

No. 137, Original
IN THE SUPREME COURT OF THE UNITED STATES
POST-TRIAL HEARING PROCEEDINGS

STATE OF MONTANA
Plaintiff,
v.
STATE OF WYOMING
and
STATE OF NORTH DAKOTA
Defendants.

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.
Special Master

Moot Courtroom, Room 80, Basement
559 Nathan Abbott Way
Stanford, California 94305
9:03 a.m., Thursday, May 1, 2014

Peter Torreano, California CSR No. 7623, CRR

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POST-TRIAL HEARING PROCEEDINGS

1 THURSDAY, MAY 1, 2014, 9:03 A.M.

2 SPECIAL MASTER: So, first of all, good
3 morning to everybody. It's great to see all of you
4 again. I think when I last saw most of you before this
5 morning it was about zero degrees Fahrenheit outside.
6 So it's a bit of a huge change in the temperature. And
7 for those of you who have never been here to the Bay
8 Area before, welcome and I hope you enjoy your visit
9 here in addition to you all participating in the
10 hearing.

11 So this is the post-trial hearing in Montana
12 versus Wyoming and North Dakota, No. 137, Original, in
13 the Supreme Court of the United States. And in terms
14 of the proceedings this morning, the -- I think that
15 what we will plan to do is go until about 12:15 today
16 when we're going to take a break because I know the
17 Attorneys General from both Montana and Wyoming will be
18 speaking to the students. I want to make sure you get
19 an opportunity to get your lunch.

20 And, also, as I think I mentioned before, Dean
21 Magill would like to meet both of you at 12:30 and
22 welcome you to Stanford Law School. And then I think
23 that the lunch they are planning is lasting until about
24 two o'clock. And so I propose that, assuming we're not
25 finished this morning, and my guess is we probably will

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1 not be, that we then come back at about 2:15 in the
2 afternoon and continue with the argument at that
3 particular point in time.

4 You can assume, as always, that I have
5 carefully read all of the various briefs, not only what
6 Montana and Wyoming have filed, but that also what
7 North Dakota, Anadarko and Northern Cheyenne Tribe have
8 filed. But you also shouldn't necessarily assume that
9 I'm as closely attuned as to exactly what details in
10 those papers are as important as you are aware. So
11 feel free to point specific items out to me.

12 So let me just start out with introduction of
13 counsel. So counsel for the State of Montana?

14 MR. DRAPER: Your Honor, good morning.

15 I'm John Draper for the State of Montana. We
16 have with us today Attorney General Tim Fox, Deputy
17 Attorney General Cory Swanson.

18 MR. SWANSON: Good morning, Your Honor.

19 SPECIAL MASTER: Good morning.

20 MR. DRAPER: My fellow special attorney
21 general, Jeffrey Wechsler.

22 SPECIAL MASTER: Good morning.

23 MR. DRAPER: We also have our expert engineer,
24 Mr. Book; general counsel for the Department of Natural
25 Resources Conservation, Anne Yates; my assistant Donna

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1 Ormerod; Mr. Art Hayes you may remember from the trial;
2 his counsel for the Tongue River Water Users
3 Association, Brenda Linlief Hall; and then at the end
4 of the row, my partner, Matthew Draper.

5 SPECIAL MASTER: Hello, Mr. Draper.

6 MR. DRAPER: Oh. There is Kevin.

7 Kevin Peterson. I'm sorry. I was expecting
8 him up here. Kevin Peterson is also a lawyer with the
9 Department of Natural Resource Conservation with the
10 State of Montana.

11 SPECIAL MASTER: Again welcome to all of you.
12 So State of Wyoming?

13 MR. KASTE: Good morning, Your Honor.

14 I'm James Kaste, deputy attorney general, for
15 the State of Wyoming. With me is the Attorney General
16 for the State of Wyoming, Peter Michael, counsel of
17 record in this case. Andrew Kuhlmann, assistant
18 attorney general in our office. We let Mr. Sayer out
19 of his office for this. Matthias Sayer from our
20 office. He kept the home fires burning while we were
21 in Billings.

22 Of course, today we have the Wyoming State
23 Engineer, Pat Tyrrell, here with us. And, as always,
24 Chris Brown, senior assistant attorney general, as well
25 as myself.

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1 MR. BROWN: Good morning.

2 SPECIAL MASTER: Good morning. And again
3 welcome.

4 And so let me just go through. Is there
5 anyone here from the United States?

6 We do not have anyone from the United States.
7 So Northern Cheyenne?

8 MS. WHITEING: Yes, Your Honor.

9 Jeanne Whiteing representing the Northern
10 Cheyenne Tribe as amicus.

11 SPECIAL MASTER: Good morning, Ms. Whiteing.

12 And is there anyone here from Anadarko
13 Petroleum?

14 MR. WIGMORE: Yes, Your Honor.

15 Michael Wigmore, Vinson & Ellis for Anadarko
16 Petroleum Corporation. With me is Julia Jones, counsel
17 at Anadarko Petroleum.

18 SPECIAL MASTER: Great. So let me just sort
19 of quickly go through -- oh.

20 MS. VERLEGER: How could you forget me?

21 SPECIAL MASTER: This is truly and formally
22 embarrassing. From the State of North Dakota?

23 MS. VERLEGER: Jennifer Verleger, assistant
24 attorney general for North Dakota.

25 SPECIAL MASTER: And I should say, you know,

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1 carried along. And it's just that during the trial you
2 didn't have much of a speaking role. So I'm sorry to
3 have forgotten the great State of North Dakota.

4 MS. VERLEGER: That's okay.

5 SPECIAL MASTER: So let me just quickly go
6 over things. So first of all, Mr. Draper, are you and
7 Attorney General Fox going to be splitting the argument
8 or how do you plan to proceed?

9 MR. DRAPER: Your Honor, we would like to
10 proceed in this fashion: To open with some remarks by
11 Attorney General Fox followed by Mr. Swanson addressing
12 the issues related to notice, then by myself addressing
13 issues relating to post-1950 water uses in Wyoming, and
14 then with Mr. Wechsler addressing water uses and
15 administration in Montana.

16 SPECIAL MASTER: Okay. Thank you.

17 Mr. Kaste, how does Wyoming want to proceed?

18 MR. KASTE: I'll do it. I asked around.
19 Nobody else volunteered. So I will do the argument on
20 behalf of the State of Wyoming.

21 SPECIAL MASTER: I'm disappointed in Mr. Brown
22 that he didn't arm wrestle you for it.

23 MR. KASTE: I asked him specifically and he
24 said no.

25 MR. BROWN: And you know better than that.

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1 SPECIAL MASTER: Okay. Let me suggest the
2 following and see whether it would be okay with counsel
3 for both sides. Rather than having Montana present its
4 entire argument and then, you know, like two and a half
5 hours from now perhaps turning it over to Wyoming, what
6 I actually think would be more valuable would be to
7 split it up very much along the lines that Montana was
8 thinking about splitting its argument up amongst
9 counsel.

10 And so the thought would be that we would
11 start out with both sides being able to present any
12 type of overview presentation that they would like.
13 Then we would go on to the question of notice and then
14 have both Montana and Wyoming address questions of
15 notice. Then we would go to the pre-1950 uses in
16 Montana and then the question of post-1950 uses in
17 Wyoming plus causation and materiality. And that way I
18 would think -- at least for me that would be more
19 valuable because the arguments would be closer together
20 on each of those points.

21 And it sounds to me as if it probably will not
22 be a problem with Montana since they have divided their
23 arguments in that fashion.

24 Mr. Kaste, do you have any concerns on that?

25 MR. KASTE: Whatever would be most helpful to

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1 you, that's fine.

2 SPECIAL MASTER: Okay. Great. Then why don't
3 we go ahead and proceed in that fashion.

4 But before, Attorney General Fox, you come up
5 let me just ask.

6 Does North Dakota plan at this point to make
7 any argument this morning?

8 MS. VERLEGER: No. Thank you, Your Honor.

9 SPECIAL MASTER: Okay. But if, you know, at
10 any point you want to, then just let Ms. Carter know
11 and I'll make sure that you have some time to do that.

12 What about the Northern Cheyenne?

13 MS. WHITEING: We don't plan to argue, Your
14 Honor, unless an issue comes up where we would like to
15 comment in which case we would ask your permission to
16 do so.

17 SPECIAL MASTER: Okay. And then finally
18 Anadarko?

19 MR. WIGMORE: I think the same position for
20 Anadarko, Your Honor. We will see how it goes and then
21 ask your permission.

22 SPECIAL MASTER: Okay. So excellent. At the
23 very end I will also ask you again just to make sure
24 that you have an opportunity to address any of the
25 issues that concern the various entities that you're

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1 referencing.

2 Okay. With that, Attorney General Fox?

3 ATTORNEY GENERAL FOX: Good morning, again,
4 Your Honor. May it please the Court.

5 Thank you again for hosting this here in this
6 wonderful corner of the world and for letting us visit
7 the Stanford campus. It's been years since I've been
8 here. I used to -- about 35 pounds ago I ran track and
9 I spent some of that time here training and it's great
10 to be back. Things have changed a little bit for the
11 better.

12 I appreciate you allowing us to have to have
13 this final word on this matter after all the evidence
14 of the trial has been gathered and evaluated, but
15 before I yield the floor to my colleagues who will
16 spend the majority of our time arguing on the specifics
17 of the case I would like to direct the Court's
18 attention to some of the big picture issues for the
19 State of Montana that rest in your hands now, sir.

20 As I mentioned at my trial opening in October,
21 this case is important to Montana and we believe this
22 case is ripe for resolution, not only because of what
23 has happened in the past, but particularly to protect
24 Montana's rights going on into the future.

25 Because of the nature of the Tongue River

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1 Basin and the possibility of drought Montana will
2 continue to rely on Wyoming's compliance with the
3 Compact to protect our pre-1950 direct flow and storage
4 water rights on a very regular basis.

5 This multi-million dollar question is then how
6 will Wyoming respond to Montana's shortage. To answer
7 that question we urge you to review what we have
8 effectively proven at trial and to understand the story
9 of Montana's water users. Now that the facts are in
10 and you have heard from our witnesses and reviewed
11 mountains of documents we believe this story is very
12 clear.

13 For many years since at least 1981 Wyoming has
14 been on notice that Montana's pre-1950 water rights on
15 the Tongue River were not being satisfied on a regular
16 basis. This fact is clear since the largest right on
17 the river, the T&Y canal, is also the second oldest
18 right and it calls the river fairly early in the
19 irrigation season every year.

20 We have presented testimony by numerous
21 Montana officials and water users and we have presented
22 many documents demonstrating that Montana put Wyoming
23 on notice of our water shortage. Despite all this,
24 Wyoming continues to dispute notice and there is a
25 clear disagreement over the facts and the standards

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1 necessary for a call. The states need yours and
2 ultimately the United States Supreme Court's resolution
3 of this and other issues.

4 Wyoming has never taken a single action to
5 provide any water to Montana under the Compact, never.
6 For many years Wyoming insisted there was no provision
7 for a call and the Yellowstone River Compact did not
8 protect Montana's pre-1950 rights. Now that Wyoming
9 finally acquiesces in your ruling, Your Honor, that
10 Wyoming has a duty under the Compact to protect
11 Montana's pre-1950 water rights there is still no
12 certainty that Wyoming will provide water to Montana.

13 You've heard from Pat Tyrrell and Sue Lowry
14 the responsible Wyoming officials, that they will honor
15 a call if they consider it valid. But you also heard
16 and Montana certainly heard the likelihood for more
17 delays or reasons why they would not honor a call.

18 In reviewing Mr. Tyrrell's testimony we see
19 there are many lingering disputes over whether Wyoming
20 would honor a call for Montana, what it would require,
21 and how long it would take. Mr. Tyrrell testified he
22 would evaluate whether the call was futile, whether the
23 water was actually going to be delivered to a
24 particular headgate in Montana, how the water was going
25 to be used, how much water might be lost between, say,

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1 Dayton, Wyoming and the T&Y Canal near Miles City and
2 whether there was a genuine or legitimate need for the
3 call.

4 Your Honor, that one example demonstrates that
5 the two state need a resolution of the issue. Even
6 though Mr. Tyrrell may be well intentioned, these
7 unanswered questions could delay or foreclose a call
8 being honored while Montana users suffer. If
9 Mr. Tyrrell's successor does not act in good faith,
10 these unanswered questions will give Wyoming an avenue
11 to delay or fail to honor a Montana call.

12 Montana simply should not be held at the mercy
13 of its upstream neighbor. What this reveals is not
14 only the need for resolution, as I told you in October
15 in Billings, it also illustrates the materiality of
16 this dispute. Montana and Wyoming have been unable to
17 reach agreement on these issues despite having a
18 compact commission since 1952 and since arguing over
19 these issues since at least 1981.

20 Both states have extended considerable sums of
21 money and time to bring this dispute to a final
22 resolution. Our presence here, Your Honor, as adverse
23 parties with a clearly genuine dispute is further
24 evidence of the materiality of this controversy.

25 This court is the only place we can get

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1 relief. You have before you a genuine dispute between
2 two sovereigns, a dispute over both facts and law which
3 will affect their actions for all future time. It is
4 important that the court resolve the dispute and
5 provide a workable methodology for Compact compliance.

6 For that reason I urge you, Your Honor, to
7 resist Wyoming's request to summarily dismiss the case,
8 quote, "without further ado," end quote, as they have
9 stated so cavalierly.

10 So let me close by saying it isn't just about
11 water rights, interstate compacts and technical
12 engineering and hydrology data. All of that is
13 important. But it is important only because it leads
14 us back to focus on the people who depend upon the
15 water. They are the heart and soul of this case and
16 they are the reason we stand before you today.

17 You know Art Hayes is here with us. He still
18 runs the original Brown Cattle Company and is raising
19 the next generation of stewards to take over for him.
20 His leadership and dedication have kept the Tongue
21 River Water Users Association thriving running a large
22 reservoir in a responsible manner and supplying water
23 to farms and ranches for 190 miles. His future and
24 that of his sons depends on whether Wyoming will honor
25 Montana's pre-Compact uses which are the lifeblood of

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1 the Tongue River Valley in Montana.

2 You've heard from John Hamilton, a softspoken
3 and sincere gentleman who is a true innovator in
4 agriculture. His years of research on crop innovation
5 have led him to grow alternative crops like melons and
6 apples in a place that Montana never thought would be
7 possible to grow those crops. He is also passing on
8 his knowledge to the next generation, and they need to
9 know whether Wyoming will protect their pre-Compact
10 uses against post-Compact depletions upstream in
11 Wyoming.

12 Les Hirsch is another smart businessman and
13 innovative farmer who suffered through the dry years by
14 traveling hundreds of miles to cut and bail hay, hauled
15 it home and took an economic loss on his cattle, but
16 somehow he kept fighting on. He relies almost entirely
17 on stored water out of the Tongue River Reservoir. His
18 daughter is working alongside her father and they need
19 to know if the reservoir will receive its water from
20 Wyoming.

21 And who can forget Jay Nance and Roger Muggli?
22 They are the two bookends of this river with the two
23 oldest water rights on the Montana side. One is a
24 tall, gentle and mild mannered gentleman. The other is
25 a short, intense and fully energized gentleman. Their

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1 story is the story of the Tongue River and their
2 testimony is uncontested prove that Montana needs
3 Wyoming to honor our senior water rights.

4 So I ask you, Your Honor, to remember those
5 Montana faces and stories. They have worked to
6 overcome hardship and to keep their community together.
7 They are not asking for special rules and they are just
8 asking for both sides of the border to play by the same
9 rules. The State of Montana looks to this court to
10 help us meet that request.

11 And may I end, Your Honor, by saying how much
12 I appreciate Attorney General Michael from Wyoming and
13 our neighbors all over Wyoming for being the friends
14 that they are. This dispute is very real. It will go
15 on without your help and we need, Your Honor, for you
16 to fully and finally resolve these issues for us.

17 Thank you.

18 SPECIAL MASTER: Thank you very much.

19 Mr. Kaste, do you have an opening statement?

20 MR. KASTE: May it please the Court.

21 I had prepared to respond basically to
22 everything all at once and so I haven't to prepare a
23 general opening such as it were, but I know everybody
24 is counting on me to start out by saying some
25 inflammatory. And so I will as is my habit.

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1 I think it is important for you as you look
2 through the post-trial briefing and you listen to the
3 arguments like those just made by Attorney General Fox
4 to listen to what they are saying. And you've heard it
5 more than once during the course of this trial and you
6 see it in the post-trial briefs: "Wyoming has never
7 delivered a drop of water to Montana pursuant to this
8 Compact." We've heard that over and over again and
9 we've heard something akin to it just now.

10 And here's the inflammatory part: We probably
11 never will because that's not how this Compact works.
12 We need to bear in mind at all times how this Compact
13 works. The Supreme Court has stated flatly that this
14 Compact does not require the State of Wyoming to
15 deliver a specific amount of water to Montana. This
16 Compact and the obligations of the parties under it are
17 governed by the doctrine of prior appropriation.

18 And that can mean when Montana makes a call on
19 Wyoming and we curtail any post-1950 uses that they
20 don't get a drop of water as a result. We all know
21 that. The people who made this Compact know that, knew
22 that at the time.

23 This case is a pretty simple case. I've said
24 it before and I've said it over and over again. This
25 is a simple breach of contract case and your job today

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1 is to look at the elements of a breach of contract case
2 and to determine whether or not Montana has proved each
3 of those elements by a preponderance of the evidence.

4 We're fortunately now through with the trial
5 and the burden of proof falls squarely on Montana at
6 this stage. There is no more giving the non-moving
7 party the benefit of the doubt. Now Montana must show
8 by a preponderance of the evidence that it has proven
9 each of five elements of its claim, which are
10 consistent with every contract claim everywhere all the
11 time.

12 I don't understand Montana's reluctance to
13 treat it as a contract case. We see in their brief
14 it's referenced here as in the Compact. Well, there's
15 a contract in the statute, but they never explain how
16 it makes any difference, how that changes the elements
17 of the claim, how it changes the burden of proof, how
18 it makes anything different for these contracting
19 parties.

20 There's no difference. It's just a simple
21 contract case. And that means because the duties of
22 the party are outlined and are promises in the Compact
23 that our promises to each other are to follow the
24 doctrine of appropriation.

25 And Wyoming has done that. I think what the

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1 trial proved to us, the evidence showed is that Wyoming
2 has followed the doctrine of appropriation and Montana
3 has not. What we learned in the course of the trial is
4 that the party who needs to be protected in this
5 situation is Wyoming.

6 Montana has allowed a tremendous amount of
7 water to go past the gate of Tongue River Reservoir all
8 winter long in each of the two years in issue and then
9 has turned to us and asked for more, and that's not
10 right. And the doctrine of appropriation doesn't
11 protect Montana's ability to waste that water all
12 winter long and ask us to make up the difference.

13 Now, with regard to the burden of proof, it's
14 important -- excuse me, the elements of the contract
15 claim, it's important to remember that Montana has to
16 show that it was the pre-1950 uses connecting to the
17 appropriations, we're short of water at a specific
18 time, not just any time but at a specific time.

19 Because the doctrine of appropriation is a
20 contemporaneous system to deal with shortages on the
21 river. It doesn't happen in the abstract. It happens
22 at a specific place on the river at a specific time,
23 and that evidence is sorely lacking from Montana. When
24 you look at the evidence with regard to shortages and
25 uses and things like that, it's never tied to a

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1 specific time, and yet it must be in order for them to
2 prevail.

3 Next, Montana needs to show a specific
4 shortage. It needs to show that it engaged in
5 appropriate intrastate mechanisms to make sure that its
6 post-1950 uses are curtailed so that water that may
7 come across the state line to the State of Montana
8 doesn't go to a post-1950 usage.

9 And I think -- in preparing for this hearing
10 it got me thinking about the discretionary operations
11 at Tongue River Reservoir, and whether you view the
12 bypasses that occur over the course of the winter to
13 keep the reservoir low as a discretionary operational
14 review and look at it in terms of the first element
15 under whether or not there's a real pre-1950 shortage,
16 or you can view them as an appropriate intrastate
17 regulatory mechanism.

18 Montana has the appropriate intrastate
19 regulatory mechanism to prevent a shortage in the
20 Tongue River Reservoir. All they have to do is hit the
21 button on that thing and shut the gate on the
22 reservoir. And if they don't do that they cannot
23 proceed with their contract claim. And they didn't.
24 They just didn't.

25 They are getting better. We all know they are

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1 getting better. So they are storing more water.
2 They've been more judicious about their winter releases
3 and consequently there's been lots more water. We've
4 had better water years as well.

5 But nevertheless you can view Montana's
6 obligation to decrease its bypasses as an appropriate
7 intrastate regulatory mechanism that they must engage
8 in before they call on Wyoming to satisfy any
9 shortfall. And perhaps that's even a better way to
10 review those bypasses rather than under the doctrine.
11 Either way you get to the same result. If Montana
12 dumps a whole bunch of water into Yellowstone, they
13 can't come to us and ask us to make up the difference.
14 They just cannot do that.

15 The next element, of course, is they have to
16 provide us with notice. Notice isn't magic, but notice
17 is serious. And, of course, we've asked you to
18 reconsider your ruling and say that notice must be done
19 in writing between two sovereign states that are going
20 to have to engage the full assets of the state to deal
21 with this call, we're going to have to get people to go
22 up and down that basin and make sure that our post-1950
23 uses are compared.

24 This is very different than a call between two
25 adjacent farmers that could be made orally between them

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1 or to a hydrographer commissioner who is up and down a
2 small portion of the river every day. This is
3 different and the formality of the notice ought to be
4 different. And I understand we have this period of
5 time prior to today where really our obligation was to
6 give Montana the benefit of every doubt, give them
7 every opportunity to show that it provided notice to
8 Wyoming.

9 We're past that point now and now we can make
10 a decision for the future that reflects the formality
11 of the call process. And it doesn't have to be
12 anything major. We saw in the 2004 and 2006 call
13 letters a couple-page letter saying "we are calling on
14 the State of Wyoming to release post-'50 water for the
15 benefit of Montana's community."

16 There's no magic words there. Montana
17 referenced requiring some magic set of words. But we
18 don't. We just ask you to demand your rights under the
19 Compact. It's just that simple. The evidence, of
20 course, shows that never happened before 2004 and that
21 it was really easy to do in 2004 and 2006 and it will
22 be easy to do in the future.

23 Once notice is made then at that point in time
24 and only that point in time can Wyoming's liability
25 arise. Only on the date of the call can Wyoming be

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1 liable for uses after that date. Wyoming like every
2 junior appropriator in the prior appropriation system
3 has the right, which Montana completely ignores, that
4 we have the right to use water until we are called off
5 by a senior appropriator. That's just the way the
6 system works.

7 Montana describes Wyoming's operations as a
8 free for all, a free river. It's not that in the
9 least, but prior to a call on the river people have a
10 water right and they are entitled to divert it until a
11 senior says I'm not getting my water rights fulfilled
12 and I want it and I need it and I have to put it to
13 beneficial use. You have to show up.

14 Until that happens what we do in Wyoming
15 cannot be the source of liability. We cannot look back
16 prior to the call and say that something Wyoming did
17 before it was put on notice that there was a need in
18 Montana can create liability. That's just not how
19 prior appropriation works.

20 Then we have the final two elements of every
21 contract claim, causation and damages. Wyoming's
22 breach of its promise has to result in some harm to
23 somebody in Montana. That seems like pretty simple
24 stuff. Yet Montana doesn't acknowledge that it bears
25 burden of proving those developments in this case, if

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1 valid and if they exist.

2 Now, Attorney General Fox said they are
3 looking for certainty, and we are as well and I think
4 you heard that from the testimony of the state engineer
5 during the course of this trial. And I think that it's
6 pretty clear that with regards to direct call certainty
7 is pretty easy. In Montana sends us a call and we have
8 to respond saying that we have knowledge. We'll do
9 that in the future.

10 With regards to the reservoirs, it's a
11 slightly different calculation as Mr. Fox said. We
12 need to figure out how that's going to work by the time
13 they make their call in June or July of any given year
14 the ship has sailed on the spring runoff. That's fair.

15 And so what needs to be done is we need to
16 have a clear guidance from this Court and when a call
17 is made with regard to the Tongue River Reservoir the
18 first thing we do, as we do under any system under the
19 doctrine of appropriations, we look back at the call
20 right and see what's going on there.

21 And for a reservoir that means looking back at
22 the beginning of the water year and finding did they
23 exercise their water right when they had the chance,
24 did they catch the water that was available to them.
25 And if they didn't, they cannot place the burden of

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1 their failure on the upstream juniors. They just
2 can't. If they had the water available and they didn't
3 catch it, it's not the juniors' burden to make up that
4 difference.

5 So what's important here is that your ruling
6 says when the call is made we look back to the
7 beginning of the water year and evaluate how reservoirs
8 operated during that period of time prior to the call.
9 And if the change needs to be made in those operations
10 because Montana fully exercised its right, fine.
11 That's okay. That's the way the system ought to work.
12 But if not, if Montana let way more water out of the
13 bottom of that reservoir than is necessary to fill it,
14 then Wyoming has no liability to Montana.

15 And then we need to know how big is Montana's
16 call right, how big is the Tongue River Reservoir, what
17 is the nature of the call right that Wyoming is
18 responsible for in some way. We are not responsible
19 for filling it, as I say, but we have an obligation
20 under the Compact to protect our pre-1950 rights or
21 post-'50 rights in Wyoming and we need to know what is
22 the nature of that right.

23 And by telling us that one simple thing, what
24 is the nature of the call right under the Tongue River
25 Reservoir, 99 percent of the water dispute is over.

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1 Once we know where the goalpost is we can then take
2 appropriate action to make sure we get through the
3 goalpost. And unfortunately Wyoming's position has
4 been the Compact explicitly explains that there are
5 both V(A) and V(C) rights in existing reservoirs as of
6 1950 and that the nature of their V(A) right or what is
7 expected under V(A) is limited and not to fill
8 capacity.

9 The Court is bearing in mind that the only way
10 Montana prevails in this case -- the only way is if the
11 math works for us -- is that Wyoming is on the hook
12 under V(A) for the entire enlarged capacity and Montana
13 can bypass as much water as it wants. If there's a
14 restriction on either of those things, there's no
15 liability. The math just doesn't work for them. They
16 had plenty of water in both 2004 and 2006.

17 So unless we come down and say Montana can do
18 whatever it wants and Wyoming is responsible like an
19 insurer or like a guarantor for Montana's behavior,
20 Wyoming prevails in this litigation. But simply
21 prevailing in this litigation is not good enough. For
22 the future we need to know the nature of that right or
23 then we will be back here.

24 I urge you to tell us and recommend to the
25 Supreme Court that the major V(A) right is in the

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1 Tongue River Reservoir. If we know that, we can make
2 it work.

3 I suppose with that I'll leave the remainder
4 of my comments to specific issues that we have to talk
5 about, but we appreciate the time and ultimately at the
6 end of the day we're going to recommend, of course,
7 that this case be dismissed, but in so doing you give
8 us the guidance that we need to avoid future disputes.

9 SPECIAL MASTER: Thank you. So I actually
10 have a couple questions, which may not go actually to
11 the ultimate merits of the case, but I just want to go
12 back over a couple of things you said. You started out
13 as you promised with --

14 MR. KASTE: An inflammatory statement.

15 SPECIAL MASTER: That would be inflammatory
16 that this was a simple breach of contract case. Now,
17 it might very well be and, in fact, I think the rulings
18 so far have been consistent with the notion that, like
19 all compacts, you look to the rules of contract law in
20 order to resolve them.

21 But you can't think, meaning that this is just
22 a regular contract case or certainly that it's a simple
23 contract case. In terms of the regular, it might be a
24 contract, but it is a contract between sovereign
25 entities that can only be heard before the United

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1 States Supreme Court.

2 I assume that means that, again, even if the
3 rules are the same, which is I think what you meant,
4 that this is a case that the Supreme Court needs to
5 give very careful attention to because it deals
6 ultimately not with the rights of single individuals
7 but with the rights of the states themselves.

8 MR. KASTE: That's exactly what I meant. I
9 don't think the rules change based on the venue of the
10 action or how rich or how powerful the litigants are.
11 The rules are the rules and whether you write the
12 contract in a statute or you write it on a bar napkin,
13 the rules are primarily the same.

14 And I suspect and expect the Supreme Court to
15 treat us like any other litigant in a contract dispute.
16 And obviously I hope they are going to do this
17 carefully, but the rules are the same and that's why
18 the elements are the same. And that's why when Montana
19 says, well, this is a contract in the statute, it's not
20 followed up with and that means we have to do something
21 different than we would do in ordinary contract
22 litigation between two private parties regardless of
23 their stature. The rules are definitely the same.

24 SPECIAL MASTER: Although occasionally you've
25 actually I think referred to the fact this is a dispute

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1 between states and argued that in this particular case
2 Wyoming should have some sort of rights it maybe
3 wouldn't get under an ordinary contract.

4 So, for example, your argument that the actual
5 notice needs to be in writing and, in fact, earlier you
6 argued that to finish it be in writing between the
7 governors of the two states because after all this
8 involves states. This is a serious matter.

9 MR. KASTE: Right. Well, and that goes to the
10 nature of the parties' duties, not the elements of
11 their claim. The nature of our duties to each other
12 can be any number of things, you know, what did you
13 promise to each other and what would we expect in a
14 contract to be a reasonable -- in other words, I think
15 the rules for contract law are notice is what's
16 reasonable under the circumstances. Right?

17 And these circumstances are between two states
18 and we don't hang out over the fence post like two
19 farmers who have adjoining fields. We have a border.
20 Our capitals are very far apart. We have some formal
21 relationship between each other that's between
22 sovereigns and the writing between those two parties to
23 give notice that Montana is short its pre-1950 rights
24 is reasonable under the circumstances and to be
25 effective.

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1 The people who testified about how interstate
2 calls have happened in the past -- and they are rare I
3 grant you that -- they just happen to be in writing.
4 And wouldn't it be great if we didn't have to fight in
5 the future about whether or not someone like, you know,
6 Keith Kerbel's level of government made a call on some
7 guy at Carmine LoGuidice's level of state government
8 that nobody else in the state government knows about in
9 future cases?

10 You said in your prior ruling other than ease
11 of proof which doesn't seem to be a good reason for
12 this to be in writing. Well, at this point they have
13 failed under any test prior to 2004 from that, but for
14 the future I think ease of proof is an important
15 consideration so that it would be real easy for us to
16 look through the documents and say that is the day
17 Wyoming's liability arose. They are on the hook on
18 that day. They need to take appropriate regulatory
19 action on that day.

20 Now is the time to do it right. Having given
21 them every opportunity to prove something less for the
22 future let's do it right and let's say it's in writing.
23 And it can be instantaneous. That's the cool thing
24 about today. You can write an e-mail between the
25 compact commissioners and the governors today and it's

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1 done just like that as if they were standing across the
2 fence post from each other in a field.

3 SPECIAL MASTER: So you would agree then that
4 even thinking about this as a compact because again a
5 compact is a form of contract, that interpreting the
6 Compact you need to recognize that it's a contract
7 between states and not just between ordinary
8 individuals?

9 MR. KASTE: I think that helps tell us what is
10 reasonable under the circumstances, yes.

11 SPECIAL MASTER: The second thing you said is
12 is that Wyoming needs protection, not Montana. And I
13 certainly understand your concern that the Court needs
14 to resolve this case in a way which is faithful to the
15 Compact and doesn't require Wyoming to do something
16 that the Compact does not require Wyoming to do.

17 But at the same time I just want to make sure
18 that you're not disputing what Attorney General Fox
19 said, which is that Montana as the downstream state
20 ultimately loses if no one does anything to enforce
21 their obligations under the Compact.

22 In other words, I don't see any way if the
23 court just were to decide to walk away from this case
24 that Montana wouldn't be the only one who could
25 possibly suffer from that.

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1 MR. KASTE: Well, I agree that it's
2 conceivable that if the Court did nothing in the course
3 of this case, in the future Montana could be injured by
4 the conduct of Wyoming. It hasn't happened yet.

5 SPECIAL MASTER: I understand that's your
6 argument. Go ahead.

7 MR. KASTE: But I agree that there's a
8 balancing in enforcing the plain meaning of this
9 Compact that protects both of us. And if you go too
10 far in either direction, one state or the other is
11 going to be harmed. So if you allow Montana unfettered
12 bypasses through its reservoir and then it's perfectly
13 fine for them to ask us to make up the shortfall caused
14 by their own action, Wyoming is injured by the failure
15 to enforce the doctrine of appropriation as against
16 Montana.

17 Similarly, if you allow Wyoming unfettered
18 post-1950 use to the detriment of Montana's pre-1950
19 rights, Montana could be injured by our conduct. But
20 the Compact protects us both and the Court can and
21 should fairly apply the doctrine of appropriation to
22 protect Montana from post-'50 use in Wyoming and
23 Wyoming from profligate bypasses from the Tongue River
24 Reservoir.

25 And they should protect us from this idea that

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1 maybe Montana tells us in December we had a bad year
2 and so you owe us for that entire year. That proceeds
3 retroactively. We need to be protected from that type
4 of claim. That's not consistent with the doctrine of
5 appropriation at all. It's not consistent with what we
6 agreed to in 1950 and we need the Court to say no to
7 that.

8 SPECIAL MASTER: So one other thing I'm not
9 necessarily expecting you to address right now, but I
10 think as we get into some of the issues I want to make
11 sure that you're addressing them along the way.

12 And that is again given that Montana is the
13 downstream state, that means that they ultimately have
14 to either rely on Wyoming complying with the Compact or
15 the United States Supreme Court in order to ensure that
16 the rights that they do have under the Compact are
17 recognized.

18 I know that when Mr. Tyrrell was on the stand
19 one of the things that he emphasized and a number of
20 Wyoming officials emphasized is that, as you pointed
21 out, Wyoming would like certainty and Wyoming plans to
22 comply with whatever ruling the United States Supreme
23 Court gives.

24 One of the things that worries me, though,
25 when I look at the way in which this case has emerged

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1 is that, as you pointed out, just submitting a notice
2 to Wyoming is not necessarily going to be the end of
3 any particular dispute.

4 And so in this particular case there's issues
5 over what exactly the reservoir rights are. There are
6 issues over whether or not Montana has actually proven
7 a case with respect to its pre-1950 direct diversion
8 flows. There are issues over exactly what has happened
9 in Wyoming in terms of who has used what water, what
10 the impact of groundwater is.

11 And I realize these cases are always
12 difficult, but one of the questions I had was whether
13 or not every single time that there is a dispute it's
14 going to end up in the United States Supreme Court with
15 dozens of issues like this particular case did and
16 whether or not there's a way of resolving this case so
17 that the Supreme Court doesn't ultimately become not
18 simply, you know, a court enforcing a compact but
19 basically a water court having to police each
20 individual issue as it arises.

21 MR. KASTE: Well, I think the answer is if we
22 were on our worst behavior, that could be the case, but
23 I don't think that's anybody's intent. You know, we
24 are in a situation where the parties have to live with
25 this compact for the future. It's not a one-off

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1 compact where we have this fight and then we just move
2 away from each other.

3 It's not a divorce. Whoever doesn't move
4 can't pick up our half and go home because we are going
5 to have to work with each other in the future. And
6 that's why certainty and guidance about the nature of
7 the parties' rights are so important in this case so
8 that the parties, who I think are both trying to act in
9 good faith in line with what the court has said the
10 Compact means, so that we can proceed without further
11 disputes.

12 Of course, this isn't the only forum. We do
13 have a dispute resolution mechanism in the Compact
14 Commission that no one has yet taken advantage of, but
15 it's there and both parties I think recognize that once
16 we know where the goalpost is with regard to calls,
17 what are they going to look like and what kind of
18 information is Montana going to show us so that, yes,
19 that's our problem and we need to shut off.

20 And it doesn't have to be much. I think what
21 you've heard from Mr. Tyrrell is we need some
22 reasonable assurance that there's an actual shortage
23 and not some arbitrary number on a gauge at the state
24 line that tells us what's happening at a headgate 200
25 miles away. We need some reasonable assurance that

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1 there is actually -- and need some reasonable assurance
2 that the water commissioners have been empowered and
3 are shutting off any post-'50 uses.

4 And I think we solve the evolution from the
5 2004 call letter and the 2006 call letter and the
6 attachment of the water commissioner's affidavit from
7 2006 was a significant step in the right direction as
8 to what a valid call letter is likely to look like.

9 You know, it's likely to see a letter from the
10 compact commissioner or the governor saying, "now is
11 the time. Here's what my water commissioner has to say
12 about what's going on. He's talked with the
13 irrigators. He's talked with Mr. Muggli. We need some
14 water. Stores are inadequate. We've taken into
15 account the appropriate things, such as current flows,
16 tributaries inflows. We know what's going on in the
17 reservations."

18 These kind of things happen in a properly
19 functioning system where the water commissioner has
20 actually a strong understanding of what is the
21 difference between the reservoir water there and the
22 natural flow that is going to be the basis of that
23 call.

24 We're going to have to take that message from
25 the water commissioner, that message from the Compact

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1 commissioner. And you've heard Mr. Tyrrell. We're
2 going to respond to that. We're going to go up and
3 down places that aren't already in regulation and that
4 means maintaining the Tongue and Bill Knapp and Pat
5 Boyd are going to spin headgates for those people who
6 are taking water under post-1950 appropriations. It's
7 not that hard to do and we do it in Wyoming all the
8 time.

9 What we need, though, is some sort of
10 assurance that what we're doing in Wyoming is really
11 for the benefit of the pre-1950 appropriation in
12 Montana. We didn't do that in 2004 and 2006 and we
13 acknowledge that and the consequences that flow from
14 that failure.

15 We all agree it's Pat Tyrrell's fault.

16 If there are consequences that flow from that,
17 we are willing to accept those because we didn't honor
18 the call. We will have arguments later today about,
19 yeah, we did not get in the call. You recall that we
20 admit that we acknowledged in those two years when we
21 actually got the notice and we acknowledge that there
22 was some storage after the call in 2004. We
23 acknowledge that we didn't do the things that we need
24 to do in the future.

25 But I think you heard from Pat Tyrrell we're

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1 going to do those things in response to a call in the
2 future. It's not that complicated. We're not likely
3 to be back there unless we don't get good guidance on
4 that reservoir. Because that's where the rubber meets
5 the road in this case as I told you in the opening.
6 That is the most important thing.

7 That is the lifeblood of the farmers in
8 Montana. And the reservoirs in Wyoming are the
9 lifeblood of our farmers and we have to send water to
10 Montana during the course of the summer inappropriately
11 to make up a shortfall they created, then it's going to
12 hurt farmers in Wyoming.

13 SPECIAL MASTER: Let me ask you just one other
14 question and then I want to get to the notice issue,
15 but you did bring up issues of burden of proof.

16 And I have a very sort of general question on
17 burden of proof and figuring out who has what
18 responsibilities. I assume that in thinking now of
19 burden of proof that I should start out by looking at
20 the Compact to see whether or not the Compact helps
21 gravitate that issue. And my initial impression on
22 that is that the Compact helps in the sense that it
23 refers specifically to prior mitigation law.

24 But then, second, I would look to prior
25 appropriation law to see who would have compacts on the

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1 issues and then to the degree that's not relevant I
2 look at contract law. You aren't shaking your head no.

3 MR. KASTE: I am. I want to talk about this
4 because there seems to be a lot of confusion that this
5 is a contract case. The Plaintiff bears the burden of
6 proving all the essential elements of his contract
7 claim. There is a difference and one that we need to
8 be cognizant of. You need to be cognizant of the
9 difference between the prior appropriation document
10 that honors the duty, the substantive duty of the
11 parties and Montana's breach of contract claim in this
12 case, which is defined by contract law and for which
13 they bear the burden of proof on every single element.

14 There is a difference in the prior
15 appropriation doctrine in practice today. We go out
16 and someone makes a call on the river and they tell the
17 hydrographer commissioner. "Sure. I'm on my way."
18 And the hydrographer commissioner walks up to the next
19 guy who is junior and shuts off his headgate.

20 He doesn't care. There's no burden of proof
21 or anything. He just shuts it off. If that guy
22 doesn't like it, well, then he has to prove that it
23 shouldn't have been shut off. That's the burden
24 shifting that we talked about. That's the burden that
25 you go, hey, maybe that applies. No. That's a

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1 different scenario in this case.

2 What happens in the field and what happens in
3 response to those contemporaneous regulatory activities
4 and who has to prove what's there is very different than
5 what has to be proven by the parties in this case.

6 This case has a claim for breach of contract and the
7 burden in that case always falls on Montana. They are
8 different and they cannot be treated the same and we
9 cannot intermingle those things when we look to see
10 whether or not Montana has proven its case by a
11 preponderance of the evidence.

12 Now, the prior appropriation document
13 definitely defined our duties to each other, but it
14 doesn't define whether or not they prevail in this case
15 when we look at each of the elements. Because cause of
16 action and the nature of those duties that we promised
17 to each other in the Compact are different in the same
18 way that -- you know, contracts contain a lot of
19 promises and unless they specifically say we're going
20 to move the burden of proof in some way the burden of
21 proof always falls on the plaintiff in the case.

22 SPECIAL MASTER: But why if the Compact, the
23 contract in this particular case, incorporates the law
24 of prior appropriation, why don't I look to the law of
25 prior appropriation then to determine not only what the

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1 substantive responsibilities are but also what is
2 necessary in order to establish liability?

3 MR. KASTE: Well, we do in the sense of what
4 did the parties do to each other, but for the purposes
5 of describing the burden of proof for the claim made in
6 this case you have to look elsewhere.

7 This is a different case than if we had, like
8 I say, the junior appropriator who came into court and
9 said the water commissioner, he inappropriately shut
10 off my diversion in order to feed the senior down
11 there. In that case he has to prove that the water
12 commissioner's actions were wrongful.

13 That's not this case at all. This is a
14 different case. We have a contractual relationship.
15 At its core Wyoming and Montana, we're not regular
16 appropriators stuck on a stream together with no
17 contract between us. We entered into a contract to
18 settle these disputes and the nature of that
19 relationship agreement had meaning. It's important and
20 it puts the burden of proof on the complaining party.

21 At its core this case is a contract dispute by
22 two parties who entered into an agreement. And that's
23 different than two appropriators intrastate having a
24 fight amongst themselves and relying on the doctrine of
25 appropriation and state statutes to settle their

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1 dispute as between them. And that difference is
2 important and that's why I say we're got to make sure
3 that we properly differentiate the two.

4 SPECIAL MASTER: So if that's true, then in
5 thinking about what type of notice is required in this
6 particular case, shouldn't I look to just general
7 contract law rather than to any prior appropriation
8 cases?

9 MR. KASTE: Well, as I say, the duty -- the
10 promises made to each other were to abide by the
11 doctrine of appropriation and the notice is intrinsic
12 to the doctrine of appropriation. To that I think
13 you're right. And so our promises to each other
14 include that promise to provide notice. Contract law
15 tells us what kind of notice when it's not otherwise
16 specified is sufficient. It says whatever is
17 reasonable. Right? I think you put that in one of
18 your prior rulings.

19 It seems like an oral notice would be
20 reasonable under the circumstances. I think it would
21 be better if it was something else. Anyway Montana
22 didn't provide it.

23 But there is this series of promises that we
24 made to each other when we agreed to abide by the
25 doctrine of appropriation interstate, but that's

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1 different -- that's at a different level than the
2 contract obligation we undertook that defines our
3 relationship.

4 SPECIAL MASTER: Okay. Mr. Brown, did you
5 have something to say?

6 MR. BROWN: I apologize. I did.

7 I just wanted to mention Mr. Kaste, though
8 inflammatory, is not very loud and the people in the
9 back apparently can't hear. So is there any way we can
10 boost the audio a little bit?

11 SPECIAL MASTER: I think that is the first
12 time I've ever heard anyone accuse Mr. Kaste of being
13 softspoken.

14 MR. KASTE: Well, I don't want to yell.
15 You're only six feet away from me. I mean I'm saving
16 that for later.

17 I will do my best in the future arguments to
18 try and fill the room and maybe I'll get more wound up
19 and it will happen.

20 SPECIAL MASTER: Okay. So this is fine. So
21 that was -- so I think I understand your position much
22 better than before. So this has been very helpful.

23 So why don't we move on at this stage if
24 people are fine with that and unless, Attorney General
25 Fox, you wanted to say anything in rebuttal I was going

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1 to turn things over to Mr. Draper to turn to the notice
2 issue and, of course, address the general question of
3 burden of proof among others.

4 ATTORNEY GENERAL FOX: I have nothing further,
5 Your Honor. I was tempted to rest our case just based
6 on your questions and counsel's answers, but I suspect
7 we ought to add a little more.

8 SPECIAL MASTER: I think I would advise that,
9 yes.

10 Mr. Draper?

11 MR. DRAPER: Mr. Swanson will address the
12 notice issue, Your Honor.

13 SPECIAL MASTER: Okay.

14 MR. DRAPER: Thank you.

15 SPECIAL MASTER: Good morning, Mr. Swanson.

16 MR. SWANSON: Good morning, Your Honor.

17 At the outset I just want to point your
18 attention to Plaintiff's A in our reply brief and
19 that's the outline addressing your specific questions
20 that you had instructed the parties to address and in
21 terms of the notice provision at page 70 and so on.

22 So in the course of my argument I'll attempt
23 to answer all those questions. If at any point I
24 haven't sufficiently answered, then I will redirect as
25 you will have me readdress issues.

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1 SPECIAL MASTER: Okay. That would be great.
2 And I do have some questions, but why don't you start
3 out and then I'll probably just jump in fairly quickly.

4 MR. SWANSON: All right, Your Honor.

5 And at the outset I think it's important to go
6 back to just the framing of where we are in the context
7 of this dispute that began we know in terms of notice
8 no later than 1981 up through 2006 for the purpose of
9 this litigation and to remember Wyoming's response
10 through all of those years. And there were a couple of
11 them.

12 The first was continued insistence on the
13 position that there is no provision for a call under
14 the Compact and that was their position through 2006,
15 in fact, until late in this litigation.

16 And, second, that really the dispute wasn't
17 about Article V(A) which said Montana's pre-1950 rights
18 should be protected against post-1950 depletions of
19 Wyoming. They continued to assert that the dispute was
20 really over Article V(B) simply dividing up the other
21 remaining waters, and Montana continued to insist that,
22 no, we, in fact, had to administer Article V(A) because
23 until we were assured that we had our pre-'50 rights
24 satisfied there was no point in discussing leftover
25 water because there, in fact, may not be leftover

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1 water.

2 And those two positions continually adhered to
3 by Wyoming give us the context for all of the arguments
4 over notice and call in the years from 1981 through
5 2006. And specifically if you look at 2004 and 2006
6 letters, and I'll start there and go back to the
7 beginning, Wyoming said there, in fact, is no provision
8 for a call, although Mr. Kaste has acknowledged that
9 was a call and he says there was no call prior to 2004.

10 So if that's the standard, that there has to
11 be a formal letter citing the detailed portions of the
12 Compact, now let's go back and look at 1981. And in
13 1981 Montana not just provided notice, Montana called
14 for water under the Compact. And we have written
15 evidence produced by the handwriting of the State
16 Engineer of the State of Wyoming.

17 And Mr. Fritz, our responsible official,
18 called Mr. Christopulos, Wyoming's responsible
19 official -- this is Exhibit Montana 136 -- and asked
20 for water, identified that we were short of water,
21 asked that water -- that senior water rights in Wyoming
22 be curtailed in order to provide us water.

23 And Wyoming, in fact -- according to
24 Mr. Fassett, this is actually Christopulos's
25 handwriting. So it's stated here himself calculated

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1 that there were post-1950 water rights being enjoyed on
2 the interstate ditch in Wyoming and added up to instead
3 of 9 I believe it was 18 to 20 CFS, which he had
4 identified specific places they could curtail and the
5 location of that ditch as close to the border that
6 water would have gone to Montana.

7 And so we have a crystal clear situation here
8 where there was a Compact violation and yet Wyoming
9 maintains that was not a valid call.

10 So what we have, Your Honor, is an elevation
11 of the standard of what Montana's duties are for notice
12 or for call under this Compact that, if we look through
13 that prism, we realize we're back to the thing General
14 Fox mentioned in his opening: Number one, that we
15 believe the evidence proves we did provide adequate
16 notice, but, number two, that we are concerned about
17 what future calls will look like and what future
18 notices will look like and how Wyoming will respond.

19 So with that framework I think it's clear in
20 1981 we provided adequate notice and Wyoming should be
21 liable for that notice. In 1982 the Compact Commission
22 discussed this issue and at that point Montana stated
23 that it would provide notice of Wyoming when it was
24 short. Wyoming did not commit to responding by
25 curtailing any rights.

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1 In 1983 Dan Ashenberg produced a memorandum
2 that was a proposed methodology of how to protect
3 Montana's rights under Article V(A). What you see here
4 beginning even in those years Montana is working to
5 creatively find a way to protect senior water rights
6 and find a way to reach a yes with Wyoming.

7 In 1984 Montana's governor wrote a letter that
8 said that Montana's pre-1950 water rights should be
9 satisfied. Wyoming's governor disagreed.

10 In 1985 Montana expressed its frustration at
11 the Yellowstone River Compact engineer meeting. We are
12 trying to find a way to administer the Compact and we
13 have now provided five years of discussion and requests
14 that Montana's senior water rights be honored. Wyoming
15 continues to resist.

16 1986. Gary Fritz and George Christopulos had
17 a phone call that's part of the wire CC record that
18 Mr. Fassett testified to on working on a process to
19 administer the Compact and to seek a way to honor
20 Montana's senior water rights and Christopulos in that
21 conversation acknowledged the 1981 call when they were
22 aware at that time that Montana's water rights were in
23 jeopardy of not being honored.

24 SPECIAL MASTER: I'm sorry. I want to jump
25 into the elements because I'm thinking that I have

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1 several questions I want to ask and rather than sort of
2 going through each of the years because, again, I've
3 found that. I've looked at the evidence on these.

4 So I guess the first question -- this is going
5 to be relevant to both you and also to Wyoming. So
6 both sides have suggested I should reconsider some of
7 my initial ruling with respect to whether notice is
8 required and, if so, what the nature of that notice
9 should be.

10 So Wyoming, you know, believes that, you know,
11 I should make it very clear, it's in writing. Montana
12 has suggested and cited two new cases, one from Wyoming
13 and one from Montana that, in fact, I should reconsider
14 whether or not notice is required at all.

15 In that regard what is the status of my prior
16 rulings on this? You know, to what degree should I at
17 this stage be willing to reopen what the actual notice
18 should look like, whether or not notice is even
19 required? Should I just view this as basically an open
20 question again or at this particular stage should I
21 feel myself as somewhat bound by what I said before?

22 What makes this a particularly interesting
23 issue is, of course, ultimately it's the Supreme Court
24 that decides these issues and what I will be doing in
25 my special report is making recommendations to the

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1 Supreme Court on how to rule on this particular issue.

2 So do you have any thoughts on that question?

3 MR. SWANSON: I do, Your Honor. I do. And
4 the reason I was going to go through the narrative of
5 the years is I wanted to address an issue of possible
6 exceptions to the notice requirement. And I think my
7 discussion on that will inform your question and, if it
8 doesn't answer it, I'll continue to reemphasize it.

9 But the idea that there are reasons why
10 Montana shouldn't be required to provide notice, you
11 indicated three possible exceptions. One, Montana --
12 we argued that, number one, it would be futile. And
13 the reason I started with the discussion of all those
14 years is it became clear Wyoming had set its legal
15 position and was not going to change. It was the
16 upstream state and didn't have to until we forced them
17 somehow to do that.

18 So year after year even though we continued to
19 provide information and provide ways, creative ways to
20 administer the Compact and receive our rights and
21 specifically our officials, if you remember the
22 testimony of Mr. Stults, was they were very cautious
23 about getting into a litigation position with Wyoming
24 because of the financial resources and because of other
25 reasons.

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1 And so we were trying to provide a way for
2 Montana's rights to be honored without taking it to the
3 nuclear option. And yet through all those years
4 Wyoming persisted to not change its position and
5 continued to say there's no call, we're not required
6 and under V(A) your rights are protected.

7 So I think in terms of the futility issue that
8 further notice wasn't going to avail Montana of
9 anything. The second --

10 SPECIAL MASTER: So if I can just ask on the
11 futility side because I certainly got the sense from
12 the variety of Montana's witnesses that they felt
13 frustrated at the time. But given that in 1981 after
14 there was, you know, what you consider to have been a
15 notice to Montana there appears to have been a
16 recognition on the record at a Yellowstone River
17 Compact Commission meeting that, you know, this was an
18 issue and that Montana would provide notice in the
19 future.

20 Is there any statement after that in which
21 Wyoming basically said, no, you know, don't even think
22 about providing notice, we're not going to do anything
23 at all? In other words, you know, once you have that
24 statement in the Yellowstone River Compact Commission,
25 that seems to be a recognition that maybe Wyoming will

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1 do something if they get a notice.

2 And so can you argue that it was futile to
3 provide a notice after that when Wyoming seemed to
4 recognize that maybe they would do something with
5 notice?

6 MR. SWANSON: Well, Your Honor, first of all,
7 there wasn't a requirement that it was a written notice
8 in that sense.

9 SPECIAL MASTER: That's a separate issue. Put
10 it aside. Just address the futility question.

11 MR. SWANSON: Separate issue. Secondly,
12 Wyoming never committed to act even in 1982 when we
13 basically voluntarily said we're going to keep telling
14 you when we're short on water. If you look at all the
15 subsequent communications -- and I'm not specifically
16 talking about the Compact Commission communications
17 because what we've had here are many Montana and
18 Wyoming state officials who in multiple or dual had it
19 that carried on those communications whether it was
20 inside the Compact Commission or outside the Compact
21 Commission.

22 But one of the things that's interesting is
23 this 1984 exchange of letters between the Montana and
24 the Wyoming governors and at that point the official
25 position of Wyoming was communicated to the highest

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1 level again saying we don't believe we have any
2 obligation to curtail, to honor your senior water
3 rights.

4 So that's an example where the boss of the
5 boss of our Compact Commissioner received word that
6 basically Wyoming is not going to respond. I don't
7 know. There may be something in this particular record
8 that we could go find, but in terms of the
9 communications that happened from officials from the
10 bottom level to the top level, Wyoming's position was
11 there's no point in asking because we're not going to
12 send you water.

13 And that goes all the way through all the
14 years in question, all the testimony of Rich Moy,
15 testimony of Jack Stults, Keith Kerbel, all the way
16 down.

17 Does that answer your question in terms of
18 what you're looking for?

19 SPECIAL MASTER: Yes. It's responsive to the
20 question. That was exactly what I'm asking.

21 MR. SWANSON: The second thing in terms of the
22 exception to the notice is the exception dealing with
23 Wyoming had other reasons to know, Wyoming already knew
24 even without our providing them affirmative notice that
25 our rights were short. And this one is pretty obvious.

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1 They were experts on the hydrology. Our
2 people were experts on the hydrology. You heard a lot
3 of testimony about the hydrograph and how it drops off
4 after the runoff. And you heard a lot of testimony
5 about how water from the Tongue and Powder River Basin
6 is all, with some very minor exceptions, runoff from
7 the State of Wyoming.

8 So in each of those conversations -- let's
9 take, for example, the conversations between Mr. Kerbel
10 and the Wyoming officials. And you recall that he kept
11 saying, "Hey, it's really dry up here." And they said,
12 "Yeah, it's really dry down here and we're regulating
13 back to 1881."

14 Well, all these water professionals knew the
15 geography. They knew where the Montana water comes
16 from. It comes from Wyoming. If Wyoming is regulating
17 back to 1881, how in the world can Montana 1951 rights
18 be receiving their water? They can't. And they all
19 knew that.

20 Not only did they all know that from their own
21 personal knowledge but from all of the communications
22 that went back and forth beginning -- I mean, you know,
23 probably no later than -- well, certainly the Compact
24 Commission negotiations and certainly communications
25 that happened in the 1950s, 1970s onwards which we

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1 pointed out in our statement of facts.

2 So the water situation in Wyoming is so linked
3 with the water situation in the Tongue River there
4 wasn't a reason why Montana had to call Wyoming and say
5 it was dry. They would be calling us and telling us it
6 was dry before we knew it was dry.

7 SPECIAL MASTER: Could I just again -- this is
8 probably a good inroad into another central issue I
9 have with respect to this and it's the -- it's the
10 question of whether or not the ultimate purpose of the
11 notice or any section which exists under notice is to
12 ask whether or not Wyoming knew that Montana needed
13 water.

14 So it's a question of just, you know, was
15 there knowledge that, in fact, Montana was short of
16 water, or was there an additional requirement that was
17 necessary, which is that not only did Montana -- or
18 Wyoming have to know that Montana was short of water
19 but that Montana needed to say please release some
20 water pursuant to the Compact for our particular use.

21 And in my various rulings on the question of
22 notice I suggested that it's not just a matter of
23 whether or not Wyoming has suspicions that maybe
24 Montana was short on water, but until there was an
25 actual demand then Wyoming wasn't under any obligation.

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1 And the reason why I included that in those
2 earlier rulings was because if you look at the various
3 cases -- there are not very many of them. There are
4 various cases that talk about a call -- the suggestion
5 is that the element of a call is it's a demand for
6 water. It's the junior appropriator saying to the
7 senior -- I'm sorry, the senior -- the senior
8 appropriator saying to the junior appropriator, you
9 know, we need your water.

10 And so, you know, if you go, for example, to,
11 you know, the major case that I relied upon in those
12 earlier rulings, which was the Worley case, then, you
13 know, what Worley specifically said was that the
14 requirement is that there be an actual demand for the
15 water.

16 And so I'm just interested in your thoughts as
17 to whether or not that should be a requirement and, if
18 not, why.

19 MR. SWANSON: Well, and I want to preface it
20 by saying we're not -- even though I'm arguing for the
21 exceptions, I'm arguing for clear exceptions as well as
22 Wyoming resisted efforts to --

23 SPECIAL MASTER: And I want to get back to
24 that. It's just this question of whether or not it's
25 just, you know, understanding that Montana needs water

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1 or a specific request where Montana says it needs the
2 water is I think relevant to two things.

3 Number one is how I might apply that exception
4 of what actually Wyoming knew. Because the exception
5 may not make a lot of sense when I think back at it if,
6 in fact, you know, what a call generally requires is an
7 actual demand for the water.

8 And then, second of all, in a lot of the
9 testimony of the various witnesses with respect to what
10 happened at various points in time, I think that if you
11 look at the testimony of a lot of the Montana witnesses
12 a lot of them are saying, yeah, we told Wyoming we were
13 short of water down here, but then when it gets to the
14 question of, well, did you actually make a call on the
15 water, then things become a little bit vaguer leaving
16 the possibility that what was happening was you had
17 Montana officials calling up people in Wyoming and
18 saying, hey, we're short on water down here but never
19 saying the words "and therefore please release the
20 water."

21 And so I think this question of whether or not
22 that demand element is essential could be determined on
23 some of these things.

24 MR. SWANSON: Yes, Your Honor. And we're not
25 trying to say that no notice because we didn't provide

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1 notice. We think it's crystal clear we provided notice
2 in all those years, '81, '87, '88, '89, 2000, 2001,
3 2002 and obviously 2004 and 2006. We believe we
4 provided adequate notice to Wyoming in each of those
5 years.

6 Secondly, we also, and without the formality
7 that Wyoming would like, asked for water, certainly in
8 1981 because that one is evidenced by the documents.
9 And I'll talk about the other one in a moment.

10 So the question would be is there not a
11 requirement for Montana to demand a certain amount of
12 water. And looking at your previous notice
13 requirements your notice requirement was that Montana
14 did not believe it was receiving sufficient water under
15 the Compact and Montana placed Wyoming on adequate
16 notice that it wasn't receiving this water and then the
17 duty was -- we didn't have to determine the reason for
18 the insufficiency, but the fact that it would be on
19 Wyoming to determine whether the insufficiency was the
20 result of their post-'50 uses.

21 And this is your opinion from December 20th,
22 2011 on the notice requirements. We think that ruling
23 should stand unless we feel that the exceptions are
24 strong enough given Wyoming's continued intransigence
25 on this issue.

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1 Going to the second part, which is whether we
2 had to actually demand water, that's why I began with
3 this context of Wyoming's continued legal position that
4 there is no such thing as a call on this Compact and
5 that even if there were that it would only apply to
6 Article V(B) allocations by percentage, not Article
7 V(A) protection of our rights.

8 That context shades Montana -- the behavior of
9 Montana officials. We knew we were up against the wall
10 and in the words of Mr. Moy we could only push water
11 uphill so long and eventually you give up. And because
12 we knew we were up against an unyielding partner we
13 ended up having the Jack Stults mentality which said,
14 "I'm not going to demand. I'm going to come up with
15 creative ways to try and get more water out of this
16 basin because I don't want to have to spend the next
17 ten years in litigation," which is ultimately what
18 we've done.

19 And so what Mr. Stults did is he tried to come
20 up with a way to say let's get more water out of this
21 basin. He was not trying to rewrite the Compact or
22 form a new compact as Wyoming claims. He said in his
23 testimony he was trying to find a way more
24 cooperatively to get more water out of the basin and,
25 if that didn't work, he could always go back to just

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1 saying, no, we're only going to go by the plain meaning
2 of the words.

3 And I asked him in his testimony, "Why did you
4 propose this more creative cooperative way to manage
5 it? Was it to get more water?"

6 He said, "That's the only reason I did it was
7 to try and get more water from Montana."

8 And I asked him, "Did you understand -- did
9 Wyoming officials -- do you believe Wyoming officials
10 understood that to be a call?"

11 And he said, "They are professional water
12 engineers. They would have had to be deluded not to
13 understand that as a call."

14 That was our last effort at cooperative ways
15 to get water without demands prior to 2004. So if you
16 look at those years with Mr. Stults, 2002, 2001, and
17 you look at Mr. Kerbel's testimony in the same years as
18 well as 2000, each time they asked for water.

19 Mr. Kerbel said in his own way, "Hey, can you
20 kick any water, any more water down here?"

21 And Mr. LoGuidice or whoever he spoke to said,
22 "Nope. We're all dried up," even though they weren't
23 regulated.

24 So I don't know that we have to -- number one,
25 I don't think there's any reason to revisit it. Number

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1 two, I think the evidence is clear that we provided
2 notice and we also requested water even though we
3 didn't do it with the formality that Wyoming required.

4 But, number three, going back to the context
5 of this basin it's clear for future remedy purposes.
6 It's clear that Wyoming understands the basin, Montana
7 understands the basin. The analysis by Mr. Book shows
8 when water will be needed in Montana. Certainly for
9 direct flow it's engaged and if the flow that he's
10 established in his Exhibit M6 flows into the reservoir
11 we will know on June 30th whether our reservoir is
12 full.

13 And so rather than overcomplicate this by
14 trying to go back and revisit it, we think the standard
15 established is acceptable and we think that we have met
16 that standard in each of the years at issue, but in
17 addition to that Wyoming's continued opposition to
18 cooperating with us and Wyoming's continued statements
19 from 1981 onward saying we will not honor a call no
20 matter how fancy you make it also should relieve us of
21 the burden of some of those years when we can't, for
22 example, 2000, tell you a specific date when we
23 provided notice.

24 SPECIAL MASTER: Okay. Let me just sort of go
25 back and talk about the various findings on my plate.

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1 So I'm assuming the best from your standpoint
2 is that I conclude that, in fact, in the relevant years
3 that based on the testimony of the Montana witnesses
4 that, in fact, Montana issued calls, and they might not
5 have been written calls, but they actually made it
6 clear to Wyoming that not only was Montana short of
7 water but they wanted Wyoming to produce water. Okay.
8 That would be clearest for you.

9 The second possibility, though, is that
10 looking at the record that with the exception of 2004
11 and 2006 what I conclude is that, well, certainly there
12 were a lot of people in Montana that called people in
13 Wyoming and said, "hey, we're short on water here" so
14 that Wyoming should have known that Montana needed some
15 additional water. But no one got to that sort of last
16 phrase of saying "and we demand, we ask, we want you to
17 provide Montana with some additional water."

18 Now, if I just look back at what my prior
19 rulings have said, it would suggest that if I were to
20 conclude that, then I would have to rule against
21 Montana. And the reason is is that -- right now I'm
22 just going to quote from page 14 of my September 28th,
23 2012 decision on Wyoming's motion for partial summary
24 judgment. This is on page 14 and talking about what
25 the notice would require.

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1 I say, "In this case, such information would
2 include notification that Montana is not getting
3 sufficient water to meet its pre-1950 appropriative
4 rights and a request that Wyoming reduce its post-1950
5 uses of water in order to allow more water to flow to
6 Montana."

7 And the reason why I included both counts of
8 that, both that, number one, Montana isn't getting
9 enough water and, number two, Wyoming should release
10 water to us is that if I look back at the Worley case,
11 again one of the few cases out there that actually
12 addresses what is required -- just as a total
13 digression, I'm surprised at how many basic issues of
14 prior appropriation law appear never to have been
15 resolved by a court or addressed by one court. You
16 would think there would be a lot of law on these
17 issues.

18 But it says that an upstream junior generally
19 cannot be held liable for downstream seniors', quote,
20 "shortage of water" unless the senior has demanded has
21 that water, to the extent of its needs and within the
22 senior appropriation, be allowed to reach its diversion
23 point. The absence of such a demand is decisive.

24 So there seemed to be that sort of critical
25 element of the call that it was something more than

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1 simply notice of we're not getting enough water. It is
2 saying "and release some."

3 And I guess one of my -- so my first question
4 is I assume that Montana would claim that actually it
5 would be fine even if there wasn't that demand and, if
6 that's the case, your view would be that that was an
7 adequate form of notice, what was the argument for
8 ignoring the demand portion of it and just saying the
9 amount of water by itself is sufficient?

10 MR. SWANSON: Well, first of all, Your Honor,
11 we wouldn't concede that we never asked.

12 SPECIAL MASTER: Oh, I understand. I
13 understand. I thought I'd just be going down and I
14 start out with the best scenario for Montana and then
15 just walking down to see depending on what I ultimately
16 conclude the Supreme Court thought what the law should
17 be.

18 MR. SWANSON: And so in terms of if we were at
19 that point of we notified or didn't do the demand or,
20 as Jeff Fassett said, we didn't pound on the table or
21 say the magic words, where we are is we are in the
22 context that I began from 1981 at minimum onward
23 communicated by the state engineer, by the governor
24 that said we're not going to provide the water.

25 In fact, Wyoming in its post-trial brief says

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1 1981 was not a call and the reason it wasn't a call is
2 because the handwritten notes say that Mr. Fritz has
3 said if we ask for curtailment what we would get. And
4 Wyoming said, well, you'd get this much, but we won't
5 give it to you.

6 And Wyoming said, well, you didn't ask for
7 water. That was a hypothetical that what if we did ask
8 for water. And that's our point, that from 1981 onward
9 what we had was a position by Wyoming that says you can
10 ask and it doesn't matter. We're not going to give it
11 to you.

12 So we had two parallel tracks. You had a
13 track with the chairman who wouldn't do anything and so
14 he wouldn't take both. And so you had continued
15 efforts year after year to try and administer the
16 Compact that were continually met with lack of a second
17 on a motion by Wyoming. And you had the track of the
18 more informal communications between Montana and
19 Wyoming regulators that are continuing to talk to each
20 other.

21 And those can't be viewed in isolation. What
22 those demonstrate is a continued request by Montana for
23 water, but that that water can't be provided unless
24 Wyoming agrees to do it under the Compact, and they
25 continued to refuse year after year meeting after

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1 meeting to even address the issue under the Compact.

2 And as you heard from the water commissioners
3 from Wyoming, and each of them sat on the stand and
4 were asked the question would you regulate the
5 interstate gates for the main stem of the Tongue to
6 provide water for Montana. And they said, well, we're
7 not going to do it until the state engineer tells us to
8 do it.

9 The state engineer was with the water
10 commissioner -- or the Compact Commissioner who said
11 we're not going to do it. So that's the reason why I
12 began with that context, Your Honor, is that we knew
13 not just because it was hypothetical, but because we
14 had asked repeatedly for that water and were
15 continually told no.

16 So at some point the Jack Stults we're going
17 to try something more creative approach took over,
18 which is even though he's asking for water he's asking
19 to -- he's asking to more creatively do it in order to
20 get the water, but he's still -- his testimony was
21 saying he's asking for it, but really what he was doing
22 is he recognized he was up against a brick wall and the
23 demand was pointless if he did.

24 SPECIAL MASTER: Let me just -- so we've
25 talked about what the notice might look like. We've

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1 talked about the futility exception. So as you pointed
2 out, another exception which I suggested in my original
3 opinion was a potential exception for preventing
4 Compact administration. The notion here was that, to
5 the degree that Montana kept trying to set up a process
6 for meeting its rights under the Compact and Wyoming
7 just kept avoiding those, that maybe at some point
8 Montana would not have any obligation to provide any
9 form of notice.

10 And as you pointed out, I think there's a lot
11 of testimony on the record that there were various
12 efforts on Montana's part to come up with various
13 approaches for managing the Compact and Wyoming
14 certainly participated in those negotiations, in some
15 cases rejected ideas.

16 If I had a situation where Montana had a
17 proposal that basically said, look, we need a process
18 so that when pre-1950 appropriators of Montana are not
19 getting their water Wyoming is going to release water
20 from post-1950 appropriators. And Wyoming said no,
21 we're not going to come up with any process for dealing
22 with that.

23 That would be the sort of thing I would see
24 falling under the exception, but at the trial most of
25 what I heard were situations where it was Montana

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1 coming up with an approach to administering the Compact
2 as a whole, not just protecting pre-1950s appropriators
3 from post-1950 appropriations in Wyoming, but dealing
4 with a whole variety of other questions such as how do
5 you actually implement Article V(B) or how you might
6 run the entire watershed on a more holistic basis in
7 order to maximize the amount of water coming out.

8 And that's what I heard Wyoming on a number of
9 occasions saying no, we actually aren't sold on that.
10 And that strikes me as a very different matter because
11 it's really getting to other issues where maybe Montana
12 wasn't actually just trying to exercise its rights
13 under the compact but trying to come up with something
14 more than what the Compact provided.

15 So with that as background my question is was
16 there or are you aware of a situation where there was a
17 proposal that just addressed the sort of narrow stuff,
18 this narrow issue of bringing up post-1950 water or
19 pre-1950 appropriations in Montana where Wyoming said
20 no, we're not going to go along with that?

21 MR. SWANSON: Your Honor, I'm not aware of one
22 in isolation because they all were part of this overall
23 conversation with the Compact, but that specific issue
24 was addressed in these conversations. If you recall,
25 there were kind of three major issues that were of

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1 controversy in the 1980s. There was the Middle Fork
2 project which was the unbuilt reservoir in Wyoming, the
3 question of Article V(A), the question of the Article
4 V(B) apportionment.

5 But the Article V(A) issue not only lingered
6 but was viewed by Montana as a threshold issue that had
7 to be dealt with before that. If you look back at the
8 conversation between Mr. Fritz and Mr. Christopoulos in
9 1986, that phone call. In that conversation Mr. Fritz
10 went back and said, look, I know we keep talking about
11 these other issues, but we have to understand what our
12 senior rights were before we can talk about what's left
13 over.

14 That's one example. And the specific examples
15 where there's a written proposal to specifically deal
16 with that at the moment escape, Your Honor, but it was
17 not something where we were acquiescing to all of this
18 stuff needs to go together or we're going to create a
19 substitute compact, but, rather, it was a way to get
20 past no and to address the issue of first we have to
21 understand not only what -- how to protect but
22 certainly quantify the pre-1950 water rights in Wyoming
23 and the pre-1950 water rights in Montana.

24 That was the point actually behind our 2002
25 commissioning of the HKM study. We knew Wyoming had

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1 just studied all their senior water rights and so we
2 hired HKM to do the same or to give us another look at
3 that because we felt that we had to have a better
4 source of information of what was their pre-'50 water
5 rights and then compare that to all the new
6 development, the expansion that was going on at that
7 time.

8 Mr. Moy testified that he was very concerned
9 about the Wyoming Water Development Commission that was
10 expanding the use of reservoirs and expanding the use
11 of irrigation to the expense of other things, but
12 specifically what he was looking at with respect to his
13 testimony on that, he was looking at the issue of
14 understanding the pre-1950 water rights violation, the
15 current use, and then what the change of demand would
16 be because he knew that Montana's pre-1950 water rights
17 were not ever going to be met unless there was some way
18 to administer that language.

19 SPECIAL MASTER: Okay. Thank you.

20 So just one last question which is on the
21 question of the 2004 and 2006 notices. So Wyoming is
22 claiming that Montana should not be able to obtain
23 damages for any of the shortages to pre-1950s
24 appropriators prior to the dates of those two notices.

25 And as you pointed out, in one of my earlier

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1 rulings I said, you know, if Montana acted with due
2 diligence, then they shouldn't be put at any loss
3 because of the fact they could not provide a notice
4 instantaneously.

5 My original intent in doing that was with the
6 notion that, you know, Montana realizes that it's short
7 on water; it immediately needs to make sure, in fact,
8 it is; that, in fact, it's insuring that all the water
9 it has is actually being utilized; that it looks like
10 maybe Wyoming has some water to issue the notice. And
11 I assume that that would mean that they post-date the
12 notice by maybe a week, two weeks, something of that
13 nature.

14 That's a little bit different than saying
15 we're going to go all the way back, go all the way to
16 the beginning of the irrigation season. And so I guess
17 my question there is is there anything on the record,
18 to your knowledge, that suggests that there was a
19 reason why Montana couldn't have issued notice a little
20 bit earlier than it actually did? Because again that
21 whole exception is based on the assumption of due
22 diligence.

23 MR. SWANSON: But, Your Honor -- and do you
24 want me to go specifically by year?

25 SPECIAL MASTER: Okay.

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1 MR. SWANSON: Because I think each of them
2 have specific instances to it.

3 SPECIAL MASTER: Go ahead.

4 MR. SWANSON: 2006 was the year that the
5 notice was -- the call letter itself was later
6 summoned. And you recall the testimony from Chuck
7 Dalby. He was the hydrologist who issued a memorandum
8 to Jack Stults in June that said flows are looking
9 pretty good. We might make it this year. And if you
10 look at Dale Book's report, table 5 from 10/5 you see
11 that the mean flow in the month of June was 3.4 CFS.
12 So that being the mean the first half of it would
13 probably be pretty good for water.

14 And Mr. Dalby issued that memo right in that
15 flush period. And then he testified that conditions
16 changed rapidly and I think within one week later he
17 had -- there was an e-mail that's in evidence where he
18 said things aren't looking so good. And it was 30
19 days, about 30 days later when Montana submitted that
20 call letter to Wyoming.

21 Now, in the letter, though, it also references
22 that Montana had contacted Wyoming and told them the
23 letter was coming prior to that. I think the reason
24 for the delay there is because we all recognized this
25 was, in fact, likely to be the straw that broke the

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1 camel's back and sent us to litigation. And so I think
2 Montana was worried about just getting all its
3 information ready.

4 But the factor there in terms of the late call
5 in that summer was the conditions changed. The
6 conditions changed sometime in the middle to the second
7 half of June and it went from good flows that drop off
8 to very low flow. And that was a direct flow issue.
9 There was a small amount, I think a 10 percent shortage
10 in the reservoir.

11 But the reservoir fill season goes all the way
12 to June 30th. So we were still within our reservoir
13 fill season. And if the flows are strong in June,
14 according to Kevin Smith, I believe he said they were
15 looking good for the reservoir and then things dropped
16 off. So in June -- or in 2006. I don't think it was a
17 tardy issue or lack of diligence. The conditions
18 changed and we responded to it.

19 In 2004 that was a call in the beginning of
20 the irrigation season. That was in early May. And, in
21 fact, Wyoming officials received notice at an advisory
22 committee meeting before that call that we were worried
23 about our direct flow and that it was highly likely the
24 Tongue River Reservoir was likely not going to fill.

25 So again that was the front end of that

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1 irrigation season and still well within the reservoir
2 fill season. So Montana was diligent on that issue.

3 If you look at 2002 -- this is interesting,
4 Your Honor. 2002 Mr. Stults had a couple of letters
5 that he was writing back and forth. He received some
6 letters from Art Hayes and a state legislator named
7 Norma Bixby and he responded with a couple of response
8 e-mails and these exhibits are Montana 141 -- I'm
9 sorry, not e-mails. They were written letters.

10 Wyoming 67 and Montana 144.

11 On May 23rd Mr. Stults wrote a letter to
12 Representative Bixby and Mr. Hayes that said: "Thank
13 you for talking to me about the concerns of the low
14 flows and we will -- based on the information that
15 you've given me and gathered we will communicate this
16 to Wyoming at our next interaction." That was May
17 23rd.

18 Exhibit Wyoming 67. May 29th, so six days
19 later Mr. Stults writes a letter to Mr. Hayes and says
20 we met with Wyoming to resolve these water supply
21 issues and it didn't go well.

22 So we know not only did he respond rapidly to
23 the concerns and met with Wyoming in that six-day
24 period, but he provided a call -- or a notice and a
25 request for water in that six-day period as well.

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1 Again that's before the end of May. That's going to
2 be at the front end of the irrigation season and that's
3 still within the fill period for the Tongue River
4 Reservoir. So we think he was diligent with that.

5 We also know from his testimony and
6 Mr. Kerbel's testimony that they were part of a
7 advisory committee and they were monitoring snow pack
8 every winter. They were continually looking at this
9 and also responding to the changes of water conditions
10 because sometimes the snow pack isn't the best teller.

11 You recall in 2003, the testimony in 2003 was
12 the snow pack was low. They were convinced they would
13 have to fill and then they had heavy spring rains and
14 they didn't have to -- they were able to fill the
15 reservoir. So conditions changed and they did the best
16 they could.

17 SPECIAL MASTER: That's actually -- this has
18 been helpful. I just wanted to get that sort of
19 general sense of how you're thinking about the issues.
20 So I'm a little bit concerned about time. There's some
21 other important issues also and I want to make sure we
22 don't get bogged down purely on notice, but this has
23 been very helpful.

24 So what I would suggest, Mr. Kaste, is we take
25 about a ten-minute break now since we've been going for

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1 an hour and forty minutes and we come back at 10:30.
2 Does that give people enough of a break? Ten minutes?

3 Okay. Great.

4 (Recess taken.)

5 MR. SWANSON: Your Honor, I wasn't sure if you
6 were dismissing me at the end of that, but I did have
7 one questions of yours that I haven't answered that I
8 was hoping for a moment.

9 SPECIAL MASTER: Okay. That would be fine.

10 MR. SWANSON: And specifically in the question
11 you posed to was and you just asked me a moment ago is
12 shouldn't Wyoming be liable for any periods prior to
13 the notice or the call.

14 SPECIAL MASTER: Right.

15 MR. SWANSON: And specifically in terms of
16 storage, any storage that they would have done for
17 post-'50 storage rights in the fill season even before
18 the call would still be out of priority. Particularly
19 if our reservoir doesn't fill they can release that and
20 send it down to our senior storage right just like they
21 do within their own state.

22 So in terms of the liability prior to the
23 call, they haven't lost the ability to still -- prior
24 to the notice they haven't lost the ability to still
25 meet our shortage by sending that water down.

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1 And the other thing that's interesting about
2 this is this concept of free river that Wyoming has
3 when in certain periods of runoff they are allowing
4 everyone to take beyond their water right, what's their
5 pre- or post-'50 water right. And if you look at the
6 timing, a large amount of that water that may be for
7 storage or direct flow use beyond anybody's water
8 rights is waters that would be flowing down to fill the
9 Tongue Reservoir in the spring.

10 And so Wyoming should be held liable for that
11 water that was taken beyond anyone's water right under
12 the concept of free river that would have flown down in
13 the spring and filled up the Tongue River Reservoir.

14 SPECIAL MASTER: Okay. So actually I do have
15 a question with respect to that.

16 So back when we first started out one of
17 Montana's claims was that if there was post-1950 water
18 stored at an early part of the water year and at a
19 later point in time pre-1950 appropriators in Montana
20 needed that water that Wyoming would need to spill that
21 water in order to meet the needs of the pre-1950
22 appropriators in Montana.

23 And Montana actually at the time of the
24 original hearing on Montana's motion -- I'm sorry,
25 Wyoming's motion to dismiss seemed to concede that if

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1 there was water stored for post-1950 use at a time when
2 the needs of pre-1950 appropriators were fully met that
3 that would then be stored in priority and it would be
4 Wyoming's water.

5 Is this different than that?

6 MR. SWANSON: This is different than that.
7 This is different from that, Your Honor. And I think
8 the first question would be when you deposit storage
9 early in a water year what do you mean by that. Do you
10 mean right after October 1st or do you mean after
11 January or at some point after January the runoff
12 begins? Because Montana's -- and probably some of this
13 is because of the further development of our factual --
14 of the factual record.

15 Montana's storage on the Tongue -- in the
16 Tongue River Reservoir limited by our winter
17 operational factors which Mr. Wechsler will address as
18 needed, but we reach a point when we can't store more
19 in the winter due to the concrete issues, due to the
20 potential for flooding, et cetera.

21 If we're at a point where we can't store and
22 Wyoming is storing post-'50 storage, that's a different
23 issue than what I'm discussing. What I'm discussing --
24 and this is rooted in the testimony. The testimony
25 despite earlier representations by Wyoming that all

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1 their storage happens in the winter where it's frozen,
2 and that's fine if that does because that still is
3 going to be potentially water that is stored out of
4 priority, that's going to be an issue of snow and
5 runoff.

6 And I guess just briefly what I mean by that
7 is the Tongue can be storing at a point when the Big
8 Horns are still frozen and the reservoirs in Wyoming
9 are storing water that should be passing through to be
10 stored in the Tongue River Reservoir. Let's say it's
11 in March, but the reservoirs at high altitude are still
12 in effect.

13 But what I'm specifically speaking to is also
14 the factual testimony by Wyoming officials including
15 water users. Tom Koltiska spoke to this when he talked
16 about the Kearny Reservoir. They store primarily in
17 the spring runoff at the same time as the Tongue River
18 Reservoir and they make no distinction between pre- and
19 post-'50 water right. And that seemed to hold true for
20 a number of the Wyoming reservoirs and it certainly
21 holds true for the padlock reservoirs.

22 So what we are positing is this scenario where
23 June 30th arrives. The Tongue River Reservoir is not
24 filled -- is not full, and we say send us the rest of
25 your -- send us maybe a certain amount of post-'50

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1 storage or we typically notify them that, in fact,
2 we're short. Then Wyoming would release water that was
3 stored at the time when it would have been stored in
4 Tongue River Reservoir and it was stored under the
5 later water right.

6 That would certainly come to affect water
7 stored prior to our notification for a call to Wyoming
8 and then that would still be water that would have --
9 that would have injured -- Montana would have been
10 injured by the storage of that water and, therefore, we
11 should be entitled to it.

12 SPECIAL MASTER: And your argument is you're
13 entitled to that because of the rule of priority?

14 MR. SWANSON: Well, what I'm going to
15 characterize as the rule of priority, really what it is
16 is water stored in a junior reservoir right that had it
17 not been stored would have come and been stored by our
18 senior right, and that's protected under Article V(A)
19 of the Compact.

20 The same could be true as well about the high
21 mountain reservoirs, but I don't know that the court
22 needs to slice it that thinly because really what it
23 amounts to is -- really what it amounts to is you know
24 all those calculations that we talked about that would
25 carry over storage from the Wyoming officials and

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1 Montana officials and you're into a more difficult
2 factual situation and probably one that actually would
3 be better addressed under the topics raised by
4 Mr. Draper.

5 SPECIAL MASTER: Okay. But just to ask this
6 question again. So other than Wyoming's practice with
7 respect to how they treat their own reservoirs in that
8 situation, is there any other either legal or
9 administrative rules that you would cite to support
10 your proposition?

11 MR. SWANSON: Well, and I don't want to -- I
12 don't want to leave out free river as well, the water
13 stored under free river conditions that would have
14 punched into the Tongue River Reservoir. And that is
15 just plainly looking at the doctrine of prior
16 appropriations in both states which says you can't put
17 water for the benefits of users if you don't have a
18 water right for it.

19 And so that's just a clear violation of the
20 doctrine of prior appropriation if a senior downstream
21 would use that water, not that really anybody would
22 have a water right downstream or someone who's storing
23 it or giving it that has no water right. But that
24 wouldn't apply to post-'50 water on behalf of Montana.
25 So I just want to focus on the pre-'50 satisfaction of

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1 rights by curtailing free river with an expansion of
2 pre-'50 water rights.

3 SPECIAL MASTER: Okay.

4 MR. SWANSON: And then as far as the other
5 issue goes in terms of if water is stored by a junior
6 reservoir stream and then is released to a senior
7 reservoir, I would look at the testimony of Wyoming.
8 That's how Wyoming does it under their own rules.
9 That's how Montana does it, although we aren't faced
10 with the same stacking of reservoirs ordinarily that we
11 see in the Big Horn Mountains.

12 But if they are applying that standard to
13 their own reservoirs, they shouldn't object to applying
14 that standard to our enjoyment of our senior right
15 under the Compact.

16 SPECIAL MASTER: Is there any testimony in the
17 record as to what Montana's practice is on that
18 particular point? I mean, I know there was the
19 testimony with respect to the way in which Wyoming
20 handled its reservoirs, but I don't recall any
21 testimony on Montana's practice.

22 MR. SWANSON: Your Honor, I don't know that --
23 it would have been Kevin Smith's testimony, if there
24 was any, and because he talked in general about
25 reservoir operations I don't know that that particular

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1 issue came up because we aren't faced with that
2 situation as much and we were faced with, you know,
3 obviously there's only one main reservoir on the Tongue
4 River.

5 So I don't know that I could -- I could do a
6 quick scan while we're still here today, but nothing is
7 coming to mind.

8 SPECIAL MASTER: What I would just say just
9 generally is on questions of this nature if I could ask
10 whether or not there's something in the record or any
11 precedent that I should pay attention to. You know,
12 rather than spending time today coming back up and
13 saying here's what it is, I would say, you know, both
14 sides are free to begin, say, next week to provide me
15 with any information. Okay?

16 MR. SWANSON: Understood. And so I guess I'll
17 conclude, Your Honor, with saying we still believe that
18 a demand isn't required. Montana didn't voluntarily
19 agree to a demand in 1982 at the Compact Commission
20 meeting. If you look at the practices of the Wyoming
21 and the Montana water commissioners, notification of
22 shortage of water rights is sufficient. There isn't a
23 demand that's required. In looking at the words of the
24 Wyoming commissioners on several occasions they weren't
25 requiring a demand and they certainly weren't requiring

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1 a formal demand.

2 And our concern with requiring a demand is
3 this: We did require a demand multiple times. We did
4 it explicitly in writing in 2004 and 2006 and that
5 wasn't good enough. So the question would be a demand
6 is needed. Then a more perfect demand is needed. Then
7 a more perfect demand is needed. And then a lot of
8 post-demand inquiry is needed before we get the water.
9 At some point we reach the diminishing returns where
10 the irrigation season is only so long and the water is
11 not coming to Montana users.

12 And so that's our concern with imposing that
13 demand and that's why we believe we should remain with
14 your previous rulings.

15 SPECIAL MASTER: Thank you.

16 Okay. Mr. Kaste?

17 So while you're walking up here I can tell you
18 I have some questions. I could either start asking you
19 those or you could start out by doing whatever
20 responses you want to the questions by Mr. Swanson.

21 MR. KASTE: Well, I did want to answer the
22 questions that you posed because I want you to know the
23 answers. If you have additional questions for me,
24 that's great, too. I kind of wrote them down and had
25 about five or six that I thought I ought to address.

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1 The first one was: "Both parties asked me to
2 review things I've done in the past. Can I and should
3 I do that?" The answer, of course, is yes and for the
4 most part no, but occasionally yes, if that makes
5 sense.

6 SPECIAL MASTER: Good lawyerly answer.

7 MR. KASTE: I got it. Obviously I note from
8 your dress you're the judge here today. You have the
9 ability prior to completing your resolution of this
10 case in the sense you have jurisdiction over it to fix,
11 change, alter one of your legal rulings prior to the
12 time you're divested of jurisdiction by recommending it
13 to the Supreme Court.

14 Should you do that often? No. Should you do
15 that occasionally? Yes when the circumstances warrant
16 it.

17 So our view, of course, is that there's one
18 thing in this case that for the future would benefit
19 the parties greatly and that is requiring that the
20 notice be in writing. That's why I asked you point
21 blank to reconsider that ruling.

22 With regard to the remaining rulings, some of
23 them we like, some of them we don't, but they are what
24 they are and we probably are okay based on those
25 rulings and in that vein probably ought not to revisit

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1 them.

2 With regard to the exceptions to the notice
3 requirement, I went back the other day and I went
4 through your original ruling on that and Montana said,
5 well, in light of the evidence at trial we should
6 revisit it. Basically all the evidence that came in at
7 trial was essentially the same as the evidence you have
8 considered on summary judgment and there's no real
9 reason to change any of those rulings with regard to
10 the three exceptions.

11 I didn't find anything new that would lead you
12 to a different -- a different conclusion than what you
13 previously reached. So while you have the authority
14 and the power certainly to revisit those rulings and
15 come to different conclusions, I don't think the
16 evidence warrants it.

17 I notice you're about to ask me a question.

18 SPECIAL MASTER: I am, sir. So one of the
19 things that Montana raised in its post-trial reply
20 brief, and it spans I think two pages, is whether or
21 not there should be any type of notice requirement at
22 all. And they cite two cases that I don't remember
23 having been brought up before.

24 One is the Van Buskirk case and the other is
25 the case of Tucker versus Missoula Light & Water

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1 Company.

2 MR. KASTE: Oh, thank you, thank you, thank
3 you.

4 SPECIAL MASTER: And so I would very much
5 appreciate it if you could address those because you
6 could certainly reading them on the surface view those
7 as saying you don't have to meet any particular
8 requirement in order to pursue a remedy for somebody
9 who has not delivered water that you're entitled to.

10 MR. KASTE: That was a pretty surface reading
11 because I think these cases are very very easy. And I
12 read that in the brief and thought, "Oh, my God. I
13 haven't heard of this Van Buskirk case and we're in
14 trouble." And then I read it and now we're not.

15 Van Buskirk is a great case in which it
16 contains the world's greatest jury instructions I've
17 ever seen that says, "Here's the rule. Jury, you're
18 going to enter judgment in favor of the defendant." As
19 a defense lawyer I find jury instructions to enter
20 judgment in favor of the defendant as great.

21 But in that case the court's theme was not put
22 the onus on what the senior appropriator has to give to
23 the junior appropriator in order to vindicate its
24 rights. It is does he have to go through the water
25 commissioner in order to vindicate his rights. That

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1 whole case is about is the water commission the
2 exclusive entity. The Wyoming Supreme Court says no,
3 you have a common law right to vindicate your right as
4 a water user and you can do that by going to district
5 court, as the litigant did.

6 It doesn't say a word about whether or not in
7 order to prevail in district court you have to provide
8 notice to the upstream junior in order to succeed. And
9 so to say that that case stands for the proposition
10 that you don't have to make a call in order to
11 vindicate your rights as a senior misrepresents that
12 case significantly.

13 And the same is true with regard to the Tucker
14 case, which you have seen before. It's the one we
15 continuously cited about the burden of proof. And in
16 that case the Montana Supreme Court makes clear several
17 times -- well, once -- that the senior appropriator
18 several times called on the junior and demanded water
19 and was told no multiple times.

20 And so the court was never faced with the
21 question that you're faced with, is notice a necessary
22 prerequisite to liability because it happened, everybody
23 acknowledged it happened, the other side said no way,
24 and they proceeded to decide the case on another issue.

25 So to represent both of those cases as saying

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1 the call is not a necessary perquisite to liability is
2 to misrepresent both. That's not what either of them
3 say.

4 SPECIAL MASTER: So your view is both of those
5 cases are basically cases that stand for the
6 proposition that we don't have to follow the rules with
7 respect to the water commissioners, but say absolutely
8 nothing about whether or not notice is required?

9 MR. KASTE: Absolutely. And, in fact, the
10 Tucker case has a long exposition about, well, was
11 there a water commissioner appointed on this river. So
12 do you have to have a water commissioner appointed in
13 order to vindicate your rights in court? Well, of
14 course not. You just have to get at that time 10
15 percent of your neighbors to agree to apply to the
16 district court to have a water commissioner appointed.

17 None of that's necessary to vindicate your
18 rights as against a senior. You can go to the district
19 court and do that without the exclusive means of the
20 statutory regime set up in both states. It's simple.
21 It's not applicable here, although the burden of proof
22 discussion in Tucker is very applicable here and we've
23 cited it a number of times. And it says the burden of
24 proof is on the junior -- or excuse me, the senior
25 call.

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1 Now, Montana has said a couple of times, more
2 than a couple of times Wyoming has changed its position
3 with regard to the call. Wow, they are dirty no-goods.
4 But here's the thing: For years they've said there is
5 nothing in this Compact that says there's a call
6 requirement and now there they are saying you've got to
7 make a call.

8 And that's true. We did change our position,
9 and that's okay because the Supreme Court told us that
10 our position wasn't consistent with the law. Okay.
11 Fine. Now that we know what the law is what are we
12 supposed to do? We go look at the facts, we apply them
13 to the law as interpreted by the court and by yourself
14 and we say that leads to this conclusion.

15 We've done that and it leads to the conclusion
16 that Montana must provide us notice, and they didn't do
17 that prior to 2004. There's nothing wrong with the
18 litigant changing its position with regard to what the
19 law requires when the court mandates that they change
20 their position. I don't know what else we could do.
21 Be held in contempt, I suppose.

22 Now we have a question about --

23 SPECIAL MASTER: Let me just stop you there.
24 I think what Montana is basically arguing is that given
25 Wyoming's view was that there was no responsibility on

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1 the part of Wyoming to provide post-1950 water for
2 pre-1950s appropriators in Montana, why would we
3 require it to provide any type of a notice?

4 MR. KASTE: Because that's what we agreed to
5 in the Compact, as we now know from the Supreme Court.
6 That's what their Compact obligation is. They must
7 provide notice. And I think you can't find a statement
8 like what we just said in the course of this evidence.

9 Wyoming's discussions with Montana -- and you
10 heard the testimony of all these witnesses. On both
11 sides their discussions were not the precise question
12 that you articulated earlier and that the only precise
13 statement is we have our pre-'50 rights, they're not
14 being satisfied, we want you to turn those on. We want
15 you to charge a post-'50 right.

16 Those discussions didn't happen in that
17 particular fight, didn't occur until '04. In fact, we
18 can see that in the technical meeting in April of 2004
19 when Keith Kerbel says -- you can see it in the minutes
20 of the technical meeting -- "Hey, what if we made a
21 call? What you do think Wyoming would do?"

22 If this is something that we thought about for
23 years and years and years Wyoming has been intransigent
24 in its position there, why is Keith Kerbel asking us a
25 month and a half before the first call was made, "What

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1 would you guys do if we made a call"?

2 How can you square that with this idea that
3 they knew our position and we were not under any
4 circumstances budging from that position on that
5 particular issue? That's a load. It really is.

6 When these people were talking they were
7 talking about overall Compact administration focused on
8 how do we divvy up the water on V(B). Because Dan
9 Ashenberg got it right in 1983 when he said on page 1
10 his proposal about how we administer the Compact, those
11 taken right from Wyoming are minimal and who cares.
12 When we read this quote Dan Ashenberg is the smartest
13 guy in the room and he says what is their to bother
14 about.

15 And then we get the HKM study in 2003 which
16 says there's 221 acres of post-1950 right in Wyoming.
17 "Oh, my gosh. Whatever shall we do?" 241 acres. The
18 smart people in the room were focused on where the
19 water was and it was V(B). And that's what they were
20 fighting about and that's what Montana wanted to
21 administer. They wanted to find a way to take
22 advantage of the water that was really available and
23 it's under V(B). That's the end of the story.

24 There was an interesting conversation between
25 two guys in 1981 followed up by Montana's implicit

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1 admission that it needs to make a call, it needs to
2 work on Wyoming, and then nothing about this issue
3 until 2004. That's it.

4 This case has been about 2004 and 2006 from
5 its inception and it shocks the conscience frankly how
6 much time has been spent talking about years prior to
7 2004 when there is not a single piece of paper
8 submitted in evidence in the last six years
9 demonstrating that the call had been made prior to that
10 period of time. There's no call. Nothing.

11 It is astonishing to believe that bureaucrats
12 on both side of this state line wouldn't have made a
13 memorandum of some sort saying, "I made a call," "I got
14 a call." And we know that by looking at what happened
15 in 2004 when a call was made. There's paper
16 everywhere. There's meetings and phone calls and memos
17 and e-mail. There are governors involved. It's a
18 crisis. Oh, my gosh.

19 Nothing like that before 2004. You don't have
20 to believe the ridiculous in the course of making your
21 decision in this case and, in fact, Montana has to
22 prove it's more likely than not that it made one of
23 these calls and it falls woefully short prior to 2004.

24 And now you've got a more important question:
25 Is notice knowledge or is it a demand? And the answer

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1 is it has to be a demand because in the prior
2 appropriation scheme we can know that our downstream
3 senior neighbor isn't getting his water, but he may not
4 need it. And if he doesn't need it and he doesn't tell
5 me he needs it, I don't have to do anything in
6 response.

7 A call is by its very nature a demand for your
8 rights on someone else and without that second piece
9 you have no call. You have -- you have a discussion
10 among neighbors standing out looking at the sky going
11 yep, it's dry, yes, it is. Who cares? That doesn't do
12 anything to initiate the process under the doctrine of
13 appropriation.

14 You have to not only note that it's dry, you
15 have to say: "And I want you to do something about it.
16 I demand my right under this Compact."

17 Montana didn't do that until 2004.

18 SPECIAL MASTER: So aren't there, you know --
19 there are at least three different situations here.
20 One is that, you know, Montana tells Wyoming, you know,
21 there's only X amount of water going across the border.
22 Under those circumstances then you can easily imagine
23 that Wyoming can think, well, that's nice. Maybe they
24 need more water, but, you know, we don't know. They
25 haven't asked for any water.

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1 But then a second would be somebody calling up
2 and saying, "You know, we're really short on water down
3 here. We're not -- you know, our farmers are, you
4 know, not getting the water that they need." And why
5 if they had said that do you need that additional step
6 of a demand? Because at that point you know that they
7 need the water. I mean, they've said they need the
8 water. It's just they haven't made that final
9 statement of "and, therefore, you need to actually
10 supply it to us."

11 MR. KASTE: Because you have to ask me to do
12 something about your situation. That's the way it is.
13 With me, obligations you have in this world you have to
14 be apprised that they want you to do something about
15 it. It's not enough just to know their situation.
16 They have to actually ask you to do something about it.

17 And, you know, there isn't a lot of case law
18 about that, but it really couldn't be more clear. It
19 says this demand is decisive. It uses the word
20 "demand." And that is so important in prior
21 appropriation systems because the junior appropriators
22 have rights. The junior appropriator can divert water
23 under junior appropriations within his water rights for
24 beneficial uses all day long until the senior calls
25 him.

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1 Regardless of what's happening at the senior
2 headgate, he might not get a drop of water. It doesn't
3 matter. Until he calls and then says, "I need the
4 water. I have a right. I'm going to put it to
5 beneficial use," this person over here has a right.
6 And that's why it's so important to demand that they
7 take action to fulfill your right and it means to us
8 that you have it. Okay? And it's not that hard. It
9 really isn't.

10 Bill Knapp says he gets out and he's out
11 standing in somebody's driveway talking with them and
12 he says, "I'm short of my water. Yeah, I'd really like
13 my water." Bill Knapp that says that part, that second
14 part, "I'd really like my water."

15 Good enough for him. Off he goes to spin a
16 headgate, but that second part is essential, essential
17 and it didn't happen before 2004. And we can tell how
18 essential it is because communications that occurred
19 prior to 2004 didn't excite anybody on Wyoming's side
20 of the line. But when we got one in 2004 he said, "I
21 talked to the governor and we are demanding our rights
22 under the Compact," he got excited.

23 Because there's a difference, a meaningful
24 difference between a communication that says, "hey, the
25 prevailing conditions in Montana stink" and "hey, the

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1 prevailing conditions stink and we want you to do
2 something about it." That difference matters. And
3 it's simple. It's so simple. Call up, demand your
4 water. They did it in '04 and '06. We acknowledged
5 they gave it, but before that there's not any evidence
6 to support that.

7 Now, you asked about, well, what about
8 applying damages retroactively prior to this, is there
9 any reason or basis for me to do that. I think the
10 answer is no, not really. Because this person has a
11 right, this junior has a right until the senior
12 exercises his right.

13 There's no basis to say to this person what
14 you did before the call is somehow wrongful when they
15 are acting in perfect compliance with their rights as a
16 junior appropriator. And so to ask them to make up a
17 shortfall for the senior who sat on his hands in the
18 exercise of his right is inappropriate and not in
19 conformity with the doctrine of appropriation which
20 gives the junior appropriator rights.

21 Both sides in this equation are protected from
22 the other. We all have to play by the rules, both the
23 seniors and the juniors. So the idea of collecting
24 damages pre-call is completely anathema to the doctrine
25 of appropriation.

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1 Now, without being a pest, reservoirs are
2 weird. Reservoirs are a problem in this case because
3 the best record would be give us a call. He spins the
4 headgate. When the water shows up it shows up.
5 Simple, very simple.

6 Reservoir is tougher because when the call
7 comes in, if you give me a call on October 2nd, it's
8 going to be hard for me to say, "I don't know if we can
9 fill or not. It's October 2nd. We don't know what the
10 snow pack is going to be." And so there is this
11 looking-back period where we look back at the call and
12 ask ourselves did the reservoir exercise its right, did
13 it catch the water that was available to it.

14 And if it did and it's still short of what
15 it's entitled to, then we're going to have to cut
16 people off. All the juniors on that stream have got to
17 go off. That's how it works.

18 And you asked about, well, is there some other
19 rule of law that allow us to get back retroactively
20 what we had on reservoirs. No. That's not how it
21 works. You make a call. Curtailment occurs from that
22 point forward. If you get filled, you get filled. If
23 you don't, you don't.

24 Sometimes reservoirs don't fill. I think
25 that's an odd part of this case Montana doesn't seem to

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1 recognize is that sometimes reservoirs don't fill up.
2 Sometimes it doesn't snow.

3 Now, when we look back and make a decision
4 about whether or not the calling right exercise is
5 fair, to see if it would be fair to the juniors at that
6 time to curtail their diversions that's not the same as
7 this priority system. Now, what we have in Wyoming, we
8 don't have a statute. We don't have a regulation. We
9 don't have case law that says something about priority.
10 Nobody is able to refer to anything as a rule of
11 priority. There's no such thing.

12 What we have is we have this series of
13 reservoirs operated in common amongst a group of people
14 who have consensually agreed to operate them in a
15 certain manner. Now I don't know about that. That's
16 completely fine so long as they don't hurt junior
17 appropriators, but it's not the rule of law that's
18 making them do this.

19 They probably have to operate differently if
20 we followed the rule, what the rules are. But when
21 they agree amongst themselves to shuttle water about
22 their own reservoirs in common ownership that's
23 perfectly fine as long as it doesn't hurt anybody else.
24 And thus far I haven't seen any evidence of their
25 shuttling water between themselves consensually that

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1 hurt anybody in Montana.

2 Now to say that their individual agreement
3 ought to be the law, no, it's not. One of the neat
4 things about the doctrine of appropriation is sometimes
5 appropriators can make agreements among themselves to
6 do certain things so long as they don't hurt anybody
7 else. It's okay. It's fine. It's equitable in that
8 way.

9 It gives people the opportunity to make
10 decisions about how they manage water in their little
11 part of the world effectively so long as they don't
12 hurt anybody else. There you go.

13 But there's no basis in law or in fact to
14 allow the Tongue River Reservoir to call on Wyoming in
15 July and say, "The storage you obtained in Park
16 Reservoir in January was wrong. You have to let it
17 go." And Montana knew that way back when when they
18 said, "Well, it's stored in priority. We can't get it
19 back." That's the long and short of it. That's it.

20 So with regard to notice, we admitted in 2004,
21 2006, we've always admitted this. This case is about
22 2004 and 2006. Everything before that has been -- I
23 can't think of a nicer word than "ridiculous." Put it
24 to bed.

25 SPECIAL MASTER: One final question.

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1 Specifically with respect to 2004, if you look at your
2 initial pre -- or post-trial brief, on page 55 of that
3 brief you've said pretty much what you've just stated,
4 which is that there is no dispute that Montana did
5 provide adequate notice to Wyoming on May 18th, 2004.

6 But if you turn back to page 50, you'll see
7 there is a discussion of the 2004 letter in the last
8 paragraph on that page where one of the things that you
9 note is that there was the language of it actually
10 talked about pre-1950 uses in Wyoming.

11 And at the very end you say: "Wyoming was not
12 obligated to take either of these actions and it was
13 not obligated to take a different action than Montana
14 had not requested."

15 MR. KASTE: Yes.

16 SPECIAL MASTER: So my question is is -- are
17 you conceding that the 2004 letter was adequate for
18 purposes of this particular case or are you claiming
19 that actually you had no obligations under the 2004
20 letter to do anything because Montana preferred
21 pre-1950 rather than post-1950 uses?

22 MR. KASTE: Both as usual. The letter in and
23 of itself is sufficient to constitute notice of
24 something. The substance of that notice was all wrong.
25 The 2006 notice is better and it's more in line with

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1 how the court has interpreted the Compact.

2 So, yes, they did -- the letter itself
3 constitutes notice. Do we have to do the things that
4 they asked us to do? No. Should we be forced to do
5 things they didn't ask us to do? I don't think so. I
6 don't understand why I should be required to read
7 someone else's mind and do things that they haven't
8 asked me to do.

9 It's not hard. Shut down your pre-'50s or
10 your post-'50s for the benefit of our pre-'50s. Had
11 they asked us that, then that would be adequate notice.
12 And that's it. It's not that complicated.

13 SPECIAL MASTER: So let me ask the question in
14 a different way. Let's assume that I were to recommend
15 to the Supreme Court that they find that Montana
16 provided adequate notice in 2004 after the notice was
17 provided, there were post-1950 storage and uses in
18 Wyoming, and that that water could have gone down to
19 Montana and, you know, go through all the various other
20 things that you think are required.

21 Would you argue to the Supreme Court in
22 response to that, no, actually we're not liable for
23 anything in 2004 because they asked just for the wrong
24 thing? I'm just trying to figure out what is your
25 argument, whether or not 2004 is okay or whether or

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1 not --

2 MR. KASTE: It would depend on how many other
3 things I'd have to argue. If that was the only one, I
4 think it is Wyoming's position and has been our
5 position that while the form of notice was adequate,
6 the substance of the notice was not and it did not
7 obligate us to you take actions that were requested.

8 And so it's conceivable we could go to the
9 Supreme Court and say that would -- that was an
10 erroneous ruling on your part to hold us liable for
11 actions that weren't requested of us. It is important
12 that they demand their right properly and ask us to do
13 the thing that we're actually obligated to do.

14 And like I say, it's not that hard. There's
15 nothing dramatic about the 2006 letter that makes it
16 all covered in fairy dust because it works. It's just
17 using the right -- demanding the right things from us.
18 So it is conceivable that if you are really going down
19 that road, then that would be wrong.

20 SPECIAL MASTER: Let me ask it a different way
21 then. In preparing my special report for the Supreme
22 Court, should I in that say Wyoming -- Wyoming's
23 argument is that they aren't liable for anything in
24 2004 because the notice was deficient? I just need to
25 know that so I know whether or not to address that

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1 particular point to the Supreme Court.

2 MR. KASTE: Yes. We had that discussion with
3 Mr. Stults at trial. We made the point in our brief.
4 It is our position that notice was substantively
5 inappropriate. And so to the extent you need to get to
6 that decision, and there are lot of ways you don't need
7 to get to that portion, then, yes, that's our position.
8 You should address it and you should make a decision
9 what the content of the notice ought to be. It's
10 pretty simple.

11 As a matter of fact you have stated it
12 earlier. If our pre-1950s are unsatisfied, we would
13 take appropriate interstate regulatory action. We shut
14 off our post-'50s for our benefit. That's it. It's
15 simple. And they did it in 2006 minus our way to do it
16 as an appropriate interstate remedy.

17 So if that helps. You're looking at me like
18 it's not helping.

19 SPECIAL MASTER: No, no, no. As I said, what
20 I want to make sure is that I'm addressing all the
21 issues for the Supreme Court I ultimately have to
22 address and it sounds like it is one. So I will --

23 MR. KASTE: It is unless you can get rid of it
24 on other grounds and I think there's lots of other
25 grounds or ways to recommend dismissal of this case

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1 without ever getting into the minutiae. And I frankly
2 think that this case ought to be decided in ways
3 without getting into the minutiae because it's governed
4 by a few very simple principles and when you apply
5 those very simple principles most of this stuff goes
6 away.

7 SPECIAL MASTER: The thing is I need to
8 address everything because I don't know exactly what it
9 is that the Supreme Court will ultimately decide. So I
10 will make my recommendation, but I will address more
11 issues than may be necessary to do that.

12 MR. KASTE: Well, then you better hit this
13 one.

14 SPECIAL MASTER: Okay. Thank you.

15 MR. KASTE: Thanks.

16 SPECIAL MASTER: Mr. Swanson?

17 MR. SWANSON: Thank you, Your Honor. I'll be
18 brief.

19 I think it speaks volumes about this case that
20 at this late date we don't know what Wyoming's position
21 is on the 2004. Apparently we now do know.

22 SPECIAL MASTER: Understood.

23 MR. SWANSON: We now do that the 2004 letter
24 is a sufficient notice, is a sufficient demand. And
25 that goes to our entire point, Your Honor. The

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1 requirement that you've previously established, and we
2 think is reasonable, is that notice is required.

3 Wyoming would like us to reach ever higher
4 levels of perfection of demand and in that way they are
5 saying that you felt the '04 call letter was
6 insufficient because the demand wasn't precise, wasn't
7 perfect. And that goes contrary to not only the
8 settled law here, but the prior appropriations
9 practices in both states.

10 And I'd direct you to testimony by Wyoming's
11 Water Commissioner, Mr. Boyd, when discussing a call.
12 He said: "It might be as simple as the senior right
13 calling and saying, 'Hey, I'm short of water.'"

14 This is on page 22 and 23 of the transcript.

15 Mr. Boyd then goes on to say in response to a
16 question: "Question: And it's not necessary for a
17 water user to use any specific words, correct,
18 when telling you he's short of water?"

19 "Answer: No, it's not necessary."

20 Mr. Schroeder also testified that there's no
21 magic word, that "hey, I need water" is sufficient.
22 And if that's a practice that the Wyoming commissioners
23 use in the State of Montana, it's a practice that we've
24 shown in the state -- or in the State of Wyoming. Let
25 me correct that. Excuse me. And then in Montana we

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1 see a practice where we often rely upon verbal calls.
2 That's a practice in both states.

3 Then again we're back to ridiculous, to use
4 Mr. Kaste's term, a ridiculous position by Wyoming that
5 not only, first of all, is there no call provision
6 under the Compact, now there is a call, but the call is
7 more than just notice, which is what Montana proffered
8 in 1981. The call must be a demand. Not just demand,
9 a perfect demand. A completely technically correct
10 demand. And not just a perfectly technically correct
11 demand, a demand that's followed up by inquiry into all
12 the details of how we intend to use the water, how
13 we're regulating the water, how much water may be lost
14 to Dayton and Miles City and all the way down the line.

15 What it is, Your Honor, is a continued
16 practice of Wyoming delaying meeting its obligations
17 under the Compact. And when you delay long enough in
18 the Tongue River Basin then you've evaded your
19 responsibility for that particular year.

20 Now, these cases, the Van Buskirk and the
21 Tucker case that Mr. Kaste says don't apply, they
22 actually -- the facts seem to fit. You're talking
23 about a person who has trouble with the water
24 commissioner and the court says you don't have to go
25 through that formal process, the exclusive process of

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1 the water commissioner. You have other ways in which
2 to ask for water.

3 Well, in this case we have a Compact
4 Commission that's not working, that's not providing us
5 the administration. So we are going, as I talked about
6 earlier, a dual track. We are continuing under the
7 Compact Commission to ask for administration.
8 Meanwhile our officials are continually communicating
9 with Wyoming officials asking for our water.

10 The Tucker case. The Tucker case is about
11 somebody who is called multiple times and refuses to
12 curtail. That sounds like the State of Wyoming in this
13 case. So again, Your Honor, we think the liability
14 issues we pointed out in the brief are certainly
15 supported by precedents in Montana law.

16 Now, I think it's interesting that we are back
17 to this position that says prior to 2004 Wyoming had no
18 notice, no idea, in fact, that Montana was short of
19 water and would be asking for water, and he cites the
20 Keith Kerbel conversation in April 2004. Well, how
21 about the Pat Tyrrell e-mail to Jack Stults in 2004
22 when he says, "Well, Jack, these issues aren't going to
23 be any different than the issues we discussed and dealt
24 with at length in the 1980s when we were dealing with
25 this before"? According to Mr. Tyrrell, this isn't the

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1 first time he's seen this issue.

2 And if you look at the testimony from
3 Mr. Fassett, Mr. Fassett, in fact, admits that we were
4 making us aware that Montana demanded water. I direct
5 you to paragraphs 95 and 96 in our facts section in our
6 first brief.

7 Mr. Stults talks about how he felt we were
8 entitled to water and he made it -- "I honestly
9 believe I made it clear to my counterparts in Wyoming."

10 Next paragraph. Question to Mr. Fassett:

11 "And did you believe at any of the times when
12 Montana gave you this information that one of
13 the purposes was to see whether or not
14 anything could be done in Wyoming to help?"
15 Speaking of water shortages.

16 "Answer: "Oh, I think to some extent that's
17 correct."

18 I'm sure we're going to hear about the "to
19 some extent," quotation. But again, he says correct.

20 Mr. Fassett on paragraph 93 in the same
21 document, he describes routine communications where
22 Montana indicated, quote -- and this is a quote from
23 his testimony: "We're not getting all of our pre-1950
24 water rights," end quote.

25 Then Ms. Lowry in her testimony -- this is

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1 paragraph 83 of our same brief -- testified she knew
2 T&Y was not getting enough water to satisfy its
3 pre-Compact right, T&Y being the second oldest right in
4 Montana. That means if number 2 is not getting it,
5 number 3 through numbers 77 are also not getting their
6 water because they are at the bottom of the river and
7 they are calling the entire river.

8 Ms. Lowry went on to say --

9 SPECIAL MASTER: I'll just interrupt only
10 because I'm just becoming concerned that, as in much of
11 this case, the notice issue is going to end up taking
12 more attention than all the rest of them. And I
13 actually know those portions of the record. So I've
14 actually gone through that. And so probably no reason
15 to go into that right now.

16 MR. SWANSON: All right, Your Honor.

17 So I will just end with this idea. And again
18 we've seen this before. This will be my final point,
19 this claim that prior to 2004 there was no call. There
20 would have been papers and memos and commissions and
21 discussions from governors and there would have been
22 all these cites.

23 Well, it didn't happen in 1981. In 1981 there
24 were no printed memos. We had handwritten notes found
25 late in discovery in some -- the wrong drawer in the

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1 wrong office. And that was clearly a call and it was
2 clearly a notification and request for water from
3 Montana in 1981.

4 And then as I had began at the beginning of
5 this testimony and it's laid out in much more detail in
6 our brief, all through the 1980s there were a series of
7 discussions, questions, letters between governors, et
8 cetera, saying we, in fact, need to deal with this
9 issue.

10 So this idea that this all came out of the
11 blue in May of 2004 is not supported, Your Honor, by
12 not only the compelling, truthful, sincere testimony of
13 gentlemen like Gary Fritz and Jack Stults and Rich Moy,
14 Rich Moy who said he was practically pounding on the
15 table trying to make them send us water, but it's also
16 belied by all the documents that do, in fact, show that
17 there were continual communications about these issues.

18 And a very clear, crystal clear call in 1981
19 still evoked a response from Wyoming that was really a
20 non-response, which I think basically demonstrates
21 we'll still be doing this continual issue all the way
22 through 2006. Wyoming is unyielding and will continue
23 to be unyielding until it's provided better guidance by
24 this court.

25 SPECIAL MASTER: Okay. Thank you very much.

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1 So I'm again aware of the time. We have about
2 I would say three hours more probably of time for the
3 argument. And so what I'd like to do is divide about
4 an hour and a half for both the issue of the Montana
5 uses and the same on the Wyoming side.

6 And I have really a set of questions when we
7 come to these issues. So I'll probably jump in even
8 sooner in terms of my questions.

9 So, Mr. Draper, you're handling the next set
10 of issues?

11 MR. DRAPER: The way you ordered them, Your
12 Honor, I believe it's Mr. Wechsler treating the
13 Montana --

14 SPECIAL MASTER: Okay. So you're Montana and
15 you're going to be doing the Wyoming ones. Okay.

16 MR. WECHSLER: I prefer to be Montana.

17 SPECIAL MASTER: Could I just jump in here?

18 MR. WECHSLER: Yes, please.

19 SPECIAL MASTER: So let me just start out with
20 the Compact because we ultimately have to go back to
21 that. I'm going to start out sort of talking about the
22 reservoir and we're going to go into direct flow right
23 after that. So on the reservoirs the first question is
24 what does -- in Montana's opinion, what does section
25 (V) (3) of the Compact mean? What is it referring to?

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1 MR. WECHSLER: It's referring to the
2 additional storage in existing reservoirs at the time
3 the Compact was entered into above and beyond the
4 existing storage as of 1950. And so you can see what
5 happens in Article V(C). What they are doing is they
6 are trying to determine the post-Compact water, that
7 percentage of water that was not already in use at the
8 time of the Compact.

9 And so they have four things there. They
10 have -- first they have the diversions above the point
11 of measurement. Second, they have brand new
12 reservoirs. I think that's (C)(1). Third, they
13 have -- and this is the one we're focusing on,
14 (C)(3) -- they have additional post-Compact storage in
15 existing reservoirs.

16 And we all know a lot of times you have
17 reservoirs just as we have here in the Tongue River
18 Reservoir and it ends up being much less expensive to
19 simply add on storage there. We've seen that happen in
20 Montana. We've seen that happen in Wyoming on a number
21 of reservoirs that have post-Compact storage in
22 existing reservoirs.

23 And then finally you have the water passing
24 the point of measurement and by doing that then the
25 states are accounting for all of the post-Compact water

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1 and then they are divvying up by percentages that
2 post-Compact water.

3 But what is very clear from both your prior
4 rulings, the court's rulings, the language of the
5 Compact, what is protected is the amount of water that
6 was already vested as of the time of the Compact. We
7 heard from Dr. Littlefield who's an historian about the
8 negotiations. We know from that that what Montana and
9 Wyoming were concerned with is protecting those water
10 rights that were vested and protected under each
11 state's existing laws.

12 And we also know that the states were very
13 aware of the Tongue River Reservoir. We see it in the
14 engineering report which ends up being extremely
15 important as they entered into the final Compact. And
16 so -- and then you can actually see it in Article V(A)
17 which protects the appropriative rights established
18 existing under the doctrine of appropriation.

19 And so we look to what does "beneficial use"
20 mean. Well, you and the court have held that it's
21 essentially synonymous with the definition under the
22 doctrine of appropriation and so in turn what we end up
23 doing is we look to what in Montana and Wyoming is
24 protected, when is a reservoir right vested.

25 And you heard -- there's a number of citations

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1 in the brief. You heard the testimony of Mr. Smith,
2 Mr. Davis, amongst others, that a water right, a
3 reservoir right in Montana is totally protected once
4 they have invested in it, built the reservoir, filled
5 the reservoir and offered it for sale. In fact, the
6 Montana Constitution explicitly indicates that sale is
7 a beneficial use.

8 And so then looking at the reservoir, well,
9 what was vested and protected as of the time of the
10 Compact? Well, the reservoir had filled to capacity,
11 been emptied, filled again prior to 1950. And, in
12 fact, we can see on multiple occasions they were
13 releasing up to 50,000 acre feet of water prior to the
14 Compact.

15 So the amount that's protected is the full
16 earned annual yield of that Compact under the -- I'm
17 sorry, of the water rights of the reservoir under the
18 Compact under regulations pursuant to Montana law.

19 SPECIAL MASTER: And so the additional 6,571
20 acre feet of capacity that has been added on here, how
21 is that handled under (V) (C) (3)?

22 MR. WECHSLER: Well, I think that is a unique
23 additional capacity because I think when you're looking
24 at the reasons that the reservoir was rehabilitated in
25 that additional storage, what you're looking at is

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1 Northern Cheyenne Tribe Compact which is directly
2 related to the rehabilitation. And so there are 20,000
3 acre feet now in the reservoir that are prior vested
4 winter rights, tribal water rights.

5 But I will say that even if you were to accept
6 Wyoming's interpretation it's only -- you know, the
7 tribal rights are covered under Article V(B), in other
8 words, they are post-Compact rights, which has a number
9 of problems which we've pointed out in the pleadings.
10 You don't actually get to that 6,700 additional acre
11 feet of water in this particular case because we know
12 that in the years at issue the reservoir always had the
13 minimum pool required by the operating plans of at
14 least 10,000 acre feet.

15 So the amount of water that was stored and
16 released in any given year was always less than there
17 was during the Compact. Does that answer your
18 question?

19 SPECIAL MASTER: Yes. It raises some other
20 questions I'll get back to later, but, yes, that
21 answers -- well, I think I understand then what
22 Montana's argument is here.

23 Another section we haven't talked about at all
24 that I was just curious when I was reading back over.
25 Do you have any idea what the purpose of section

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1 V(E) (2) is?

2 MR. WECHSLER: Pardon me. Hopefully my
3 colleagues.

4 SPECIAL MASTER: I apologize.

5 ATTORNEY GENERAL FOX: I happen to have a copy
6 of the Compact. I just so happen to have one here.

7 SPECIAL MASTER: And I'll just read for
8 everyone else's purposes. This is V(E) (2) and it says:
9 "There are hereby excluded from the provisions of this
10 Compact devices and facilities for the control and
11 regulation of surface waters."

12 MR. WECHSLER: You're taxing my memory. I
13 don't know off the top of my head. I do know that this
14 was addressed in some early briefing and I want to say
15 it was addressed as part of a motion to dismiss or in
16 the oral argument, but I will say at the moment I
17 don't -- I believe it's covered in --

18 SPECIAL MASTER: Mr. Draper looks like he's
19 anxious to --

20 MR. DRAPER: Well, Your Honor, that reference
21 to surface water, it is curious, but it refers to sheet
22 water that has not reached water course which is
23 normally not subject to prior appropriation.

24 SPECIAL MASTER: Okay. Okay. Thank you.

25 Okay. Back on.

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1 MR. WECHSLER: So in this litigation Wyoming
2 at the -- in the middle or the end of trial and, in
3 fact, carrying over until now has taken this novel
4 interpretation that we're -- the only amount of water
5 that was protected was 32,000 acre feet which is
6 related to the contracts, but that's contrary to the
7 language of the Compact, as I explained.

8 It's contrary to the doctrine of appropriation
9 both in Montana and I should say in Wyoming as well
10 where we heard the testimony from Mr. Tyrrell and
11 Mr. Fassett that the way in which a reservoir right in
12 Wyoming is protected also has to do with building and
13 filling the reservoir and then it's the entire capacity
14 that is protected.

15 It doesn't take into account the intent of the
16 state in protecting the prior rights and, in fact, it
17 makes no sense given that we know from the letters to
18 Congress and the documents that were before Congress
19 and they adopted this Compact that one of the issues
20 that was important near and dear to both states and
21 particularly for Montana was storage. And so for
22 Montana to have given up a huge amount of storage
23 really particularly with complete silence in the
24 Compact is contrary to that.

25 I think it's also contrary to the -- it

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1 illustrates that it is a -- that Wyoming has these
2 continuously shifting positions in order to minimize
3 their Compact obligations. And the reason I say that
4 is the last time that Wyoming has taken a position on
5 when reservoirs are perfected and what amount of water
6 is protected under the Compact was during the 1980s in
7 the Middle Fork project and there's testimony, in fact,
8 some documents that Wyoming's position at that time was
9 the amount of water that is protected under a storage
10 right is the amount of water that was viable let alone
11 built and perfected.

12 And the reason they were saying that is they
13 had the Middle Fork project which was a large amount of
14 storage in the Powder River. Montana objected to it
15 taking largely the same position that we take today.
16 And Wyoming's response to that was, well, because it
17 was filed even though it's not filled, even though it's
18 not filled and, therefore, protected, vested under the
19 doctrine of appropriation that amount of the reservoir
20 water is still protected under Article V(A).

21 The other thing I would note about that 32,000
22 what I'll call a novel argument is under the facts, for
23 example, in 2004 it doesn't even come into play. And
24 the reason that's true is we know today that the amount
25 of water that is allowed for the Tongue River Water

POST-TRIAL HEARING PROCEEDINGS

1 Users Association is 40,000 acre feet. Of that 7,000
2 are tribal rights which only a small amount of that was
3 used in that year.

4 We also note that in 2004 something like only
5 55 percent of those rights were allowed to be used and
6 that's because there were such great shortages. As
7 you'll recall, there's a pro rata sharing of shortages.
8 And so that means that we're really only talking about
9 something like 20,000, 25,000 acre feet of water was
10 actually used, released, enjoyed by Montana in terms of
11 its reservoir water in those years.

12 I want to -- unless you have questions about
13 that, I want to turn to the issue of winter flows.

14 SPECIAL MASTER: Sure. Why don't we turn to
15 winter flows.

16 MR. WECHSLER: Okay. And in your -- in
17 your -- the questions that you posed in the case
18 management order, you actually talked about them in
19 terms of winter releases, and I do want to quibble a
20 little bit about language because Montana does not
21 administer that water right in terms of the amount of
22 water that has been stored and released.

23 And the reason that's true is we're talking
24 here about an on channel reservoir and so the river
25 comes down and it comes through. It's only when water

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1 is actually captured that that water is stored. And so
2 what we're talking about instead is simply flow of the
3 river through the reservoir during these times.

4 In the motion for summary judgment, Montana's
5 motion for summary judgment, we pointed out that the
6 Compact does not require any particular type of
7 administration of water rights including we had
8 specifically called out the reservoir in terms of those
9 operations. And you, in fact, held in Montana's favor
10 and held then that it was the burden on Wyoming in
11 establishing that those operations were not consistent
12 with the doctrine of appropriation or were simply
13 wrong.

14 And the reason that that ends up being
15 important is we have two experts who in this case have
16 discussed reservoir operations. Both of those,
17 Mr. Smith and Mr. Aycock, testified on behalf of
18 Montana. Wyoming has offered no evidence whatsoever
19 about the operations of the Tongue River Reservoir
20 being inappropriate. And so that's a fatal mistake.
21 They are simply unable to satisfy the burden that you
22 set up for them.

23 Wyoming suggests that it's self-evident that
24 somehow winter flows through a reservoir should be
25 considered to be a waste or problematic. But again

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1 that is directly contrary to cases we have pointed out
2 in our brief and it's directly contrary to all of, not
3 some of, all of the expert testimony, the experts who
4 understand reservoirs who operate reservoirs in this
5 case.

6 Yet even without any kind of testimony
7 Wyoming's position is essentially Montana should have
8 set the reservoir flows at the beginning of the winter
9 at 50 CFS and should have walked away. And we pointed
10 out that there are a number of reasons that these flows
11 through the reservoir are, in fact, necessary.

12 And one is that this would cause significant
13 damage to the reservoir itself and endanger communities
14 downstream. In the brief we have cited to cases which
15 show that the doctrine of appropriation imposes an
16 obligation to operate a reservoir reasonably and, if
17 not done so, you're subject to liability.

18 As Wyoming's witness, Mr. Whitaker, for
19 example, and others as well have acknowledged, Wyoming
20 itself does not require a facility or a reservoir to be
21 operated in a way that causes damage to communities or
22 to the facility itself. And so this ends up being
23 another example of Wyoming attempting to impose a
24 stringent burden, obligation, standard on Montana that,
25 in fact, it doesn't practice in its own state.

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1 The winter flows are justified by I would say
2 six different things on which there is extensive
3 testimony from Mr. Smith, Mr. Aycok, Mr. Hayes who
4 again is with us here today and who acts as president
5 of the Tongue River Water User Association as the
6 operator of the reservoir. Those flows are justified
7 in order to prevent damage to the Tongue River
8 Reservoir. I mentioned that. You remember they have a
9 45,000 --

10 SPECIAL MASTER: I got that only because, you
11 know, this is stuff --

12 MR. WECHSLER: Yes, please.

13 SPECIAL MASTER: -- that I'm actually pretty
14 familiar with that at this point.

15 Several questions. First of all, so a lot of
16 this again, you know, I think gets back to the question
17 of the one-fill rule. I understand Montana's arguments
18 that Wyoming doesn't really, you know, follow sort of a
19 strict one-fill rule.

20 So there's the Federal Land Bank versus Morris
21 case that Wyoming believes states that Montana follows
22 the one-fill rule. And as I mentioned before the trial
23 began, when we look at that case, you know, you can --
24 you know, you can peruse and certainly have a potential
25 reading of that case that would say yes, it does. And

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1 at the same time, though, it's quite clear to me from
2 all the testimony that that's not what Montana actually
3 does.

4 So I guess one question I have is, you know, I
5 might ultimately say to the Supreme Court, oh, you can
6 distinguish the Federal Land Bank versus Morris case
7 and it's actually all totally consistent with not
8 following the one-fill rule.

9 But another possibility is that I come to the
10 conclusion that, you know, it seems to say the one-fill
11 rule, but the practice ever since Morris has been
12 something totally different.

13 If that's the situation, what should I
14 recommend to the Supreme Court they should do? Should
15 I recommend to the Supreme Court that it ignore all the
16 years of practice? Do I tell them that they should
17 ignore the Morris case?

18 MR. WECHSLER: Well, what I would say is --
19 and I'll call it the Federal Land Bank case. I would
20 first say there is no clearer case of dicta that I've
21 ever seen.

22 SPECIAL MASTER: I understand that.

23 MR. WECHSLER: I think the language leading up
24 to the paragraph in the discussion says something like
25 "we like this language" even though it's clearly

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1 unnecessary to the decision to make -- to address any
2 of those issues and, in fact, the holding is not
3 related to that language.

4 SPECIAL MASTER: Right.

5 MR. WECHSLER: So what do you do if -- my
6 understanding of your question is what do you do if you
7 find well, yes, I would agree that that is the rule as
8 stated by the Montana Supreme Court in this dicta.

9 Well, I would say --

10 SPECIAL MASTER: Even if it's not dictum, it's
11 an indication of what that Montana Supreme Court
12 thought at the time. So, you know, again, this is sort
13 of a serious situation where you have a clear I think
14 administrative practice and you have at least dictum in
15 one case that is just going a different way.

16 MR. WECHSLER: True. And I would suggest to
17 you that it's not the best indication of what the
18 current Montana Supreme Court says because, as we cited
19 in the brief, there are now claims examination rules
20 which are adopted by the Supreme Court and in those
21 rules they allow for multiple fills of the reservoir.

22 And so had the Montana Supreme Court believed
23 that there was a one-fill rule, then that would not --
24 they would not have adopted such a rule. So I would
25 look to that rule first.

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1 But setting that aside I understand your
2 question more to be what if -- you know, leaving that
3 regulation out of the equation, what I would say is the
4 Supreme Court has always been extremely reluctant to
5 tell states what their water rights are or what the
6 laws for the doctrine of the prior appropriation are.

7 And, in fact, we see that in this case. There
8 was a footnote in the 2011 court case which went
9 through great pains I thought to say, "Look it, states.
10 This is a state law issue. You know, we know that from
11 the McCarran Act and some of the cases, prior cases.
12 And so we're not going to tell you -- we, the Supreme
13 Court, are not going to tell you what your state law
14 prior appropriation doctrine is."

15 And so if for whatever reason you're inclined
16 to adopt or are afraid that maybe that Morris case is
17 the best indication of what the law is in Montana, my
18 suggestion would be certify it to the Montana Supreme
19 Court, allow the Montana Supreme Court to address its
20 own law, something that, you know, the Supreme Court is
21 clearly very reluctant to do.

22 But I think in order to get there you have to
23 ignore a lot of -- all of the testimony I would say and
24 you heard from essentially the state engineer of
25 Montana saying there's no one-fill rule here. We heard

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1 from, you know, everyone on down to claims examiners
2 that that is true. We can see in the adjudications
3 that the orders adopted by the Water Board allowed for
4 multiple fills in all of the state water projects,
5 which I think is something like 22 different projects
6 throughout the State of Montana. And then, of course,
7 there's the claims examination rules.

8 I would also say I don't think that simply
9 saying, "Montana, you have a one-fill rule" is
10 dispositive. And the reason that's true is we see --
11 and we've cited a number of authorities in the brief.
12 I won't go into detail on that, but what I think they
13 show is that simply saying you have a one-fill rule
14 doesn't mean that the proposition that Wyoming is
15 suggesting, which is a rigid, a most rigid application
16 of that doctrine, which is to say starting October 1
17 all water that passes through the reservoir must be
18 charged against the reservoir.

19 We see that that is not the way a one-fill
20 doctrine works in Colorado. It's not the way it works
21 in Idaho, which are really the only two other states
22 I'm aware of that have that doctrine. And we even see
23 that that's not the way that that works in Wyoming.

24 And the reason and the thing I would point to
25 the most for that is you can see the notice to fill

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1 which was a requirement that the rules have in the
2 State of Wyoming that when they are going to start to
3 tell a reservoir, okay, now it's time for you to start
4 filling that they issue these notices to fill. We
5 heard Mr. LoGuidice say that, in fact, that was the
6 standard practice.

7 And so it's at that point when the reservoir
8 must start filling. We know that in the Tongue River
9 Basin there was never a notice of those issues. I know
10 that, you know, Wyoming's argument is somehow Bill
11 Knapp can testify that, oh, people just sort of knew
12 that, but nevertheless there is not a -- there was
13 never any notice to fill issue there.

14 And when we talked to Mr. LoGuidice who I'll
15 remind you is the head of the Division II office there,
16 what he said is, well, the regulators have a fair
17 amount of discretion in how they are administering and
18 managing these reservoirs and they can use that
19 discretion, for example, to consider a number of
20 factors including when it should fill, when it should
21 be charged with water.

22 We also see that this situation of bypass
23 flows being charged against the reservoir, the fact
24 again is not the way that Wyoming actually administers
25 its reservoirs. There is Kearny Reservoir which has

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1 bypass flows, all which are long and the reason they
2 give is they don't want the cement to be damaged just
3 as in the Tongue River Reservoir. Those are never
4 charged against Kearny. Wyoming's comeback to that is,
5 well, that's totally different because there's never a
6 call made by the reservoir.

7 So let's look at Park Reservoir. In Park
8 Reservoir we know that there's a bypass flow of
9 probably 4 to 5 CFS throughout the year. I think the
10 testimony of Mr. Knapp was that ends up being somewhere
11 in the realm of 1,600 to 1,700 acre feet over the
12 course of the winter and to offset that Wyoming has a
13 90 CFS right. So there's still something like 1,600
14 CFS that are unaccounted for.

15 Well, in '01 and in '04 the reservoirs that
16 are connected to Park Reservoir, Cross Creek and Big
17 Horn -- well, in 2001 and 2004 Park Reservoir did not
18 fill and it is connected to those two junior
19 reservoirs, Cross Creek and Big Horn. And so under
20 their rigid, you know, rule as they claim that should
21 be imposed on Montana, you would expect Park Reservoir
22 gets charged with all of that water that it bypassed,
23 that 1,600 acre feet.

24 Well, in fact, that's not what they did. It's
25 not what they've done. What they did is, as they

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1 always do in administering their reservoirs, that they
2 allowed that water, the junior water that was stored in
3 Cross Creek or Big Horn to be passed down to Park
4 Reservoir.

5 And so again, you know, we're seeing Wyoming
6 attempting to impose what they are calling this
7 one-fill rule on Montana when, in fact, whether or not
8 the dicta in that Federal Land Bank case is correct it
9 doesn't answer the question as to whether Montana's
10 practices were appropriate. Even if there were a
11 one-fill rule, which we obviously very vigorously
12 contest, it wouldn't necessarily follow that we had to
13 store every drop of water beginning October 10.

14 And, of course, setting aside all the things I
15 was going to start talking about, which is the major
16 damage it would cause to the reservoir, the operational
17 problems, the stock rights, the ice jams and all of
18 that.

19 SPECIAL MASTER: I understand all of that.

20 So let me ask a totally different question.

21 MR. WECHSLER: Sure.

22 SPECIAL MASTER: If Montana just decided not
23 to begin filling the reservoir until June, you know,
24 and there's -- you know, for the moment let's assume
25 that there's no particular safety reasons for doing

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1 that or for downstream purposes. It's just one year
2 Montana decides not to fill up until June?

3 MR. WECHSLER: Totally arbitrary.

4 SPECIAL MASTER: That's right. I mean, it
5 just decides that, you know, year, you know, it looks
6 there will be more than enough water. We'll just leave
7 it in the lake. And then they start to fill it up and
8 they turn to Wyoming and say we want our water now. Is
9 there anything that would prevent Montana from doing
10 that under Montana's approach?

11 MR. WECHSLER: I think that what would prevent
12 that and really what the constraints on the reservoir
13 is the historic pattern of use and we have explained
14 that the historic use defines the water right. It is a
15 component of the water right and, therefore, the Tongue
16 River Reservoir is obligated then to fill during the
17 runoff period when once these dangers and problems to
18 the reservoir and downstream are abated. That is when
19 it is obligated to start filling.

20 And in the example that you were positing I
21 think they are no longer following their historic
22 pattern of use. Now they are essentially at the end of
23 the spring runoff period. I think they basically used
24 the irrigation season and I think there are cases that
25 say you can't change your historic pattern of use to

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1 the detriment of juniors because that forms a component
2 of your water right as we have argued.

3 SPECIAL MASTER: Let me actually go on to the
4 beginning sort of spending time on the direct flow
5 rights.

6 MR. WECHSLER: Okay.

7 SPECIAL MASTER: So could you just in
8 relatively succinct terms tell me what in Montana's
9 view Montana needs to show in order to prevail on the
10 direct flow rights.

11 MR. WECHSLER: Yes. I think that Montana
12 needs to show that there were actions in Wyoming that
13 caused shortages to the state water and, therefore,
14 that there was insufficient water to satisfy Montana's
15 pre-1950 rights. And I am in part going on the prior
16 rulings of the court.

17 And so I think the difference is and what the
18 questions that end up arising are, well, first of all,
19 Wyoming's argument is you must identify an individual
20 water right in Wyoming that should have been shut off
21 and then trace it down to the individual user in
22 Montana and have this sort of causal link as between
23 the two.

24 I think that that is -- that's contrary to the
25 general notion of the Compact being as between two

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1 sovereigns. It's inconsistent with the first interim
2 report and also the 2011 Supreme Court decision that
3 are essentially talking about lots of water that are
4 then apportioned to the two states.

5 And I also think it's inconsistent with the
6 prior case law and for that I think I would point to
7 the Colorado versus New Mexico case in which you see
8 some of the similar things being raised by Colorado
9 there. They were saying look, New Mexico was making
10 inefficient use of water down in New Mexico. They
11 wasted water. They had abandoned rights.

12 What the court held in its 1984 ruling was
13 that New Mexico had met its burden of showing a real
14 and substantial injury by showing that the diversions
15 in the upstream senior state would cause less water to
16 be available for the downstream state.

17 After that the burden shifted to the State of
18 Colorado, in this case the State of Wyoming here, to
19 show that New Mexico was receiving more water than it
20 needed. And I think in part that answers some of the
21 questions like waste and intrastate remedies that
22 really ultimately that burden rests on Wyoming. I
23 think they acknowledge that for the purposes of waste
24 in their pretrial memorandum where they acknowledged,
25 yeah, that's our burden.

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1 And in your motion on summary judgment you had
2 said, well, again, it's Wyoming's burden to show that
3 the practices in Montana were insufficient. But
4 setting all of that aside for a second, because here
5 we're talking about very, you know, technical things
6 and I understand that you are wanting to cover all the
7 bases.

8 But I think it's important to keep in mind
9 this is not a close case. Whether or not Montana had
10 sufficient water to satisfy its pre-1950 uses or, as
11 Mr. Draper will talk about, whether Wyoming caused that
12 is really not subject to a reasonable question.
13 Montana presented what I would call three sets of
14 evidence that it was not receiving sufficient water in
15 those years to satisfy its pre-1950 right.

16 The first was -- and, as we know, what we have
17 here is a pretty simple system. There are 77
18 pre-Compact rights in Montana. All have been
19 adjudicated or in the process of adjudicating. At the
20 top of the system you've got the reservoirs. We know
21 when the reservoir fills when it fills.

22 At the bottom of the system you have the
23 second oldest and largest right, which, by the way,
24 ends up being the calling right in Montana, the T&Y
25 Ditch. And the hydrograph starts way up here.

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1 Everybody has got water and then immediately it crashes
2 and nobody has got water.

3 The overwhelming evidence presented by
4 Mr. Hirsch, Mr. Muggli, Mr. Hamilton, the water
5 commissioners, Mr. Kepper and Mr. Fjell, Mr. Gephart,
6 was the only water users in Montana that were receiving
7 water in the years that we're talking about, receiving
8 direct flow pre-1950 water, were the Nance right, the
9 seniormost, the 1886 right, and part of the T&Y, not
10 even the whole T&Y, just part of T&Y, again an 1886
11 right.

12 The rest of them including the T&Y was on
13 stored water. And so clearly there's insufficient
14 water there to satisfy Montana's pre-'50. And that was
15 the situation throughout the years because you would
16 see at the beginning of the year, reservoir didn't
17 fill. Once they start releasing water from the
18 reservoir then you know that they are not receiving
19 sufficient water for direct flow and the remainder of
20 the time that situation prevailed.

21 You can look to the state line data which
22 there is information in Mr. Book's rebuttal testimony
23 on the level, the flow levels on each day at the state
24 line gauge which are -- sometimes they get as low I
25 believe as 6 CFS.

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1 And so the second piece of evidence I would
2 point to is that the experience of the water users,
3 people like Mr. Hayes, the water commissioners, the
4 people who testified on behalf of Montana said in order
5 to satisfy the two seniormost rights, meaning again
6 Nance and T&Y, you had to have 200 CFS passing the
7 state lines, and again you see that in almost none of
8 the time frame that we're talking about.

9 The second -- the third level set of evidence
10 that shows Montana's pre-1950 rights were short is
11 Mr. Book's analysis of the demand. And so there you
12 would see what I would actually call a conservative
13 analysis, and we included in our brief why we consider
14 that conservative.

15 He looked at return flows. He looked at the
16 amount of acreage that has been used in various
17 periods, various months, and he calculated how much
18 water is necessary to satisfy Montana's pre-'50 rights,
19 and then we can compare that to how much water was
20 actually entering the state, which, again is not even
21 close.

22 And so Wyoming wants to quibble about the
23 details. I think you can probably -- you could assume
24 Mr. Book's analysis was 50 percent overestimating and
25 you still are not even close to the amount of water

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1 that Wyoming was providing to the State of Montana.

2 SPECIAL MASTER: We need to break, but let me
3 ask you and leave you with one question.

4 So, again, what I want to make sure I also
5 understand is exactly what Montana thinks is necessary
6 in order to show a violation of those direct flow
7 rights.

8 And if I understand you correctly, even though
9 you think there was a lot of evidence showing them
10 back -- there are people out there that you didn't
11 really want to get the water. It sounds as if what
12 Montana is saying is you look to see what are the
13 rights in existence, the rights that have been
14 recognized in Montana on the -- on the Tongue River and
15 you total those up. And if, in fact, you're not
16 getting that much water, then you've established your
17 case. And so I'm curious as to whether or not that's
18 true.

19 And then it's just a hypothetical afterwards.
20 If, for example, the T&Y Canal, if they just went out
21 of existence, all of the land was fallow -- never tell
22 Mr. Muggli I used this as a hypothetical -- but if this
23 was the case, would Montana be able to continue to
24 claim water for that acreage or, you know, do you
25 actually have to show there, in fact, people utilizing

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1 that water?

2 MR. WECHSLER: I understand.

3 SPECIAL MASTER: Okay. Great. So let's take
4 a break and we'll come back -- if you won't mind, we'll
5 come back like 2:10 rather than 2:15. I want to
6 squeeze another five minutes at the end. We have about
7 ten minutes left and then I want to switch over to
8 Mr. Kaste.

9 (Lunch recess taken.)

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POST-TRIAL HEARING PROCEEDINGS

1 Stanford, California

May 1, 2014

2 AFTERNOON SESSION

3 MR. WECHSLER: Good afternoon.

4 SPECIAL MASTER: I left you with a question
5 and a hypothetical.

6 MR. WECHSLER: That's true. And so I
7 understood the questions to be, first, what must
8 Montana show in order to show a violation and,
9 second -- I'm paraphrasing, but if the T&Y were to
10 abandon legally no longer a valid right is what
11 happens.

12 SPECIAL MASTER: Actually, let me just clarify
13 that and let's assume that, you know, they just stopped
14 using their water. They haven't necessarily abandoned
15 it yet.

16 MR. WECHSLER: Okay. I think that to answer
17 the question I'll start where Montana's original
18 position was and then concede that that has changed.
19 Montana's original position in this case was the
20 Compact locked in a certain amount of depletion and so
21 there was an obligation at the state line delivery that
22 at the state line associated with certain conditions
23 that a certain amount of water had to be delivered.

24 That position was rejected. Essentially the
25 court said that the amount changed based on prior

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1 appropriation doctrine and so, for example, if there is
2 a right which was diverting the same but consuming more
3 pursuant to, you know, changing irrigation or other
4 type of change to the right that Montana was no longer
5 allowed to receive that amount of water.

6 So under the doctrine of appropriation what we
7 say is the standards are clear, the law is clear that
8 once you have an adjudication you're entitled to the
9 amount of water to satisfy your water right. That's
10 been established through that adjudication. That forms
11 the prima facie amount of the water right and that's --
12 I'll give you a Montana statute cite of 85-2-227.

13 I think that's the also the Parshall versus
14 Cowper case. We will recognize that the amount that
15 Montana is entitled to, if that amount of water
16 ultimately isn't needed Montana wouldn't get all of
17 that water, which I think goes to your second question.

18 And that's why you see in the Book analysis
19 there is some allowance that, in fact, if all of the
20 acreage isn't being irrigated in particular months and
21 we see that in, for example, June and September that
22 we're not claiming that amount of water.

23 And so I think the answer to the T&Y
24 questions, and I'll answer both of the hypothetical I
25 guess I posed which was T&Y no longer a valid right,

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1 totally abandoned, not transferred and completely not a
2 valid right, Montana would not be entitled to that
3 water.

4 If, however, it were simply idle or there's
5 some acreage that were idle, I think as an initial
6 matter Montana would be entitled to that water.
7 Wyoming, however, could establish, prove that that
8 water wasn't necessary or needed as happened in the
9 Parshall case and I think very very relevant to this
10 case as happened in the Colorado versus New Mexico
11 case.

12 As I said, the defense there from Colorado,
13 the upstream state, was very much along the lines of
14 what Wyoming is claiming here, that there was wasted
15 water or abandoned rights, water that was not necessary
16 in New Mexico. And once New Mexico established that
17 those actions up in Colorado were causing harm to their
18 rights, then the burden was placed onto Wyoming in the
19 second phase of that case, the 1984 case, to show that,
20 in fact, New Mexico didn't need that water. And so
21 that I think is how that would play out.

22 I will say those are hypothetical situations.
23 Again, in this particular case I don't think we get
24 anywhere near any particular line because we're dealing
25 with very small amounts of water that were coming into

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1 Montana, you know, at a time that in Wyoming they were
2 using post-1950 uses, where there was a free river
3 situation. And we weren't even close to receiving
4 enough water to satisfy all of our rights.

5 So it's really not a close question. And as I
6 said before, all of the evidence shows that -- you
7 know, whether you want to look at Mr. Book's analysis
8 or you want to look at the testimony of the water
9 users, our water users simply were not receiving their
10 water. They were short of water. They were all short
11 of water and using storage.

12 And we also know that the storage right, it is
13 uncontested that it didn't fill. They were being
14 forced to cut back and there was a lot of details we
15 talked about at the trial about the ways that that
16 caused hardship to Montana users.

17 SPECIAL MASTER: Okay. So that's really
18 helpful. So just to rephrase, basically what Montana's
19 position is is that the adjudicated water right is sort
20 of prima facie evidence of what the entitlement is and
21 that should be what Montana receives, although to the
22 degree that Wyoming can prove that, in fact, their
23 particular acreage which is not being used, then you
24 can take that amount out.

25 MR. WECHSLER: That's correct, Your Honor.

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1 SPECIAL MASTER: All right. So let me ask and
2 I'm not sure there's an easy answer to this question.
3 It might just be the nature of compacts and the
4 original jurisdiction of the Supreme Court, but does
5 this put the Supreme Court in a position that, to the
6 degree that there are calls in the future by Montana
7 against Wyoming and the claim is we're not getting all
8 of the direct flow water that we're entitled to, that
9 every time there's a dispute over whether or not
10 particular partners are actually getting -- actually
11 need the water, that that's going to end up, unless the
12 parties can agree on it, before the United States
13 Supreme Court?

14 MR. WECHSLER: Well, I think there's a danger
15 of that unless an appropriate remedy is put in place.
16 We know that the court is very hesitant to have a water
17 monitor, which they have done in rare occasions, but
18 has been very clear that it's hesitant to do it and I
19 think probably it would be fair to say unlikely to do
20 it in the future.

21 What I would say to that is all along Montana
22 has argued that in the remedies phase -- and I don't
23 think we're there yet. This phase of the case is to
24 say was there a violation and, if so, in what amount,
25 how many acre feet or CFS.

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1 I think the question for the next phase as we
2 view it is okay, what do you do about that? We know
3 that there's been this violation and Montana has argued
4 all along that what ought to be done is that a
5 methodology is put in place that will involve some
6 technical analysis and a study and, you know,
7 potentially could be resolved by you or if the parties
8 are able to resolve it as they did, say, in Arkansas
9 River it was helpful.

10 But the methodology would essentially say,
11 okay, under certain circumstances a certain amount of
12 water that's -- that certain indices, whether it's
13 strictly meters, whether it's at the Miles City gate,
14 the state line, places in Wyoming, that the parties
15 have some certainty as to what they should be doing,
16 what they -- you know, they know what to expect given
17 those indices.

18 I think we heard Wyoming say that that kind of
19 certainty would be helpful. It would very much be
20 helpful for Montana. In fact, we have said all along
21 that has been the primary objective for the State of
22 Montana in this case is to get a workable methodology
23 so that going forward we're able to know that we can
24 expect to enjoy our pre-Compact rights every year.

25 And, you know, that methodology may involve

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1 indices. It may involve some process for a call that
2 we know will be honored given certain circumstances.
3 So I think that's what we envision.

4 SPECIAL MASTER: Okay. So actually I want to
5 take you back just for a moment to the reservoir
6 storage issue because I realize there was one question
7 that I just wanted to clarify. And that is is it
8 Montana's position with respect to the storage right
9 that what Montana has a right to do is to fill the
10 reservoir once a year to its full capacity of about
11 79,000 acre feet?

12 MR. WECHSLER: Yes. That's our position.

13 SPECIAL MASTER: Okay. And I know then the
14 preliminary decree, for example, there was reference to
15 134,000 acre feet. Montana is not claiming that they
16 have a right to that amount?

17 MR. WECHSLER: Not under the Compact.

18 SPECIAL MASTER: Okay. And why is that?

19 MR. WECHSLER: Well, I think in the -- in the
20 course of the litigation you make certain choices about
21 what it is we want. We feel that is totally
22 defensible. I think right now the total fill capacity
23 of the Tongue River Reservoir given the adjudication is
24 a little bit of an undecided question in terms of how
25 many -- what capacity can it fill to.

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1 We've decided that the more prudent approach
2 was to take something that was totally defensible, that
3 was, in fact, conservative, an amount of water that we
4 know -- you know, we know that the reservoir filled
5 prior to the Compact. We know that the tribal rights
6 were in existence and protected at that time. We know
7 that the rights of the reservoir are commingled. And,
8 therefore, for Montana to receive its full amount, it
9 needs to fill to that 79,000 recognizing that we feel,
10 like I said, that's a conservative position but one
11 that is very very defensible.

12 SPECIAL MASTER: Okay. Thanks. I'm just
13 looking at them -- just looking at the time and I want
14 to make sure we're able to get through everything. If
15 there's some additional points you want to make on the
16 storage and direct flow rights at this forum, that's
17 fine, but what I'd most want is to return to Mr. Kaste
18 and we can come back for some follow-up.

19 MR. WECHSLER: That's good.

20 SPECIAL MASTER: Okay. Excellent. Thank you.
21 So have you been keeping track of my
22 questions?

23 MR. KASTE: Well, I tried. And so I suspect
24 we want to talk about the reservoirs first.

25 SPECIAL MASTER: Yes. Let's do that.

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1 MR. KASTE: Well, the first thing I want to
2 say is unrelated to one of your questions, but it's
3 sort of endemic throughout the course of this
4 litigation. You just heard Mr. Wechsler describe
5 filling the reservoir in a way that I think is
6 exceedingly telling about what's really at stake here.

7 And I have this conversation with my kids all
8 the time, you know, when they say "it fell" and "it
9 broke." "It" disclaims all personal responsibility for
10 it falling and it breaking when you knocked it off and
11 broke it. And when you say "it didn't fill" Montana
12 disclaims responsibility for not filling their
13 reservoir. They have the keys to that reservoir gate
14 and they have the means available to them to fill it,
15 and they should.

16 And I think that's a huge problem in this
17 litigation and a huge disconnect between the parties
18 with regard to reservoirs. We have this idea on this
19 side that it just happened and on this side we know
20 that they did it. That's a big problem that needs to
21 be fixed in this litigation.

22 Now your first question was what does Article
23 V(C)(3) mean. Well, it means exactly what it says. In
24 existing reservoirs existing uses are counted under
25 V(A) and any existing reservoirs new uses are counted

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1 for V(B) purposes. There's no magic to it.

2 Mr. Wechsler tries to say that, well, you
3 know, really that's for enlargement. If you built a
4 bigger reservoir, then that's what that's designed to
5 deal with. Well, it doesn't say that. It doesn't say
6 new storage in existing reservoir is enlargements.
7 He's using the words that would lead us to believe that
8 they're talking about a different hole in the ground.
9 It talks about uses and Montana says, well, that's
10 crazy, that's ludicrous, it doesn't make any sense at
11 all. Why would Montana do that?

12 Well, because the Compact was designed to
13 protect existing uses. You said that in your first
14 interim report. I think you said in your first interim
15 report that it says that all over this Compact. It's
16 designed to protect existing uses.

17 And so when Wyoming sat down to negotiate this
18 Compact in 1950 and it looked across the way they saw a
19 reservoir being operated and, as you heard during
20 trial, to satisfy 32,000 acre feet worth of contracts,
21 and we know that they never even sold that.

22 What's interesting to me is we went back and
23 we looked at the trial exhibits and there's this
24 wonderful report on activities of the water board that
25 Mr. Smith testified to. And you see in that report it

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1 says, well, by 1961 we only actually sold 11,000 acre
2 feet of contract water.

3 That's what Wyoming saw when we looked across
4 the way. We can live with that. That's fine. We can
5 protect that. And that's what Article V(C)(3) does.
6 We saw what was going on in Montana and Wyoming has
7 been exceedingly generous in light of the fact that
8 only 11,000 acre feet was actually sold and therefore
9 actually put to beneficial use by virtue of the plain
10 language of the 1937 compact.

11 Fine. Let's say it's 32,000 acre feet.
12 That's what you had the ability to sell in 1950.
13 That's what we anticipated would happen when we entered
14 into this contract in 1950 was the Tongue River Water
15 Users Association would put 32,000 acre feet of water
16 for beneficial use. And that is protected under V(A).

17 And there's been plenty of water in both years
18 at issue to satisfy that right. And anything above or
19 beyond that right is calculated under V(B) because one
20 thing that the Compact makes clear and one thing the
21 doctrine of appropriation makes clear, too, is that we
22 don't count the same water twice. There's no way to
23 double-count water under this Compact. It's either
24 V(A) water or it's V(B), but it can't be both.

25 And so it means exactly what it says and it

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1 necessarily means that any existing reservoirs, there's
2 a V(A) pool and a V(B) pool. That's it.

3 SPECIAL MASTER: Let me ask you several
4 questions about that. The first is let's assume that
5 we don't have the issue of the amount of water which is
6 flowing through the reservoir in the winter and instead
7 what Montana does is it's simply on a particular date
8 close the gate, fills it up so we get away from the
9 one-fill rule which we can come back to in a moment.

10 So under those circumstances what is Wyoming's
11 argument as to how much water Montana would have a
12 right under the Compact under its V(A) rights to put
13 in? Is it basically you can fill it up until it gets
14 to the 32,000 level and then that's it?

15 MR. KASTE: Well, you can fill it all the way
16 up if there's water available.

17 SPECIAL MASTER: Understood.

18 MR. KASTE: But Montana's ability to call on
19 Wyoming at any given point in time and say, "hey, we
20 are seeking to enforce our V(A) right, the limit of
21 that right is 32,000 acre feet. It's defined as of
22 1950. That's it. It's 32,000 acre feet. And they can
23 because they have the space store lots more water in
24 there and that -- all that water is, it's related to at
25 some given point in time calculated or part of the V(B)

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1 calculation.

2 And that's the extent of their right. And if
3 they call on us to provide more than 32,000 acre feet
4 or they are calling us and saying we need to curtail
5 your uses at this point in time and they have had
6 access to more than 32,000 acre feet of water, then
7 their call is invalid. They have the water. They
8 can't call for more for this right.

9 SPECIAL MASTER: Okay. So again just looking
10 back at how much the reservoir actually filled to prior
11 to the negotiation of the compact, it looks like it
12 ranged from a low of about 36,000 acre feet to a high
13 of somewhat over 75,000 acre feet. And Wyoming's
14 position would be we, "Well, in those years Montana was
15 lucky. There was plenty of water to fill it up to that
16 level."

17 But, in fact, if they had been water-short
18 years and the only way they could have filled it beyond
19 32,000 acre feet would have been to call Wyoming, they
20 would have been out of water. They would never have
21 been able to fill to any of those levels.

22 MR. KASTE: Yeah, that's right. And that
23 concept adheres in this Compact because it's limited to
24 beneficial use. The amount of water that Montana put
25 to beneficial use from this reservoir prior to 1950 was

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1 at most the 32,000 acre feet of contract water that it
2 had the authority to sell. And if they got more than
3 that in a given year, great, but it cannot call on
4 Wyoming to supply water after it has received that
5 amount in any given year.

6 SPECIAL MASTER: Let's ask exactly the same
7 question in just a slightly different way. Then it's
8 your view that, at least what they are fighting after,
9 the Montana negotiators of this particular Compact
10 would have thought to themselves based on this
11 particular question, well, you know, all those various
12 years and we could have billed it for more than 32,000
13 acre feet, that was just through the generosity of the
14 precipitation gods and, in fact, all we are getting
15 pursuant to this Compact is the right to fill it up to
16 32,000 acre feet, again assuming that there's not more
17 water available.

18 MR. KASTE: I happen to think that's what they
19 thought because that's what they wrote. That's the
20 plain language of this Compact.

21 SPECIAL MASTER: Okay.

22 MR. KASTE: And I understand there's a -- I
23 suspect you're going to ask me about, well, why is that
24 somehow different than the direct flow which we took up
25 to the Supreme Court. They said, well, that's not

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1 limited to the amount that you should have assumed as
2 of 1950. Right? We know that's the case.

3 And the answer, of course, is interesting.
4 Under the Compact they treated reservoirs differently,
5 the call reservoirs, had explicitly treated them
6 differently than the other rights. Did it inure to
7 Montana's benefit? Maybe not. But they must have
8 thought that was the way to go because that's what they
9 agreed to do.

10 And reservoirs in this case are limited to the
11 amount of water they put to beneficial use as of 1950
12 and if there's a new use in that reservoir, it's just
13 five feet of water.

14 SPECIAL MASTER: So let's parse the language
15 of (V) (C) (3) in a little more detail because I'd love
16 to get your guidance on this. So the first thing it
17 says is "the net change in storage in acre feet in
18 existing reservoirs."

19 So you could interpret that in theory in at
20 least two ways. You could read that to the net change
21 in the amount of water stored in acre feet or you could
22 read it the net change in storage capacity in acre
23 feet.

24 MR. KASTE: I think it's pretty hard to read
25 the word "capacity" into this language. That would

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1 be -- I think that's the kind of language you would
2 expect to see if that's what they intended to do. I
3 mean, how hard is it to say "enlarge" or "change in
4 capacity." It's not hard and the drafters of this
5 Compact were well schooled in crafting the language
6 related to a water agreement.

7 You'd have to do I think some heavy lifting to
8 add those kinds of words into this language. It
9 doesn't say "capacity." It doesn't say "enlarged
10 storage." And it would be an easy thing to do to add
11 that language had that been their intention.

12 SPECIAL MASTER: But if I were to think about,
13 for example, oh, a -- I'm going out to acquire some
14 storage space because I want to store some various
15 materials around my house and I've run out of storage
16 space in my house. I can easily imagine going in and
17 asking someone out in the world how much storage is
18 that.

19 I mean, they way at least I thought about it I
20 think that the way I use the term "storage" I'm
21 thinking about total amount that I can store, not the
22 amount I've actually stored.

23 MR. KASTE: We have to read the whole sentence
24 in this particular instance.

25 SPECIAL MASTER: Okay.

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1 MR. KASTE: And the beginning of this sentence
2 relates to the latter and it talks about used for
3 irrigation, municipal and industrial purposes developed
4 after January 1, 1950. So while we talk about storage
5 in general at the front end, we limit it to the smaller
6 pool at the back end of this clause. And necessarily
7 by creating this smaller pool which is limited to the
8 net change in storage for purposes, specific purposes
9 developed after 1950, we know we can't double-count
10 water necessarily means there's a V(A) pool which
11 isn't accounted for in V(C) under Article V(C) (3).

12 So your existing reservoirs have some other
13 pool not mentioned here that would count under V(A).

14 SPECIAL MASTER: And so then the question --
15 let me just turn to that for a moment.

16 So let's assume that we interpret this to
17 refer to the amount of water stored rather than the
18 storage capacity. As you point out, it's only that net
19 change in storage used for irrigation, municipal and
20 industrial purposes developed after January 1, 1950.
21 And you're going to have to help me on the facts here.

22 So you initially had to contract the 32,000
23 acre feet and that gets expanded to a contract for
24 40,000.

25 MR. KASTE: In 1969.

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1 SPECIAL MASTER: In 1969. But isn't it for
2 the same land that the water is being used?

3 MR. KASTE: Well, the contracts can be applied
4 anywhere. If I understand them, you just buy a share
5 of the water and if you don't apply them to your land
6 it's not dependent upon your priority waiver of water
7 rights or anything like that.

8 SPECIAL MASTER: I guess my question is it
9 says "for irrigation, municipal and industrial purposes
10 developed after January 1, 1950." So is there any
11 evidence in this case that the additional water that is
12 being stored now is being used for any irrigation,
13 municipal and industrial purposes developed after
14 January 1, 1950?

15 MR. KASTE: Everything above I believe at
16 least 32,000 acre feet is being used for a purpose
17 after 1950. You're talking about location and that's a
18 different deal.

19 SPECIAL MASTER: Isn't it the same purpose?

20 MR. KASTE: I don't think so.

21 SPECIAL MASTER: Again, this means it sounds
22 as if okay, if you develop some new agricultural area,
23 you have a new purpose to develop after January 1,
24 1950. To the degree it's all going to the same area,
25 it's all purposes developed fully.

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1 MR. KASTE: I see what you're saying. No,
2 there's no evidence about that question including --
3 neither side put in any evidence about where the
4 additional contract water was used. I think we talked
5 about with Mr. Hayes about how the contracts work and
6 you can tell I think from the testimony that sometimes
7 they come up for sale and they buy them from their
8 neighbors on occasion. Then they put them on different
9 lands.

10 So there's no particular evidence that would
11 tell you that this land is newly irrigated after 1950,
12 this land was irrigated before 1950 with water from the
13 reservoir. That level of detail is not in the
14 evidence.

15 SPECIAL MASTER: Okay. And again what's
16 interesting here is if "developed" refers to purposes
17 and given that there's not a common link problem, then
18 it raises the question of whether the quickness
19 developed after it kicked in.

20 MR. KASTE: I think in this case -- and it's
21 difficult because these were purpose here and these
22 beneficial uses at other points and parts of the
23 Compact that they say at the beginning of that that was
24 used for that. And so I think we have to look at how
25 much water was used prior to 1950 that's protected

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1 under V(A), how much water is used for any of these
2 purposes that were developed after 1950.

3 So "use" is the key word here and not
4 "purposes developed." I don't know that there's
5 another way to figure it out if we don't look at the
6 uses that was 1950 versus the uses after.

7 SPECIAL MASTER: Well, again to the degree
8 it's being used in the same area of land and is being
9 used for agricultural purposes just like it was prior
10 to 1950, do we have a new purpose or a new use? We
11 might have more water being applied, but it would still
12 seem to be for the same uses and purposes.

13 MR. KASTE: I think it's a new use to add more
14 water, you know, the way this thing is written. I
15 think what the drafters must have been thinking when
16 they put this thing together is we're taking a snapshot
17 in 1950 and we're seeing what the State of Montana was
18 doing and we're seeing what the State of Wyoming was
19 doing regarding exports in 1950.

20 And what we're using the water for, what
21 you've developed at this point in time, that's
22 protected under V(A). We want to protect existing
23 uses. And if you're going to start using more water,
24 that's fine so long as you do it under the percentage
25 allocation under V(B).

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1 They really didn't just take a snapshot.
2 That's the line below the V(A), above V(B). And if you
3 use more water, that's V(B) water.

4 SPECIAL MASTER: So if using more water on the
5 same land is considered a new use, then doesn't that
6 mean actually the Supreme Court was wrong in its
7 earlier decision because we agree that Wyoming
8 appropriators are now actually consuming more? Isn't
9 that in use?

10 MR. KASTE: That's why I say they treated
11 reservoirs differently in this Compact by putting in
12 this specific language here. They are treating
13 reservoirs differently than they do the direct quoted
14 versions where they measure at the headgate and you're
15 able now to consume, consume more of the water that you
16 have put to beneficial use as of 1950 because of better
17 irrigation techniques.

18 They are treated differently in the Compact
19 and so, no, the Supreme Court wasn't wrong before.
20 And, yes, it can do this, follow this interpretation of
21 the Compact at the same time without being inconsistent
22 Because the agreement of the parties is different as it
23 relates to storage and direct flow rights.

24 SPECIAL MASTER: Okay. This is -- on all of
25 this what I'm trying to do is to get a sense of how one

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1 might interpret this language.

2 MR. KASTE: I agree that there's an
3 inconsistent or a seeming inconsistency and that's why
4 I bring it up, but the inconsistency is the result of
5 the plain language of the agreement. And so we have to
6 make that work. We're stuck with the plain language of
7 the agreement and here I think it's fairly clear.

8 SPECIAL MASTER: Okay.

9 MR. KASTE: So what we were talking about
10 after --

11 SPECIAL MASTER: We were still basically --
12 we've addressed (V) (3) (C) so far and then also I just
13 wanted to clarify exactly what Wyoming's position was
14 as to how much Montana can store in advance of that.

15 MR. KASTE: And our position is as we said at
16 the trial in 2013, but I want you to keep in mind as
17 you go through this one other piece of evidence and
18 that is the beneficial use limitation in Montana's
19 water right itself.

20 We heard and we looked at the abstract and
21 talked to Mr. Davis about the beneficial use
22 recommendation in Montana's water right and we know
23 that they can only release 32,000 acre feet of water to
24 put to use as in the reservoir water right as of today
25 and, of course, it was 40,000 in 1969 and was 32,000

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1 back in 1950.

2 And if the Compact itself doesn't limit
3 Montana's Article V(A) right in the way that Wyoming
4 sets, then the beneficial use limitation within
5 Montana's own water right certainly does. Montana
6 cannot ask us to supply more water that it can put to
7 a beneficial use and there's a beneficial use
8 limitation in its water right specifically. And it has
9 changed over time.

10 We think we're really only on the hook for
11 that limitation as it existed in 1950 with regard to
12 their V(A) right. It is not what the Compact drafters
13 had in mind that they could have had these changes over
14 time at 20,000 acre feet of storage for the Northern
15 Cheyenne Tribe, add another 8,000 acre feet of contract
16 water and say, well, that's the V(A) right.

17 But there is this other beneficial use
18 limitation. I think we talked about it a little bit at
19 the trial and certainly in our brief and, if not the
20 Compact, then that right is limited in the same way by
21 the beneficial use limitation. You can't ask me to
22 provide water that you can't put to beneficial use.
23 Beneficial use is a limiting factor in this Compact.
24 It's specifically defined and it applies across the
25 board.

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1 SPECIAL MASTER: Actually, let me ask you
2 another hypothetical then. So let's assume you have
3 the original reservoir and it is following the position
4 and you fill that up to 32,000 acre feet. And then
5 let's assume that after the Compact is negotiated
6 Montana develops another reservoir on the river and I
7 think we would have to conclude that new reservoir is
8 probably not covered under section V(A).

9 And it develops this new reservoir in order to
10 have a place in which to store the Northern Cheyenne
11 Tribe's water and also to store the additional 8,000
12 acre feet in the new Compact, and it basically fills up
13 that reservoir. And then it starts exercising its
14 right to draw down that first pre-1950 reservoir all
15 the way to the top, fills it up to 32,000. Farther
16 down fills it up to 32,000.

17 Would that be okay under the Compact? The new
18 reservoir fills up in a year in which no one has any
19 complaints. There's water there. It's filled it up.

20 MR. KASTE: They can fill it and drain it as
21 many times as they want until they call me and ask me
22 to make up the difference. And that's really the key
23 here. The call, as I said earlier, is so important in
24 this situation because Montana, if there is available
25 water in the river, they can fill that reservoir to

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1 their heart's content, they can dump it, whatever they
2 want.

3 But once they call on the junior to make up
4 some shortage, then their actions are subject to some
5 scrutiny and at that point in time you look at the
6 language and see what they are entitled to under their
7 V(A) right to get that 32,000 acre feet. And if the
8 answer to that question is yes, then their claim
9 against Wyoming must fail, their call must fail,
10 because we're only on the hook to curtail diversions if
11 they are not going to meet that V(A) right.

12 Now, they may have a remedy under V(B) for the
13 additional space that they would like to fill up, but
14 that's a different question. It's certainly one not at
15 issue in this case.

16 SPECIAL MASTER: Okay. So let me ask the
17 question just a little bit differently again. So again
18 you have the original storage reservoir, a new one is
19 filled, and in wet years that new reservoir is filled
20 up.

21 MR. KASTE: Are you asking do I have to use
22 the water in the other reservoir first?

23 SPECIAL MASTER: That's right.

24 MR. KASTE: No.

25 SPECIAL MASTER: So now they don't have enough

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1 water in the old reservoir in particular here and so
2 they call on Wyoming and say, "Guess what? We haven't
3 been able to get our 32,000 acre feet out -- into the
4 old reservoir."

5 MR. KASTE: No. Just like Montana can't make
6 us release water that was stored in priority in
7 Wyoming, we can't make them release water that is
8 stored in priority in Montana. If that water was
9 stored in a second reservoir at the time when it was
10 available stored in priority, you have no right to tell
11 them to dump that until they are ready to to use it at
12 a place and time of their choosing.

13 Does that make sense?

14 SPECIAL MASTER: Yes. Okay. Thank you.

15 MR. KASTE: That's not our contention though,
16 although I do think it would be a really good idea if
17 we built another reservoir and used the water in it.
18 It would save a lot of problems. And honestly that's
19 what the drafters, of course, thought would happen on
20 the Tongue River Reservoir and it's still an option for
21 Montana.

22 It's worth noting Montana is not precluded to
23 this day from building additional storage and having
24 built it use it. And that's a problem with what
25 Montana has done in the course of operating its

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1 reservoir in the past is that, while it may still have
2 sort of gotten away with it, it made a voluntary choice
3 not to use it.

4 And it's hard for the upstream state to look
5 at the public water sitting in Montana and say, "Well,
6 we want more." Use what you have and when you're done
7 with that, then you call us. And that's what it comes
8 to. That doesn't seem quite right.

9 SPECIAL MASTER: So are you ready to go on
10 to --

11 MR. KASTE: Direct flows.

12 SPECIAL MASTER: Okay. What about the
13 one-fill rule?

14 MR. KASTE: Well, the one-fill rule is
15 interesting. Obviously I don't think this case was to
16 be certified to the Montana Supreme Court because we
17 can all read the decision of the Montana Supreme Court
18 in 1940. And it says this statute, which is still in
19 effect today, necessarily includes a one-fill
20 limitation.

21 It doesn't sound that difficult to me. It
22 says we've interpreted this statute from Montana and it
23 necessarily includes a one-fill limitation.

24 I think we get to the same result in this case
25 whether we look at the Compact or whether we apply a

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1 one-fill rule because what Wyoming contends Montana is
2 doing when it is releasing water available to it over
3 the course of a year and calling on us to make up the
4 difference is asking for a second fill. If they could
5 have filled and didn't, well, then they are asking us
6 to refill their reservoir in reality.

7 And, of course, you know Montana wants to
8 describe this to you as Wyoming physically says you
9 have to shut the gate and you have to operate the
10 reservoir in an unsafe way, and you know that's not the
11 case. Montana has unfettered discretion to operate the
12 reservoir however it perceives to be safe and
13 reasonable.

14 That's their reservoir. We don't purport to
15 exercise control over it, but when we account for the
16 water that flowed across the state line and through
17 that reservoir, if it passes through their gate and it
18 wasn't necessarily delivered to a downstream senior
19 appropriator, then they could have stored it. And
20 their decision not to store it, whether made for good
21 reasons or not, remains their decision and they are
22 accountable for that decision.

23 It's an accounting complaint on our part.
24 They cannot let this stuff go by and then charge us for
25 that amount from an accounting standpoint, not from a

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1 physically stored or not stored standpoint. I don't
2 care what Montana does with its water, whether it
3 chooses to leave its reservoirs lower or higher,
4 whether it chooses to bypass a lot or a little.

5 What I care about is how they count and if how
6 they count does not include these bypasses on their
7 side of the ledger, then something is wrong. Because
8 Wyoming is not Montana's insurers. We're not their
9 guarantor. We're not required to give them some
10 specific amount of water. The water goes by and if
11 they fail to catch it, the burden of that decision
12 falls on them. They assume the risk of the operation
13 of their dam, not Wyoming.

14 SPECIAL MASTER: So I understand kind of what
15 Wyoming is trying to do. So let me just ask again
16 several questions. The first one is -- as far as I can
17 tell, it's not as if Montana just recently decided to
18 actually let water flow through its reservoirs because
19 this was also a practice they had back in 1950 at the
20 time that the Compact was negotiated.

21 So was this another instance where the Montana
22 negotiators actually gave up something that they were
23 doing at the time?

24 MR. KASTE: I don't think so. I think what we
25 learned from that interesting set of limitations study

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1 is that when they created the Tongue River Reservoir
2 their idea was we'll only fill it up about 45,000 acre
3 feet total and leave the top seven feet for flood
4 control. I remember reading that in the sedimentation
5 study.

6 And so when the negotiators got together and
7 agreed to the limitation in Article V(C)(3) they knew
8 in their minds, well, we've got seven feet of reservoir
9 space that we've got to use except to hold the water
10 for a second until we can safely pass it out as part of
11 our flood control operations. They weren't giving up
12 anything.

13 And the idea that, well, we can bypass a lot
14 of water for a long time, so that means we can continue
15 to do it, is wholly at odds with the doctrine of
16 appropriation. No one -- one of these wonderful cases
17 says no one has a right to waste water by not using it.
18 A pattern of not using water does not create a right
19 for the continued ability to continue not using that
20 water.

21 The doctrine of prior appropriation abhors
22 waste and it encourages at every turn the beneficial
23 use of water. And if you voluntarily let water go past
24 your headgate, you have acquired no right to use it
25 ever. And Montana has done that for a long time, but

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1 that does not give them a right to continue to do that
2 to our detriment.

3 They can keep doing it practically. It
4 doesn't bother us until they call on us and say our
5 actions have put us behind the eightball on this
6 reservoir. We'd like you to make up the difference.
7 They have no right to let that water go by and then
8 say, well, we have right to the use of it by letting it
9 go through our dam and which is put to no beneficial
10 purpose between that dam and the Yellowstone River,
11 none.

12 SPECIAL MASTER: So my understanding is not
13 that Montana's claim is putting that water through a
14 headgate for beneficial use but that instead it is that
15 they are running the dam in a prudent fashion, and part
16 of that prudence is not storing all of that water in a
17 particular time of the year and all they want to do is
18 continue that particular practice.

19 And I understand Wyoming's argument that,
20 well, that's great, that might be good, but don't take
21 that on us. But that sounds very different than
22 wasting water.

23 MR. KASTE: Well, if you don't put it to a
24 beneficial use and you could have, then it wastes
25 water. It was there, it was available to you, and you

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1 wasted your chance. And it may be prudent in terms of
2 your operations, but if you have access to water and
3 you don't use it, that's waste, or you don't need it.

4 And so what they are saying is when they come
5 back later in the year and they say, "Well, we needed
6 that water, but we let it go past and now we want you
7 to send us some of yours to make up the difference." I
8 do not see how that burden can fall on Wyoming.

9 SPECIAL MASTER: So I would separate out two
10 different arguments again. I understand what your
11 argument is with respect to whether or not Wyoming
12 should be responsible for the water that Montana
13 decides in the exercise of operating the dam to let
14 flow through, but that's a separate question from
15 whether or not that would actually be waste under the
16 prior appropriation system.

17 Under your theory of waste isn't any type of
18 flood control dam that lets water out in order to store
19 the water later on waste?

20 MR. KASTE: If you don't put the water to a
21 beneficial use it is to the extent that they then want
22 to use some additional water that they had in their
23 possession to put to beneficial use.

24 And I see what you're saying. There's a
25 dichotomy in there between the responsibility for those

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1 decisions and saying it's a horrible waste. It has
2 this terrible connotation. And you can decide it
3 either way, but I think you reach the same conclusion,
4 which is you have an obligation as a reservoir owner to
5 store water when it's available and, if you don't, it's
6 waste.

7 There's not a nice way to say it. If it was
8 available, you didn't store it, it's wasted.

9 SPECIAL MASTER: Now go back to my initial
10 question. What I'm understanding your answer to my
11 question of you really can imagine that Montana
12 negotiators agreed to this, my understanding of your
13 answer is that, well, actually all they thought they
14 were going to get was 32,000 acre feet. They knew they
15 had a lot more capacity than that and, therefore, they
16 weren't worried that they weren't going to get the
17 32,000 acre feet.

18 MR. KASTE: And their intention, as we see
19 from the sedimentation survey, was not to store water
20 in that top seven feet. 20,000 acre feet were for that
21 reservoir. Their intention there was to keep it only
22 there except for during a flood event. So, yeah, they
23 looked out and thought we don't -- we're not going to
24 protect in explicit terms in this Compact something
25 more than the amount of water we're putting to use

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1 today.

2 SPECIAL MASTER: But under the one-fill rule
3 don't they get just one chance to get 32,000 and
4 anything that gets -- that flows through gets counted
5 against the 32,000?

6 MR. KASTE: I think there's some
7 misunderstanding about the one-fill rule that once that
8 amount of water comes into the reservoir you have to
9 shut something off and no more can come in. And that's
10 not really true. If water is available, you can keep
11 filling it. You can fill it and fill it and fill it
12 and fill it -- right? -- if there's water available.

13 But if you attempt to make a call on somebody
14 junior to you, you look at the operations and say did
15 you have enough to fill to that amount in this case
16 that's protected by Article V(A) and in other cases did
17 you get your full capacity. And if the answer to that
18 question is yes, then anything over that is gravy.

19 And if there was more than what was necessary
20 to fill you up, then the harm -- not the harm, but the
21 burden of refilling that space doesn't fall on the
22 upstream junior, the upstream user.

23 So the one-fill rule is kind of a minimum.
24 It's not a maximum.

25 SPECIAL MASTER: I understand that. But let

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1 me go back again and let's assume it's just a turn back
2 to -- in retrospect it would be a really blind deal and
3 Montana just like it had historically lets water flow
4 through in the first couple of months of the year.

5 And then it gets around to April or May and
6 they start filling up the reservoir and it doesn't even
7 make it to 32,000 acre feet. What you're telling me is
8 that the negotiators on Montana's part, no one
9 understood that in that situation that, you know, they
10 would only get 32,000 acre feet. They couldn't claim
11 more against Wyoming and that furthermore all the water
12 that they had let out in -- you know, earlier in
13 January and February and March, that gets counted
14 against that 32,000.

15 MR. KASTE: I think that the people who
16 negotiated this Compact would very much expect water
17 that they purposely dumped out of the bottom of their
18 reservoir would count against them. I think they
19 understood and I can't imagine they wouldn't understand
20 that concept very clearly.

21 And, yes, I think that they would have
22 understood that if it didn't get to 32,000 acre feet
23 because I think the folks who negotiated this Compact
24 for Montana understood that sometimes reservoirs don't
25 fit and this river system is dynamic in the sense that

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1 some years there's way more water than anybody knows
2 what to do with and some years it's really dry.

3 And they assumed that there was a risk
4 associated with creating the reservoir and that it
5 might not fill. And Wyoming was not going to be
6 responsible for anything more than the V(A) right in
7 that reservoir. I don't think they'd be shocked by
8 that at all. I think those men knew exactly what they
9 were doing.

10 SPECIAL MASTER: I hate to prolong this, but I
11 just have to ask one last question. So you're also --
12 when you're telling me that if one of the Montana
13 negotiators had gone back to Mr. Hayes's father, who
14 would have been around at that point in time?

15 MR. HAYES: My great uncle.

16 SPECIAL MASTER: Great uncle.

17 Gone to his great uncle and said, "Guess what?
18 You know, I know we've been filling this reservoir to,
19 you know, a certain average, 50,000 acre feet, and
20 furthermore you've been running out it in a way that
21 lets water flow through in the early part of the year.
22 And we have a great deal and we're going to protect
23 you. And as part of that protection you better really
24 be careful about running that water flow through
25 because in the future if you let it flow through it

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1 could count against you. And in addition to that
2 actually you don't get to store 50,000, if in fact it's
3 a dry year. All we're going to guarantee you is
4 32,000."

5 And do you think that Mr. Hayes's great uncle
6 would have said great deal?

7 MR. KASTE: I think that the people that
8 negotiated this Compact would have gone to Mr. Hayes's
9 great uncle and said, "We've got a compact that
10 protects existing uses. What we're doing today is
11 going to be protected under V(A) of this Compact."

12 And that's exactly what Wyoming is continuing
13 to propose to you today.

14 SPECIAL MASTER: Okay.

15 MR. KASTE: And I guarantee you that's exactly
16 how they sold that to the Montana water users. "We are
17 protecting existing uses." And at that time, of
18 course, there was 11,000 acre feet that they had
19 contracts for. There wasn't very many folks. It was a
20 different time, but the contract is what it is.

21 SPECIAL MASTER: So another question. So I
22 understand your belief that the Federal Land Bank case
23 adopts a one-fill rule. Does it adopt both a one-fill
24 rule in the sense that you only get to fill your
25 reservoir once or does it adopt a one-fill rule that

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1 says, "Hey, now you get to fill your reservoir once
2 and, by the way, you need to start as soon as October
3 1st"?

4 MR. KASTE: Well, the water use is fairly
5 common throughout.

6 SPECIAL MASTER: Whatever is at the beginning
7 of the -- I don't know. Is it October 1st or December
8 1st or January 1st? But that there's a particular date
9 upon which you have to start filling the reservoir.

10 MR. KASTE: I think the one-fill rule says you
11 get to store water when it's available and if that's
12 October 2nd, store it. If that's January, store it.
13 If it's May, store it. That's your responsibility as a
14 reservoir owner. If it's available, store it during
15 the course of the water year.

16 Of course, this Compact resets every year and
17 you have nice little water year to work with, but your
18 responsibility as reservoir owner and the risk you
19 assume when you operate the gate that if water is
20 available I'm going to catch it and, if I don't, it's
21 my problem. That's the problem with this case.

22 SPECIAL MASTER: So let's focus a little bit
23 more on Federal Land Bank and the one-fill rule. So,
24 first of all, going back to the question which I asked
25 Mr. Wechsler earlier. Let's assume that I conclude in

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1 directing the Supreme Court that it looks like Federal
2 Land Bank seems to be saying that the one-fill rule is
3 a great idea.

4 It's also fairly clear that the practice in
5 Montana has not been to follow the one-fill rule. So
6 should I recommend to the Supreme Court that it tell
7 Montana that the practice it's been following for the
8 last, you know, series of decades is illegal under
9 their state law?

10 MR. KASTE: I think you should recommend to
11 the Supreme Court that it follow the law as articulated
12 by the Supreme Court of Montana. I said this in my
13 brief and I think it's hilarious, but my speeding
14 doesn't make speed limits any less valid. Just because
15 I do it all the time doesn't mean that the law has
16 somehow changed. Just because Montana says that -- it
17 seems kind of harsh, but it isn't that.

18 That doesn't mean that the law has changed.
19 The law is what it is and it's our job to enforce it
20 and to follow it. And the fact that DNRC thumbed its
21 nose at the fairly clear pronouncement of the Montana
22 Supreme Court is of no moment. It has no consequence.
23 They are scofflaws. That's fine. They could do what
24 they want, but the fact of the matter is that's the law
25 of Montana.

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1 SPECIAL MASTER: So one of the things that
2 Montana also points to is Rule 10B of the Montana
3 Supreme Court followed by claims examinations.

4 MR. KASTE: Which is worse than dicta and they
5 claim that this is dicta and when you point to
6 something else where the court hasn't even really been
7 squarely presented with the question outside of the
8 judicial process and say, well, that must have changed
9 the law.

10 You know what? If somebody wanted to change
11 the law in Montana it should be the legislature that
12 does that and it should either modify this statute that
13 the Supreme Court interpreted and say it does not
14 include that one-fill limitation or they should
15 eliminate the statute.

16 SPECIAL MASTER: Okay. So taking a look at
17 the statute itself and my understanding from your brief
18 and Montana's brief that the current version of it is
19 85-2-305. The statute says "appropriate water by means
20 of a reservoir shall apply for a permit as prescribed
21 in this chapter." Now, it must have been I keep
22 looking at this statute and if, in fact, the Montana
23 Supreme Court was interpreting that statute, I don't
24 have any idea how they came out with a one-fill rule
25 from that.

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1 MR. KASTE: It is not clear that the statute
2 says that and that's what the court is for. Obviously
3 what the Montana court was doing was they were looking
4 at a statute that said people have a right to store
5 water. We're going to let people store water.

6 And we looked at it and said, well, what does
7 that really mean, what does that entail and what does
8 the decisions by the court entail. Well, that
9 necessarily includes a one-fill limitation. It
10 necessarily includes them. Otherwise your reservoir
11 becomes the bully on the river and it starts beating up
12 everybody upstream I get to refill as much as I want.
13 What do you think of that?

14 Well, we don't like it. And the fact that
15 it's not an explicitly related element in the statute
16 doesn't make the pronouncement of the Montana Supreme
17 Court any less viable.

18 SPECIAL MASTER: So why don't we move on. I'm
19 looking to make sure I'm not missing anything.

20 Why don't we go on into the direct flow right.
21 And I really -- let me just tell you I have sort of one
22 main question here, which is could you explain what
23 Wyoming believes Montana should have shown in order to
24 prevail on the direct flow rights.

25 MR. KASTE: Yes. And I think it goes back to

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1 what Mr. Wechsler was just talking about. We need a
2 methodology. Well, we have a methodology. We have the
3 doctrine of appropriation and what you have to show is
4 pretty simple.

5 It would have been easy enough had Montana had
6 what we consider to be a functioning regulatory system
7 and this -- like I say, they are on the verge. They
8 are getting better over time as they have water
9 commissioners appointed and appointed who know the
10 system.

11 They need to show that there is an actual
12 unmet contemporaneous demand somewhere on the river,
13 not that the state line flow is some number, not that
14 the paper rights of all of the water holders are some
15 number. What we need to see is an actual
16 contemporaneous demand that is not being met.

17 It's not that hard to show. The 77 pre-1950
18 water rights, it should be relatively easy for Montana
19 to show that, but they didn't really do that in this
20 case. They used Mr. Book's methodology which isn't
21 designed to show you actual contemporaneous demand.
22 When I gave you the state line flow, no, well, let's
23 just figure when it hits 200 unless we have a reservoir
24 across the way.

25 And that's great and all, but it doesn't tell

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1 you what's happening at the headgate and it doesn't
2 account for the things that are occurring in the 190
3 miles between the state line and the T&Y Canal. What
4 we need are just the water commissioners to go out and
5 give us a real demonstration of actual contemporaneous
6 demand. We'll need Mr. Muggli to say, "I'm not getting
7 the water that I'm entitled to and I want it."

8 And for them to say, "And then I went up the
9 stream and I was able to differentiate between
10 reservoir water and natural flow for real," not based
11 on just the number at the state line because that
12 number is changing constantly as we move down the
13 stream. "I went up the stream. I shut everybody off
14 that wasn't entitled to the water because they had the
15 junior right with T&Y and now Wyoming needs to shut off
16 here."

17 In the course of a water year that's actually
18 going to happen in a relatively short period of time
19 and it shouldn't be that difficult to do once the water
20 commissioners start figuring out what is the real state
21 of natural flow in that river. What they've done in
22 the past is they've taken what is an expedient and
23 efficient for them route, which is to say, oh, 200. We
24 pretty much know that at that point everybody is on
25 reservoir water.

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1 And that's great that it works for them, but
2 when they want to call on Wyoming they need to call on
3 the prior appropriations system and there's some burden
4 on them to ensure that their actions shutting off --
5 that there's an actual need of calling up and that
6 they are actually shutting off juniors upstream such
7 that we can be assured when we turn off our post-1950
8 rights it will inure to the benefit of the caller, not
9 Montana.

10 Well, you know, it is it between sovereigns
11 and it's about the state line. No, it's not. It might
12 be that way in another compact, but this Compact
13 incorporates the doctrine of appropriation and the
14 doctrine of appropriation is all about individual water
15 right holders, what are their rights as it relates to
16 the other guy.

17 And that means because the states don't really
18 have water rights in the system, we're not irrigating
19 the fields, they actually have to look at the behaviors
20 and needs and ability to put to beneficial use of
21 individual irrigators in Montana and then look at the
22 actions of people in Wyoming and, if it's time, curtail
23 them.

24 SPECIAL MASTER: Let me again just take a step
25 back then. If there's evidence in the record that is

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1 showing that there are particular water users on the
2 Tongue River in Montana who have been told that they
3 can't take their direct flow rights because there isn't
4 enough water and there's been a call, say, by the T&Y
5 Canal and as a result of that they are now calling for
6 storage water and they are actually calling Mr. Hayes
7 with the telephone line up and saying, "Hey, I want
8 some stored water," why is that not evidence on faith
9 of contemporaneous demand on the theory that if they
10 didn't need water they wouldn't ask for the storage
11 water? You presumably would take your flow rights
12 before you took the storage rights.

13 MR. KASTE: Sure. I think in a properly
14 functioning system when we have an accounting record
15 that we can be fairly certain is doing a good job of
16 accounting that the request for reservoir delivery may
17 be a good indication, but there's an unmet demand.

18 But our point in these cases is we don't have
19 that with regard to the materials that Montana
20 submitted for the time in question, for '04 and '06.
21 What we have is disarray and what we have is sort of
22 admitted "I don't really keep good track of the natural
23 flow of reservoir water. We're doing our best, but
24 we're not there yet."

25 If we had some confidence that when that

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1 reservoir order was made that it really reflected the
2 situation, the true situation on the river, there could
3 be good evidence of that. But I don't think the
4 evidence that you received during the course of this
5 trial can give you much confidence in the true state of
6 the river. And it's frankly why we would go there when
7 we could just use a call, just have a call by
8 appropriator that says "I'm not getting my water."

9 And if it's somebody prior to pre-1950 and the
10 work is done in a post-1950 right, Montana is perfectly
11 justified in calling Wyoming and saying, "We're at that
12 point. We will need to curtail your diversions. We
13 want our post-1950 V(A) rights."

14 The call is the better mechanism and it's
15 part -- a large point largely about the water
16 commissioners in this case. No party can really have
17 much faith or confidence that what they are describing
18 on the river is the true state of affairs because they
19 weren't in a position to know at that time.

20 And you can tell by virtue of the water
21 commissioner's manual and district training manual that
22 they are going to get to a point where we will have a
23 very firm grasp on the true state of the river until
24 Montana. And it's going to be awfully hard for Wyoming
25 to say anything other than okay when that call comes in

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1 in the future.

2 SPECIAL MASTER: So does this then come down
3 to a question of the adequacy of the job that the
4 commissioners were doing in keeping track of the
5 Montana water in the Tongue River?

6 MR. KASTE: Well, it undermines our ability to
7 use the call for reservoir water as a surrogate for a
8 call for priority regulation, that's true. And when we
9 talk things that can undermine our confidence, people
10 making calls for reservoir water when the flow at the
11 state line is 700 CFS. There's no way anybody should
12 be making a call for reservoir water when there's 700
13 CFS right at the state line, and yet that's what we
14 saw.

15 I think what we see is a system that's
16 evolving and getting better and more sophisticated
17 every year and we're probably to the point now where he
18 can have some confidence with a little bit more
19 information from Montana with regard to how they
20 actually account for natural flow. Because we can't
21 have a situation where Mr. Muggli is standing at the
22 bottom of the river saying, "I never made a call" and
23 Mr. Hayes up at the reservoir going, "Get it on
24 reservoir rights. Get it on reservoir water."

25 Those things can't coexist when Mr. Muggli has

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1 never actually called for his reservoir rights, but
2 he's being charged for them. How can you have
3 confidence that that system is functioning in a way
4 that we could be justified in Wyoming turning off our
5 post-1950 rights in response to that? I don't think
6 that situation can or will persist in the future.

7 SPECIAL MASTER: You wouldn't necessarily have
8 to have Mr. Hayes, Mr. Muggli, each individual water
9 user come in and testify that we needed that water even
10 though we didn't get it.

11 MR. KASTE: I think that communication goes
12 from Mr. Muggli to his water commissioner who relays it
13 to probably Mr. Davis who calls Mr. Tyrrell and then he
14 calls Mr. Knapp and the headgate is turned. There's a
15 few calls in there, but that's the thing about
16 state-to-state underregulation is that it's going to
17 take the work of a number of individuals to do that.

18 But we can't just look at the state line and
19 assume that some state of affairs exists at any given
20 headgate downstream. And that's what Montana is asking
21 you to do and that's not consistent with the doctrine
22 of appropriation.

23 SPECIAL MASTER: Okay. So this has been very
24 helpful. If there's anything you're dying to tell me,
25 feel free to.

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1 MR. KASTE: I have a list, but I will withhold
2 it.

3 Thank you, Your Honor.

4 SPECIAL MASTER: Thank you.

5 Mr. Wechsler?

6 MR. WECHSLER: Thank you, Your Honor. I'll
7 try to be brief.

8 At first when Mr. Kaste first came up here and
9 talked about the reservoir operations and the
10 operations being problematic the State of Wyoming had
11 the opportunity to disclose a reservoir -- an expert in
12 reservoir operations. They chose not to.

13 The only evidence that we have here that says
14 that this reservoir was operated reasonably, prudently
15 and consistent with the doctrine of appropriation and
16 then consistent with its operating plan and operating
17 manual, which are also consistent with the doctrine of
18 appropriation in other reservoirs elsewhere, there is
19 no other evidence in the record.

20 Mr. Kaste talked about the protected amount of
21 the reservoirs and he talked about a snapshot, which is
22 interesting because that's the exact same argument that
23 Montana was making to the exception that opened up new
24 law. In fact, I know that we used the language
25 "snapshot." That was rejected by the court.

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1 I was happy to hear that he said that the
2 amount that's protected is the amount that was in use.
3 He ignores, however, that the beneficial use of the
4 reservoirs as defined by the adjudication court is a
5 sale, which is consistent with the Montana
6 Constitution. And Wyoming has put no evidence on that
7 that's not consistent with the doctrine of
8 appropriation as is their burden.

9 Ultimately there was an adjudication in this
10 Court and it was found that, in fact, it was that full
11 amount that was put to beneficial use. And so that use
12 even under Mr. Kaste's rationale is the amount that was
13 protected, the full amount that was offered for sale
14 in -- prior to the Compact.

15 And we know how much was offered for sale.
16 Well, you can look at the Compact, the contract which
17 would be the full amount of the firm annual yield.
18 That's what was protected. That was what the State of
19 Montana was obligated to provide to the Tongue River
20 Water Users Association.

21 Mr. Kaste talked about the one-fill rule. I
22 think you asked him about the statute. I was very glad
23 you did that because there's really nothing in the
24 statute that indicates there is a one-fill rule in
25 Montana. And, in fact, the Federal Land Bank case

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1 itself is talking about a Colorado statute. So to the
2 extent the statute plays in here, if Montana had chosen
3 to adopt a one-fill rule it would have done so by the
4 statute.

5 Next Mr. Kaste offered an awful lot of
6 supposition about what the intent of the negotiators
7 was, and there's no evidence in the record to support
8 that. In fact, there is some evidence in the record
9 about what the negotiators were thinking. That comes
10 from the testimony of Dr. Littlefield. Again, it's
11 uncontested. I believe Dr. Littlefield was not even
12 cross-examined.

13 And what he said that the intent of the
14 drafters was was to protect all fully vested and
15 prospective water rights that were in existence at the
16 time of the Compact, which would mean again the full
17 amount if the reservoir had been filled and offered for
18 sale.

19 Turning to direct flow, Wyoming makes a number
20 of arguments that are really in a vacuum and I wonder
21 sometimes listening to Mr. Kaste if I had been at the
22 same trial. The evidence on which Montana is relying
23 is not simply the analysis done by Mr. Book, although
24 certainly we fully support that as it is correct, but
25 as I indicated before, there was water user after water

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1 user who came onto the stand to testify about the
2 shortages, about needing reservoir water, about the
3 only two rights that were receiving the full amount of
4 their water were the two 1886 rights, that is, Jay
5 Nance and Roger Muggli. There's no contrary evidence
6 in the record.

7 The water commissioners then came forward.
8 They said they visited every single point of diversion
9 at the beginning of the year. They were on the river
10 every day. They were taking daily records. They were
11 providing monthly reports to the court. They have
12 testified that they had called off rights when they
13 were taking direct flow that they weren't entitled to.
14 They testified that they accounted for stored water.
15 They accounted for direct flow water.

16 And so somehow the notion that this was a
17 system which was not properly accounted for or there
18 wasn't proper administration is entirely, completely
19 unsupported by the record. Again it was Wyoming's
20 burden under your ruling to show that the
21 administration was improper. They offered really no
22 evidence on that issue.

23 Thank you.

24 SPECIAL MASTER: I need to ask you two
25 questions, first on that last one.

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1 There was testimony in which -- it was all on
2 cross-examination of the various commissioners and
3 others that a lot of the members of the water
4 commission didn't seem to add up. And so what should
5 the Supreme Court do with that particular evidence?

6 MR. WECHSLER: I think we're talking about --
7 as I recall, it was two or three water users who
8 Wyoming pointed out it looked like you had -- you were
9 actually allocated too much storage water or too little
10 storage water. I think in a system as large as the
11 Tongue River in Montana with the number of users
12 several years after the fact to be coming up and asking
13 about particular numbers, it's really trivial. And it
14 shows sort of that Wyoming is grasping at straws there.

15 If you look at the overall body of evidence,
16 the body of evidence is that they were keeping
17 excellent records. They were keeping track. They all
18 testified they were keeping track of both storage and
19 direct flow water.

20 And each one of the water users came forward
21 and when they were asked did you feel like the water
22 commissioners were doing an acceptable job, they all
23 without exception said that they felt like it was an
24 exemplary job. And so water administration is to some
25 degree an imperfect science and so if there's one or

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1 two errors or something that's unexplained at this
2 point, I don't think that that has any bearing
3 whatsoever on liability.

4 SPECIAL MASTER: Okay. So if you look at the
5 evidence as a whole, you know, there were both gaps in
6 the records and in addition to that there were errors
7 that appeared to exist in the records.

8 And so I think one of the questions that the
9 Supreme Court needs to address to the degree that it
10 believes that it has to look at the adequacy of the
11 Montana administration of its water is what would be
12 the standard for determining whether or not the
13 administration is adequate. Any thoughts on what would
14 be the appropriate standard?

15 MR. WECHSLER: Reasonableness. Reasonably
16 consistent with the doctrine of appropriation. If what
17 we're looking at is, you know, several years after the
18 fact in the volumes and volumes and volumes of
19 documents that were produced there is one or two
20 errors, that's a high standard indeed.

21 I think generally the standard would be was
22 it -- was it reasonable, did it do a reasonably good
23 job in assuring that the appropriate -- that the water
24 users who were entitled to water got water. And I
25 think all of the evidence shows that that was true.

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1 SPECIAL MASTER: I mean, the other question I
2 had was that you said with respect to the amount of
3 water for which Montana had contracted to provide from
4 the Tongue River Reservoir that the contract was
5 actually for the entire firm annual yield.

6 MR. WECHSLER: Yes.

7 SPECIAL MASTER: But, of course, for a period
8 of time the amount that was actually being delivered
9 was less than the total storage capacity of the
10 reservoir. And so if you think about the differences
11 between the V(A) category of water and the supplemental
12 water under V(B), doesn't amounts that you have
13 contracted for but not been delivering fit better into
14 the V(B) category than the V(A) category?

15 MR. WECHSLER: No, I don't think so because I
16 don't think what you're looking at is the amount that
17 was delivered to our reservoir. I'm unaware of any
18 authority in terms of storage rights and reservoir
19 rights where the amount of water that you are entitled
20 to that is perfected is the amount that was delivered.

21 Instead it is the amount of water that was
22 stored and, as I said, in Montana it's the amount that
23 was stored and offered for sale. That was the full
24 amount. The full amount was, in fact, contracted, the
25 full firm annual yield. And so we don't consider the

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1 32,000 or that 8,000 change once they had operated the
2 reservoir for some amount of time and recognized
3 actually we might be able to eek out an additional
4 amount from that firm annual yield.

5 We don't consider that to be a relevant
6 consideration when we're looking at the amount that was
7 perfected. And, in fact, one of the considerations
8 that you had identified was how are other reservoirs
9 managed. And the other reservoirs in the State of
10 Montana, as Mr. Smith testified to, are administered in
11 exactly the same way.

12 There was some examples that Mr. Smith
13 provided where they had originally contracted for a
14 smaller amount and when that reservoir after yet
15 several years of operations realized, well, we can get
16 a few more acre feet out of this in terms of the firm
17 annual yield they contracted for that amount without
18 having to modify or change the existing water right
19 which still held the same priority date and the same
20 amount.

21 SPECIAL MASTER: Okay. Can you just remind
22 me. What is supplemental water under the Compact?

23 MR. WECHSLER: Excuse me.

24 SPECIAL MASTER: Okay. It's one of those
25 terms that's in there.

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1 MR. WECHSLER: It would be -- I'm looking,
2 Your Honor, at Article V(B), clause 2.

3 SPECIAL MASTER: Right.

4 MR. WECHSLER: It says: "Of the unused and
5 unappropriated waters of Interstate tributaries of the
6 Yellowstone River as of January 1, 1950, there is
7 allocated to each signatory State such quantity of that
8 water as shall be necessary to provide supplemental
9 water supplies for the rights described in paragraph A
10 of this Article V."

11 SPECIAL MASTER: Right.

12 MR. WECHSLER: So what's that? So that's the
13 for -- so if you had an existing ditch let's say and
14 you had -- at the time of the Compact you had 100 acres
15 that were being irrigated, but in normal times there's
16 only sufficient water to satisfy, say, 50 acres of
17 that, then you could seek a supplemental supply which
18 would be we think in direct priority without regard to
19 the state line for that land.

20 SPECIAL MASTER: And so thinking about this
21 now in terms of reservoir, you have a reservoir which
22 has a capacity which is bigger than the amount of water
23 which was being used in 1950 and now you have more
24 water which is being provided. Why is that not, you
25 know, identical to the supplemental water for the

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1 ditch?

2 MR. WECHSLER: Because the supplemental supply
3 is a new supply of water. When you're looking at
4 Article V(A) you're talking about the appropriate
5 rights to beneficial uses. Again beneficial uses is
6 defined as a beneficial use under the doctrine of
7 appropriation. And to the extent that those were fully
8 used as of January 1, 1950, those are protected and the
9 Tongue River Reservoir was fully used as of January 1,
10 1950.

11 Reservoir rights have always had sort of a
12 unique place in prior appropriation documents and part
13 of the reason is you want to protect the reasonable
14 investment expectations of someone building a project
15 like that. You would not get someone building a
16 project if you said to them, "Go ahead and build your
17 project, but we're not going to protect anything
18 until -- you know, we're only going to protect it once
19 it's actually used."

20 So throughout the West essentially what has
21 developed, and different states use different
22 languages, but, in essence, in Wyoming and in Montana a
23 reservoir is fully protected, fully vested when it is
24 built and filled and then after that you're entitled to
25 be using that water anywhere within that project.

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1 SPECIAL MASTER: So why don't we take a break
2 at this stage.

3 I have to say, though, in closing this section
4 here that most water law books including our water law
5 textbook historically had very little on storage
6 rights. And I'm both beginning to conclude one of the
7 reasons was that this is one of the more sort of
8 detailed intricate areas of the law now. Everyone
9 probably needs to spend a lot more time focused on this
10 in the various texts that are being issued.

11 Anyway, so I appreciate the guidance. They
12 were really very useful and then we'll come back in
13 about ten minutes.

14 (Recess taken.)

15 SPECIAL MASTER: Mr. Draper, so we are going
16 to finish by 5:00. That's the one thing I know because
17 I also have a flight to catch. I have a flight at 7:30
18 that I have to catch. So we will be finished by 5:00.

19 And so what I would like to do is to divide
20 this to keep this within about an hour and then that
21 will give an opportunity. If either Anadarko or the
22 Northern Cheyenne want to make any arguments, we'll
23 have time for that.

24 So I'll try and keep everybody on track
25 including myself.

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1 MR. DRAPER: Very good, Your Honor. I think
2 that's a very doable goal.

3 SPECIAL MASTER: Because the other thing I'll
4 say is is that sort of looking at questions, this last
5 portion strikes me as in many ways very fact specific.
6 And so there are probably fewer questions I'll have
7 here than I did in the other sections.

8 MR. DRAPER: And I think a lot of the
9 questions have at least been touched on beforehand.

10 I did want to make one point with respect to
11 the earlier discussion on the Worley case. You talked
12 about the demand issue and how they had used that term
13 in that New Mexico Supreme Court case.

14 I want to draw your attention to the language
15 on page 651 of the Pacific Reporter in that case, just
16 the third paragraph before the end of the opinion.

17 It says: "The downstream senior appropriator
18 is entitled to use water to the extent of his needs and
19 within his appropriation. If needed, and if the water
20 is not reaching its diversion point, he must make his
21 needs known."

22 Now, that's the Worley case and it is
23 consistent with the purpose for this reference to a
24 demand, namely, you have to have the information that
25 there is a need downstream. And I think it makes clear

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1 when you look first to the purpose of the demand, which
2 is to provide the information that the water is needed
3 downstream, and the specific concluding language of the
4 court that it's the knowledge of the need that's
5 important, not the particular formulation of do you
6 combine that with some formulaic "pursuant to Article V
7 of my priority" or whatever you are being instructed or
8 requested to take from that.

9 So I think that really helps understand what
10 the court was talking about in that case and not a
11 specific formula, which I think was one of points he
12 was trying to get to.

13 I just had one other introductory point that
14 flows from your earlier discussion, if I may.

15 SPECIAL MASTER: Sure.

16 MR. DRAPER: You were asking Mr. Kaste about
17 his reliance on contract law and pointing out that the
18 Compact is both a contract and a federal statute. I'd
19 like to direct your attention to the language in the
20 Texas-New Mexico decision on the Pecos River where
21 Justice White speaking for a unanimous court rejected
22 New Mexico's position that it didn't know that it was
23 in violation of the compact, that it acted in good
24 faith and therefore shouldn't be held to have violated
25 the compact.

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1 In response to that position the court said
2 that there is this contract aspect of a compact and
3 when you make commitments you may find out that there
4 were commitments you didn't need and that you have to
5 pay for it today. And so I think that -- that goes to
6 this -- some of these questions you had relating to
7 notice.

8 I would point out that that compact in I think
9 it's Article 9, the Pecos River Compact specifically
10 requires use of the prior appropriation doctrine. So
11 it's a case that was interpreting the compact that
12 expressly refers to and relies on the doctrine of prior
13 appropriation and rejected the notion that was
14 suggested by the upstream state in that case that it
15 didn't have notice, it wasn't aware, it was acting in
16 good faith and therefore it shouldn't be held liable
17 and that was rejected by the court.

18 I'm here to address particularly issues
19 related to use of Wyoming post-1950 rights during
20 periods when the pre-'50 rights in Montana were going
21 unsatisfied. And so I'll address a few points there
22 and then answer any questions that you may have from
23 the briefs.

24 SPECIAL MASTER: Yes. I have several
25 questions. So if you want to address a couple of

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1 points first, that's fine. Again, I've read the
2 briefs.

3 MR. DRAPER: Well, following up on some of
4 your questions this morning and in the questions that
5 you gave us as we went into the briefing I would point
6 out that we -- in our final figures we refined those
7 storage figures to just focus on fill periods, which is
8 essentially the same for the reservoirs in the two
9 states.

10 And that's in generally that spring fill
11 period beginning about April 1st and going until late
12 fill or they are called now by direct flow rights that
13 are more senior which typically happens usually around
14 the end of June, beginning of July.

15 And so we have refined our analysis to focus
16 just on that fill period and that's all of our claim is
17 the interference with our ability to fill that occurred
18 because of the filling of post-Compact rights in the
19 reservoirs in Wyoming. And when we did analyze the
20 fill of the post-Compact space in the Colorado -- or
21 I'm sorry, in the Wyoming reservoirs we utilized the
22 general methodology which was agreed to by the Wyoming
23 experts that when you're releasing water in the prior
24 year it's considered to be released from the most
25 senior priority so that that empty space that can be

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1 filled with the most senior priority in that reservoir,
2 if there's not a division of ownership that might
3 complicate that.

4 And so that assumption of releasing the most
5 senior water first when you get to -- when Wyoming
6 comes down to the Tongue River Reservoir they won't
7 apply that. They seem to think that there's two
8 priorities in the Tongue River Reservoir, which, of
9 course, we don't agree with. They seem to think
10 there's two priorities and that we are releasing the
11 junior water fills.

12 So they are applying a totally backwards
13 approach when it comes to us as compared to how they
14 are happy to have their reservoirs and I think do
15 analyze their reservoir operations in Wyoming.

16 So I think with those -- those are the points
17 that relate to -- especially to reservoir operations.
18 I mean, the briefs are comprehensive. So if you've got
19 any questions that you want to discuss in that regard,
20 this might be a good time to do that.

21 SPECIAL MASTER: Okay. Let me go ahead and
22 let's say I don't have many questions in this
23 particular area, but I do have some. So the first goes
24 to, well, Mr. Larson's testimony and the issue of
25 groundwater modeling. And my first question is how

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1 should I and ultimately the US Supreme Court go about
2 actually evaluating the reliability of the model that
3 Mr. Larson used?

4 And I know that Mr. Larson testified in his
5 view it would be viable to use that particular model,
6 but, of course, I have the testimony of Dr. Schreuder
7 who says it wasn't a reliable model. So are there
8 particular indicators or factors that should be looked
9 at in deciding whether or not a groundwater model is
10 sufficiently reliable for a court to rely upon it?

11 MR. DRAPER: Your Honor, we have some
12 experience to look at in that regard particularly the
13 Arkansas River case between Kansas and Colorado. It
14 was 270 days of trial there. Most of that was over a
15 model, a so-called hydrological institutional model
16 that had groundwater aspects and surface water aspects.
17 And there was a lot of testimony from opposing experts
18 in that case.

19 And you will find that really it boils down
20 to -- first of all, the basis for those opinions and
21 then the credibility and logic of the experts as they
22 explain to you how they utilized that information and
23 the basis that they started with to reach their
24 conclusions. And they test each other by opposing
25 testimony and ultimately it's up to the Supreme Court

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1 and you in the first instance to determine whether what
2 they say makes sense basically.

3 And we did that for 270 days in the Arkansas
4 case and the court ultimately adopted the model there
5 that was the result of that testimony.

6 Now, there's some similarities that I think
7 are helpful and that is that here as there we started
8 with a model that had been initially developed by or
9 for the US Government and had been developed outside
10 the context of the particular litigation. Oftentimes
11 models will be developed for a particular case and
12 those are perfectly fine as a category, but there's
13 extra -- there's extra reliability and assurance of
14 impartiality when a party not -- one of the parties to
15 the litigation has developed a model and done that
16 prior to the litigation, not with an eye towards
17 litigation.

18 And that's the kind of thing we had in the
19 Arkansas case. We had a model that was developed
20 initially by the USGS. It wasn't complete, but it was
21 a start and the concepts in that model were applied.

22 More directly in the litigation over the
23 Republic River between Kansas, Nebraska and Colorado we
24 started there with a groundwater model that had been
25 originally developed by the USGS in particular.

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1 Ultimately that case settled, but the settlement was
2 based on taking that model that had been previously
3 developed by or for a federal agency in the area in
4 question and adapting it to the particular purposes of
5 the case.

6 And so when an expert like Mr. Larson paid to
7 model like that he's already starting from a good
8 strong basis of credibility. And we can see that
9 that's what happened in this case. Mr. Larson took
10 that model, focused on the part of the model that is
11 relevant to our purposes here. Some time passed so
12 that he was better able to calibrate it based on data
13 that had become available since that time and applied
14 it in this case.

15 So those are some of the factors that go into
16 determining whether a groundwater model -- as you say,
17 it's subject to -- always subject to a certain degree
18 of uncertainty. It is a replication of the physical
19 world and it can't be perfect, but where we need to
20 solve disputes where we know that logically and based
21 on certain facts that there is the possibility that
22 there is a hydrologic connection, for instance, that
23 that can then be tested and quantified as long as your
24 assumptions going into the process are tested and
25 reviewed for reliability.

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1 So here that was taken. Certain adjustments
2 were made by Mr. Larson and it was applied and data was
3 what he had reported.

4 Now, we have the criticisms, as you mentioned,
5 from Dr. Schreuder. He is suggesting that -- among
6 other things that there should have been a so-called ET
7 salvage function in there which the Government
8 didn't -- the federal government didn't feel was
9 necessary obviously, but he's saying that it should
10 have been in there and it was a mistake not to have
11 that in there.

12 We disagree. It is not a given that these ET
13 salvage functions are reliable. They have appeared in
14 certain models, but the evidence of the relationship
15 between groundwater level and whether a preatophyte,
16 this non-beneficial type ET is diminished because you
17 reduce water level. There's not any assurance that we
18 showed on cross-examination of Dr. Schreuder and
19 through Mr. Larson's testimony that there is a reliable
20 relationship there in terms of the different --
21 difference in one meaning there's a difference in
22 another.

23 SPECIAL MASTER: So let me ask along those
24 lines. So in looking at the differences between
25 Mr. Larson and Dr. Schreuder there are several things

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1 that at least looking back over the record I'm not sure
2 exactly how to resolve.

3 One of them is the -- the issue of ET. As you
4 brought out I think on cross-examination it's not clear
5 that one should rely upon Dr. Schreuder's estimates as
6 to what the level of ET should be, but at the same time
7 reading the various supporting papers that were going
8 into evidence it's also not clear to me that the ET
9 reduction would be zero. In fact, it's probably
10 somewhere between zero and where Dr. Schreuder is.

11 Similarly on the amount of water going back
12 into the river as a result of the storage operation,
13 there are a variety of numbers out there and I'm not
14 quite sure which of the numbers based on the
15 examination I've done so far is the correct number, if
16 any of those numbers is the correct number.

17 So how should the Supreme Court deal with
18 those uncertainties regarding the model?

19 MR. DRAPER: Well, I would first point out a
20 perhaps obvious difference here. Mr. Schreuder,
21 Dr. Schreuder, did not do a model. He said there's
22 only one model here. And in many cases you'll have
23 models from both sides. That was true in the Arkansas
24 case. And here he didn't do any analysis. He simply
25 tried to poke holes in Mr. Larson's analysis.

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1 The evidence I think on the ET salvage
2 function is very mixed, in fact, even changing sides
3 and some of that evidence you will see if you review it
4 carefully. So there is very little confidence that
5 that actually should be included in the model. If you
6 are looking for a reliable model, it shouldn't be
7 inserting something that -- that has questionable
8 reliability itself. And that is true of the ET salvage
9 function.

10 It's a theory. It hasn't been totally
11 disproved, but it certainly hasn't been proved and
12 you've got clear examples where in recent modeling
13 efforts by the federal government and in the interstate
14 suits that kind of function has not been proved at all.

15 So we believe that it was very appropriate to
16 use the model in this case that was created for the
17 federal Bureau of Land Management that it was
18 constructed without it being such a function.

19 Your second point went to return flows and
20 what do we do with those various numbers that are out
21 there. Well, the strongest evidence on that is really
22 Mr. Wheaton who was called by Colorado who had hands-on
23 experience and has very good qualifications to do the
24 kind of testing and investigation that he has done in
25 the Powder River Basin of which geologically the Tongue

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1 River is part.

2 And he has found through flocculation and so
3 on that these infiltration ponds are very poor
4 infiltrators and do not allow water to go back in any
5 discernable quantity to the regional groundwater
6 system.

7 So that was -- that was the testimony of him.
8 He was called by the State of Wyoming, but he verified
9 that this was -- what they wanted him to say was not
10 true. There is not large scale infiltration. In fact,
11 he said he hadn't seen any.

12 Now the other part of this is, well, if you
13 have little or no infiltration to the groundwater
14 system, what about direct discharges to the -- to the
15 rivers, to the Tongue River itself or tributaries like
16 the Prairie Dog Creek.

17 The message that Wyoming gave to us throughout
18 the years was they were not allowing discharges to
19 surface streams. They were not doing it. Period. No.
20 Now, Mr. Larson checked into that further, as
21 documented in his reported testimony, and was told that
22 there was -- there essentially was no surface water
23 discharge.

24 Now, we had some testimony -- we had some --
25 and that was talking to the Wyoming -- or taking

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1 material from the Wyoming Department of Environmental
2 Quality. That's where he went for his information was
3 the Wyoming Department of Environmental Quality reports
4 and information and he found that there was very little
5 there.

6 Now, we did have some evidence that was put
7 on by one of the Wyoming witnesses that indicated there
8 were some direct discharge I think to Prairie Dog Creek
9 in very small amounts and within a few months -- the
10 period didn't match up with our study period here for
11 the most part, but there were a few months of
12 cross-over there.

13 The problem with that evidence was that there
14 was no indication that that water ever, if it did
15 occur -- contrary to what they had been telling us over
16 the years, if it did occur that it ever reached the
17 state line.

18 We have testimony from Mr. Pilch among others
19 that he took everything out of Prairie Dog Creek and so
20 this claim of some discharge in excess of what
21 Mr. Larson testified to does not seem to have any basis
22 to us.

23 And recall that Mr. Larson did assume based on
24 his investigation of the work of the federal government
25 primarily but also of the Department of Environmental

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1 Quality of Wyoming that there was less than 25 percent
2 return flow. And so he assumed 25 percent. He was
3 very conservative about that. There are indications
4 that it went down to zero or almost zero, but he
5 assumed 25 percent to be safe and to be conservative.

6 SPECIAL MASTER: I have a couple more
7 questions here. One is what in Montana's view is the
8 relevance of the fact that Montana wasn't regulating
9 its CBM wells?

10 MR. DRAPER: Absolutely none, Your Honor.

11 SPECIAL MASTER: Okay. Why is that? Why
12 should we be arguing over what Wyoming is doing when at
13 the same time you're permitting pumping on the Montana
14 side?

15 MR. DRAPER: Well, first of all, we're talking
16 about does the Compact prohibit this if it occurs. And
17 the terms of this Compact are not going to be subject
18 to whether this year or next year or last year one of
19 the states is or is not doing something.

20 We've seen arguments like that fail miserably
21 in the Supreme Court before interstate cases where
22 Nebraska was arguing, well, we weren't even regulating
23 groundwater pumping at all in 1943 when the Republican
24 River Compact was adopted. So how could the
25 negotiators and the states have intended to regulate

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1 something that they weren't even regulating. And the
2 court rejected that very roundly.

3 And it's the same thing here. You can't --
4 it's just illogical to claim that the scope of the
5 Compact depends on what an administrative agency is or
6 is not doing, you know, in a particular time period.

7 SPECIAL MASTER: I guess I would separate out
8 two questions. The first is what is its relevance to
9 what the scope of the Compact is, and one could say
10 there that, in fact, the fact that Montana is not
11 regulating it says nothing about whether or not it's
12 regulated under the Compact. But the second question,
13 though, becomes, to the degree that Montana is pumping
14 CBM groundwater that is connected with the Tongue
15 River, can Montana then complain that Wyoming is doing
16 it to the injury of Montana's water users? It just
17 seems somehow that there should be the same standard
18 for both states.

19 MR. DRAPER: Well, on your second question
20 there, what about the impact of whatever pumping --
21 let's say CBM being downstream Montana -- what about
22 that effect on the flows of the Tongue River.

23 SPECIAL MASTER: Uh-huh.

24 MR. DRAPER: Well, I view that as pretty much
25 an internal matter. I mean, if Roger Muggli needs

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1 187.5 CFS and he's getting 50 and we have some CBM
2 pumping that might be affecting it let's just assume
3 for purpose of discussion a couple of CFS, that is more
4 of an administrative issue within Montana.

5 And it doesn't mean that you've got to resolve
6 that question in order for Wyoming to be required to
7 give its normal water that it would do -- provide at
8 the state line to provide for our pre-'50 rights,
9 which, as we know, typically reduces all of a sudden to
10 the T&Y right.

11 SPECIAL MASTER: Let me make sure I understand
12 this. So let's assume that pre-1950 appropriators in
13 Montana are short 4,000 acre feet of water in a
14 particular year. And let's also assume that there's
15 actually a reliable groundwater modeling that shows
16 that in Wyoming they are pumping groundwater that is
17 depriving the river of 4,000 acre feet. There's also
18 evidence that Montana users are pumping groundwater and
19 depriving the river of 4,000 acre feet.

20 Is it your argument in that setting that
21 Montana can say, well, we're not going to regulate our
22 groundwater, but we're going to turn to Wyoming and
23 require them to do it?

24 MR. DRAPER: No. Absolutely not, Your Honor.

25 Your example, if our pre-'50 rights are short

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1 4,000 -- a 4,000 acre foot depletion being caused by
2 groundwater pumping in Montana, we've got all the water
3 we're entitled to under the compact.

4 But I would submit that the best evidence of
5 that is Mr. Book's table that shows what's needed for
6 those pre-Compact rights. And as long as Wyoming is
7 providing that -- if some of that is taken by a
8 depleted process downstream, that doesn't matter. That
9 is not something that we would presume to come to
10 Wyoming about. We've gotten our water and it's up to
11 us to use that.

12 But, again, let's say that -- let's say in
13 your example that we're short let's say a hundred CFS,
14 if we do it in CFS units, and our groundwater use is
15 depleting five. It is no excuse, no valid excuse for
16 Wyoming to say, "Oh, well. You have a five CFS right
17 there. We can tell that based on our reliable model.
18 We don't have to give you anything. We know you're a
19 hundred CFS short of Mr. Book's number at the state
20 line, but because you haven't gone out and regulated
21 that we're off the hook."

22 No.

23 SPECIAL MASTER: Okay. Thank you.

24 So that's actually all the questions that I
25 have of Montana at the moment. And so unless there's

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1 something more that you want to add, I would suggest
2 that we hear from Mr. Kaste and maybe you can come back
3 up for any reply.

4 MR. DRAPER: Very good.

5 SPECIAL MASTER: Okay. Thank you very much.

6 MR. KASTE: Well, Mr. Draper took a little bit
7 of a digression back into some issues that were
8 previously covered. I figured I ought to complete the
9 process.

10 He read you paragraph 19 from the Worley
11 decision. I'll read from paragraph 20 which says: "We
12 are not required to decide whether the demand must be
13 made upon the state engineer, the water master, the
14 upstream junior appropriators or one or more of them.
15 Here it is undisputed that no demand of any kind was
16 made."

17 So the notion that Worley doesn't require
18 demand is false.

19 Now, with regard to the questions that you had
20 about post-1950 uses in Wyoming, your first question is
21 how do I evaluate the reliability of the model. Well,
22 I think you should definitely look at Mr. and Dr. and
23 decide with Dr. because that's an easy way to go.

24 SPECIAL MASTER: Doctor, doctor.

25 MR. KASTE: Yeah, doctor, doctor.

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1 You face the question that every fact-finder
2 in a case faces that is you have two well-qualified,
3 seemingly well-qualified experts who both have reached
4 diametrically opposed conclusions. "How am I supposed
5 to pick between those?"

6 And it's not an easy task and credibility of
7 the witnesses comes into play. And I think there are
8 more -- there are pretty important things here that you
9 can use as a guide for deciding that Mr. Larson's
10 analysis isn't reliable for these purposes, one of
11 which is, well, let's look at his model.

12 Was it designed for this purpose? No. Was it
13 calibrated to this particular location? No. Did the
14 guy who did the analysis make modifications to that
15 model in a way that was well grounded in the facts?
16 No. We heard from the people what the facts are with
17 regard to the practice of using unlined CBM
18 impoundments, and they are not lying, for the express
19 purpose of infiltrating water into the ground and
20 evaporating it up into the sky.

21 Mr. Larson's modification of the model was
22 totally out of line and that affects the amount of
23 water that goes back into the ground.

24 Did you talk to other relevant experts and did
25 you take advantage of their knowledge? No, I didn't do

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1 that. Who should he have talked to? Well, Mr. Wheaton
2 would be a great guy to talk to. Mr. Larson didn't
3 talk to him. Mr. Wheaton came in and he told us lots
4 of interesting things about CBM and Mr. Draper was very
5 careful in what he said to him.

6 Mr. Wheaton said he never saw any water from
7 CBM impoundments go back to the regional aquifer
8 system. No, he never saw any water go 5,000 feet into
9 the ground. He saw lots of water that went five feet
10 into the ground and that's in the groundwater as well
11 and that water can have an effect on the stream.

12 That water can offset the amount that you're
13 pulling out of the bottom. It's reasonable stuff.
14 Lots of water makes its way back in. The fact that
15 Mr. Larson didn't attempt to modify the model in a way
16 that doesn't account for that properly makes it
17 unreliable.

18 I think with regard to ET salvage, does the
19 analysis take into account all of the relevant
20 factors? No, it doesn't. It doesn't take into account
21 what used to be a fairly important factor in ET
22 salvage. The exact amount of difference that makes in
23 the model probably isn't that big of a deal because the
24 amount calculated is so small any change that reduces
25 the depletions calculated by Mr. Larson distinguished

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1 them.

2 The amount of water at issue with regard to
3 CBM is so small that any minor adjustment makes it all
4 go away. And that's why, of course, Dr. Schreuder's
5 conclusion is when we look at this and we understand
6 the limitations of the model, the conclusion you have
7 to reach is the amount depleted from the Tongue River
8 is indistinguishable from zero. It's just -- we can't
9 even figure out what that little amount is with the
10 data that we have.

11 And I think that the Court would be well
12 justified in following Dr. Schreuder's lead and finding
13 that for this particular purpose the BLM model which
14 was well crafted to do something else just doesn't look
15 at it.

16 Now, your next question I find really
17 interesting, which was what is the relevance of the
18 Montana's CBM loss. They are really relevant because
19 Montana has obligations under this Compact just like
20 Wyoming and we've talked about pre-1950 uses that are
21 subordinate -- post-1950 uses are subordinate to
22 pre-1950 uses.

23 And that's true on both sides of the state
24 line and we know before Montana can make a demand on
25 Wyoming they are supposed to engage in appropriate

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1 intrastate regulatory measures. If they are going to
2 ask us to turn off our pumps, we are going to turn off
3 their pumps. Those are just as post-'50 as ours and
4 they have the same effect kind of effect on the stream
5 as ours do, perhaps more because they're closer to the
6 places where Montana has to use the water.

7 We see even using Mr. Larson's analysis that
8 there is robust depletions and estimations from Montana
9 pumping and Wyoming pumping. And they are fairly close
10 to each other and merely offset. But it is astounding
11 to me that Montana would say, "We can do whatever we
12 want. We can call on you to make up the difference and
13 you don't have any business looking at what we're doing
14 here on our side of the line."

15 That's essentially what they're telling us.
16 "Don't worry about what we're doing on our side of the
17 line with this water. Your job is to give us" -- and I
18 think you just heard it again from Mr. Draper -- "a
19 certain amount of water at the state line and then
20 don't look any further. You have no right to look at
21 how we do things in the state. Just give us a certain
22 amount of water at the state line."

23 That is not how this Compact works. We got
24 started today by saying that's not how this Compact
25 works. The parties have mutual obligations to each

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1 other and that in this case means before Montana can
2 come to us and complain about CBM production in Wyoming
3 they need to take some sort of action to deal with the
4 effects of CBM production in Montana, but frankly
5 neither of us thought to do anything with regard to CBM
6 production in either state because the effects on the
7 Tongue River are so small as to be de minimus and not
8 worth our time.

9 And both states make allowances for de minimus
10 groundwater pumping in various ways. Montana doesn't
11 even permit its wells. They don't even get above the
12 criteria necessary to obtain a water right. So they
13 can't be regulated in priority by a water commissioner
14 because Montana says the wells are too small. "We are
15 not going to bother with those internally."

16 And Wyoming, although asking them to get a
17 water right, requiring a water right from every one of
18 our CBM wells, we haven't seen effects from those CBM
19 wells that justify the state engineer's opinion
20 regulating those wells as if they are from a single
21 sort of supply with the surface water. We probably
22 ought to listen to the folks in Montana and the folks
23 in Wyoming who have to deal with this problem every day
24 and determine ourselves that these wells' effect on the
25 stream is too de minimus for the Compact to warrant

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1 intervention at this time.

2 SPECIAL MASTER: Okay. Let me ask just
3 several questions there.

4 The first is is that in Wyoming's brief one of
5 the things that you said is that both states had
6 determined that the connection between CBM groundwater
7 production and surface water is too tenuous to warrant
8 intrastate regulation.

9 But I looked at the record. I can't find a
10 situation where either state has actually made that
11 positive determination. I certainly can find in the
12 record a lot of evidence that no one has raised the
13 issue in Wyoming and that therefore the state engineer
14 does not have any determination there.

15 In Montana it appears as if they basically
16 just decided that because no one is going to be using
17 the water that is pumped out that they aren't even
18 regulated under the prior appropriation system. But I
19 don't see anything that leads me to a positive
20 determination. Am I missing something?

21 MR. KASTE: No. Nobody went out and did a
22 cool study. Nobody else built a model for this
23 purpose. But I think the policy makers in each state,
24 at least none of our policy makers in the legislature
25 and in Montana, their policy makers, have made an

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1 implicit determination not to bother with that at this
2 time.

3 Now, ultimately CBM production could be done
4 in such a way that action needs to be taken, but at
5 this point in time and as it specifically relates to
6 2004 and 2006 we always have to come back to this date.
7 It's grounded in a specific space in time. There was
8 not sufficient material effects on the stream for any
9 of the policy makers in either state to do anything
10 about this. Neither should we.

11 SPECIAL MASTER: Let me ask you then another
12 question. So again it might be that the Supreme Court
13 ultimately reaches the conclusion that the model
14 Mr. Larson used was not sufficiently reliable to depend
15 upon, but let's assume that the Supreme Court actually
16 looks at the results of the model.

17 In determining whether or not there is a
18 sufficiently material non-de minimus impact on the
19 surface water from the CBM groundwater pumping, does
20 the Supreme Court look at the amount of water that
21 Wyoming returns to the river system itself? Let me
22 sort of explain this in a different way.

23 One way of looking at this is, well -- and
24 again it's all going to depend upon the facts, but if
25 you believe that the percentage that is returned to the

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1 river is very high, you can look at that and say, well,
2 when you actually look at it overall, we don't know
3 whether it's having any impact at all, in fact, maybe
4 it's getting to the river faster than it was before
5 and, therefore, there's not a material connection and,
6 therefore, this is actually not groundwater which is
7 even managed under the Compact. That's one
8 possibility.

9 The second possibility is to say, well, if you
10 ignore for a moment the water that's being returned to
11 the river, actually the pumping of the CBM groundwater
12 is having an impact on the river and what Wyoming has
13 basically done is to develop what in Colorado might be
14 an augmentation plan saying, "Okay. We're pumping it
15 out rather than bringing it back, but don't worry.
16 We're going to put it right back in anyway."

17 And maybe there's no difference between those
18 two --

19 MR. KASTE: If I understood either of them,
20 then I could tell you.

21 SPECIAL MASTER: Yeah. Under the second you
22 could say, well, actually they are connected. There's
23 a material connection and, therefore, actually it does
24 full under the Compact, but there's no liability here.
25 Whereas in the first situation you would say we don't

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1 even get to a stage of asking about liability because
2 it's not managed under this Compact. It's too
3 immaterial.

4 And if your answer is there's no difference
5 between those two, that's fine, too.

6 MR. KASTE: You already said it, but only if
7 you understood either option, but I think Anadarko has
8 already briefed that this water isn't covered by the
9 Compact.

10 SPECIAL MASTER: All right. I understand.

11 MR. KASTE: And I agree with that.

12 SPECIAL MASTER: So I'm assuming now that --
13 right. I'm assuming now that, you know, the question
14 is is it sufficiently material to the Compact.

15 MR. KASTE: Right. And the materiality in
16 this circumstance is no. And what I think we're
17 talking about is there's a connection as the water is
18 pulled out of the ground with the stream from below and
19 there's a connection with the stream from above when we
20 put it back in. Fair?

21 And I think that what we're looking at is what
22 is the net effect of those two actions on the stream.
23 Does that make a difference that we should be cognizant
24 of as it relates to the relationship between the
25 states? And the answer is no.

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1 What we've done is we've changed sort of the
2 time when that water makes its way to this stream. We
3 take some of it out and so forth. But none of it makes
4 a difference to the stream that would create a really
5 usable quantity of water for anybody downstream in a
6 particular time.

7 When you look at how much difference it makes
8 in a stream even using Mr. Larson's figures, which I
9 think are deeply flawed, we look at that and try to
10 pick it out for a date. Is there a usable quantity of
11 water for a farmer in Montana? No, there's not. And
12 if there's not a usable quantity of water for a farmer
13 in Montana, the Compact really probably ought not to
14 provide a remedy that imposes harm, much greater harm
15 over here than any commensurate benefit on the north
16 side belonging to Montana.

17 SPECIAL MASTER: So humor me on this because
18 this might ultimately not make a difference, but it
19 strikes me as an interesting potential distinction.
20 And the reason again is that -- and again it might be
21 that it's not even material if you ignore entirely
22 water being returned to the river either directly or
23 through storage.

24 But if you think about the factual situation
25 as one in which basically there's water being pumped

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1 out of the system through the CBM pumping and then what
2 happens is you're taking that water and you're going to
3 return it to the river, one way of thinking about this
4 is that the question -- if the standard is materiality,
5 then the question is does it have a material impact
6 when you pump it out.

7 That's the question of whether or not Wyoming
8 can or -- or Montana can say, "Hey, that might be our
9 water. We need to worry about this." And then
10 Wyoming's response is, well, but what we're returning
11 it to the river, which, as I say, you know, if I'm
12 thinking in terms of the way other states might think
13 about this, it sounds a little bit like an augmentation
14 or a mitigation type. "Don't worry we're pumping it
15 out, but we're putting it right back again."

16 But again all hypothetical, you could see the
17 burden being quite different in that if indeed this is
18 more like an augmentation plan, then I would think that
19 it very well might be Wyoming's obligation at that
20 point to actually show that the augmentation plan is
21 adequate rather than Montana's.

22 MR. KASTE: What I think is the materiality
23 ought to be measured with regard to a place, a person,
24 a thing. And so materiality has to be measured at the
25 stream because those are the persons claiming to be

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1 impacted by the pumping that's occurring 5,000 feet
2 below the ground. And so materiality for the people of
3 Montana is not -- I think we pumped 800,000 acre feet
4 of water out of the ground in the common Powder River
5 Basin in the course of several years.

6 It seems like a material amount of water, but
7 it doesn't make a difference to them, to Montana. So
8 the question that we have to answer goes to the purpose
9 of this Compact and the answer is no. And so I don't
10 think we're obligated to show that this pumping in
11 Wyoming is not having some effect or we are augmenting
12 the stream in some fashion. I think what we need to
13 look at is what is the impact on the people in Montana.
14 And if there's no discernable impact on them, why would
15 you care? Why should we do anything about it?

16 SPECIAL MASTER: And I would say the only
17 reason we could potentially -- and this is an issue
18 that I'm still struggling with. So I don't want to
19 suggest to you that I've already reached a decision as
20 to whether or not any particular action has a material
21 impact, but the difference would be we have a lot of
22 disagreements over exactly how much water is getting
23 returned to the Yellowstone River system.

24 And so it could make a difference as to
25 whether or not it is Montana's burden as part of

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1 showing that, in fact, pumping is having a material
2 impact because I think that one of the things
3 Dr. Schreuder's testimony suggested is if you include
4 both ET and you include also the returned water to the
5 river, then it all looks as if it's all part of the
6 noise and you can actually flip the numbers and you can
7 get a positive figure rather than a negative figure.

8 But if, in fact, all Montana's burden is is to
9 show that pumping out has an impact, then they might
10 have made an initial prima facie case if you just look
11 at the rest of the modeling -- again, I'm posing this
12 as a hypothetical -- that, in fact, the pumping is
13 having a material impact. And then it would be
14 Wyoming's burden to actually show that the amount of
15 water that is being returned makes up for that and that
16 therefore there's no liability.

17 MR. KASTE: I do not believe that Montana
18 fulfills its burden by demonstrating that they are
19 simply pumping in Wyoming in a certain amount. Their
20 burden is to prove that that pumping in Wyoming in a
21 certain amount caused an effect to some thing or
22 someone in Montana. In the absence of that causal
23 connection Montana hasn't proven its case and, like I
24 say, materiality has to be measured in relationship to
25 somebody.

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1 SPECIAL MASTER: Okay. Let me then ask you
2 just another couple of questions and if there's
3 anything else you want to add, you should feel free to.

4 One is -- and again I'm going to pose this as
5 a hypothetical. Let's assume that for a particular
6 year, say 2004, 2006, conclude that there is a call on
7 a particular date and that before that date that
8 there's no liability, after that date there is
9 liability.

10 One of the arguments I understand Wyoming is
11 making is there's just not any evidence in the record
12 to determine what water might have been used before a
13 call date and what water might have been used after a
14 call date with the exception of the two reservoirs Dome
15 and Sawmill that apparently fill afterwards for a total
16 of 688 acre feet.

17 Why shouldn't the court looking at the
18 evidence as a whole say, well, we know that -- you
19 know, let's assume that the court concludes that
20 there's actually evidence that there was post-1950
21 water that was used during that period of time either
22 directly taken out or evaporated or stored in one of
23 the reservoirs that didn't have a direct measure.

24 Could the Court conclude that it is more
25 reasonable than not, more likely than not that if you

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1 just proportion that amount over the season as a whole
2 and take the percentage that occurred after the call
3 date that that's a good measure of the -- of water that
4 Montana was deprived of after the call?

5 MR. KASTE: No, absolutely not.

6 SPECIAL MASTER: Why not?

7 MR. KASTE: Nobody testified that the
8 evaporation on any one of these little reservoirs
9 occurs at a steady rate. Nobody testified that the
10 irrigation that occurred before and after these
11 particular call dates occurred at a steady rate. What
12 you have to assume and speculate about is that the
13 amount of water on any given day pre-call and post-call
14 used at that particular right or reservoir is the same.

15 Nobody testified to that. So the Court would
16 have to speculate as to the amount pre and post. I
17 mentioned more than once during the course of the trial
18 that these dates are really important and we need that
19 evidence from Montana's experts to differentiate pre
20 and post in order to do the right thing here.

21 In order to directly fix liability on Wyoming
22 we have to know those particular numbers. And
23 particularly without any evidence that this number is
24 the same as that number on any given day the Court
25 would have no basis for finding, "Well, I'll just say

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1 it's that many days. You know, I'll do some math and
2 figure out every day it's a foot and there are 200
3 days. So that's 200 feet. There you go."

4 The Court is not in a position to do that
5 because it doesn't have sufficient evidence to let it
6 be comfortable with the notion that that rationale that
7 is credible, that reasoning is credible. That needed
8 to come from an expert witness.

9 Mr. Book needed to testify the amount of
10 evaporation on May 1 is the same as amount of the
11 evaporation on August 1st. And without that testimony
12 the Court would have no basis for proportionally
13 awarding the water to Montana in this case.

14 SPECIAL MASTER: So does that mean that if
15 Montana were to issue another call let's say next
16 week -- it turns out to be early Friday -- and they
17 issue a call. Does everyone have to go out immediately
18 and start measuring what the evaporation is on every
19 reservoir that Wyoming has not directly measured the
20 Compact reservoir and it needs to travel up and down
21 the roads to see exactly who is utilizing water on
22 their land? Is that the only way in which Wyoming --
23 Montana would ever be able to prove its case?

24 MR. KASTE: Oh, I doubt that. I'd be willing
25 to bet Mr. Book would tell you what the evaporation was

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1 for any given period of time on any size reservoir and
2 even go get the information without too much trouble.
3 He didn't do that in this case.

4 But you highlighted an important point. In
5 this case the burden falls squarely on Montana to go
6 find out information like that through the course of
7 discovery and present it to you. He didn't do that.
8 But it remains their burden. You can't eliminate their
9 burden by noticing it might be a little hard.

10 They are Plaintiff in this case. They need to
11 find out what water was used in Wyoming after the call
12 date. They can do that during the course of discovery
13 and we had ample discovery in this case and we had to
14 assemble that information and present it to you in the
15 court. And if they have to do that in the future, that
16 may be their burden as well.

17 We're not likely to see a situation that we
18 saw in the past because of the evolving nature of
19 regulation in Montana and supervening changes in the
20 law, at least in our view, when the court tells us
21 that's not the how the Compact words. We're obviously
22 going to respond differently than we did in '04 and
23 '06. And so the odds of us even clarifying about the
24 same things in the future are limited.

25 SPECIAL MASTER: Last question. The causation

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1 issue.

2 So we talked earlier about the issue of
3 contemporaneous demand. So let's assume all the
4 various -- Montana is able to meet all of its various
5 other responsibilities. So it chose that you have
6 pre-1950 users in Montana that don't have water and
7 that there are post-1950 users in Wyoming that were
8 using water during that period of time.

9 What is the causation issue that you think
10 also needs to be addressed? Is it simply the question
11 of whether or not if water had gone into the river from
12 those 1950 users in Wyoming it would have made its way
13 all the way down to the pre-1950 users in Montana?

14 MR. KASTE: Yeah. It's that simple. What we
15 need is an expert to say, well, here's the call to
16 Wyoming. Here are all these post-'50 users. If we
17 shut them off, that water will go there. It's not
18 complicated. It's something Montana certainly could
19 have done if it felt like it had to, but it doesn't
20 view this case as a continuing causation element. Had
21 it wanted to, it could have put on sufficient proof of
22 causation, but it didn't. And it's too late now.

23 SPECIAL MASTER: So is this any different than
24 if people call?

25 MR. KASTE: I think I wrote in the brief that

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1 causation is the flip side of futility and I think that
2 that's true. And when you're engaged in a contractual
3 relationship with somebody and you say they are not
4 living up to their promises, then it becomes your
5 burden to prove causation in any case. That's
6 Montana's burden.

7 Like I said, there's a difference between
8 doctrine of appropriation and the promises that were
9 made and our duty under the contract and the cause of
10 action and elements of that cause of action that
11 Montana must prove in this case. They are different.
12 And so causation is one of those elements that they
13 can't get out from under.

14 SPECIAL MASTER: And so this is one of those
15 areas where when I look at the law of most of the
16 western states it's that under prior appropriation
17 doctrine if a junior appropriator wants to resist
18 giving up water when people call is it its
19 responsibility to show that it would be futile.

20 But you're saying here we shouldn't worry
21 about who has the burden of the prior appropriation
22 law, it's a matter of contracts law?

23 MR. KASTE: Yes.

24 SPECIAL MASTER: Okay. Last question. I
25 promised that was going to be the last question, but I

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1 have one more left.

2 If there was a contract law -- a contract that
3 you and I entered into, and we agreed that we're going
4 to abide, the purposes of this contract, to the
5 contract law of Wyoming. And let's assume that the
6 contract law of Wyoming has somewhat different burdens
7 of proof than the contract law of California where
8 we're actually sitting on the empty contract. Do I
9 ignore the contract law of Wyoming?

10 MR. KASTE: Absolutely not. The parties can
11 contract and do something different than the default
12 law and they can impose duties including shifting the
13 burden of proof in a case, choosing jurisdictions and
14 things like that. That didn't happen here. And
15 incorporation of the doctrine of appropriation in this
16 Compact while it sets the parties' duties does not
17 alleviate Montana's burden of proving causation in this
18 case.

19 SPECIAL MASTER: So when I look again at V(A)
20 and it says that the appropriative rights shall
21 continue to be enjoyed in accordance with the laws
22 governing the acquisition and use of water under the
23 doctrine of appropriation your view is that governs --
24 the responsibility of the parties has nothing to do
25 with burden of proof?

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1 MR. KASTE: Yes. Burden of proof in this case
2 is different. It's not burden of proof -- I have
3 failed to explain this well, I think, and I apologize
4 for that. I think we talked about it two times and I
5 screwed it up every time.

6 SPECIAL MASTER: I'm just pressing you to see
7 whether or not in fact --

8 MR. KASTE: Yes. The burden of proof is not
9 dictated by the terms of Article V(A). In fact, the
10 duties of the parties doesn't affect the burden of
11 proof in these proceedings. They are very different
12 matters.

13 SPECIAL MASTER: No. I understand your point
14 entirely.

15 MR. KASTE: All right. I get to sum up now
16 before the Plaintiff?

17 SPECIAL MASTER: Sure.

18 MR. KASTE: I'm going to do it in two
19 sentences.

20 SPECIAL MASTER: Okay.

21 MR. KASTE: Thank you very much for all the
22 time you've spent on this case. The parties very much
23 appreciate it. We very much look forward to receiving
24 the guidance that you give us because both parties, as
25 you've heard today and have heard over and over, are

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1 interested in establishing some certainty with regard
2 to this Compact so that we can get along and move
3 forward on this river without coming to the Supreme
4 Court again.

5 And so with that I would request on behalf of
6 the State of Wyoming that in the course of making your
7 recommendation to the court that you recommend that
8 this case be dismissed.

9 Thank you.

10 SPECIAL MASTER: Thank you.

11 Mr. Draper?

12 MR. DRAPER: Yes, Your Honor. Thank you.

13 You covered a number of topics with Mr. Kaste.
14 The first one had to do with the two experts related to
15 the CBM analysis and I just emphasize there was a big
16 difference in their qualifications.

17 Mr. Larson is a hydrologist. Dr. Schreuder is
18 not. He's got two Ph.D.s, but neither one is in
19 hydrology. They are in mathematics. So we're dealing
20 with a hydrologic question here which requires
21 hydrologic judgment and Mr. Larson with his experience
22 with the USGS and many applications has shown his
23 abilities as an analyst who does not overstate things.

24 SPECIAL MASTER: And, you know, I think you've
25 made that point quite well in your briefs. And really

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1 what I've been looking to for both of you, and it's
2 been valuable, has been what independent indicia are
3 there that the Court could look at in deciding whether
4 or not one or another expert is correct.

5 MR. DRAPER: Yes. And we would submit that's
6 one factor for you to look at.

7 I just want to mention, also, that we do have
8 statutory and regulatory regulation of CBM to document
9 its effects, as we've described in the brief. So we
10 were making certain assumptions in our earlier
11 discussion. I just want to be sure we haven't lost
12 that point.

13 SPECIAL MASTER: I think that's -- I think
14 that's fair. My understanding of Montana law is that
15 there is a regulatory system with respect to CBM water
16 as it is outside of the norm of the prior appropriation
17 system itself.

18 MR. DRAPER: Right. The model itself,
19 contrary to what Mr. Kaste was asserting, was made for
20 the type of purpose that we're using it for in this
21 case, which was what are the effects on surface streams
22 including the Tongue River.

23 Again the ET salvage function that
24 Dr. Schreuder has pulled out and said, well, the
25 government forgot to use this and, therefore, you

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1 shouldn't rely on this model, the model we have adopted
2 after litigation between states, most recently in this
3 court, did not have that function.

4 And yet it had preatophytes. Like most rivers
5 it had preatophytes. There's been litigation on the
6 Arkansas River preatophytes to the Colorado Supreme
7 Court. People want to take credit for eradicating
8 them. If you're familiar with the Shelton Farms case
9 regarding this. Those are preatophytes. Did they have
10 a preatophyte salvage or an ET salvage function? No.
11 It was adopted by the court.

12 So there's no basis for trying to assert that
13 because it doesn't exist in this government model that
14 it's somehow deficient.

15 This insistence that the downstream states
16 have to match the upstream states with respect to what
17 it regulates is a red herring. Water flows downhill
18 and there are many things that affect that process in
19 the upstream state and the upstream state is not
20 affected by what goes on downstream as a result.

21 And so there is -- there's no rule that the
22 downstream state of a compact has to be doing or even
23 on this Compact has to be doing what the upstream state
24 is. The Compact imposes certain obligations and
25 those -- by their very nature since the upstream state

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1 is in possession, as the General pointed out earlier,
2 they've never let any water down under this Compact.
3 There's not a single drop they've ever let down.

4 That's proof positive they are in control of
5 the resource and that they should -- nothing should
6 change because of the way that CBM pumping is regulated
7 downstream is -- is certainly a good example of a red
8 herring. It's just part of the many complications that
9 while we would like to throw away Montana getting into
10 relief here they say, well, you turn the world upside
11 down when you ruled that Article V(A) did have some
12 meaning and did protect pre-Compact rights, but in
13 effect they don't want to do anything different than
14 they've been doing up to now.

15 SPECIAL MASTER: So again let me just ask on
16 the CBM pumping that's occurring in Montana. I know
17 that Montana disagreed with the portion of my first
18 report that suggested that Montana might have an
19 obligation to remedy shortages through an intrastate
20 remedy before they turn to an interstate demand.

21 But assuming that's correct, if it was a
22 situation where any shortage in Montana could be met by
23 just reducing CBM pumping that's taking place within
24 the Montana borders, that would seem to then I would
25 think under that excuse Wyoming from having to reduce

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1 its CBM pumping because basically it could resolve in
2 either intrastate or intrastate and interstate. It's
3 hard to see how you could call Wyoming if you're not
4 addressing it yourself.

5 But I could imagine a slightly different
6 situation where the shortage in Montana is so large
7 that even if I'm to limit it, it would still have a
8 problem.

9 MR. DRAPER: Yes. And that is the situation.

10 SPECIAL MASTER: So that's your argument here?

11 MR. DRAPER: It's so large that it pales in
12 insignificance to any possible effects of CBM pumping.
13 We're talking hundreds of CFS, 150 CFS shortages, and
14 you can see based on all that pumping that goes on in
15 the CBM fields of Wyoming, it's just a few CFS. So
16 it's a whole different order of magnitude, couple of
17 orders of magnitude.

18 But to your first point if the shortage to our
19 pre-1950 right could be caused by anything that's
20 happening in Montana, that's not -- that's our
21 responsibility, not Wyoming's. But if Wyoming is
22 causing a shortage of what our rights need by whatever
23 means, whether it's CBM or maybe they put a bucket in a
24 river by helicopter and take it somewhere, whatever the
25 depletion source is doesn't matter, but if -- if they

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1 are not providing the water that our rights, our
2 pre-'50 rights need, then they do have a responsibility
3 under dual interpretations of Article V(A).

4 SPECIAL MASTER: Although maybe this is only
5 to the issue that would be relevant for injunctive
6 relief, but it seemed to me that there was some kind of
7 unclean hands or estoppel argument that to the degree
8 Montana is doing something that's harming its users
9 should they be able to complain about Wyoming doing
10 something exactly the same?

11 MR. DRAPER: There is no such unclean hands
12 situation here, Your Honor. That doctrine has not been
13 asserted here and it's not applicable. If there are
14 wells downstream in Montana that are depleting flows to
15 further downstream users in Montana, that's not causing
16 any harm to Wyoming and it's not -- it's not a source
17 of any criticism or determination of unclean hands.
18 Not at all.

19 SPECIAL MASTER: Okay. I'm looking at the
20 time and I just want to make sure I give you an
21 opportunity to talk about any other issue that came up.
22 We have about ten minutes left.

23 MR. DRAPER: I think your suggestion about pro
24 rata, if you decide only a portion of the season is --
25 falls within a -- or constitutes a violation, I think

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1 pro rata is probably a good way to go. That approach
2 has been used.

3 There's always a need in these cases where you
4 have many different possibilities of what the master of
5 the court will rule. If there's an infinite number of
6 possibilities, you can't put on an infinite set of
7 evidence to address every possibility. So masters have
8 sometimes asked for further evidence. Sometimes they
9 have simply taken a pro rata or if it's clear enough to
10 them made an adjustment.

11 So these questions come up with some
12 regularity in interstate cases and so they they've been
13 handled without declaring that because the evidence
14 didn't happen to hit exactly where a special master
15 decided lines should be that it was a complete failure
16 of evidence.

17 SPECIAL MASTER: If -- and, again, as you
18 know, I have sometimes asked either or both parties for
19 information that turned out not to be relevant, but one
20 of the things is that if you are aware of any case in
21 which a court, particularly a special master, took an
22 approach which is similar to proportionality, then I
23 would consider it.

24 MR. DRAPER: Very good. And I think you said
25 we have a week to provide you with anything that might

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1 fall into that kind of category.

2 SPECIAL MASTER: So I would say on both sides
3 if there is anything that occurs to you after the
4 hearing that you think would be responsive to some of
5 the questions or concerns that I've raised, you know, I
6 would be remiss if I didn't ask you to reply on that.

7 At the same time, you know, realizing that the
8 briefs have been very long, I would ask that those be
9 quite short and simply be the provision of citations
10 with certain brief references. This is not an
11 opportunity for more argument but for more information
12 that could be relevant.

13 MR. DRAPER: Very good. You also raised the
14 issue of materiality with Mr. Kaste. I'm not aware of
15 any interstate compact enforcement case where anything
16 was denied because of materiality. And under the
17 doctrine of prior appropriation you don't see that
18 coming up.

19 Typically if you have an application for a
20 well, a pump and its effect on other wells, you see
21 typically that some flexibility is allowed with respect
22 to groundwater levels. But when it comes to impacts on
23 surface water there's no -- there's no leeway. You
24 make up through augmentation plans, for instance, the
25 exact amount that you affect the stream.

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1 I think that's everything. Thank you, Your
2 Honor.

3 SPECIAL MASTER: Okay. Thank you.

4 MR. WIGMORE: Five minutes is enough, Your
5 Honor.

6 SPECIAL MASTER: Okay. My only question. So,
7 Ms. Whiteing, are you wanting to add anything?

8 MS. WHITEING: If I make any remarks, I will
9 be very short.

10 MR. WIGMORE: As will I.

11 SPECIAL MASTER: Okay. Well, I would ask that
12 it be like two minutes. And I know Mr. Draper and
13 Mr. Kaste would want to respond to anything that is
14 contrary to what they are contending, but I would like
15 you to keep it short.

16 MR. WIGMORE: Do you want to hear about CBMs
17 or reservoirs?

18 SPECIAL MASTER: Oh, why don't we start with
19 reservoirs first.

20 And while you're walking down here,
21 Ms. Whiteing, the one thing I will say is that I
22 understand the need to make recommendations to the
23 Supreme Court that do not in any way make little of the
24 rights of the Northern Cheyenne Tribe because you were
25 not parties in this particular action. And I'll

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1 confess there are times when I've read various briefs
2 and I've begun to worry as to whether or not that's
3 actually possible.

4 But to the degree I conclude that, in fact, to
5 resolve this you actually have to address the nature of
6 the rights of the Northern Cheyenne Tribe, I think what
7 my recommendation to the Supreme Court would probably
8 have to be is that to resolve that issue the Northern
9 Cheyenne and the United States would have to be parties
10 in the action.

11 So just to let you know I understand that.

12 MS. WHITEING: Thank you, Your Honor. You cut
13 my remarks to maybe 30 seconds.

14 SPECIAL MASTER: Okay.

15 MS. WHITEING: Having said that I want to make
16 this one point, which is it has become clear to me in
17 the course of this argument today that Wyoming is
18 apparently treating the Tribe's Tongue River Reservoir
19 allegation -- allocation as if it were a state
20 appropriative right.

21 We don't agree with that. It is an allocation
22 in a reservoir. It does have a later priority date,
23 but it is a federal reserve water right. That's what
24 we agreed to in the Compact. That's what Congress
25 ratified.

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1 So we would say that the 20,000 acre foot
2 allocation has to be treated as if it were a federal
3 reserve water right and not a state appropriative
4 right, which it comes within the three-tier system
5 under the Yellowstone Compact.

6 So we want to make that absolutely clear. The
7 Tribe essentially gave up a portion of its direct flow
8 right in exchange for a storage right, if that's how
9 you weigh the priority date, but it is still a federal
10 reserve water right. And I think that's something that
11 can't be impacted. That's what Article VI says.

12 So I'll just leave it at that. Thank you.

13 SPECIAL MASTER: Thank you very much.

14 MR. WIGMORE: I'll be very brief as well, your
15 Honor. May it please the Court.

16 I just want to -- I really just want to make
17 two points here. One is you asked the question about
18 the reliability of the Larson model and how that issue
19 gets resolved. And I think it gets resolved because
20 legally it doesn't matter whether that model is
21 reliable or not.

22 The reason it doesn't matter is because
23 Montana has provided no evidence at all with respect to
24 impact based on the Larson model in Montana. It's very
25 clear that Mr. Larson comes up with quantities only

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1 within the entire Tongue River watershed above the
2 Tongue River Reservoir and that's on -- in his report
3 on pages 8 and 12.

4 And then what Mr. Book does is he simply
5 assumes that all of those impacts occur at the state
6 line. There's no basis for that assumption. There is
7 no record -- there's no evidence in this case
8 supporting that assumption.

9 He said at page 21 that CBM impacts are
10 assumed to occur at the state line. In his rebuttal
11 report that Montana relies upon he says CBM impacts the
12 state line. No transit loss applied. So there's no
13 evidence in this case that the quantities calculated by
14 Mr. Larson, in fact, affect the State of Montana.

15 And not only is Mr. Book's assumption not
16 based on any evidence in this case, it's demonstrably
17 wrong and Montana knows it's wrong because he says
18 there's no transit losses that apply. And as we argue
19 on page 7 of our brief, in another context when Montana
20 was -- or Wyoming argued for credit for CMB direct
21 discharges. And when you talk with Mr. Draper up here
22 when he was talking about Prairie Dog Creek, one of the
23 arguments that Montana makes in its reply brief on page
24 62 and 63 is there's no evidence that it gets past any
25 Wyoming diverters. Well, there's no evidence in

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1 Mr. Book's assumption that any decreased flow in the
2 Tongue River Basin above the Powder River Reservoir get
3 by the pre-1950 Wyoming diverter.

4 Montana also in its post-trial brief on pages
5 154 and 156 when Wyoming was arguing for post-1950
6 Kearny Lake imports to request for that Montana argues
7 that the report doesn't consider transit loss, it
8 doesn't consider ditch loss, it doesn't consider
9 evaporation, and as and for all the foregoing reasons
10 this analysis is flawed and should be disregarded.

11 Mr. Book does not consider any of those
12 factors either in making his assumption that these
13 impacts occur at the state line and his -- at least
14 with respect to CBM his report is also flawed and can
15 be disregarded. So it doesn't matter what Mr. Larson's
16 model says because there's no evidence tying the
17 quantities in his model to Montana -- to losses in
18 Montana.

19 The other point that I wanted to make relates
20 to the intrastate remedy issue which you raised.
21 Mr. Larson's report is very clear that in both cases he
22 was looking at the effects of CBM pumping in the Tongue
23 River Basin upstream of the Tongue River Reservoir.
24 Mr. Draper was mistaken when he said it's simply an
25 internal issue.

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1 Mr. Larson's report is only looking at the
2 effects in Wyoming and amongst the Tongue River
3 Reservoir. And if you look at his table, figure 4 on
4 page 12 of his report, he shows the effects of the
5 Wyoming pumping on the Tongue River Basin and he shows
6 the effects of Montana. This is not an internal issue
7 and because Montana has an obligation to stick to its
8 problems first it cannot call on Wyoming to fix its CBM
9 pumping when their own expert with all the flaws that
10 we believe is evident in Mr. Larson's report that his
11 own expert concludes that pumping in Montana affects
12 the flow and the surface streams above the Tongue River
13 Reservoir.

14 And on the issue -- and so it's our point all
15 along as a matter of law that it's clear this Compact
16 does not cover CBM. Montana, as you said, regulates
17 CBM, but they don't regulate it under the doctrine of
18 appropriation as if it's connected surface streams.
19 There's no evidence in this case and it's -- it's true
20 that Montana has never tried to shut down CBM pumping
21 in Montana and this Compact cannot be interpreted to
22 allow that level of infringement on Wyoming's
23 sovereignty. And Montana does not regulate CBM pumping
24 and those actual appropriations are interconnected and
25 does not shut down its own wells before calling on

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1 Wyoming to do so.

2 SPECIAL MASTER: Okay. Thank you.

3 MR. WIGMORE: Thank you.

4 SPECIAL MASTER: Mr. Draper?

5 MR. DRAPER: Your Honor, I'll just be very
6 short.

7 We just heard a rehash of Mr. Wigmore's
8 statement to you at the summary judgment hearing and it
9 shows no relation to the evidence that's been presented
10 to you. It's almost bizarre in terms of its lack of
11 connection to what's actually been presented to you in
12 this case. I don't think there's any need to go into
13 the details at this point. It's in the record and we
14 would simply ask that you take that into account.

15 Thank you.

16 SPECIAL MASTER: Thank you.

17 Mr. Kaste?

18 MR. KASTE: It's five after 5:00 and we were
19 supposed to be done five minutes ago.

20 I agree with everything Mr. Wigmore said and
21 have no response to Mr. Draper's comments. I think
22 we've made our positions clear in our briefing.

23 Thank you again.

24 SPECIAL MASTER: Okay. I think, you know,
25 once again I have to congratulate, you know, the

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1 attorneys on both sides for doing excellent jobs on the
2 briefing. It's one of the reasons why we're able to
3 keep this hearing to just one day is that virtually
4 everything that was important was covered there, but
5 today -- you know, I will tell you it's not always
6 clear to me that oral argument is valuable, but today
7 was extremely valuable in helping me think through
8 various issues in this particular case.

9 Now, originally my hope was that I would be
10 able to get a draft of the special report to all of you
11 and get your comments and then revise it and then get
12 it to the Supreme Court by the very beginning of June
13 so they might actually be able to consider it and set a
14 schedule before they head off for the summer.

15 I will still try to do that, but my guess is
16 it's 50/50 probability at this stage, you know, because
17 of the delay that the transcript caused in the -- I
18 still would love to do that so we don't lose the two
19 months of the Supreme Court's summer, but I can't
20 absolutely guarantee -- as I say I think it's probably
21 an even probability at this point as to whether or not
22 I will succeed in doing that.

23 But the process will be the same. So as soon
24 as I can get the special report in draft form I will
25 then circulate it, ask all of you for any comments that

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1 you have as to the accuracy of factual citations and
2 the like and then finalize it for the Supreme Court.

3 So any questions on the process?

4 MR. KASTE: I have a question. We have not
5 received a bill for the trial.

6 SPECIAL MASTER: Because I haven't finalized
7 it, yeah, but it will be out within the next week.

8 MR. KASTE: Okay.

9 SPECIAL MASTER: I would say.

10 MR. KASTE: I do want to make sure Peggy and
11 Susan are taken care of.

12 SPECIAL MASTER: I can tell you that they have
13 been taken care of. So I have paid them and so I'm the
14 only person at this point who is floating that and --
15 but the bills are going out within the next week.
16 There's a lot of things on the calendar.

17 Anyway and so --

18 MR. DRAPER: Your Honor, did you want us to
19 submit -- I think we talked about at one point
20 submitting a set of the exhibits on a thumb drive that
21 have been admitted.

22 SPECIAL MASTER: I think there was -- I think
23 that there was an offer by somebody to come up with a
24 clean version of all the exhibits that would be on a
25 thumb drive. I think that would be really valuable for

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1 the Supreme Court. I didn't actually order that that
2 be done. So I think it's a question of whether or not
3 one or both parties would be willing to put in the time
4 to do that.

5 MR. DRAPER: We'd be glad to work with the
6 State of Wyoming to make that happen.

7 SPECIAL MASTER: Yeah. I think it would be
8 very helpful to the Supreme Court so they have all of
9 the exhibits in their final version available on a
10 thumb drive. That would be excellent.

11 And again, you know, I would think at the
12 earliest that that would be useful would probably be in
13 June and, you know, assuming that things slip over, it
14 might not be until July that we actually have that
15 available.

16 MR. DRAPER: Very good. And thank you very
17 much.

18 SPECIAL MASTER: Okay. Thank you, all.

19 And, again, I hope you enjoy the remainder of
20 your stay here and I'm just going to clean up here for
21 a second. So everybody is free at this stage to go
22 about the rest of your business.

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CERTIFICATE OF REPORTER

I, PETER TORREANO, a Certified Shorthand Reporter, California License No. 7623, do hereby certify:

That said proceeding was taken at the time and place therein named and was reported by me in shorthand and transcribed by means of computer-aided transcription; that the foregoing 256 pages is a full, complete and true record of said proceeding.

I further certify that I am not of counsel nor attorney for any of the parties in the foregoing deposition and caption named nor in any way interested in the outcome of the cause named in said caption.

Dated: May 13, 2014

PETER TORREANO, CSR 7623