

No. 137, Original

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 137, ORIG.
	)	
STATE OF WYOMING	)	
and STATE OF NORTH DAKOTA,	)	
	)	
Defendants.	)	
	)	
	)	

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TRANSCRIPT OF PROCEEDINGS

July 27, 2016

Reported by: PAMELA J. HANSEN, RPR, RMR, CRR

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1           The above-entitled matter came on for  
2 hearing before HON. BARTON H. THOMPSON, JR., Special  
3 Master, 559 Nathan Abbott Way, Stanford, California  
4 94305-8610, on July 27, 2016, at 9:00 a.m., at Byron  
5 White Federal Courthouse, Division 2, 1823 Stout  
6 Street, Denver, Colorado.

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P R O C E E D I N G S

1  
2 SPECIAL MASTER THOMPSON: This is a  
3 hearing in the U.S. Supreme Court case of the State  
4 of Montana versus the State of Wyoming and the State  
5 of North Dakota, No. 137 Original, again before the  
6 United States Supreme Court.

7 And this morning the hearing is on two  
8 separate motions in connection with remedies. The  
9 first is the State of Wyoming's motion basically to  
10 conclude the case at this point, and then second of  
11 all will be Montana's motion for summary judgment on  
12 the Tongue River Reservoir. And so we should  
13 probably start, as we always do, with an invitation  
14 of counsel for the various parties. So we'll start  
15 with the State of Montana.

16 MR. DRAPER: Good morning, Your Honor.  
17 I'm John Draper, counsel of record for the State of  
18 Montana. I have with me at counsel table Jeffrey  
19 Wechsler, who is my co-counsel, outside counsel.  
20 Then at the end of the table is our Attorney General,  
21 Tim Fox. General Fox would like to address the  
22 Special Master at your convenience when you consider  
23 it appropriate. Next to him is Mr. Alan Joscelyn,  
24 the Chief Deputy Attorney General of Montana.

25 I would also note that we have with us

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1 Mr. Tim Davis, who is the administrator of the  
2 Division of Water Resources of the Department of  
3 Natural Resources and Conservation of the State of  
4 Montana, and with him is Kevin Smith, who is the  
5 chief of the state Water Projects Bureau in that same  
6 division.

7 SPECIAL MASTER THOMPSON: Okay. Thank you  
8 very much, Mr. Draper, and I'll welcome again  
9 Attorney General Fox, and it's nice to see all the  
10 various counsel again.

11 Mr. Joscelyn, I don't remember you  
12 participating before.

13 MR. JOSCELYN: That is the fact. I had  
14 not had the pleasure of appearing personally before.  
15 I've sat in on many of the conference calls in the  
16 last year and a half. So it's a pleasure to be here.  
17 Thank you.

18 SPECIAL MASTER THOMPSON: You're welcome.

19 And so next is the State of Wyoming.

20 MR. KASTE: Good morning, Your Honor. I'm  
21 James Kaste on behalf of the State of Wyoming. With  
22 me as always, my life partner Chris Brown and  
23 Attorney General Peter Michael. In addition, we have  
24 with us today the state engineer for the State of  
25 Wyoming, Mr. Patrick Tyrrell.

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1           SPECIAL MASTER THOMPSON: Again, welcome,  
2 Mr. Kaste, Attorney General Michael. It's great as  
3 always to see you, as well as the various other  
4 counsel and administrators for the State of Wyoming.

5           So next, State of North Dakota.

6           MS. VERLEGER: Good morning, Your Honor.  
7 I'm Jennifer Verleger for the State of North Dakota,  
8 and as always on behalf of all of my co-counsel.

9           SPECIAL MASTER THOMPSON: So welcome,  
10 Ms. Verleger. And it should probably be noted for  
11 the record that Ms. Verleger, as always, is actually  
12 representing North Dakota all by herself.

13           So are there amicus in the courtroom  
14 today?

15           MR. DUBOIS: Your Honor, James Dubois for  
16 the United States. I will not be speaking on any  
17 motion. I'm just here to observe today.

18           SPECIAL MASTER THOMPSON: Okay. Thank  
19 you, Mr. Dubois. And if at any point, though, you do  
20 want to say anything on behalf of the United States,  
21 you're obviously welcome to do so.

22           So as I -- oh, I'm sorry.

23           MS. WHITEING: Your Honor, I'm Jeanne  
24 Whiteing, representing amicus the Northern Cheyenne  
25 Tribe. And I will not be speaking today either. I



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1 just will be monitoring the hearing. Thank you.

2 SPECIAL MASTER THOMPSON: Okay. And sorry  
3 that I hadn't noticed you sitting there in front of  
4 the railing, Ms. Whiteing, but again, it's great to  
5 see you. And again, if at any point you do want to  
6 say anything on behalf of the Northern Cheyenne  
7 Nation, feel free to do so.

8 Okay. So I had suggested in the e-mail  
9 that I sent out yesterday that we actually start with  
10 Wyoming's motion right off the bat, then turn to  
11 Montana's motion. My hope is that we'll be out of  
12 here by about noon. We will certainly be out of here  
13 by 1:00 because I have a plane to catch, as I guess  
14 probably a variety of other people also do. I do not  
15 have any set times for the presentations. I don't  
16 think that's probably necessary this morning.

17 I should note that, as always, I've gone  
18 through all of the various briefs. I have gone back  
19 and looked I think at all the major cases that have  
20 been cited in the briefs. I have reviewed portions  
21 of the record which I think are relevant. So I'm  
22 pretty on top of the arguments on both of the two  
23 sides. However, having said that, I would love to  
24 have both Montana and Wyoming counsel to begin with  
25 whatever summary or presentation of their argument

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1 they would like to start with, but as always, I will  
2 probably jump into the argument fairly quickly with  
3 questions.

4 So since I'm going to start with Wyoming's  
5 motion, what I would suggest is that we begin with  
6 your argument. I assume Mr. Kaste will be making  
7 that argument. So begin with that, and then we'll  
8 switch over to Montana. That will probably be an  
9 excellent point, Attorney General Fox, if you wanted  
10 to say whatever you would like to for the record at  
11 that particular point, and then if there are other  
12 members of your staff or your counsel who will be  
13 making arguments, you can certainly do that. Okay?  
14 Does that sound good from a process standpoint?

15 MR. KASTE: Yes, Your Honor.

16 SPECIAL MASTER THOMPSON: We'll probably  
17 take a break about an hour and a half through this so  
18 that people have an opportunity to visit the  
19 restrooms or whatever else they would like to do. If  
20 people need a break before then, just let me know.

21 Mr. Kaste.

22 MR. KASTE: Thank you, Your Honor. I  
23 think one of the things to add with regard to the  
24 order of things today, it's probably apparent from  
25 the nature of the motions pending before you, and

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1 that is that part of the State of Wyoming's motion is  
2 essentially the opposite side of the coin from  
3 Montana's motion, and so it's very likely that I'll  
4 say most of what I have to say in response to  
5 Montana's motion for summary judgment and, of course,  
6 presenting our own. But I'll sort of play it by ear,  
7 and if there's things that I haven't addressed that  
8 you want me to talk about at a later time, that's  
9 fine and I'll be happy to do that. But I don't want  
10 there to be a surprise that I seem to be addressing a  
11 motion that they have not yet had an opportunity to  
12 bring out on their own.

13 SPECIAL MASTER THOMPSON: I understand  
14 that there is significant overlap between the two  
15 motions, and probably inevitable you will bring in  
16 Montana's motion with respect to your particular  
17 motion, but I will come back at the end and let both  
18 parties also talk about Montana's motion.

19 MR. KASTE: Okay. Well, thank you for  
20 coming out. And I think you should have held this  
21 hearing in Cheyenne. You could have gone to Cheyenne  
22 Frontier Days, which is this week. You're missing  
23 the world's largest outdoor rodeo. And if you stay  
24 until Friday you can go see Kiss with Mr. Brown.

25 With regard to the case, we've asked, the

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1 State of Wyoming has asked at a couple different  
2 points in these proceedings for you to do something  
3 unusual. At the summary judgment stage we talked  
4 about this case having de minimis value and,  
5 therefore, making it fairly good sense to end it at  
6 that point in time without going through trial. You  
7 didn't agree with that. Probably a good decision.

8 We asked at the conclusion of the trial  
9 that as part of your representation you recommend to  
10 the Court that we not proceed with the remedies case.  
11 We asked the Court to make a decision on this case  
12 utilizing equitable power without proceeding to the  
13 remedies phase, and the Court declined to do that.  
14 Also probably a good decision, and an unusual request  
15 on our part, and we made that, those two requests, in  
16 light of the very unusual circumstance we found  
17 ourselves in in the course of this case. We're  
18 looking at an interstate dispute where the amount of  
19 water at issue is very small, particularly in light  
20 of the amount of water that generally flows through  
21 this river.

22 Today we're in front of you asking for  
23 essentially the same thing, but we're in a very  
24 different procedural posture, and it makes our  
25 request not unusual but routine. Our request now is

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1 for you to determine that there are no genuine issues  
2 of material fact that preclude the entry of judgment,  
3 counter-intuitively, against my client and in favor  
4 of Montana.

5 I believe since we're in this familiar  
6 procedural posture, this issue is now ripe for your  
7 determination and ripe for your recommendation to the  
8 Court. We're in a position where we're on a merry go  
9 round and we can't seem to get off, and neither party  
10 can get off it. We need you, we need your help, and  
11 we believe this is the right time for you to get us  
12 off this merry go round.

13 We need a tool or this case will go  
14 through a very long, I think, protracted remedies  
15 phase, and in proportion to the amount at stake, any  
16 amount of time is a protracted amount  
17 proportionately. So we need you to come in, to rule  
18 on this case before we go through proceedings. And I  
19 think it's important, it's very important to  
20 understand that no amount of discovery, no amount of  
21 additional proceedings are going to change the  
22 outcome of this case, and that's what makes it ripe  
23 for determination now.

24 The damages are what they are, the relief  
25 that you order is going to be what it's going to be,

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1 and there are no additional facts that we can find  
2 that are going to change that result.

3 I think we have in place a lot of clarity  
4 as a result of these proceedings and as a result of  
5 this lengthy process that we've undertaken. We have  
6 an initial opinion by the Court based on the first  
7 interim report that clarified significant disputed  
8 issues between the parties. We have a substantial  
9 second interim report that clarify those further,  
10 along with a host of rulings on pretrial motions that  
11 govern the parties' conduct going forward, and we've  
12 used those rulings in the course of the last two  
13 years to modify our conduct and to follow the Compact  
14 in a way that Wyoming wasn't prior to these rulings,  
15 and it has been by all accounts extremely successful.

16 We have for the first time in history two  
17 calls made on the State of Wyoming, both of which  
18 were honored, and two calls withdrawn by the State of  
19 Montana at an appropriate time when the circumstances  
20 warranted it.

21 By all accounts, the rulings in this case  
22 have led to a fairly successful change in the  
23 relationship between the parties. And that's not to  
24 say that at some future point in time there won't be  
25 a dispute. I can't guarantee that and no one can.

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1 But the dispute that was brought before you is over,  
2 and we just need an order putting it to bed.

3 Now, I know you've read everything, and I  
4 think the briefing in this case is clear. I think  
5 the issues in front of you at this point are  
6 relatively simple. Not water law centric, by any  
7 means, but I'll go through each of the various issues  
8 in a little bit of detail and use that probably as a  
9 jumping off point for the questions that I know you  
10 have.

11 I think the first issue I have to address  
12 is Montana's assertion that, Well, we haven't had an  
13 opportunity to conduct discovery in the remedies  
14 phase of this case. That's true, but you're only  
15 entitled to discovery if it's going to make a  
16 difference, and the burden on Montana at this point  
17 in time in response to a summary judgment motion, if  
18 it doesn't have the facts necessary to establish that  
19 a genuine question of material fact precludes the  
20 entry of judgment, you have to come forward with an  
21 affidavit or a declaration explaining that those  
22 facts are out there or we believe them to be out  
23 there, and if we were able to discover them it would  
24 make a difference in the outcome of this case.

25 Neither of those two things are true, and

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1 Montana has made no attempt to show that either of  
2 those two things are true. It's important to  
3 remember that this is summary judgment proceedings,  
4 and albeit early in these proceedings, you still have  
5 the same obligation to come forward with evidence in  
6 response to the motion. You cannot stand silent.  
7 You cannot just say, I need discovery, and not put  
8 forward, give the affidavits demonstrating that  
9 there's discovery out there that you should get and  
10 you're precluded from it or the questions of fact do  
11 in fact exist. There's a burden at this stage of the  
12 litigation. Montana has failed to meet it.

13 I think it's also important to recognize  
14 in this regard that the evidence that Montana  
15 couldn't marshal on this issue is evidence within its  
16 custody or within its control. We're talking about  
17 damages. This is the plaintiff's case. This is  
18 their obligation and their opportunity to go to their  
19 water users and say, What are your damages? Or to  
20 look at its own records, look at its own reservoir  
21 and say, What are our damages? They haven't been  
22 precluded from obtaining any of that information  
23 because we haven't had formal discovery in this case.

24 The parties have an obligation even before  
25 they file suit to do an adequate investigation into



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1 their case and marshal facts in support of it on all  
2 the elements of their claim, including damages.  
3 There's -- there's no showing that that was done  
4 here. Frankly, no showing that it needs to be done  
5 here.

6 So I think that there's no excuse for the  
7 failure to provide affidavits or to claim under Rule  
8 56(d) that I need more time, I need more time to  
9 marshall evidence and here's what it would be. We  
10 haven't had any proof that that needs to take place.

11 So I think it's important to bear in mind  
12 as we look at particularly damages, which is -- which  
13 is the area in which most discovery would take place.  
14 The injunctive and declaratory relief, and so forth,  
15 is not a discovery intensive remedy in most  
16 instances, but damages are.

17 You know, if this was a different case,  
18 very different case, we might very well be in a  
19 position where we'd want to talk to farmers in  
20 Montana, go back into their records, look at what  
21 they grew, didn't grow, the -- what damages they may  
22 have claimed under their insurance showing crop  
23 losses, and look at consumptive use, and spend, I  
24 don't know, a couple years and a few million dollars  
25 looking at what happened during both of these years

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1 on that side of the line, but it doesn't make sense  
2 to do that here because of the nature of damages that  
3 we're limited to by virtue of the very unique  
4 circumstance of having the Tongue River Reservoir and  
5 a separate pool of water available to purchase as it  
6 was in 2004 and 2006.

7 We're in an extremely unusual situation,  
8 you're not likely to see again in other original  
9 action cases, where we have this established pool of  
10 water that was available to replace the losses that  
11 Montana had. Montana failed to avail themselves of  
12 that available substitution.

13 And the very basic rules of contract law  
14 say if you don't do that, then your damages are  
15 limited across the board to the amount of available  
16 replacement. Whatever that cost, that's what you  
17 get. And if you had damages that you suffered  
18 because you failed to take advantage of an  
19 opportunity to cover your loss, that burden falls on  
20 you and not on the person that breached. Elementary  
21 principle of contract law, you have a duty to  
22 mitigate.

23 Didn't happen here, consequently damage is  
24 limited.

25 SPECIAL MASTER THOMPSON: This is probably

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1 a good place to jump in.

2 MR. KASTE: Sure.

3 SPECIAL MASTER THOMPSON: As you already  
4 identified from the expression on my face.

5 So -- I'm sorry. Is it not -- you can't  
6 hear very well?

7 MS. VERLEGER: We still can't hear  
8 Mr. Kaste any better.

9 SPECIAL MASTER THOMPSON: Is that any  
10 better? Okay.

11 MR. KASTE: I think she said she can't  
12 hear me.

13 SPECIAL MASTER THOMPSON: We'll both try  
14 to do a better job.

15 Okay. So let me just start out by asking  
16 three pertinent questions. So the first one is just,  
17 I have not been able to figure out why the parties  
18 have not been able to settle on the damages question.  
19 I can totally understand why Montana and Wyoming may  
20 not have been able to settle on questions of  
21 declaratory relief that's necessary, injunctive  
22 relief, something that should be included in the  
23 remedies at this particular stage, how the costs  
24 should be allocated or if they should be allocated.  
25 All of that I can understand why Montana and Wyoming

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1 can't agree. But I would have thought by now, given,  
2 as you point out, the amount of water that is at  
3 stake here, that the two sides would have been able  
4 to agree on the amount of damages or the form of  
5 damages.

6 And without revealing any type of  
7 confidential discussions that have taken place as  
8 part of settlement discussions, can you provide any  
9 type of insight into why it is that this damages  
10 issue hasn't been settled yet?

11 MR. KASTE: You asked me the only question  
12 I can't answer. That is not fair.

13 SPECIAL MASTER THOMPSON: Another way of  
14 saying this, are there some specific questions with  
15 respect to damages which is preventing the two sides  
16 from coming to an agreement?

17 MR. KASTE: I don't believe so.

18 SPECIAL MASTER THOMPSON: Okay.

19 MR. KASTE: Here's what I can tell you.  
20 We're talking about water in the West, and compromise  
21 with regard to water in the West is near impossible.  
22 And that's why I began with telling you we're on a  
23 merry go round, both parties want to get off but we  
24 can't, and we're going to need somebody to tell us to  
25 get off or it ain't going to happen.

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1           And I apologize to you, I apologize to the  
2 Court. I took very seriously, and I think we all  
3 did, the Court's admonition that we think very  
4 seriously about whether we continue to involve the  
5 jurisdiction of the Court. We all got the message.  
6 But like I say, this is water in the West, and it  
7 is -- it is too controversial and too important to  
8 the people in both states for decision makers to  
9 compromise.

10           SPECIAL MASTER THOMPSON: Okay.

11           MR. KASTE: It's just -- it's just that  
12 hard because of the nature of the subject matter.

13           SPECIAL MASTER THOMPSON: Okay. That's  
14 fair.

15           MR. KASTE: That's the best --

16           SPECIAL MASTER THOMPSON: I've worked in  
17 this field for a long enough period of time to  
18 understand that this is a difficult area of  
19 compromise, and having said that, I still do not  
20 understand -- and Mr. Draper, I will ask you exactly  
21 the same question, Attorney General Fox, too, as to  
22 why the parties haven't been able to resolve the  
23 damages question.

24           So let me turn to the second question,  
25 which I just want to make sure I understand Wyoming's

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1 position as to what Wyoming finds acceptable for me  
2 to do. So as I understand it, what Wyoming says,  
3 it's perfectly fine for the Supreme Court to take the  
4 maximum dollar per acre amount, that according to the  
5 record water was available from the Northern Cheyenne  
6 Tribe during the 2000s, which is \$15 an acre-foot,  
7 and multiply that times the total amount of water  
8 that the Supreme Court has found that Wyoming used in  
9 contravention of the Compact. So that's step one.

10 And then to also include prejudgment  
11 interest at either, depending on what the Supreme  
12 Court ultimately decides, at either the Wyoming rate  
13 of interest or the rate of interest under Section  
14 1961, in other words, the federal rate of interest.

15 And third of all, to calculate that  
16 interest from the dates upon which Montana initially  
17 notified Wyoming that they were not getting  
18 sufficient water and therefore a call was made. Is  
19 that a correct summary of what Wyoming would consider  
20 to be an acceptable award of damages?

21 MR. KASTE: Yes.

22 SPECIAL MASTER THOMPSON: Okay. Thank  
23 you.

24 Then my third question is, in order for  
25 the Supreme Court to conclude that that is an

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1 appropriate award of damages, I think there are  
2 probably four things that the Supreme Court would  
3 need to be able to find. No. 1, that in this  
4 particular case that the appropriate damages are an  
5 award of monetary damages rather than water. So  
6 No. 1, that in this case there should be monetary  
7 damages rather than water. Second of all, that the  
8 doctrine of mitigation actually required of Montana  
9 ranchers and farmers to acquire water that they did  
10 not otherwise receive from the Northern Cheyenne  
11 Tribe. Third, that we have enough information to be  
12 able to determine what the cost of that would have  
13 been. And then fourth of all, disgorgement of any  
14 benefits that Wyoming received from that water is  
15 inapposite for this particular case, inappropriate  
16 for this particular case.

17 MR. KASTE: I think that's correct, and  
18 you also need to find that water was available.

19 SPECIAL MASTER THOMPSON: Yes. I think  
20 that's part of the mitigation requirement. I would  
21 include in that second requirement that the Court  
22 would have to find that in fact under the law of  
23 mitigation, that there was water available and  
24 farmers and ranchers should have bought that water.  
25 Okay.

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1           So I want to put aside for a moment, I'm  
2 going to come back to it in a minute, as to whether  
3 or not specific relief in the form of water is  
4 appropriate. I want to put that aside for the moment  
5 and just deal with the other three issues.

6           So I thought I understood your concept of  
7 mitigation until I read the Special Master's report  
8 in Kansas versus Colorado. So this was Arthur  
9 Littleworth's order regarding mitigation, and it's in  
10 the third report of the Special Master in Kansas  
11 versus Colorado. And the first parts of what he  
12 wrote in there is what I thought I understood, which  
13 is that basically the defendant, which is in this  
14 case you, bear the burden of proving that the  
15 plaintiff failed to take reasonable steps to mitigate  
16 its damages. Second of all, that the duty to  
17 mitigate damages did not arise until the injured  
18 party has a reason to know the breach has occurred.  
19 Both of those are relatively straightforward.

20           But then there's a paragraph, which I must  
21 admit I had not really focused on when I studied  
22 remedies in law school, and it specifically says,  
23 moreover, Colorado, which in that particular case was  
24 the defendant, was certainly in a position to be  
25 aware of any Compact violations as early in time as



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1 Kansas, the plaintiff in that particular case, was  
2 aware of it. Okay? So that in other words, the  
3 defendant, that would be you in this particular case,  
4 was aware as soon as the plaintiff, which would be  
5 Montana in this particular case, was in violation.  
6 Whenever that may have occurred, Colorado also could  
7 have reduced potential damage in Kansas by Compact  
8 compliance, but damage award will not be reduced on  
9 account of damages which the defendant could have  
10 avoided as easily as the plaintiff.

11 MR. KASTE: That's nonsense.

12 SPECIAL MASTER THOMPSON: So let me just  
13 go on. So I go to the cases that Art Littleworth  
14 actually cited in support of it. One was a case  
15 called Shea, this is a really complex one, it's  
16 Shea-S&M Ball, B-A-L-L, versus Massman,  
17 M-A-S-S-M-A-N, hyphen Kiewit, K-I-E-W-I-T, hyphen  
18 Early, E-A-R-L-Y, and also Buras, B-U-R-A-S, versus  
19 Shell Oil Company. And both of them say much the  
20 same thing, that if in fact the way in which the  
21 plaintiff could have mitigated damages is also  
22 something the defendant could have done, that the  
23 plaintiff isn't under any obligation to mitigate the  
24 damages. So --

25 MR. KASTE: They may --

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1           SPECIAL MASTER THOMPSON: Help me  
2 understand.

3           MR. KASTE: All three of them are then  
4 nonsense, because in a contract case, which this is,  
5 when one party breaches and the duty to mitigate  
6 arises on the other party, in almost every instance  
7 the breaching party is -- says, I'm done, I'm not  
8 going to pay your damages. I -- I'm not in breach in  
9 fact. I haven't done anything wrong. You're on your  
10 own.

11           And that's, of course, what happened here.  
12 We said, We're not in breach. We had an argument  
13 about that. It turns out we were. But in all of  
14 these cases, the plaintiff -- the breaching party  
15 breaches the contract, damages arise -- or the  
16 opportunity for damages arise, and that triggers the  
17 defendant's obligation to mitigate his damages. It  
18 is -- it is invariably the case that the plaintiff  
19 could have paid for those or could have acquired  
20 substitute goods in the same way the defendant could,  
21 but that's nonsense. That's not how the world works.  
22 In almost every contract case the plaintiff doesn't  
23 march right in and pay for substitute goods. It  
24 doesn't happen.

25           So I -- I guess I'm not familiar with

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1 where that kind of ludicrous stuff came up, but  
2 that's not how it works in the real world, and it's  
3 not how it ought to work either because the defendant  
4 in a breach of contract case -- excuse me -- the  
5 plaintiff in a breach of contract case is the master  
6 of their own destiny with regard to their damages.  
7 That's what the doctrine of mitigation does, is it  
8 looks to the plaintiff and says, You could have done  
9 something to help yourself, and because you didn't,  
10 we're not going to put that burden on the defendant.

11 And to say to the defendant, you're not  
12 entitled to a defense of failure to mitigate because  
13 you didn't march right in and do what the plaintiff  
14 should have done of their own accord, that's --  
15 that's not the law as I know it. I don't think  
16 that's what the restatement says. And -- and I don't  
17 believe those cases ought to be applied in this  
18 circumstance.

19 In every contract case, every one, the  
20 plaintiff has an obligation when they know there's a  
21 breach, which occurred when the call was made in 2004  
22 and 2006 and Wyoming said, we're not doing that. At  
23 that point in time that person, that contracting  
24 party also has a burden, and they failed to meet  
25 that, hopefully in a very small measure at the end of

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1 the day, but that failure makes a difference in what  
2 they're entitled to at the end of the day.

3 SPECIAL MASTER THOMPSON: That's -- I must  
4 admit that what you just said was what I always  
5 thought was the rule with respect to mitigation, but  
6 I'm now puzzled by these set of cases and what  
7 Special Master Littleworth said in the case of Kansas  
8 versus Colorado.

9 MR. KASTE: If you read enough cases, you  
10 can find two that say the exact opposite thing. In  
11 this case, one is right and supported by the  
12 restatement of the law, which I think is pretty darn  
13 good authority, and I think that's what we ought to  
14 follow and what the Court is likely to follow. Their  
15 track record demonstrates that they turn to the  
16 restatement of contracts when they're looking at  
17 contract issues that are presented to them in the  
18 first instance to see what the rules are and what  
19 rules they ought to apply. The restatement is  
20 awfully fair. I think we agree on that.

21 SPECIAL MASTER THOMPSON: So let me go on  
22 the other side -- aspect of that, which is not what  
23 the legal requirement is but whether or not in fact  
24 the evidence shows, the evidence that was presented  
25 during the liability phase, that in fact there was an

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1 obligation to mitigate in this particular case. And  
2 I know that Montana's argument is in part they should  
3 be able to get more discovery, but I also understand  
4 that Montana's argument is that in fact if you look  
5 at that evidence, it doesn't meet the burden of proof  
6 that Wyoming would have on summary judgment.

7 So there are a couple of questions I have.  
8 The first is, when you look back at the record, I'm  
9 looking specifically at pages or some of the pages  
10 that you cited, so in Volume 7, on Page 1499, Art  
11 Hayes testified that in fact the tribe was selling  
12 water in 2004 and 2006, but that in 2004, which was  
13 the only year he was explicitly asked about it, he  
14 didn't have enough money to go and buy the amount of  
15 water. So that he couldn't mitigate in that  
16 particular situation because he simply didn't have  
17 the money to go out and buy water that, of course, he  
18 would otherwise have been receiving if there had not  
19 been a breach.

20 Similarly, John Hamilton, this is in  
21 Volume 16, Page 3669, Mr. Hamilton says that one of  
22 the reasons why he did not buy the Northern Cheyenne  
23 water, again, was because it was too expensive. He  
24 had basically run out of cash at that particular  
25 point to go out and buy more water.

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1           So given that particular testimony by two  
2 of the farmers and ranchers in this particular case,  
3 can the Supreme Court find that in fact it had an  
4 obligation, presumably it has to go out and pay,  
5 cobble money in order to go and buy the money to  
6 mitigate the issue.

7           MR. KASTE: Well, the rule is whether you  
8 can mitigate without -- let me see if I'm getting  
9 this right -- undue risk, burden or humiliation.

10           I think there are a couple of important  
11 points to remember here. One is, Montana made a  
12 claim for its water and Montana has money. Montana  
13 could have done something to help the farmers. And  
14 if we're talking about Montana's pool of water in the  
15 reservoir, it has an obligation to do that. Well,  
16 we're going to write the check to Montana. We're not  
17 going to write a check to John Hamilton. We're not  
18 going to write a check to Art Hayes.

19           We're dealing with sovereigns here, their  
20 sovereign rights as between each other, and so the  
21 lack of funds is not an appropriate answer for  
22 Montana and the claims that it's making in this case  
23 on behalf of itself.

24           And I understand that we are all working  
25 to get this water in the right places for farmers and

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1 for our citizens, but the claims in this case are  
2 brought by Montana, not Art Hayes. What's important  
3 about his testimony is he said flat out, water in  
4 both those years, it was available. It was available  
5 to Montana, just as it was available to Mr. Hayes,  
6 Mr. Hamilton, and every other water user there.

7 If -- if this was as important as it  
8 appears to be, although when you stretch out that  
9 1356 acre-feet over two years amongst a whole bunch  
10 of water users, what amount of money would have made  
11 Mr. Hayes whole out of that. What's his proportion  
12 of that 1300. Did he say that he couldn't afford  
13 that? I don't think so. I don't think he knew he  
14 was entitled to 1356 acre-feet or more likely some  
15 small percentage of that. Could he afford that?  
16 That evidence isn't in the record. Montana hasn't  
17 put it forward.

18 What we have is him making an amorphous,  
19 it was a tough year and I didn't spend money to  
20 change my operations, not knowing that I may be  
21 entitled to what might be 150, I don't know,  
22 acre-feet in 2004 and 2006. It might have been less  
23 than a foot from Mr. Hayes individually or  
24 Mr. Hamilton individually.

25 It doesn't seem to me that we're in a

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1 position to take that excuse and say, Well, I guess  
2 we can't have summary judgment because they couldn't  
3 afford it. We don't know the answer to that  
4 question, and we don't need to know. That's the  
5 important follow-up, is we don't need to know whether  
6 or not they could or couldn't afford it because  
7 Montana hasn't brought that to your attention in  
8 response to the summary judgment motion. They didn't  
9 walk in here with an affidavit from Mr. Hayes saying,  
10 I was entitled to 100 of that 1300 acre-feet of water  
11 and that would have cost me \$150, or is it \$1,050.  
12 You know I can't do math, although I did try to do  
13 the prejudgment interest calculation. I think I did  
14 it right. \$1,500, he didn't come in here and say  
15 that to you in an affidavit in response to this  
16 summary judgment motion, and you need to have that  
17 before you can make your finding that a genuine  
18 question of material fact is based on that formula.

19 SPECIAL MASTER THOMPSON: So I hear you  
20 saying two things, and one is a factual decision and  
21 the other I'm a bit puzzled about. So the first,  
22 which is a factual determination, is I think what I  
23 heard you say at the very outset was that in your  
24 view, it was Montana's obligation, when they sent the  
25 notice to Wyoming and they got back basically a



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1 letter that said, No, we don't believe we have an  
2 obligation to provide additional water to Montana,  
3 that at that point in time Montana should have sent a  
4 letter to all the water users on the Tongue River  
5 saying, You probably have an obligation to mitigate  
6 right now. We know some of you might not have enough  
7 money, and if you don't have enough money, please let  
8 us know right away because we will go out and we will  
9 buy however much water you think we should buy and  
10 we'll make you whole and provide you with that water.

11 Is that correct? Is that what you're  
12 arguing?

13 MR. KASTE: They should do something.  
14 They have the ability to do something. What they do  
15 in response to Wyoming's breach I'm not in control  
16 of. How they choose to handle that I don't really  
17 care, but I know that they could have, even with  
18 their own money or asked the farmers on their own  
19 behalf, gone to the Northern Cheyenne Tribe and  
20 bought 1356 acre-feet of water, and they did not.  
21 How they do it is up to them.

22 SPECIAL MASTER THOMPSON: So then the  
23 second point which I hear you making, which I'm  
24 actually a little bit more puzzled by, is that on  
25 this particular question, Montana had an obligation

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1 to provide various affidavits; for example, Mr. Hayes  
2 and Mr. Hamilton didn't have enough money to buy the  
3 water.

4 But the reason why I'm puzzled by that is  
5 if I go to the very sections of the liability phase  
6 record that Wyoming is relying upon to show them that  
7 water was available from the Northern Cheyenne Tribe,  
8 and it could have bought it for no more than \$15 an  
9 acre-foot, is that very record in which Mr. Hayes and  
10 Mr. Hamilton explicitly said, Well, we couldn't buy  
11 water because we didn't have the money.

12 MR. KASTE: Yeah, I hear you. What the  
13 distinction is, is they're not talking about what  
14 they know to be their proportionate share. They  
15 didn't even know what their proportionate share was  
16 when they made their statements. They made this out-  
17 of-context statement that I don't have any money to  
18 buy water, but they had no idea what amount of water  
19 they were on the hook to buy. How can they -- how  
20 can they legitimately create a genuine question of  
21 fact about their ability to purchase or replace the  
22 water if they don't know how much they're supposed to  
23 buy.

24 SPECIAL MASTER THOMPSON: So couldn't that  
25 same argument have been your argument that this

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1 really should have been Montana that's going out  
2 there and buying water to make up for the water that  
3 the farmers did not have. Doesn't your argument just  
4 now also suggest that at an individual level,  
5 Mr. Hayes and Mr. Hamilton couldn't have actually  
6 mitigated their damages because they didn't know  
7 exactly how much water they weren't getting.

8 MR. KASTE: Well, I think they could. I  
9 think all the farmers in Montana could have looked at  
10 what they were growing that year, decided they didn't  
11 have enough water, and bought some from the tribe.  
12 They didn't, and I think they ought to be stuck with  
13 the consequences of that decision. You can't  
14 complain, whether you're the farmer or you're  
15 Montana, that, Hey, I got shorted water and it hurt  
16 me. But there was water available, and you could  
17 have bought it, I think you ought to buy it.

18 And that's the whole point here. There  
19 was water available. I don't care who paid money. I  
20 don't care who wrote the check. Whatever damages  
21 resulted could have been addressed by releasing 1300  
22 and 56 acre-feet in the two respective years. I  
23 think the burden is on Montana to do that if they're  
24 the one complaining about, I got shorted, I got  
25 shorted 1300 acre-fee of water that I'm entitled to

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1 under this Compact.

2 Hey, buy it. I think that's how it ought  
3 to work. For you to complain about your damages, you  
4 have an obligation to fix them before they get out of  
5 hand, and they didn't.

6 SPECIAL MASTER THOMPSON: So let me ask  
7 another factual question, which is, again I was  
8 looking at the specific portions of the record that  
9 Wyoming had pointed me to. And one was Volume 8,  
10 Page 1653. And looking at that particular page,  
11 there was a reference to the fact that there was 180  
12 days of notice requirement to the Montana Department  
13 of Natural Resources and Conservation, the State of  
14 Montana department, and it suggested this was some  
15 type of Compact requirement, I assume the Compact  
16 between the Northern Cheyenne and Montana.

17 And unless my memory is not good enough to  
18 remember that, then what was the nature of that  
19 Compact requirement, do you recall?

20 MR. KASTE: Under the Northern Cheyenne  
21 Compact, the Northern Cheyenne Tribe is supposed to  
22 talk to the State of Montana in advance of each  
23 individual year and let them know whether or not  
24 they're going to market their Compact water, and  
25 they're supposed to give advance notice. I think we

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1 gave you an Exhibit M-387, which is on that same  
2 page, the notice from 2004 or the document  
3 identifying that that was in place in 2004.

4 Our other exhibit, Exhibit M-399, is not  
5 the same notice. I think we had trouble locating  
6 that same document in the case, specifically notice  
7 that was given in 2006. Instead we have like  
8 Mr. Hayes saying they were marketing their water in  
9 2006, and Mr. Whiteman, whom we also cited, who said,  
10 yes, we were marketing water in those years.

11 And we give you that second exhibit that  
12 has a spreadsheet indicating quantities of water that  
13 were purchased by various individuals in 2006, and  
14 it's evident from that spreadsheet that that's  
15 Compact water and not 7500 acre-feet of contract  
16 water that the tribe also has. Otherwise it should  
17 be on that spreadsheet as using part of their 7500  
18 acre-feet of contract water.

19 So I think you take the pieces of  
20 available evidence, and granted the documentation  
21 that we had on this particular issue, what we were  
22 able to cobble together during the course of  
23 discovery is incomplete, but what we do have  
24 demonstrates that it was available for sale in 2006.  
25 And so from that I think we should infer, and we're

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1 allowed to make reasonable inferences in summary  
2 judgment, saying that there was requisite notice in  
3 2006. What you don't see is information indicating  
4 that they did not, either by affidavit or declaration  
5 or some other document submitted in response to our  
6 summary judgment motion.

7 SPECIAL MASTER THOMPSON: Okay. Thanks.  
8 That's very helpful.

9 So now we go to the last of the questions,  
10 which is the disgorgement issue. And so here I would  
11 again appreciate whatever help you can provide me on  
12 this.

13 So as I understand how the Supreme Court  
14 has most recently ruled on this particular question,  
15 is that in order to find that disgorgement is  
16 appropriate, that the Supreme Court does not have to  
17 find that Wyoming has deliberately reached the  
18 Compact, but that instead that they acted in, I'm  
19 going to use the language of the Supreme Court,  
20 reckless disregard of another more vulnerable state's  
21 rights.

22 And so two questions. Number one, is that  
23 the standard that I should be using in determining  
24 whether or not disgorgement is appropriate? And if  
25 so, didn't Wyoming in this particular case by, in

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1 response to Montana's call, saying, No, we're not  
2 going to provide you with water, we don't think we  
3 have an obligation here, is that in reckless  
4 disregard of Montana, the downstream state's rights  
5 under the Compact?

6 MR. KASTE: The first question, reckless  
7 disregard was the standard, but I think if you look  
8 at the majority opinion of Justice Kagan in that  
9 case, that the standard is probably more  
10 appropriately knowingly.

11 SPECIAL MASTER THOMPSON: Knowingly failed  
12 to comply.

13 MR. KASTE: Well, it just says knowingly.  
14 I -- I would prefer if it was reckless, but I think  
15 the important thing is under either test, lenient  
16 knowingly, and more stringent reckless, Wyoming did  
17 not breach the Compact in the same kind of knowingly  
18 or reckless disregard to the rights of Montana.

19 I think there's a very good contrast to be  
20 made by the actions of Nebraska in Kansas versus  
21 Nebraska and the actions of Wyoming in this case.  
22 Nebraska engaged in what is just a very traditional,  
23 efficient breach analysis. It's better for me to  
24 breach the Compact than it is to comply, and I know  
25 I'm doing it and I don't care because it's better,

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1 works out in my favor. That's knowingly, clearly.

2 It's not what happened in this case. The  
3 State of Wyoming was presented in 2004 with a letter  
4 that asked it to do a number of things that, one,  
5 were nutty like draining Lake DeSmet. Two, had never  
6 been asked for before. Three, were completely  
7 inconsistent with our historic understanding of the  
8 Compact and the way it works. And in good faith  
9 reliance on our interpretation, without trying to  
10 damage or hurt anybody knowingly, we made a decision  
11 that that call shouldn't be honored.

12 And in 2006 we're faced with the same  
13 dilemma again, with no resolution from either the  
14 Compact commission and the Court, and made the same  
15 decision. Our interpretation of the Compact mandated  
16 this action. That's very different than saying, I  
17 know that I owe you this and I don't care. I'm going  
18 to act in a way that's inconsistent with the Compact  
19 regardless.

20 People can have a dispute about the  
21 meaning of a document as poorly written as the  
22 Yellowstone River Compact, and we've had one for a  
23 decade, and we've had to have you and the Court over  
24 the course of that decade explain to us what it  
25 means. That's okay. That's not the kind of conduct



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1 that implicates disgorgement as a remedy.

2 Disgorgement as a remedy is purposeful. I  
3 purposely am going to take advantage of you. I'm  
4 knowingly going to take advantage of you.

5 An honest dispute between two parties  
6 about the interpretation of a Compact that result in  
7 damages is every Compact case or every contract case.  
8 You and I could have a contract to exchange money for  
9 goods, and I say, That's not what the Compact or  
10 contract provides in this circumstance. I'm not  
11 going to pay you. You're damaged.

12 I can't get disgorgement as a remedy  
13 there. We had an honest dispute about the meaning of  
14 the contract.

15 That's this. Disgorgement is not an  
16 appropriate remedy in this case by any stretch of the  
17 imagination. If it was, then it's the appropriate  
18 remedy in every case where two parties disagree about  
19 very difficult Compact language.

20 SPECIAL MASTER THOMPSON: So let me just  
21 separate out several different possibilities. All  
22 right? So there's the possibility there the parties  
23 agreed on the actual meaning of the Compact, but one  
24 state just accidentally violates it. All right?  
25 They don't attack some of the people who maybe are

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1 losing water in their state but they should have.  
2 That strikes me as a situation where there's not a  
3 knowing breach.

4 But doesn't the argument that you make  
5 mean that any time an upstream state wants to hold  
6 onto more water than the Compact really requires them  
7 to do, all they have to do is to say, you know, My  
8 interpretation of the Compact is that we don't have  
9 to provide you with water. And then they litigate  
10 that particular issue, and again, they don't have the  
11 disgorgement.

12 Isn't there also a requirement that  
13 states, you look at a Compact and come up with a --  
14 at least a reasonable interpretation of it. In this  
15 case, is my question ultimately here, or one the  
16 Supreme Court has to read, is the question whether or  
17 not Montana's interpretation was a reasonable  
18 interpretation at the time.

19 MR. KASTE: Wyoming's.

20 SPECIAL MASTER THOMPSON: I'm sorry,  
21 Wyoming.

22 MR. KASTE: I think both the alternatives  
23 are wrong. What you're getting at, I think, is the  
24 difference in motive. Is there evidence of a motive  
25 here beyond a good faith dispute of the meaning of

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1 difficult language. You're implying by your -- by  
2 the nature of your question that we -- we want the  
3 water to the exclusion of our good faith  
4 interpretation of the Compact, and we're using that  
5 interpretation as the means to hide and get at the  
6 water that we want. And disgorgement is a remedy  
7 that flows from motive knowingly, recklessly. It  
8 just isn't mine. Right?

9           There's no evidence of this in this case,  
10 that there was a Wyoming official anywhere along the  
11 way that had that state of mind. I'm going to use  
12 this Compact as a means to keep this water away from  
13 the other side, and this is like a subterfuge, this  
14 is my ruse. We don't have any evidence of that, and  
15 we're not going to find any either through more  
16 discovery.

17           Mr. Tyrrell got on the stand.  
18 Mr. Tyrrell was deposed. Mr. Tyrrell made a  
19 decision. Mr. Whitaker told you point blank it was  
20 his fault. Remember, he said that. The  
21 decision-maker was sitting in the back of the room,  
22 and everybody in this case had an opportunity to ask  
23 him, Why did you do that? What were you thinking?  
24 What made you say no to this Compact?

25           He told us, fairly, Well, that was our

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1 interpretation. This is how we read the Compact.  
2 It's describing our rights and responsibilities, and  
3 we believed that we did not have a responsibility to  
4 take the actions that were requested of us by  
5 Montana. In particular, the ones in 2004 that seemed  
6 really outlandish, but even the ones in 2006 that  
7 were -- that were much more rational, and ultimately  
8 turned out to be in complete conformity with the  
9 Court's interpretation of the document. There's no  
10 evidence of motive here that will give you any  
11 grounds to recommend disgorgement as a remedy.

12 And you can ask Mr. Tyrrell again, but  
13 you're going to get the same answer. We don't need  
14 to go through discovery to get at the information  
15 that we already have.

16 SPECIAL MASTER THOMPSON: Okay. So then  
17 let me get back to the very first question that was  
18 stated in this case, and that is, you can't just  
19 avoid the various factual issues that we just  
20 discussed, as well as the question of whether or not  
21 mitigation was required in this particular case by  
22 awarding water rather than awarding monetary damages.

23 MR. KASTE: Awarding water creates a  
24 different set of problems, and mind you, a worse set  
25 of problems, because specific performance is usually

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1 a last resort, and specific performance in this case  
2 makes very little sense. Who am I supposed to give  
3 that water to? Who am I supposed to take it from?  
4 The people that have water available this year from  
5 whom I might steal from to give to somebody else who  
6 steals it, force them to provide it to Montana under  
7 my obligation, am I taking it from the right people,  
8 from the wrongdoers back in 2004, 2006? Am I giving  
9 it to the right people? The people who need it this  
10 year may not be the same people who needed it in '04  
11 and '06. It may not go into the reservoir. The  
12 logistic problems with it are substantial.

13 And when am I supposed to give it to them?  
14 The reservoir is filled this year. Get your 1356 out  
15 of that. A whole bunch of water went over the  
16 reservoir in this year and in '04 and maybe there  
17 will be some next year. When am I supposed to make  
18 this payment to them? When it's convenient to them?  
19 I don't know of any provision of law that allows  
20 specific performance maybe five years in the future,  
21 when they actually need it, as opposed to at the end  
22 of the case.

23 It's impossible for me to figure out a way  
24 to do this that's fair to the people on both sides of  
25 the lines. Actual remedy, the problems that existed

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1 in 2004 and 2006, monetary damages are the only  
2 remedy that really makes sense here. As inadequate  
3 as they may be to whatever happened in 2004 and 2006,  
4 that's all we can really do in a fair way. Because  
5 if I give Art Hayes water today, I may not be  
6 actually remedying the injury that happened in 2004,  
7 and I don't know how to figure that out.

8 I don't think we need to because we  
9 shouldn't turn to specific performance as a remedy  
10 when there's an adequate remedy at law. And it's a  
11 few dollars, and it's easy, it's sensible, and to the  
12 extent we get to vote on it, we vote for money. I  
13 just don't see how we can do this in a sensible way.

14 SPECIAL MASTER THOMPSON: Okay. Thank  
15 you. So that's all quite useful on the question of  
16 damages.

17 MR. KASTE: Okay.

18 SPECIAL MASTER THOMPSON: So before we run  
19 out of time entirely, we should probably talk about  
20 the various other issues.

21 MR. KASTE: I can run through them quickly  
22 or I can just respond to your questions.

23 SPECIAL MASTER THOMPSON: Why don't I go  
24 ahead and just go ahead and ask my questions.

25 MR. KASTE: All right.

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1           SPECIAL MASTER THOMPSON: And then you can  
2 come back and say whatever else you want to. Does  
3 that make sense?

4           MR. KASTE: Sure.

5           SPECIAL MASTER THOMPSON: Okay. So on the  
6 question of declaratory relief, so I have several  
7 questions here also. And I'm going to for the moment  
8 put aside your question of the Tongue River  
9 Reservoir, because that's in Montana's motion, as you  
10 pointed out, this might inevitably come up.

11           So the first -- just a little bit of  
12 premise on this. The first is, is that as Montana  
13 points out, if you look at prior original  
14 jurisdiction cases, in virtually every case that I  
15 found the Court has indeed set out in its decree some  
16 specific holdings with respect to the way in which  
17 the river should be managed.

18           In this particular case there's obviously  
19 a lot of -- of material in both the first report that  
20 I filed with the Supreme Court and the second report  
21 that I filed with the Supreme Court, but none of that  
22 is embodied specifically in the decree except to the  
23 degree that it's implicit in what the Supreme Court  
24 ultimately found.

25           So at a minimum, I think this is one of

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1 the things that Montana suggests, at a minimum,  
2 shouldn't I provide for a decree that includes the  
3 specific elements of the interim reports that have  
4 been guiding the parties apparently in their  
5 management of the Tongue River?

6 MR. KASTE: You know, honestly I -- it  
7 didn't become apparent to me that you hadn't done  
8 that in this last order until fairly recently. I  
9 anticipated the order that flowed from the Court in  
10 response to the parties' exceptions to say, We adopt  
11 the contents of the second interim report and,  
12 therefore, it sort of makes itself or merges into the  
13 order and becomes part of the decree.

14 That didn't happen in the order that you  
15 presented to the Court, and it should. I think that  
16 your next order, recommendation, should say the Court  
17 adopts the content of the first and second interim  
18 reports. And we understand our obligation is to  
19 follow the various rules that you lay down in both of  
20 those reports. Fine.

21 And I think a lot of the disconnect  
22 between the parties' position on this is more a  
23 discussion of term -- or a dispute over terms than it  
24 is about substance. We're entitled to a decree.  
25 Montana says, Well, you're entitled to a judgment.



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1 One is just a different term for the other.

2 I don't care what you call the final order  
3 in this case, whether you call it a decree or whether  
4 you call it a judgment. It needs to include the  
5 adoption of these reports so future generations  
6 understand, We're bound by those rulings. It's the  
7 Court's ultimate outcome, and it needs to contain a  
8 money judgment in favor of Montana in light of first  
9 finding that Wyoming is liable for two years for a  
10 certain amount of water.

11 Does it need to do more than that seems to  
12 be the sticky wicket. And the answer I think is no,  
13 it does not need to require and should not because  
14 Montana hasn't established that it is entitled to  
15 some other specific declaration or some other  
16 specific injunction. There is a test for injunctive  
17 relief. They don't meet it. There are  
18 considerations weighing in favor and against  
19 declaratory relief in certain instances. There are  
20 none that suggest we need additional declaratory  
21 relief in this case.

22 And I think there's a very big distinction  
23 between some other additional declaratory relief that  
24 exists outside the second interim report and a  
25 revisiting of a holding of that report, which is the

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1 essence of Montana's motion for summary judgment,  
2 which is, I don't like the answer you gave me in the  
3 first instance. I'd like a different one. That's an  
4 appeal. That's a motion for reconsideration. That's  
5 not the same as saying at the conclusion of the case,  
6 here's the declaratory relief that then flows from  
7 your findings on liability.

8           You're not being presented with that.  
9 You're being presented with a motion to reconsider,  
10 which I think, one, I'm not sure you have the ability  
11 to reconsider in light of the fact that the parties'  
12 exceptions were rejected. I take that to mean that  
13 Montana's request for additional discussion or  
14 elucidation of what the Tongue River Reservoir right  
15 is has been denied by the Court, and they have  
16 accepted your decision that it makes good sense in  
17 this case to stop at a point that you don't have to  
18 go any further. Stop at this discussion to resolve  
19 this case and go no further.

20           I think that there were reasons that you  
21 stopped. You articulated them very well in the  
22 course of your report. I understand and respect  
23 those reasons. I understand that I previously asked  
24 you to do something different, and I'm used to you  
25 disagreeing with me in light of my requests, so it

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1 doesn't bother me. But I understand that you came to  
2 a conclusion that this was the right thing to do in  
3 response to the case in front of you.

4 And now, in light of that changed  
5 circumstance where we have this guidance and no more,  
6 Wyoming is willing to accept that ruling in order to  
7 move on and to get this case resolved, which is in  
8 everyone's best interest. To do more than that, as  
9 you very -- very carefully pointed out in your  
10 report, requires us to get into questions that we're  
11 probably not prepared to answer, and they relate to  
12 parties that aren't before the Court. And as much as  
13 I wanted you to do something else, you didn't, and  
14 I -- I think we should live with that. And having  
15 seen your reasoning, rationale, it's probably the  
16 prudent thing to do.

17 So we're -- we're at a place now where the  
18 question is, what -- what kinds of additional  
19 remedies should flow from the determination of  
20 liability? And Wyoming's position is those remedies  
21 ought to be limited to the money judgment and nothing  
22 else.

23 And the idea that Montana should be  
24 entitled to some injunctive relief, which is not  
25 really articulated, and most of the declaratory

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1 relief they seem to be asking for isn't articulated  
2 either, and I think that's inherent in this  
3 merry-go-round concept that we can't get off of. We  
4 can't get off, we know we have to keep arguing, but  
5 we can't even tell you what we want because we've  
6 reached a point of diminishing returns here. And if  
7 you can't even tell us what you want, what you think  
8 you ought to get, and in order to get you have to  
9 show certain things, and Montana has failed to do  
10 that, particularly with regard to injunctive relief.

11 I understand the concept of, Well, the  
12 upper state needs to be put in its place. It sounds  
13 like punishment, the Court saying, You need to be  
14 punished so you won't do this again. Well, that's as  
15 much soaring rhetoric as anything else. The Court  
16 actually looked at the rules for the imposition of an  
17 injunction, and the limitations that they have placed  
18 on themselves about what is or is not the right time  
19 and right reasons to grant an injunction and intend  
20 to follow them.

21 If you have a remedy at law, you don't  
22 need an injunction. If you have no good evidence  
23 that there's a serious breach imminent in the future,  
24 you don't get an injunction. And I think that if you  
25 fairly apply the test for injunctive relief, the

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1 situation we're in and the evidence that was before  
2 you in the liability phase, that you should find that  
3 no injunctive relief is necessary or warranted in  
4 this case.

5           And it's hard for me to do because I don't  
6 even know what relief they want other than an  
7 injunction to comply with the Compact, which is an  
8 obligation we already have. And you've heard from  
9 multiple individuals from the State of Wyoming who  
10 have done all they can do, which is tell you, I see  
11 the Court's ruling, I understand it, I respect it, I  
12 will follow it. You look at the course of conduct of  
13 these parties over the last two years and that's  
14 what's happened. We've seen the ruling, we respect  
15 it, we follow it.

16           It's probably important to note this is a  
17 case between sovereigns, not people. The State of  
18 Wyoming doesn't have ill will. The State of Wyoming,  
19 it's this ambiguous thing. It's bigger than any of  
20 us. The State of Montana doesn't have ill will.  
21 It's bigger than any of us. And I think it's fair to  
22 presume that these sovereigns are just trying to  
23 follow the law as they understand it. Our conduct  
24 bears that out. And I think that that's going to be  
25 the case in the future.

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1           At some point in the future we're going to  
2           fight. We've got a baby. We've a married couple  
3           with a baby. The baby is not going anywhere, and  
4           sometimes, under some circumstances in the future we  
5           may have an additional dispute, but if we're lucky it  
6           will be 50 years from now, like it was 50 years after  
7           the first Compact was generated.

8           SPECIAL MASTER THOMPSON: So hopefully the  
9           headline in the Wyoming newspapers tomorrow is not to  
10          label that the state of Wyoming is an ambiguous  
11          thing.

12          MR. KASTE: I don't know what it is. I  
13          struggle with the concept of sovereignty. It's an  
14          entity but it's made up of a whole bunch of people,  
15          and my experience with people on both sides of this  
16          line, there are people of good faith trying to do the  
17          right thing.

18          SPECIAL MASTER THOMPSON: So I want to  
19          follow up on what we've just been talking about and  
20          settle some issues. The first is, is there a need  
21          for the Supreme Court in its final decree to actually  
22          adopt some of the specific findings that were in  
23          my -- particularly in my second interim report, with  
24          respect to the various rights and obligations of the  
25          parties.

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1           You suggested that maybe all the Supreme  
2 Court needs to do is to simply say they adopt what  
3 was ever in my first and second interim report. I  
4 think the problem with that is, is, of course, there  
5 were a lot of other things in the first and second  
6 interim report in terms of the logic the Supreme  
7 Court might not agree with.

8           So my inclination, and I appreciate your  
9 thoughts on this and Mr. Draper's thoughts on this,  
10 is to go back, pull out some of the specific findings  
11 regarding the rights and obligations, and put those  
12 into a decree so that they are specifically set out.  
13 The three values of that is, one, the Supreme Court  
14 is only agreeing to the actual findings rather than  
15 any of the logic that might be in there, and it's  
16 clear what those are.

17           Second of all, it's a good way of  
18 ferreting out whether or not in fact the parties are  
19 not sure what some of those specific findings  
20 actually mean. Because one of the things I would  
21 plan to do is to give both sides -- or actually, I  
22 should say all three sides an opportunity to take a  
23 look at that decree and see whether or not they think  
24 that actually accurately sets out what they believed  
25 was embodied in the first and second interim reports.

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1           And then third of all, provide some  
2 guidance for both sides to actually adopt them. So  
3 that's my inclination at a minimum.

4           Then there's a second issue, which I would  
5 appreciate Montana addressing -- well, actually  
6 there's a second issue, which was Montana's motion,  
7 which is whatever that decree is, it should go  
8 further than the second interim report with respect  
9 to Montana's rights in the Tongue River Reservoir.  
10 We'll talk about that during Montana's portion.

11           There is a third question, though, and  
12 that's what I will appreciate Montana's thoughts on  
13 first, which is, is there anything else that needs to  
14 be in that decree? Because I agree with you,  
15 Mr. Kaste, in moving forward we need to know exactly  
16 what people think should be part of the relief, and  
17 at this point for so long generality as to what's  
18 necessary. Then -- that's sort of Part A.

19           MR. KASTE: Can we stop at Part A?  
20 Because that's a lot.

21           SPECIAL MASTER THOMPSON: Yes, let's stop  
22 right there on Part A. So this one I'm not asking  
23 you to address Montana's motion or whether there  
24 should be anything else, but I would appreciate your  
25 thoughts on any problems with my basically pulling



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1 out what I think are the key findings and putting  
2 that into a decree that I would recommend to the  
3 Supreme Court.

4 MR. KASTE: Well, other than you're asking  
5 for a fight, which you are. To the extent that you  
6 pull something out that I like and they don't, we  
7 fight over the thing you pull out. To the extent you  
8 don't pull something out that I want in there and  
9 they don't, we fight. And we are just prolonging  
10 these proceedings I think needlessly.

11 I understand that there are -- that your  
12 opinion builds from the beginning to the end, and yet  
13 every opinion from every point does that. So there's  
14 dicta in every opinion. There's some facts in there  
15 that didn't matter that people thought were  
16 interesting and threw in. And then there's the heart  
17 of the matter and the holdings.

18 And I really don't want to fight about  
19 that but we will, I guarantee you we will, and we'll  
20 fight hard and we'll fight longer than we should for  
21 the reasons I previously mentioned, and we won't get  
22 a better deal than what we currently have. I don't  
23 see there being a significant advantage to saying,  
24 well, this is -- after putting together what is a  
25 comprehensive piece of work here, which has been very

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1 helpful, to say, Now I'm going to cut that up and you  
2 can ignore a bunch of stuff in there, I'm not going  
3 to like that. I like a lot of the stuff. Montana is  
4 not going to like it. There's stuff they like that  
5 we don't.

6 I think that the best course of action is  
7 to adopt the second interim report in whole. It's  
8 efficient. Neither party took exception to all of  
9 that stuff. We liked it in some measure, enough that  
10 we were willing to not fight about its contents in  
11 front of the Court, with the exception of the two  
12 things we brought up, which are pretty small in the  
13 grand scheme of things. We got that agreement  
14 already. I don't think you ought to mess that up.

15 More than pragmatically, I really think  
16 you can't be inclusive enough in whatever it is that  
17 you would plan to write to capture the essence and  
18 the important parts. There's a lot of good for both  
19 parties in minutia in here that will get left off,  
20 and won't I don't think do the future generations a  
21 whole lot of favors to distill it down in ways that  
22 are unfair.

23 SPECIAL MASTER THOMPSON: So I certainly  
24 do not want to unravel what has occurred already, but  
25 at the same time, it's safe, Mr. Kaste, but you're

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1 beginning to convince me that we need some kind of  
2 declaratory relief here because in fact the parties  
3 don't agree on what portions of the second interim  
4 report they're going to abide by, which portions  
5 they're not going to abide by, and what they need --

6 MR. KASTE: I didn't say that.

7 SPECIAL MASTER THOMPSON: Well, if that's  
8 not a problem, then I don't see why it's going to  
9 take very long to come up with a decree that includes  
10 everything that the parties are going to accept,  
11 because if in fact, as you point out, there's  
12 something that I might not include and you're going  
13 to say, Hey, we need to include that, Montana is  
14 going to say, Fine, go ahead and include it, because  
15 apparently both of you are in agreement with  
16 everything in there.

17 MR. KASTE: We don't think that's going to  
18 happen, and I don't -- I don't want to get into a  
19 position where we bet how awful this is going to be  
20 or how great it is going to be. I believe that we're  
21 going to have -- we're going to create disputes that  
22 we didn't need to create and we're going to create a  
23 fight that we don't need to create because we're  
24 generally happy with where we are. And once you  
25 start parsing things out, we will be generally

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1 unhappy with where we are. As a whole, it seems to  
2 work pretty well. You start picking it apart and  
3 we're going to have problems.

4 I didn't say that anybody is not going to  
5 abide by it. I don't think that we're in a position  
6 now where we can -- we have any disagreements about  
7 what it means or our rights and responsibilities. If  
8 we start taking it apart, then we're probably going  
9 to fight. And we can resolve that. It will take  
10 some time. We'll be back and forth saying, Why, what  
11 value do we obtain by going through that process when  
12 we already have a comprehensive piece of work that we  
13 all agree on and are living under peacefully. I  
14 don't think we benefit ourselves or future  
15 generations by tearing the sucker apart.

16 SPECIAL MASTER THOMPSON: So why is it  
17 that you would end up fighting with each other if it  
18 is put in the decree but you're not going to end up  
19 fighting about this in two or three years when the  
20 issues actually come up?

21 MR. KASTE: Because you're giving us the  
22 opportunity, and it's water in the West. And we  
23 can't compromise, we won't compromise, and we'll  
24 demand everything that we like out of there, and so  
25 will they, but not what you want.

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1           We're in a position now where we are  
2 content. When you put us in a position where we have  
3 to go back and forth with each other, we will  
4 invariably retreat to our camps and attempt to get  
5 the best deal out of that decree. Why? What good  
6 does it do? Nothing.

7           SPECIAL MASTER THOMPSON: Okay. So let's  
8 move on from there.

9           So the other issue I was going to say is  
10 the question of whether or not there should be  
11 injunctive relief. And on that, I think that  
12 Wyoming's position is quite clear. I probably will  
13 have some questions, but I think it makes more sense  
14 for Montana to address some of my questions on  
15 injunction first.

16           Similarly, on the cost issue, at the  
17 moment I don't have any questions, but again, I might  
18 have some questions after Montana addresses your  
19 motion.

20           So for the moment I don't have any more  
21 questions for you. Is there anything else you would  
22 like to say to me at this point?

23           MR. KASTE: I don't think so, other than  
24 I'd appreciate it if you grant our motion for summary  
25 judgment and kick us off this merry go round. I

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1 think we'd all appreciate it if you would do that for  
2 us before we have to engage in some form of future  
3 proceedings, to the detriment of both states, because  
4 we're going to have to pay for it.

5 Thank you.

6 SPECIAL MASTER THOMPSON: Okay. Thank  
7 you, Mr. Kaste.

8 What I would actually propose, since  
9 probably a lot of people have had some coffee before  
10 coming to the hearing. We've been going for an hour  
11 and 15 minutes right now. Why don't we take like --  
12 I would not propose a long break. I would propose  
13 10 minutes, does that sound good? A 10-minute break  
14 right now, and then we will come back. And so we're  
15 recessed for about 10 minutes. Thank you.

16 (Recess taken.)

17 SPECIAL MASTER THOMPSON: Let's go back on  
18 the record.

19 So Attorney General Fox.

20 MR. FOX: Good morning, Your Honor. Thank  
21 you for the opportunity to address the Court, and I  
22 want to acknowledge my colleague and now long time  
23 friend, General Michael, who has been a pleasure to  
24 work with not only in this matter but many other  
25 matters as well.

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1           It's no secret that in fact Wyoming and  
2 Montana do share a lot of common interests, and for  
3 the most part I would say probably historically we  
4 work together on things that are of note to the West.  
5 For instance, the federal-state relationship and many  
6 other things.

7           But I think Mr. Kaste is right, this is  
8 water in the West, and to quote a long-standing maxim  
9 of jurisdiction, whiskey is for drinking and water is  
10 for fighting. And I know a little bit about both of  
11 those, which brings me to where I am today as  
12 Attorney General because as you know, Your Honor,  
13 this is where I grew up. I know these people and the  
14 work and businesses that they do.

15           And this is obviously very important to  
16 both states, but it's important to me because I grew  
17 up in this area. I worked in places like Lame Deer  
18 on the Northern Cheyenne Reservation. As Your Honor  
19 is aware, we have a home just minutes from the Tongue  
20 River Reservoir and the state line. And this is very  
21 important to me for a lot of reasons.

22           And Your Honor is certainly -- you've  
23 heard the testimony of people like Mr. Hayes and  
24 Mr. Hamilton, and so you, too, understand the  
25 importance of these things to people who work for a

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1 living and live off the land.

2           So I think it's important to look at the  
3 context of what Montana is asking for historically.  
4 Certainly the events that led up to the water Compact  
5 itself were important negotiations and important  
6 actions that were taken, hopefully to avoid the kinds  
7 of circumstances that we've seen ever since then, and  
8 we're now looking at 60 plus years of disputes with  
9 the State of Wyoming. And as the Court is aware,  
10 it's not just the years of 2004 and 2006 where the  
11 violations have been found that are important, but  
12 we're looking at a pattern and course of conduct  
13 really for more than 60 years that really exemplifies  
14 Montana's request for remedies, not just for past  
15 actions but for the future, for this generation and  
16 generations to come, to finally settle these issues,  
17 not just so we don't have disputes, but so Wyoming  
18 and Montana can work together in the future for the  
19 best interests of all their constituents.

20           So my remarks will be somewhat brief, but  
21 I think it's important, Your Honor, in the dialogue  
22 that you had with Mr. Kaste and talking about  
23 declaratory relief in particular, and the Court's  
24 suggestion that perhaps gleaning some of the  
25 directives or guidance, if you will, that have come



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1 out of the first and second interim reports, and then  
2 to put that down on paper to direct the parties in  
3 the future so that they avoid these disputes, so they  
4 know where they stand, they know what they can and  
5 can't do.

6 Just as a few examples, you know, first  
7 and foremost, what -- we now know, because the Court  
8 has told us, that Montana can make a call under the  
9 Compact. That's an important step but it's just the  
10 first step. But what does Montana need to do before  
11 making that call? That's an issue perhaps can be  
12 gleaned from the reports, put it into a decree.

13 What -- how must Montana make the call for  
14 it to be valid? We know more about that. It needs  
15 to be in writing, it needs to go to particular  
16 parties. And certainly, how long does Wyoming have  
17 to respond to a call? And what must they do in  
18 responding to the call? Can they withhold water  
19 while they determine, as their engineer has  
20 mentioned, whether they think a call is valid or not?

21 These are the kinds of issues that have  
22 got us stuck in the past and have caused this kind of  
23 problem and grief and consternation, and this is not  
24 just a hypothetical. This involves and impacts the  
25 lives of individuals on both sides of the state line.

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1 And it really, I think, Your Honor, when we look at  
2 affirmative relief in addition to the issue of  
3 damages, declaratory relief and injunctive relief are  
4 not only the norm in these kinds of cases, as Your  
5 Honor has mentioned, but it really, really is  
6 something that needs to happen in this case in order  
7 for the parties to go forward and know and understand  
8 what they need to do.

9 And the time is ripe. While there is  
10 some, I guess, opposition to not having this case  
11 settle now, when we look in the big scheme of things,  
12 when we're talking about 60 plus years or perhaps  
13 even more when we look at the events leading up to  
14 the Yellowstone Water Compact, another seven months,  
15 for instance, as was suggested in the parties' joint  
16 suggestion, where we go from here in terms of  
17 discovery and what have you, seven months is not a  
18 long time to settle this in frankly what could be in  
19 perpetuity for many generations to come.

20 So Montana would submit, Your Honor, that  
21 the time has come to certainly wrap this up. No one  
22 has more incentive to finish this than Montana. We  
23 believe that there could be and we're open to  
24 negotiations to try to settle certain issues. We can  
25 still do that. But I think we've come to the

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1 realization that politically it's easier for the  
2 parties to be told what to do than to try to sell a  
3 settlement to their constituents and say, This is  
4 what we agreed to do, when those constituents may not  
5 be happy. And that politically is one of the  
6 barriers that makes it difficult to settle a case  
7 like this, because, again, as Mr. Kaste said, this is  
8 water in the West.

9 So I believe that Your Honor and the Court  
10 has an opportunity here to create a long-lasting  
11 legacy that will serve the people of Wyoming and  
12 Montana for many, many years to come, but we won't be  
13 able to do it if we leave it here, as Wyoming has  
14 suggested, and if we don't finish this remedies phase  
15 and make sure that we have declaratory relief and  
16 injunctive relief in a manner, shape and form that's  
17 meaningful and fair and really spells out where we go  
18 from here.

19 So, Your Honor, those are more conceptual  
20 and 30,000 foot level comments that I would like to  
21 make. I think it under -- where we've gone in just  
22 this hearing today underscores the fact that there  
23 isn't very much agreement and there will be future  
24 disputes. And as Mr. Kaste has said, he knows and  
25 acknowledges that there will be disputes, and we know

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1 that there will be shortages of water.

2 With that in mind, the time has come to  
3 have very specific parameters set forth, which --  
4 some of which can be gleaned from the record I  
5 believe, but some of which needs to come from further  
6 discovery.

7 Mr. Draper will be discussing two points  
8 that Wyoming has brought up in their motion, damages  
9 and declaratory relief. And Mr. Wechsler will do --  
10 will talk about injunctive relief and cost. And if  
11 Your Honor has any questions of me, I'd be happy to  
12 answer those now and -- or try to answer those now,  
13 recognizing that counsel of record knows much more  
14 about this case than I do.

15 But again, we appreciate, Your Honor, your  
16 attentiveness to this and your commitment. We really  
17 do believe that there's an opportunity here for the  
18 Court to set the stage to make sure that Montana and  
19 Wyoming not only get along but do the right thing for  
20 the right reasons.

21 SPECIAL MASTER THOMPSON: So let me  
22 actually ask two questions. The first one is, as I  
23 understand what Mr. Kaste is suggesting, I'm going to  
24 paraphrase and probably add in some things that  
25 Mr. Kaste did not say, but my understanding of what

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1 Mr. Kaste was saying was, you know, you've already  
2 said a lot in the two interim reports. The Supreme  
3 Court has sided with you on both of those occasions.  
4 And if you just leave Montana and Wyoming to actually  
5 implement what's in there, we would be able to do  
6 that, but if you force us to actually confront some  
7 of these issues again in the public staying of a  
8 Supreme Court case, we're just going to end up  
9 fighting over exactly what -- because right now we're  
10 all three satisfied.

11 And so I think my question is, I think  
12 what you're saying is, Actually, no, we're going to  
13 fight unless the Supreme Court basically tells us in  
14 a decree exactly the way in which the system should  
15 be operated in connection with the issues that are  
16 before us.

17 MR. FOX: Well, Your Honor, I think  
18 there's a difference that needs to be made. You  
19 know, whether or not we're fighting with the Court,  
20 for instance, or fighting with each other, I think  
21 it's safe to say, given the history and, for  
22 instance, the water under the bridge, if you will,  
23 that's occurred over the last 60 plus years that  
24 there is a pretty good chance, if not a substantial  
25 chance, under the current circumstances, without more

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1 specific guidance in the form of declaratory and  
2 injunctive relief from this Court, that there will be  
3 disputes, and very likely we will be back before this  
4 Court. It may not be these parties or these  
5 individuals or it may not be Your Honor, but  
6 certainly it will be someone.

7 We would like to avoid that. We think  
8 that is avoidable. We believe that this Court can  
9 help us fashion the kind of guidance, if you will.  
10 Just, for instance, dispute resolution. Under the  
11 Compact, as I understand it now, the provisions, we  
12 have to have the United States to vote if there's  
13 going to be any resolution of a difference between  
14 Montana and Wyoming, but they don't historically  
15 vote. Can the Court require that they vote? I think  
16 you can. And as I mentioned, what does Wyoming do in  
17 the interim when we make a call?

18 Now, in the last year or two they've been  
19 relatively good to work with, and I think with the  
20 Court breathing over our necks, that could be so, but  
21 this case does have to come to a conclusion at some  
22 point.

23 We don't relish the idea of having further  
24 disputes with the State of Wyoming. They're our  
25 friends and our neighbor. But we can't settle this

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1 without your help, and we think that it's possible to  
2 do it. Your idea, Your Honor, of presenting  
3 something for us to comment would be acceptable to  
4 Montana.

5 Another option that I'm familiar with in  
6 my private litigation experience is, as the  
7 prevailing party here, Montana could submit to you a  
8 proposed consent decree, Wyoming -- with  
9 justification in the form of brief or affidavits or  
10 whatever, with Wyoming having the ability within a  
11 certain amount of time to comment on that and Montana  
12 to reply. That would -- could perhaps save some  
13 work. It might be more expeditious, Your Honor,  
14 although we have every confidence in your ability to  
15 set forth whatever guidance you feel is necessary.  
16 But those are options that, again, come from my  
17 experience in civil litigation and that may be  
18 helpful to the Court, and Montana is certainly  
19 amenable to doing that.

20 SPECIAL MASTER THOMPSON: Okay. Thank  
21 you. And second question, which I'm going to ask you  
22 the same question that I started out asking Mr. Kaste  
23 with respect to the damages issue.

24 MR. FOX: Sure.

25 SPECIAL MASTER THOMPSON: And feel free to

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1 defer this to Mr. Draper if you want.

2 And that is, again, I can understand why  
3 the parties haven't settled yet, but I don't  
4 understand why the parties have not been able to  
5 resolve the question of damages.

6 MR. FOX: Sure.

7 SPECIAL MASTER THOMPSON: And if there's  
8 anything you can help me out with on that.

9 MR. FOX: Well, Your Honor, I may have  
10 maybe a little more latitude than Mr. Kaste did  
11 because I wasn't directly involved in the -- in the  
12 negotiations. I was informed, actually, within the  
13 last few days that we were unable to come to a  
14 settlement.

15 And I think, again, Mr. Kaste was correct  
16 in the sense that water is a very important issue.  
17 We're talking about farmers and ranchers and  
18 municipalities, individuals who have financial stakes  
19 in these things on both sides of the -- of the  
20 border. It was my understanding that we were charged  
21 with the responsibility of having some sort of a  
22 global settlement, so at least from my perspective,  
23 we were looking at tying things together. And as  
24 Your Honor is aware, you can give a little in one  
25 area to take a little in another area, so that may



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1 have entered into this situation.

2 But I think ultimately politically it's  
3 difficult in some cases to tell your constituents  
4 that you have agreed to something that may or may not  
5 compromise what they've had before, which in some  
6 cases could have been very, very advantageous to  
7 them. I think the Court -- Your Honor used the word  
8 vulnerability. Montana is vulnerable. We are the  
9 downstream state. We don't hold cotton, and that  
10 kind of imbalance in position and strength has been  
11 the problem for 60 plus years. And the only way to  
12 fix that, I believe, is for the Court to intervene  
13 and give us the kind of prospective relief that  
14 allows the parties to work together.

15 On the issue of money, I think you're  
16 right, it's possible to settle those things. There  
17 may -- you know, you've mentioned disgorgement and  
18 some of the other things that really are not  
19 developed in the record. In the big scheme of  
20 things, it's always been Montana's position that the  
21 prospective relief is the most important thing here  
22 to govern the parties going forward.

23 You know, given another opportunity, we'd  
24 love to sit down and try to settle that. And perhaps  
25 one -- I'm thinking off the top of my head, Your

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1 Honor, and hopefully my co-counsel in the back won't  
2 contradict me, but perhaps one option is for the  
3 parties -- for Montana to work on a draft consent  
4 decree while working with Wyoming on settling the  
5 damage issue in particular, given the directive  
6 perhaps from the -- from the Court that we actually  
7 are going to do it that way, that there will be a  
8 consent decree with prospective relief in the form of  
9 declaratory and injunctive relief. Montana will  
10 suggest what they would like to do. Wyoming would  
11 comment. The Court would determine ultimately what  
12 further information the Court may need. And in the  
13 meantime we try to work out the damages issue in good  
14 faith.

15 And correct me if I'm wrong, Your Honor.  
16 That really doesn't include the issue of cost,  
17 correct?

18 SPECIAL MASTER THOMPSON: That's correct.

19 MR. FOX: So we would need some guidance  
20 from the Court on whether or not Montana is entitled  
21 to costs, and if so, to what degree and how much, and  
22 that might be just as easy as submitting a bill of  
23 costs to the Court, with a brief explaining why we  
24 think we're entitled to those amounts. Wyoming can  
25 again respond. The Court could then determine what

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1 parameters it wishes to use to determine what costs  
2 Montana might be entitled to.

3 Those are all things that could continue  
4 to go on that would streamline and expedite the  
5 process and give the Court the information it needs  
6 to make a determination.

7 SPECIAL MASTER THOMPSON: Okay. Thank  
8 you, Mr. Attorney General.

9 MR. FOX: Thank you.

10 SPECIAL MASTER THOMPSON: Mr. Draper.

11 MR. DRAPER: Thank you, Your Honor.

12 SPECIAL MASTER THOMPSON: So you've heard  
13 my questions with respect to both the injunctive --  
14 I'm sorry -- both the question of damages and also  
15 with respect to declaratory relief. And so you're  
16 welcome to either start with what you were planning  
17 on saying or go directly to those questions.

18 MR. DRAPER: Thank you, Your Honor. I  
19 will -- with your permission, I'll just make five  
20 initial points very briefly, and then go to your  
21 questions.

22 What Wyoming is asking for in its motion  
23 for summary judgment is for you to do what the Court  
24 refused to do. They didn't -- they did not even want  
25 this phase to take place. They didn't believe that

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1 there was anything necessary other than a summary  
2 disposition on damages that it had calculated in  
3 dollars.

4 And now it is before you, and we're simply  
5 asking for the same relief in terms of summary  
6 judgment, asking you to rule as a matter of law that  
7 we're not entitled to submit evidence on any of the  
8 aspects of remedies that they have mentioned in  
9 their -- in their motion. Nothing should be  
10 submitted on damages. We should -- are supposed to  
11 just take their word for it. Nothing on the form,  
12 whether it should be money or water. Nothing on  
13 whether disgorgement is appropriate. They don't --  
14 they don't believe that there is any declaratory  
15 relief to which we're entitled, although that was our  
16 first request in our initial filing in this case.  
17 Our request for the case to be accepted by the Court  
18 was accepted, and that is our primary motivation as  
19 we expressed right there out of the box. They want  
20 to deny that.

21 They say yes, well, there's been some -- a  
22 couple years where we satisfied the call criteria,  
23 and we should leave it at that and deny the primary  
24 relief that Montana requested in its initial filing,  
25 which was approved as a filing by the Court.

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1           But I'd also like to make the second point  
2           that this case was bifurcated by your order. Case  
3           Management Plan No. 1, Paragraph 2, reserved the  
4           matters relating to remedies to the later remedies  
5           phase. So even this evidence that they point to with  
6           respect to 7 to 9 or 7 to 15 dollars per acre-foot,  
7           some random remarks that came into the record,  
8           that -- that was not within the scope of evidence  
9           that we were allowed to discover or present to you.  
10          It's not subject to cross-examination. It's not  
11          subject to countervailing evidence. It's -- frankly,  
12          as a matter of fact, it's wildly out of sync with  
13          what we've seen in our interstate cases in the past  
14          where the Supreme Court has approved damage relief.

15                 There was -- we just had the Kansas versus  
16          Nebraska case, where 3.7 million was approved for  
17          around 7,000 acre-feet. That's more like \$52 per  
18          acre-foot. And these are -- obviously these are  
19          factual matters. They want you to avoid all that,  
20          turn a blind eye to it, and accept the random  
21          evidence that happened to come in in a phase of this  
22          case that was not intended to cover that subject.

23                 We feel that that is turning on its head  
24          the normal procedure that this Court follows. As you  
25          know, the Court is anxious to have a full record in

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1 these cases. We've seen that explicitly set out in  
2 cases like United States versus Texas. We see it in  
3 every reference to a special master. Your reference  
4 directs you to take evidence, such evidence as the  
5 parties may offer and such other evidence as you may  
6 call for. They want a full record here, and if the  
7 parties don't happen to provide it, the master is in  
8 a position to request it, evidence that he believes  
9 needs to be part of the record.

10 So this -- this approach to original  
11 jurisdiction cases, and we've seen it in interstate  
12 water cases, is totally contrary to the summary  
13 disposition that they're asking you to enter right  
14 now. And I would suggest that the Court would be  
15 quite surprised if you did accept their motion and it  
16 came right back to them.

17 They were -- they were asked by Wyoming to  
18 avoid this whole phase as being unnecessary. And to  
19 grant their motion would essentially be to accept  
20 their exception to the Court, and return it to them  
21 based on much less than a full record.

22 I would point out that in that regard, the  
23 Court -- and Your Honor is probably very familiar  
24 with these in recent cases we have been very thorough  
25 in entering decrees, or the Court has been very

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1 thorough. For instance, I have in my hand the two  
2 volumes from the fifth and final report of Special  
3 Master Littleworth in the Kansas v. Colorado case.  
4 These are the volumes that set out the rules by which  
5 compliance will be achieved by Colorado, and it's --  
6 it's a help to Colorado. It knows exactly what it  
7 needs to do and what it doesn't need to do.

8 I would submit that that would be true  
9 here, too. Not only -- not only Montana, but Wyoming  
10 also needs to know what it needs to do in the future  
11 in order to be in compliance with the Compact.

12 You have set out general principles in  
13 analyzing past actions, past hydrologic conditions.  
14 As Your Honor was suggesting, those need to be  
15 transformed and supplemented so that they in future  
16 action can avoid -- and I would say the merry go  
17 round here that we're looking at is if this does not  
18 happen, we will be back here on a merry go round  
19 every time that -- as Mr. Kaste has suggested, every  
20 time that the hydrologic conditions change we need to  
21 come back here. Otherwise it's an advisory opinion,  
22 and it's absolutely contrary to the jurisprudence in  
23 this area over the years, starting with the Pecos  
24 case, which is really our first case where we see an  
25 attempt to enforce an interstate water Compact. And

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1 the Court has been very careful about the remedy  
2 phase.

3 You'll notice in that 1987 decision in the  
4 Texas v. New Mexico, that is talking completely  
5 about -- well, almost completely about remedies, but  
6 there -- it can be in money. The Special Master,  
7 Charlie Meyers, assumed that it had to be in water.  
8 The Court said, No, it could be in money. But you  
9 have to look at that. You have to look at the  
10 equities. You have to look at whether payment in  
11 water would be the most just and equitable remedy  
12 under the facts of that case, the facts of that case.

13 Wyoming doesn't want you to look at these  
14 facts. They say it's unnecessary. Just take our --  
15 take our money, enter a judgment against us. Yes, we  
16 violated, this is how much, let's be done with it,  
17 and we don't want any more direction as to how to  
18 avoid these problems coming up next year, when the  
19 hydrologic conditions admittedly will be different.  
20 They're different every year.

21 We've also seen in the more recent case,  
22 the Kansas versus Nebraska case, treatment of  
23 remedies in that case. So the decision that came out  
24 in February 2015, after you submitted your second  
25 interim report in this case, dealt essentially almost



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1 completely with remedies. The parties were agreed,  
2 yes, there's been a major violation. There were a  
3 few adjustments as to what the amount was, but the  
4 rest of that whole consideration is remedies. And  
5 they want you to skip that in this case.

6 The remedies that they were considering in  
7 that Kansas v. Nebraska case are contained primarily  
8 in a couple of volumes. Again, these are on the  
9 Supreme Court Web site. The first volume of the  
10 final settlement stipulation that gives those rules  
11 for how the model is to be used, and then a model  
12 documentation volume that actually has the model in  
13 the back on a disc, the model code input, output,  
14 grass, all this kind of thing, and it provides that  
15 if there's any dispute as to what the narrative  
16 describing the rules is, that that would be settled  
17 by what's in the -- what's in the model that's in the  
18 pocket part.

19 Back in the early days, before computers  
20 became as useful as they are today, in the Pecos  
21 River case, you can see there, the 1988 amended  
22 decree that we've cited, the reliance on a particular  
23 exhibit, which I'm holding in my hand here. This is  
24 the Texas exhibit that's mentioned in the decree, and  
25 it's the -- it's the Pecos River Master's Manual, and

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1 it has equations.

2 Well, we all know that equations, it's  
3 like computer models, they're set up so that you can  
4 handle different hydrologic conditions. It doesn't  
5 have to be exactly as it was in the years that the  
6 Court looked at based on data of inflows and outflows  
7 in that case. These are formulas by which you go  
8 forward, by which the parties can tell if they're in  
9 compliance, and in that way avoid coming to this  
10 Court more than absolutely necessary to resolve their  
11 disputes. If their dispute is over, such as in this  
12 case, when can a call be entered? When is it  
13 appropriate? What are the attributes of a valid call  
14 here?

15 If we don't know those going in, you can  
16 see that next year we're going to be back. And the  
17 Court is going to be very disappointed to see us.

18 The Court wants us, I believe, to follow  
19 its precedence here. Of course, the facts in each  
20 case differ. We're not going to be adopting, I don't  
21 believe, a big computer model, and so on, but there  
22 are certain rules. When can a call be made? When  
23 can a call be challenged? What do you have to do if  
24 you as Wyoming receive a call? What's the time  
25 for -- for you to respond to that? How do you

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1 respond to it? How do you document it? What kind of  
2 monitoring is required?

3 Those are -- those are ultimately simple  
4 things, but if you don't -- if you don't have clear  
5 rules, it is -- we know these days, just like Texas  
6 and New Mexico, where the Court says, these states  
7 have a propensity to disagree if there's room to do  
8 so.

9 As you can see, we took extra time while  
10 the case was pending before the justices to see if we  
11 couldn't, with their strong encouragement that we had  
12 in their order, to settle this, at least part of it.  
13 And as Your Honor has pointed out, we couldn't settle  
14 any part, including the damages. And that's the  
15 situation today.

16 We tried, but as I think Mr. Kaste had a  
17 good phrase, this is western water law. Officials  
18 having to justify why they gave in voluntarily,  
19 without being required by the Supreme Court Special  
20 Master, the Supreme Court itself, as arguably giving  
21 away water that they would otherwise be enjoying.  
22 And frankly, the -- we've seen a couple of  
23 settlements of these interstate cases, but that's  
24 very unusual. Normally you cannot settle these  
25 things. They have to be litigated for those reasons

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1 that Mr. Kaste pointed out.

2 And so it was a surprise really to me that  
3 in a couple of cases, where there were strong  
4 personalities in Nebraska that wanted to go forward  
5 and reach an agreed solution, that you could do that.  
6 We also had that situation on the Republic River. We  
7 had been litigating the Arkansas River for 13 years  
8 of trial, and we were not anxious, if we didn't have  
9 to, to go through another experience like that. And  
10 so we -- we did enter into a settlement, but as Your  
11 Honor may have noticed, the Court has countermanded  
12 part of that settlement and changed it. So that one  
13 part of it, without any -- any other adjustment in  
14 the balance that we achieved in that settlement, has  
15 found that one part had to be changed, and did so.

16 So that can also have a bit of a dampening  
17 effect on the parties' ability to settle these  
18 matters.

19 So that's -- that's the background that  
20 we're cleaning up, including this most recent case  
21 where the Court has taken special pains to emphasize  
22 its commitment, its authority to do whatever --  
23 whatever is necessary to protect downstream states,  
24 which has this inherent geographical vulnerability,  
25 as the General has mentioned. They point that out

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1 directly, and they say it is this Court's duty to  
2 protect those downstream states and to remind them,  
3 those downstream states, of their -- of their duty to  
4 comply with these compacts.

5 And that's where you get into the  
6 remedies. What is necessary to adequately remind  
7 downstream states sufficiently of the need to comply  
8 with the Compact. And that's where you get into the  
9 equitable mix of remedies. You can see even  
10 disgorgement was -- was ordered in that case the very  
11 first time as part of that what the Court felt was  
12 necessary to adequately remind the downstream state  
13 of its -- of its duties.

14 And it did not -- it did go through what  
15 the situation was there, but it did not specifically  
16 tie it to any principle of contract law or any state  
17 of knowledge, if you could attribute state of  
18 knowledge to a state, which we have to do in effect.

19 One thing I would point out here in that  
20 context is that they firmly rejected, the Court  
21 firmly rejected the notion that Wyoming is pressing  
22 here, that contract law alone governs what the Court  
23 can do here. That's their position. You have got to  
24 go to this replacement number that they've come up  
25 with. You have no choice.

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1           These cases teach differently. The Court  
2 has said it's at the apex of its powers to order an  
3 appropriate remedy when it is enforcing an interstate  
4 Compact, which is both by nature a contract and a  
5 federal statute. It's a little bit like light.  
6 Sometimes it's like a wave, sometimes it's like a  
7 particle. And the Court has to use its judgment,  
8 guided by reports of its Special Masters, to  
9 determine just how to do that in each case. And to  
10 submit that it is a pure contract question, which is  
11 the dissenting -- position of the dissenters in the  
12 Kansas v. Nebraska case, has been rejected.

13           So those are general points --

14           SPECIAL MASTER THOMPSON: Mr. Draper --

15           MR. DRAPER: Yes.

16           SPECIAL MASTER THOMPSON: -- if I may  
17 interrupt you. I'm looking at the clock, so I want  
18 to try to be as efficient as possible.

19           MR. DRAPER: Very good.

20           SPECIAL MASTER THOMPSON: So the first  
21 thing -- and I appreciate your thoughts on  
22 Mr. Kaste's thoughts, which is that the Supreme  
23 Court's order, basically, when it came back to me,  
24 really does not provide me with much information at  
25 all with respect to how I should resolve these two

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1 motions. What it does say is that the Supreme Court  
2 has gone out to resolve all the remedies it chooses,  
3 but that doesn't mean that I couldn't decide in this  
4 particular form and fact. Without interim hearings,  
5 I couldn't go ahead and issue, or at least that's not  
6 saying that I'm going to. It's saying I don't think  
7 we know because the Supreme Court basically was  
8 silent on that particular exception.

9 In the same way, of course, as on the  
10 other side, the fact that they sent it back to me  
11 without a specific order saying that I have to look  
12 at whether or not Montana has a right to fill the  
13 reservoir beyond the 32,000 acre-feet means that I  
14 shouldn't address that particular issue at this  
15 particular stage. As far as I know, the Court was  
16 basically silent. They just didn't want to resolve  
17 those questions on their own.

18 MR. DRAPER: Your Honor, I understood  
19 their order simply to be, number one, rejecting the  
20 notion that it not go back for a remedies phase.  
21 That's clear. But otherwise, they are simply  
22 entrusting the case now in the remedies phase to your  
23 judgment, and they want to have you in the first  
24 instance to recommend to them how it should be done.

25 For instance, on the Tongue River

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1 Reservoir, there wasn't any need for you to go beyond  
2 the 32,000 acre-foot fill holding that you did for  
3 purposes of resolving liability. That's all we were  
4 talking about there. So it was -- it was quite  
5 understandable and acceptable that you didn't.

6 However, going forward, the situation is  
7 different. As we have pointed out in our affidavits,  
8 if you compare how much is needed to fill the full  
9 capacity, you need -- you go above 32,000 in  
10 93 percent of the years, looking at the -- applying  
11 that to the historical record.

12 You can also see that when you just look  
13 at how many years did -- was more than 32,000  
14 acre-feet stored, new water stored in the reservoir.  
15 85 percent of the years. That is far more than every  
16 other year. It means that next year, the likelihood  
17 is very high that more than 32,000 needs to be  
18 stored.

19 But right now the 32,000 limit is there.  
20 So when we start filling on October 1 and we get to  
21 the 32,000, at that point, under the ruling as it  
22 stands now, we have -- we do not have a Compact-  
23 protected right to continue to fill. And in  
24 85 percent of the years we would need to do that. We  
25 will need to fill beyond the 32,000 acre-foot level.



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1           So today, yes, it's fine that we didn't  
2 go -- you didn't go beyond the 32,000, but going  
3 forward, we can see that not only will it come up  
4 sometime, it will come up almost every time. And so  
5 you couple that with the admission in the affidavit  
6 that was filed by Mr. Tyrrell that, yes, we will in  
7 dry years, I can't deny that we might have disputes.  
8 And it just goes to point, when there's water  
9 everywhere, we don't need a Compact. Who cares?  
10 It's when the water supplies get short, and when the  
11 water supplies get short, we saw that in 2004 and  
12 2006, there was a dispute. We were told, You don't  
13 have such a right under the Compact. Letters that  
14 purport to be calls are ineffective. We will not  
15 honor them. You don't have that right. There's no  
16 violation of this Compact.

17           All those questions can be answered simply  
18 for the future going forward. We know that, yes, in  
19 those years there was a violation. The order has  
20 been entered by the Court based on your  
21 recommendation, but under the other hydrologic  
22 conditions, which are going to be different this year  
23 and next year and the year after, from 2004, 2006,  
24 they know those are going to be different, and under  
25 Wyoming's proposal we stay on the merry go round of

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1 coming back to the Court on each new set of  
2 hydrologic conditions.

3 This is an impossible way to proceed  
4 really, looking at judicial economy, looking at the  
5 Court's role in resolving disputes between states.  
6 It can only resolve the disputes between states  
7 during the time? Is that -- is that fulfilling its  
8 responsibilities as the Court itself has stated? I  
9 don't think so.

10 SPECIAL MASTER THOMPSON: Okay. I want to  
11 move on to both damages and declaratory relief. And  
12 let me actually try and ask some very specific  
13 questions here, because I asked questions of  
14 Mr. Kaste, both with respect to law and facts. I  
15 think I can -- I think I have a pretty good  
16 understanding of the cases there and what they stand  
17 for.

18 I have two specific questions, answer  
19 specifically if you want and more generally if you  
20 can't. The first one is, what would be Montana's  
21 view with respect to the possibility of providing  
22 water rather than monetary damages? The advantages I  
23 see are, number one, again we don't have to deal with  
24 a lot of the evidentiary issues I think would come up  
25 in connection with monetary damages. And to be

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1 honest, I just can't imagine that it would be worth  
2 the discovery and the trial proceedings to figure out  
3 exactly what the damages would be, either in terms of  
4 loss to Montana or benefits to Wyoming, given the  
5 total amount of water that we're talking about here.  
6 So one thing is to avoid those various issues.

7 Second of all, it would serve the purpose  
8 of disgorgement, because to the degree the water is  
9 more valuable to Wyoming than Montana, they lose that  
10 water in the future, but it would also make Montana  
11 whole because you would get the water that you were  
12 shorted before.

13 So I see a variety of potential advantages  
14 to water. And as I think you said in your briefs,  
15 prior to 1987 that was all the Supreme Court talked  
16 about, was relief in terms of water, that it was not  
17 until the Texas versus New Mexico decision in 1987  
18 that we were talking about monetary damages. So  
19 thoughts on water versus monetary damages.

20 MR. DRAPER: Well, I think they both have  
21 their difficulties. The 1987 discussion in Justice  
22 White's opinion on the Pecos River for the -- for the  
23 Court was unanimous, I believe. He spent a lot of  
24 time addressing that because Special Master Meyers  
25 had assumed that he had to order repayment in water.

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1 And the Court went into the balancing of equities,  
2 that water looks a lot like specific performance, and  
3 that requires a balancing of benefits and detriments  
4 on both sides of the state line.

5           You know, there's issues in practicality.  
6 You know, is it -- is it possible to obtain water  
7 easily in Wyoming that would be sent down? Is it  
8 possible to buy water from the Northern Cheyenne  
9 Tribe that's already in storage, make it available to  
10 Montana?

11           These are all questions that have some --  
12 some complications. Depending on where the water  
13 comes from, you may have to worry about transit  
14 losses. There's also the question of timing. If  
15 you're going to repay in water, water that you took  
16 when the chips were down and everything was dry,  
17 everybody needed extra water, and you held onto it  
18 upstream, and that's what happened in 2004 and 2006,  
19 is it fine just to buy some water and say, Hey, it's  
20 available in a year when nobody is -- is short of  
21 water.

22           So you do have some complications there.  
23 And we -- we went into that, there was substantial  
24 discovery at trial on the question of money versus  
25 water in the Arkansas River case before Special

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1 Master Littleworth. And he made a determination that  
2 Kansas's request that it be in money would be favored  
3 over Colorado's request that repayment be made in  
4 water.

5 So following the recommendations of the --  
6 or at least the discussion of the principles  
7 applicable in the 1987 Texas v. New Mexico decision,  
8 the Special Master there ruled that it would be in  
9 money, and that was not challenged before the Court.

10 If you go to the money option, there are  
11 complications there. How do you convert water into  
12 money? That -- there was -- there was a lot of  
13 testimony, a lot of discovery, expert analysis that  
14 went into that very question in Kansas v. Colorado.  
15 And this is true in large part in the Kansas v.  
16 Nebraska case. But, you know, there were -- there  
17 were many -- more than a handful of agricultural  
18 economists working on that case at one time. There  
19 were all sorts of specialists that had to be called  
20 in to make that conversion from lost water, shortfall  
21 deliveries, to cash.

22 And it was disputed on many levels, but  
23 the Court ruled and the Master dealt with all the  
24 multitude of issues that came up in the context of  
25 it, trying to figure out how much is an acre-foot of

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1 water worth in dollars and cents, and what are the --  
2 what is the prejudgment interest rate? Should it be  
3 the interest rate at which states borrow money?  
4 Should it be at the interest rates that farmers are  
5 subject to? You know, all these questions had to be  
6 looked at.

7 And so it was -- it was an analysis that  
8 included, and I think this is important, that there  
9 were ripple effects of these actions, an extreme  
10 state, a disgorged state of water, what effect did  
11 that have throughout the lower state's economy.

12 And that analysis of secondary impacts was  
13 accepted by the Special Master, as it was in a  
14 slightly different form in the Kansas v. Nebraska  
15 case, as being part of damages that would be ordered  
16 to be paid in that case.

17 So there -- there are lots of potential  
18 complications. Wyoming would have you believe, No,  
19 it's just pure contract law, and we have a couple of  
20 random statements here that we think you should rely  
21 on. Don't accept any cross-examination or  
22 countervailing evidence, even though this looks  
23 pretty low compared to what -- the cases we've got on  
24 record. They state the numbers right there in the  
25 Kansas v. Nebraska case. Just accept that and we're

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1 done.

2 SPECIAL MASTER THOMPSON: So let me ask a  
3 second question. So I understand Montana's arguments  
4 that at this point the record is not adequate to  
5 award monetary damages, to determine what those  
6 monetary damages would be. It doesn't mean that I  
7 agree with Montana's arguments. That's something I  
8 have to decide after this particular hearing, but I  
9 certainly understand Montana's arguments.

10 On the other side of the equation, the  
11 parties haven't been able to settle this damages  
12 issue, but it cannot, as I say, cannot imagine it  
13 would justify all the attorney time, expert witness  
14 time, the time of all of the various water users to  
15 actually figure out what the monetary damages might  
16 be in this particular case.

17 So I guess the other question I have is  
18 that if I decide that in fact Wyoming is not entitled  
19 to summary judgment at this particular point in time,  
20 is there any way of truncating the damages portion of  
21 the case so that we don't end up with six or seven  
22 months of discovery and then even a several day trial  
23 on this particular question, or am I basically  
24 confronted between a choice at this stage of either  
25 ruling for Wyoming and suggesting that the Court

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1 award the damages calculation Wyoming suggested, or  
2 putting all the parties through a very long  
3 proceeding figuring out what that number actually is,  
4 or whether or not I should award water as the  
5 damages.

6 MR. DRAPER: Well, I am truly sorry, I  
7 truly regret that we were not able to settle that  
8 issue. The fact is it takes two to tango, and it  
9 just hasn't been possible at this state.

10 I would -- I would say, based primarily on  
11 the experience in the Arkansas River litigation  
12 between Kansas and Colorado, that certain elements  
13 can be settled along the way, particularly if the  
14 Special Master makes certain rulings about what is  
15 appropriate. And --

16 SPECIAL MASTER THOMPSON: So just to  
17 interrupt you there. For example, I could decide  
18 that disgorgement was not appropriate. If I decided  
19 disgorgement was not appropriate, then you wouldn't  
20 have to worry presumably about the -- about the gains  
21 that Wyoming might have had as a result of holding on  
22 to that particular water.

23 MR. DRAPER: That's a potential, Your  
24 Honor.

25 SPECIAL MASTER THOMPSON: And it's just an



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1 example. I imagine there are probably ones that cut  
2 the other way also.

3 MR. DRAPER: Yes, but there -- really,  
4 there were a number of instances in that Kansas  
5 versus Colorado litigation where, although the  
6 parties were at odds as a general matter, when the  
7 Master made a ruling on something, then there was an  
8 opening where we could settle something based on  
9 that, and we did so.

10 And I -- I think that -- I think that  
11 model is something that could work here. We haven't  
12 been able to settle all of the damages, but if -- if  
13 there's some intermediate direction by the Special  
14 Master as to what he sees as the applicable  
15 principles, for instance, then there may be a window  
16 there to go ahead and settle. And it might just be  
17 part, or ideally it would be something that would  
18 save the parties a lot of time and expense.

19 SPECIAL MASTER THOMPSON: So a factual  
20 question on the damages side. So one of the  
21 questions I asked Mr. Kaste was, if you look at the  
22 record, the record has these statements from, for  
23 example, Art Hayes in which he says, you know, The  
24 reason I didn't go out and buy water from the Indians  
25 in this particular case was that I simply didn't have

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1 the money to pay the Northern Cheyenne for the water  
2 rights that it holds.

3 And Mr. Kaste's response to me I think  
4 was, in part, the alternative was Montana could have  
5 gone out and purchased water from the Northern  
6 Cheyenne and provided that to the farmers and,  
7 therefore, there was still a failure to mitigate.

8 Any response to Mr. Kaste's suggestion?

9 MR. DRAPER: It's a very novel one, Your  
10 Honor, unprecedented in any context that I've  
11 experienced.

12 As Your Honor noted, the parties did not  
13 know that there was a Compact violation going on that  
14 needed to be compensated for, that Montana claims  
15 that it didn't know that it was violating the  
16 Compact. Certainly we didn't know. We were getting  
17 these protestations that we had no rights under the  
18 Compact. And under those circumstances where a party  
19 says, No, you -- you're entitled to nothing, there's  
20 no violation to mitigate, to then say, once the Court  
21 has ruled, Yes, there was a violation, that -- that  
22 the damages, which is an element of that reminder to  
23 the downstream state from the upstate stream of its  
24 obligations under an interstate Compact to comply,  
25 that that should be diminished.

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1           Mr. Hayes didn't have the money. The  
2 damages in Kansas v. Colorado, and also in Kansas v.  
3 Nebraska, were based on individual circumstances.  
4 The farmers' losses are what were summed up and  
5 accumulated to be the state's losses or the major  
6 part of the state's losses. And so in choosing an  
7 interest rate, for instance, for the prejudgment  
8 interest, the Court adopted a rate that was  
9 applicable to individuals, not to the state.

10           So the suggestion that the state should  
11 have had the responsibility and suffer diminution of  
12 remedies that would otherwise be available to it does  
13 not comport with the kind of just and applicable  
14 remedy as the Court has said it wants to enter in  
15 these cases.

16           SPECIAL MASTER THOMPSON: So let me turn  
17 to the declaratory relief issue and just ask you a  
18 couple of questions there. So first of all, as I  
19 understand what Attorney General Fox has suggested  
20 and what you've suggested, you believe that the  
21 declaratory -- that any form of decree embodying  
22 rules with respect to the operation of the Tongue  
23 River should include not only matters that were  
24 resolved in the first and second interim report, but  
25 second of all, follow your motion on the question of

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1 whether or not the State of Montana has a right to  
2 fill the Tongue River Reservoir beyond 32,000  
3 acre-feet each year.

4 And my understanding is that you also  
5 think it should include other forms of -- of  
6 declarations that have not been set out so far? For  
7 example, you mentioned, you know, what happens when  
8 Montana calls the river? Does Wyoming have a set  
9 period of time to -- to respond to that call? Can  
10 you just reject the call and say, Sorry, we don't  
11 think you've provided enough information about how  
12 you've been operating the Tongue River Reservoir and,  
13 therefore, we reject it?

14 So could you help me on that last, as to  
15 what type of information you will be -- needs to be  
16 in the decree report. And I'm not asking for  
17 specifics. I'm just asking for sort of general  
18 categories.

19 MR. DRAPER: Well, I would mention first,  
20 we will need to know the extent of the Tongue River  
21 Reservoir rate that is protected by the Compact,  
22 obviously, but beyond that, we need to know the  
23 procedures applicable to calls. When can a call be  
24 placed? And under prior appropriation law, any time  
25 your water right is entitled to take water and is not

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1 receiving the water, not receiving the water because  
2 juniors upstream are taking it, a call is  
3 appropriate, and that situation arises literally on  
4 October 1st typically every year.

5 If a call were to be put on on October 1st  
6 and 32,000 acre-feet is stored, is it appropriate  
7 then for Wyoming to say, Well, you've got your  
8 32,000. That's all the Court said you were entitled  
9 to, and the rest of the water is ours, you know.  
10 So...

11 SPECIAL MASTER THOMPSON: So we've got one  
12 category, which is sort of the Tongue River Reservoir  
13 rights.

14 MR. DRAPER: Right, and when generally  
15 calls can be put on.

16 SPECIAL MASTER THOMPSON: Okay.

17 MR. DRAPER: When must they be lifted.  
18 Some -- some of this stuff should be able to be  
19 answered very succinctly, I would think, but as long  
20 as we have that rule -- now, if we -- if we leave  
21 this case and we don't have a clear definition that,  
22 yes, you can put -- if you choose, you can put a call  
23 on on October 1st if you haven't filled to your  
24 winter fill capacity, which is presently 45,000  
25 acre-feet, we may get -- we may get a lot of

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1 pushback.

2 In fact, Mr. Kaste has suggested that if  
3 we try to delineate these things, we're going to have  
4 a fight. That's just telling you straight out, we've  
5 got issues that need to be resolved, and the whole  
6 purpose of this proceeding is to resolve the dispute  
7 between the two states. And it will not be resolved  
8 if their approach is accepted. And we don't know  
9 when we can put one on, when it has to come off,  
10 what -- what we can expect that Wyoming has to do.  
11 Let's say, two days they've got to shut off all their  
12 rights. What are those rights? It would be easy to  
13 list those, just attach them to the decree, these are  
14 the rights that have to be shut off.

15 Here, you might want to list the --  
16 another listing the pre-Compact rights of Montana.  
17 Those are the rights being protected. Easy to do  
18 based on the -- as you say, it is pulling stuff from  
19 your first two reports and from the record, and  
20 putting them in a decree and saying, These are the  
21 principles that will apply going forward.

22 SPECIAL MASTER THOMPSON: Okay. So let me  
23 ask two more questions. The first is with respect to  
24 some prior Supreme Court decrees. So if I recall  
25 correctly, you were involved in the Kansas versus

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1 Colorado case --

2 MR. DRAPER: Yes.

3 SPECIAL MASTER THOMPSON: -- before  
4 Special Master Littleworth.

5 MR. DRAPER: Yes.

6 SPECIAL MASTER THOMPSON: And I noticed in  
7 going through his decree that there was a dispute  
8 resolution provision in it that provided first for  
9 negotiation between the parties and then actually  
10 binding and nonbinding arbitration. And my question  
11 is, was that something that the parties had agreed to  
12 or was that something that the Special Master decided  
13 to do?

14 MR. DRAPER: That is something the parties  
15 agreed to. You'll see something -- you'll see that,  
16 and you'll also see a similar provision in  
17 Article VII of the final settlement stipulation in  
18 the Kansas v. Nebraska case. In that final  
19 settlement stipulation it set out a dispute  
20 resolution procedure, and that also is by agreement.

21 And my understanding of the Court's  
22 thoughts on this is that they don't believe that it's  
23 appropriate or even that they have the authority to  
24 impose something that's not required in the Compact.  
25 They will enforce the Compact according to its terms,

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1 but no further. And if the Compact has provided no  
2 mandatory dispute resolution process, it is not going  
3 to add that requirement to the Compact. As we saw in  
4 the 1983 Texas v. New Mexico decision, it was not  
5 willing to change or supplement the terms of the  
6 Pecos River Compact.

7 So that's why I think here it would be  
8 ideal if the parties could as a part of a decree come  
9 to you and say, Well, on that part we've agreed to  
10 the following procedure and we ask that you insert  
11 that in the decree that you ask the Court to approve.  
12 And I think it can work that way, but I don't think  
13 that the Court believes that it should be adding one  
14 unless it's agreed to.

15 SPECIAL MASTER THOMPSON: Okay. And I  
16 don't think -- were you involved in Texas versus New  
17 Mexico?

18 MR. DRAPER: Yes, in some form.

19 SPECIAL MASTER THOMPSON: Okay. So I  
20 noticed also in the decree there it was ordered that  
21 the parties try to resolve matters with the  
22 Interstate Commission to the degree they could. Do  
23 you have -- I know there was all the argument with  
24 respect to whether or not the Interstate Commission  
25 needed to be sort of a regent figure but also whether



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1 or not there should be a river master. There also  
2 was an order in there that the parties try to get the  
3 Interstate Commission to resolve it. And I was  
4 curious whether or not that came about.

5 MR. DRAPER: That was the -- that's more  
6 the area of suggestion from the Court. You know,  
7 there -- typically the upstream state will be saying,  
8 Don't worry about it, the commission, it's set up by  
9 the Compact to deal with it.

10 Well, it's typically it's not -- you can't  
11 get a resolution out of -- out of those commissions  
12 because there's typically a -- as a practical matter,  
13 a veto vote, but they -- but there were all these  
14 efforts to make -- I think the Court specifically  
15 said if the parties can settle these matters, there's  
16 no need for us to revisit that -- those -- those  
17 agreements. And so they -- my understanding is they  
18 put that in there, but it wasn't -- you know, you do  
19 what you can, but there weren't any consequences.

20 And, of course, the parties' position was  
21 they always tried to settle things through an  
22 Interstate Commission.

23 SPECIAL MASTER THOMPSON: And so along  
24 those lines, so I agree with you that some of the  
25 Supreme Court's decisions seem strongly to suggest

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1 that what the Court does not want to do is create new  
2 procedures that are not in the Compact itself. So  
3 under those circumstances, to the degree that Montana  
4 is interested, as you suggested, in more information  
5 about, for example, does Wyoming have a set period of  
6 time to resolve -- I'm sorry, excuse me -- to respond  
7 to a call? What happens if the parties disagree as  
8 to whether or not the call is legitimate?

9 How does the Court determine how far it  
10 can go in providing those sort of details, and where  
11 it's basically coming up with new procedures that it  
12 should not add to these compacts?

13 MR. DRAPER: I see your point. And I  
14 think it -- the dividing line is what is necessary to  
15 implement the decision they have made as to what the  
16 rights and responsibilities are in the Compact that  
17 it is interpreting and enforcing. So there's been a  
18 ruling that, although it's not specifically set out  
19 in the Yellowstone River Compact that a call is  
20 necessary in order for Montana to enjoy its rights  
21 under the Compact, to protect its pre-Compact rights.  
22 And so that is a requirement that obviously is not in  
23 expressed terms, but it's set out in the Compact.  
24 And I think it is the -- it is natural and consistent  
25 with these previous decisions to say how that's going

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1 to be implemented.

2 Here, we're talking about calls, whether  
3 they have been justified, whether they can be refused  
4 or have to be honored, this kind of thing. In those  
5 other cases that we referred to, it's arguably much  
6 more complicated, and the complications are dealt  
7 with by -- by computer models. And over the  
8 objections of some of the parties, computer models  
9 have been adopted.

10 Take a look at the Kansas/ Colorado case  
11 in particular. It was settled as to whether or not  
12 to use it in the Republic River case, but in the  
13 Arkansas River case between Kansas and Colorado, that  
14 was disputed, and in fact most of our trial time I  
15 would say was over the model, and that was several  
16 days of trial time, and so it was a hotly contested  
17 issue.

18 But here you are adopting procedures to  
19 implement the finding of the Court that that Compact  
20 applies in that case to groundwater. It found that  
21 there was a certain amount of pre-Compact plumbing  
22 that was grandfathered into the Compact, but beyond  
23 that, all depletions had to be accounted for, and if  
24 -- there were disputes between the states as to how  
25 that would be implemented.

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1           And you can see in computer situations,  
2           you get into all those technical hydrologic and  
3           modeling terms to get to the point where you have a  
4           model that is satisfactory to the Court, sets the  
5           rules for going forward as to how its decision is  
6           going to be implemented.

7           Here, it looks a lot simpler, and I think  
8           it is a lot simpler. We've got to set out some rules  
9           for how -- how Montana satisfies the river call  
10          requirement, and how Wyoming satisfies its  
11          obligations when there is a call. I would say -- so  
12          there is those procedures, and some of the ones you  
13          just suggested. There's documentation issues.  
14          Documentation is part of this, so that if a dispute  
15          does arise, that things can be accounted for.  
16          Typically it will allow the parties to work things  
17          out themselves if they're adhering to the rules. And  
18          then reporting about conditions that are relevant to  
19          the Compact requirements.

20                 SPECIAL MASTER THOMPSON: Okay. So one  
21          last question along these particular lines.

22                 So going to the notice requirement, the  
23          reason why I didn't put it in my second interim  
24          report that notice was required was because of the  
25          language of the Compact providing that the Compact

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1 protected pre-1950 rights under the law of prior  
2 appropriation, and I concluded that part of the law  
3 of prior appropriation was wishful thought in the  
4 law.

5 Does that then suggest that in determining  
6 what is appropriate to put into a decree and what's  
7 not appropriate to put in a decree, that I need to  
8 ground all of the provisions of the decree ultimately  
9 in the provisions of the Compact? So a call is  
10 necessary, that's part of the law of prior  
11 appropriation. As I said, I didn't think the call  
12 had to take any particular form because prior  
13 appropriation is not dictating a particular form.  
14 Each state has a different approach to that. So do I  
15 need to ground things in the language and meaning of  
16 the Compact itself?

17 MR. DRAPER: Ultimately, everything needs  
18 to be based on the Compact. Now, as you point out,  
19 the reference to the prior appropriation doctrine in  
20 Article V(A) pulls in aspects of that doctrine that  
21 are appropriate to the compact. And the Court has  
22 held that damages can only be awarded on the basis of  
23 a violation, if there is a violation, only if a  
24 proper call is made and you have decided in two years  
25 it was but in other years the requirements were not

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1 satisfied.

2 So to set out the general principles that  
3 you were just mentioning about not required to take  
4 any form, that simply needs to be put in an  
5 appropriate provision of a decree, and I would hope  
6 that it would set out exactly what is allowable. If  
7 there are choices, it could be by letter, it could be  
8 by an e-mail. Are each of these permissible, and  
9 what kind of confirmation of receipt might be  
10 necessary, those kinds of things. I think those are  
11 details of how you implement the Court's decision on  
12 this on the general principle, and gives the guidance  
13 that's necessary for us to follow those principles in  
14 the future.

15 SPECIAL MASTER THOMPSON: Okay. Thank  
16 you.

17 So I notice Mr. Wechsler has been over at  
18 the table anxious to get to the questions on  
19 injunctions and cost, and I want to make sure we have  
20 some time to address that, and also address your  
21 motion, which is -- which is equally important.

22 MR. DRAPER: So with that, Your Honor,  
23 I'll give the podium to Mr. Wechsler.

24 SPECIAL MASTER THOMPSON: Okay. Thank you  
25 very much.

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1 MR. DRAPER: Thank you.

2 MR. WECHSLER: Good morning, Your Honor.

3 SPECIAL MASTER THOMPSON: Good morning,  
4 Mr. Wechsler. I'm sorry I've used up a lot of times  
5 on those first two questions, but I had more issues  
6 with respect -- I can't speak this morning -- I had  
7 more issues with respect to those first two  
8 questions.

9 MR. WECHSLER: I'm not disappointed at  
10 all, Your Honor.

11 SPECIAL MASTER THOMPSON: Thank you.

12 MR. WECHSLER: Rather than address  
13 anything that I prepared, I understand you have  
14 questions and I want to address the issues that are  
15 important to you. So perhaps it's best that we go  
16 directly to your questions.

17 SPECIAL MASTER THOMPSON: Okay. So I'm  
18 going to say that on the injunctive relief question,  
19 what I need the most help on is what you see as the  
20 standard for whether or not the Court should simply  
21 issue a decree that might vary with Mr. Kaste's view  
22 that it simply sort of adopts everything that was in  
23 the first and second interim reports, to Montana's  
24 view that it should be a more detailed decree, but it  
25 simply sets out the emphasis on what Montana has to

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1 do to call the river, you know, this is the way in  
2 which the Tongue River Reservoir rights operate, but  
3 it's basically just setting out the rights and  
4 responsibilities, versus one that says, you know,  
5 Wyoming is enjoined and ordered to comply with the  
6 Compact in all its terms.

7 MR. WECHSLER: Your question, Your Honor,  
8 is the standard, and I think in Wyoming's exception,  
9 they identified the four elements for an injunction,  
10 and we don't disagree that that is what applies. I  
11 think the only disagreement between the parties is  
12 whether the Connecticut versus Massachusetts case  
13 applies, which would be, say, a clear and convincing  
14 standard, whereas Montana thinks that it's a  
15 preponderance of the evidence.

16 And I think as we outlined in the papers,  
17 the reason we think that is -- this is not an  
18 equitable apportionment case where that standard  
19 applies, it is a Compact enforcement case, all the  
20 parties agree that the proper standard for that is  
21 the preponderance of the evidence standard.

22 And I would note when we're talking about  
23 that particular dispute, Kansas versus Nebraska does  
24 talk and provide some guidance on the injunction  
25 question, and they did not notably cite the



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1 Connecticut versus Massachusetts case.

2 Does that answer your question?

3 SPECIAL MASTER THOMPSON: Yes. So  
4 that's -- that's very helpful.

5 And so on the question, then -- so taking  
6 the Kansas versus Nebraska decision, the most recent  
7 decision we have from the Supreme Court, they talk  
8 about whether or not there's a cognizable danger of a  
9 recurrent violation. And so do we then, back on  
10 that, need to show that?

11 MR. WECHSLER: Yes, Your Honor, although  
12 for the purposes of this summary judgment motion, the  
13 burden is obviously on Montana -- I'm sorry -- on  
14 Wyoming to show that not only that they are entitled  
15 to judgment as a matter of law, but on that  
16 particular question, the cognizable danger question,  
17 that there's sufficient facts in the record and that  
18 there is no dispute over the -- the material facts.

19 And one problem that we have here, of  
20 course, is there never was any evidence presented on  
21 the cognizable danger piece. I'm not exactly sure  
22 what Wyoming relies on because when it came to  
23 drafting their summary judgment motion, although you  
24 had asked them to actually take the time to do that,  
25 they didn't set out the material facts on which they

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1 rely. So Montana was really at a loss to determine  
2 exactly which facts for any one of those element.

3 So yes, to answer your question directly,  
4 yes, we do agree that the cognizable danger piece  
5 applies. I can say a little bit more about what  
6 facts we think there are that show that there's at  
7 the very least a dispute, but even more strongly we  
8 believe shows there is a cognizable danger. And so  
9 unless you tell me that you're not interested in  
10 hearing that --

11 SPECIAL MASTER THOMPSON: Okay. So let me  
12 just then construct a draft section of an opinion and  
13 then respond to that, which will get you to exactly  
14 the same place. It is that the standard is whether  
15 or not there's a cognizable danger of a recurrent  
16 violation; that both on the record as well as in  
17 other proceedings before the Special Master, Wyoming  
18 officials have said they will comply with all of the  
19 provisions that have been set out in the Supreme  
20 Court opinions and the record -- I'm sorry -- and the  
21 reports of the Special Master; that there have been  
22 two disputes since the -- since 2008 -- or I  
23 shouldn't say disputes -- there have been two calls  
24 on the river since 2008, and in both of those cases  
25 Montana called the river, Wyoming responded,

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1 according to the letters of Mr. Tyrrell; and we have  
2 data by determining how much water was at that point  
3 stored in the pre-1950 reservoir, as well as making  
4 sure that no pre-1950 appropriators got water out of  
5 the river, and that ultimately the calls were -- were  
6 ended without any disputes over what the Supreme  
7 Court has said and what has been in the reports of  
8 the Special Master. And, therefore, no injunction,  
9 no injunctive relief is necessary, and furthermore,  
10 that, you know, it's fully supported by the Kansas  
11 versus Nebraska case, in which the Court said there's  
12 no reason for an injunction.

13 MR. WECHSLER: Yes, Your Honor, I think  
14 that does get me to the exact same place.

15 SPECIAL MASTER THOMPSON: Fair enough.

16 MR. WECHSLER: Let me first address the  
17 cognizable danger. Wyoming has discussed this as if  
18 this is some very high hurdle, that this is going to  
19 be a difficult thing for the Compact to approve.

20 I think the case law bears that that's  
21 quite the opposite. In fact, the Court has called it  
22 a relatively modest hurdle. Other courts have  
23 described it only as recognizable evidence that this  
24 could potentially happen in future.

25 So -- and in evaluating the cognizable

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1 danger, the courts have said you have to look at all  
2 of the circumstances. So what circumstances are  
3 there here that show that there is a cognizable  
4 danger, which serves two purposes. One, we think  
5 show that there is a cognizable danger; and two,  
6 clearly show that there are disputes over the facts  
7 on this particular issue.

8 I think the first thing is you have to  
9 look in a historical context. For years Wyoming  
10 resisted every single effort to administer and work  
11 on this. The states have been constantly at odds.  
12 And it was only as a last resort when Montana sought  
13 the recourse of a lawsuit in this case that that  
14 actually happened, that there actually has been some  
15 impact. So you have to consider the historical  
16 context.

17 Next you have to consider that every  
18 single year Montana is short of water. So a call is  
19 necessary on both the reservoir and direct flow  
20 rights every single year. And there I'll pause and  
21 I'll say, Well, if you look at what the Special  
22 Master in the Kansas versus Colorado case -- and  
23 you've referenced the third report, I think, I think  
24 this -- the part I'm referring to is in the fifth  
25 report, what the -- what the Special Master there

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1 found persuasive was that Colorado had caused that  
2 violation by groundwater pumping, and Colorado was  
3 not proposing to stop groundwater pumping, that in  
4 fact that taking of water, that exact type of action  
5 was going to continue going forward.

6 The same type of rationale applies here.  
7 Wyoming is not proposing to stop taking water from  
8 reservoirs or direct flow rights, nor is it proposing  
9 to stop all post-1950 water uses. And so you have  
10 the exact same dynamics in play there, which as I  
11 said the Special Master in Kansas versus Colorado  
12 found very persuasive.

13 Next, Wyoming has taken the position in  
14 testimony in this case, I believe it was on the  
15 third-to-last day, the state engineer, Pat Tyrrell,  
16 took the position that it had the right to  
17 unilaterally validate or approve of a call; that is,  
18 without reference to Montana, it's going to make a  
19 determination as to whether or not it's a valid call.

20 That is certainly something that Montana  
21 is almost certain to dispute. So if and when that  
22 happens, as they have told you it will happen, there  
23 again we can see that this is only going to recur.

24 And then I think you referenced the  
25 2015 -- or the past -- prior two years. But I think

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1 if you go back and you look at our exception in --  
2 our response to Wyoming's exception rather and the  
3 appendix to that, it wasn't so smooth in 2015, and in  
4 fact Wyoming raised several issues, which Montana  
5 thought were entirely inconsistent with the second  
6 interim report, even though we were sitting at that  
7 time before the Supreme Court on this very case.  
8 Once you remove, of course, the very strong eyes of  
9 the Supreme Court, now you're -- now you're in a  
10 place where Montana is particularly vulnerable.

11 And then I would also point out, in terms  
12 of cognizable danger, that Wyoming, unlike in some of  
13 these other cases, most notably Kansas versus  
14 Nebraska, and I'll address that case in a moment, has  
15 not adopted any new rules and no new statutes which  
16 would ensure compliance with the Compact. It asks  
17 you to simply rely on the rules it already had in  
18 place, but, of course, those rules were in place  
19 before and we had the violation.

20 The next thing I would say, and I think I  
21 have three more points on this particular question,  
22 but the next thing that I would say is essentially  
23 what Wyoming is asking you is to believe that their  
24 sort of good faith representations, that is, the way  
25 the law looks at this, that their voluntary cessation

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1 of the conduct is enough so that there should not be  
2 an injunction.

3 But courts have been very, very reluctant  
4 to believe those types of things. We outline that in  
5 the papers. I'll mention a couple here. In fact,  
6 the Supreme Court directed courts to beware -- this  
7 is a quote, Beware the efforts to defeat injunctive  
8 relief by protestations of repentance and reform.

9 They have said that they -- the parties  
10 making such protestations such as Wyoming bear a  
11 heavy burden of persuading the Court that the  
12 challenged conduct cannot reasonably be expected to  
13 start up again. That particular quote is from the  
14 Friends of the Earth versus Laidlaw case.

15 And the Court has also said in the  
16 Concentrated Phosphate case that a statement, meaning  
17 a statement that, Oh, don't worry, we're going to  
18 believe -- we're going to do this in the future, and  
19 this is a quote, "standing alone, cannot suffice to  
20 satisfy that heavy burden."

21 So, in other words, on the record that we  
22 have before you right now, there are significant  
23 disputes over fact, and all we have is a statement  
24 from Wyoming, which the Court has held in other  
25 contexts is not enough to satisfy that burden. So as

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1 a matter of law, it's insufficient to -- for summary  
2 judgment.

3 I'll also point out that in the Kansas  
4 versus Colorado case, Colorado argued, quote -- and  
5 this comes from the fifth report at 105 -- "The Court  
6 can be satisfied that Colorado has no intention of  
7 deliberately violating the Compact in the future."  
8 That was Colorado's argument.

9 The Master goes on to agree, Yes, I  
10 don't -- I believe that they are trying to comply in  
11 good faith. However, because of the reason I gave  
12 before, he still found that it was necessary to grant  
13 the injunction because you still have the same  
14 dynamics in play.

15 You asked about the Kansas versus Nebraska  
16 case. I think there's some important things to  
17 understand in the Kansas versus Nebraska case that  
18 distinguish that. The first is the opinion that Your  
19 Honor has read goes to great pains to explain that it  
20 is providing equitable relief, and the purpose of  
21 that equitable relief is to remind the upstream state  
22 of its duties and ensure that there's no future  
23 violation.

24 That is what we are seeking with the  
25 injunction. The declaratory relief we believe is the



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1 most important part of that, and if there were some  
2 robust form of other equitable relief, be it as it  
3 was in that case disgorgement or something else that  
4 the Special Master determines is correct, and all of  
5 that goes to ensuring that this doesn't happen again,  
6 that would satisfy Montana.

7           The second point that I think is very  
8 important in that Kansas versus Nebraska case is  
9 Nebraska had put in place, in fact, they had multiple  
10 efforts, but by the end they had gone through very  
11 significant pains to change the entire statutory  
12 scheme in that particular area. And the reason they  
13 changed the statutory scheme was all aimed at Compact  
14 compliance. So, for example, they put in an entire  
15 scheme which allowed for natural resource districts,  
16 which gave them certain authority, which was not in  
17 place.

18           And in light of all of that evidence,  
19 because again that was at the end of the trial, which  
20 included remedies, the Court I think essentially  
21 concluded that, Well, it's more than just a  
22 statement; it is in fact an entire statutory scheme  
23 that is out there so we can see their commitment.

24           And then finally, you mentioned the two  
25 disputes from the past two years. I will say that

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1 that came at significant effort and compromise by the  
2 State of Montana. I do not agree that it was a very  
3 smooth process by any means. And from Montana's  
4 perspective, if it showed anything, it was that  
5 disputes are inevitable, and not that they were --  
6 that this is going to obviously work going forward.

7 And in fact, we think what the Court and  
8 what your role here is is to ensure that there is  
9 relief in place to make sure that we don't ever have  
10 to be here again, which as the General mentioned is  
11 something that is -- behooves both states.

12 SPECIAL MASTER THOMPSON: Thank you. So  
13 that actually answers that questions that I have with  
14 respect to Montana's positions on the injunctive  
15 side, and on the cost side, I actually don't have any  
16 questions. I've read through all the materials. I  
17 think it's all straightforward, and ultimately it's a  
18 question I have to resolve, but I certainly  
19 understand the arguments of both sides, so unless you  
20 have something you want to add.

21 MR. WECHSLER: I have nothing to add.  
22 Thank you very much.

23 SPECIAL MASTER THOMPSON: Thank you very  
24 much, Mr. Wechsler.

25 So, Mr. Kaste, I'm sure there's lots of

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1 things you want to say. I urge you at this point to  
2 only say the things that I've heard on.

3 MR. KASTE: Well, I only want to make a  
4 few points, the first of which is I wish we would  
5 have had that fight, because I'm pretty sure I'm  
6 going to win that. And I think you heard exactly the  
7 reason why we're going to fight is, even from  
8 Attorney General Fox when he got up to talk,  
9 Mr. Draper mentioned the word supplement. Well, we  
10 need some declarations to supplement what you did in  
11 the second interim report.

12 I guarantee you we are going to fight  
13 about supplementing things that are not in your  
14 report. And I don't believe it's appropriate for you  
15 to issue declaratory relief that adds onto those  
16 things that you've already done.

17 I also heard, from my point of view what I  
18 heard was, let's relitigate things that are in the  
19 supplemental report and squeeze more out of them. I  
20 remember very, I think, adamantly asking you to  
21 just -- just tell them that when they make a call,  
22 that it be in writing. I'm pretty sure you heard  
23 that from them today. We've come on this merry go  
24 round 180 degrees from where we've been in the past,  
25 and you said no. And you said -- Mr. Brown made me a

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1 list of things you said in your second interim  
2 report, which is -- he does that, he never talks,  
3 he's like my moot life partner, he refuses to talk  
4 -- but you've already talked about those things that  
5 they were just telling you about, just as a matter of  
6 convenience we pick up on. You said the notice  
7 requirements should be applied flexibly, with an eye  
8 to its purposes rather than as an exercise in  
9 formalism. You see that on Page 49 of your report.  
10 You said, Well, the commission could presumably  
11 establish a specific procedure specifying -- or for  
12 enforcing Article V(A) that does or does not require  
13 notice. That's on Page 49.

14 You said -- I have a list, and I don't  
15 want to bore you with it because you wrote it, but  
16 I've got it looks to me like 10 different things you  
17 said about the notice requirement in your second  
18 interim report to drive our conduct. I don't want to  
19 relitigate that. And like I said, if you start  
20 tearing this apart, we're going to fight because  
21 we're going to be relitigating things that you've  
22 already decided.

23 And I'm not going to lie to you, the  
24 decision is not perfect. There are pieces of it that  
25 I would like you to have said more, and I really

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1 don't want to fight about it now, and I don't think  
2 it does the parties any good to go back and  
3 essentially relitigate all of the particulars related  
4 to the findings that you made during the liability  
5 phase of this case.

6           You made decisions and you issued rulings  
7 that resolved the questions that were before you. To  
8 go farther than that would be a mistake, and it would  
9 be inconsistent with the Court's position that they  
10 don't render advisory opinions. And when you asked  
11 Mr. Draper very specifically, How am I supposed to  
12 pick, two days to respond to a call or three days,  
13 that's not in the Compact. You're issuing an  
14 advisory opinion. You don't have the facts in front  
15 of you, you don't have the law behind you, you don't  
16 have a Compact that dictates one result over the  
17 other.

18           What you're faced with is a Compact that  
19 sets up a mechanism for dealing with these issues.  
20 There's a Compact commission. They're supposed to  
21 administer this Compact. And when they can't, and  
22 only when they can't, we come to you and we come to  
23 the Court. And at this point we don't have anything,  
24 anything else where we're saying we can't figure this  
25 out, we can't work through this problem.

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1           Frankly, we haven't given the commission  
2           the opportunity to do anything subsequent to the  
3           issuance of the second interim report to determine  
4           whether or not it's adequate to meet our needs going  
5           forward. I think it is. I hope it is. It may not  
6           be. And years in the future we may have a dispute  
7           that the Compact commission can't resolve, but we  
8           don't have one now, and I don't think we should  
9           create one under the guise of declaratory relief.

10           Let me say something about a remedy  
11           related to water. I brought that up. I'm inherently  
12           twitchy about the idea of making a payment in water  
13           because it's scary to me that we would have to work  
14           through the logistical issues associated with that  
15           kind of remedy. The state engineer is a smarter guy  
16           than I am, and if that was the Court's order that we  
17           make this payment in water, we could figure out how  
18           to make that work.

19           The problem, and Mr. Draper identified it  
20           in the same way I have, is timing. When do we make  
21           that payment? Because, like I said, I could count  
22           1359 acre-feet of water that went over the reservoir  
23           this year, go ta-da, but that's not fair. That  
24           doesn't repay them in the sense that it was supposed  
25           to repay them for our -- our violation.

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1           So if that is the Court's order, we will  
2 find a way to make it work. If you find that that is  
3 a more sensible and convenient, efficient way to  
4 order the relief in this case, we will make it work.  
5 And so I don't want to leave you with the impression  
6 that Wyoming is completely intractable in its  
7 position that money is the easier, more efficient  
8 remedy. If you think that that's not true, we'll  
9 figure it out. So we leave that to your discretion.

10           And I don't know if you have any questions  
11 for me with regard to the injunction. I want to just  
12 say just a couple of things. I think, you know, the  
13 idea that, one, we don't know what -- what's supposed  
14 to happen in any given set of circumstances, and so  
15 on, I think that's not entirely true. For example,  
16 how do we know what's a valid call?

17           Well, your report, if you look at Footnote  
18 20 of your report, you say, Well, Wyoming would need  
19 significant evidence -- or Montana needs significant  
20 evidence to determine the reservoir might not fill.  
21 Again, that's their decision to make a call. If that  
22 doesn't exist, Wyoming, like every junior  
23 appropriator, ought to have the right to say, I'm not  
24 honoring your call. I'm looking at the same forecast  
25 as you. That's not going to fill.

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1           That's part and parcel of our  
2 relationship, and that's one of the reasons why this  
3 idea that we're going to have a big, fat computer  
4 model or there might be some magic mathematical  
5 formula that dictates our relationship in any given  
6 year doesn't make any sense for us. We have a very  
7 unique Compact. Not entirely. I guess there are a  
8 couple others out there that adopt the doctrine of  
9 appropriation, but they're not these ones. And we  
10 have a system with about a million moving parts in it  
11 and a hydrologic condition in any given year that is  
12 what it is, and that hydrologic condition and the  
13 free will decisions made by individual irrigators  
14 about whether or not they want to use water now or  
15 not makes a huge difference in whether or not we're  
16 supposed to respond to a call favorably or not.

17           Not -- this is not amenable to a  
18 mathematical solution because it is, as you know, and  
19 we argued often about this being a decision that's  
20 made in the specific time, in response to specific  
21 conditions, specific actions, and specific  
22 requirements that these senior irrigators have when  
23 they say, I need my water and I intend to put it to  
24 beneficial use if I get it. Then we make the  
25 determination and we look to see what's available and



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1 who can we turn off. That may or may not be the same  
2 focus in any given year.

3 This isn't that kind of case. And so  
4 we've got the outline of -- of rules and  
5 requirements, responsibilities, that we can use to  
6 make these decisions going forward, but they are  
7 inherently flexible, dependent upon circumstances  
8 that we cannot possibly identify no matter how big  
9 your model is.

10 And so I think we have more than enough to  
11 get us through to complete this case right now  
12 without saying more, and that's in large measure I'd  
13 like to stick to what we currently have rather than  
14 fighting about new things.

15 I'd say with regard to the -- the request  
16 for injunctive relief, I'd point again to the  
17 standard, there's no irreparable injury in this case.  
18 We can repair it. There's a remedy. They have to  
19 earn an injunction. And I understand that it's often  
20 been given in these original action cases, but I  
21 believe, because I just want to, that the Court  
22 looked at the standard when it did that, followed it,  
23 and found that the prevailing party earned the  
24 injunction that it received because it didn't have an  
25 adequate remedy in law, it was susceptible to

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1 irreparable injury, and there was some evidence that  
2 there was a cognizable recurrence. The word escaped  
3 me, about a possibility of occurrence. I presume the  
4 Court followed its own rules and found that to be the  
5 case in every one of those circumstances.

6 This isn't those circumstances. And I  
7 think that the most efficient, the most beneficial  
8 resolution of this case is to end it now. I think  
9 we've put you in a position procedurally where you  
10 can do that and feel confident that the parties were  
11 treated fairly and had a fair opportunity once in  
12 here during the course of presentation. But in  
13 particular Mr. Draper as it relate, to damages says,  
14 Hey, I have evidence that the price is more. I have  
15 testimony, I have a document, I have anything to  
16 demonstrate that it makes good sense, and that we're  
17 forced by virtue of the summary judgment standards to  
18 proceed. I didn't hear any of that. I didn't hear,  
19 I have evidence that mandates that we have additional  
20 fact finding in this case.

21 We don't need additional fact finding. It  
22 wouldn't do us any good. We'd be right where we are  
23 here today. As a result, we've requested you grant  
24 our motion for summary judgment, enter a judgment or  
25 decree or whatever you want to call it, and -- and

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1 put an end to these proceedings without -- without  
2 forcing the parties to do more and undertake  
3 additional costs and expenses.

4 SPECIAL MASTER THOMPSON: Okay. Thank  
5 you, Mr. Kaste.

6 MR. KASTE: Thank you.

7 SPECIAL MASTER THOMPSON: Okay. So I know  
8 it's noon right now, but we're going to finish before  
9 1:00 because I've assured some people that we are  
10 going to, and knowing the questions I have on  
11 Montana's motion, it will not actually take a long  
12 time in terms of argument. Would people like a  
13 5-minute break? Yes, okay. We'll take a 5-minute  
14 break, but no longer than 5 minutes.

15 (Recess taken.)

16 SPECIAL MASTER THOMPSON: Okay. Why don't  
17 we go back on the record at this point, and we are  
18 now going to be discussing Montana's motion for  
19 summary judgment on the Tongue River Reservoir. And  
20 to try to make this maybe a little bit more  
21 efficient, Mr. Draper, let me start out by telling  
22 you, obviously, the two issues that I'm most -- have  
23 most interest in.

24 MR. DRAPER: Great.

25 SPECIAL MASTER THOMPSON: The first

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1 question is, what type of a standard should I be  
2 using in deciding whether or not I have to address  
3 Montana's rights in the Tongue River Reservoir to  
4 fill it beyond 32,000 acre-feet. And then the second  
5 question is whether that standard is what the facts  
6 show in the record at the moment.

7 And let me just give you some additional  
8 thoughts on those. So first of all, with respect to  
9 the standard, one possible reading of the various  
10 Supreme Court opinions that have been cited to me is  
11 that, in addition to deciding that in fact there's an  
12 overall case or controversy, and there clearly is  
13 here or else we wouldn't have gotten this far in this  
14 particular case, that I also need to determine that  
15 any particular issue that I'm going to address has to  
16 be more than hypothetical or abstract, and that,  
17 using the language in the Los Angeles versus Lyons  
18 case, 1983, there has to be some suggestion that this  
19 is the real posture that the parties are confronting.

20 In the City of Los Angeles versus Lyons  
21 case, as you recall, the big question there was did  
22 the plaintiff in that particular case have standing  
23 to seek injunctive relief even though the Court  
24 concluded that in fact there was a case or  
25 controversy there, they conclude there was a separate

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1 question as to whether or not the plaintiff had  
2 standing to seek injunctive relief.

3 And analogizing here, the argument would  
4 be that I just can't address any question the parties  
5 raise with respect to the Compact. I have to  
6 actually conclude that there was some reasonable  
7 prospect, as I say, I just use the term real and  
8 immediate but seeking guidance on what the actual  
9 standard is, that there is some reasonable prospect  
10 that this is going to be something that the parties  
11 are going to confront. So that's a question on the  
12 standard.

13 The second question then goes to the -- to  
14 the facts in this particular case. And there I think  
15 reading the facts in as favorable of a light for  
16 Montana, that they are basically that, you know --  
17 I'm just going to call out some particular facts  
18 because I realize that there was a lot in your favor,  
19 but the ones that strike me as most convincing is  
20 that if you look at five of the nine years in which  
21 we have data since the reservoir was expanded in  
22 1999, in five of those nine years Montana actually  
23 did store more than 32,000 acre-feet in the  
24 reservoir. It wasn't a matter that they could have,  
25 they actually did store more than 32,000 acre-feet of

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1 water in the reservoir.

2 And that even in 2006, a year in which I  
3 concluded that we didn't have to address the question  
4 beyond 32,000 acre-feet in order to find that Montana  
5 was damaged, I was able to reach that conclusion only  
6 by a small hair because in fact Montana in that year  
7 stored 31,414 acre-feet.

8 And so just sort of looking at the record,  
9 those are the two things that I found on Montana's  
10 premise were most convincing that, yes, this is  
11 probably an issue that the parties will confront in  
12 the near future.

13 So anything you want to add to those  
14 thoughts would be appreciated.

15 MR. DRAPER: Okay. To look at those in  
16 order, the real and immediate controversy or  
17 question, point, I think we have taken pains to show  
18 in several ways that this -- that we have an  
19 immediate controversy right now, today, because we  
20 are looking at the probability that we will need to  
21 store more than 32,000 acre-feet in the future.

22 And it's almost overwhelming because the  
23 chances, given the statistics that you cited and the  
24 rest of the information in those affidavits, which is  
25 totally based on the record in this case, it's not --

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1 it's not just 10 years down the road we would have a  
2 dispute, which I think in itself would be sufficient.  
3 We don't want the state coming back every 10 years to  
4 get things resolved. The Court has got a lot of  
5 other important things to do.

6 So here we have, it's very likely that  
7 next year we will have to come back and the following  
8 year and the following year. It's -- it's  
9 overwhelming that we have -- we will have a dispute  
10 here, and not later but sooner.

11 So I think the -- we satisfy that  
12 question, is there an actual controversy as to this  
13 part of the case. And I think it comes under that  
14 holding in the Oklahoma versus New Mexico case, where  
15 the opinion by Justice White of the Court is that  
16 when a case is before it, it has a duty it feels to  
17 resolve every issue before it. And this is not only  
18 an issue, it's an issue that will inevitably come up  
19 and it's imminent. So I think it satisfies the real  
20 and immediate question very soundly.

21 And the facts that you point to are quite  
22 convincing in that regard. Five of the nine years  
23 since -- since the expansion of the reservoir is over  
24 50 percent of the time just in that short a period.  
25 And as you point out, in 2006 it missed it by a few

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1 acre-feet, a few hundred acre-feet in needing to know  
2 whether more than 32,000 acre-feet is something that  
3 we can call for.

4 And typically you call if your -- if your  
5 water right is not satisfied, you're entitled to  
6 call. And until the reservoir is up to its limits of  
7 storage, we should be able to call, but if we can  
8 only call to the extent of 32,000 acre-feet, partway  
9 through the year you're likely to hear from Wyoming,  
10 You've filled to 32,000, we've been watching, so  
11 don't -- don't think about continuing to call. We  
12 don't recognize it after this point, relating to  
13 post-'50s stored and diverted. The Court only held  
14 you have 32,000, that's the least, they didn't go  
15 beyond that, and you have no leg to stand on for more  
16 than 32,000.

17 And yet I believe that the undisputed  
18 facts show that we do have the right under the prior  
19 appropriation doctrine, which was incorporated in  
20 '85, to fill to the pre-Compact capacity of the  
21 reservoir, which you held was 72,500 acre-feet.

22 Now, the actual reservoir is larger than  
23 that by about 6700 feet at the moment because of that  
24 enlargement. But in a sense, the reservoir rarely  
25 goes down to a level less than 6700 acre-feet. That



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1 72,500 foot limit doesn't prove to be limiting in all  
2 but very unusual circumstances that we haven't seen,  
3 but I think it's an appropriate limit. That's what  
4 our capacity was pre-Compact, and if the reservoir  
5 were drawn down for whatever reason all the way, for  
6 instance, at that point we wouldn't be able to fill.  
7 If you had -- if you had no carryover at all for  
8 whatever reason, if you need to drain it for repairs,  
9 how much can you put in that first year starting from  
10 zero? The answer in our view is only 72,500. We  
11 can't go all the way under those circumstances. And  
12 yet those are very unusual circumstances.

13 In essence, it is correct to say that  
14 we're asserting the right here. We think the record  
15 is clear and complete on it that we have the right  
16 under the prior appropriation doctrine and the  
17 pre-Compact priority that we'll be protected by the  
18 Compact up to the right to fill 72,500 acre-feet in a  
19 single year.

20 We always add the phrase less carryover  
21 storage, but that's kind of a redundant phrase. If  
22 there is -- if there's already water in the  
23 reservoir, which is very typical, we don't actually  
24 go up to that right, but that is the right. The  
25 prior appropriation doctrine recognizes, and it's

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1 appropriate to have it entered as a matter of summary  
2 judgment at this time.

3 And I would point out there's quite a  
4 difference between asking for summary judgment on  
5 something which was within the issues litigated in  
6 the liability phase of this case, and the water  
7 rights associated with the Tongue River Reservoir was  
8 central to that, as Your Honor has pointed out in  
9 respect to the Court, and you have devoted many pages  
10 of your report to setting out those facts, analyzing  
11 them, up to what you determined was necessary in  
12 order to resolve liability issues.

13 Now, as I mentioned before, we need to  
14 fully resolve that dispute between the states because  
15 Wyoming is not willing to recognize a right beyond  
16 32,000 acre-feet.

17 Now, let me encourage you to ask other  
18 questions. I had just a small handful of points to  
19 make but I don't want to intercede in this.

20 SPECIAL MASTER THOMPSON: No. I was going  
21 to say, I read the motions, so if there are any  
22 points that are new, feel free to add them at this  
23 time.

24 MR. DRAPER: In fact, I've covered several  
25 of those already. I would point out that Wyoming

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1       itself, under -- its witnesses under oath have stated  
2       that it is necessary to resolve this question of the  
3       full extent of the reservoir right. They're now  
4       taking a different position, but they have put in  
5       that testimony, and we believe that that is  
6       absolutely true.

7               I'll just close by saying, because I think  
8       we did cover all the points I had in mind, that  
9       resolving the issue in this way on summary judgment  
10      is a judicially efficient way to resolve the issue.  
11      It's possible it could be left open for further  
12      proceedings, but I don't believe it's necessary. The  
13      parties were invited to present the evidence that  
14      they had on this issue. They did. A record was  
15      made. You have analyzed that record. I think it is  
16      ripe for resolution by summary judgment.

17             SPECIAL MASTER THOMPSON: So on that last  
18      point I'll just mention, in thinking about various  
19      possibilities to this particular motion, I thought  
20      about the question if this could be one to leave  
21      jurisdiction open. The problem is, all of the cases  
22      I've seen in the past, I think the Supreme Court has  
23      wisely decided only to leave the jurisdiction open if  
24      you know that within like a year or year and a half  
25      or something of that nature it can resolve the

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1 question. And here this is an issue that presumably  
2 could come up a year from now, it could come up four  
3 or five years from now. So I don't think as a moral  
4 situation the Court leaves these issues open.

5 MR. DRAPER: I would agree, Your Honor. I  
6 think, based on the prior cases, that the Court would  
7 want to resolve this issue. It has the law and facts  
8 available to it, and it will create a difference in  
9 actually achieving its overall goal of resolving the  
10 controversy existing today between the states.

11 SPECIAL MASTER THOMPSON: Thank you.

12 MR. DRAPER: Thank you.

13 SPECIAL MASTER THOMPSON: Mr. Kaste, as  
14 you're walking up here, basically I'll say a few  
15 questions. What do I need to decide in determining  
16 whether or not to resolve this particular issue? And  
17 do you have any thoughts on what the record currently  
18 shows regarding the prospect of this issue coming up?

19 MR. KASTE: Well, I don't know if this  
20 issue will arise in the future, and neither does  
21 Montana. What I heard from Mr. Draper was --

22 SPECIAL MASTER THOMPSON: You might want  
23 to talk a little louder.

24 MR. KASTE: What I heard from Mr. Draper  
25 was a hypothetical. Maybe in the future we'll fight.

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1 Maybe the reservoir will be drained, and maybe we  
2 won't know how to figure it out, and maybe we'll be  
3 back in front of the Court.

4           You're not here to decide maybes. You  
5 made a decision, a very specific decision in the  
6 second interim report that said, I don't need to  
7 decide this issue in order to resolve the claims  
8 before me. And not one thing has changed from the  
9 moment you made that decision.

10           There was a case and a controversy brought  
11 to the Court's attention. It related to 2004 and  
12 2006 ultimately. You decided what needed to be  
13 decided in order to resolve that case or controversy,  
14 and there exists no further case or controversy.  
15 There exists speculation that there is a potential  
16 for a future case, but you can't decide a future  
17 case. The Court can't decide a future case. The  
18 Court recognizes that it doesn't issue advisory  
19 opinions and it doesn't decide hypothetical  
20 questions, and that's where we are with this issue.

21           We've -- we've done all that needed to be  
22 done, and we're now -- we're exactly in the -- on a  
23 merry go round where Mr. Draper and I have switched  
24 positions, and I'm telling you I don't want you to  
25 decide this in spite of the fact that I previously

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1 asked you to decide that. See how weird this has  
2 gotten? Each of us at one point or another has taken  
3 the exact opposite position based on the changed  
4 circumstances. You've made a ruling. Both parties  
5 have adjusted. And our adjustment is to say, the  
6 best interests of this case is to stop.

7           You cannot decide an issue merely because  
8 two parties might agree that it would be great if you  
9 did. That doesn't establish a case or controversy,  
10 because the parties think it would be beneficial to  
11 them to have this question decided before a case or  
12 controversy arises. That's sort of the essence of a  
13 declaratory -- you know, the limitations on  
14 declaratory judgment, is you can't have two people  
15 walk in and go, We'd like you to answer this  
16 question, Court. The Court will come back and say,  
17 whether it's the Supreme Court or another federal  
18 court, it doesn't confer jurisdiction upon me under  
19 Article III, the fact that we think it would be nice  
20 to know the answer in advance of a case or  
21 controversy.

22           We're bound here by the Constitution,  
23 and -- Mr. Brown keeps pounding with his finger  
24 saying, Nothing has changed. And he's right about  
25 that. Not a darn thing has changed since the second

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1 interim report that would make it necessary to decide  
2 this question now.

3 SPECIAL MASTER THOMPSON: I'm not sure I  
4 should ask this question but I think I have to. Do  
5 the parties even agree at this point as to what the  
6 second interim report actually said with respect to  
7 the Tongue River Reservoir? And I ask that because  
8 in your opposition to Montana's motion, in trying to  
9 demonstrate that in fact it was a hypothetical issue,  
10 you said given the current winter storage operations  
11 on the Tongue River Reservoir, Tongue River Reservoir  
12 will have 50,000 acre-feet of water in it and,  
13 therefore, it's not really going to be an issue as to  
14 whether or not Montana can store more than 32,000  
15 acre-feet at that particular point.

16 Montana in its reply said, No, that's not  
17 the way in which we actually do this. Instead you  
18 start out with what the carryover is as of October  
19 1st, and then Montana can store another 32,000  
20 acre-feet beyond that.

21 One of the things I find quite interesting  
22 about that is the way that Wyoming at least sort of  
23 set out the hypothetical in its motion, it was a way  
24 of looking at the facts that benefited Montana, but  
25 then Montana's interpretation of what I said

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1 basically was one within it that Wyoming may be  
2 demonstrating once again a merry go round complex.

3 MR. KASTE: It's an apt metaphor today,  
4 isn't it?

5 SPECIAL MASTER THOMPSON: Yes.

6 MR. KASTE: Well, there are distinctions  
7 to be made here between -- and I think you've heard  
8 this come through Attorney General Fox and myself at  
9 various points in the day. The positions that the  
10 parties take in the course of this litigation is one  
11 thing, and the way in which Mr. Tyrrell and Mr. Davis  
12 comport themselves are different at times. And we  
13 have behaved in a way that has been pragmatic. And  
14 that's what I think Wyoming is trying to point out in  
15 its articulation about how it has worked over the  
16 past couple of years.

17 Montana and Wyoming have collectively,  
18 without regard to what the number is in your second  
19 interim report, have behaved in a way that  
20 pragmatically led to the reservoir filling. We were  
21 fortunate in these years that there was enough water  
22 that that could happen without getting really wound  
23 up about it. Wyoming responded to Montana's calls  
24 and took what we believe to be and I think by all  
25 accounts were appropriate actions with regard to



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1 their reservoirs and rights. Montana took what we  
2 believed to be very reasonable reservoir operation  
3 actions over the course of not just the spring but  
4 during winter as well, and that included deviating  
5 from their operations guidelines for the reservoir to  
6 reach this somewhat higher level, which as you know  
7 is -- is still in its exploratory phase for the  
8 reservoir operator.

9 But pragmatically we got to a point  
10 through both of our actions where we were able to  
11 handle the call and fill the reservoir. And at the  
12 end of the day both parties are best served by  
13 physically filling Montana's reservoir.

14 So is it -- is it a big deal to know what  
15 the number is? I don't know that it matters. What  
16 matters is filling the reservoir and then putting  
17 that water on Art Hayes' crop. And the people  
18 responsible with implementing your decision have done  
19 that and done that well over the course of the last  
20 two years. And I'll grant you that we haven't had  
21 the worst possible two years that we could have, but  
22 the positions we take here and the actions of our --  
23 of our administrators on the ground are different. I  
24 tend to think what they do is way more important.

25 And so I understand that there's the

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1 possibility always that Wyoming could recede and say,  
2 Under these circumstances you're -- you're done,  
3 32,000 acre-feet. Montana could say, No, no, our  
4 right is larger. And we could find ourselves in  
5 front of a Court again in the future at some point in  
6 time based on a set of facts that don't currently  
7 exist.

8 Our point is not that that is an  
9 impossibility, but that that case hasn't yet come  
10 before you. And if it hasn't come before you, you  
11 can't go out on a limb and start making rulings in  
12 the abstract. And maybe that means that we're here  
13 next year. I don't know. That's the way the  
14 Constitution works, though. I didn't write it, but I  
15 think that's where we are.

16 SPECIAL MASTER THOMPSON: The problem  
17 here, at least in part, and I don't expect you to  
18 provide me with an easy answer, what I have to do is  
19 I think, based on all the evidence, how best to  
20 resolve this and what recommendations to make to the  
21 Supreme Court.

22 But both sides are saying, Help us off the  
23 merry go round, but I think Montana thinks the merry  
24 go round is the lawsuit, and that we just -- you  
25 guys, as long as this case remains alive, you're just

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1 going to continue to litigate everything. Well,  
2 that's true, but I think Montana wants to get off the  
3 litigation merry go round and assumes everything will  
4 be fine after that.

5 MR. KASTE: Wyoming.

6 SPECIAL MASTER THOMPSON: And Mr. Tyrrell  
7 has affidavits that are basically saying, Hey, we can  
8 resolve these things, just in the litigation so that  
9 we can sit down and resolve them, whereas Montana I  
10 think is saying, It's not just the litigation. It's  
11 our relationships generally over the Tongue River is  
12 the merry go round, and we're never going to be able  
13 to resolve all these various things until the Supreme  
14 Court helps us by actually enunciating some basic  
15 rules, and that's how we get off of the merry go  
16 round, and those two requests are inconsistent.

17 And I have Mr. Tyrrell saying, Everything  
18 is great once we get out of Court, and I have  
19 Mr. Davis saying, Well, it's not all that great and  
20 we have all these various issues that we still need  
21 to resolve.

22 MR. KASTE: Well, let me answer it this  
23 way. One of those things is within your power to do  
24 and one of them isn't. And you're limited by Article  
25 III and the Court is limited by Article III dealing

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1 with the litigation, and to get us off that merry go  
2 round. You don't have the power to sit us down like  
3 a parent and two children and say, You're not leaving  
4 here until you shake on it, or -- or whatever the  
5 resolution might be.

6 Your role here, unfortunately, and the  
7 Court's role is necessarily limited, and you can help  
8 us on one side of this equation but not the other,  
9 and to step outside of that role would be a mistake.

10 SPECIAL MASTER THOMPSON: Two comments on  
11 that. The first is, is that ultimately what I need  
12 to do is to issue a report to the Court on what the  
13 law is and how that law then applies to the facts  
14 that are set forth. And as I've already set out, you  
15 know, I think both of the two sides have done a good  
16 job helping enunciate what the law is here and what  
17 the facts are.

18 The second thing is, you know, that it  
19 will be nice to have a sense that what the Court is  
20 doing is actually being helpful in this particular  
21 context. And I guess in that connection, you know, I  
22 think one of the things I hear from Wyoming is, don't  
23 do anything more, and Montana is saying, do a lot  
24 more.

25 I obviously at this stage will do only

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1 what the law provides, but I guess I also would urge  
2 both parties that if there is anything else that this  
3 Court can do to help on these issues, hopefully you  
4 can come to an agreement on those and suggest them.  
5 I don't think there is. Hence, here I am right now,  
6 but I would urge the parties to do that.

7 MR. KASTE: I guess I would reiterate what  
8 I said before. There are -- there are -- there are  
9 people of good faith on both sides of this issue, and  
10 both of them are telling you, You're going to have to  
11 make us do this, not because we're the kind of folks  
12 that can't get along but because that's the reality  
13 of the situation. And the best thing the Court can  
14 do for both parties is to resolve the issues and  
15 write us an order that puts this thing to rest in the  
16 most efficient and fair way.

17 It's not -- it's not like we haven't tried  
18 to sit down and talk through these things. There are  
19 fundamental institutional problems that we're both  
20 incapable of resolving, to all of our -- I think the  
21 people in this room, we're not thrilled that that's  
22 what we have to report to you, to report to the  
23 Court. That's not consistent with what we generally  
24 do as lawyers. We try to solve problems. And yet  
25 the only solve -- the only resolution to this problem

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1 has to come to us from the Court. So we need -- we  
2 need decisive action, and our view is that the sooner  
3 the better.

4 SPECIAL MASTER THOMPSON: And again, I'll  
5 just -- I'll repeat this, which is that the issues  
6 that are before me, those need to be resolved on the  
7 law. There are a variety of issues that are not  
8 before the Court and I think both sides agree that  
9 the Court cannot sua sponte take on itself. So, for  
10 example, the Supreme Court cannot decide, because  
11 there's a dispute resolution approach, to what  
12 happens if Montana and Wyoming disagree on an issue  
13 which is not before the Court here.

14 But in prior cases the parties have been  
15 able to come together and say, Well, in addition to  
16 what the Court is deciding, there are some things  
17 that you can help us do in the future, and it would  
18 be great to embody those in a decree.

19 And one of the things that I'm suggesting  
20 is, is that in addition to just the general  
21 negotiations, it might be useful for both sides to  
22 think about whether or not it would be something both  
23 sides can agree on that would be a way of avoiding  
24 this ever coming back to the U.S. Supreme Court  
25 again, which I think is everybody's fervent wish,

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1 including the Supreme Court's.

2 MR. KASTE: Well, I think I can speak for  
3 Montana as well, we'll make every effort, recognizing  
4 our limitations.

5 SPECIAL MASTER THOMPSON: Understood  
6 entirely. So thank you, Mr. Kaste.

7 Mr. Draper.

8 MR. DRAPER: Thank you, Your Honor. Just  
9 a couple of points. We have heard today reiterated  
10 that Wyoming believes that it can determine whether a  
11 call is valid, and we have seen in the context of  
12 this motion to enter summary judgment on the Tongue  
13 River Reservoir that there is a glaring need to  
14 determine whether a call is valid once 32,000  
15 acre-feet have been stored. We believe the record is  
16 clear that, yes, to the extent of the original  
17 pre-Compact size of the reservoir, 72,500, there is.  
18 Wyoming does not agree with that. It made that very  
19 clear in their papers. And they want to keep it that  
20 way.

21 We do not believe that the Court has  
22 addressed this particular issue that you adopted in  
23 the second interim report, and we believe that you  
24 need to go ahead and address that issue now.

25 As to the actions in the last two years,

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1 obviously the parties, they're walking on egg shells  
2 while this is before the Supreme Court, and you can't  
3 use that as a guide as to whether there's a dispute  
4 or not. We -- we can see black and white that there  
5 is a dispute here today, and it will arise very  
6 shortly. It's not necessary that it arise in the  
7 next year or two, but this one will. And so it's an  
8 urgent need that we have here. And we as plaintiff  
9 want to see this case come to the proper conclusion  
10 just as soon as possible. That -- that's a typical  
11 desire of a plaintiff. We don't want it dragged out.  
12 We don't want it stalled. We would like the relief  
13 that we're entitled to entered as soon as possible.

14 So we're -- we're very motivated to do  
15 this quickly, efficiently, and part of that is to  
16 achieve an order of the Court that will minimize as  
17 much as possible the chances that we'll be back here  
18 in a short time.

19 So with that, I think unless you have  
20 further questions --

21 SPECIAL MASTER THOMPSON: I guess the only  
22 question I have is I actually want to ask Mr. Kaste.  
23 Other than what's on the record in terms of the two  
24 of you, is there any understanding as to whether or  
25 not the parties agree on actually how you calculate



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1 the 32,000 acre-feet storage that the second interim  
2 report provided that Montana was entitled to?

3 MR. DRAPER: Well, as we pointed out in  
4 our brief, they seem to misunderstand what you ruled.  
5 You were very clear about it, and the 31,414  
6 acre-feet that you mentioned earlier, that's --  
7 that's the amount that came in in that year starting  
8 October 1. They seem to think, Oh, we had 50,000, as  
9 an example. It was an improper example, but just if  
10 you had 50,000 in the reservoir, it doesn't mean you  
11 get to put 32,000 in.

12 Both states under the prior appropriation  
13 doctrine count the storage right from the beginning  
14 of the fill season, which is typically at the end of  
15 the prior irrigation season, here it's the beginning  
16 of the Compact year or water year set out under the  
17 compact, October 1. And in Wyoming they issue  
18 notices if -- in discovery they showed notices that  
19 they issued to reservoir -- reservoirs that, Now  
20 you've got to start filling, and we're going to count  
21 everything that you don't fill against your right.

22 They -- there's no disagreement about that  
23 principle. They just seem to misunderstand it, and  
24 this is the kind of misunderstanding, us pointing it  
25 out, yes, you can say, well, it doesn't amount to our

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1 benefit to point that out. What amounts to our  
2 benefit is to be clear. Ambiguity is going to work  
3 against the downstream state every time. If there is  
4 a propensity, if there is an ability to disagree, and  
5 when you leave things uncited like this or confused,  
6 that's where the propensity of these states to  
7 disagree will come up again.

8 As we've seen over the last 60 years,  
9 there have been problems, and they have -- none of  
10 them have been resolved until now. And the Court had  
11 made -- through your efforts primarily, has made  
12 tremendous progress, but there's a part of the job  
13 that still needs to be done.

14 SPECIAL MASTER THOMPSON: Okay. Thank  
15 you.

16 MR. DRAPER: Thank you.

17 SPECIAL MASTER THOMPSON: So let me make  
18 some final comments, and then I want to actually  
19 phrase another set of issues that have arisen for me  
20 with my -- actually Stanford faculty have.

21 So first of all, I do think there are a  
22 few things that the parties appear to agree on today.  
23 One is that water in the West is different; that  
24 water in the West, it is a resource unlike any others  
25 and obviously leads to significant and frequent

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1 disagreement. The second is that both sides want to  
2 get off of the merry go round, and hopefully whatever  
3 the Supreme Court does on this particular case will  
4 help you on that particular front, because otherwise  
5 both sides are in strong disagreement on exactly how  
6 the Court can best help you on that particular issue.  
7 And again, my view is that the Court's principal role  
8 here is to resolve the matters that are before it.

9 I will probably at this point, I'm hoping  
10 to get a draft opinion back out by September 1. I  
11 don't think it's going to be any sooner than that  
12 based on my calendar. I would really strongly  
13 encourage both sides, as I've always done, to  
14 continue to negotiate during that period of time, in  
15 particular to see whether or not there's any way that  
16 you can resolve the damages issue. I understand it.  
17 I strongly understand Attorney General Fox's issue  
18 that frequently it is easier to resolve one issue  
19 when it is being resolved along with a variety of  
20 other issues.

21 And the more specific you get on what you  
22 are trying to settle, sometimes it becomes more  
23 difficult. But at the same time, that struck me as  
24 an issue from the very outset the parties should be  
25 able to settle. So I would ask the parties to confer

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1 again with respect to that particular issue and see  
2 whether there's any way of resolving it, and if there  
3 is prior to September 1, please let me know.

4 I also would encourage both sides to begin  
5 to think about whether or not, in addition to what  
6 is -- what the Supreme Court will decide to enter in  
7 a decree as part of this original jurisdiction matter  
8 based on the law of the Supreme Court and the law of  
9 the case, whether there are any other types of  
10 provisions that you can mutually agree upon to  
11 include in that decree that would help you moving  
12 forward.

13 I am very pleased to see that the last two  
14 calls that Montana issued were resolved as well as  
15 they were, and I realize, as Wyoming -- I'm sorry --  
16 as Montana points out, that it wasn't necessarily  
17 smooth, that there were issues that came up. But  
18 nonetheless, I'm pleased to see that, but I also  
19 recognize that once the Supreme Court actually  
20 resolves this case, that there might be various  
21 issues, such as ways to resolve various disputes and  
22 particular processes, that it would be useful for  
23 both sides to have in the group, that the Court would  
24 not order on its own, but that again both sides would  
25 see as beneficial, and I would encourage the parties

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1 to be thinking about that.

2           You do not need to resolve that at the  
3 moment. I would think that would be an issue to  
4 resolve in terms of what the final decree would look  
5 like, and I do not plan to make a determination of  
6 that as part of this opinion. I will resolve  
7 Wyoming's motion, but I will not actually come up  
8 with a decree as part of this. I will probably  
9 submit I think a decree that has more detail is  
10 appropriate. I will probably set out a process for  
11 doing that. And I appreciate, Mr. Fox, your  
12 suggestion that that might be something that the  
13 parties initially take on rather than having me try  
14 to turn my hand to that issue. So -- but it is  
15 something that I think it would be valuable for the  
16 parties to be thinking about and discussing in the  
17 meantime.

18           So again, I will plan to have an opinion  
19 hopefully the beginning of September on the two  
20 motions that are before me, but I would, number one,  
21 ask the parties if you would confer once again on  
22 settlement, seeing in particular whether you're able  
23 to settle the damages issue; and second of all, that  
24 they begin to think about whether or not there might  
25 be conditions that would be valuable to put into and

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1 include in an award, future disputes ending up at the  
2 Supreme Court rather being resolved in an economical  
3 and efficient manner.

4 So that's thoughts of moving forward on  
5 the two motions that are before me right now. Any  
6 questions or thoughts on that?

7 Okay. Then let me bring up the issue that  
8 I have as a faculty member at Stanford, and this is  
9 something that I would appreciate the parties  
10 discussing and acting on as soon as they can.

11 So Stanford has something in September  
12 which they call Sophomore Option. It is part of  
13 sophomore college, and basically for three weeks,  
14 there's two or three faculty members who work  
15 intensively with a group of sophomores on a really  
16 interesting issue. And one of the great things, it's  
17 the only course they take in September and so  
18 frequently we will do field trips.

19 I did a great trip like this five years  
20 ago when I taught Western Water Policy while rafting  
21 the Colorado River through the Grand Canyon.  
22 Probably the best course I've ever taught, and we  
23 stopped every day and we hiked down and talked about  
24 western water issues, and then we'd raft on some  
25 more.

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1           This year I am co-teaching a sophomore  
2 college on natural resource issues on Native American  
3 lands. And as part of this course, we're going to  
4 have a field trip, and we're going to start out going  
5 up to visit some of the Coastal tribes in Washington  
6 and talk about some fishery issues.

7           Then we're going to take a train to  
8 Glacier in Montana. And we're going to meet with  
9 representatives of the Blackfeet Reservation,  
10 Flathead, and we're going to come down and meet with  
11 the Crow.

12           So here come the two issues that I would  
13 appreciate your comments on. The first is that, I  
14 think it would be really valuable for me also just to  
15 talk to them about how they deal with their resource  
16 issues. We're going to be down there, we're going to  
17 be visiting with the Crow, and so I think that would  
18 be very useful.

19           If we do that, I will not take the lead in  
20 contacting anyone on the Northern Cheyenne  
21 Reservation. We will not talk about any issues that  
22 have any relevance to this particular case. But  
23 given that the Northern Cheyenne are Amicus in this  
24 particular case, I just want to make sure that no one  
25 has an objection to us meeting with the Northern

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1 Cheyenne, and Ms. Whiteing in particular, I want to  
2 make sure you do not have any objection to that.  
3 Again, we will not talk about the issues in this  
4 particular case. It would just be a discussion about  
5 how the Northern Cheyenne are dealing with the  
6 various resources and land issues on the reservation.

7 Then the second issue, which is that -- so  
8 as I said, I'm going to be down with the Crow on the  
9 reservation, and I was talking to a colleague of mine  
10 who's another trustee for the Nature Conservancy, and  
11 she said, Oh, she had a property in northern Wyoming,  
12 and there's a bunkhouse there that we would be more  
13 than welcome to utilize. And I said, Sounds  
14 absolutely great. We started talking about it, and I  
15 don't know whether any of you can guess, but it was  
16 the Padlock Ranch.

17 And so the question then becomes, do you  
18 have any objection to the students and the two  
19 faculty members staying at the Padlock Ranch? I'm  
20 happy to pay my own way, but again, that's something  
21 that I don't expect an answer right now.

22 MR. KASTE: I can give you one because we  
23 knew that this was happening. We got a copy of your  
24 agenda. I guess from my point of view, rather than  
25 being concerned with the Padlock Ranch, we noticed on



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1 the agenda a stop in Helena to talk to state  
2 officials, but we have no objection. In fact, we  
3 have complete comfort that your discussions, whether  
4 they be at the Padlock Ranch or in Helena, will not  
5 veer into the context of this case whatsoever. It  
6 looks like a great opportunity for your students.  
7 And I don't anticipate that it will make any  
8 difference in the outcome of any of your rulings.  
9 So...

10 SPECIAL MASTER THOMPSON: So that's  
11 actually the third point. As Mr. Kaste just pointed  
12 out, we also were thinking we would stop in Helena,  
13 again just to get state perspectives on -- on Indian  
14 land issues in Montana, and again we would not be  
15 discussing anything relevant to this case.

16 MR. FOX: Your Honor, might I approach?

17 SPECIAL MASTER THOMPSON: You certainly  
18 may.

19 MR. FOX: First and foremost, where do I  
20 sign up? Obviously, all of the issues that your  
21 students will be studying and you'll be teaching  
22 about are very near and dear to the hearts of Wyoming  
23 and Montana. As Your Honor is probably aware,  
24 Montana and Wyoming are actively engaged in the coal  
25 port expansion issues in both Washington and Oregon,

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1 which intriguingly had a conflict between the  
2 tribal -- the Pacific Coast tribes and the Plains  
3 tribes such as the Crows, who have a very substantial  
4 coal mine, which as I would surmise is one of the  
5 reasons you're visiting the Crow Agency.

6 But subject to Wyoming's approval, you  
7 know, we would lend ourselves, our staff, to you to  
8 the extent that you would want to visit with us.  
9 Mr. Joscelyn is heavily engaged in all of those  
10 issues with the Crow tribe and, of course, the coal  
11 port issues as well.

12 And that's my home, as you know. And  
13 incidentally, here in about three weeks I will be  
14 adopted into the Crow Tribe, I've been told, which is  
15 a great honor for any individual. We also have a  
16 ranch, as you know, that's close to the Tongue River  
17 and the Tongue River Reservoir, but -- I don't know  
18 how many students you have, but we've actually put up  
19 I think as many as 25 people there. But would offer  
20 all of our services and help in any way, shape or  
21 form, subject again to Wyoming's approval.

22 And we also have particular expertise,  
23 Mr. Joscelyn and I, on the Otter Creek coal tracts,  
24 which are something that the Northern Cheyenne Tribes  
25 are really interested in. We work very hard on any

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1 of those issues, both before and after. So we have a  
2 perspective we might be able to lend to that.

3 Now, having said all of that, I'm up for  
4 re-election. That's about a month or two before the  
5 election and my schedule probably will be somewhat  
6 crazy, but to the extent I might be able to help at  
7 all, I would be willing to do that.

8 SPECIAL MASTER THOMPSON: So I appreciate  
9 that particular offer. I'm going to try as much as  
10 possible to avoid any hints of having any type of  
11 favors bestowed upon by either side in my faculty  
12 position, but I do appreciate the offer. I might  
13 call on both sides at some point to have contacts  
14 with that. That's where that can sometimes be used.

15 But for me, as I said, what I would really  
16 appreciate is just to let me know if you have any  
17 concerns on either side and send them to my  
18 assistant. You don't have to send me anything.

19 MR. FOX: Your Honor, if I could add one  
20 thing I neglected to mention, my oldest brother,  
21 Dr. Richard Fox, is the foremost authority on the  
22 archeology of the Custer battle at Little Bighorn  
23 Battlefield, and I don't know that I can offer his  
24 services at this moment, but if you have any free  
25 time at all and you are going to be in that area,

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1 that's a very I think important national cemetery and  
2 park to visit. And if you had need of someone to  
3 show you around, I might be able to get my brother to  
4 do that, again subject to Wyoming's approval.

5 SPECIAL MASTER THOMPSON: I appreciate  
6 that. Without going into too much on sophomore  
7 college, there's actually a sophomore college that's  
8 been offered for 10 years now, which is called Field  
9 Battle. And it basically goes both to the Little  
10 Bighorn Battlefield as well as Gettysburg, and stop  
11 by one of our former Secretary of State -- no,  
12 Secretary of Defense is at Stanford, and he actually  
13 goes to the battlefield and walks them through the  
14 entire battle. And thankfully he's going to be at  
15 the Little Bighorn with our class. And the Crow have  
16 also offered to take us on the battlefield. So you  
17 can begin to see how this is actually going to be a  
18 great class.

19 MR. KASTE: Well, you've asked us to give  
20 some thought to whether we have concerns. Wyoming  
21 does not. We don't need to think about it anymore.  
22 Like I said, we were aware of the agenda previously,  
23 and it didn't cause us concern then and it doesn't  
24 now. We appreciate you bringing it to our attention,  
25 and we have every confidence that there will be no

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1 appearance of impropriety. And, you know, if  
2 something comes up and you have any concerns, please  
3 give us a call and let us know whatever happened.

4 SPECIAL MASTER THOMPSON: And for both  
5 sides I'll send Montana as well as anyone else in the  
6 courtroom, I'm happy to send you the agenda for this  
7 particular class so you know exactly what it's going  
8 to be looking at. And again, I recognize both sides'  
9 generosity in helping out on this particular matter.  
10 And so do not fear that I certainly think one side  
11 more than the other is helping out. You've been very  
12 generous to offer that.

13 So again, if you have any concerns, let me  
14 know.

15 Ms. Whiteing?

16 MS. WHITEING: Yes, I just wanted to say  
17 that I'm sure that the Northern Cheyenne Tribe would  
18 welcome a visit on the ground, and I would be happy  
19 to facilitate --

20 THE REPORTER: I'm sorry.

21 MS. WHITEING: I'm also a member of the  
22 Blackfeet Tribe, and was involved in their water  
23 settlement.

24 SPECIAL MASTER THOMPSON: And would be  
25 happy to help facilitate that as well.

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1           SPECIAL MASTER THOMPSON: Okay. I very  
2 much appreciate that particular offer.

3           Okay. So with that, I think we can  
4 adjourn for the day. I will take both of the two  
5 motions now under advisement and, as I say, issue a  
6 decision in early September.

7           So with that, we're adjourned. Thank you  
8 very much.

9           (The proceedings adjourned at 1:00 p.m.,  
10 July 27, 2016.)

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1 STATE OF COLORADO)

2 ) ss. REPORTER'S

3 CERTIFICATE

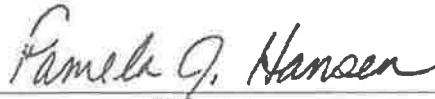
4 COUNTY OF DENVER )

5 I, Pamela J. Hansen, do hereby certify that  
6 I am a Registered Professional Reporter, Certified  
7 Realtime Reporter and Notary Public within the State  
8 of Colorado; that this hearing was taken in shorthand  
9 by me at the time and place herein set forth, that it  
10 was thereafter reduced to typewritten form, and that  
11 the foregoing constitutes a true and correct  
12 transcript.

13 I further certify that I am not related to,  
14 employed by, nor of counsel for any of the parties or  
15 attorneys herein, nor otherwise interested in the  
16 result of the within action.

17 In witness whereof, I have affixed my  
18 signature this 5th day of August, 2016.

19 My commission expires September 3, 2018.

20 

21 Pamela J. Hansen, CRR, RPR, RMR  
22 216 - 16th Street, Suite 600  
23 Denver, Colorado 80202

24  
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