legislated effort to bring some of
6 the tributaries of Connecticut over to the Boston
7 area, and Massachusetts was saying that they were
8 perfectly happy to comply with those limitations.
9 And the Corps, or the Secretary of War had put
10 definite limitations of what could be taken and
11 when water had to be released from reservoirs.
12 Massachusetts said that's fine, we'll live with
13 that. And the Court, under those circumstances,
14 said it's very hard for us to find any injury here
15 which, of course, under that circumstance, it's
16 not very important to show.

17 Have I used up our time?

18 SPECIAL MASTER: I think you've used up
19 the time. I want to make sure we do have an
20 opportunity to get to Montana's position with
21 respect to intrastate administration.

22 MR. DRAPER: Okay.

23 SPECIAL MASTER: I do have, though,
24 there was just one question that I asked about how
25 storage would be handled within Montana. If you

1 have a situation where you're going to be storing
2 water in a reservoir, and you're not planning on
3 storing water in, say, the November versus April
4 period, you're not going to start until May to
5 really fill up the reservoir, how is that actually
6 handled? And if you don't have an answer, then
7 that's fine.

8 MR. DRAPER: Well, I can say a few
9 things about it that perhaps, with some options to
10 supplement, if necessary. As I think Your Honor
11 is aware, this one-fill rule that Wyoming talks
12 about applying is not applicable. It does not
13 exist in Montana. And so even though they let
14 water out of their reservoirs in the winter, as
15 you saw that the reservoir uses on the basic tour,
16 they claim that any water released has to be
17 accounted against the storage. That's not
18 something that we do in Montana. Frankly, it is
19 not using your reservoir efficiently to say, no,
20 you can't fill the reservoir each year because you
21 let something through during the winter.

22 But to get directly to your question,
23 the water rights in Montana are more flexible than
24 that. Having a certain filling period, or a steps
25 filling period, as we have historically with the

1 Tongue River Reservoir, where you have a winter
2 limit which is necessary in order to keep the
3 water from coming up on the concrete there at the
4 reservoir and causing damage, and then having the
5 main fill period during the March-April-May-June
6 period, that is an acceptable way of describing a
7 water right under Montana law.

8 SPECIAL MASTER: So one of the things,
9 because I don't expect either side is fully
10 prepared to answer this particular question today,
11 and I'm keeping a list here. But another thing I
12 would love to receive is just references to
13 whatever law there is. So you don't need to
14 summarize it, but just any statutory or regulatory
15 provisions regarding storage rights so that I have
16 a better sense of how storage is actually handled
17 in the two states, that would be helpful.

18 MR. DRAPER: Very good.

19 SPECIAL MASTER: Thank you. So, Ms.
20 Whiteing, I'm going to go immediately to you
21 because I know you have to get out of here by
22 3:30.

23 MS. WHITEING: Thank you, Your Honor.
24 I appreciate your indulgence. I just wanted to
25 make just a couple of very brief points in

1 connection with the 1992 agreement.

2 You had asked what happens if you
3 accept Wyoming's argument. And I want to state,
4 first of all, that when I addressed Wyoming's
5 argument in our amicus brief, I certainly did not
6 understand that the ultimate point or the ultimate
7 focus of their argument was, in effect, an
8 indirect challenge on the Northern Cheyenne
9 Tribe's Tongue River Reservoir priority date. So
10 kind of having understood that from their reply
11 brief, and understanding the link that they make,
12 although I don't really understand the logic of
13 that link, and I don't really see anything in the
14 evidence, and I'm not aware of anything that makes
15 that link, I wanted to say a couple of things
16 about that.

17 First of all, the designation of the
18 priority date that the Tribe's Tongue River
19 Reservoir water right was a matter of compromise.
20 For the Tribe, it was a compromise between an 1881
21 date and a 1937 date. So that was a fairly
22 significant compromise on the Tribe's part.

23 So if Wyoming's position is accepted
24 that the priority date of that allocation is
25 later, presumably sometime in the 1990s, then that

1 really does pretty irrevocably alter the compact
2 water right that the Tribe negotiated that was
3 confirmed by the Legislature, by Congress, and
4 decreed by the Court.

5 So to the extent that that argument has
6 the potential for modifying, changing, or
7 affecting the Tribe's water right as decreed, we
8 would argue that that has Rule 19 implications.
9 That the Tribe is obviously an interested party.
10 We would say that the United States is an
11 interested party as well. And neither of us can
12 be joined in this proceeding without our consent.
13 So as you go through that issue, I would ask you
14 to keep that in mind.

15 SPECIAL MASTER: I think you can rest
16 assured that I will take great care not to suggest
17 anything that would in any way implicate the water
18 rights of the Northern Cheyenne Tribe, recognizing
19 that, number one, the last thing I want to do is
20 to get into additional areas of water law without
21 knowing all of the additional implications. But
22 as you point out, to the degree that resolution of
23 this case actually affected the Northern Cheyenne
24 Tribe's rights, then you would need to be a party
25 to the action, and you're not.

1 MS. WHITEING: That's correct. And I'm
2 not sure that we would want to be either, but...

3 SPECIAL MASTER: Understood.

4 MS. WHITEING: We'll see where that
5 goes.

6 SPECIAL MASTER: I really wouldn't want
7 you to be part of it either.

8 MS. WHITEING: The other issue that I
9 wanted to address is one of the questions that you
10 put in your list of questions, and that is the
11 authority of the governors to enter into this
12 agreement. The State of Montana and the State of
13 Wyoming have both addressed that somewhat. I
14 wanted to address it from our point of view, and
15 it's this: Under the Montana Water Use Act which
16 established the Reserve Water Rights Compact
17 Commission that negotiated the compact with the
18 State of Montana, the compact commission is
19 established under Montana Code 2-15-212. The
20 commission acts under the authority and on behalf
21 of the governor. The governor, obviously then,
22 has a big role in this, but the governor's ability
23 to negotiate that compact is circumscribed by
24 additional provisions of the Water Use Act that
25 require that the compact be approved by the

1 Legislature, by the Tribe, and by the federal
2 government. So it's not enough for the governor
3 to just negotiate the compact. It requires all of
4 the other approvals as well.

5 Now, the question is, does the 1992
6 agreement change the compact in any way. And I
7 would say, at least under the arguments today, and
8 maybe even in addition to them, the agreement
9 changes the compact in two ways. First of all, it
10 changes who has to consent to a change in the
11 Tongue River model. The compact says a change in
12 the model can be made with the consent of the
13 parties. Wyoming's not a party. We now have a
14 situation where the agreement says the Tongue
15 River model can be changed with the agreement of
16 the parties and the State of Wyoming. I see that
17 as a substantive change to the compact.

18 In addition, the compact says that the
19 compact itself cannot be changed without consent
20 of the parties, the provision that you cite in
21 your questions. And we now have a situation under
22 the 1992 agreement that you need the consent of
23 the parties and the State of Wyoming. I think
24 that's another substantive change to the compact.
25 Both of those, therefore, to the Tribe would

1 require the same kinds of approvals that the
2 initial compacts required; the approval of the
3 Legislature, approval of the Tribe, and approval
4 of Congress.

5 And so we would argue that at least as
6 of the Montana governor, and I'm not speaking as
7 to be in accord with the Wyoming governor, at
8 least as to how the compacting process is set up
9 in the State of Montana, the governor himself
10 could not make that change.

11 Those are just two very brief points I
12 wanted to make. And hopefully, if there are any
13 additional questions or additional briefing on
14 this, we certainly can state our position at that
15 time as well.

16 SPECIAL MASTER: So several things.
17 Number one, I don't think any additional briefing
18 is needed on this particular question just with
19 the involvement.

20 The second thing was, you mentioned a
21 Montana act?

22 MS. WHITEING: It's the Montana Water
23 Use Act. It was passed in 1979. It basically
24 sets up the adjudication procedure within the
25 State of Montana, the procedure that's underway

1 now and has been for some time. It also set up
2 the process for entering into compacts with the
3 Montana tribes, as well as the federal government,
4 over federal and Indian reserved water rights to
5 address federally reserved water rights. That's
6 generally set out in the 5-2-700s, where it says
7 about the procedure.

8 SPECIAL MASTER: Okay. And then the
9 other question that you have any thoughts on, that
10 would be appreciated. So if you actually look at
11 the agreement, the 1992 agreement, there's this
12 provision that everyone has been focused on that
13 basically says the State of Montana will not
14 consent to any changes or modification of the
15 Tongue River water model. Do you have any sense
16 of why it was that Wyoming wanted that particular
17 provision?

18 MS. WHITEING: You know, I'm hard
19 pressed when I look at this agreement to
20 understand what the motivation was. Obviously,
21 the Tribe was not a party to this, was not a party
22 to the negotiations. I don't know what occurred.
23 I do know if Wyoming had concerns when the compact
24 came before the Congress for ratification, they
25 obviously felt that this addressed those concerns

1 sufficiently to not oppose the compact, but I'm
2 not sure what they expected out of that. As we
3 argued in our brief, it's really only one part of
4 the model that is defined in the compact and that
5 is memorialized in the compact. That part of the
6 model does not contain the assumptions that
7 Wyoming is concerned about. I have to assume
8 maybe they didn't read the compact when they
9 entered into the agreement. I'm not sure. But
10 otherwise, the model itself does not affect
11 anybody, at least as it's used in the compacts
12 except the Tribe, and only in some very peripheral
13 ways. It's not a model that we operate on to
14 determine anything about the operation of the
15 river. It only addresses the three points that I
16 set out in my brief as to how shortages are
17 shared, when excess water may be available, and so
18 on. So it really only affects the Tribe and the
19 Tribe's right under the compact.

20 The only substantive thing they did was
21 to assist the parties in determining and
22 establishing the Tribe's water right based on data
23 from the model. Once the allocation was set in
24 the compact, the model really has no relevance
25 except for those three items. And whatever -- and

1 certainly even in the compact itself, which says
2 it will not affect anything under the Yellowstone
3 Compact, the legislation which says the same, and
4 even the agreement that says the same, we don't
5 see what reliance on the model achieves under this
6 agreement.

7 SPECIAL MASTER: Thank you. So it's
8 3:32. You better dash.

9 MS. WHITEING: Thank you.

10 SPECIAL MASTER: Okay. Mr. Kaste?

11 MR. KASTE: Well, to make it clear,
12 before Ms. Whiteing leaves, that we're not talking
13 about the Tribe's water. We're talking about
14 Montana's water in that enlargement, and in no way
15 are we attempting to affect the Tribe's right in
16 that reservoir. What Wyoming says happened is, an
17 enlargement was built, and that enlargement holds
18 Montana water. And if the 1992 agreement doesn't
19 apply the way we say, there is nothing out there
20 in the world that say Montana's water that's
21 brand-spanking new is entitled to pre-'50 priority
22 dates. That's our position, not the Tribe's
23 water.

24 SPECIAL MASTER: Thank you. So again,
25 I just want to make this point for her

1 presentation. So I know you're tempted to
2 probably address everything.

3 MR. KASTE: I just really want to quick
4 address your questions, if I can.

5 SPECIAL MASTER: That would be fine.

6 MR. KASTE: I hope I've gotten most of
7 those down. The first one that I have down is
8 what happens in Wyoming with regard to storage and
9 you let water go past your reservoir, is that
10 counted against you? And the answer is yes, it
11 can. When you get an order to fill from your
12 commissioner, you need to fill. And if that works
13 an injury on your -- that water that you let past
14 can be counted against you. A lot of time there's
15 more than enough water, and so it doesn't really
16 come up. But the mechanisms are in place to count
17 that water against the reservoir holder if it
18 turns out they didn't fill, and they had the
19 opportunity to, they're not going to be allowed to
20 call their neighbor upstream and say: Hey, shut
21 off and fill me up. That won't happen. And
22 that's what's really being -- what Montana is
23 asking you to do here. We didn't fill because of
24 my personal decisions, and now I'm asking my
25 neighbor to make up the difference although they

1 have done nothing, and that wouldn't happen under
2 Wyoming law. The best statute I think I can point
3 you to is Wyoming Statute 41-3-603, which talks
4 about giving the hydrographer commissioners
5 authority to require people to store whenever
6 water is available. And I believe that there are
7 actually some border control regulations on the
8 subject as well, but I don't have a cite for you
9 today. We'll have to get to that.

10 SPECIAL MASTER: That's fine. Again,
11 on this particular point, what I would like both
12 sides to do is give me any citations or material,
13 either statutory regulations, or guidelines that
14 would help me understand the way this is going.

15 MR. KASTE: You asked if there was
16 evidence in the record about post-1950 diversions
17 other than those four years, and you were pointed
18 to Mr. Book's Appendix C and some ditch
19 diversions. I'd just remind you that those ditch
20 diversions contain multiple rights, some of which
21 are pre-'50, some of which may be post-'50, and so
22 they don't tell you anything about what lands the
23 water may have been applied to.

24 Similarly, you asked, well, is there
25 really a question of fact among the experts about

1 whether or not the reservoir would have filled to
2 its pre-1950 capacity in the event that you don't
3 choose to enforce the 1992 agreement, and you've
4 heard something about Mr. Aycock's report. The
5 answer to that question is no. I would refer you
6 to Mr. Hinckley's Figure 5A. And again, this is
7 just the basic math. You'll see in that Figure 5A
8 with a minimum winter bypass of 50 CFS in every
9 similar year from -- in this particular chart,
10 it's 1991 through 2009. The reservoir fills not
11 only to 69,000 acre-feet, but if you'll look at
12 the graph, more than 72,500 acre-feet as well.

13 So the answer to your question is,
14 there isn't any evidence in the record indicating
15 the reservoir wouldn't fill, assuming that minimum
16 winter bypass is 50, the pre-1950 capacity. And
17 then the way that Mr. Aycock and Mr. Smith, as I
18 told you before, get to this notion that it
19 doesn't fill is by applying a maximum winter
20 carryover, which is, as I say, not consistent with
21 the Doctrine of Appropriation, that allows water
22 you could have stored to pass by your headgate for
23 reasons unrelated to the needs of downstream
24 seniors.

25 You asked about this trigger flow

1 thing. I think you correctly pointed out we have
2 three affidavits in the record from the
3 hydrographer commissioners throughout the Tongue
4 River Basin that regulate the trigger flows.
5 They'd been around, and they know that when they
6 get a certain level, it's time to go to work, and
7 that's what those triggers one. Those are the
8 things that tell us we're about to the point where
9 we know we're going to start getting calls, and
10 those calls do come, and that communication does
11 occur, and there is an ascertainment and a
12 confirmation of contemporaneous demand by our
13 water users. And I think if you look at
14 Commissioner Schroeder's affidavit, I think,
15 frankly, you have to misread his deposition to get
16 to the point where he says he regulates to trigger
17 flows, and that misreading is not sufficient to
18 create a question of fact. He does later say in
19 his deposition, he verifies that there's an actual
20 need all the time. And if you look at the
21 affidavit we had him submit, and I can tell you,
22 he's sort of incensed by the assertion that he
23 regulates to trigger flows. But Paragraph 4 of
24 his affidavit that we submitted talks about people
25 don't call him and say, "I'm going to cut my hay

1 today," but he is able to ascertain the decrease
2 in demand in the system, and he makes adjustments
3 based on that decrease in demand. So people don't
4 call him and say, "I'm going to church," but he is
5 aware of the changing demands along the system.
6 And like I say, there are multiple rights in those
7 various ditches, and so it's a fairly complicated
8 process. But, you know, a couple years on the
9 system, and it runs like clockwork, for the most
10 part. And it really is -- I think, here from
11 Mr. Schroeder, if there's water coming out of the
12 bottom of one of those ditches that's not being
13 used, he's going to crank that headgate down to
14 match the demand. And the folks in Wyoming, at
15 least, are watching that on a continuous basis
16 throughout the irrigation season. There really is
17 a definite and firm attempt to ascertain
18 contemporary actual demand in Wyoming, and we
19 think that the same kind of standard ought to
20 apply in Montana because that's what we bargained
21 for when we adopted an appropriative kind of
22 compact. We didn't bargain for a mass delivery
23 kind of compact like these other cases you keep
24 hearing about. All those cases are really
25 interesting and totally inapplicable because we

1 have a fairly unique compact here that works
2 different than all of those. Nobody is entitled
3 to a set amount of water as between the states.
4 It changes all the time based on the ability of
5 those people and the need of those people to put
6 it to beneficial use. And so the rulings in those
7 other cases are just not applicable. They're not
8 helpful to you in your decisions today. So the
9 more I hear about them, the more I keep wondering
10 why.

11 And one of those cases that you heard
12 about was this Wyoming vs. Colorado. You don't
13 have to show injury. Well, I tell you what, in a
14 contempt proceeding you don't have to show injury,
15 and that's what that was. It was a contempt
16 proceeding. This is a case about breach of
17 contract. At its core, this is a breach of
18 contract case, and that means somebody has to
19 prove breach, causation, and harm, and that
20 somebody is the State of Montana. So when you ask
21 about the burden of proof, the burden of proof in
22 those proceedings for everything, including all
23 the particulars necessary to prove a breach, falls
24 on Montana, squarely on Montana. There is no
25 question that the burden of proof in this case

1 falls on Montana. And that means they're going to
2 have to show need in Montana at a time when
3 there's post-'50 use in Wyoming. At that point,
4 they have established a violation. And that they
5 have utterly failed to do in this case in any
6 manner. And this case is ripe for summary
7 judgment. This case begs for summary judgment.
8 And we'd ask that you enter summary judgment in
9 favor of the State of Wyoming and dismiss
10 Montana's complaint.

11 Unless you have any other questions?

12 SPECIAL MASTER: Oh, I do. I'll be
13 very brief. So first of all, can you help me to
14 again understand if this compact were wholly
15 implemented, how -- if you are constantly changing
16 the Article V(A) allocations, how you then figure
17 out what the Article V(B), pursuant to the
18 allocations are, given that you don't really know
19 any particular point in time how much you should
20 be letting down for Article V(A)?

21 MR. KASTE: You know, I heard you ask
22 that question, and I thought, wow, that sounds
23 complicated but I don't think it really is. What
24 we have is a system where we have these tiers, and
25 we've got our V(A) water, and we have to make

1 adjustments in that over time to reflect actual
2 demand, and if we were doing that on both of sides
3 of line, that would be great. And as you do that,
4 you've got the potential for changes in your V(B)
5 allocations. So as the V(A) changes in Montana go
6 up or go down, there's a consequent change in the
7 V(B) allocation on a current basis, and we don't
8 really regulate for V(B). We haven't done that.
9 I think Mr. Wechsler told you we haven't been
10 administering under V(B), and so it really isn't
11 that complicated in practice. I mean, most of the
12 time, I think what's really going on is, we're
13 looking sort of on a broader than day-to-day basis
14 and checking are we still good, and I think, I
15 think, that the fact is, is that Wyoming never
16 quite uses the percent allocated to it under V(B),
17 and so nobody cares and it really is sort of a
18 solution in search of a problem there. Maybe
19 there comes a time in the future where it causes
20 us some headache, but I just don't see it now.

21 SPECIAL MASTER: Okay. Just one or two
22 other questions. One is Mr. Wechsler's argument
23 actually according to the 1992 agreement with
24 respect to post-1950 rights, that those 1950 to
25 1980 rights are assumed to be supplemental rights,

1 and so they are still inferior to pre-1950
2 rights.

3 MR. KASTE: Well, I think the 1992
4 agreement was based on an interpretation of the
5 compact that you didn't ascribe to. I think the
6 folks who executed the 1992 agreement believed
7 that pre-1950 rights and supplemental rights were
8 treated about the same; and therefore, everybody
9 who agreed in that agreement that pre-'50 and
10 supplemental were taken off the top was a
11 reflection of that interpretation. And like I
12 say, my position in this litigation is because
13 that's an interpretive and implementing decision,
14 the actual interpretation of the Yellowstone River
15 Compact that the Court has laid down is irrelevant
16 to whether or not the parties should be forced to
17 live by the agreement that they made in 1992.

18 SPECIAL MASTER: Okay.

19 MR. KASTE: I have a sneaking suspicion
20 the parties didn't anticipate necessarily the
21 rulings of this Court. I know for a fact that
22 Wyoming did not.

23 SPECIAL MASTER: Okay. And I think
24 those are the questions which I need answered at
25 this point in time.

1 MR. KASTE: Thank you very much.

2 SPECIAL MASTER: Thank you. So why
3 don't we take a 10-minute break right now and then
4 come back. And if it's absolutely necessary, what
5 we can do is to schedule a pretrial status
6 conference for next week rather than doing it
7 today. There's no reason we have to resolve those
8 questions today. So if we need the remaining time
9 to hear Montana's motion, then that is the way we
10 will deal with it.

11 Let me just say with respect to --
12 well, before we go off the record for the break,
13 one of the things that Mr. Kaste had asked when
14 he, Mr. Draper, and I were together on the field
15 trip was, if there was any way I could indicate at
16 the close of the oral arguments today if I were
17 planning on granting summary judgment for Wyoming,
18 that would be nice, because then people wouldn't
19 have to continue to prepare for trial. Although I
20 would love to be in the position that I could
21 indicate one way or the other, I have to confess
22 that after the oral arguments today, I'm going to
23 have to go back and look at some additional
24 issues, so I cannot indicate that right now.

25 But to the degree that I can determine

1 the answer to that question before mid-September
2 just one way or the other, so that even before
3 written opinions that you have a set time for, I
4 will let you know. Obviously, we don't want
5 anyone to bear trial expenses unnecessarily. But
6 at this point in time, I can't say one way or the
7 other on that.

8 The only other thing I will say,
9 because I know I haven't said it frequently over
10 time, but whichever way I rule on the motion for
11 summary judgment that Wyoming has filed, I hope
12 that the parties are continuing to discuss
13 settlement. Because since it's two states, I
14 realize that water issues are complicated, and
15 there's a lot more frequently than just, as I
16 mentioned earlier, the acre-feet. I would be
17 remiss, and I'm sure the Supreme Court would be
18 annoyed at me if I didn't at least encourage you
19 to discuss settlement, okay? So with that, let's
20 take a 10-minute break, and we'll come back and
21 discuss Montana's issues.

22 (Recess from 3:45 p.m. to 3:54 p.m.)

23 SPECIAL MASTER: Okay. If everyone's
24 ready, what I would suggest is that we go back on
25 the record at this point. And so the remaining

1 hour we will spend on Montana's motion for summary
2 judgment upon the compact's lack of specific
3 intrastate administration of the parties. So let
4 me just say one or two things as background here,
5 and these are primarily for Montana, but the final
6 part of it is also for Wyoming.

7 So the motion itself reads that, "The
8 State of Montana moves for partial summary
9 judgment. The Yellowstone River Compact does not
10 impose specific requirements on intrastate
11 regulation and administration of the water rights
12 as a prerequisite for the state's enjoyment of its
13 pre-1950 compact rights." And assuming I agree
14 with Montana on this, it would be fairly easy for
15 me to simply reach a conclusion that, in fact, the
16 compact doesn't require any specific regulations,
17 but that isn't probably going to help very much in
18 this particular case. And I assume one of the
19 reasons why you filed your motions was, you wanted
20 a little bit more guidance as to what's actually
21 needed to be shown during trial, and I think the
22 issues raised here are very important. So again,
23 just be clear, that it's very easy to say that
24 there are no specific requirements, but that
25 doesn't mean there aren't any requirements at all.

1 So there are several things that would
2 be useful for me to know. The first one is, it
3 would be helpful if I had a better sense from
4 Montana as to whether or not there are specific
5 issues of intrastate administration for which you
6 are seeking summary judgment here, and then
7 there's material in the record on which I can
8 rule. So, for example, it could be that what you
9 are seeking is a ruling that Montana's current
10 process for regulating post-1950 appropriative
11 rights in Montana are fine, and that there's no
12 requirement that they do anything more than
13 they're doing right now. That's something very
14 specific that I could provide a ruling on at this
15 particular date, looking at the records, seeing
16 whether or not there's enough on the record to
17 make a determination on that.

18 So one question is whether or not
19 there's some specific items of intrastate
20 administration for which you are seeking summary
21 judgment, that you believe there's enough on the
22 record here I should be able to rule on that.

23 The second question is actually the
24 very first one that I listed on my sheet of
25 questions I passed out the other day, which is the

1 better understanding of exactly what Montana is
2 claiming here because one way of reading the
3 motion is basically that once that water crosses
4 over, there has to be enough water that crosses
5 over in order to meet the paper rights of those
6 pre-1950 appropriators and for storage. But at
7 that point, it's Montana's to administer out, if
8 Montana wants to. But I'm not sure that's your
9 argument. It might be very well be your argument,
10 well, but we have to make sure that, for example,
11 water that we're claiming not just going to
12 post-1950 appropriators, but we do enough.

13 And if that's the argument, then the
14 question that I have to address is, what's the
15 standard for determining whether or not Montana's
16 standards are sufficient. And, Mr. Kaste, I don't
17 know whether you intentionally did this this
18 morning, but at one point when you were talking
19 about the oversight, you said that Wyoming was not
20 expecting continual oversight but just wanted
21 reasonable oversight, and I'm paraphrasing, but
22 you definitely used the term "reasonable."

23 So one particular way of looking at
24 this is, whatever Montana needs to do in order to
25 make sure that they are not demanding and taking

1 water that Wyoming doesn't need to pass over the
2 state line, and so long as Montana's method of
3 doing that is consistent with what it does
4 everywhere else in the state and is reasonable,
5 then that's fine. There's no requirement that
6 Montana do it just like Wyoming, or that Montana
7 do it any differently than it does in all other
8 compacts so long as it's a reasonable approach to
9 satisfying the particular requirement.

10 So I don't know whether that's helped
11 or just confused people more. But those are three
12 things that would be very helpful for me to have
13 to address.

14 MR. DRAPER: Thank you, Your Honor.
15 The first question that you just posed as to
16 whether we were looking for specific rulings about
17 particular aspects of administration or something
18 more general, the answer is that we were looking
19 for a more general statement of principles that
20 comports with our understanding of the compact,
21 and we think you can read that out of the compact.
22 And, of course, we have an expert report case if
23 the Master desires to look at the extrinsic
24 evidence that may impact that. But we were
25 looking for a general principle or confirmation of

1 that, that the states are allowed to apply the
2 Prior Appropriation Doctrine within their own
3 States, basically as they did, and I think looking
4 at the criteria like is it done in the Tongue
5 River Basin, basically, as it's done throughout
6 the rest of the state, and is it reasonable are
7 good ways of describing what you understand to be
8 the type of requirement that might be implicit in
9 the compact in their view.

10 But it's our understanding that, for
11 instance, we were just hearing from Mr. Kaste,
12 well, the way we do it Wyoming is, you know, no
13 water gets through, you don't get a credit, the
14 implication being that's the way it should be in
15 Montana. And that's just exactly the kind of
16 thing that we've been hearing for a long time,
17 that we're seeking a ruling on as a general
18 principle and not going to any specific one at
19 this time. I think the evidence that will be
20 presented at trial, expert opinions and so on,
21 will have some bearing on the detail.

22 SPECIAL MASTER: So let me just pick up
23 there. So what I hear you saying, number one,
24 it's not Montana's position that once the water
25 passes over the state line it can do whatever it

1 wants, but that Montana needs to follow general
2 principles of prior appropriation in a way which
3 is non-biased and, in other words, applies the
4 same rules with respect to the Tongue River as it
5 would in other segments of the state, recognizing
6 that if the problem is different, different
7 approaches follow, but that there's not some rule
8 that follows that's considered biased against
9 Wyoming's interest in the Tongue River; and second
10 of all, it needs to be a reasonable approach to
11 the prior appropriations?

12 MR. DRAPER: I think that's basically
13 correct, Your Honor, yes.

14 SPECIAL MASTER: Okay. So I understand
15 that you're looking for just sort of setting out
16 general principles. But are there particular
17 settings in which that's come up so far? So just
18 thinking about what we've heard this morning, it
19 appears to be an issue in connection with the
20 degree to which Montana regulates post-1950
21 appropriators in order to make sure that the water
22 that Wyoming is required to let move down, that it
23 goes to the pre-1950 appropriators rather than the
24 post-1950 appropriators. So it's the number one
25 priority.

1 Number two is for Wyoming to bring up
2 the question of how do you police beneficial use,
3 which really gets to the question of are you out
4 there ruling that while Wyoming's facing a
5 problem, that means that somebody's saying that
6 then they shouldn't be claiming this much water as
7 they would otherwise? That strikes me as the
8 second context of that solution.

9 And the third context in which it sounds
10 like has come up is in connection with the
11 reservoir operations. Those includes the three.
12 Are there others that, to your knowledge, that's
13 come up in that context so far?

14 MR. DRAPER: Those are the major ones I
15 think of as of right now. And I would say that,
16 as Your Honor is probably aware from our expert
17 reports, we do not believe that, having
18 established a conceptual right to supply our
19 pre-'50 users, that we should be hamstrung with
20 the policing of beneficial use, to take one
21 example that you just gave, and do something more
22 than just the normal administration that we do.
23 And as long as we're doing that in a reasonable
24 way, and not in a way that is calculated to change
25 the rules in the Tongue River Basin as opposed to

1 other areas of the state, that the presumption in
2 this case that water is being put to beneficial
3 use is the standard operating procedure. And if
4 that's the standard operating procedure, and
5 that's done through the state, and that's
6 reasonable, that is sufficient. And we are
7 concerned, and it underlies this notion that,
8 having established the principle, that we'll end
9 up getting no water in the end, because every day
10 you've got to go check to make sure that Farmer A
11 is doing it, or Farmer B is not out getting a
12 haircut, or didn't get up at 2 o'clock in the
13 morning to turn his pumps for the ditch on. That
14 kind of detail, as we know, can change on a daily
15 basis. They want to have this kind of frenetic
16 administration a prerequisite for Montana
17 receiving its water and it simply, if accepted,
18 would set up an unworkable situation. It would
19 just be impossible to satisfy those kinds of
20 demands they are making. And I think it's
21 implicit in the Master's questions about what
22 effect would it have V(B) under the compact if
23 they're always changing these. And even though
24 the -- well, as Your Honor knows, we're not asking
25 for a set amount at the state line like the

1 Colorado River Compact. I think it changes every
2 day.

3 But to the extent that we're not
4 getting our block of pre-'50 water, then it is our
5 position, as measured at the state line that, it's
6 incumbent upon Wyoming to keep its post-'50 rights
7 shut off. And we know there are post-'50 rights
8 that are not above other rights in Wyoming for
9 other reasons don't get regulated soon enough, as
10 pointed out in Book's report, to stop their
11 interference with our rights not being satisfied,
12 and yet post-'50 rights not being regulated off in
13 Wyoming.

14 So we believe that the compact is
15 consistent with an orderly administration which
16 comes from establishing the correct amount that's
17 needed at the state line for our block of pre-'50
18 rights. And that's really where the State of
19 Montana, which is a party to this compact, where
20 that water is received, and it's naturally where
21 the allocation and the compliance should be
22 measured with respect, in this case, to correct
23 flow.

24 So as Your Honor implied, it has all
25 sorts of ramifications even beyond Article V(A) to

1 allow these kind of tests to be put in place in
2 order for us on a daily, weekly, monthly basis to
3 be able to enjoy our rights under the compact.

4 And by the way, I would mention that
5 those other cases that we've been discussing on
6 the Republican River and the Arkansas River, those
7 don't have a set stated amount of delivery
8 requirement. Those vary for each -- for the
9 applicable time period, those vary in each time
10 period. There's no set acre-foot value that we
11 have in the Colorado River Compact. It changes.
12 And that's why you use models to do with and
13 without analysis, because it's changing. They're
14 analyzed on short time periods that are combined
15 to whatever the appropriate accounting period is
16 under those various compacts.

17 I would say, one of your questions had
18 to do with reciprocity measures. What's good for
19 the goose is good for the gander, it sounded like,
20 and I think I've answered that in what I've just
21 said, that each state, as long as you put it, is
22 not applying special rules in the Tongue River
23 Basin for some unprincipled reason and is acting
24 reasonably, that, no, there's no reciprocity. If
25 Wyoming is operating under a one-fill rule, then

1 that means that Montana has to operate under a
2 one-fill rule. So I think that's been answered
3 implicitly by what we say.

4 Looking at your questions for us that
5 you provided the other day, you talk in one of the
6 bullets about the balance between Article V and
7 Article XVIII. Article V is reference to the
8 Doctrine of Prior Appropriation, and Article XVIII
9 is reference to the retention of jurisdiction by
10 each of the states to manage and distribute the
11 water according to their own solutions and rules.
12 I think -- and again, we probably addressed a lot
13 of that in what we've just been discussing. I
14 would note that the retention of sovereignty, and
15 particularly where it's the subject that is a
16 specific compact provision, is something that the
17 Court has found important, that that can be seen
18 in the recent Tarrant case that's decided by the
19 Court where the Court noted that states were
20 inherently reluctant to give up sovereignty.
21 That's what really what we're talking about here.
22 Article XVIII is a specific mandate to preserve
23 sovereignty, consistent with, of course, any other
24 provisions of the compact. And it gives an
25 imposition on that sovereignty to have another

1 state come in and tell you how you are going to
2 run your system if you want to enjoy your rights
3 under the interstate compact.

4 You asked a question about whether
5 there were -- a division of waters under Article
6 V(B) was an issue, but I think maybe that was
7 answered earlier.

8 SPECIAL MASTER: I think the question's
9 been answered, yes.

10 MR. DRAPER: And finally, you asked a
11 question, as I would paraphrase it, if you had a
12 water user in Montana with a junior right and a
13 senior right, if he has a pre-'50 right and
14 post-'50 right, would it be permissible for that
15 user to take water when it comes to him under his
16 pre-'50 priority and apply it to the post-'50
17 lands, and the answer to that is no. If you're
18 going to take your water right -- and I'll give
19 you an example, a very specific priority and a
20 specific acreage -- and move it to other -- apply
21 it to other lands, you need to go through the
22 appropriate change of procedures.

23 All right. So I think I have may have
24 maybe covered the questions that you specifically
25 asked, and I was going to contain myself to those

1 unless there are further issues to address.

2 SPECIAL MASTER: No, I think that's
3 most of it. So let me just go back into the rest
4 of it. One could imagine, for example, Montana
5 saying to Wyoming that not only do you have to
6 shut off your post-1950 appropriative rights when
7 we're short of water; but furthermore, we want you
8 to get out there and make sure that none of your
9 pre-1950 appropriators are hanging or wasting
10 water in one fashion or another. And I understand
11 Wyoming explained that they do that already. But
12 Montana's position here would, again on this
13 concept of reciprocity, be so long as what
14 Wyoming's doing is a reasonable approach to making
15 sure that there's no waste by the pre-1950
16 appropriators, that that's a reasonable approach
17 to it, then that's fine under the compact? It
18 hasn't come up, but that's basically the
19 reciprocity question.

20 MR. DRAPER: On the issue of whether a
21 state allows water to be wasted and how that
22 should be dealt with, it shouldn't be dealt with
23 any differently on one side or the other of the
24 state line, I would say no. I think the
25 presumption should be that water is not being

1 wasted. Now, if the state finds a big problem on
2 the other side of the state line and thinks that's
3 a problem, they can raise it with the other state,
4 or, if necessary, in this kind of a forum. But
5 the presumption on both sides should be that the
6 other side is not wasting water. We know that
7 there are infections in the administration of
8 water, but I think that falls under the
9 reasonableness criteria that you've suggested.

10 SPECIAL MASTER: Okay. So thanks, that
11 answers all of my questions, and we've dealt with
12 a lot of these issues earlier today, so that's not
13 a lock on these particular specifics, but that was
14 very helpful in clarifying the motion in the
15 context in which these motions are to be
16 developed.

17 MR. DRAPER: Thank you.

18 SPECIAL MASTER: Hello, Mr. Brown.

19 MR. BROWN: Your Honor. It's the end
20 of the day.

21 SPECIAL MASTER: It is.

22 MR. BROWN: We've plowed a lot of
23 ground. And I think, as you just mentioned, we
24 have at least in some fashion or another or some
25 point in time or another covered a lot of things

1 that potentially could have been brought up under
2 this particular argument, so I'm not going to try
3 to belabor you with going over stuff again, and
4 I'm going to try to just answer your questions,
5 but I want to focus to a couple of other things as
6 well, if that's all right.

7 First of all, you had asked Montana
8 whether or not they were asking for summary
9 judgment with regard to any specific regulation in
10 Montana, and I just want to point out that to my
11 knowledge, there's nothing in the record
12 specifically with regard to regulation that
13 Montana has actually engaged in, and that is
14 information from the commissioners, information
15 from their depositions, the records that those
16 commissioners may or may not have kept. And so I
17 just wanted to point out that I don't believe that
18 there's anything in the record where you could
19 make any sort of determination with regard to that
20 and I think that comports with what Mr. Draper
21 said, so I don't think there's a problem there.

22 SPECIAL MASTER: No, I agree. I'm not
23 sure that there is. I don't understand Mr. Draper
24 to be asking for that. And sort of the other side
25 of the question was, I don't want to rule on any

1 specific issue where Wyoming felt it was basically
2 being a general motion coming in front of me
3 saying, well, I'm going to go ahead, and I'm going
4 to rule on the following three administrative
5 questions. I don't think I'll have the
6 opportunity to brief each of those. It's,
7 obviously, easier for me to establish some general
8 principles as to intrastate administration, and we
9 can apply them specifically at trial. But I just
10 wanted to make sure then that that was what the
11 parties wanted me to do. But I understand that
12 both Montana and Wyoming are more than happy for
13 me to address this particular question in a
14 general level and not decide specifics except to
15 the degree that it's relevant to Wyoming's motion
16 for summary judgment.

17 MR. BROWN: I think that's right. I
18 think Wyoming was sort of in the same boat as you,
19 that the motion in our mind kind of came in from
20 left field, and we didn't really know what exactly
21 to do with it. We didn't know what Montana was
22 asking for precisely because there's never been at
23 any point in this litigation that Wyoming has
24 suggested that Montana has to adopt Wyoming's
25 system of water rights administration or

1 regulation. We simply never said it. So the
2 basis of the motion being that kind of confused
3 us, and it's, I think, a straw man argument that's
4 set up to, I guess, hide the purpose of what I
5 think or what Wyoming thinks is the actual purpose
6 of Montana's motion, which is to say they really
7 don't have to do anything that the compact doesn't
8 obligate Montana to do anything with regard to any
9 kind of intrastate regulation in Montana. I think
10 I just heard from Mr. Draper that that's not
11 entirely true, although there's not really very
12 clear sideboards on what that might mean. But
13 that's kind of what Wyoming felt as if the purpose
14 of that motion was, and so the response was, well,
15 you don't have to adopt Wyoming's system. But
16 under the compact, and the way that it's been
17 interpreted by yourself and by the United States
18 Supreme Court already, they have to have a system
19 in place that comports with the Doctrine of
20 Appropriation because their rights stem from that.
21 They continue to enjoy the rights under the
22 Doctrine of Appropriation, and so any system they
23 have has to comport with the Doctrine of
24 Appropriation and implement it, and that's our
25 simple position with regard to the general

1 question. Not that it's reasonable necessarily.
2 Not that it matches anything else that might exist
3 in Montana. Not that it's worked for the Tongue
4 River to this point. But that it has to comply
5 with the Doctrine of Appropriation. You have to
6 look at first in time, first in right. That's
7 important. You have to look at beneficial use.
8 That's very important. Every state that has the
9 Prior Appropriation Doctrine, that's a very
10 important element to that, and not only at the
11 time your water right is adjudicated. You, of
12 course, have to go into your adjudication, be it a
13 state district court in Montana, be it the border
14 control in Wyoming, and you have to show your
15 historic beneficial use to prove up that water
16 right to say: I went in, and I did the work, and
17 I put that water to ground, and now I get a right
18 to continue to do that forever so long as I
19 actually do it. And it's a continuing right.
20 That beneficial use is a continuing limitation on
21 that right. There's absolutely no right to use
22 the water unless you're going to actually use it.
23 It's just a paper right. It's a usufructuary
24 right. If you don't use it, there's no right.
25 It's really that simple.

1 And so to stand at the -- and what
2 Montana wants to do not only with its motion and
3 the perspective, really, that it keeps talking
4 that it needs, but also a very close cousin, Mr.
5 Book's demand model, is to stand on the state line
6 with a piece of paper in its hand and say: These
7 are our paper rights; this is how much water you
8 needed; and it's got to be here at the state line.
9 Well, that's not how it's done under the Doctrine
10 of Appropriation. You don't stand at the state
11 line. For one, you've got to look at what the
12 needs are of the appropriators. You stand at
13 their headgate and you say, "Mr. Watergate, or Mr.
14 Irrigator, or Mr. Muggley, do you need this water?
15 Do you have a right to this water? Do you have
16 the ability to divert this water?" And if all
17 those things are true, and if there's not enough
18 water actually there to satisfy that right, then
19 that's when that senior right goes unsatisfied and
20 that's what Montana has to prove in this case,
21 that this senior right is unsatisfied. That's the
22 first part of their claim. They have to show that
23 that right is not continued to be enjoyed under
24 the Doctrine of Appropriation. That right is only
25 unsatisfied when there's not water available at

1 that water right to satisfy it when it's needed.

2 And I've probably already talked longer
3 about that than I wanted to. And this goes to the
4 core idea of do we look at the paper rights, or do
5 we look at actual need. I think it's very clear
6 under the Doctrine of Appropriation and under the
7 multiple Montana cases that we've cited to you
8 that it's based on actual need. If you read the
9 early Montana cases, it talks about -- it's based
10 on necessities. It's based on your need for that
11 water at any particular point in time. If you've
12 got a right to 2,000,000 CFS, if you don't need
13 it, you have no right at all to call for it, and
14 the Montana cases are very clear on that.

15 And I wanted to reiterate one, and
16 Mr. Kaste referenced it to you this morning, and
17 that was Quigley vs. McIntosh, and that's that
18 first -- there's actually two Quigley v. McIntosh
19 cases cited in our brief, and I call this one No.
20 1 because it's the earlier one, but it's at 290 P.
21 266. And that's the one where -- and the
22 situation was, it was a creek, and I don't know
23 how to pronounce it. It's Ophir Creek. I
24 apologize to Montana if I mispronounced that
25 creek. But this creek already had the decree on,

1 so it already had some very early rights,
2 including some placer mining claim rights on it,
3 and there were some limitations on those mining
4 rights. They could only be ever used for that.
5 It could be used for nothing else.

6 So Mr. Quigley came into the District
7 Court, and I don't understand exactly how the
8 process existed back in 1930. Actually, I think
9 he applied for it in 1928. But at any rate, there
10 was a decree. He wanted to appropriate what he
11 thought was surplus water. So there's a whole
12 bunch of water in the spring. There's more water
13 than everybody needs in the spring, "I want to
14 come in and appropriate that." So he goes into
15 the District Court, and the District Court said
16 fine. He said, "I agree with you. There's some
17 water from about May through June, and if you want
18 to appropriate that water" -- I think it was 800
19 inches, 200 CFS -- "if you want to come in and
20 appropriate that, fine. But I'm going to put
21 restriction on it, and I'm going to put a
22 limitation," and this is the limitation that he
23 put on it, "that the plaintiff and the petitioner
24 herein shall cease to divert the water of Ophir
25 Creek under any decree entered herein when the

1 quantity or volume of water flowing in said Ophir
2 Creek at plaintiff's point of diversion shall be
3 equal to or less than that of the decreed water
4 rights prior to the right of the plaintiff fixed
5 and allowed herein as of April 14, 1928."

6 And you need to go read that. Trust me
7 when I tell you, Your Honor, that is a
8 triggerpoint. What the District Court was telling
9 Mr. Quigley was that when at his headgate the
10 flows of Ophir Creek were such that the volume
11 wouldn't be able to satisfy all the prior decreed
12 rights, he could no longer divert. So once the
13 water gets to that, all those paper water rights
14 added up in front of him, once it gets to that
15 amount, he could no longer take his new 20 CFS out
16 of the creek. Well, he thought that was wrong,
17 and so he appealed and it went to the Montana
18 Supreme Court. And you can read the case, but
19 essentially the Montana Supreme Court said: No,
20 that is not what we look at. We don't look at the
21 paper right to determine whether or not the junior
22 appropriators can lawfully take the water. We
23 need to look at whether they need it. At that
24 particular point in time, the senior water user
25 cannot demand the junior water user turn off until

1 the senior actually needs the water. And that is
2 a uniform principle that I've been able to find no
3 contrary law to.

4 And just for an additional reference
5 besides the Montana cases we cited, if you go back
6 and take a look at our old friend the Worley case
7 with regard to a call, I think you will find that
8 the very same ideas are expressed in there. In
9 fact, one of the cases Mr. Kaste cited to you is a
10 Montana case, the Cook vs. Hudson case, is
11 actually cited by Worley. And it's the same
12 concept. We don't pledge allegiance to paper
13 rights. We simply don't. You have got to put
14 that right to use or you have none.

15 The only other thing I want to say
16 about actual use is that not only is the case law
17 extremely clear, that you have to have actual
18 contemporaneous need, but the 1914 Miles City
19 decree already limits all of these Montana
20 pre-1950 water rights by its very own language.
21 And I direct you to the decree which is attached
22 to Exhibit M of Montana's brief in opposition to
23 Wyoming's motion. And on Page 24 of the Miles
24 City decree, it reads like this: It says, "Every
25 party to the decree was perpetually enjoined from

1 in anywise wasting the waters of said Tongue River
2 or diverting at any time any more thereof than is
3 reasonably necessary for the use to which it is
4 applied." That right there is a limitation that
5 we don't -- it doesn't really matter what this
6 decree says, that you, T&Y Irrigation District,
7 need 187 CFS. You're limited at all times to the
8 amount of your need. It's right within those
9 water rights.

10 SPECIAL MASTER: So I assume the decree
11 is long?

12 MR. BROWN: The decree is fairly long.
13 It's actually in two places in the decree. It's
14 right in the middle on Page 12, and at the end at
15 Page 24. The one I was citing to you is on the
16 very last page, so it's relatively easy to find.

17 And if you'll can bear with me a sec,
18 like I said, I'm trying to cut some of this out.

19 I think Mr. Kaste did a pretty good job
20 when he was up here again of dispelling any notion
21 that Wyoming has the burden of proof to prove
22 Montana's claims for them. It's just not the way
23 it is. And the only thing that I want to mention
24 is that the affirmative defense arguments that
25 Montana raises in its reply for its motion, it

1 cites several cases, and it cites Archer, an
2 Archer case, which is a promissory note case, it
3 has absolutely nothing to do with water. It's
4 just, I think, citing the case for the general
5 proposition of affirmative defenses. It cites
6 that Wyoming case, the Parshall v. Cowper; and it
7 cites a Montana case, but it's an abandonment case
8 that has absolutely nothing to do with needing or
9 wasting water. It's an abandonment case.

10 So the only one that Mr. Wechsler
11 actually talked about was the Parshall v. Cowper,
12 and that case is not this case. That was a case
13 where the water commissioner had gone out and
14 regulated or reduced, I guess curtailed, the
15 amount of water that an appropriator was taking
16 because their ditch couldn't hold the water. And
17 there's a Wyoming statute that says water
18 commissioners can regulate water rights in Wyoming
19 to prevent waste. So that's exactly what the
20 commissioner did. The water right holder sued him
21 after he regulated and said, "I have a paper right
22 for X amount." It was more than what the
23 commissioner had given him. And it was in that
24 context where the commissioner had actually gone
25 out and regulated somebody in compliance with the

1 statute where the Court said: That certainly is
2 defense to that action and we recognize you have a
3 legal entitlement to that. But if you can't take
4 your total water right, you have no right to it.
5 So that's a defense to this action you brought
6 against the commissioner. So it's not the context
7 that we have in this circumstance.

8 I just wanted to talk a little bit
9 about -- Mr. Draper mentioned it again, and I
10 think it's mentioned in the brief, about the
11 onerous nature of the system that we're trying to
12 thrust upon Montana, and it's not. I mean, it
13 just simply is not. We're not suggesting that
14 there has to be some hour-by-hour sort of
15 oversight by all of these water rights. And, of
16 course, the actual parameters of this would have
17 to be either agreed to, I think, or figured out
18 through the course of this proceeding. But
19 generally, this is what Wyoming believes Montana
20 would have to do to generally be in compliance
21 with the Doctrine of Appropriation which regulates
22 its water rights, and I think it's consistent with
23 Montana law as well.

24 But you have to know that the water
25 user needs the water. And so how do you do that?

1 You talk to him. It's not a complicated process.
2 And I think they already mentioned, you go out to
3 the headgate. You go out to wherever their point
4 of diversion is, and you see can they divert the
5 water. And you see is there enough water there to
6 satisfy their right. And you compare that to
7 their paper right and say are they within their
8 paper right. And if you can look and see that
9 there's not enough water to satisfy that right and
10 that irrigator wants that water, there you go.
11 That's as complicated as it gets with regard to
12 that element to figure out whether or not that
13 particular right is unsatisfied.

14 So in looking back, that's what you
15 need to show. You need to show at any particular
16 point in time that water user did not have the
17 water at their headgate to put to use when they
18 wanted to. That's the first part of that, to show
19 that that right went unsatisfied. Moving forward
20 then, it would be the same thing. And I'm trying
21 to make a little bit of a distinction here
22 because, obviously, we could work out a system
23 that makes a little more sense moving forward than
24 we can looking back because looking back, if
25 Montana wanted to make claims or knew that it had

1 claims to make with regard to its unsatisfied
2 pre-1950 rights, it should have collected the
3 evidence. It should have went out to Mr. Muggley
4 and said, "Do you have water at your headgate? Do
5 you need more water at your headgate? What does
6 that mean? How much water do we have here?"
7 That's not Wyoming's burden of proof that it
8 didn't exist. That's Montana's burden of proof
9 that it did exist. Montana is the plaintiff in
10 this case. That is their burden.

11 SPECIAL MASTER: So can I just
12 interrupt here for a second, and let me just try
13 and answer a question that's directly relevant, I
14 think, to this particular motion. So Montana has
15 a particular process that it follows for
16 administering the Tongue River once it passes the
17 border, and their descriptions in some of
18 the affidavits about the process that's used,
19 where the commissioner is appointed for the four
20 specific years for when he had the most expert
21 testimony. What's wrong with Montana's argument
22 that: Well, what the compact says is that
23 pre-1950 water rights must continue to be enjoyed
24 pursuant to the Law of Prior Appropriation. We're
25 a prior appropriation state. This is the way in

1 which we administer our rights. We're not doing
2 anything differently here than we do anywhere
3 else. And if Wyoming, rather than a separate
4 state, was just an upstream appropriator who had a
5 senior right -- or a junior right, that somebody
6 downstream would call the river, that would mean
7 we would call the river at that point, so long as
8 the commissioners are sort of talking informally.
9 So why isn't that sufficient under this scenario?

10 MR. BROWN: I think I'm going to answer
11 that in two parts. I think, first of all, maybe
12 it is. Our position is, is that whatever system
13 Montana seeks to employ, so long as it comports
14 with the Doctrine of Appropriation, the generic
15 Doctrine of Appropriation, the Doctrine of
16 Appropriation as recognized by the two states,
17 then it's sufficient. And then our argument is,
18 there are certain things that you have to do under
19 the Doctrine of Appropriation in order to make
20 that system work. And so as long as whatever
21 Montana decides to do is that, then fine.

22 The second part is, I think in the
23 position in our response was that there are laws
24 in place in Montana that certainly allow this to
25 happen. I think the laws in Montana that I have

1 taken a look at certainly feel wholly consistent
2 with the Doctrine of Appropriation. The second
3 part, to answer my question, you have to employ
4 it. You actually have to do it. And in the
5 evidence that we have in this case is that that's
6 not done. That's not in front of you. I'm just
7 making that representation. There's two parts,
8 fine, as long as you do it. And I haven't had the
9 opportunity -- today was the first time I heard
10 it's reasonable, so long as that's done all over
11 Montana. I haven't done in that discovery. I
12 don't know how it's done all over Montana. I know
13 how it's been done on the Tongue River in the
14 past. I will tell you that if you take a look at
15 a couple of our cases that we cite in our brief,
16 there's very specific mention in there with regard
17 to very detailed orders the commissioner has
18 received. There's a case -- and I apologize, I
19 didn't prepare to pull those up off the top of
20 my head -- but there's a case with regard to --
21 the whole case was about appealing a district
22 judge's orders to a commissioner, saying: Whoa,
23 whoa, whoa, that's kind of over the top. We've
24 got some very detailed, very specific orders to
25 this water commissioner that the District Court is

1 giving, and we don't like that. And it was
2 basically -- it had to do with these very senior
3 appropriators who said that they didn't have a
4 limit to where they could put their water. They
5 could put it on whatever land they wanted to, and
6 the District Court said no. And so he wrote
7 orders to those commissioners and said they will
8 not put water on that land or land outside of what
9 they historically had.

10 And so my sense from reading some of
11 the cases is, the commissioners were charged with
12 very much more specific regulatory tasks in other
13 cases in Montana than they have been on the Tongue
14 River.

15 SPECIAL MASTER: So getting to the
16 standard, and I'm trying to figure out how to
17 actually resolve issues of this nature. And it's
18 a problem where you have to believe in compacts on
19 the issues that come up, and it would be nice if
20 there were a set of regulations that you could
21 turn to to resolve them. And so in thinking about
22 how you actually would evaluate what Montana is
23 doing, and we think it's pre-1950 appropriative
24 rights to make sure that they're not complaining
25 about Wyoming not letting enough water down and

1 then releasing the water. You know, I'll just
2 give you my initial impression on this, and again,
3 I appreciate both your argument and Mr. Draper's
4 continuing to remind us to whether there are other
5 things I should be thinking about. But it strikes
6 me that given that these pre-1950 rights are
7 supposed to be enjoyed under the Law of Prior
8 Appropriation, that there are rights. So clearly,
9 for example, I would think Montana could not adopt
10 a principle that, well, once we've adjudicated a
11 water right, or decided that somebody has a
12 particular right to a fixed amount of water, then,
13 Wyoming, you have to provide it, and we're going
14 to have a new rule that all of our appropriators
15 can just waste water. If they want to just throw
16 it back into the river, or even better, put it in
17 trust and take it to California where we'd be more
18 than happy to accept additional water, at that
19 point it's no longer the Law of Prior
20 Appropriation. And furthermore, it would seem
21 unreasonable that Montana could demand that of
22 Wyoming if these rights are really under the Law
23 of Prior Appropriation. But different states have
24 different rules. They have different procedures.

25 And so in thinking about how you can

1 actually resolve this question, this is obviously
2 what I will hear at trial, it's also relevant to
3 Wyoming's motion for summary judgment, it strikes
4 me that at least two criteria that would be
5 reasonable, or certainly are ones that could be
6 employed, would be, number one, that you can't be
7 in a situation where because Montana knows the
8 water is coming from Wyoming, they won't worry
9 quite as much about it when the Tongue River
10 because that's well spent, so that certainly can
11 be bias.

12 So then the other is, does it
13 reasonably advance -- does that state's prior
14 appropriation law, does it reasonably advance the
15 goals of the prior appropriation system. So
16 that's why I came up with this, so long as it's
17 not bias, so long as it reasonably advances the
18 goal of the prior appropriation system which has
19 been adopted by the compact, then that would seem
20 to be the appropriate standard. But if people
21 have thoughts as to other ways in which I should
22 be looking at these issues where Montana is
23 basically claiming we're a prior appropriation
24 state, I mean, we follow the rule of prior
25 appropriation, this is just waiving them to

1 determine whether or not that's permissible.

2 MR. BROWN: Well, it's a line-drawing
3 exercise.

4 SPECIAL MASTER: It's a line-drawing
5 exercise, and so I draw out, as lawyers always do,
6 which is certain equity and reasonableness, and so
7 those were the two principles I came up with. If
8 you have thoughts on other ways to address it...

9 MR. BROWN: I think my thoughts would
10 go to exactly what Montana asked the United States
11 Supreme Court to do when it judged Wyoming's
12 pre-1950 water rights. You take look at the laws
13 in Wyoming, and you take a look at the laws in
14 Montana, and you see if they're compatible and see
15 if they agree. And if they agree, well, then
16 you're probably pretty close if not there already.
17 I think you also take a look at the course of
18 dealings between the states, and I think you can
19 look to the Tarrant case that Mr. Draper cited for
20 that very principle. Let's see how the parties
21 have acted within their own systems or with each
22 other, for example, with the 1992 agreement, and
23 see how they've come to interpret this. Let's see
24 how they've come to implement the doctrines in
25 their states.

1 And so I think so long as the States of
2 Montana and Wyoming are fairly consistent with
3 regard to the way they implement administration
4 and regulation of water rights, then you're home,
5 I think, or at least pretty close to being home.
6 If they don't agree, or if they're inconsistent,
7 or if they're short on some kind of law, then you
8 do exactly what the Supreme Court did in our case.
9 And I think you have to take a look at the generic
10 Law of Prior Appropriation, you take a look at the
11 doctrine as it's developed in the United States
12 Supreme Court, and you take a look at the other
13 prior appropriation states, and you try to come up
14 with a consensus answer, I guess, if that's
15 possible. I know it perhaps may not be. But I
16 think one of the more difficult questions that
17 probably could come up has already been answered
18 with regard to the increased efficiency and the
19 rule of recapture, and those are some tough
20 questions. But I think that's how you need to
21 analyze it, and I think that's how you have to
22 deal with it. I don't think one state can just
23 sit back and say: This is the way I do it;
24 everywhere else, I'm good. I think it has to
25 comply with the Doctrine of Appropriation, and I

1 think you actually have to employ your law.

2 SPECIAL MASTER: I'm running short on
3 time. So if there's another point or two that you
4 really want to make, I'll be quiet.

5 MR. BROWN: I apologize. The only
6 thing I want to do is make sure I get your
7 questions answered. The reciprocity. If you read
8 Article V(A), it says applies to both states.
9 There will be no double standard written in V(A).
10 It applies to both states. What's good for
11 Montana is good for us and vice versa.

12 I think I've probably at least caught
13 most of your questions. So unless you have
14 another one, I'll be done.

15 SPECIAL MASTER: That's actually been
16 very helpful, so thank you.

17 So, Mr. Draper, do you want a minute
18 or...

19 MR. DRAPER: Just one minute, if I may,
20 Your Honor.

21 SPECIAL MASTER: No, I meant before you
22 came up, do you want a minute before you come up
23 here to at least talk?

24 MR. DRAPER: I'll take one minute.
25 Thank you.

1 (Discussion off the record.)

2 MR. DRAPER: Thank you, Your Honor.

3 SPECIAL MASTER: You're welcome.

4 MR. DRAPER: Just a couple of comments
5 on Mr. Brown's statements. He said that we would
6 just have to work out the administration. He said
7 we're not talking hour to hour, so we're breathing
8 a little bit of a sigh of relief, but it sounds
9 like it's not too much more than that, is what
10 they had in mind, as to what we've -- when we've
11 got to re-prove that things are still meeting all
12 their criteria, but it is an indication that it's
13 just the idea that you've got to work it out, that
14 it's not required by the compact, and we feel that
15 the compact itself, and as you'll see, the
16 extrinsic evidence shows the context, that it's
17 consistent with that, that this compact was
18 entered into by the states partly on the basis
19 that they couldn't get their two systems to match,
20 and they decided we'll figure out a way to do
21 that. We'll have Article V(A), everything will be
22 treated as it has been as far as existing rights,
23 and we'll divide later waters, which they were
24 hoping for, and certainly in this interstate
25 tributary didn't get largely realized. But that

1 each state would be left to its own devices within
2 those general terms of prior appropriation. And
3 there's no evidence, there's no suggestion that
4 Montana is any different from that. We have, from
5 the time of the compact and way before and today,
6 applied that doctrine as it has matured in the
7 State of Montana.

8 And consistent with the Master's
9 formulation, what we're doing is, we believe,
10 consistent with those criteria. They're asking
11 for -- they're saying just because we do it, that
12 we administer our prior appropriation system the
13 same in the Tongue River Basin as the rest of the
14 state, doesn't do it for them. Apparently we need
15 to at least be ready for the Supreme Court to
16 impose greater responsibilities with respect to
17 the prior appropriation and administration in the
18 Tongue River Basin in order to enjoy our rights
19 under the compact than we do elsewhere. It seems
20 to me that the suggestion of the criteria itself
21 argues against that. It's just they -- in fact,
22 it illustrates the extra hoops that they want
23 Montana to jump through before they have to let it
24 in this postdated water ban. And we're saying as
25 long as we're reasonably applying the Prior

1 Appropriation Doctrine uniformly around the state
2 and reasonably within that doctrine, that should
3 be the end of the matter certainly as to the
4 presumption that water is being administered
5 appropriately. And when the criteria for us
6 getting water is reached, that it's not subject to
7 second-guessing on an hourly or daily or monthly
8 basis. If you're not out there changing the
9 allocation on what they -- well, they wouldn't
10 insist on hourly, but they're actually changing
11 the allocation. In other words, they don't have
12 to let that water down today because of somebody's
13 hay. That's their example. They don't do it up
14 in Wyoming. They don't change that. You can see
15 it in the deposition testimony that's quoted in
16 our brief. They don't back it off because one guy
17 might be doing something where he's not taking all
18 of his water for a certain period. And yet
19 they're trying to impose that on us as a
20 precondition for enjoying our compact rights.

21 And I think the cases that they're
22 citing are not inconsistent with this notion
23 that -- the presumption is that the water is being
24 put to beneficial use. It's not necessarily an
25 irrebuttable presumption, but it's a presumption.

1 And that's the way a system can work smoothly and
2 efficiently. It's not -- if somebody suddenly
3 begins to abuse the system, there are remedies for
4 that. But the presumption is that the rights are
5 being exercised under the prior appropriation
6 system; that the administration is being done
7 properly; and that it's going to be a very unusual
8 case, and it's going to require special conditions
9 and special showings to say: Well, you don't get
10 your compact water anymore. I'm sorry. The
11 Supreme Court said you might be able to get it,
12 but we don't think you're applying it efficiently
13 enough; that you're checking with these guys every
14 6 hours or 12 hours the way we think you ought to.
15 You can't satisfy our requirements.

16 And the idea of a general survey that
17 Mr. Brown suggested really is not consistent with
18 the posture that the states were in when they
19 entered into the compact. Obviously, they
20 wouldn't enter into a compact that they thought
21 would immediately change how they administer their
22 systems, and we're going to have to jump through,
23 all of a sudden, a bunch of hoops to exercise
24 their rights under the compact.

25 And I would just complete by saying

1 there's no evidence. I mean, the years we've been
2 talking about where there's been quantification
3 issues, we were in drought, and they're up there
4 saying, whoa, whoa, whoa, we don't know if they
5 need that water. They need to show us. And if
6 they don't show us, then we're going to use that
7 water in this drought. It's more valuable to us.
8 We're not going to let it go because you
9 haven't -- you're in a drought too down there,
10 but, I'm sorry, you haven't satisfied our
11 requirements, and they're still saying that.
12 We've got a real issue here that they say we've
13 got to comply with their demands, and we're saying
14 as long as we're doing it reasonably, consistent
15 with our laws and regulations, and uniformly, that
16 that should satisfy any requirements that the
17 compact has as far as the prerequisite to enjoy
18 our rights under the compact to our allocation.

19 I think that will do it.

20 SPECIAL MASTER: Thank you. Okay. So
21 I think I have handed out three things earlier;
22 does that sound correct? Does anyone still have
23 the three? I think the first one was the
24 citations to the portions of the record regarding
25 the actions of the commissioners? Was that the

1 first one? I haven't written them down. I was
2 scribbling at the time.

3 The second one I know was any
4 evidence -- pointing to any evidence in the record
5 regarding what would happen as to the filling of
6 the reservoir if there was the extra 100,000
7 acre-feet.

8 MR. KASTE: 10,000 acre-feet.

9 SPECIAL MASTER: I'm sorry, there was
10 not --

11 MR. KASTE: If we've got 100,000
12 acre-feet, we'd be good.

13 SPECIAL MASTER: We would have resolved
14 that. 10,000 acre-feet. And the third was just
15 any citations to portions of statutes,
16 regulations, administrative manuals regarding how
17 reservoir storage is handled as to -- that pertain
18 to points in time where you are storing water in a
19 reservoir. And then I'll tell you ahead of time
20 what I'm thinking about there is, is that if there
21 is in either state a concept that is part of the
22 storage volume, it says, okay, you store it for
23 any particular period, rather than when water is
24 available so that if there's water available for
25 that period, you just let it run by doesn't count

1 against you. That's what I'm trying to get a
2 sense of how those storage rights will link up to
3 the available water.

4 MR. KASTE: What is your time frame for
5 this?

6 SPECIAL MASTER: Well, that's a good
7 question. So I don't want you to work over Labor
8 Day Weekend because that's what Labor Day is all
9 about. What about a week from Monday? Or again,
10 I'm not asking for briefs here. I'm just asking
11 for references to any part of the record or, in
12 this last case, statutes, regulations. If you
13 want more time, that's fine with me.

14 MR. KASTE: I was thinking less, but
15 that would be fine.

16 SPECIAL MASTER: I'll go ahead and
17 start working in the meantime. So is that --
18 well, if we could do it by Friday, that would be
19 even better.

20 MR. KASTE: We can do that.

21 MR. DRAPER: Your Honor, it would help
22 me quite a bit if we didn't make it earlier. If
23 you could give us one more day, say till Tuesday,
24 a week from Tuesday. Unless it's going to create
25 a big problem for you, that would be very

1 helpful.

2 MR. KASTE: Maybe we're talking
3 different weeks. You are talking Tuesday 10 or so
4 days from now, or Tuesday four days from now?

5 MR. DRAPER: Yes. Not the Tuesday
6 after --

7 SPECIAL MASTER: Labor Day, no. I'm
8 talking about next Friday. So that gives you --
9 you know, you can stop working for the next couple
10 day, then next Tuesday, Wednesday, Thursday, so
11 that should just be four on that, okay?

12 MR. DRAPER: Whatever you say, Your
13 Honor.

14 SPECIAL MASTER: No. Otherwise, I was
15 just thinking that, you know, I want to let you
16 know as soon as possible whether or not -- you
17 know, which way I might be ruling on this. And I
18 certainly have told you, I have to get this to you
19 by the 16th, which would be not long after that.
20 So I have to review this. And again, I'm not
21 asking for a briefing. I'm just asking for any
22 references.

23 And so what I'll do is, I'll also have
24 some prior schedules and time next week when we
25 could do a status conference, and that I won't

1 enter the case management order which I circulated
2 yesterday until we have that conference in case
3 you have any comments on that document.

4 And then the other thing I wanted to
5 cover is, I am currently planning on -- there are
6 like two or three retired court clerks from the
7 District of Montana, and I think I can hire one of
8 them to serve as -- basically, it's a clerk of the
9 court, so I can actually file the papers, keeps
10 and uses the gavel, but I'll figure that with you
11 first.

12 And the other thing which I would love
13 to hear your thoughts on is that I would -- I
14 think it could be beneficial to me to have
15 somebody that -- if I need to call somebody just
16 on any type of a procedural issue, which is
17 something I haven't encountered before; that I
18 could consult with on that, other than the
19 parties. And Judge Thomas on the 9th Circuit has
20 suggested one of his former clerks he thinks will
21 be available. So it would not be somebody who I
22 would be consulting on a regular basis. It would
23 just be if there was, again, a procedural issue.
24 And since I have not tried a case before and not
25 encountered something before, I would be able to

1 get advice. Judge Thomas highly recommends this
2 young man. I'll be happy to give you the name.
3 The only problem is, that person is now in
4 practice in Montana -- out of the state, but
5 practicing in Montana, and I recognize the
6 sensitivities of having somebody who is employed
7 as an attorney in one state or the other. So
8 that's the other thing which I'll talk to you
9 about, and any other issue that you want to
10 address.

11 MR. KASTE: I would just ask, the bean
12 counters in the office have asked me, against my
13 wishes, to -- maybe one of the things we can talk
14 about during the status conference is sort of the
15 status of your fees.

16 SPECIAL MASTER: And so I actually have
17 an order that I will send around tomorrow.

18 MR. KASTE: Fantastic. We're trying
19 to -- we have to put, as I said, the bean
20 counters, the right money in the right places in
21 order for everybody to be happy, and we to have do
22 a lot of that as trial approaches, so that would
23 be very helpful.

24 SPECIAL MASTER: So I will go ahead and
25 do that tomorrow, and that will be through July 1

1 of this year. I actually prepared a schedule.

2 So I appreciate everyone standing. So
3 court is adjourned.

4 MR. WECHSLER: Your Honor, we do have
5 one question. It will be helpful if we could get
6 the name of the person who was the former clerk of
7 Judge Thomas. And our concern there is just that
8 Mr. Swanson does know some former clerks in this
9 area, and so it would be helpful.

10 SPECIAL MASTER: No, I'll be happy to.
11 I'll circulate that name ahead of time. And
12 again, I would imagine this would just be in
13 substance and not carrying somebody full-time
14 help. It's just in case I have to consult with
15 somebody and call them up and get some advice.
16 I'm hoping this will be for the District of
17 Montana. I might also be able to talk to some of
18 the District Court judges there as the issue comes
19 up, and that would probably be my first preference
20 of addressing the case. Okay.

21 MR. DRAPER: I think in answer to your
22 question as to whether we had any problem with
23 your proceeding along those lines with the clerk
24 and this kind of advice, the answer is no for
25 us.

1 MR. KASTE: I think the answer is no
2 for us as well. I think it's routine for judges
3 to go and talk to the folks in the halls about
4 certain questions they have within the bounds of
5 propriety, and I'm sure that you would do the
6 same, so I think it's fine.

7 SPECIAL MASTER: Okay. We can talk
8 about this more in detail, but I'll go ahead and
9 start talking to these former clerks of the court
10 about serving as a clerk of the court for the
11 trial, assuming that there's a trial, and then I
12 will circulate the names. You're looking at the
13 ceiling to see what is ahead. What are you
14 thinking?

15 MR. KASTE: Well, the bean counter just
16 whispered in my ear. Would we be contracting with
17 this clerk personnel directly, or would that be
18 worked through in the billings that we receive
19 from you as if it was part of your necessary
20 expenses?

21 SPECIAL MASTER: I can do it either
22 way.

23 MR. KASTE: He's more familiar with
24 the bean counting.

25 SPECIAL MASTER: We can discuss this

1 next week. I'm not going to enter into an
2 agreement with anyone in the meantime.

3 (Discussion off the record.)

4 SPECIAL MASTER: But that will at
5 least -- you know, that sort of notion, they
6 probably they will permit me to have somebody for
7 advice, and I will at least call around to these
8 former clerks.

9 Okay? Very good. Thank you very much.
10 Court is adjourned.

11 (The hearing concluded at 5:07 p.m. on
12 August 29, 2013.)

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1 STATE OF COLORADO)
2) ss. REPORTER'S CERTIFICATE
3 COUNTY OF DENVER)

4 I, Leo R. Kniebel, do hereby certify
5 that I am a Certified Shorthand Reporter and
6 Notary Public within the State of Colorado.

7 I further certify that this hearing was
8 taken in shorthand by me at the time and place
9 herein set forth, that it was thereafter reduced
10 to typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 9th day of September, 2013.

18 My commission expires February 24,
19 2015.

20 _____
21 Leo R. Kniebel, CSR
22 216 - 16th Street, Suite 600
23 Denver, Colorado 80202
24
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