

No. 137, Original

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, DEFENDANTS

OFFICE OF THE SPECIAL MASTER

TRANSCRIPT OF HEARING

on

WYOMING'S MOTION TO DISMISS

The Byron White United States Courthouse
1823 Stout Street, 1st Floor Courtroom,
Denver, Colorado 80257

February 3, 2009 - 10:00 am

Reported By: Amy Schmidt, CSR, RPR

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P R O C E E D I N G S

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SPECIAL MASTER: So this is a hearing this morning on Wyoming's Motion to Dismiss in Supreme Court Original 137, State of Montana versus State of Wyoming and State of North Dakota.

6

The order of the proceedings this morning is that we will hear first from counsel for the State of Wyoming -- sorry, yeah, State of Wyoming, then the State of Montana, then the United States. And then my understanding is that Wyoming plans to reserve some time for a reply to the other parties.

12

MR. MICHAEL: Yes, your Honor.

13

SPECIAL MASTER: As I mentioned in the court order, these times are relatively loose. I hope people remain pretty close to the amount of time I apportioned for the various parties, but I will probably have lots of questions and I will take that into account and not necessarily cut you off exactly when the time is up.

10:01

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So probably we should start out with the appearances by each of the various parties. We will start with you, Mr. Michael.

23

MR. MICHAEL: Yes, your Honor.

24

Peter Michael, Senior Assistant Attorney General for the State of Wyoming. With me at the counsel

25

10:02 1 table is David Willms, Assistant Attorney General for
2 the State of Wyoming. And I guess if you would like
3 other introductions -- We have other attorneys general
4 here, but I don't know if you want me to introduce
5 them. That's up to you, your Honor.

6 SPECIAL MASTER: Okay. Since they have come
7 all this way, let's introduce them.

8 MR. MICHAEL: The Attorney General,
9 Bruce Salzburg, is here, your Honor. Also, we have
10 other attorneys from my office: Marion Yoder, Senior
11 Assistant Attorney General; Luke Esch, Assistant
12 Attorney General; Kaycee McMullin, our paralegal; --
13 She has talked to Susan Carter a number of times at
14 this point -- and also our State Engineer,
10:03 15 Pat Tyrrell. I will introduce him as well.

16 SPECIAL MASTER: Thank you very much.
17 Welcome.

18 State of Montana?

19 MS. BOND: Good morning, your Honor. My
20 name is Sarah Bond, Sarah with an "h" Bond, Assistant
21 Attorney General for the State of Montana. With me at
22 the counsel table are John Draper, Jennifer Anders of
23 our office, another Assistant Attorney General, and
24 Jeffrey Wechsler from Montgomery & Andrews, where John
25 is from. And with us is a man who came on the plane

10:03 1 but his tie did not, our Chief Deputy Attorney
2 General, Chris Tweeten.

3 SPECIAL MASTER: I hope your tie appears at
4 some point.

5 MS. BOND: Just for the Court's information,
6 we also have Jeanne Whiting for the North Cheyenne
7 Tribe observing today.

8 SPECIAL MASTER: Welcome.

9 And Counsel for the United States?

10 MR. DuBOIS: Good morning, your Honor.
11 James DuBois for the United States.

12 SPECIAL MASTER: Thank you very much.

13 Okay. So counsel for Wyoming.

14 MR. MICHAEL: Thank you.

10:04 15 May it please the Court? I need a very tall
16 microphone, your Honor.

17 Let me -- In terms of reserved time, your Honor,
18 I think probably I will just play it by ear and keep
19 it within an hour for the total argument, if that's
20 okay. We don't have time here obviously.

21 Let me kind of outline where I think we can go
22 from here. Obviously, in this kind of a setting with
23 the amount of briefing that has occurred and the
24 amount of materials we have provided, questions, I am
25 sure, will come up and be most welcome at any point in

10:04 1 the argument but --

2 SPECIAL MASTER: Let me just -- Just to let
3 you know, I appreciate that. I have gone through all
4 of the various briefs, I have gone through virtually
5 all of the materials that were in the joint minutes
6 that the parties put together. So I am pretty
7 familiar with the arguments and with the materials.

8 MR. MICHAEL: Very good. I hope that that
9 will move it along.

10 Let me -- Real quickly, I think I will probably
11 spend most of my time on the real base issue that I
12 think has been brought together fairly well by the
13 briefing at this point, which we disagree with the
14 United States and Montana on, which is is there an
10:05 15 interstate prior appropriation scheme under this
16 compact that allows Montana -- individual Montana
17 water rights or maybe a group of water right holders
18 in Montana at some time in the water year when the
19 river is low, whether it be the Tongue or the Powder
20 River, to actually make a demand on Wyoming and ask
21 Wyoming to check and see if it has any post-1950 water
22 rights that are diverting water and release that water
23 and close the diversion points and let the water flow
24 downstream. I think that's the real crux of where we
25 are in the case. That's the most issue.

10:06 1 There is a side issue that I think doesn't fall
2 under that concept and that is the use of sprinkler
3 irrigation, increased efficiency through changes in
4 technology that occurred in both states, but, of
5 course, admittedly in Wyoming after 1950.

6 Mostly in these drainages it's primarily
7 irrigation. So we are talking about the use of
8 sprinklers to spread surface water versus the use of
9 ditches, especially unlined ditches that tend to leak,
10 so forth and so on.

11 That issue is really more of an issue under the
12 depletion concept really, I think. I think on that
13 issue the United States supports our position. And I
14 may get to that. I hope I have some time to do that.

10:06 15 I think it's a fairly brief issue that we can discuss
16 later on, but, again, I want to stay with the main
17 event.

18 There's another issue that's somewhat
19 important -- well, it's very important actually, but
20 it's the issue of groundwater. But groundwater is
21 embedded in Montana's main theory. Groundwater is --
22 Montana would like to say that, if Wyoming has a
23 groundwater well somewhere near the river, one of
24 these rivers that was developed after 1950, -- And
25 given some of the facts that are actually in the

10:07 1 materials you have, that's where most of the
2 groundwater development occurred was after 1950 --
3 would that water be counted.

4 Under our theory, that water would be counted in
5 the 60/40 split of post-1950 rights in the allocation
6 under V-B. Under Montana's theory, they said, well,
7 if you have somebody pumping groundwater, for example,
8 on the Tongue River in Wyoming, somewhere near the
9 Tongue River and that's a post-1950 development and we
10 have a pre-1950 irrigator in Montana that, because
11 it's the middle of the summer, is lacking in water,
12 can he take what he thinks he is entitled to from the
13 river, can he stop the pumping.

14 It's really not different, just a different
10:08 15 source, a type of development in Wyoming. So the
16 groundwater reservoir storage and direct flow in
17 Wyoming fall under that umbrella. So, again, that's
18 back to the main event, is there interstate prior
19 appropriation here.

20 Let's go to the prior appropriation issue. Let
21 me preface my remarks with an observation and
22 something I hope to get into maybe a little more
23 detail later, but I think it's one of the most
24 important points when you look at the history of how
25 this compact came to be.

10:08 1 It's actually an undisputed point. It shows up
2 in all the briefs and shows up throughout the
3 materials and some of the most important materials at
4 the most important times during the compact
5 negotiations. It's the fact that storage --
6 construction of storage reservoirs on the three
7 Interstate tributaries of Yellowstone River -- three
8 of the four tributaries of the Yellowstone River
9 between Wyoming and Montana is a critical, critical
10 component. It was the driving force behind this
11 Compact at the close of World War II.

12 The money was appropriated apparently. The
13 materials show that. The drafters intended to build
14 the Yellowtail reservoir and the Bighorn, to build
10:09 15 Moorhead Reservoir on the Powder River. The Tongue
16 River was already a state line reservoir, controlled
17 the flow at the state line.

18 Of course, as your Honor I am sure is aware, the
19 concept of reservoir storage at the state line was
20 near and dear to the engineering committee of the
21 Compact Commission. And the reason, of course, was
22 the changes in the type of hydrology of the river. It
23 slows down the runoff by storing water so it can be
24 released later.

25 The concept of this Compact -- It's throughout

10:10 1 the documents. There's some excellent discussion of
2 this -- is let's get this compact done. The first
3 negotiations were in 1935. Here we are in 1950.
4 Let's get this compact done so that the storage
5 projects can go forward.

6 If the storage projects go forward, that will
7 solve the problem that Montana is at the table about,
8 which is we have got rivers, both the Tongue and
9 Powder, that largely are fed by snowmelt in the high
10 mountains of Wyoming, and those rivers have a runoff
11 period, maybe a month and a half, in May or June. By
12 July, there's not enough water in those rivers to
13 satisfy the existing uses on those rivers.

14 In fact, in the materials -- Especially, there's
10:10 15 a really important -- It's lengthy. In our materials
16 we have a report from the Federal Power Commission
17 that was done in 1940, and it was drafted -- It says
18 on the title page it was drafted for the very purpose
19 of being presented to the negotiators of the
20 Yellowstone River Compact Commission.

21 And that report details some interesting
22 discussions of law by federal attorneys but also
23 details the situations that existed in each state.
24 And it points out in the 1930s it was not uncommon in
25 drought years for Montana to not have any water

10:11 1 available to it in the Tongue River in June, July, and
2 August because of the hydrologic cycle, because the
3 runoff has occurred and Montana doesn't have
4 sufficient storage at the state line.

5 So the concept that we see again and again is
6 that storage is absolutely critical. And I could
7 refer you to a page on that, your Honor, if you would
8 like, although I am sure you can find it later.

9 SPECIAL MASTER: I know where it is.

10 MR. MICHAEL: There's discussion of the
11 1930s. There's an index in that Federal Power
12 Commission report. Again, I emphasized the storage
13 was very important here.

14 Well, how -- I guess my next question then is --
10:12 15 We have to move to an analysis of the text. And we
16 are really lucky in this case in a lot of ways. We
17 have a compact where the negotiators of the 1950
18 compact -- even an earlier version, 1940s -- kept
19 minutes, and they are official minutes. So we are
20 before the Court with documents that are reliable.

21 This is important in terms of the motion to
22 dismiss before the Supreme Court in the original case
23 versus what we might typically see in a federal
24 district court case where bare notice pleadings pretty
25 much survives and you wait until the summary judgment

10:12 1 stage to present materials.

2 Well, that's not the law in the original cases.
3 I think the United States has certainly backed our
4 position on that in their brief, that if you can get
5 to a case and resolve it early on, these important
6 legal issues, because you have reliable materials, you
7 should do that. The Supreme Court should do that.

8 The case that they cite and we cite is Ohio
9 versus Kentucky for that. So I think these materials
10 that we have are quite reliable.

11 But obviously, when you start looking at the
12 interstate compact, it's a contract, and we have to
13 try to discern what it means by its express language.
14 And if we can help ourselves by looking at exactly
10:13 15 what the drafters did as they came up with this
16 language, I think we should do that. It's almost
17 crazy not to. But I think the express language here
18 is pretty clear cut. Obviously, the provisions we are
19 talking about are Articles V-A, V-B, and V-C.

20 The first question -- Actually, there is some
21 agreement on Article V-A. The agreement by all the
22 parties in this case -- And it's in Montana first.
23 They filed here. It's in the United States' brief on
24 this motion. When I say the brief, it was filed by
25 Montana, the very first brief on the motion to file a

10:14 1 complaint.

2 Everybody agrees that the language in V-A does
3 not create an interstate prior appropriation scheme
4 under which a water right in Montana that existed in
5 1950 could call off a water right in Wyoming in 1950.
6 Even if the water right, for example, on the Tongue
7 River was a 1950 water right and the water right in
8 Wyoming was 1949, well, they admit the language of
9 that provision doesn't provide for interstate prior
10 appropriation.

11 That admission is almost undeniable. Because
12 when you look at the history and you look at the
13 drafts that were proposed, you see again and again and
14 again throughout negotiations --

10:14 15 The negotiations I am going to refer to are the
16 ones in 1950. The prior versions of the Compact are
17 somewhat important. I will talk about that because
18 there was actually a prior appropriation compact in
19 1935 that went nowhere. Neither state legislature
20 passed it and it never came back. But Montana wanted
21 to keep pushing the concept of prior appropriation
22 without regard to state lines, and it's in provisions
23 that Montana kept proposing.

24 They had an attorney, Mr. Leonard, who was a real
25 proponent from Montana. Again and again in the

10:15 1 negotiations, especially the critical ones on
2 October 24th and 25th of 1950, Mr. Leonard was
3 proposing let's make sure that Article V-A says at the
4 end of the language -- after the word appropriation,
5 let's make sure it says without regard to state lines.

6 That language failed. So we have here today --

7 SPECIAL MASTER: Can I interrupt?

8 MR. MICHAEL: Yes.

9 SPECIAL MASTER: Because I realize, and I
10 guess Montana realizes, that no one is arguing here to
11 integrate the pre-1950 appropriative rights in a way
12 that somebody in Montana who say has a 1939 right can
13 argue that somebody that has a 1945 right -- that
14 somebody with a 1939 right could require somebody with
10:16 15 a 1945 right to let their water flow down to a person
16 with a 1939 right.

17 One of the things I am very interested in is what
18 is Wyoming's view as to what Section V-A does. What
19 is the relevance of Section V-A?

20 MR. MICHAEL: Section V-A does what a lot of
21 the drafters said it was intended to do and what
22 Montana's statute in 1952 says it did. It recognized
23 water rights existing in each state as of 1950 under
24 those state's interstate water laws.

25 I think that's the key, under each state's law.

10:17 1 The reason I say that is in 1950 -- And under the
2 general law of compact theory, there is no background
3 penumbra, whatever you want to call it, of interstate
4 prior appropriation law when you are talking about an
5 interstate stream being allocated between two states.

6 You have a procedure that if two states won't sit
7 at the table, like Montana and Wyoming did -- That's
8 called apportionment, which is a suit before the
9 Supreme Court. The judicial body declares what the
10 judicial body thinks is fair.

11 This discussion is not new. The federal
12 attorneys in the report -- the Federal Power
13 Commission report discussed this in 1939 in the
14 report, but it's not a new concept.

10:17 15 So you have two options. That option obviously
16 doesn't have anything to do with this case because
17 there's no equitable apportionment on the rivers
18 because the parties sat down.

19 The next question becomes what can the parties do
20 when they sit down. They can horse trade, make a
21 trading compact, and they can select from a menu of
22 options. They can select from a menu of options what
23 methodology they would like to use.

24 In this case, our theory is the methodology was
25 quite simple. They recognized -- froze each state's

10:18 1 water laws on these interstate steams -- I shouldn't
2 say laws. They froze the rights that existed under
3 each state's own laws, which you know from reading the
4 materials were very different. Their prior
5 appropriation in nature -- Most states had prior
6 appropriation concepts, but their laws had a lot of
7 distinctions to them and different things happened.
8 Wyoming did things different than Montana.

9 So under each state's own water laws, those
10 rights were frozen in place. That's what V-A does.
11 That's why under V-A -- I will give you -- This is why
12 under V-A a Montana pre-1950 water right can't call
13 for water from Wyoming from another pre-50 water
14 right. Because to do that, there would have to be an
10:19 15 interstate law that ignores the state line. There
16 would -- Montana's own water law would have to have
17 extra sovereign application. It would have to apply
18 in Wyoming.

19 As you see in the negotiation in Wyoming,
20 Mr. McNally especially, who was a lawyer on the
21 Commission, said again and again we will not agree to
22 a super commission, we will not agree to
23 administration across state lines, we will not
24 agree to -- He said this directly -- interstate
25 priority, we won't agree to that, Wyoming refuses. So

10:19 1 what they did is they froze in place each state's own
2 prior appropriation law.

3 SPECIAL MASTER: Can I give you a really
4 simple hypothetical? And I realize that the storage
5 systems on the tributaries that are involved here --
6 And we can come back to that. That might complicate
7 some of the issues, but let's assume that as a result
8 of climate change the reservoirs run dry, you have a
9 river that -- tributary that has very little water in
10 it, and because of post-1950 diversions from the river
11 in Wyoming there are some pre-1950 appropriators in
12 Montana who do not receive their water.

13 Is Wyoming's view that Section V-A is not
14 relevant therein, there is not a Compact right that
10:20 15 Montana enjoys in that situation?

16 MR. MICHAEL: That's correct. We believe
17 that V-A does not create, as the United States says, a
18 protection. It just recognizes the rights that exist.

19 This Compact -- What we are saying is this
20 compact -- The Compact never attempts to create a
21 methodology to reach across state lines. And
22 Montana's water rights --

23 Let's say in your example there's a 1930 right
24 involved here that's not receiving their water. Their
25 right in 1930, the entire size of that right, was to

10:21 1 call off other appropriators in Montana. That right
2 did not go into -- So unless you believe this Compact
3 expanded that right or created some kind of interstate
4 amalgam of the two state laws, which, of course, would
5 slow down the process immensely and the engineering
6 committee would say we don't want to go there, we
7 recommend you don't do that -- Unless you did that,
8 you wouldn't have a mechanism to do what you said.

9 Now, that doesn't mean that Montana -- that
10 doesn't mean that Montana has no remedy for their
11 situation depending on the circumstances. The reason
12 they may have a remedy is -- Recall that the rights
13 you talked about in Wyoming, taking water out of the
14 river it's diverting, is a post-1950 right. That
10:22 15 right -- From October 1st through that date when
16 Montana is making the claim, that right has to --
17 Wyoming has to keep count of all the water that's
18 diverted to that diversion.

19 And included in the total divertible flow, which
20 consists of the diversion of post-50 uses in Wyoming,
21 diversion to post-50 uses in Montana, and whatever
22 water went out the bottom of the river through that
23 portion of the water from October 1st to the given
24 date, if Wyoming at that particular time has exceeded
25 40 percent of the total avertable flow, then it's in

10:22

1 violation.

2 So what I am saying is the flip side of that is,
3 as of that date, Montana in that river must have
4 received, if Wyoming is in compliance, at least
5 60 percent of the total avertable flow. That is the
6 balancing mechanism that prevents Wyoming --

7 Wyoming is accused in some of the briefing -- I
8 don't recall whether it was from Montana or the United
9 States -- of, under our theory, we have unfettered
10 Wyoming rights -- post-50 rights, unfettered use of
11 the water. They can do anything they want.

10:23

12 That's not true. The post-50 rights are limited
13 by the 40 percent. If Montana -- You know, we are
14 doing little fractions, a little arithmetic here. If
15 Montana had diverted some of the water that went to --
16 60 percent of the water that went to the post-50s, if
17 they instead had diverted to the pre-50s, then the
18 total avertable flow would be smaller because it
19 doesn't get counted if it goes to pre-50. If that's
20 smaller, then for Wyoming to stay within its
21 40 percent they can't take too much. It's done on a
22 cumulative basis.

23 The question becomes -- When you look at the
24 draft, especially in October, October 25th, you look
25 at the discussion, that was really the final

10:23 1 discussion where the question was asked do we want to
2 do a daily avertable flow concept like we did in
3 '42-44 or modify cumulative avertable flow.

4 The agreement was unanimous, and Fred Buck of
5 Montana said I second the motion. He was the state
6 engineer. Let's do a cumulative avertable flow.

7 So what does that mean? It doesn't solve
8 Montana's timing problems, but it creates equality
9 with respect to the use of the water. Montana's
10 problems with the pre-50 rights is a timing problem.
11 If there's post-50 water available in Montana, the
12 pre-50 will call them off.

13 If Montana builds the storage that it was going
14 to build -- Well, I shouldn't say Montana. The Bureau
10:24 15 of Reclamation built a project on the Bighorn River at
16 the state line. One of the promised projects was
17 built.

18 And it's interesting, I think, that the Bighorn
19 River isn't part of this case. Why isn't it part of
20 this case? Because Montana isn't suffering the timing
21 problems. Why isn't it suffering the timing problems?
22 It has got storage.

23 So when the drafters entered into these
24 negotiations, they had choices to make. When Montana
25 got to October 24th-25th of 1950, this critical

10:25 1 discussion was pushing, pushing, pushing. Wyoming,
2 you have got to get an interstate prior appropriation
3 scheme here.

4 The answer to the engineering committee -- It's
5 in the report to Commissioner Newell. I think it's a
6 critical document. On October 23rd of 1950, the
7 answer to the engineering committee was we don't
8 recommend that we waste time trying to do an
9 interstate prior appropriation scheme.

10 They point out a couple things about that. They
11 point out that, in order to do a prior appropriation
12 scheme, you have to adjudicate the rights up and down
13 the river. Under any prior appropriation scheme -- I
14 don't care if it's a 1910 in Montana trying to call
10:25 15 off a 1949 in Wyoming or a 1910 in Montana trying to
16 call off a 1989 in Wyoming. In order to have a prior
17 appropriation scheme that works, the right that is
18 making the call has to be a recognized right with a --
19 a right that we can tell exists.

20 The way you do that on these rivers is to
21 adjudicate rights. Montana in 1950 did not have any
22 adjudication on the Powder River. It had a partial
23 adjudication on the Tongue River. They completed
24 their adjudication on the Powder in 1983.

25 So the drafters -- the engineering committee

10:26 1 stated pretty specifically in that letter that, in
 2 order to do an interstate prior appropriation scheme,
 3 you probably are going to have to have adjudication of
 4 the entire river, which would cost a lot of money and
 5 take time.

 6 If you do that, then we are going to fight about
 7 how long this compact case can get done -- If we don't
 8 get the compact done, you are going to lose your
 9 storage. But if we move fast, we reject Montana's
 10 notion of an interstate prior appropriation scheme and
 11 we don't fight about it and we get this compact in
 12 place simply right now, then the storage will get
 13 built and the problem that we are trying to solve --
 14 Montana is trying to solve by inserting this prior
10:27 15 appropriation goes away.

 16 They had a choice. Montana had a choice. I
 17 think it was a very stark choice, and the engineering
 18 committee suggested the choice should be in favor of
 19 storage and against getting a prior appropriation
 20 scheme. That was what was selected. That was the
 21 final selection.

 22 SPECIAL MASTER: So I am going to go back to
 23 Article V for a moment.

 24 MR. MICHAEL: Yeah. Right.

 25 SPECIAL MASTER: I am still trying to

10:27 1 determine exactly what Section V-A does in the Compact
 2 under Wyoming's interpretation. So I understand you
 3 are saying it recognizes the pre-1950 appropriation of
 4 rights under the laws of each --

 5 MR. MICHAEL: -- state.

 6 SPECIAL MASTER: -- of the two states.

 7 MR. MICHAEL: Right.

 8 SPECIAL MASTER: Presumably, also in North
 9 Dakota.

 10 MR. MICHAEL: Whatever their law is, right.

 11 SPECIAL MASTER: But of what relevance is
 12 that? Does it do anything more than if you would just
 13 leave pre-1950 appropriation rights out of the
 14 Compact?

10:28 15 MR. MICHAEL: It does. Because if you
 16 exclude them from the Compact, then Montana is free to
 17 bring an equitable apportionment claim at a later
 18 date. Because the compact doesn't pre-empt that
 19 issue.

 20 I think this is an interesting point you make
 21 because, if you will notice, the very last session in
 22 December of 1950, the very last session -- Up until
 23 that time, this supplemental order that shows up in
 24 "B", the beginning of "B", was an exclusion in the
 25 Compact. It was an exclusion. In the draft --

10:28 1 Let's bring that in. Let's bring that in. Why
2 did they do that? Well, do we really want to have --
3 After this compact, do we really want to have an
4 interstate case -- equitable apportionment case where
5 we ask the Supreme Court to decide what to do about
6 supplementation?

7 Let's bring it in. So what they wanted to do was
8 to cover -- What they wanted to do was to pre-empt,
9 which is try to reduce all causes of future
10 controversy with respect to the water in the
11 Yellowstone River, and do an equitable division.

12 So let's bring in the rights, but what do we do
13 with the rights? We do what most other western
14 compacts, including the Colorado River Compact, which
10:29 15 is -- You know, one of our biggest problems is dealing
16 with these pre-existing rights. Let's just recognize
17 those in place and move on. Let's just recognize
18 those rights as they exist and move on.

19 But the question I ask in this case -- I think
20 this is the key question we come to. If we recognize
21 those rights as they exist, what did they include?
22 The rights as they existed in the interstate right did
23 not include a right to make a call on water across the
24 state line.

25 If you wanted to include that, you do what

10:29 1 Mr. Leonard proposed in his proposal and what Montana
 2 asked for until they finally caved in on that on
 3 October 24, 1950. You say -- You write this clause
 4 and you -- Instead of talking about the laws and shall
 5 continue to be enjoyed under the laws, which is the
 6 law of each state, you talk about -- In his version,
 7 it said the general law of appropriation. At the end
 8 of the clause he added "without regard to state
 9 lines".

 10 Now, a general law of appropriation without
 11 regard to state lines, that's a new law. That's an
 12 interstate prior appropriation scheme. That's what
 13 you would do if you wanted to do that. Montana wanted
 14 it, but they gave up on it. And now they are back
10:30 15 asking for it again.

 16 SPECIAL MASTER: So prior to the negotiation
 17 and approval of this compact, if Montana believed that
 18 as a result of junior appropriators in Wyoming
 19 diverting water from tributaries here were denying
 20 water to more senior appropriators in Montana, would
 21 Montana have had no remedy at that point other than
 22 equitable apportionment?

 23 MR. MICHAEL: Absolutely right. The remedy
 24 would have been an equitable apportionment action.
 25 And the answer to the Supreme Court wouldn't

10:31 1 necessarily be prior appropriation. It could be --
2 Prior appropriation might be an element chosen and it
3 might not be. The court would do what's equitable.

4 There's a quote in the materials, in the Federal
5 Government Lawyers of 1939 from Justice Holmes, about
6 that's what we do. But in the Hinderlider case, the
7 US Supreme Court also pointed out that, wow, that's
8 the difference between compacting and equitable
9 apportionment. No, Montana law would not have
10 provided its people with a remedy to go across state
11 lines.

12 SPECIAL MASTER: What's involved in Bean v.
13 Morris?

14 MR. MICHAEL: Well, Bean v. Morris was a
10:32 15 case that I think was -- that was a case,
16 interestingly, between Montana and Wyoming. Water was
17 coming from Montana to Wyoming, a reverse situation.

18 Now, Bean v. Morris -- The other thing I think
19 you have to understand too is there's a distinction
20 between an individual claim -- an individual claim
21 based on prior appropriation and a state apportionment
22 of all the water rights. I think there's a difference
23 there.

24 Bean versus Morris, the Supreme Court -- In 1911,
25 justice Holmes affirmed the federal case. You have to

10:32 1 read the federal underlying case. In the underlying
2 case, the determination was, well, be careful,
3 Montana, what you are asking for because, you know,
4 turnabout may be fair play. We think the downstream
5 appropriator ought be able to call across state lines.

6 That in my view and I think in others -- In some
7 law review articles and some other ones we cite in the
8 brief, that concept was called into question, whether
9 that would apply. And it certainly -- It definitely
10 is called into question with respect to an allocation
11 by two states trying to solve all the issues on the
12 interstate stream.

13 In other words, either compacting or equitable
14 apportionment. An equitable apportionment action
10:33 15 doesn't involve one against one. It's multiple
16 against multiple. So it's possible that, if nothing
17 happened in this case, an argument could be made,
18 since there's no equitable apportionment and there's
19 no compact, maybe one individual could call on another
20 individual.

21 I think that's questionable under later doctrine.
22 Once it's compacted, that's out the door, unless it's
23 in the compact, unless the compact says, yes, you may
24 do that.

25 SPECIAL MASTER: Again, if -- Again, go back

10:33 1 to my real simple hypothetical. There's no storage
2 available. So we really aren't talking about a
3 post-1950 appropriator in Wyoming who is diverting
4 water and, as a consequence of that, there are
5 pre-1950 appropriators in Montana who are not
6 receiving their water.

7 Wyoming's position is that, under the Compact,
8 first of all, neither Montana nor the pre-1950
9 appropriator in Montana has any right. Furthermore,
10 Montana doesn't have a right to go to the Supreme
11 Court and try to address that situation via equitable
12 apportionment at this stage. Furthermore, on an
13 individual basis, that pre-1950 appropriator is now
14 excluded from going to the Wyoming courts and trying
10:34 15 to follow through.

16 MR. MICHAEL: Right. Because under the
17 Hinderlider case that question came up, -- I think it
18 was the Hinderlider La Plata case -- that once a river
19 is apportioned the individual water right holders in
20 the state are bound by the apportionment.

21 There's two ways to appropriation, equitable
22 apportionment or compact. Once that occurs, each
23 state has to enforce the compact against their own
24 people. They can't say, oh, we weren't part of the
25 compact, our poor irrigators.

10:35 1 So, yes, once this compact is done, our theory is
2 no, but I think the existing law at the time -- The
3 law of each state is recognized by these. It's
4 recognized, again, by the discussions between the two
5 delegations, that Montana kept saying we want to put
6 in this language "without regard to state lines"
7 because we want to create some mechanism to come
8 across state lines.

9 If the existing law -- Under "A", if the existing
10 law at the time or the law that "A" is trying to refer
11 to is a law of interstate prior appropriation, I guess
12 the big question is then why can't -- why can't under
13 this compact a pre-1950 in Montana call off the
14 pre-1950 in Wyoming.

10:36 15 Everybody admits that the draft of this --
16 Because "A" doesn't do that. So where is the concept
17 that, well, you don't have interstate prior
18 appropriation, all of those problems for a pre-50
19 calling off a pre-50. So why do we create all those
20 problems again with a pre-50 calling off a post-50?
21 You know, how does that occur in this language? If
22 you admit that V-A doesn't do it pre-50 against
23 pre-50, how does it do it pre-50 against post-50? It
24 doesn't make sense.

25 SPECIAL MASTER: Can I go on just for a

10:36 1 moment to Section V-B --

2 MR. MICHAEL: Right.

3 SPECIAL MASTER: -- of the Compact?

4 MR. MICHAEL: Very good.

5 SPECIAL MASTER: So under V-B there is
6 basically -- as I understand it, there's two
7 priorities. There's priority first for supplemental
8 water supplies and then there is the division of the
9 remaining water between Montana and Wyoming. I am
10 trying to understand that particular section.

11 If there is water, for example, stored in
12 Wyoming, do the holders of supplemental water rights
13 have first call on that water? Can they complain
14 under the Compact if somebody who does not have a
10:37 15 supplemental water supply receives their water first?

16 MR. MICHAEL: I think "B" is treated just
17 like "A" is. When the word unappropriated water is
18 used, it's treated -- it's the flip side of the
19 appropriative rights in "A". It's rights within each
20 state. So if we were in Wyoming, we would apply
21 Wyoming law. If a pre-1950 wanted to supplement --

22 Now, you are just talking about within Wyoming;
23 correct?

24 SPECIAL MASTER: Just within Wyoming.

25 MR. MICHAEL: Yeah, within Wyoming and a

10:37 1 reservoir was built and some of the reservoir shares
2 were owned by a pre-1950 Wyoming water right. And
3 Wyoming allows him -- Which we do. We allow him to
4 supplement his acreage, put more water than he can get
5 from natural flow onto his acreage.

6 I think that's what the directors were thinking
7 about when they did this was water from the reservoir.
8 You build reservoirs and you supplement water that
9 otherwise wouldn't be available from natural flow.
10 Wyoming law would apply to that. And under Wyoming
11 law, the pre-1950s would have the priority to put that
12 water on their supplemental supply.

13 But you wouldn't have to look at the Compact for
14 that. That would be under Wyoming law. And we
10:38 15 wouldn't -- What the Compact does though is, the water
16 that goes onto that acreage that was pre-1950 acreage,
17 the water that was stored in the reservoir in the
18 springtime and goes on the pre-1950 acreage, that
19 doesn't get counted in the 60/40.

20 The same with Montana. Under their law, if it's
21 from pre-1950 supplements from the Tongue River
22 Reservoir, that doesn't get counted either.

23 SPECIAL MASTER: Let's go to a situation
24 where somebody in Montana is claiming supplemental
25 water rights and their argument is that there's water

10:39 1 flowing to somebody who is post-1950 and, furthermore,
2 does not hold a supplemental water right in Wyoming.
3 Can they, under the Compact, ask that that water --

4 MR. MICHAEL: Not in our view. Because,
5 again, the unappropriated water -- To try to determine
6 what water is unappropriated or not is based on the
7 concept of the law in each state. In other words, if
8 you go to each state to see if there's unappropriated
9 water --

10 I will give you the example. Let's put the water
11 in Wyoming. I will go with your example. Let's put
12 the water in Wyoming because we are talking about some
13 water sitting in a reservoir in Wyoming or it's going
14 to a diversion, to a post-50 water right in Wyoming
10:39 15 out of a reservoir. However that's done, we know that
16 that water is not water going to a pre-1950 water
17 right. It's not water under "A". It's water
18 that's --

19 So the question you have to ask is is that water
20 unused -- Well, it's unused. It hasn't been
21 consumed -- and is that water unappropriated. And we
22 are not saying -- The term unappropriated here is
23 consistent with the way the drafters used the term in
24 "A". They didn't use the word unappropriated but they
25 used the term appropriated, which is the flipside of

10:40 1 the term, and we should see consistency there.

2 So the word unappropriated, if you look to
3 Wyoming law, and you ask yourself is that water
4 unappropriated. If it's not used by pre-50 rights and
5 it's not appropriated to the pre-50 rights because the
6 pre-50s in Wyoming are satisfied, then a 1957
7 diversion point in Wyoming can go ahead and take that
8 water. So that would be consistent with Wyoming law.
9 It would be unused and unappropriated water, so it
10 complies with the Compact.

11 Now, if it goes to a post-50 right, it has to be
12 counted. And that's Montana's protection is it has to
13 be counted in the 60/40.

14 SPECIAL MASTER: So if I'm focusing on
10:41 15 Section V-B -- It begins, "Of the unused and
16 unappropriated waters". So if there is water that is
17 supplied to somebody who is a post-1950 appropriator
18 in Wyoming that -- if they did not take it or
19 otherwise go to somebody who has an unsatisfied
20 pre-1950 right in Montana, isn't that water
21 appropriated and therefore not counted under
22 Section V-B?

23 MR. MICHAEL: I don't think so because
24 Montana's pre-1950 right of appropriation is based on
25 its state law and its right to appropriate doesn't go

10:41 1 across the state line. That water -- Until that water
2 crosses the state line -- Because, remember, the state
3 line means something here. I mean, the drafters in
4 Montana tried to get rid of the state line. They
5 tried to erase it. They didn't get that accomplished.
6 The state line means something.

7 In Montana, the appropriation is a state law. It
8 doesn't allow it to claim water while that water is in
9 Wyoming. The water of the State of Montana, like
10 under our constitution in Wyoming, is water within the
11 boundary of the state. Unless you have an interstate
12 law that says we can wipe out the state line, then the
13 word appropriation for Montana's rights is a Montana
14 appropriation. Montana appropriation does not
15 extend --

10:42 16 SPECIAL MASTER: So to clarify, under
17 Article V-B where it begins "Of the unused and
18 unappropriated waters of the Interstate tributaries",
19 when we are talking about various waters that would go
20 to Wyoming -- post-1950 Wyoming usage under
21 Section V-B, the words "of the unused and
22 unappropriated waters" does not refer to water that's
23 appropriated under Montana law?

24 MR. MICHAEL: I don't think so. Because to
25 do that, now you are saying that -- you are actually

10:43 1 now creating an interstate scheme. Now you are saying
2 that a Montana appropriation reaches water while it's
3 in Wyoming. If you do that, you interpret the word
4 unappropriated to mean that, then you are saying it
5 means something different than what it means in V-A.

6 Montana and the United States admit that in V-A
7 that their pre-1950 water right doesn't go across the
8 state line, at least with respect to pre-1950 rights
9 in Wyoming. They can't call off a junior in Wyoming
10 with -- But then they are trying to use this word
11 unappropriated. That's the way we can reach a
12 post-1950 right in Wyoming. But in order to do that,
13 you now have to flip the definition of appropriation.

14 And in "A" you were talking about intrastate,
10:44 15 recognizing intrastate appropriated rights. Now, out
16 of the one word, unappropriated, you have created an
17 interstate scheme with all the problems that an
18 interstate scheme would create.

19 So I think you have to be consistent when you
20 interpret this. And when it's clear that V-A is
21 talking about rights in each state, appropriated
22 rights under the laws of appropriation, we are talking
23 about two laws. When you talk about what's
24 appropriated or unappropriated in "B", you should talk
25 in the same fashion, that you haven't erased the state

10:44 1 line magically when you go from the sentence in "A"
2 and then go right to the next sentence in "B". That's
3 our argument in a nutshell.

4 SPECIAL MASTER: So let me go to one other
5 section. I don't believe anyone mentioned this in
6 their briefs, but that is Section V-D of the Compact.
7 So this deals with existing water rights for the
8 states of Montana and North Dakota below Intake. And
9 this provision says:

10 "All existing rights to the beneficial
11 use of waters of the Yellowstone River in
12 the States of Montana and North Dakota,
13 below Intake, Montana, valid under the laws
14 of these states as of January 1, 1950, are
10:45 15 hereby recognized and shall be and remain
16 unimpaired by this Compact".

17 Is it Wyoming's view that this should be
18 interpreted the same as Section V-A, that all
19 appropriative rights are under state law but it does
20 not give any right to enforcement under the Compact?

21 MR. MICHAEL: So you are asking -- Well,
22 what your question is then is whether it's our view
23 that Montana is getting this interstate concept with
24 this language. I mean North Dakota is getting that.

25 SPECIAL MASTER: Let me rephrase the

10:46 1 question. The question is, if you had an
2 appropriator -- a pre-1950 appropriator in Montana
3 below Intake, would they have any right under the
4 Compact to prevent a post-1950 appropriator from
5 taking water in Wyoming for a pre-1950 right that
6 Montana was assessed on.

7 MR. MICHAEL: That's a tough hypothetical
8 because Intake is the mouth and interstate -- It's in
9 the Yellowstone River, so it doesn't really apply to
10 Montana versus Wyoming. It would clearly simply be
11 between North Dakota and Montana, in my view, because
12 Intake is the mouth. That's where the measuring point
13 is.

14 SPECIAL MASTER: The geography lesson is
10:47 15 important.

16 MR. MICHAEL: Yeah. The water left the
17 Interstate tributary. So V-B only deals with water in
18 the Interstate tributaries, the V-B, which is the four
19 main systems. So it really -- I don't think you can
20 glean anything from that, what Montana and North
21 Dakota decide to do.

22 Let me -- Well, I better save some time. Unless
23 you have some questions on the sprinkler system. We
24 can do that. We can have a discussion.

25 SPECIAL MASTER: Yeah. Let's actually go on

10:47 1 to the other issues for a minute. I know you want to
2 reserve time for what the United States and Montana
3 want to discuss, but I would like to ask a couple of
4 questions both on the question of increased efficiency
5 and also on the groundwater question.

6 Again, I understand your argument is that
7 Section V-A does not give pre-1950 appropriators in
8 Montana any right as against Wyoming appropriators.
9 So all these questions are going to assume that it was
10 before determining that, in fact, in Section V-A that
11 the pre-1950 Montana appropriators do have that.

12 So on the question of increased efficiency, so
13 looking at the Binning and the Bowers cases, a couple
14 questions. The first one is the only case of those
10:48 15 that is prior to the negotiating and entering into
16 what was the Compact is the Binning case.

17 MR. MICHAEL: Right. Bower was a few years
18 after, 1957. Binning was '40.

19 SPECIAL MASTER: But in terms of trying to
20 look to see what the ex-cannon law was at the time the
21 Compact was negotiated, it's Binning.

22 MR. MICHAEL: It's Binning, I think, but I
23 think Bower stated it more clearly. I don't think --
24 I think the same concept is -- But the Bower statement
25 is the clearer statement, I think, of the concept.

10:49 1 It's been a concept of Wyoming law for time and
2 memorial. I think when the Court states this in both
3 Binning and in Bower, they are stating what the law
4 is, what the common law is. It's not saying the
5 common law begins today.

6 SPECIAL MASTER: So all three of the cases,
7 Binning, Bower, and Fuss -- As I understand the facts,
8 all of them deal with somebody who is basically
9 appropriating seepage water rather than somebody who
10 is appropriating water that has returned to the stream
11 water from which it came; is that correct?

12 MR. MICHAEL: I thought the Bower case was a
13 little more expansive than that. In other words --
14 Certainly Fuss was. Fuss was in the drainage ditch
10:50 15 before it got back to the stream, but that may be
16 true. I would have to review those again. They may
17 have involved a neighbor that was trying to
18 appropriate the water before it got back to the
19 stream.

20 SPECIAL MASTER: The reason I ask these
21 questions is Bower has some expansive language in it
22 about the ability of an appropriator being able to
23 increase their efficiency, but all three of the cases
24 appear to be seepage appropriation cases where
25 somebody is appropriating water flowing off somebody

10:51 1 else's property. And the Binning case doesn't have
2 that type of expansive language.

3 MR. MICHAEL: Not as expansive. I agree
4 with that. I think the concept though -- I think the
5 United States and we are correct on that concept.
6 Because the point is, in Wyoming, for example, if
7 there happens to be return flow in the stream -- And
8 it's commonplace up and down these rivers to have
9 return flows. If it's in the stream, then it's
10 available for diversion again.

11 This compact deals with that. This compact
12 doesn't say, you know, once the water winds through
13 somebody's field and turns pink, let's say, and goes
14 back in the main system that we look at that and
10:52 15 exclude that or we deal with that issue of whether --
16 This wasn't consumed or anything.

17 The Compact drafters decided to keep it simple,
18 and they decided that all water, whether it was return
19 flow or came out of a snowbank or raindrops, is
20 avertable flow. That's the way it will be divided up.
21 We will just count that. If it's going -- If it goes
22 to a post-50 diversion, no matter how many times it
23 was diverted and came back in and got diverted and
24 came back in doesn't make any difference.

25 The point is that, under the Wyoming law at the

10:52 1 time, if a water user -- Again, the sprinkler issue is
 2 a pre-1950 irrigator. Once he uses that water to
 3 extinction, it doesn't contribute a return flow, then
 4 obviously it doesn't return to the river and doesn't
 5 get counted again.

 6 But the drafters knew that there was a give and
 7 take of that going on, and they decided let's not do a
 8 consumption method where you care whether they
 9 consumed 80 percent, 90 percent, or 40 percent. That
 10 would have been written in if they wanted to do it.
 11 They wanted to use the avertable flow method. So they
 12 could count. If there were changes in return flows,
 13 then so be it. If we try to go there, it's going to
 14 be too complicated, too difficult. It was an option.

10:53 15 The Myers draft and the McNally-Wehrli draft were
 16 both issues that talked about the inflow-outflow
 17 method, but they were rejected.

 18 Now, if you start talking about it again and say,
 19 oh, Wyoming is required to maintain certain return
 20 flows, now you are telling Wyoming how much it can
 21 consume and now you are -- That's why I say this is a
 22 depletion concept, which was roundly rejected. It was
 23 considered but it was rejected. So they are trying to
 24 bring that back and it doesn't exist.

 25 So it's more than just the cases, I think. It's

10:53 1 also the concept that this is not a depletion
2 methodology in this compact. I think that kills that
3 issue.

4 Did you have some questions about groundwater?

5 SPECIAL MASTER: Yeah. So on the
6 groundwater side, at the time that the Compact was
7 negotiated, was there any relevant law in Wyoming as
8 to what types, if any, of groundwater would be
9 considered service water for the purposes of prior
10 appropriation?

11 MR. MICHAEL: No. Wyoming had passed a
12 groundwater statute three years earlier in 1947, but
13 it did not deal with the issue of possible
14 interconnected groundwater. There was no law in
10:54 15 place. Montana had no groundwater statute at that
16 time in 1950, but, no, Wyoming's statute that's been
17 passed is pretty bare bones about --

18 Basically what it said was, if you want to pump
19 groundwater in Wyoming, you have to get a permit, you
20 have got to join our system of getting permits, but it
21 didn't say and if you get a permit and we determine
22 that your groundwater is eluvial in nature and
23 actually impacts the surface flows from a nearby
24 stream that we are going to do what's called -- We now
25 call it conjunctive management, we will manage it

10:55 1 together. That did not exist at that time.

2 SPECIAL MASTER: So, again, just to be
3 absolutely clear on this, so at the time the Compact
4 was negotiated, there was neither any case law in the
5 statute or any administrative practice in Wyoming
6 regarding water and groundwater that was
7 interconnected service water.

8 MR. MICHAEL: No. I am certainly not aware
9 of any case law or statute. The drafters were aware
10 of groundwater. There's no question the groundwater
11 was becoming an issue.

12 The report from the Federal Power Commission,
13 they included surveys. The interesting thing, I
14 think, from there was the report basically said don't
10:56 15 waste your time with groundwater, it's not having
16 enough impact on surface water, and there's very
17 little potential, especially in the power -- And the
18 management report said that too, that it has little
19 potential to interfere with surface water.

20 But, you know, I think our position on
21 groundwater -- I will stop in just a second and maybe
22 have a little more time -- I think is pretty
23 straightforward. We are not saying that if Montana
24 feels like it's being damaged by the way Wyoming
25 allows groundwater pumping, whether it be just

10:56 1 interconnected or -- Most of it is deep aquifers and
2 nothing is capped out there. Regardless, if it feels
3 that that's the case, then its remedy is to seek an
4 equitable apportionment of groundwater.

5 The way I determine it is simple. If you look at
6 the language of the Compact, it's really pretty
7 straightforward without, you know, a massive expansive
8 reading of the definition of diversion, that the
9 United States gives to the word diversion. If you do
10 that, I think you will find that trying to regulate
11 groundwater in this compact is trying to pound a
12 square peg into a round hole.

13 The better solution to that -- Because we don't
14 think groundwater is covered by the Compact, the
10:57 15 better solution, if Montana wants to solve that, is to
16 ask Wyoming to sit down at the table to build a square
17 hole to fit the square peg. The way you do that is
18 you ask for a new compact or an addendum to this
19 compact that does deal with groundwater.

20 Or if Wyoming is recalcitrant and doesn't want to
21 talk about it, follow your equitable appropriation
22 claim. Then if it comes to a special master like you
23 or you personally, then when you build your
24 groundwater regulatory system you build it with a
25 blank slate based on the current knowledge and modern

10:57 1 principles.

2 But you don't try to do it based on something
3 that in, I think, 60 pages of minutes not one word was
4 mentioned of it. You do it with your head up thinking
5 about what you are trying to accomplish, with, like I
6 say, a modern approach, with more knowledge, with the
7 understanding, for example, that there's this thing
8 called coal bed methane, coal bed natural gas that
9 nobody in 1940 even contemplated. And then we have to
10 allow for that.

11 If you go into the groundwater issue, the sky is
12 the limit on how complex it can be. The better way to
13 approach that is -- I think the way it's required is
14 to approach it with a blank slate and not with trying,
10:58 15 again, to pound a square peg into a round hole.

16 SPECIAL MASTER: Thank you.

17 MR. MICHAEL: Thank you.

18 SPECIAL MASTER: Thank you very much.

19 Counsel for Montana?

20 (A discussion was had off the record and a
21 short recess was taken).

22 SPECIAL MASTER: Anytime you are ready.

23 MS. BOND: Thank you, your Honor. That is
24 much better.

25 May it please the Court, my name is Sarah Bond,

11:06 1 Assistant Attorney General for the State of Montana.

2 Just to respond very briefly to Wyoming's
3 argument, Wyoming would have this Court believe and
4 the United States Supreme Court interpret this compact
5 to mean that we signed -- Montana signed a compact
6 that froze Wyoming's rights, froze Montana's and
7 Wyoming's rights but prevents us from ever enforcing
8 those rights. Because once it's in the compact, we
9 can't bring an equitable appropriation action.

10 This would be an unprecedented interpretation of
11 a federal law of the court and is not an appropriate
12 allowable interpretation. No court has ever held a
13 compact so ineffective, and we think that it's an
14 improper interpretation here.

11:07 15 Briefly, with respect to the consumption issue,
16 as your Honor noted, the Binning and Bower cases are
17 about seepage. We are not talking about seepage.
18 Also, in Montana, for example, the seepage rules are
19 different than the return flow over the surface rules,
20 and it is --

21 We consider it a bedrock principle of prior
22 appropriation law. Once the water returns to a water
23 course, -- That's what Binning was about -- it's
24 subject to appropriation by a junior appropriator and
25 a senior appropriator cannot change his views to the

11:08 1 detriment of that downstream junior.

2 That's exactly what we are talking about. We are
3 talking about in our increased consumption claim the
4 return flows that aren't getting to the river, which
5 is the water flow clearly apportioned by the
6 Yellowstone River Compact.

7 SPECIAL MASTER: Are there cases in Montana
8 to that effect?

9 MS. BOND: Yes. I am thinking the most
10 recent case is the Hidden Hollow Ranch case, which is
11 very recent, but I would bet money that also Wiel in
12 Wyoming -- I am not sure how to pronounce it -- the
13 treatise on the water has a similar rule.

14 Let me then go back to my argument, which is
11:08 15 essentially, as we stated in our briefs, which I won't
16 reiterate but have we stayed -- has Montana stayed a
17 claim for relief by alleging that Wyoming has depleted
18 storage in the Yellowstone River System to the
19 detriment of Montana's rights allocated to her under
20 Article V of the Compact.

21 Now, we come to the Court before a motion to
22 dismiss, so we agree with Wyoming that the rules are
23 that in original jurisdiction actions the rules are
24 very liberal with respect to favoring a full
25 development of the facts. Under Supreme Court action

11:09 1 12(b)(6) motions are adjudicated under essentially the
2 same rules as civil procedure rules but with the
3 important modification that it is a very liberal
4 standard because of the high and public interest
5 involved in original actions.

6 Here about almost a year ago, the Supreme Court
7 exercised its gatekeeping function and granted
8 Montana's motion to file this complaint. By that
9 ruling, the Court exercised its gatekeeping function
10 and held that this dispute raises matters of
11 seriousness and dignity that weren't exercised of the
12 original jurisdiction of the Supreme Court.

13 Given this prior ruling, today the question
14 before the master is, as a matter of law and despite
11:10 15 assuming the facts that we have alleged to be true,
16 which is that Wyoming has depleted the flows of the
17 Yellowstone River System, notably the Tongue and
18 Powder, by virtue of increasing her storage,
19 increasing her consumption on 350 acres, increasing
20 her number of acres irrigated, and also allowing
21 groundwater pumping to affect the flows of the river
22 to the detriment of Montana's pre-50 rights and
23 Montana's other rights under Article V, does that
24 still not stay any claim for relief. Is Montana, as
25 Wyoming would have it, completely without recourse.

11:11 1 Again, as I indicated, I think this would be an
2 unprecedented interpretation of the federal and state
3 law, which is the Compact, and urge the Court to deny
4 the motion to dismiss at this point.

5 We think the nature of the case now is the Court
6 must decide whether Article V-A has any meaning,
7 whether it provides the right of Montana to make a
8 state line call.

9 As we said in our reply brief, we think the
10 manner by which the flows are being depleted at this
11 point is not an issue that the Court needs to resolve
12 but that it should be remanded for further factual
13 development after the motion to dismiss is denied.

14 Again, Montana's allegations were assumed to be
11:11 15 true, which are Wyoming was refusing to curtail its
16 consumption of the Tongue and Powder, that Wyoming has
17 a lot of construction of new and expanded water
18 storage facilities in the Tongue and Powder, that they
19 have a lot of new acres to be irrigated, that they
20 have a lot of construction and use of groundwater
21 wells both for irrigation and for coal methane
22 production in the Tongue and Powder, and that by the
23 changing from -- typically changing from flood to
24 sprinkler we are not talking about seepage here. We
25 are talking about return flow, over land flow, or

11:12 1 water flows.

2 By virtue of that change, the river has been
3 depleted. Our pre-50 users have been injured. We
4 called Wyoming. We made a state line call, which the
5 senate report clearly anticipates, and it was refused.
6 So here we are. So the Court must assume Wyoming has
7 caused Montana injury by depleting the water and
8 whether we have a cause of action for that.

9 Again, the liberal standard should be applied
10 because it is an original jurisdiction case and the
11 Court has already exercised its gatekeeping function.
12 It's our belief that to exceed to Wyoming's
13 interpretation would be to rewrite the Compact itself,
14 something the Court cannot do. Congressional consent
11:13 15 transforms the interstate compact into a law of the
16 United States, and Congress may not grant leave from
17 the constitution.

18 Let's go back to the plain language of the
19 Compact, if we could, because I think that's where the
20 crux of our case lies.

21 As your Honor noted, V-A is in the Compact, and
22 Wyoming would have us write it out of the Compact.
23 The rules of compact interpretation, as you noted, are
24 relatively simple. They are difficult to apply
25 sometimes because of complex facts, but it is a

11:13 1 compact, it is a statute, and we start with the plain
2 language of the compact.

3 The language of the compact is that it was
4 enacted to:

5 -- "remove all causes of present and
6 future controversy between said States and
7 between persons in one and persons in
8 another with respect to the waters of the
9 Yellowstone River and its tributaries --"

10 Now, there's a specific exclusion for
11 Yellowstone:

12 -- "other than waters within or waters
13 which contribute to the flow of streams
14 within the Yellowstone National Park, and
11:14 15 desiring to provide for an equitable division
16 and apportionment of such waters --"

17 That's referring back to basically everything but
18 what comes out of Yellowstone. And then it
19 acknowledges the need for storage and the Compact
20 follows.

21 Now, Article V-A -- To back up, we think that
22 this language, as well as in Article V-A, indicates
23 that the drafters and the States and Congress which
24 enacted this compact are thinking globally, thinking
25 on a watershed basis.

11:15 1 If you have read the Joint Appendix, you will see
2 that there were hundreds of pages of studies;
3 consumptive use, cropping patterns, return flows,
4 underground water. The Basin was thoroughly studied.

5 Frankly, the states of Wyoming and Montana wanted
6 to get in on the federal project, which may have some
7 what-goes-around-comes-around. The thinking, when I
8 am reading historic documents, is Wyoming and Montana
9 have to get into the Pick-Sloan plan and the feds are
10 requiring them to apportion the water so that the feds
11 don't build a reservoir and get drawn into a water
12 dispute.

13 But the states can't agree on what the pre-50
14 water rights are. So some of the drafts you have
11:15 15 before you expressly exclude pre-50 rights. Well,
16 that doesn't really work because that doesn't achieve
17 the goal of the federal government to provide a full
18 and equitable apportionment.

19 Many of the previous compacts divided the water
20 and purported to protect existing rights, but in
21 Article VI -- And those revisions also said those
22 previous rights had to be satisfied out of
23 apportionment as indicated in the percentage. That
24 didn't work either because if you don't know what the
25 rights are but you protect them and then subject them

11:16 1 to the proportional change, you know, that's an
2 inconsistent term.

3 So what we have here is a document that was
4 intended to cover all the waters that would reach the
5 Yellowstone. This intent -- Except those that it
6 expressly excludes. This intent is tracked throughout
7 the Compact.

8 The term Yellowstone River System is specifically
9 defined in Article II-D to mean:

10 -- "the Yellowstone River and all of
11 its tributaries, including springs and
12 swamps," -- which in some states might be
13 considered groundwater -- "from their
14 sources --"

11:17 15 "From their sources". It doesn't say sources
16 above the ground or sources below ground. It says
17 "sources".

18 -- "to the mouth of the Yellowstone
19 River near Buford, North Dakota, except
20 those portions thereof which are within or
21 contribute to the flow of streams within the
22 Yellowstone National Park."

23 That's a global term. That includes everything,
24 except for the Yellowstone water. And black letter
25 law with respect to compact interpretation is, you

11:17 1 know, you look at the terms of the compact. If
2 there's one article of the compact that excludes or
3 includes something and another article doesn't, then
4 that is to be taken into account.

5 In the basic Virginia versus Maryland, for
6 example, the question was whether Virginia citizens
7 had workout rights on the Potomac. And Maryland said,
8 oh, well, everybody knows we have got the rights on
9 that side of the river, you can't, you know, have
10 that, and those rights aren't specifically mentioned.
11 And Virginia said the compact doesn't say this is
12 governed by a compact. Virginia said, well, that
13 clause doesn't say you can regulate our side of the
14 river, look at this other clause, that clause says if
11:18 15 we are going to regulate fishing we have to do that
16 together.

17 So in that case the court says the drafters knew
18 how to add inventory and they didn't put it in the
19 workout right. So, Virginia, you have the workout
20 rights. It can't be just inferred and added to it.

21 Similarly here, we have a compact where we see
22 that the drafters knew how to exclude water. They
23 expressly excluded water in the Yellowstone National
24 Park, and they expressly listed several exclusions in
25 Article V-E.

11:18 1 Now, obviously it doesn't exclude pre-50 rights
2 as some earlier drafts did, nor does it exclude
3 groundwater. So let's turn to Article V-A. It says:

4 "Appropriative rights to the beneficial
5 uses," not just appropriative rights, "to the
6 beneficial uses of the water of the
7 Yellowstone River System --"

8 Again, we have several different definitions of
9 geographic and hydrologic areas in the Compact itself.
10 Article X with respect to the Basin, Article V with
11 respect to the Interstate tributaries. Article V-A
12 says the Yellowstone River System, which the plain
13 language of the Compact in Article II-D is a
14 comprehensive hydrologic definition, which includes
11:19 15 all sources of water for that river.

16 -- "appropriative rights to the
17 beneficial uses --"

18 Again, we have emphasized in our brief this time
19 that "uses" also comes out in the history.

20 -- "of the water of the Yellowstone
21 River System existing in each signatory
22 State --" that includes North Dakota --
23 "as of January 1, 1950, shall continue to
24 be enjoyed in accordance with the laws
25 governing the acquisition and use of

11:20

1 water --"

2 Not under the laws of the signatory state but
3 under the doctrine of appropriation. We think it is
4 an error to interpret this second part of this clause
5 to read that the continued enjoyment refers back to
6 the laws of the signatory states.

7 We have two states that were arguing for over
8 20 years, and they couldn't come to an agreement as to
9 what the pre-50 rights were. Because although those
10 states are prior appropriation states, each state --
11 This continues on today -- has their own
12 administrative bells and whistles about how they are
13 administered, is it a central water right filing
14 system, those kinds of things.

11:21

15 But it says:

16 -- "continue to be enjoyed," which,
17 again, means they were in use at that time
18 and they are not new -- "in accordance with
19 the laws --"

20 And the rest of that clause is "governing the
21 acquisition and use of water under the doctrine of
22 appropriation", not the laws of the signatory states,
23 which earlier versions of the Compact did say. That's
24 not what they came up with. So --

25 SPECIAL MASTER: So can I just interrupt you

11:21 1 here with a couple of questions regarding your
2 interpretation of Section V-A?

3 It's not clear that the Special Master needs to
4 address this in resolving the motion to dismiss, but I
5 am curious as to what Montana believes it needs to
6 show in order to establish a violation of Section V-A.

7 Let me give you a -- I will give you a
8 hypothetical, and this is a variant on the
9 hypothetical which the State of Wyoming has in its
10 brief.

11 Assume that you have a storage facility in
12 Wyoming. That storage facility was filled with water
13 during a time of the year when there was sufficient
14 water in the tributary in order to meet all of the
11:22 15 pre-1950 appropriative rights in Montana and still
16 that water continued to run down. During the dry time
17 of the year, there's insufficient water for the
18 pre-1950 appropriators in Montana. Is it Montana's
19 view that Wyoming needs to release water from that
20 reservoir in order to meet the pre-1950 rights in
21 Montana?

22 MS. BOND: Your Honor, we agree with Wyoming
23 that the general rule of prior appropriation provides
24 that, if you store in priority, you may use out of the
25 priority. The question is whether the increment of

11:23 1 storage in that reservoir was stored in priority.

2 Most of the --

3 Again, this -- I agree this is a factual matter
4 to be determined at trial. You know, presume that
5 there are reservoirs in the head waters of the Tongue
6 primarily, and also Lake DeSmet Reservoir in the
7 Powder system, which have increments of some pre-50
8 and some post-50 water. They can't use the post-50
9 water if our pre-50 rights aren't being satisfied. So
10 it's a matter of counting.

11 If, in fact, they stored in priority, then, yes,
12 they can use that when we are going short. They have
13 a lot of increased storage in their reservoirs, and so
14 that is a matter that we think deserves to be fleshed
11:23 15 out at discovery.

16 We think we need to allege that they are
17 diverting and consuming additional water that was not
18 being consumed in -- prior to 1950 when our pre-50
19 rights were not being satisfied. That was the nature
20 of the call in 2004 and 2006. It was our contention
21 at the time that the documents that we had from
22 Wyoming showed that they had post-50 water stored at a
23 time when the pre-50 rights were going unsatisfied.

24 While they can certainly use their pre-50 water
25 when our post-50 -- pre-50 rights aren't being

11:24 1 satisfied, the post-50 water has to be accounted for
2 as post-50 water. So that, I think, needs to be
3 sorted out.

4 We think given the liberal pleading standards
5 here, having alleged a depletion of the Yellowstone,
6 and relying on the plain language and structure of the
7 Compact with which the United States agrees with this,
8 there must be a cause of action for us to seek to
9 enforce our rights to pre-50 water.

10 Indeed, in the -- a lot of the records of the
11 Compact Commission -- Again, in the appendix of
12 previous years, we were focused on post-50 water. But
13 in a dry year, -- And, obviously, this is a huge
14 problem in Colorado -- you may not even have pre-50
11:25 15 water.

16 This is a relatively new issue for us to realize,
17 hey, wait a minute, we are not getting our pre-50
18 water. The legal issue was thoroughly distinct and
19 clear. Hence, the complaint and the motion to
20 dismiss.

21 So the Court does need to decide does Montana
22 have a cause of action where pre-50 rights and
23 actually also V-B Clause 1 rights are being -- going
24 unsatisfied because --

25 There's causation here. I hope you can see the

11:26 1 cause. That's part of the equation too, of course.
2 That's a hydrologic complex issue.

3 -- are going unsatisfied and they are using
4 expanded waters. It's --

5 So if I could go back a little bit to the
6 structure --

7 SPECIAL MASTER: So let me follow through on
8 this. So maybe to simplify this line of questions, to
9 resolve the motion to dismiss it's your view that all
10 that the Special Master needs to find is that there
11 are situations in which Wyoming, by satisfying the
12 calls of post-1950 appropriators, would violate the
13 Compact to the degree that the pre-1950 appropriators
14 in Montana were not satisfied. And the specific
11:26 15 situation in which that would occur is best addressed
16 at a later point.

17 MS. BOND: Yes, your Honor. But to tweak it
18 just a tad, we think that the 12(b)(6) law and
19 especially applicable to the original jurisdiction
20 case is that you have to assume they are depleting.

21 The allegations that we have in our complaint are
22 broadly pled under Article V because, frankly, the V-A
23 rights are inextricably tied to V-B Clause 1 rights
24 because they are pertinent to the same agency. So I
25 think until there's some discovery, it's just not

11:27 1 possible to tease those differences out.

2 Because supplemental acres are closely tied to
3 existing acres. As you see through the compacting
4 history, in many years they were, in fact, in the same
5 article and they were only pulled out recently.

6 As the senate report indicates, the supplemental
7 rights were -- The senate report tracks -- And,
8 actually, Wyoming disagreed with what we interpreted
9 but agreed with the conclusion that the Compact
10 establishes three tiers of water rights.

11 V-A, which is pre-50 water rights, they are
12 frozen in time. We agree with that, but we don't
13 agree that a court could interpret the Compact as they
14 are frozen and we are frozen out. I mean, you have no
11:28 15 cause of action under the Compact, no cause of action
16 of an equitable apportionment. That's an
17 unprecedented interpretation of the federal law.

18 Clause V-B(1) is the second tier. It comes from
19 the unused and unappropriated, not just unused but
20 unappropriated waters of the Interstate tributaries.
21 There again, you have another defined term. It's not
22 Yellowstone system. It's Interstate tributaries.

23 That's where the storage was going to be, the big
24 tribs. Those tribs were going back and forth across
25 the border. That's not what they were focused on.

11:28 1 They wanted to build storage.

2 -- "of the Interstate tributaries of
3 the Yellowstone River as of January 1, 1950,
4 there is allocated --"

5 Now, this is the allocation language that Wyoming
6 points to to say that V-A was carved out of the
7 Compact, but it's our position that V-A has to mean
8 something and it wasn't carved out of the Compact.
9 It's in there. So this is the allocation.

10 -- "to each signatory State such
11 quantity of that water as shall be necessary
12 to provide supplemental water supplies for
13 the rights described in Paragraph A --"

14 So you have got the set of rights, you have an
11:29 15 engineering committee that had mapped out all of the
16 acres, and it's whatever those rights were consuming
17 on those acres prior to 1950.

18 But, of course, since 1950 in the west most of
19 that irrigation was partial service, not full service.
20 So the drafters and Congress and the States concluded
21 that the orderly development of the Basin would be
22 best served by providing for the preference for those
23 existing rights to have their second flooding, second
24 flow of water from the system prior to allocating the
25 remainder, which is the remainder of the unused and

11:30 1 unappropriated waters that's been allocated by virtue
2 of percentages measured by a avertable flow method.
3 As an aside though, we think Article V includes the
4 term beneficial uses. Now, that's a depletion term,
5 just like Yellowstone River System. That's
6 all-inclusive. "Beneficial use" in Article II-H is
7 "defined to be that use by which the water supply of a
8 drainage basin is depleted when usefully employed by
9 the activities of man."

10 V-A is a depletion clause. V-B is measured by
11 diversions. The senate reports clarify that the
12 reason they used avertable flow methodology in
13 measuring the new water was because it was all going
14 to come from storage. I think that's on Page 13 of
11:31 15 the appendix as well as other places.

16 But when you are measuring a volume of water that
17 comes from storage, it makes sense to measure that
18 delivery to whoever is going to use it by avertable
19 flow as opposed to the existing rights. We didn't
20 know what they were, but whatever was being used and
21 consumed, depleted, to the extent the river was being
22 depleted at that time, that's what's frozen and
23 protected.

24 SPECIAL MASTER: Can I go back just for a
25 moment to Section V-A? And one of the things that you

11:31 1 have noted in your argument and also noted in the
2 briefs was that the negotiators of this compact
3 decided not to try to quantify pre-1950 rights, and
4 you mentioned in the brief that one of the reasons was
5 lack of good records. Another thing that you
6 mentioned was that there were different water laws and
7 policies between the two states.

8 Aren't those just as much problems now as they
9 were at the time that the Compact was negotiated?
10 And, if so, are you saying that the negotiators
11 basically decided to put off those issues and hope
12 that there would be a special master at some point to
13 solve them?

14 MS. BOND: I was really trying to resist
11:32 15 giving a football analysis, but at the same time I
16 think we can say that they punted on this one.

17 Yes. The short answer is yes. We have to --
18 Montana has done her due diligence. We had to have
19 determined that our pre-50 rights were, in fact, being
20 injured by Wyoming before we filed the complaint. It
21 is a task of some significance, but we -- There's no
22 other means by which we may enforce the Compact.

23 Again, the drafters thought that they wouldn't
24 need to quantify the pre-50 rights because, once all
25 the storage was built, the water table comes up,

11:33 1 hydrology is changed, and everybody gets their post-50
2 water also.

3 So I do think that -- As you know, we agree with
4 Wyoming that we are not seeking to administer pre-50
5 rights in Wyoming, but our pre-50 rights are being
6 harmed under V-B Clause 1. This has to mean
7 something. There has to be a cause of action. That's
8 why there's Article XIII, the judicial remedy. But
9 that's doable. I mean, we have engineers. We have --
10 We can -- It's not an unknowable number.

11 SPECIAL MASTER: Getting back, again, to the
12 problems that the negotiators had in even
13 contemplating trying to quantify the pre-1950 rights,
14 as you pointed out, all that Article V says is that it
11:34 15 shall -- the pre-1950 rights shall continue to be
16 enjoyed in accordance with the laws governing the
17 acquisition and use of water under the doctrine of
18 appropriation.

19 It's Montana's view that that does not refer to
20 the appropriation law of each state. So what
21 appropriation law does it refer to, and how -- if the
22 Supreme Court gets into this issue, how does it
23 address the question of what appropriation rules to
24 apply?

25 MS. BOND: Your Honor, to clarify my earlier

11:34 1 position, we do think that the existing state laws are
2 relative to the amount of beneficial use and right at
3 the pertinent time of pre-50. It's the continuing use
4 that is subject to the doctrine of appropriation.

5 As counsel for Wyoming said, there's a great
6 discussion of that in the appendix. I think it starts
7 at about Page 25 to 28 in the Federal Power Commission
8 report discussing the federal common law of
9 appropriation as applied in -- by Justice Holmes. He
10 very eloquently quoted New York versus New Jersey and
11 subsequently developed in Texas versus New Mexico and
12 so forth, Wyoming versus Colorado.

13 The basic -- Our position is what is not
14 incorporated into the continued enjoyment is that
11:35 15 which can't be in accordance with this compact. In
16 other words, the concept that you could continue to
17 consume more and more water and say, oh, well, it's
18 related back to the pre-50 right or that's why I could
19 divert the water in 1950, so I can consume it all and
20 it never will get to the river, regardless of the
21 impact on the river.

22 Once the federal compact was adopted into federal
23 law, it becomes a federal statute that we believe does
24 freeze the rights, the uses of time, and so it cuts
25 off certain elements of a right that might otherwise

11:36 1 exist under Wyoming law.

2 For example, the doctrine of relation-back. I
3 think both states at the time had basically some
4 version of the doctrine of relation-back. That's cut
5 off because existing new acreage is obviously V-B
6 Clause 2.

7 The increased consumption. We might have been
8 able to do that somewhere else, but now that we have
9 the Compact Wyoming becomes the junior appropriator as
10 to Wyoming and they can't recapture return flow that
11 did get to the Yellowstone River System and come
12 across the state line for our users if it comes to our
13 detriment.

14 So the doctrine of appropriation is a little bit
11:37 15 broader. It relates to the continuing use, not the
16 quantification of beneficial use. Again, it's not
17 just appropriative rights recognized by the States.
18 It's appropriative rights to the beneficial uses, and
19 beneficial uses is defined as a depletion term.

20 SPECIAL MASTER: So it's your position that
21 you look to Montana and Wyoming law in order to
22 determine what appropriative rights existed as of
23 January 1, 1950 to the beneficial uses of the water of
24 the Yellowstone River System, but then you do not look
25 to the laws of those two states in deciding how those

11:37 1 rights can then be utilized in the future, how they
2 can be changed?

3 MS. BOND: Your Honor, to the extent that
4 the signatory states had doctrines of water use that
5 conflict with the express terms of this now federal
6 law, yes. And it immediately comes to mind the
7 doctrine of relation-back. And once the Compact is
8 passed, we think that you have rights in Montana to
9 possibly call for call for supplemental rights, and
10 you have this percentage allocation for the need to
11 serve new acres. So that's not prior appropriation.
12 That's an allocation. So to that extent, it's cut off
13 by the Compact itself.

14 Again, the appropriative rights, which are
11:38 15 defined by the state laws, are still further limited
16 by beneficial uses. So it has to be the amount
17 consumed. Otherwise, you wouldn't have any need for
18 supplemental water. Because if you could do it under
19 existing law, what's V-B Clause 1? There's nothing
20 there.

21 So the Compact itself, if it freezes those rights
22 in time, that does necessarily cut off some types of
23 continuing uses that you might otherwise be able to do
24 under your state law because now Wyoming has a
25 downstream junior that's in the same system.

11:39 1 SPECIAL MASTER: So a little bit of history
2 would be very helpful to me. When was it that Montana
3 first raised the question and implementation of the
4 Yellowstone River Compact, of whether or not Wyoming
5 can satisfy post-1950 appropriative rights if pre-1950
6 appropriators in Montana are not fully satisfied?

7 MS. BOND: That specific question arose from
8 a dispute from the 1980s in which Wyoming had on paper
9 the paper right of a -- I think it was called Middle
10 Fork or something like that or Middle Creek down by
11 Kaycee on the Powder. That project had a 1940
12 priority date, and it was their position at the time
13 that if it were ever built -- It had not been built --
14 it would be exempt from the Compact because it had a
11:40 15 pre-50 date on it.

16 And we thought, number one, this violated any
17 notion of relation-back recently, so in 40 years since
18 the paper had been filed and no use had been made.
19 And we disputed that particular issue for some time.

20 Then it was in 2004, I think, that we first
21 realized that our pre-50 rights were not being
22 satisfied. Again, the 1930s were very, very dry. It
23 was, in fact, not an issue yet, but in terms of the
24 hydrology, prior to 2004, people were focused on the
25 percentage allocations. It didn't become clear to us

11:41 1 until about 2004 that our pre-50 water uses were not
2 fully satisfied.

3 We had a number of disputes that were beginning
4 to crystallize throughout the '80s and '90s about the
5 Compact, the Compact's interpretation, but I believe
6 2004, in fact, was the first time we raised that
7 particular issue.

8 SPECIAL MASTER: And Wyoming in one of its
9 briefs mentions that some of the years in the 1950s
10 were quite dry, notes that the first time that this
11 issue was raised was not until several decades after
12 the Compact was negotiated. Is there a reason why
13 this has not come up until, first of all, the '80s?

14 MS. BOND: Well, your Honor, firstly, we
11:41 15 don't think that is particularly germane to whether or
16 not that's what the Compact means, and I can't
17 speculate as to what the Compact commissioners were
18 thinking in the '50s. You can read the documents to
19 see for yourself. You have some of the records. It
20 appears that they were pretty focused on getting the
21 storage water and allocating it under V-C.

22 Certainly, Yellowtail wasn't being built and
23 pursued, so there was a lot of attention going to
24 Yellowtail, which was a massive reservoir on the
25 Bighorn. That wasn't completed until the '70s but

11:42 1 late in the process.

2 So there were lots of other things diverting the
3 attention of the commissioners, and all I can say is I
4 don't think it's relevant to what the Compact means.

5 SPECIAL MASTER: So Section V-B -- When
6 Mr. Michael was up here, I asked him whether or
7 not -- if there was somebody with a right to a
8 supplemental water supply who asked for water from the
9 reservoir, whether or not under the Compact they would
10 be entitled to water before any other post-1950
11 appropriator. Do you have an answer on that question?

12 MS. BOND: Your Honor, I think we are
13 sticking with our three-tier theory, which means they
14 have the second right, preferred right as Burke, I
11:43 15 think, called it to water. So that the Compact
16 provisions' pre-50 rights get satisfied, and they
17 quantified it saying they didn't think they were going
18 to need to.

19 Then V-B Clause 1 rights have a preference over
20 new water applied to new lands. That's why the
21 irrigation -- That's why the engineering committee
22 spent so many years mapping irrigating neighbors. The
23 historic evidence is quite clear that it was --
24 irrigation was used, that it was intended that those
25 partially-served acres would get supplemental supply

11:44 1 before the post-50 new acres would be served.

2 SPECIAL MASTER: Do you know whether a
3 situation has ever arisen under the Compact where a
4 pre -- where an older supplemental water right asked
5 for their water prior to a separate post-1950?

6 I am just wondering whether or not that's a
7 question that has ever arisen before the Compact
8 Commission or before the States and, if so, how it was
9 resolved.

10 MS. BOND: Your Honor, I am not aware that
11 specific question has been brought to the Commission,
12 but it is our belief -- and the United States agrees
13 with us -- that this is a three-tier system.

14 That concept is actually pretty standard
11:44 15 throughout the drafting history, that, first,
16 obviously, existing rights have to be satisfied. And
17 even McNally of the Wyoming Commission was quite clear
18 that those rights had to be protected, that the
19 Compact couldn't just exclude them. It had to be
20 included and protected. There's a great letter
21 from -- in your Joint Appendix starting about 286
22 about existing rights have to be protected. That's
23 just the common law of the Compact.

24 Then you have a preference for supplemental
25 rights for partially-served acres that are already

11:45 1 getting some water under Article V-A, which is another
2 example that they are thinking of consumption on the
3 land, not the water being diverted.

4 Thirdly, after those rights are all satisfied,
5 then the remainder of the unused and unappropriated
6 waters is allocated by these percentages. And that
7 was intended to be stored water.

8 Again, as you note in this Article V-E, there are
9 specific exclusions for specific types of rights.
10 Other than the waters arising in Yellowstone National
11 Park and the water uses that are excluded in V-E,
12 there are no exclusions under this compact.
13 Groundwater is not excluded. Water from underground,
14 in other words, is not excluded and pre-50 water
11:46 15 rights are not excluded. And it would be an improper
16 Compact interpretation and in violation of the plain
17 language here to write those exclusions in at this
18 point.

19 SPECIAL MASTER: So in the -- both the
20 Congressional report and also in the senate report on
21 the Compact, there is language to the effect that the
22 Compact can attempt to either regulate or administer
23 existing rights. And I can point out particular
24 passages.

25 So, for example, on Page 22 of the Joint

11:47 1 Appendix, --

2 MS. BOND: Yes.

3 SPECIAL MASTER: -- you will see at the very
4 top of the page -- Actually, you should probably go to
5 the bottom of Page 21 where it says:

6 "Extensive studies by an engineering
7 committee appointed by the Commission to
8 advise it disclosed that little can be
9 gained from a water supply standpoint by
10 attempting in the Compact deregulation and
11 administration of existing appropriative
12 rights in the signatory States."

13 So could you explain how that language is
14 consistent with Montana's position?

11:47 15 MS. BOND: Yes, your Honor. Actually, going
16 back to Page 21, it also references the Pick-Sloan
17 plan in the middle -- bottom half of the page, which
18 is something to keep in mind. And the minutes are
19 interesting. They adopted the Compact at 12:30 in the
20 morning. I mean, that's trouble. These guys were
21 pressed.

22 So what this other language indicates -- It says
23 Article V sets out the apportionment, Article V-B, and
24 this relates to the first tier not being what
25 Mr. Leonard wanted, which was a complete watershed

11:48

1 administration without regard to the state law.

2 What it means is those are the blocks, and
3 Montana is not seeking to tell the state engineer of
4 Wyoming which head gate to turn off. That's their
5 block of water. Montana has its block of water.
6 North Dakota has its block of water. It's not --
7 neither the task of the Commission or of the state
8 officials of Montana to administer those rights
9 inter se on the one side, but the Compact creates a
10 cause of action for us at this state line.

11 Our second tier rights are not being satisfied --
12 Excuse me. Our first-tier rights or second tier
13 rights are not being satisfied when Wyoming is taking,
14 as we have alleged and so must we assume for purposes
15 of this motion, water for new uses.

11:49

16 I think the other language that is striking in
17 the legislative history that I think Wyoming uses to
18 varying terms but can be used to explain the terms of
19 the Compact is the discussion about Newell saying that
20 the division of water -- it was decided not to divide
21 the pre-50 rights.

22 And I reviewed the legislative history to -- that
23 is referring to the allocation of -- percentage
24 allocation, which the earlier version of the Compact
25 did apply to existing rights. It was pulling them out

11:49 1 and protecting them separately that allowed the
2 Compact to go forward.

3 In the 1944 compact and in some of the earlier
4 drafts, there was a division of water by basin. You
5 get the first 2200 acre feet and then we get 3,000 and
6 then the rest was percentages. It was fairly
7 complicated. That's what Article V was. Then in
8 Article VI it would say all existing rights or all
9 rights heretofore existing and hereinafter acquired
10 shall be protected but shall be satisfied under the
11 percentages.

12 That was -- The States couldn't agree on what the
13 pre-50 rights were. So once the final draft of the
14 engineering committee pulled those pre-50 rights out
11:50 15 and separated them from that percentage allocation,
16 that's what led the parties forward.

17 And as early as 1940, Mr. Sloan interestingly at
18 the Commission meeting was saying you don't have to
19 worry about quantification of the pre-50 rights
20 because there will be enough water in the system that
21 there won't be a problem. But that's the division --
22 The protection of the pre-50 rights was removed from
23 the final draft and that's what allowed the Compact to
24 go forward. That's why it's a block that's not
25 administered by the Commission.

11:51 1 SPECIAL MASTER: Thank you. I want to make
2 sure that we have some time to talk about increased
3 efficiency and also groundwater.

4 So turning, first, to your question of increased
5 efficiency, if -- if the Court were ultimately to
6 agree with Wyoming that Wyoming's law historically
7 permitted an appropriator to increase their
8 efficiency, even if there was a more junior
9 appropriator downstream who was utilizing that
10 particular plot, and if we -- So assuming that, first
11 of all, what was Montana's law at the time that
12 Compact was negotiated?

13 MS. BOND: Your Honor, we think the relevant
14 law of adopting prior appropriation was extant, that
11:52 15 once the Compact was passed was what kind of
16 appropriated change. We think in both states a change
17 is limited to consumption and consumptive use because
18 the downstream appropriator takes his appropriation
19 from the stream and relies on the stream conditions at
20 that time.

21 And we will recognize in 1911 the Montana case
22 Smith versus Duff was all about groundwater and other
23 things but also recognized that with Section 498 the
24 appropriator can change his rights. But the first
25 rule is no injury to other appropriators. We would --

11:53 1 Although both states are late on the uptake in
2 dealing with it administratively, we don't think the
3 appropriate interpretation of the rule here is what
4 can an appropriator do without being regulated. The
5 question is what can an appropriator do vis-a-vis
6 another appropriator.

7 And we think both Binning and Bower also
8 withstand the allegation that an appropriator
9 interstate cannot change his views to the detriment of
10 a downstream appropriator. All western states follow
11 this no injury rule. That's one of the changes that
12 we think the Compact affected in the laws of the
13 signatory States. Maybe in other basins they can, but
14 once Montana becomes a downstream senior to Wyoming
11:53 15 they have to account for it for us.

16 Again, we are not saying that Wyoming should
17 never build storage or increase efficiency. Those
18 things are encouraged by the doctrine of
19 appropriation. But it isn't a matter of accounting.
20 If our pre-50 rights or V-B Clause 1 rights are
21 inexplicably connected and because they are all used
22 on the same land are not being satisfied, basically
23 you have to account for those uses or, you know, every
24 state will plan for augmentations and other things as
25 we all try to tighten up our water use.

11:54 1 SPECIAL MASTER: So, again, though assume
2 that -- If I were ultimately to conclude that
3 Wyoming's law was different than what Will claimed in
4 his treatise was the law of prior appropriation,
5 perhaps different than what Montana followed, what law
6 should I look to in citing whether or not increases in
7 efficiency that injure other appropriators is
8 permissible?

9 MS. BOND: Your Honor, again, we would
10 dispute the proposition that a Wyoming appropriator
11 could do that to another Wyoming appropriator. We
12 would suggest that the Court look to the doctrine of
13 appropriation as that term -- that concept is applied
14 by the United States Supreme Court in the original
11:55 15 action.

16 Here you have it expressly included in the
17 Compact and -- The first answer, of course, is that
18 it's not correct to say under Wyoming law that an
19 appropriator can change his views to the detriment of
20 a downstream appropriator. Incidentally, it was
21 codified nicely in a Wyoming statute later in 1957. I
22 think it's 41-3-104, and it is the standard rule by
23 which appropriators are allowed to change their uses
24 when another appropriator complains that it is
25 injuring them.

11:55 1 So we think that every state follows the no
2 injury rule and that once the Compact is enacted that
3 continues to be in accordance with the laws and
4 adopted appropriation upon the no injury rule between
5 Montana and Wyoming. Otherwise, they could consume
6 everything to the detriment of the flow of the
7 Yellowstone River System and completely defeat the
8 apportionment made by Congress. You would have --

9 Congress considered this an allocation and
10 apportionment of the river and attempted to use the
11 terms allocation and division with respect to the new
12 water that was conceptually a separate chunk. And
13 they weren't hurting anybody by dividing the new water
14 made available, but as to existing rights that was an
11:56 15 apportionment. Whatever is being used, it is being
16 used.

17 So first -- Our first point is that you can't
18 increase your consumption and not change what you are
19 using. Beneficial use is a depletion term. If you
20 change the depletion, as they say they can, you are
21 changing that allocation.

22 As a practical matter, what that rule would allow
23 is any farmer or rancher irrigating can by virtue of
24 his management decisions on his field change the
25 apportionment to Montana because he can recapture and

11:57 1 reuse all of his water and prevent it from getting to
2 the stream, even if Montana had a pre-50 user who had
3 been relying on that.

4 And actually, both Binning and Bower stand for
5 the proposition that -- On Page 602, for example,
6 Bower points out that the Binning opinion, the
7 importance of protecting water rights based on return
8 flows was repeatedly stressed.

9 So we are not talking about seepage. We are
10 talking about return flows. Once they get to the
11 water course -- In Wyoming law, water course is a term
12 of art meaning a stream of defined channel. That was
13 also in the opinion of Bower. We are entitled to rely
14 on it. We are talking about any depletion by whatever
11:58 15 means; from CBM pumping, from irrigation pumping, or
16 from increases in consumption, or increases in acres,
17 or increases in post-50 storage, and the way that
18 storage is used must be accounted for and released if
19 our pre-50 water rights are not being satisfied.

20 The three-tier system is what -- is what the
21 Compact established. And it established it as to
22 Montana and Wyoming, and to hold otherwise would
23 essentially be writing over V-A in the Compact. And
24 we don't think you can do that.

25 SPECIAL MASTER: Again, I want to make sure

11:58 1 I understand your position. So in resolving some of
2 the secondary questions with respect to increased
3 efficiency and groundwater, your view would be that I
4 should first look to the language of the Compact
5 itself to see whether or not that helps to resolve the
6 issue.

7 Assuming that that does not resolve the issue --
8 You, again, emphasized earlier under Article V-A that
9 the appropriative rights that predated January 1st,
10 1950 are to "continue to be enjoyed in accordance with
11 the laws governing the acquisition and use of water
12 under the doctrine of appropriation." Is it your view
13 that there is a federal law of appropriation?

14 MS. BOND: Well, to re-emphasize, our focus
11:59 15 on V-A was the appropriative rights to the beneficial
16 uses. Beneficial use can be quantified on the ground.

17 Yes, there is a common law that the Supreme Court
18 applies in terms of the doctrine of appropriation.
19 It's applied in original jurisdiction cases all the
20 time. You have an overlay here of it not being an
21 equitable apportionment case but rather a compact
22 interpretation case.

23 Again, the limitation on application of signatory
24 state law may be fairly minimal. I think it arises
25 necessarily from the three-tier structure because,

12:00 1 again, V-B Clause 1 describes uses of water that could
2 have been made perhaps, assuming our view is correct,
3 that was included within the bundle of sticks
4 Wyoming's rights. It's cut off if it wasn't consumed
5 as of 1950, historically so.

6 And, again, these are the factual matters that
7 are difficult but quantifiable. Every rancher follows
8 a field one year, rotates crops, those kinds of
9 things. Those kinds of fluctuations-- And, of
10 course, the hydrology itself. Herodotus was right.
11 You can't sink your foot in the same stream twice.
12 That's what makes this so fascinating. But we have
13 engineers who can figure this out, what was being used
14 historically, beneficial uses as of 1950. We are
12:01 15 protected in Wyoming to that amount.

16 Again, we are not claiming the right to make a
17 futile call or to stop them from using their water in
18 a particular way or to ascertain on the Wyoming side
19 how they decide who has to get cut off, if someone has
20 to get cut off, but rather -- It has to mean
21 something.

22 We think that the core question the Court must
23 resolve at this point is does the Compact provide a
24 right of action for Montana against Wyoming. We think
25 what clearly contemplates a state line call is when

12:02 1 they said that you can't call for a supply difference
 2 from that V-A. So it stands that we can call for the
 3 supply that was obtained, and to interpret it
 4 otherwise would be to render it a nullity, which the
 5 court shouldn't do.

 6 Secondly, that we have pled the cause as we pled
 7 the depletion of the Yellowstone River System, and we
 8 think we have pled that. The Court has to assume,
 9 again, that those depletions to the river have
 10 occurred to the detriment of our pre-50 rights.

 11 And just as an aside, also that -- You were
 12 asking about groundwater, and Wyoming was suggesting
 13 that we renegotiate the compact on groundwater. As I
 14 think we clearly stated in the brief, we are not

12:03 15 claiming there's some kind of separate allocation with
 16 respect to groundwater. We are alleging that, to the
 17 extent the pumping of groundwater depletes the flow of
 18 the Yellowstone River System, then it has to be
 19 accounted for based on their use just like any other
 20 depletion.

 21 And I think we have -- The United States briefed
 22 it well. You can see it in the plain language of the
 23 Compact Article II-G.

 24 "The terms 'Divert' and 'Diversion'
 25 mean the taking or removing of water from

12:03 1 the Yellowstone River or any tributary
 2 thereof when the water so taken or removed
 3 is not returned directly into the channel of
 4 the Yellowstone River or of the tributary
 5 from which it is taken."

 6 It's a complex factual issue to be determined,
 7 the nature of the hydrologic connection. But, again,
 8 we have alleged that that groundwater is depleting the
 9 river. And to the extent it is depleting the river,
 10 it has to be accounted for.

 11 SPECIAL MASTER: So, again, let me sort of
 12 try to clarify Montana's view on this.

 13 So, first of all, it's Montana view that to the
 14 degree that there's hydrologically interconnected
12:04 15 groundwater, that if as a result of its pumping it's
 16 impacting pre-1950 prior appropriators in Montana,
 17 that that would be a violation of Article V-A? Is
 18 that correct?

 19 MS. BOND: Yes, your Honor. That's correct.

 20 SPECIAL MASTER: Okay. And is it also
 21 Montana's view that if one includes groundwater in V-A
 22 one also needs to include groundwater in the
 23 administration of Article V-B?

 24 MS. BOND: Yes, your Honor. I think that
 25 the difference in terms of the scope of those two

12:04 1 clauses within Article V -- There is a difference in
2 scope. Article V-B covers Interstate tributaries.
3 Those are defined, but groundwater is -- I would think
4 you could take judicial notice that groundwater
5 pumping can have an effect on surface water. It may
6 be a change in hydrologic pressure, it may be a change
7 in groundwater gradients. It may not be a molecule
8 for molecule exchange. Because we alleged there's
9 some depletion, it has to be accounted for, and I
10 think that's true both of "B" and "A" because it's not
11 exclusive. The Compact is intended to be
12 comprehensive of the system.

13 SPECIAL MASTER: So, therefore, if
14 groundwater is covered under Section V-A, --

12:05 15 MS. BOND: Yes.

16 SPECIAL MASTER: -- then that also means
17 that the Compact is covered under Section V-B. And if
18 you -- Again, if we believe it's hydrologically
19 interconnected, it needs to be taken into account in
20 the allocation of water between Montana and Wyoming
21 for the various tributaries.

22 What I am asking is is there any way that one
23 could conclude it's covered under V-A and now conclude
24 it's also covered under V-B for purposes of the
25 allocation.

12:06 1 MS. BOND: I don't think so. I think the
2 only -- As I said, the Compact is a fascinating
3 document. We feel the more and more you will read it,
4 you will see that the articles have different
5 coverages.

6 Article X, as we have noted, is a basin --
7 Yellowstone River Basin, geologic -- geographic
8 definition. You can't transport water out of the
9 Basin without the consent of the parties.

10 And Article V-B(1) is unused and unappropriated
11 water of the Interstate tributaries. Potentially,
12 there's groundwater in the Yellowstone River System
13 that may not be hydrologically connected to the
14 Instate tributaries, but that -- I don't think it's a
12:07 15 conceptual matter. It makes sense to say it's
16 comprehensive. Anything that you do in the system
17 that affects the river has to be accounted for.

18 SPECIAL MASTER: So is it your position that
19 I could resolve the question under Article V-A without
20 it impacting the interpretation of Section V-B with
21 respect to groundwater?

22 MS. BOND: Well, put another way, that the
23 answer would be the same for both articles?

24 SPECIAL MASTER: So the question is -- So
25 one of the questions that I have --

12:08 1 MS. BOND: Am I missing something? I am
2 missing something.

3 SPECIAL MASTER: If I ultimately -- As a
4 special master, I will have to and the Supreme Court
5 will have to address the question of whether or not
6 groundwater is covered under Section V-A. What I am
7 wondering is that, if one decides that groundwater is
8 covered under Section V-A, does that mean it's also
9 covered under Section V-B, which gives that ruling
10 broader implications than just limited in Section V-A.

11 MS. BOND: Yes, your Honor. I think I have
12 been standing here too long because I was not
13 tracking. Yes, I think groundwater is not excluded.
14 It is included in the Compact and must be considered
12:08 15 in the appropriate -- in the apportionment and
16 allocation.

17 And the answer is not different from V-A to V-B.
18 The Compact covers groundwater. It's in. Which is,
19 of course, how all the tributaries are. There are
20 compacts that don't even mention groundwater. It
21 would be similar to Wyoming saying you have got this
22 compact but there's no state line call right, but now
23 you also can't file an equitable apportionment action,
24 you can't do anything to protect those rights with
25 respect to groundwater.

12:09 1 If it's excluded, then as the other Supreme Court
2 cases have held, if it's excluded and impacts the
3 allocation or apportionment, then that's defeating the
4 plain language of the compact by allowing them to
5 stick the straw in the ground.

6 SPECIAL MASTER: Just some very quick
7 factual questions. The first is I couldn't find any
8 reference to groundwater in the negotiation history of
9 the Compact. Are you aware of that?

10 MS. BOND: There is a chapter on groundwater
11 in the Federal Power Commission report that
12 includes -- erroneously, I think -- that the impact of
13 groundwater pumping at that time was insufficient to
14 affect the service flows.

12:10 15 So in the sense that it corroborates our
16 understanding that the -- All of the engineering and
17 Department of Interior studies of the Yellowstone
18 Basin looked at it from a good engineering and
19 hydrologic standpoint, a hydrologic whole, but that
20 goes back to 1940. The question for them was is it
21 affecting the river.

22 We think that was carried through to the Compact.
23 If we didn't think it was, it would have been
24 included. But, again, we cite Virginia versus
25 Maryland and say it's not excluded, and the drafters

12:10 1 knew how to exclude things.

2 SPECIAL MASTER: Prior to the rise of this
3 particular controversy, has there been any discussion
4 of groundwater in connection with the Yellowstone
5 River Compact that you are aware of?

6 MS. BOND: Your Honor, if you have looked at
7 the record, you will see it was increasingly at the
8 time of the Commission because of the massive pumping
9 associated with coal bed methane. That's a very
10 recently developed industry. All states are
11 struggling with that.

12 I am not aware of it being brought to the
13 Commission. Again, my -- We do view the Commission as
14 limited to administering the post-50 water. So that
12:11 15 may be part of the reason that more specific issues
16 weren't brought to the Commission in the past.

17 SPECIAL MASTER: You might have addressed
18 this in your brief. I can't recall at the moment, but
19 was there any law or administrative policy in Montana
20 at the time that the Compact was negotiated regarding
21 hydrologically interconnected groundwater?

22 MS. BOND: Well, Smith versus Duff is a 1911
23 case.

24 SPECIAL MASTER: So Smith v. Duff is the
25 answer.

12:12 1 MS. BOND: Correct. The State recognized,
2 as does Wiel or Wiel, that if it's connected it's
3 connected. It doesn't matter whether you take it from
4 below the surface of the ground or not. We did have
5 some groundwater codes -- The first one I am thinking
6 of is 1961 though.

7 SPECIAL MASTER: Okay. Thank you very much.

8 If you want to take one more minute to
9 summarize --

10 MS. BOND: I am so confused now. Thank you,
11 your Honor.

12 I guess I would just summarize and point out that
13 we think the United States was right and we think we
14 are right that the Compact provides a full equitable
12:12 15 apportionment of the Yellowstone River System, and
16 provides three tiers of water and necessarily provides
17 a cause of action for Montana against Wyoming when it
18 is diverting and depleting more than its allocated
19 apportioned share under the Compact, the means by
20 which various depletions are made to our detriment,
21 which we believe we have proven.

22 SPECIAL MASTER: Thank you very much.

23 Okay. Mr. DuBois, counsel for the United States.
24 I should point out here that the United States is
25 appearing as amicus curiae.

12:13

1 MS. DuBOIS: Good morning, your Honor.
2 Mr. DuBois for the United States. As you said, the
3 United States is appearing as amicus curiae in this
4 action.

5 I think that it's been gone over, but I think
6 it's important to remember that we are here simply on
7 a motion to dismiss. And the primary issue is whether
8 Montana stated a claim upon which it can be granted or
9 not, and so has Montana stated the factual
10 allegations. It must be sufficient to raise a right
11 of relief above the prayer for relief on the
12 assumption all the facts have been reached are true.

12:14

13 I think to resolve the motion to dismiss the
14 Court needs to focus on a few fairly focused issues.
15 The first one, obviously, I think everyone has brought
16 up is whether or not Montana is entitled to seek
17 protection under essentially V-A for the existing
18 rights, and they have four separate theories for
19 postulating that as far as types of post-1950 water
20 development that can be asserted.

21 If the Court -- If the Special Master determines
22 that there is no ability to protect the pre-1950 water
23 rights, the case is over. If the Court determines
24 that there is a right of action under V-A, then we
25 would encourage the Court to address each of the

12:15 1 individual -- four individual theories in order to try
2 to move this matter along.

3 Mr. Michael cited to Ohio versus Kentucky.
4 Essentially, the object of all this is to try to get
5 the current parties to the merits of the controversy
6 as quickly as possible.

7 Now, as to the central question, I think it's
8 been reiterated by Montana several times that we agree
9 that the Yellowstone River Compact allows Montana at
10 least a limited right of redress. The text of the
11 structure and the history of the Compact establishes
12 Article V-A protects pre-Compact rights against
13 post-Compact diversions in Wyoming.

14 Our primary starting point for all of these --
12:16 15 for the Compact or contract or statute has to be the
16 plain text of the Compact. Article V-A states that:

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

24 I believe Wyoming has asserted essentially
25 Montana froze those water rights in place, but we

12:16 1 really didn't get, I think, a clear idea of what it
2 means to freeze them in place. What does it give to
3 either side if you have frozen them in place? I
4 think, as we pointed out, it's unclear after all the
5 argument whether or not Wyoming is taking the position
6 that they are excluded -- the pre-1950 water rights
7 are excluded from the allocation or whether it is
8 simply freezing the allocation.

9 I think we take the position -- the United States
10 would take the position that it is not an exclusionary
11 provision in V-A. There are other provisions that
12 clearly exclude water from the Compact. But the
13 continue -- shall continue to be enjoyed, the United
14 States serves, is a substantive provision. You read
12:17 15 it together with V-B where it also used the term water
16 is to be enjoyed in relation to waters that are
17 clearly allocated to the supplemental water rights.
18 Specific use of the word allocation is in there. We
19 would have to say that that is -- those two need to be
20 read together as similarly being substantive, that
21 these are allocations of water.

22 So you have got a block, I think, that's been
23 described as a block of water to each state under the
24 V-A allocation, if you will, and then in V-B you have
25 got a directive that of the unused and unappropriated

12:18 1 waters of the Interstate tributaries as of January 1,
2 1950 there is allocated to each state supplemental
3 rights to be acquired and enjoyed in accordance with
4 the laws governing the acquisition and use of water
5 under the doctrine of appropriation.

6 I think that the other piece of the plain text
7 and parallel construction you have to look at here is
8 under both V-A and V-B you have got reliance on the
9 doctrine of appropriation. Within V-B, you twice have
10 the use of the expression the unused and
11 unappropriated waters of the Interstate tributaries.
12 In the first use of that, it is the unused and
13 unappropriated waters. That is defined for the
14 supplemental rights in the context of the doctrine
12:19 15 provision.

16 I think that the understanding of the doctrine of
17 appropriation is a background for both states, and
18 both states' view of the language is important. It's
19 critical. Because under the doctrine of
20 appropriation, which has been described in several
21 places but as a general proposition was described by
22 the Supreme Court in Wyoming versus Colorado, the
23 fundamentals of the doctrine of appropriation are
24 essentially a right of continued use by priority of
25 appropriation. That is a fundamental tenet of the

12:20 1 whole appropriation doctrine is the ability to protect
2 that existing use from being imposed on or intermeshed
3 by a subsequent use.

4 So we believe that the use of the unused and
5 unappropriated term in defining what is then subject
6 to the division of water in V-B is critical. I think
7 this is where we ultimately disagree with the State of
8 Wyoming. Mr. Michael postulated that if you read that
9 only in context of state law that each state can take
10 whatever still is wet within their state and say,
11 well, it's still wet, it's still here, someone can
12 appropriate it. It's unappropriated only within that
13 state.

14 I think that the larger context here, however,
12:21 15 the plain language of this is that you are defining
16 unused and unappropriated as all the leftover water,
17 the remainder of the water. I think you have to view
18 that in the context of -- I think some of your
19 questions alluded to it. It's interstate essentially.
20 It's that water has been appropriated by the water
21 rights that were attempted to be fixed.

22 And under V-A both states had extremely
23 technological questions that's reflected in the
24 negotiations, that they were very concerned about
25 protecting what they had and what their appropriators

12:22 1 had before you start worrying about dividing with your
2 neighbor.

3 So I think that with that background, the
4 appropriation doctrine is a proposition. It's
5 important to view the plain meaning as you wander
6 through this compact.

7 You have got Article V-A saying that the existing
8 water rights as of January 1, 1950 shall be enjoyed
9 under the doctrine of appropriation.

10 And then within the general concepts of the
11 doctrine for appropriation, the unused and
12 unappropriated water, what's left after those water
13 rights were satisfied, is subject to the division
14 either -- for supplemental water rights.

12:22 15 And then the remainder -- As the third-tier water
16 is set out in V-B, the remainder of the unused and
17 unappropriated water is divided by percentage.

18 So that's, I think, the central thrust of the
19 text itself is it's a provision of all the water of
20 the system by essentially those three categories, but
21 the second two categories are -- only come from that
22 portion that is still unused and unallocated within
23 the prior appropriation doctrine, not the law of an
24 individual state. But it uses the term as a broader
25 term, the doctrine of appropriation.

12:23 1 That general priority matters only to the
2 division of water in V-B, which is the supplemental
3 rights and the percentage allocation. It's not,
4 however, applied that -- The unused and
5 unappropriated, of course, doesn't apply to V-A where
6 you clearly have a division to each state where they
7 clearly rejected interstate administration. But that
8 does not foreclose the interstate administration to
9 some extent, some limited extent with the waters
10 allocated in V-B that only come from that unused and
11 unallocated.

12 To accept Wyoming's interpretation, I think,
13 would be to ignore the plain language and to adopt an
14 interpretation that really washes the term unused and
12:24 15 unappropriated waters from the doctrine of
16 appropriation. Because essentially, I think, it's as
17 Montana has stated it, it cuts off their actual right
18 to continue to use and enjoy under the doctrine of
19 appropriation the water that had been appropriated and
20 placed in beneficial use.

21 I think there's been some argument that the
22 position advocated or suggested by the United States
23 is perhaps somehow inconsistent with the avertable
24 flow principle adopted under V-B, third tier, if you
25 will, and V-C. I don't think that that is a correct

12:25 1 interpretation. I don't think that -- Because the
2 avertable flow principle is only applied to the
3 third-tier water, I don't think that it's a meaningful
4 distinction in the context of determining whether or
5 not V-A provides some redressible protection or not.
6 I think to some degree the distinction between
7 convertible flow and depletion for the central
8 questions in this case is a bit of a red herring.

9 I think the United States' interpretation of
10 Article V of the Compact is consistent with the
11 preamble of the Compact, which says that it's the
12 desire of the States to remove all causes of present
13 and future controversy between the States with respect
14 to the waters of the Yellowstone River and its
15 tributaries and a desire to provide for an equitable
16 division and apportionment of such water.

17 It's the entire flow, the entire -- all of the
18 waters of the Yellowstone River System. And in
19 reading that, I think it's also relevant to note that
20 it was -- the reason we would conclude that V-A is a
21 substantive allocation, if you will, and division of
22 water is that there were present controversies in the
23 '30s and the '40s up until 1950 that had to do with
24 the flow certainly of the Tongue and Powder. So there
25 were existing controversies with water rights that

12:27 1 existed prior to January 1, 1950.

2 The suggestion that that was all punted and left
3 for another day or just excluded would not affect the
4 purposes noted in the preamble to resolve present
5 controversy as of 1950. Those controversies existed.
6 The only way you get to resolving those controversies
7 and preventing future controversies about that same
8 issue is if you divide the water and you move on from
9 there, but you don't just sort of say, well, we are
10 going to ignore it and not deal with it and exclude it
11 from the Compact. I think that just goes to the fact
12 that that water was not excluded from the Compact,
13 that it is, in fact, included.

14 I think that Wyoming -- I don't recall that
12:28 15 Wyoming mentioned this in the argument today, but one
16 small point as far as the briefing is that they
17 suggested in the briefing that all of the water --
18 basically, the only way you have a violation of the
19 Compact is when the water is divided on this basis. I
20 think that the term -- the meaning of the plain terms
21 of the Compact refute that.

22 The only application of the annual split, annual
23 count of water only applies to the third-tier water.
24 The second portion of the allocation of V-B, which
25 goes to the remainder of the unused and unappropriated

12:29 1 water, is divided by a percentage basis. And then
 2 that's where the annual accounting occurs is only
 3 within that third tier, not within the first tier of
 4 pre-1950 or the second tier of supplemental waters.
 5 Again, allocated on appropriation priority, so that
 6 priority level actually then is created using V-B.

 7 SPECIAL MASTER: So I want to make sure that
 8 we don't run out of time for addressing both the
 9 increased efficiency issue and the groundwater issue.
 10 So let me just start out with a very general question.
 11 How does the United States suggest that the Special
 12 Master and the Court resolve the question of increased
 13 efficiency? Is the answer in the terms of the Compact
 14 itself or do I have to look beyond the Compact to
12:30 15 state law?

 16 MS. DuBOIS: I think the answer, your Honor,
 17 is it's not addressed under the Compact. I don't
 18 think -- In this respect, I don't think the language
 19 is as clear as in other respects. I -- I think that
 20 you end up looking sort of sequentially.

 21 I think you start with is it in the Compact. I
 22 have to say I don't think that it's gin clear. I
 23 believe what we have set forth in our brief is that
 24 you would have to look at -- ultimately at the laws of
 25 the state.

12:31 1 Sort of sequentially I think what this compact
2 sets up is the doctrine of appropriation, and I think
3 that Ms. Bond is correct that there is at least some
4 general concepts of the doctrine of appropriation set
5 forth in, for instance, Wyoming versus Colorado and
6 brought along in some other cases. There's some
7 general understanding level.

8 However, I do not think that any of those cases
9 get down to the sort of nitty-gritty detail that you
10 are talking about here as far as, you know, increased
11 efficiency. I don't recall anything in the language
12 of those cases that lay out the general precepts of
13 the doctrine of appropriation that would be
14 particularly helpful in that regard. I may be wrong,
12:32 15 but I don't recall any.

16 Sitting back here listening to your questions and
17 thinking is there anything, I don't think there is, at
18 which point I think you have to come back to the --
19 beyond sort of the general definition of what's
20 appropriated or unappropriated water down to those
21 kinds of specifics. I think you probably need to
22 investigate the state law.

23 SPECIAL MASTER: So if you will assume for a
24 moment that Wyoming law differs from Montana law on
25 this particular point and that the states differ on

12:32 1 this particular question --

2 MS. DuBOIS: I think they do, your Honor.

3 SPECIAL MASTER: How should I resolve the
4 question under this particular compact? Does the
5 Compact incorporate the law of each individual state
6 for the rights in those states or is there, again,
7 some broader prior appropriation law?

8 MS. DuBOIS: I think -- Depending on the
9 question, I think it's a combination. As I said, I
10 think there's a general issue as far as the
11 unappropriated -- what that means and what that means
12 in a general sense.

13 However, when you get down to this letter, I
14 think that it probably -- Certainly, we relied on
12:33 15 Wyoming state law and agreed. I think that what
16 Article V-A provides is that those existing rights
17 shall continue to be enjoyed under the doctrine of
18 appropriation. I think you are then looking at the
19 appropriation doctrine as that applied to the existing
20 water rights that were defining the -- define these
21 allegations that go with any water right in a
22 particular state.

23 I mean, you can change it under these conditions
24 in this state and these conditions in this state.
25 It's strictly pertinent to -- For instance, in some

12:34 1 states you might have irrigation water that has to be
2 impervious to the land. I think those things would be
3 unique to a state.

4 So I think in looking at that and looking at the
5 intent of the parties as manifested in the
6 negotiations, they were certainly intending to protect
7 the attributes of the existing water rights when they
8 drafted V-A to protect the water rights as of
9 January 1, 1950. So I think that ultimately as you
10 sort of go down that hierarchy, you end up back with
11 state law.

12 SPECIAL MASTER: On the question of
13 groundwater, look back at the special master's first
14 report in Kansas versus Nebraska. And the special
12:35 15 master there found that the language was clear and
16 unambiguous, and therefore he did not need to look to
17 any type of supplemental evidence as to the meaning of
18 the language. But he then did go on to talk about
19 some of the other broad indicia.

20 MS. DuBOIS: There I believe the special
21 master was also looking at a substantial amount of
22 discussion in the Arkansas -- or the governing rules
23 that made it abundantly clear.

24 Perhaps more instructive to some degree might be
25 the Kansas versus Colorado case. Mr. Draper has

12:36 1 intimate knowledge of that. But in that case and what
2 you can take from both of these cases is that these
3 were compacts that were compacting the surface flow.
4 They compact the surface flow. They measure the
5 surface flow. Your compliance or non-compliance is a
6 function of the surface flow.

7 And there is no specific mention of groundwater
8 in the Arkansas River Compact. Yet, because the
9 intent of the compact is to resolve the issues
10 regarding the allocation of the flow and because
11 development of groundwater can affect that flow, the
12 courts have very pragmatically on very different
13 languages -- The fact that this language and this
14 compact is different than the Arkansas River Compact
12:37 15 aren't any different than avertable flow versus
16 depletion.

17 The takeaway from all those cases is the court
18 looked at it pragmatically and said this is about
19 dividing the flow, things that affect that flow should
20 be accounted for. It's not a --

21 I think it has been suggested this morning that
22 to include groundwater you should -- The only question
23 is what about -- what do you do with groundwater
24 development that in the terms of this compact depletes
25 those rivers by taking or removing water from the

12:38 1 Interstate tributaries. That's the only real
2 question. And that is doable. Is it messy?
3 Absolutely. But it is part of what is being
4 allocated.

5 Ultimately, it impacts the surface flow. Do you
6 regulate all groundwater as a result? Not
7 necessarily. What you have to do is figure out what,
8 if anything, of the groundwater problem is impacting
9 the river. If it's not -- If you get into the factual
10 allegations made by the State of Wyoming, those aren't
11 relevant at this point. But when you get there, if
12 there's no hydrologic impact, who cares? It doesn't
13 affect this compact at that point.

14 So I think that that is the distinction there,
12:39 15 but the takeaway from the relatively infamous compacts
16 on the Arkansas and Republican rivers, which do not
17 specifically mention groundwater in either case, talk
18 about diversion flow on the Republican River and
19 things that affect it. But they still talk about the
20 diversion flow of the Republican River, what's in the
21 channel, and it goes out from there to what affects
22 that flow. That's really, I think, the takeaway.
23 That, again, does not matter whether you are talking
24 about a depletion compact or diversion compact. It
25 all comes down to flow.

12:39 1 In the case of the Colorado -- of the Arkansas
2 River Compact, it's also timing of flow. Because the
3 measure of compliance with that compact is whether or
4 not Colorado has depleted usable flows at the Kansas
5 state line. That's the issue, not unlike what we are
6 talking about here. You know, if there's groundwater
7 diversion that is simply within the second or third
8 tier, then it's not the equivalent of impairing the
9 usable state flow.

10 SPECIAL MASTER: So two others questions.
11 The first gets back to one of the issues I was
12 discussing with Ms. Bond, and the question is what
13 potential implications are there of a ruling on the
14 question of groundwater and Section V-A for
12:40 15 groundwater and Section V-B.

16 Do you have a view as to whether or not one can
17 conclude that Section V-A does cover groundwater to
18 the degree that, if groundwater is interfering with
19 pre-1950 rights, that you can ask for groundwater
20 to -- Can water be included in groundwater as relevant
21 in Section V-A but not Section V-B?

22 MS. DuBOIS: I don't think you can, your
23 Honor. I think it's the same thing. It's a matter of
24 whether or not the groundwater pumping is taking or
25 removing water from the stream that is either

12:41 1 allocated under V-A, appropriated potentially under
2 V-B, one, second tier, or simply is part of the taking
3 water when there's unused and unappropriated water
4 available in the stream. It's the same basic analysis
5 of impacts on flow.

6 And it's not that it would be prohibited. It
7 simply has to be accounted for. And whether or not
8 that means, you know, a compensable, recoverable
9 injury, there's a thousand ways -- I am sure you are
10 well-aware to remove water to the extent that you have
11 got an adverse impact that you have to cover that.
12 Obviously, you have delayed impacts and more complex
13 hydrology than turning the pump on and off. But
14 there's other ways to deal with that.

12:42 15 So you have to deal with that both in relation to
16 V-A and whether there's a violation of V-A, which I
17 think is the only thing that's been appropriately pled
18 at this point, versus sort of how exactly you can
19 account for it under V-B.

20 SPECIAL MASTER: Let me actually get down to
21 an issue that you just raised, which is that Montana
22 in its brief on the motion to dismiss says that they
23 are arguing that not only is Wyoming violating
24 Section V-A but that Wyoming is also violating
25 Section V-B. And in your brief, you suggested that

12:43 1 Montana cannot under their Bill of Complaint, as
2 described in their motion for leave to file the bill,
3 make an argument under Section V-B.

4 So let me split it into two parts. The first is
5 I assume you are not suggesting that Montana can't
6 rely upon V-B and other sections in interpreting
7 Section V-A.

8 MS. DuBOIS: Correct.

9 SPECIAL MASTER: But instead what you are
10 suggesting is they can't make an independent argument
11 of a violation under Section V-B. Is that what you
12 are saying? Explanation here would be helpful.

13 MS. DuBOIS: No, I think that it's much more
14 simple than that. I don't think they pleaded it. You
12:43 15 know, whether they could make one, I suppose -- I
16 mean, I can come up with imaginative ways to make one,
17 but they haven't pleaded it at this point.

18 SPECIAL MASTER: Your view is they have not
19 pled it. Montana says, if you look at the actual bill
20 of complaint, they just refer to Section V, not
21 specifically Section V-A. You're suggesting that the
22 complaint should be read in connection with the motion
23 for leave to file the bill. And since that really
24 focuses on V-A, that's what the complaint should be
25 limited to.

12:44 1 MS. DuBOIS: I think that my recollection of
2 the Bill of Complaint -- Unfortunately, I did not read
3 that yesterday -- is that the factual allegations they
4 make are that, one, their 1950 water rights have been
5 injured and that through these various mechanisms
6 there have been post-1950 depletions or diversions in
7 Wyoming that cause injury. From that, I think that
8 one can really only fairly tease out that they alleged
9 that the V-A water rights have been injured by V-B
10 diversions. I don't think whether they could or not
11 amend it or not and make a claim for relief under V-B
12 is a different question, but I don't think they pled
13 it at this point.

14 SPECIAL MASTER: Let me ask the question a
12:45 15 slightly different way. I hate to get into some of
16 these more minute points, but in deciding whether or
17 not Montana is entitled at this point in time without
18 trying to amend their bill of complaint to raise
19 independent arguments under Section V-B, should I look
20 simply to the bill of complaint? And if I find that
21 clear on its face, then that ends the matter, or am I
22 also supposed to look at the motion for "B" to file
23 the bill of complaint?

24 MS. DuBOIS: I don't know if I have an
25 opinion on that. I am leery -- I am leery on simply

12:46 1 relying on a pleading, although I think certainly in
2 this case that the brief in support did clarify some
3 of the ambiguity in their complaint. And I believe in
4 our response to Wyoming's motion to deny the bill of
5 complaint we put -- we did make some reference to
6 the -- to the brief as helping to clarify. Having
7 done that, I think -- As much as I am somewhat
8 reluctant to go beyond the face of the pleading, we
9 have done so already ourselves in our pleading.

10 So I think it should not be ignored, but I would
11 say primarily the source document is the bill of
12 complaint. But the Court has already found that's at
13 least adequate to get to the motion to dismiss. So
14 there is sufficient clarity at that point. And --

12:47 15 SPECIAL MASTER: We are definitely out of
16 time. Okay. Thank you very much.

17 MS. DuBOIS: Thank you.

18 SPECIAL MASTER: So, Mr. Michael, I assume
19 you would like to respond.

20 MR. MICHAEL: Thank you, your Honor. I
21 would. I know we are running over a little. I have
22 two points I would like to make.

23 SPECIAL MASTER: I want to make sure that
24 you feel that you had adequate time.

25 MR. MICHAEL: I appreciate that very much.

12:48 1 Let me maybe start with some comments. I think a
2 lot of these issues come together fairly well, and I
3 think Mr. DuBois stated some things that kind of
4 brought some issues to a head. And I think we all
5 know what they are. I will just repeat them and
6 respond to those.

7 The question that I think the Court has to ask --
8 Let me go back a page. I wrote it down here. I had
9 five stars next to it -- is how are the existing
10 rights -- pre-1950 water rights existing in each state
11 as of 1950 protected by the Compact.

12 And Montana really is saying that those rights --
13 They are not protected from other pre-50 rights. They
14 concede that, but they say they are protected from
12:49 15 Wyoming's diversions to post-1950 rights. And they
16 say that the means of protection is clearly an ability
17 to do an interstate call across the state lines, which
18 the Compact drafters, I believe, had a word for it and
19 the Secretary of the Interior Chapman had a word for
20 it. It was the word you asked the question about,
21 which was administration.

22 As we look -- That's one side of the question is
23 is there an administration intended here across state
24 lines. Because administering pre-1950 rights to call
25 off pre-1950 rights, which is what Montana says can't

12:50 1 happen, but administering pre-1950 rights in Montana
2 does not adjudicate and has many differences with what
3 Wyoming would consider a proper water right or proper
4 amount with the proper priority taken against a
5 Wyoming post-50 right. It's the same process.
6 There's nothing different. You have to do the same
7 thing, and you have to do the things that -- The
8 drafters said, my goodness, if we do this --

9 Let me grab a note. I wanted to read just to
10 emphasize this point, one thing said in the materials.

11 This was Commissioner Newell in his report to
12 Congress.

13 SPECIAL MASTER: Is this in the Joint
14 Appendix?

12:51 15 MR. MICHAEL: It's in the Joint Appendix.

16 SPECIAL MASTER: Is there a page?

17 MR. MICHAEL: It's Page 17. I will just
18 read it because I think this is a really important
19 concept that we have to keep in mind. Before I talk
20 about how the protection was granted, this is the
21 protection we believe Montana doesn't have. We have a
22 recognition of rights but no protection.

23 "In earlier attempts to arrive at a
24 compact and in the earlier meetings here
25 reported, there was searching discussion as

12:51 1 to whether the agreement sought on division
 2 of waters should include the water now
 3 appropriated and in use or should apply only
 4 to the unappropriated and unused balance
 5 which is available for further development.
 6 The latter principle was decided on
 7 (Article V-A) for several reasons."
 8 This is where I am talking about the reasons now.
 9 First -- This is the one I want to focus on.
 10 "First, it would be a huge and
 11 time-consuming task to determine and fix
 12 comparable values for existing rights in
 13 three states with differing water laws and
 14 practices in establishing water rights".

12:52 15 The second one is -- I guess that's a reason not
 16 to impose interstate prior appropriation. The
 17 question is -- The question we ask ourselves is, if
 18 today the United States and Montana think it would be
 19 a little more fair based on what they think today to
 20 impose interstate prior appropriation, that's not the
 21 question we are here for.
 22 The question we are trying to determine is what
 23 did the drafters think was a fair deal in 1950. What
 24 the engineering committee suggested and what the
 25 drafters felt and what Mr. Newell confirms here is

12:52 1 that setting up a system of interstate prior
 2 appropriation is fraught with problems. What would
 3 those problems do? Those problems would delay the
 4 process. And what would delaying the process do?
 5 Well, it's referred to in the very next sentence that
 6 Mr. Newell discusses. He said:

 7 "Second, the basic fact that there is
 8 enough water if properly conserved by
 9 storage to take care of all existing and all
 10 feasible future developments points up
 11 the importance of arriving promptly at the
 12 simplest workable agreement that would
 13 permit such storage projects to proceed."

 14 Speed, simplicity, and storage. Now, what I
12:53 15 learned from the last several hours of argument by
 16 Montana and the United States is that, if you take
 17 this case forward on the proposition that these
 18 drafters understood that establishing interstate prior
 19 appropriation scheme as to any interaction of these
 20 rights would be very, very difficult and very, very
 21 time-consuming, you would have to accept their
 22 argument, accept the proposition that the drafters
 23 decided, fine, we won't say anything about it, we
 24 won't do this, and we will just put it off to the
 25 future and let it be made up by a special master at

12:54 1 some later date, and hopefully the Supreme Court will
2 confirm that determination.

3 I would submit to you that what happened at that
4 time in 1950 was that the drafters decided and Montana
5 decided that, if we can build the storage, that's task
6 number one, and to get to that task we need to
7 complete a compact here. And we can't build an
8 interstate prior appropriation scheme if the other
9 attorneys that talked here today are struggled with
10 this.

11 As you asked specific questions, what would it
12 mean, whose law would we apply, do we look to Wyoming
13 law, do we look to Montana law, what would the federal
14 law be, what would be fair, what do we think is fair
12:54 15 today, what do we think was fair then, all those
16 questions, on and on and on, the answer was this is
17 not what we would try to do to protect Montana's
18 pre-1950 rights. We will recognize those rights, but
19 that doesn't mean, as I said earlier, that those
20 rights are left without protection.

21 Obviously, the first thing is priority
22 protection. The priority protection occurs when you
23 build the storage. And the storage was mentioned
24 directly, that that is the primary task here, to build
25 the storage.

12:55 1 And there's quotations. I won't read them now.
2 We don't have time, but there's quotations in the
3 materials about if we build the storage. Mr. Leonard
4 said at one point, if we build the storage, we are
5 okay for 100 years. It's on and on and on like that.
6 So the storage.

7 The other thing that's protection for pre-50
8 water rights is each state's existing law under V-A.
9 Each -- Pre-50 water rights in Montana will be calling
10 off within their own state post-50 water rights in
11 Montana. As that occurs, as I mentioned earlier, the
12 ingenious provisions and simplicity and ingenuity of
13 the Compact comes into play.

14 And as those pre-50 rights are called off, the
12:56 15 post-50 rights are called off, the diversions to those
16 rights stop and the avertable flow total stops
17 growing. Wyoming's ability to take 40 percent stops
18 growing. So it actually does have -- The interstate
19 law as applied within the State of Montana has an
20 impact on Wyoming's post-50 use. Post-50 diversions,
21 I should say.

22 So I think that there is protection. I think
23 that's the question. But do we go back today and say,
24 well, we got these three types of protection and our
25 drafters definitely decided not to include language

12:56 1 that erases the state line under V-A, but that's not
2 good enough, we would like the icing on the cake now?

3 I guess the bottom line to that is a deal is a
4 deal. And the history is important. And the deal was
5 a fair deal then. And if they don't think it's fair
6 now, it's really too bad because a deal is a deal. We
7 have to look at the history to determine what the deal
8 was.

9 The fact is that numerous interstate compacts
10 don't have any prior appropriation. That's a rarity
11 to have prior appropriation law, the interstate prior
12 appropriation law incorporated in the interstate
13 compact.

14 In this particular case in 1935, there was a
12:57 15 draft that incorporated interstate prior appropriation
16 law. And what it said was it's too complicated for us
17 to figure out now, we will specifically say that the
18 Commission can go ahead and figure out the provisions
19 later. That draft was -- didn't get anywhere.

20 That's what they are telling us now. They are
21 saying what you should do now is recognize interstate
22 prior appropriation somewhere within this compact
23 through the use of one word, unappropriated, and then
24 we will build this whole construct that the drafters
25 didn't want to try to build in 1950 because they

12:58 1 wanted storage to solve the problem.

2 I think you have to look at that balance of what
3 they were trying to accomplish as you read the
4 language of those sections.

5 A couple more points. I didn't -- The United
6 States in their brief did say that -- I felt pretty
7 strongly that Wyoming was correct on the issue of
8 increased efficiency and that under V-A that the laws
9 that existed -- Wyoming law in 1950 determines how
10 pre-1950 water rights get to be continued to be
11 enjoyed, which is our position. They continue to be
12 enjoyed under Wyoming law. I think the United States
13 said that.

14 But I think the backtracking I heard up here on
12:58 15 that a little bit from Mr. DuBois kind of indicates a
16 problem, an inconsistency in the United States' mind
17 and Montana's as well. The inconsistency is, if the
18 efficiency issue under V-A indicates that the law
19 that's being referred to -- the water rights under V-A
20 being referred to are indeed the water rights in the
21 law of two different states, as we argued consistently
22 through the interpretation of all those sections, if
23 that's true for efficiency, that should be true for
24 this concept of how we analyze pre-1950 rights. It
25 should be intrastate.

12:59 1 So I think that the argument that they made in
2 their brief supporting us on the sprinkler system, the
3 efficiency concept, is consistent with us, what we are
4 saying. Our argument is consistent throughout that
5 what the drafters decided to do was erase the state
6 lines and look at each state's law.

7 As I said before, it does provide Montana with
8 protection and a remedy. The remedy -- Let me get to
9 the remedy question because I think that that's
10 something I would like to talk about for a quick
11 second.

12 One of the questions I have and that really came
13 to my mind when I read Montana's reply to the motion
14 to dismiss is, if you were to decide and recommend to
13:00 15 the Court and the Court decides that Wyoming is
16 correct and there is no interstate prior appropriation
17 scheme intended by this compact and, in fact, this
18 compact can, in fact, be violated but it's violated if
19 a post-50 -- if Wyoming's cumulative percentage of
20 post-50 use on any given date and water year is over
21 40 percent on the Tongue River or over 42 percent on
22 the Powder, -- In other words, the cumulative
23 avertable flow is met -- if that's true and that's the
24 only theory upon which Montana could succeed, had they
25 adequately pled that theory in their bill of

13:01 1 complaint, if they had and you ruled that way, then
2 the case, I think -- If you think that that was
3 adequately pled, then we proceed on and we decide not
4 whether -- what would happen under interstate prior
5 appropriation scheme. We decide has Wyoming violated
6 the Compact by at some point in the water year going
7 over its percentage.

8 If we have, if Wyoming has done that, that would
9 stay a claim. Montana could stay a claim. I don't
10 think that -- You know, you look at the allegations on
11 Page 3 of their Bill of Complaint, and the allegations
12 are very, very sparse obviously. "Wyoming has allowed
13 new acreage ... in violation of Montana's rights under
14 Article V of the Compact". They don't say whether
13:01 15 Article V-A or Article V-B, and they don't allege that
16 Wyoming has violated the avertable flow principle
17 under the Compact.

18 Again, I am new to the United States Supreme
19 Court practice. I understand generally the Court is
20 not -- doesn't take with great favor amendments to
21 pleadings, so I don't know how that would fit into
22 this discussion. But if we are right and you agree we
23 are right and there's no interstate prior
24 appropriation, I think there's a real serious question
25 as to whether this case ought to be dismissed.

13:02 1 And if Montana wants to come back and bring a
2 case under the proper interpretation of the Compact,
3 if we look at all the diversions, for example, in 2006
4 and 2004 and on June 15th, 2004 Wyoming has a
5 42 percent on the Tongue River, they were over, they
6 violated the compact, then I think that would stay the
7 claim, but I do have my doubts as to whether they
8 stayed the claim.

9 That's as far as I can go on that issue, but I
10 think it's an important issue depending on what you
11 decide to do on these other issues.

12 Let me see if there was anything else real quick,
13 if you will indulge me one more minute.

14 Let me just close with one thing that I think --
13:03 15 I just want to summarize one more thing. It's within
16 the materials, but I think it comes up in the
17 questioning, and that's this. The question I guess --
18 One of the questions I had is, if Montana's right to
19 interstate prior appropriation is alluded to by this
20 compact, why does it only deal with their pre-50s
21 claim in the first place? Why is there not a
22 pre-50 -- If V-A is intended to protect those rights
23 as they existed in those states and it's not under
24 state law, it's under some kind of federal law or some
25 kind of law that we are going to make up in this case,

13:04 1 why would they agree then that pre-50 rights can call
2 off post-50 rights?

3 I think the answer is that V-A doesn't allow that
4 because all V-A does is what we argued. All it does
5 is recognize, as the drafters said, the existing
6 rights as they exist in each state under each state's
7 own law.

8 As I said earlier, each state's own law does not
9 allow anybody in Montana to reach across the state
10 line and say they are appropriating water while still
11 in Wyoming. Whether they are reaching across the
12 state line as a 1948 appropriator to reach across and
13 get a 1949 right, both pre-50, or whether they are
14 reaching across as a 1948 appropriator and asking to
13:04 15 shut off a 1951 right, the principle is the same. I
16 think under V-A the drafters of the Compact did not
17 intend to create an interstate prior appropriation
18 scheme for all the reasons we stated.

19 I think that covers it, unless you have more
20 questions.

21 SPECIAL MASTER: I just have one quick
22 question. That was quite helpful. That is that, in
23 the original brief that you filed in connection with
24 Montana's motion to file the bill of complaint, you
25 raised the question of whether or not Montana's

13:05 1 argument regarding storage facilities pled a
2 legitimate claim because the storage facilities here
3 were in the tributaries. Is that still an issue I
4 need to address? Montana in its briefs noted you
5 hadn't raised it again on the motion to dismiss.

6 MR. MICHAEL: Well, I think it is, your
7 Honor. I think in "B" the drafters -- In V-A the
8 drafters talked about existing rights in the
9 Yellowstone River System, which we have argued, of
10 course, is surface water. Because the system hasn't
11 addressed that in the Compact. Part "B" talks about
12 the Interstate tributaries. It's a very clearly
13 defined term. It's the four main stems of the four
14 rivers.

13:06 15 So if the Interstate tributaries is what "B"
16 deals with and you are trying to calculate whether
17 Wyoming is within the 40 percent, then you have a
18 concern on which reservoirs. If they have man-made
19 storage on a given day, does that reservoir count
20 against total avertable flow? It counts against
21 Wyoming in the numerator of that equation.

22 If you do that, if you go upstream of the
23 Interstate tributaries and you get reservoirs upstream
24 of the Interstate tributaries, then you have departed
25 from the plain language that's used in "B".

13:07 1 Now, the interesting thing about "B" is, further
2 down where it refers to the remaining water, it
3 doesn't say tributaries.

4 Then "C" talks about water -- when you do the
5 count, it talks about water above the measuring point.
6 The measuring point is at the very bottom of the
7 river.

8 So I think there's some gray area there, a
9 certain amount of gray area. I think -- Probably the
10 more sensical interpretation, I would think, would be
11 that when "B" launches into Interstate tributaries,
12 that would be the -- where the drafters envisioned the
13 count occurring on the Interstate tributaries.

14 The reason I say that is it talks so much about
13:07 15 the storage -- the massive storage projects at the
16 state line. The stuff upstream Wyoming attributes is
17 much, much smaller. So I think that would be -- Maybe
18 there's some facts that almost -- At least the layout
19 of the drainage would probably be -- maybe kind of get
20 that to that question.

21 You know, there's one more point that really I
22 think would be helpful to everybody in this case. And
23 maybe I just wasn't listening very well, but I thought
24 I heard Montana say with respect to the reservoirs
25 that, if their theory is correct and they are allowed

13:08 1 to call for water that would be in storage in Wyoming
 2 reservoirs, that they could only store that -- call
 3 for that water at that time going into storage. It's
 4 not water that was stored when everybody had enough
 5 water. That's my understanding from what I heard,
 6 that that's the case.

 7 The argument we made in our brief was that, if
 8 Montana's theory is correct and there is an interstate
 9 prior appropriation that we are going to establish
 10 here under some kind of federal law or some kind of
 11 quasi two-state law or whatever we pick and choose,
 12 make it up as we go along, if we do that, what effect
 13 would that have on reservoirs that stored in priority.

 14 If Montana is conceding that point, I think, if
13:09 15 nothing else today gets accomplished, that issue
 16 should go out of the case if we are in agreement. We
 17 certainly say under any theory of prior appropriation
 18 I know of in the western United States --

 19 Again, if the Court is going to try to impose
 20 this theory that it's some kind of amalgam to state
 21 law or whatever, under either one of the states -- We
 22 cited the Montana 1941 Federal Land Bank case. Under
 23 anybody's theory, nobody, whether they are in Wyoming
 24 or downstream in Montana or in North Dakota, can call
 25 for reservoir storage that was stored in priority. I

13:09 1 think we have established that, if nothing else here
2 today.

3 We hope the case goes forward if we are not
4 successful in our motion, which I think we should be,
5 obviously. Thank you very much.

6 SPECIAL MASTER: Thank you.

7 So let me thank all counsel and everyone who
8 assisted them for the excellent oral arguments today.
9 They have been very helpful to me in understanding the
10 case better and also the various legal issues that
11 underlie this particular case.

12 I do have one or two quick administrative
13 questions. The first one is I asked the parties to
14 put together a Joint Appendix of all of the various
13:10 15 documents that either side relied upon in their
16 arguments. And the Joint Appendix has been quite
17 helpful, and so I thank everyone for the time and
18 effort they had to go to to actually put these
19 together.

20 When we had our original status phone call,
21 however, I got the feeling that there might be some
22 disagreement as to which of the various documents I
23 could actually consider if I felt that the language of
24 the Compact was unclear and I needed to look at any
25 additional documents.

13:11 1 So I guess the question is do you want to present
2 anything in the way of just putting papers on any
3 documents that you don't think would be legitimate to
4 consider? I am not talking here about whether or not
5 you think they are really weighty or not weighty. I
6 just want any document you think neither I or the
7 Court should think about or look at that document in
8 connection with resolving the motion to dismiss.

9 MR. MICHAEL: We wouldn't object to
10 anything, your Honor. I think everything in there
11 could be considered.

12 SPECIAL MASTER: Again, I am not asking you
13 to suggest that one document should be considered more
14 significant than another document. I just want to
13:11 15 know whether there is any dispute that, for example, a
16 particular document shouldn't be considered at all
17 because it's not clear who wrote it, there's no date
18 on it. Those were some of the issues suggested
19 earlier.

20 MS. BOND: Your Honor, we are not actually
21 clear on the -- the relevance of many of the
22 documents. In an ordinary case, they wouldn't be
23 admissible. If it's not relevant, we trust the Court
24 will apply standard Supreme Court rules with respect
25 to the relative importance of congressional history

13:12 1 and so forth. So we don't seek to exclude any of
2 these things.

3 SPECIAL MASTER: That's fine. That's all I
4 was asking for. Obviously, if I do, you will have an
5 opportunity to tell the Supreme Court that I have done
6 that.

7 Now, that raises my second question, which is I
8 hope sometime within the near future I will come to a
9 decision on this particular motion. Obviously, if I
10 decide that the complaint should be dismissed and
11 grant Wyoming's motion to dismiss the entire
12 complaint, then at that point I would file a final
13 report with the United States Supreme Court, at which
14 point both sides would be entitled to bring any
15 exceptions they have to that particular report.

13:13 16 If, on the other hand, I conclude that the motion
17 to dismiss should be denied in whole or in part, I
18 will then be faced with the question of whether or not
19 simply to issue a memorandum of decision and move
20 forward with this particular action or to take the
21 time to actually issue an interim report to the
22 Supreme Court, at which time both of the two sides
23 would be entitled to bring exceptions to that. And we
24 would wait until the Supreme Court addresses that and
25 then we would be back here, unless the Supreme Court

13:14 1 decides to dismiss the entire complaint.

2 Any -- This is something that obviously the
3 Special Master will need to decide looking at the
4 practice of prior special masters in this situation,
5 but are there views that either Montana or Wyoming has
6 or the United States has as to whether or not an
7 interim report would be appropriate at that stage?

8 MS. DuBOIS: Your Honor, I would just note
9 that in Kansas versus Nebraska the interim report was
10 the option and that was -- the Court didn't give any
11 kind of a ruling other than to just accept that as it
12 was and tossed out Nebraska's exceptions, but it at
13 least gave people a very clear place to start with
14 when it came back.

13:15 15 SPECIAL MASTER: Wyoming?

16 MR. MICHAEL: Your Honor, I guess I have to
17 waffle and say it depends. I think there's a
18 possibility, depending on which issues get decided.
19 It could be something we would actually stipulate as
20 to whether we thought you should issue a report. If
21 the issue was significant enough that it didn't
22 resolve the whole case, it might be Montana may think
23 we need to get this decided because, obviously,
24 there's a lot of resources that would go into further
25 levels of this case if we get into facts.

13:15 1 So I think that would be part of the
2 contemplation you make at that time. We certainly
3 would want to talk to counsel for the other parties on
4 that issue at that time.

5 SPECIAL MASTER: Okay. Montana?

6 MS. BOND: Your Honor, I guess we think the
7 recent practice is what we were anticipating and that
8 worked pretty well in that the special master would
9 issue an internal report. If Wyoming is right, then
10 it is a huge waste of resources for us to go forward.
11 So we would expect the Court would issue an interim
12 report, and we can file exceptions to that and the
13 Supreme Court can determine if the case can go forward
14 at that point.

13:16 15 Just for the record, if I might, we forgot to
16 introduce Todd Sattler for the State of North Dakota.
17 They didn't speak, but the record should be complete.

18 MR. SATTLER: I am Todd Sattler. I am an
19 Assistant Attorney General.

20 SPECIAL MASTER: Thank you very much.

21 Again, it's going to depend on my schedule when I
22 can get a decision on this particular motion, and I am
23 expecting, however, that I should be able to do it
24 within four to six weeks. So that's my -- that is
25 what I am going to try for because, you know, I hope

13:16 1 that, you know, as always we can resolve all matters
2 as expeditiously as possible.

3 Thank you all very much for the oral arguments
4 this morning. We are adjourned.

5 (At 1:17 pm the foregoing proceedings were
6 concluded).

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1 C E R T I F I C A T E

2 I, AMY SCHMIDT, CSR, RPR, and a Notary Public
3 of the State of Colorado, appointed to take the
4 foregoing hearing, do hereby certify that the
5 foregoing proceedings were taken by me at The Byron
6 White United States Courthouse, 1823 Stout Street, 1st
7 Floor Courtroom, Denver, Colorado on February 3, 2009;
8 that the proceedings were thereafter reduced to
9 typewritten form by means of computer-aided
10 transcription; that the foregoing is an accurate
11 transcript of the proceedings at that time.

12 I further certify that I am not related to
13 any party herein or their counsel and have no interest
14 in the result of this litigation.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my Notarial Seal this 16th day of
17 February 2009.

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AMY SCHMIDT, CSR, RPR

25 My Commission Expires 09/22/2012

PLEASE ATTACH TO YOUR COPY OF THE HEARING RE:

MOTION TO DISMISS

Re: Montana v. Wyoming and North Dakota
Original 137 - United States Supreme Court
Date of Hearing: February 3, 2009

THIS TRANSCRIPT OF HEARING HAS BEEN FILED

 XXX Signature waived or not required

 Reading and signing was not requested by the
deponent

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sheets, if any, to be filed at trial

 Not signed, notice duly given pursuant to the
Rules of Civil Procedure.

 Signed by the deponent with no changes

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which is enclosed

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enclosed

FILED WITH: BARTON H. THOMPSON, Jr.,
SPECIAL MASTER

DATE FILED: _____

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Enclosures: (As above noted)

cc: Peter K. Michael, Esq.
Sarah A. Bond, Esq.
John Draper, Esq.
Todd Adam Sattler, Esq.
James J. DuBois, Esq.
Jeanne S. Whiteing, Esq.

