

IN THE SUPREME COURT OF THE UNITED STATES

No. 137, Original

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REPORTER'S TRANSCRIPT OF HEARING

July 27, 2012

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STATE OF MONTANA,

Plaintiff,

vs.

STATE OF WYOMING and STATE OF NORTH DAKOTA,

Defendants.

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PURSUANT TO NOTICE to all parties in interest, the above-entitled matter came on for hearing before Special Master Barton H. Thompson, Jr. on Friday, July 27, 2012, commencing at 9:02 a.m., at 1823 Stout Street, Courtroom 2, Denver, Colorado, before Gail Obermeyer, Registered Professional Reporter and Notary Public within and for the State of Colorado.

1 APPEARANCES :

2 MONTGOMERY & ANDREWS

3 By John B. Draper, Esq.  
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8 and

9 STATE OF MONTANA, DEPARTMENT OF JUSTICE

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15 Appearing on behalf of Plaintiff.

16

17 STATE OF WYOMING

18 OFFICE OF THE ATTORNEY GENERAL

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25 Appearing on behalf of Defendant  
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STATE OF NORTH DAKOTA

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Appearing on behalf of Defendant  
State of North Dakota.

19

20 Also Present: James J. Dubois, Esq.  
21 Jeanne Whiteing, Esq.

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23

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25

1 P R O C E E D I N G S

2 SPECIAL MASTER THOMPSON: Please be  
3 seated. I'm not quite used to that. So this is a  
4 proceeding in Montana versus Wyoming and North  
5 Dakota, which is No. 137 Original, in the Supreme  
6 Court of the United States.

7 So good morning, everybody. We have  
8 this courtroom until noon today. And I'd like to  
9 do three things. First of all, we'll have the  
10 hearing on Wyoming's Renewed Motion for Partial  
11 Summary Judgment. And that will take up probably  
12 virtually all of the time.

13 Then, second of all, I want to have a  
14 brief discussion of Wyoming's Motion for Leave to  
15 Amend Its Answer to Include the Defenses of Laches  
16 and Mitigation of Damages. And I understand that  
17 the State of Montana does not oppose the motion  
18 itself. So I think that will be a relatively  
19 brief discussion. But I do want to talk about  
20 that.

21 And then, finally, I want to have a  
22 relatively brief status conference to get a sense  
23 of how the trial is shaping up in the other  
24 original jurisdiction matter before the Supreme  
25 Court at the moment, to just get a sense of how

1 you think discovery is going. And then begin to  
2 talk about trial in this case, which I realize is  
3 still approximately a year away, but we probably  
4 need to start thinking about timing and location.

5 But as I said, what I'd like to do is  
6 start out with a hearing on Wyoming's Renewed  
7 Motion for Partial Summary Judgment. And on that,  
8 what I'm expecting to do is probably to take about  
9 an hour for both sides. But as we have done in  
10 the last couple of proceedings, I'm not going to  
11 actually limit either side to exactly an hour. It  
12 will just depend on how many questions I have and  
13 how much you want to tell me. But, hopefully, we  
14 will finish up sometime a little after 11 o'clock  
15 on that, and then we can go to the other two  
16 matters.

17 So let me just, at the very outset, ask  
18 whether there's anything else that we should have  
19 on our agenda this morning, other than those three  
20 items? If not, then let me ask you to start out,  
21 for the court reporter's purposes, with just  
22 identification of counsel who are here this  
23 morning. So, actually, let's start with the State  
24 of Wyoming.

25 MR. MICHAEL: Your Honor, Peter

1 Michael, State of Wyoming, Chief Deputy Attorney  
2 General. With me at counsel's table are David  
3 Willms and James Kaste. We've got some other  
4 attorneys who are involved in the case as well,  
5 but behind the bar.

6 SPECIAL MASTER THOMPSON: Thank you  
7 very much, Mr. Michael. And then the State of  
8 Montana, please.

9 MR. DRAPER: Your Honor, John Draper,  
10 counsel of record for Montana. With me is Jeffrey  
11 Wechsler, from our office, and Jennifer Anders,  
12 that's A-n-d-e-r-s, from the Attorney General's  
13 Office of Montana.

14 SPECIAL MASTER THOMPSON: Thank you  
15 very much, Mr. Draper. And do we have counsel for  
16 North Dakota?

17 MS. VERLEGER: Jennifer Verleger, Your  
18 Honor. V-e-r-l-e-g-e-r.

19 SPECIAL MASTER THOMPSON: Okay. Thank  
20 you very much, Ms. Verleger. And I don't think  
21 probably that Mr. Jay is with us this morning, but  
22 Mr. Dubois is.

23 MR. DUBOIS: Good morning, Your Honor,  
24 James Dubois for the United States. And Mr. Jay  
25 will not be with us much longer. I believe he is

1 going to abandon us for private practice.

2 SPECIAL MASTER THOMPSON: That's what  
3 they ultimately all do. Thank you very much,  
4 Mr. Dubois. And then a note, that Anadarko sent  
5 an e-mail saying that they're not going to be here  
6 for the hearing this morning. And then, finally,  
7 for Northern Cheyenne?

8 MS. WHITEING: Yes, Your Honor. Jeanne  
9 Whiteing representing the Northern Cheyenne Tribe.

10 SPECIAL MASTER THOMPSON: Good morning,  
11 Ms. Whiteing. Is there anyone else here  
12 representing anybody that I haven't mentioned? I  
13 don't think so. You surprise me. Okay, great.  
14 So then why don't we go ahead. And, Mr. Michael,  
15 if you want to start out, since it's your motion.

16 Let me just say, at the outset, that  
17 I've read all of the briefs for this particular  
18 motion. I've read through all of the supporting  
19 materials submitted by both Wyoming and also  
20 Montana. I can say that I know those materials as  
21 well as probably you and the other counsel for  
22 both sides know the materials. And, in fact, one  
23 of the things I'm hoping you'll be able to do this  
24 morning is help me in understanding what you  
25 consider to be the key facts on this particular

1 motion.

2           So what I would suggest is -- this will  
3 be on both sides. I'll just give you a little bit  
4 of time for sort of a brief opening comment or  
5 two, in terms of, again, what you see as some of  
6 the key things. If you have some new things that  
7 you want to bring to my attention, that would be  
8 particularly appreciated. Again, I've read the  
9 briefs quite thoroughly here.

10           I have a whole list of questions. And  
11 I would suggest that we spend most of the time  
12 answering those questions, then I'll give you a  
13 quick break to confer with anyone over on your  
14 side, and if there's anything left that you want  
15 to emphasize, that would be -- that would be fine  
16 at that stage. I really do want to spend most of  
17 the time on the questions, because that's going to  
18 give you a sense of where I am and help me best in  
19 actually coming to an appropriate decision on your  
20 renewed motion.

21           I should also mention, as always, the  
22 briefs on both sides were extremely good and  
23 effective. Every time I read a brief, I was  
24 absolutely convinced that side was correct, until  
25 I read another brief. And so hopefully this

1 morning you'll be able to help me come to some  
2 appropriate decisions in this matter. So with  
3 that, Mr. Michael.

4 MR. MICHAEL: Yes. May it please the  
5 Court, Your Honor, with your comments in mind, I  
6 did, I guess, get our laundry list together of the  
7 issues and also a real preliminary about summary  
8 judgment. So I want to do that as well. We have  
9 issues of timing. This is about this  
10 notification. And, obviously, there's lots of  
11 words we're going to throw around; man call,  
12 curtailment, notification, and all that.

13 But we have issues about timing of  
14 notification. We have issues about the content of  
15 the notification. We have issues about who is  
16 authorized to give notification. To the extent  
17 that the other state should honor it, or believe  
18 it, or listen to it, or care about it, we have  
19 some exceptions. We have a strict demand  
20 requirement that we have to discuss. And there's  
21 a couple exceptions that I think you were not  
22 briefed the last time about. They're the ones  
23 that you mentioned in your Memorandum Opinion, but  
24 were not really proposed by Montana. So I want  
25 to definitely discuss those.



1                   Footnote 10 of your Memorandum Opinion  
2 and the accompanying text. Also, the futility  
3 exception that would relate to exhaustion as to  
4 the remedies. So those are three. And so I think  
5 those are the general legal -- there's factual and  
6 legal issues in all of those. And so I guess we  
7 bounce maybe back and forth a little bit between  
8 facts and the law.

9                   But I want to talk a little bit first  
10 for a moment on summary judgment, in terms of  
11 where we are, how we got here, burden of proof,  
12 some of these issues, because this is an unusual  
13 circumstance since we last were here in Denver on  
14 September 30th. And the unusual circumstance is  
15 that the plaintiff -- we have a case that's been  
16 going on now for five-and-one-half years. And  
17 Montana, of course, is the plaintiff.

18                   And the plaintiff's responsibility is  
19 to have the elements of their case together. And  
20 we have had a lot of discussion already in this  
21 case about notice of pleadings and what's  
22 required. And, in fact, on the V(B) issue we  
23 talked about notice of pleadings. But at some  
24 point in the lawsuit the plaintiff -- it should be  
25 when they filed the complaint -- should have

1 evidence of the elements of their complaint.

2           And fishing expeditions, the word you  
3 used back on September 30, are not appropriate.  
4 And so certainly as of filing of the complaint  
5 here, Montana had alleged that Wyoming had  
6 violated the Compact by not curtailing pre-1950  
7 rights in favor of -- curtailing post-1950 rights  
8 in favor of pre-1950 rights. That was in the  
9 Brief in Support of Montana's Motion to File. So  
10 they knew that was part of the case. They knew  
11 that they were going to have to prove that.

12           So the question is -- now, we got off  
13 on a detour in this case, that went all the way to  
14 the Supreme Court talking about mass delivery  
15 allocation. And that became a theory of the case.  
16 And that is no longer the theory of the case.  
17 It's been defeated. But, still, in this case has  
18 been this ideal all along. So we got to  
19 September 30th of last year, and Montana asked for  
20 time to develop its evidence of making a -- its  
21 evidence on making a call. And, of course, we  
22 didn't want to see error in the case through a  
23 procedural issue, so we deferred to allowing  
24 discovery on that issue.

25           And as soon as the gates were opened

1 and the horses were down the track on discovery,  
2 we sent out interrogatories. And in those  
3 interrogatories were various questions that --  
4 pretty obvious questions, ones we discussed last  
5 fall -- which were, did you make demand on  
6 Wyoming, notice demand, curtailment, broadly based  
7 questions. And when did you do it, and who did  
8 it, so we could start finding out what I believe,  
9 and I think we'll discuss this today, is an  
10 essential element of Montana's complaint -- of  
11 their case that they have to prove, is that the  
12 notification was made. And we'll talk about what  
13 that notification needs to be.

14 But the point is that the answer we get  
15 back in discovery five-and-one-half years into the  
16 case is, well, we gave notification in 2004 and  
17 2006, and possibly other years, and no names. So  
18 here we are, five-and-one-half years in the case.  
19 The plaintiff, we would hope, when discovery  
20 starts, when we asked, may we have the evidence of  
21 the elements of your case, that they would say,  
22 "Yes. Here is the evidence."

23 And certainly after May 2nd of 2011,  
24 the Court came back with its decision and said  
25 this is not a mass delivery case. This is a

1 Compact. It involves, basically, the claim that  
2 the pre-'50 rights of Montana were injured by  
3 post-'50 diversions in Wyoming, that Montana would  
4 have had some -- a name for us and some  
5 information for us. But not to be.

6 So, of course, we did what we had to do  
7 as the defendant. We have a deadline coming up of  
8 January 15th for our renewed motion. And as  
9 defendant, the other option is to sit back, not  
10 say anything to Montana, allow Montana to maybe  
11 wait till a couple weeks before renewing our  
12 motion, and then, "Tell us all the names in  
13 supplemental discovery." And then we don't have  
14 time to even take a deposition and test those  
15 witnesses.

16 So I did the only thing I knew how to  
17 do in this case. And it's unusual, because, like  
18 I say, in most cases the plaintiff can tell the  
19 defendant the elements of their case and their  
20 evidence when those first interrogatories go out.  
21 It didn't happen. And I did ask for  
22 supplementation. I finally got it.

23 I didn't get it until after I took  
24 depositions. Because I had to get on the trail  
25 and try to, at this point, with a shotgun, with a

1 very open choke on my shotgun, try to find out who  
2 these people might be. So I started with who I  
3 felt were pretty obvious candidates of the Montana  
4 Compact issues in past years and were still  
5 living: Ferris, Fritz, and Stults.

6 And then I also threw in Moy, because  
7 Moy was the person that Montana had submitted the  
8 declaration to you last fall. And he was the one  
9 that said from '81 to 2004, we made complaints to  
10 Wyoming. Now, once I took his deposition, he  
11 said, "Well, I don't even know about the 1990s."  
12 So, obviously, the declaration was overly vague  
13 and actually somewhat misleading, really. I hate  
14 to say it, but I think it was.

15 But anyway, so I took Mr. Moy's  
16 deposition. And the timing was such that I took  
17 Mr. Moy's deposition first. He was in Washington.  
18 He had to be back in Montana, so I took his  
19 deposition, then I followed up with Kerbel,  
20 Stults, Fritz, and Ferris. Ferris really -- he's  
21 an older gentleman, very nice, but doesn't really  
22 remember much from 35 years ago. And we didn't  
23 even submit any of his materials with this.

24 So that's kind of how we got to where  
25 we were. And so that's why it came down as

1 postured, that we actually were taking the  
2 depositions of the people that -- after the  
3 depositions that Montana identified as their  
4 people that had put Wyoming on notice. They  
5 actually had added another person, which led to  
6 the question of authority, which, of course, was a  
7 question we talked about maybe a little bit last  
8 fall.

9           It became a lot more of interest to me  
10 after the argument and after the status  
11 conference, where I had asked the question, "When  
12 I go into discovery, Your Honor, should I be  
13 deposing every water user in Montana on the  
14 possibility that somebody talked to their uncle in  
15 Wyoming and made a call on behalf of Montana, and  
16 they were just some irrigator that didn't work for  
17 the State?" And you had made the comment that you  
18 didn't think -- although, obviously, not  
19 definitive -- you didn't think the coffee shop  
20 calls would be enough.

21           So we had this authority issue that's  
22 in my mind. And that authority issue we'll talk  
23 about, I'm sure, today. Because it's a question  
24 of who -- who can make the call. And that  
25 authority issue came to the fore in the very first

1 deposition when Mr. Moy said he had various  
2 discussions with Wyoming at these annual meetings,  
3 and technical meetings right before the annual  
4 meetings, and he didn't think he had authority to  
5 make a demand on Wyoming, which was an interesting  
6 comment by him.

7           And then we had other -- we have the  
8 letters from '04 and '06 that kind of raised this  
9 authority issue. So that's how that kind of  
10 developed. It was a discovery of a direct  
11 development of an issue that was already in the  
12 case that I had to flush out. So I've done that  
13 in the renewed motion. I think that's the purpose  
14 of the renewed motion.

15           Now, one thing I want to mention, Your  
16 Honor, is in the context of how -- also, how we  
17 got here, you asked us after you issued that  
18 order -- not an order, it's not an order. That's  
19 totally a mistaken statement. It was a Memorandum  
20 Opinion on the motion that was to be renewed. We  
21 were told to provide -- I think it was, I forget  
22 the phrase that you used -- but to provide some  
23 comments. And in Montana's comments they said,  
24 "We disagree with a lot that's in here, but we're  
25 just making comments to be helpful," which is

1 exactly what you had intended and exactly what we  
2 did as well.

3           So certainly I think when we renewed  
4 the motion -- first of all, I always think in  
5 litigation that I'm interested in arguments that  
6 the other party makes. So when you issue a  
7 Memorandum Opinion that has some ideas in it on  
8 Footnote 10, and yet the other side hasn't briefed  
9 it, and I haven't briefed it, because when I do  
10 some comments on your -- what I was invited to  
11 do -- and that, of course, wasn't to be rebriefed,  
12 and we knew that, we knew that from way back when  
13 in this case, that it wasn't to be rebriefed, and  
14 you were clear about that -- that this is going to  
15 be my chance to brief these issues.

16           But I'm interested in whether the other  
17 side thinks they have any legs. If they're going  
18 to raise some exceptions to the rule, I think they  
19 need to brief those exceptions, and then I can  
20 reply to their briefing on it. I don't even know  
21 if they think that your idea is a very good one.  
22 I don't even know that they think those ideas are  
23 ones they want to propose as a party to the case.

24           Because that can happen in a case.  
25 That can happen in a case where a judge makes



1 something that really -- I don't know what you  
2 call it, a suggestion or what -- a preliminary  
3 idea of what he thinks is a rule of law that  
4 applies, but the parties haven't briefed it, and  
5 it hasn't even come up from the other side.

6 So that's kind of how the thing came  
7 down, in terms of that. I think where we are  
8 today, we have now thoroughly briefed all those  
9 various topics, the issues you've raised, and,  
10 also, the renewing issues that came up earlier,  
11 because discovery has shed some more light.

12 Now we're here with the renewed motion,  
13 which, of course, if it's denied, we'll be making  
14 this motion in a sense -- we'll be arguing this  
15 law of facts, I'm sure, in closing argument, at  
16 the least, and having to present facts on it. So  
17 it's just a summary judgment, but we certainly  
18 want to get this all out in front of you today.  
19 And I think we've done that.

20 SPECIAL MASTER THOMPSON: So,  
21 Mr. Michael, this might be a good time for me to  
22 jump in and start asking some questions.

23 MR. MICHAEL: Yes.

24 SPECIAL MASTER THOMPSON: And that was  
25 very valuable in the way of sort of setting the

1 stage for this overall renewed motion. My  
2 questions fall into three different categories --  
3 or thinking about this differently, I want to talk  
4 about three different issues.

5           The first, which plays off of what you  
6 were just talking about, is the State of Montana's  
7 argument that they really didn't need to provide  
8 notice, at least at some point in time, because it  
9 would have been futile. And that, obviously,  
10 plays off of one of the exceptions, which I  
11 suggested in the Memorandum Opinion.

12           The second issue is Montana's claim  
13 that notice was unnecessary, at least at some  
14 point in time, because Wyoming had enough  
15 information to determine for itself, without any  
16 type of notice or call, what needed to be provided  
17 in order to satisfy Article V(A) of the Compact.

18           And then third involves the issue of  
19 assuming that Montana did still need to provide  
20 adequate notice, whether or not they did so in the  
21 years that they are claiming that they did.

22           So let me start with that first issue,  
23 this issue of futility. And you're absolutely  
24 right in, number one, recognizing that this is a  
25 really new and unusual case. I don't know of any

1 Compact that was written in exactly this fashion.  
2 So there's probably no clear precedent out there.  
3 And so frequently we're going to have to think  
4 through these issues by thinking about the  
5 policies underlying aspects of the Compact and  
6 also thinking about other possible analogies.

7           And so I actually appreciate your  
8 reopening some of these issues that I talked about  
9 in the Memorandum Opinion, because I want to make  
10 sure in my next Memorandum Opinion that, as I  
11 mentioned, I decide this appropriately. So let me  
12 go back and just give you a little bit more of my  
13 logic, the issues that I was confronting when I  
14 was drafting that Memorandum Opinion.

15           So let me just start out with Texas  
16 versus New Mexico, which was a United States  
17 Supreme Court decision in 1987, 482 U.S. 124,  
18 which is one of just a handful of decisions that  
19 we had from the United States Supreme Court  
20 regarding a state's right to damages where there's  
21 been a violation of a water Compact.

22           And this was the first case in which  
23 the Supreme Court dealt with the question of  
24 whether or not the damages were appropriate at  
25 all. And in that connection, the Court mentioned

1 that a Compact is, after all, a contract. And  
2 then there's nothing in the nature of Compacts,  
3 generally, or of the Compact they were dealing  
4 with, in particular, that counsels against  
5 rectifying a failure to perform in the past, as  
6 well as ordering future performance called for by  
7 the Compact. By ratifying the Constitution, the  
8 states gave this Court complete judicial power to  
9 adjudicate disputes among the states.

10 And then in response to New Mexico's  
11 argument that, well, they hadn't done anything in  
12 bad faith, you know, they had a belief of their  
13 own as to what the Compact required and engaged in  
14 good faith in reliance upon that view, the Court  
15 said the good-faith differences about the scope of  
16 contractual undertakings do not relieve either  
17 party from performance. A court should provide a  
18 remedy if the parties intended to make a contract  
19 and the contract's terms provide a sufficiently  
20 certain basis for determining both that a breach  
21 has, in fact, occurred and the nature of the  
22 remedy called for.

23 So that's about the only guidance that  
24 I think we have from the United States Supreme  
25 Court on this question of damages. And so when

1 you read that, my sort of first impression when I  
2 thought about that was, well, Montana is basically  
3 claiming that its pre-1950 appropriators didn't  
4 get the water that they were entitled to. And all  
5 they're asking for now is damages for a failure to  
6 get that particular water. And so based on that,  
7 should there be any notice of call requirement in  
8 the law.

9           But as you point out in your initial  
10 brief, it does say in this particular Compact that  
11 pre-1950 appropriators will continue to enjoy  
12 their rights pursuant to the laws of prior  
13 appropriation. And one of the concepts behind  
14 prior appropriation is that if you need water  
15 under your priority, you should provide notice to  
16 the other side, a call to the other side.

17           And as you point out, there's a good  
18 reason for that; which is, that if you don't  
19 provide that, the other side might not know that  
20 they should be providing water. So there is this  
21 prior appropriation requirement. And there's a  
22 good reason for that; which is, it permits the  
23 other side to know when to perform without having  
24 to provide water that might be going to waste. So  
25 in my Memorandum Opinion, I agreed with you on

1 that particular point.

2                   And so if this were a situation where  
3 Wyoming, at the very outset, had said, you know,  
4 "We owe pre-1950 appropriators whatever water they  
5 need. And by the way, Montana, just let us know  
6 any time, and we'll provide that water," and then  
7 Montana did not provide any type of notice, well,  
8 that seems to fall directly in line with the  
9 requirement of prior appropriation that a call be  
10 provided. And there's good policy reasons behind  
11 it.

12                   So let me ask you a hypothetical now,  
13 that all as background. And I realize that you  
14 disagree with the factual predicate for this whole  
15 thing coming down, but let's assume that Wyoming,  
16 at the very outset, said to Montana, "We don't owe  
17 pre-1950 appropriators anything. Under this  
18 particular Compact, we have no responsibility to  
19 pre-1950 appropriators."

20                   Is it Wyoming's argument that even if  
21 Wyoming said that at the very outset, that Montana  
22 would have had to provide a call every time they  
23 needed water from pre-1950 appropriators in order  
24 to -- in order to maintain an action for damages  
25 at this point?

1 MR. MICHAEL: Absolutely, Your Honor.

2 SPECIAL MASTER THOMPSON: And what  
3 would be the use of that, if Wyoming had denied  
4 any responsibility whatsoever?

5 MR. MICHAEL: The use of that is --  
6 well, you've gone through the practical question,  
7 but I could go back through the legal analysis of  
8 that.

9 SPECIAL MASTER THOMPSON: We'll get to  
10 the legal analysis in a moment. But I'm just  
11 wondering -- I could understand what the purpose  
12 of a call is in a state where the state says, you  
13 know, "You have the prior appropriation system.  
14 And if you need water and you receive  
15 appropriated, let us know, and we'll shut down."  
16 That serves a really good lawful purpose. But  
17 what would be the purpose of requiring Montana to  
18 say when they need water, if Wyoming is already  
19 claiming it's not going to provide water?

20 MR. MICHAEL: Even in your  
21 hypothetical, whether it's a state or an  
22 individual upstream appropriator that says, "I  
23 don't think I owe water" -- for example, "My water  
24 rights are senior to yours, not junior. You say  
25 you have 1910's, I have 1909's." But then you

1 say, "I have 1911's," there's a dispute about  
2 whether there's -- what the relationship is.

3           And taking your hypothetical, there's a  
4 dispute about the relationship. So the upstream  
5 irrigator says, "I have senior water rights, not  
6 you. So even if you make a call, I'm not going to  
7 give you water." That's your hypothetical,  
8 basically. The value of making the call is that  
9 the senior -- now the senior water rights holder,  
10 at that point, he's, "If you make a call, I may do  
11 this." Okay. "I haven't talked to my lawyer. I  
12 haven't really looked at it carefully. I'm not  
13 under the gun. I'm not under the pressure of  
14 actually paying damages if this occurs. I'm  
15 taking a legal position. I think I'm right. I  
16 haven't maybe done all my research."

17           It serves the purpose of bringing the  
18 issue to a head. And in a contract case, it  
19 requires -- another example, I think the landlord/  
20 tenant one is an excellent one. But when a party  
21 disagrees about -- and this happens all the time  
22 in law. Parties disagree about the content of the  
23 contract. What does this term mean? The party  
24 that wants to advance their contract case has to  
25 satisfy the preconditions of getting a damage



1 claim.

2 A real estate contract, the parties  
3 disagree about whether the property should be  
4 conveyed or not, whether the title is ready for  
5 conveyance, whatever. There's a provision that  
6 says that in order to get damages, you have to  
7 notify the other side of such and such.

8 A landlord/tenant situation where the  
9 landlord has to notify the tenant to get out in  
10 30 days, notice to quit, and they disagree whether  
11 it's 30 days, the landlord still, to win his  
12 damage case later when the tenant doesn't leave  
13 after 30 days, after giving the notice, still has  
14 to give the notice. He has to eat his own  
15 cooking, as it were.

16 If he believes this is what the Compact  
17 means, then he has to come forward and say, "I am  
18 going to satisfy everything the Compact means and  
19 put you on the hook. I'm going to put you at  
20 risk, Mr. Defendant, by doing the things that  
21 would be necessary under my theory." And it  
22 serves the purpose of the parties not just talking  
23 about it, but the seriousness of saying, "I  
24 believe in my position. I believe that it is a  
25 doctrine of appropriation."

1                   For Montana's case, if Montana in 1981  
2 says, "I believe that this case creates the  
3 doctrine of appropriation" -- and I say 1981,  
4 Mr. Moy's internal memo, where he said, "I don't  
5 think the pre-'50 in Montana can call a pre-'50 in  
6 Wyoming, Montana can't do that, but they can call  
7 a post-'50s in Wyoming." That was Mr. Moy's idea.

8                   It forces -- then Montana has to go  
9 ahead and say, "Okay. This is what we think the  
10 Compact means. And we are going to live by it  
11 ourselves. So, Wyoming, we have put you at risk,  
12 because we are living by our interpretation. And  
13 now, Wyoming, you have to -- you've told us some  
14 things about what you think your interpretation  
15 is, but now you've got to get serious, because  
16 we're asking you to live by it."

17                   That's the reason why you have to -- a  
18 party can't just pontificate about their rights.  
19 They need to assert their rights, if the contract  
20 between the parties requires such assertion. They  
21 have to live by the contract. They're just as  
22 much disagreeing about the interpretation as maybe  
23 Wyoming is. And they have to put their money  
24 where their mouth is, so that Wyoming's money is  
25 at risk. And I think that's -- in any contract

1 situation, the law would never say because  
2 somebody says they disagree about your  
3 interpretation of the contract, you can go ahead  
4 and ignore the various provisions that are  
5 preconditions to sue or to a claim under the  
6 contract, and then proceed on that, and the other  
7 party doesn't have a chance to say, "Well, I can  
8 defend on that, but it turns out you were right."

9           And in this case, it did. It turned  
10 out Montana was right. We do not take exception  
11 to your ruling that there was no interstate prior  
12 appropriation intended by the drafters here. They  
13 wanted recognition of existing rights, but not --  
14 not a scheme across state lines. We lost on that  
15 issue. We are at risk for having taken that  
16 position. But in the years where Montana put its  
17 money where its mouth is and made a call under  
18 that, that was necessary under their position.

19           SPECIAL MASTER THOMPSON: Let me ask  
20 you --

21           MR. MICHAEL: So that's why we conceded  
22 in 2004 and 2006, when they did make the call,  
23 that we were at risk, because we were wrong about  
24 the contract, what it meant. That's no excuse for  
25 them.

1                   SPECIAL MASTER THOMPSON:  So let me  
2 just interrupt you there.  And let me just follow  
3 through on the contract analogy.  So let's assume  
4 that there is a contract in which one party agrees  
5 to provide another party with some type of object.  
6 It might be that they agree to provide them with  
7 equipment of one nature or another.  And it also  
8 provides that the other party has to specify the  
9 actual nature of the equipment at some point or  
10 another.  It has to provide the specifications of  
11 the equipment.

12                   And the first party that has agreed to  
13 provide the equipment, at some point says, you  
14 know, "This whole category of equipment over here  
15 that you think that we agreed to provide you, we  
16 don't need to provide you with that at all.

17 That's actually not in this contract.  You might  
18 think that we're contracted to supply you with  
19 this type of equipment, but we don't have to."

20                   At that point, would it be -- is it  
21 your thought that the other side has to actually  
22 then provide all of the specifications still, or  
23 wouldn't that be basically a repudiation of that  
24 portion of the contract on the first party that  
25 would excuse the second party from doing anything

1 at that stage, other than a suit for damages?

2 MR. MICHAEL: Now we're going back to  
3 you want an informed --

4 SPECIAL MASTER THOMPSON: If you want  
5 to plead ignorance --

6 MR. MICHAEL: No, no. It's  
7 anticipatory repudiation. But the law is replete  
8 with demand requirements to require something to  
9 occur. And again, anticipatory repudiation, we  
10 will not do this if you do this, maybe there's a  
11 circumstance when you have -- and again, I think  
12 the UCC deals with this. UCC certainly requires  
13 demand of various things at various times.

14 But certainly in a case with a couple  
15 of states where the recipient of the demand is a  
16 multifaceted entity with people changing  
17 positions, with an Attorney General's Office that  
18 gives advice on, "Hey, we know Montana has changed  
19 its view on this contract a number of times."

20 2002, they said pre-'50s. What's going  
21 on with pre-'50s. 2006 they said, well,  
22 post-'50s -- so they change their mind --

23 THE REPORTER: Excuse me. Could you  
24 please slow down.

25 MR. MICHAEL: Sorry. -- under the

1 Compact. So when you have -- certainly in this  
2 situation, if you thought that anticipatory  
3 repudiation was a viable theory, I don't know how  
4 it could be applied to an entity over a period of  
5 time that changes -- that has -- and this is one  
6 of the arguments on the authority issue, in that  
7 you have an entity that has -- who is speaking for  
8 who, and how long did they speak for that entity,  
9 and does the entity have a chance to digest the  
10 demand and decide is it going to honor that  
11 demand.

12                   And so I think that's -- that's an  
13 additional difference. I won't concede the point  
14 that that would be an anticipatory repudiation  
15 situation in this to begin with. But even if it  
16 was, for a governmental entity where the  
17 discussion is changing over time and various new  
18 people come and go, the idea that that  
19 governmental entity's position is frozen in time,  
20 Montana didn't freeze its own position in time.  
21 It made two different calls in 2004 and 2006. And  
22 so I don't think that will apply. I don't think  
23 under these facts it would apply.

24                   SPECIAL MASTER THOMPSON: So --

25                   MR. MICHAEL: I have trouble with that.

1                   SPECIAL MASTER THOMPSON: So let me  
2 take one step further back, which is, to my  
3 knowledge, as I said in the Memorandum Opinion, I  
4 don't know of any cases out there dealing with  
5 calls that deal with the type of hypothetical  
6 which I asked. And so, inevitably, what we're  
7 having to deal with is either looking at the  
8 policy behind the requirement of the call to  
9 address whether or not there are any exceptions to  
10 the issue that you raised in your papers, or we  
11 have to look to an analogy.

12                   And originally Montana, in sort of  
13 raising this idea, used the analogy of exhaustion  
14 of administrative remedies and when that was  
15 necessary. You and I have just been talking about  
16 whether or not there's some good contract  
17 analogies. And I'll be interested in Montana's  
18 view on the analogy of looking at contract law in  
19 order to decide whether or not there is an  
20 exception here.

21                   But are you -- do you have any sense of  
22 other analogies that I could be looking at here in  
23 order to decide whether or not there should be an  
24 exception?

25                   MR. MICHAEL: I felt that the contract

1 analogy -- because the one I thought of, again,  
2 was the landlord/tenant contract, where the  
3 landlord needs to give the tenant notice of 30  
4 days to quit. And the landlord, you know,  
5 shuffles around and, "Boy, I could get somebody  
6 else paying more rent on this property. I'd sure  
7 like you to leave. Are you thinking about leaving  
8 any time soon," blah, blah, blah, blah, blah.

9           And I was involved in these cases in my  
10 practice. I mean, we would send a letter, "We  
11 demand get out." You know, it's time to quit.  
12 And we'd walk into the JP court or the circuit  
13 court in Wyoming and say, "The tenant wouldn't get  
14 out." The first thing the judge would ask for is,  
15 "Where is your notice to quit?"

16           And so, to me, that's the -- and that's  
17 the need to have a firm -- when it gets into these  
18 other issues and what's the timing of it, because  
19 it has to be at least 30 days before you want the  
20 tenant to get out. Because time is important. So  
21 that's the one I thought of.

22           I thought the exhaustion analogy is  
23 very inept, because I don't think we're talking  
24 about the same thing. A call is not going to be  
25 deciding where to go to get a remedy. The



1    McCarthy case, for example, the one Montana cited  
2    and you cited in the Memorandum Opinion, is a case  
3    about, can a party that has a claim against  
4    another party go right into federal court without  
5    taking a detour into an administrative process,  
6    which is exhaustion. But it's about what process  
7    gets used.

8                    But in this case, the call requirement,  
9    when it's a demand from one contracting party --  
10   it's a demand from one contracting party, Montana,  
11   to the other party of the contract. And the  
12   contract says, this is a contract under the  
13   doctrine of appropriation. And the doctrine of  
14   appropriation says that that one party must make  
15   demand on the other party.

16                   The issue involving that demand is a  
17   theft -- what we're talking about there is a  
18   condition perceived to be able able to proceed on  
19   your claim, because that was an element of your  
20   contract claim. It's not a question -- it's not a  
21   question of where you go with that. If Wyoming  
22   had said, "You should have gone to the Court -- to  
23   the Bureau of Reclamation with your case," and  
24   Montana rushed right into the Supreme Court, then  
25   we'd be talking about exhaustion. And Montana

1 would be saying, "Oh, well, you said we had to go  
2 to the Bureau of Reclamation, but they have a  
3 ten-year backlog. It would have been futile. I  
4 got an excuse." That's the McCarthy case.

5 In the cases we cited from the ERISA  
6 context, futility comes up. But futility in the  
7 exhaustion of administrative remedies, that's not  
8 what I'm talking about. The call requirement --  
9 Montana -- Wyoming is not an administrative agency  
10 making a decision as a third-party referee about  
11 the relationship between Montana and Wyoming.  
12 Wyoming is a party to the contract that is  
13 entitled to a demand.

14 And then if Wyoming does not follow  
15 that demand, for whatever reason, we don't think  
16 that your theory of the contract is correct, then  
17 we are at risk, because they made the demand. And  
18 from that point forward, we denied the demand, and  
19 it turns out to be wrong, then we may be liable  
20 for damages. But it's not a question of where the  
21 remedy is taken.

22 An exhaustion of remedy is a question  
23 of where it goes, who hears it, what's -- how does  
24 it get there. And futility to exhaustion is a  
25 theory of it doesn't have to go on these

1 procedural steps. And that's not what we're  
2 talking about at all here. A call is not a --  
3 what court does it go to to find a referee.  
4 Montana took 30 years on some of these claims.  
5 From 1981, 31 years. They say you still have a  
6 claim denied to ever take them to a referee.

7 SPECIAL MASTER THOMPSON: So I  
8 understand your argument, but here is the problem  
9 we get into here, is that in a general process  
10 when you have to make -- well, actually, let me  
11 use this as an opportunity to ask you a question.  
12 In the state of Wyoming, how do calls operate? If  
13 I'm a senior appropriator, and I'm not getting my  
14 water, what do I do?

15 MR. MICHAEL: Wyoming has something the  
16 Compact does not have. In fact, the drafters of  
17 the Compact didn't want this to be in existence,  
18 as you know. Wyoming has an administrative  
19 scheme. We have a way to take the call, but it  
20 doesn't go to the administrative body, it goes to  
21 the local hydrographer who, under statutory  
22 requirement, needs to simply apply the priorities  
23 as best he can.

24 So you make the call -- actually, we  
25 can do what they do in Montana, which is, the

1 downstream person can call the upstream person and  
2 keep it out of the administrative system. That's  
3 what Montana -- I think the argument in this case  
4 is that Montana did that, because they didn't have  
5 anywhere else to go. I think that's the argument.  
6 And in Wyoming, there is somewhere else to go.

7           Now, in Montana there's somewhere else  
8 to go at times. If the downstream appropriator  
9 wants to bring in a district court, they appoint a  
10 commissioner. But ours are on duty all the time.  
11 Every summer in Wyoming, they're on duty.

12           But -- but if the commissioner -- and  
13 we talked about this last time, September 30th --  
14 if the commissioner -- some of these little  
15 creeks, things are done fairly repetitively,  
16 because it's so simple. The system is so simple.  
17 You know, there's no storage, little return flow,  
18 it's upstream on the basin, and it's a rocky  
19 little stream.

20           When the stream gets to a certain  
21 level, the commissioner doesn't even wait for a  
22 call. He goes in and regulates the stream under  
23 statutory authority to set the priorities. I  
24 mean, under this Compact, if the drafters  
25 thought -- I mean, first, our theory was different

1 in the beginning of this case -- if they thought  
2 that was going to happen, which is what we've  
3 embarked on now, a nice way to do that is to have  
4 a deputized authority who can move all the way up  
5 and down the stream and see the system.

6 Now, where does the administrative part  
7 fit into that? Here is the difference. In  
8 Wyoming, if the irrigator that makes the call --  
9 let's say the upstream -- the downstream irrigator  
10 makes the call, claims he's senior. And the  
11 commissioner says, "Sorry. There's enough water  
12 in your headgate. You're not entitled to a call,"  
13 or, "Sorry, you're not actually senior. What are  
14 you talking about?" That's -- a police action is  
15 done like that. The cop is on the beat.

16 But there's an appeal process. And  
17 this is where we get into the administrative  
18 remedy part. If the downstream senior wants to do  
19 something about that, there's a way that he needs  
20 to go. He needs to go to the superintendent. If  
21 he fails there, he can go to the state engineer. If  
22 he fails there, he can go to the district court or  
23 the Wyoming Supreme Court. Four steps.

24 Now, what if he skipped and goes right  
25 to the state engineer, and the state engineer

1 says, "Well, you know, you had to follow this  
2 administrative process." And he says, "Well, it  
3 would have been futile. I know that  
4 superintendent. He's biased against me. He's  
5 biased against me." Then we would be into this  
6 process of what exhaustion means and whether it  
7 would be futile.

8                   And that's why I say the exhaustion  
9 analysis only applies in the situation where if  
10 the Compact hadn't had an administrative body --  
11 and I don't mean the cop on the beat, I mean above  
12 that -- that if there's a dispute about what the  
13 circumstances are between the states, it gets  
14 appealed on up, and what is the administrative  
15 remedy. And then Montana will say, "Well, it is  
16 futile. We want to go right to the Supreme  
17 Court."

18                   SPECIAL MASTER THOMPSON: So I  
19 understand that your point is that basically -- so  
20 in Wyoming, the first thing that you would do is  
21 you would tell the upstream junior. You would  
22 just notify him?

23                   MR. MICHAEL: You could. You don't  
24 have to.

25                   SPECIAL MASTER THOMPSON: You don't

1 have to.

2 MR. MICHAEL: You could go to the cop,  
3 go right to the cop.

4 SPECIAL MASTER THOMPSON: You could do  
5 it through the administrative process?

6 MR. MICHAEL: Well, you say  
7 administrative process, but it's not an adversary  
8 process yet. It's a police process. Two parties  
9 are not in court. I mean, it's a police process.

10 SPECIAL MASTER THOMPSON: But I guess  
11 what I'm wondering is if it gets to the question  
12 of whether the exhaustion of administrative  
13 remedies is an appropriate analogy, is whether or  
14 not when you say Montana should have provided some  
15 sort of a call or notice, whether or not what  
16 you're referring to is letting the person upstream  
17 know that they're taking water that they shouldn't  
18 be taking, or whether or not it's going to the  
19 commissioner or, you know, whoever it is that has  
20 some ability to shut down that junior appropriator  
21 and say, "They're taking water that they  
22 shouldn't. Please shut them down"?

23 MR. MICHAEL: Oh, no. I don't think  
24 under the Compact it can go directly to a  
25 Wyoming --

1                   SPECIAL MASTER THOMPSON: No, I  
2 understand that. What I'm saying is that, is a  
3 call more in the nature of notice to somebody, or  
4 is it more in the nature of a process that you go  
5 through? And it sounds like in Wyoming it's both.  
6 If it's more like a process, then it strikes me  
7 the exhaustion of administrative remedies is a  
8 good analogy.

9                   MR. MICHAEL: No, I don't think so. I  
10 don't think it's really a process. I think it's  
11 a -- the downstream -- let me put it this way:  
12 The way it gets confusing is because some of these  
13 creeks get done by a matter of routine. Because  
14 our commissioners are always on duty. They just  
15 go out and regulate. They just do it. And so if  
16 the downstream -- if the downstream irrigator  
17 thinks that it's not being regulated properly,  
18 then he makes a demand.

19                   Well, let me put it this way: If the  
20 upstream -- the better way of putting this is, if  
21 the upstream irrigator is being told to curtail,  
22 and he thinks it's wrong, that curtailment, you  
23 know -- well, no, I think I had it right the first  
24 time. Go right into the -- you tell the  
25 hydrographer, "Get out of the way. I'm making a



1 call."

2 Now I'm doing a formal call process.

3 Okay. The hydrographer is involved if there's any  
4 formality. But then in order to get the actual  
5 legal system involved, you have to make a call.  
6 In order to say that there's a violation, you need  
7 to make a call. The senior downstream would have  
8 to make the call. Even though -- the guy is  
9 hanging around doing stuff, but in order to say,  
10 "This guy is doing it wrong," make the call. I  
11 want formal appropriation. I want formal  
12 appropriation. That's what the downstream is  
13 doing.

14 SPECIAL MASTER THOMPSON: Fair enough.  
15 So let me now, after this hypothetical, get to the  
16 factual issue. And so Montana in its opposition  
17 papers suggests several times that we're in  
18 basically exactly the hypothetical which I gave.  
19 So, for example, on page 28 of Montana's  
20 Opposition Brief, starting the third line, it  
21 says: For decades Wyoming maintained that it had  
22 no obligation under Article V(A) to provide water  
23 to Montana and persistently disregarded Montana's  
24 complaints, beginning as early as 1981, that  
25 Wyoming was overusing its allocation under the

1 Compact.

2                   And then on page 43, Montana says:  
3 From the time the Compact was adopted, Wyoming has  
4 insisted that it affords no protection for  
5 pre-1950 rights of Montana. And Article V's sole  
6 purpose is to provide unappropriated water of the  
7 interstate tributaries.

8                   So do you agree with that summary by  
9 Montana or --

10                   MR. MICHAEL: Oh, that's totally not  
11 true.

12                   SPECIAL MASTER THOMPSON: And so could  
13 you explain why it's not true? Particularly,  
14 point me to the facts that help to establish that  
15 Montana -- I'm sorry, that Wyoming was willing to  
16 provide water to pre-1950 appropriators if Montana  
17 had simply asked.

18                   MR. MICHAEL: Oh, see, now you changed  
19 the question on me there. Because this is  
20 different. It's different whether Montana asked  
21 or Wyoming affirmatively said, "We will never do  
22 this." It's another thing to say that the issue  
23 didn't come up, which is really what happened.

24                   You know, when you look at the '83  
25 Ashenberg report, and you look at the '88, '89,

1 '89 annual reports of Gary Fritz about V(A),  
2 Montana's position was obvious. It was clear  
3 that, well, maybe V(A) -- we know why the drafters  
4 didn't do anything with V(A) specifically,  
5 because, you know, there's so many pre-'50 rights  
6 in Wyoming. And the way Wyoming runs its strict  
7 system, they shut off, there won't be any  
8 post-'50s on by the time pre-'50s in Montana are  
9 on. It just doesn't come up, so we're not going  
10 to -- why are we messing with it.

11 Fritz said, "Listen, you're talking  
12 about wasting time on that issue, dealing with  
13 that, when we need to figure out what to do with  
14 surplus water as coal development happens."

15 And so the idea of futility is that --  
16 it's an equitable defense that has to be proven  
17 with certainty, as those cases I cited show. And  
18 the party has to show that they were certain that  
19 what they were doing was futile. And you don't  
20 show certainty by saying, when an issue wasn't  
21 ever brought to a head, and the parties didn't  
22 have a discussion about it, you have to show --  
23 the Lindemann case, or some other cases we cited,  
24 have to show that the issue came up, came to a  
25 head, the exact same issue, and the other side

1 said, "Absolutely not. This is our position  
2 carved in stone." And you just don't see that.

3           The V(A) concept just is not hanging  
4 around. The stuff they have in their materials is  
5 these side comment -- Senator of Montana writing a  
6 letter to Montana's deceased -- they're both  
7 deceased, of course -- Fred Buck, State Engineer,  
8 1952, saying that L.C. Bishop, who is also  
9 deceased, said something at some presentation  
10 about, "Well, you know, if things don't work out,  
11 these -- certain parts of the Compact may have to  
12 go to court if there's a disagreement." I mean,  
13 that is so vague. That is not this issue ever  
14 coming to a head.

15           And I struggled -- I looked through  
16 these materials, and it just isn't there. And  
17 both parties by the way, Your Honor, agree that  
18 they had to account for pre-'50 rights. They had  
19 to account for how much -- what the pre-'50 rights  
20 were of each state, so that a state -- Wyoming  
21 couldn't cheat, for example, or Montana cheat and  
22 say, "Well, there's no post-'50 rights on up here  
23 that we would count in V(B), or we don't count  
24 this under V(B), because it's really a pre-'50  
25 right." You could cheat under V(B) by

1 misrepresenting whether it's a pre-'50 or post-'50  
2 right.

3           And that's where both sides agree. We  
4 have to account for pre-'50 rights to make V(B)  
5 work. Because if you're counting pre-'50 rights  
6 as a post-'50 and vice versa, the accuracy of your  
7 count is going to be off. And either state could  
8 cheat the other one. And so they all understood  
9 you had to go through all the rights and make sure  
10 they were properly attributed to their -- whether  
11 they were pre-'50 or post-'50. But that's a V(B)  
12 issue.

13           SPECIAL MASTER THOMPSON: So I  
14 understand. So your position, then, is that  
15 basically it isn't that there was ever a  
16 discussion in Wyoming which said, one way or the  
17 other, whether it would satisfy Article V(A) for  
18 pre-1950 rights of Montana, the issue just didn't  
19 come up?

20           MR. MICHAEL: Well, I would say this:  
21 I think you see in a few places, like you see in  
22 the Lou Allen report, there's a 1983 Ashenberg  
23 report about V(A). And the first page of the  
24 Ashenberg, it says, V(A) doesn't really matter,  
25 because it doesn't have any practical. It's not

1 worth worrying about. Wyoming has not had enough  
2 development for V(B) rights. It's never going to  
3 come up. And the drafters knew that. So we're  
4 not going to mess with that.

5           And now he comes back, I think late in  
6 Exhibit T, he has this whole thing, "We think V(B)  
7 ought to be done the way the Compact says. We  
8 should count the water going on the bottom river,"  
9 blah, blah, blah. Okay. "We want it, sir, done  
10 exactly that way." And I think in the end, late  
11 in that material, Allen says, "He's dead, and he's  
12 not here to come talk about it."

13           This is way back when -- 1984, I think,  
14 '83 -- that, you know, pre-'50 rights are not  
15 really relevant to this Compact, but we have to  
16 keep track. I think he says that in Exhibit T.  
17 Your Honor, let's see if I have that. So there  
18 may have been some places where Wyoming stated  
19 that interpretation, but I don't think anybody  
20 cared. I don't think they were discussed. I  
21 don't think they sat down at the table and said,  
22 "Wyoming said, boy, if you ever really push that  
23 interpretation, we will never concede that," or  
24 anything of that nature, anything close to that.

25           And, in fact, Your Honor, let me go one

1 step further. If Montana was concerned about that  
2 and saw that as a challenge that needed to be  
3 resolved, then, you know, I don't see why, you  
4 know, Montana then is promising to go ahead and  
5 tell Wyoming if they're short pre-'50 rights. If  
6 they think it's futile, why is Gary Fritz saying,  
7 "'81, '82, '83, we will tell you if we think we're  
8 short of our pre-'50 rights"? In other words, our  
9 estoppel argument trumps the futility argument  
10 anyway.

11 SPECIAL MASTER THOMPSON: So when did  
12 this issue first come up, in your view?

13 MR. MICHAEL: Oh, I think -- if it  
14 first came up, it would have come up as a  
15 sidelight, a minor sidelight, in the discussion of  
16 V(B) and the models -- you know, like I said,  
17 page 1 of the Ashenberg report, "Don't worry about  
18 it." And then in Lou Allen's -- way back in the  
19 end of that where he says, "Okay. Well, you know,  
20 V(A) doesn't matter." And, again, they're not  
21 here to explain all the details.

22 But, you know, that's -- that would be  
23 the first time I think the issue -- you said "come  
24 up." It's important what we mean by "come up,"  
25 because I don't think it came up in a sense of

1 Montana could take something from that and then go  
2 run with it and say, "Wow. We're in great shape.  
3 We never have to make a call. We can just forget  
4 about that."

5           And you have in '83, that very year you  
6 have Fritz saying, "We will tell you if we think  
7 our pre-'50 rights are being shorted." Then in  
8 '92, he brings it up in the annual meeting with  
9 Jeff Fassett and says, "Hey, we're concerned."  
10 Now, in between, he acted like V(A) didn't mean  
11 anything. He didn't care about it. But then in  
12 '92, he says, "Well, our folks are thinking that  
13 maybe there's some pre-'50 water we're not  
14 getting."

15           And Fassett says, "That's a serious  
16 issue. You should raise that. But you should do  
17 it timely. We can't deal with that after, with  
18 the lawyers. Raise it during the water year."

19           And then silence. If you look at  
20 Montana's brief, silence from 1992 to 2001. They  
21 have nothing in there about this at all. Silence.  
22 And then in 2004, of course, we have Montana  
23 making a call that's inaccurate on the Compact.  
24 And it says, "We want your pre-'50 rights to  
25 satisfy our pre-'50. And Stults on page 2,



1 exhibit -- Attachment A to the Moy declaration.

2           And even more so, you have Stults  
3 saying, "Well, can't we work out a way to get  
4 around this Compact with the random doctrine of  
5 appropriation? We'd like to do something  
6 different with you."

7           SPECIAL MASTER THOMPSON: So let me  
8 change the subject rather quickly. We're running  
9 out of time. So the second argument that I  
10 believe Montana is making is basically they  
11 provided Wyoming, at some point in time,  
12 sufficient information. You didn't even get a  
13 call. So let me just ask today, does Wyoming have  
14 sufficient information to know how much water to  
15 release to Montana in order to meet pre-'50 rights  
16 today?

17           MR. MICHAEL: It's impossible.

18           SPECIAL MASTER THOMPSON: Okay. Why?  
19 Could you just explain what it is that Wyoming is  
20 missing at this point in time to determine how  
21 much water to release.

22           MR. MICHAEL: We don't know -- well,  
23 take the Tongue River this summer. The Tongue  
24 River went in and out of regulation because they  
25 had a late -- some late rainfall and snowmelt.

1 They went into regulation, back out of regulation,  
2 in Wyoming. That kind of thing happens all the  
3 time. So the information we need -- the Powder  
4 River is a great example.

5 Here's what happens on the Powder  
6 River. Montana has never regulated the Powder  
7 River. Montana has never -- this is in the Kerbel  
8 deposition and Stults deposition. On the Powder  
9 River, below the state line, Montana lets people  
10 share water. They let juniors upstream take  
11 water. And, I mean, post-'50 rights, take water.  
12 And there's a pre-'50 right short downstream. The  
13 pre-'50 right downstream would rather have less  
14 water, but have it delayed by groundwater, by the  
15 flood irrigation, heavy flood irrigation system.  
16 And the water doesn't get down there for -- it's  
17 delayed by weeks. And the downstream irrigator  
18 has a choice, do I care more about timing or  
19 quantity.

20 And so on the Powder River, it's never  
21 been done in Montana. In fact, there was  
22 testimony by Stults, and I talked to them about an  
23 e-mail that was sent the day before their 19 --  
24 their 2004 call on May 17th, where Jack Stults  
25 requested information -- and this is in the

1 testimony -- requested information of what's going  
2 on on the Powder today, before we call Wyoming  
3 tomorrow. And what he got back was, "They're  
4 still sharing water."

5 So he made a call on Wyoming the next  
6 day. He said, "We are to cut back pre-'50 rights  
7 on the Powder." He said, "We will only get one  
8 cut in a day." Well, that doesn't tell Wyoming  
9 whether if we release post- -- if we curtail  
10 post-'50 rights, it's going to go to pre-'50  
11 rights. In fact, it would be a violation of the  
12 Compact. It would have been. I believe we'll be  
13 able to prove this. And I think we have strong  
14 evidence already.

15 But it's an example. I'm giving it to  
16 you as an example that Wyoming -- the Compact is  
17 violated as to Wyoming, even if Montana makes a  
18 call, if they make a call when they are not in  
19 compliance, when they're still taking post-'50  
20 water.

21 And then you've got -- on the Tongue  
22 you've got a huge complication. You've got a  
23 reservoir, its contracts under the state line.  
24 And when Montana is releasing water from that and  
25 contract water comes out of it and then floods

1 and -- or sprinkles, and they have return flows.  
2 What is happening way down that river -- the  
3 river, the water, obviously, doesn't have -- isn't  
4 color coded when it goes down there. And if  
5 there's water available on that river and the  
6 doctrine of appropriation has been released, and  
7 we know this from the whole first part of this  
8 case -- it's been released from return flows. It  
9 is now appropriated water.

10                   And if the pre-'50s are satisfied from  
11 that water downstream, then there's no basis for  
12 Montana to make the call upstream. So the idea  
13 that Wyoming would know, without boots on the  
14 ground in Montana, what the circumstance is down  
15 there.

16                   Now, as I said at the end of our reply  
17 brief, if Montana makes the call, knowing what we  
18 know now, but what has been ruled on -- and again,  
19 this doesn't affect the damage case. That goes  
20 forward. But going forward now, we know that the  
21 call is made -- and if Montana makes it like they  
22 did in '04 and '06, we can rely on a piece of  
23 paper that's authorized by the government, and  
24 it's done by their Compact commissioner, we will  
25 curtail our post-'50 if there are any at all.

1           I think the Ashenberg analysis will  
2 probably apply. But if there is, we will curtail.  
3 And then we will go down and look and see if  
4 Montana was indeed entitled to do that. If they  
5 weren't, they're in violation. They're getting  
6 water -- if it ends up going to post-'50 rights,  
7 they have violated the Compact by not -- by making  
8 an improvident call.

9           So there's risk that goes both ways  
10 here, Your Honor. And that's the beauty of the  
11 call. It puts both parties -- but for Wyoming to  
12 know what's happening down there or to have a  
13 protocol -- as I pointed out in our brief, maybe  
14 you're going to the modeling -- for us to know on  
15 the Powder, we have to know more than just are  
16 there pre-'50s not getting water.

17           Montana has to commit to the fact that  
18 they are in regulation. And, in fact, I think  
19 this is why Jack Stults wanted to work something  
20 out outside the doctrine of appropriation, because  
21 he realized -- and that's what he was saying in  
22 his deposition. "Could we just work something  
23 out? It's good for Montana to have post-'50s on  
24 it, creating groundwater storage for us." And if  
25 they don't make the call, it may be because they

1 don't want to make the call, because they'd rather  
2 the timing -- this is the whole first part of our  
3 case.

4           Return flows from Wyoming help Montana.  
5 And the timing of those flows is wonderful for  
6 Montana, because it delays when the water gets  
7 there. And so that -- the way they regulate the  
8 Powder could be the way they'd like to see it  
9 regulated across state lines.

10           So how is Wyoming to know, if Montana  
11 doesn't make a call, that they even want the  
12 water? They may prefer to have it two weeks later  
13 and let us keep flood irrigating, not only  
14 pre-'50s, but some post-'50s that they happen to  
15 be on -- which they probably aren't. But that's  
16 another issue.

17           SPECIAL MASTER THOMPSON: Let me --  
18 actually, let me ask another basic question. In  
19 the various years that Montana is claiming it  
20 provided adequate notice, from 1991 through 2006,  
21 this total of 15 years, if they had made what  
22 would have been considered an adequate call, was  
23 there a process that Wyoming could have followed  
24 in order to actually shut down post-1950  
25 appropriators on both the Tongue and the Powder?

1                   MR. MICHAEL: Oh, absolutely. They do  
2 it all the time, every day, up and down the rivers  
3 every year. This has been in place since --  
4 Wyoming has got the boots on the ground. We have  
5 the names. We have the people. Some of them  
6 aren't alive anymore. But the water commissioners  
7 and hydrographers are out there every day. They  
8 would have been told by their area superintendent  
9 to get to work and shut it down. I mean, it would  
10 have gone through Cheyenne. There's no doubt  
11 about it. Because this is a Compact issue. It  
12 would have gone to the Compact commissioner. In  
13 fact, it should have, because it's a priority.  
14 But again, there's a way to accomplish that. No  
15 question.

16                   SPECIAL MASTER THOMPSON: Okay. So let  
17 me go to one or two specific parts of the  
18 depositions that have been taken. And I want to  
19 use these in order to get a better sense of what  
20 you think is missing, in terms of evidence, to  
21 actually support Montana's claim that it provided  
22 adequate notice.

23                   So start out with the years 2002 and  
24 2003. And it appears there is testimony in the  
25 deposition of Jack Stults. In particular, there

1 is your questions and his answers at pages 86 to  
2 91 of the materials. And I can give you a sense  
3 of what he testified. He said that he remembers  
4 having conversations during the period of time  
5 that he was the Yellowstone River Compact  
6 commissioner.

7 He says, "What I remember doing was  
8 saying that we're having a tough time in Montana,  
9 and it appears to us -- it seems quite obvious to  
10 us that we're in less good shape under these  
11 climatic circumstances right now, these weather  
12 circumstances, than you guys are, say, around  
13 Dayton. If you look at the health and  
14 productivity of the agriculture on the two sides  
15 of the state line, there's a marked difference."

16 Then he says, "I made it clear to them  
17 that we felt that they were taking more water than  
18 they were entitled to, and that they should --  
19 that some of that water should be coming across  
20 the state line to Montana."

21 You asked, you know, were you saying  
22 that Montana is demanding that Wyoming curtail  
23 water users in the immediate future so that more  
24 water will cross the border?

25 He said, "I did not use those words."



1           You said, "Did you use words where you  
2 thought you were conveying that intent, that we  
3 were making a demand, in that water year, for  
4 curtailment?"

5           He says, "Yes." He then says that, "I  
6 truly believe that I was saying something that  
7 would convey that message and that they would  
8 understand."

9           You then asked, "Times of the year?"

10          He says, "It would have been in June  
11 and May."

12          You say, "Of which years?"

13          And he says, "2002, 2003."

14          So why is that not adequate testimony  
15 to support the view that Montana provided adequate  
16 notice in May and June of 2002 and 2003?

17          MR. MICHAEL: They don't have a date,  
18 and they're not going to be able to prove it.  
19 Well, I don't care -- they should have gotten a  
20 date by now. We've asked them for dates. We need  
21 a date. There's a difference between June 30th  
22 and May 1st, a huge difference. In a low water  
23 year, those are the years when the change occurs.  
24 Somewhere in there -- there's no violation.  
25 Somewhere in there there could be.

1                   So you have to have a date. He has no  
2 way of finding a date. He doesn't have any  
3 documentation. There's no date. It's an  
4 essential element of their case. They can't prove  
5 a date.

6                   SPECIAL MASTER THOMPSON: So timing.  
7 So aspect number one is your belief is that unless  
8 Montana can show a specific date that they  
9 provided notice, that it -- their evidence is  
10 insufficient to support dam use for that year?

11                   MR. MICHAEL: The other part of it  
12 is -- and it goes beyond -- you read me the  
13 quotation. And I think in our presentation,  
14 there's other parts to the deposition. Because I  
15 had to keep honing in on this witness, "What do  
16 you mean? What were you trying to do?" And this  
17 is the one that I think, to me, creates this  
18 plausible deniability problem for Wyoming.

19                   And this is where you start -- and this  
20 cuts close. This is a close cut on content of the  
21 call. When somebody says, "Yes, I think they  
22 should have known. I meant that their grass was  
23 greener than our grass." Of course, that's not a  
24 violation in and of itself, because as Ashenberg  
25 said, our land grass is a lot of the time greener,

1 because we have all this pre-'50s. And we're  
2 upstream, and their pre-'50s can't call our  
3 pre-'50s.

4 But the idea that, you know, he's at  
5 some outside of the Compact commission scenario,  
6 he's on a field trip, and he says this to  
7 somebody, and then later in deposition he makes it  
8 clear that, "I wasn't demanding it under the  
9 Compact. That's what we did in '04 and '06." And  
10 this is where you and I disagree from your  
11 Memorandum Opinion and what we argued before and  
12 what I've argued again; that what is a demand.  
13 Does the word mean anything.

14 And he used the word "demand." But  
15 when he really described what he did, what he  
16 described doing was trying to urge Wyoming to get  
17 in the room and talk about solutions outside of  
18 the prior appropriation doctrine. That was his  
19 intent, he said. "I wanted to scare them, and  
20 this is what I wanted to get out of it. I wanted  
21 to get something where we worked around the prior  
22 appropriation system. And I wasn't expecting them  
23 to do something under the Compact."

24 Because I asked him later the specific  
25 question, "Was this demand under the Compact?"

1 And in your Memorandum Opinion, you have the state  
2 is making a demand under Article V(A) or under the  
3 Compact. So that, to me, is the rub. And the  
4 reason it's a rub is because the upstream state,  
5 if we go ahead and say, "Well, we've got -- take  
6 that as a demand -- content-wise, timing aside, we  
7 have to take that as a demand." Then later on, it  
8 turns out they do what I said a little earlier.  
9 It turns out Montana was -- it was a bad demand.  
10 They were in violation. They opposed '50s --  
11 their pre-'50s were still getting water. It  
12 wasn't timely.

13 In May, most Mays, even the worst year,  
14 everybody is getting water. So if it's wrong,  
15 then we have to be able to say, "Montana, we  
16 curtailed, based on your demand. And we cut  
17 people back that were going to get another cutting  
18 of 'A.' And now we want to come after you for  
19 damages for improvident -- improper demand."

20 And he says, "Well, I was just trying  
21 to work on getting negotiations going. I wasn't  
22 trying to make a demand under the Compact." You  
23 know what that looks like. That's what I did in  
24 2004. That's when I get the governor involved.  
25 And we want everybody to stand to attention. I

1 want everybody to know, you know.

2 But this one, I was trying to fly under  
3 the radar. I didn't want it to go to the  
4 gubernatorial. But this Compact is based on the  
5 governors being told every year on annual reports  
6 what happened that year, what was important. And  
7 if you look at those annual reports that year,  
8 Mr. Stults didn't think it was important.

9 And Mr. Moy and Mr. Stults testified  
10 that they -- when Moy came in long before  
11 Mr. Stults is here, that they looked at every  
12 annual report that they had to make sure they were  
13 accurate. And those were supposed to be reports  
14 to the governor so that these kinds of important  
15 Compact issues get raised to the appropriate  
16 level, to the governors, because they're the ones  
17 that appoint the representatives. So you feel  
18 that every annual report is a report to the  
19 governor.

20 And he wanted to keep it -- he didn't  
21 want to trigger the political process. He didn't  
22 want to trigger anything that would raise this to  
23 a level, because he thought he could work  
24 something out with Wyoming outside the random  
25 doctrine of appropriation. Well, this Compact

1 says, doctrine of appropriation.

2                   So the idea is -- okay. He said that.  
3 I read that this morning. It was Moy pages 81 to  
4 96. He said that. But when you read it in the  
5 context of the deposition, this is what you're  
6 going to hear -- presumably you will hear it at  
7 trial -- is Mr. Stults saying, "I didn't want to  
8 trigger anything. I didn't want them to act on  
9 it. I didn't want Wyoming" -- Wyoming, when they  
10 hear the word call, they go ballistic, and they  
11 actually insist on prior appropriations.

12                   Well, we don't want that when Montana  
13 is not using prior appropriation. He doesn't want  
14 the Compact to be brought into force, because  
15 Montana is not ready to do it. So there's a  
16 reason why he would have, you know, beat around  
17 the bush. So, you know, yes, there is that  
18 inconsistency in his testimony. But, you know,  
19 read -- if you read the whole thing, I think when  
20 somebody says straight out, it was not my intent  
21 to have them act on it, but then he says that they  
22 should have taken it as a demand. That's somebody  
23 that's trying to retain plausible deniability or  
24 recreate it after the fact, years later, to keep a  
25 lawsuit going.

1           So that's what I don't like about that.  
2   But the timing kills it anyway. And so that's  
3   what I think about that one. Questions -- other  
4   questions, Your Honor? Have I covered that?

5           SPECIAL MASTER THOMPSON: Yes. Let me  
6   just really quickly, just ask on both of those two  
7   points. So first of all, on the need for a  
8   specific date. So going back again to the notion  
9   that a call is required in order to maintain  
10  damages. Are you aware of any case, other than  
11  the Worley case from Mexico that you referred to  
12  in your initial brief, that deals with what type  
13  of demand or call --

14           MR. MICHAEL: No, Your Honor. I read  
15  the Tucker case, 1926 Montana case. But the Court  
16  in that case said that the downstream irrigator  
17  made a request and demand, repeated request and  
18  demand. It didn't differentiate. He used the  
19  word demand, and said you retain your ability to  
20  bring a lawsuit later and get damages because you  
21  did that. And you didn't go to administrative  
22  process, but it wasn't even available. So the  
23  exhaustion from upstream wasn't useful.

24           So those two cases, Worley and Tucker,  
25  would be the only two where we see the demand

1 requirement. I mean, Tucker was based on some  
2 other cases, Cook, and some other cases I cited  
3 back in September. But it wasn't directly on that  
4 point. So I think we're seeing here in terms of  
5 policy . . .

6 SPECIAL MASTER THOMPSON: So let's  
7 assume, then, in all other ways a demand would  
8 have been adequate but -- and I know that  
9 originally you wanted, you know, the requirement  
10 that the call be in writing. But let's assume for  
11 the moment it's okay for it to be oral, so long as  
12 is it's an official request and demand for water  
13 under the Compact.

14 Realizing that we're dealing with  
15 periods of time, people can't remember exact  
16 dates, you know, somebody says, "Oh, it was June  
17 or July," maybe there's a question of whether or  
18 not the demand would have been -- based on that  
19 testimony, whether you could get damages, for  
20 example, in June or July. But shouldn't I at  
21 least be able to say, "Well, it's adequate for any  
22 time after the end of July, because you gave it  
23 sometime in those two months"?

24 MR. MICHAEL: I thought about that, and  
25 I say no.



1 SPECIAL MASTER THOMPSON: And why?

2 MR. MICHAEL: Because I think the other  
3 side -- we have to have a target to shoot at.  
4 You're saying, okay, I'll grant you a target.  
5 I'll give you July 31st. Because somebody says,  
6 "I think it was 1988. And it was all these bad  
7 water years. And I think a couple years in the  
8 1990s." And now, of course, you know, that call  
9 is even worse, because five months later, he  
10 doesn't even tell his boss about it, doesn't  
11 even -- he said, "It was between Mike and me. I  
12 didn't want it to go to any other level. I didn't  
13 even want my own boss, who's our Compact  
14 commissioner, to know I did it."

15 There's a lot of problems with that  
16 '88. Okay. But I still think that that one --  
17 that in terms of us trying to try the case, we  
18 need to have dates to work from. And I think that  
19 when you're coming forward in a lawsuit of this  
20 magnitude, that you need to -- if your people want  
21 to -- if you want to file a lawsuit for damages  
22 20 years later, if you didn't take notes, and you  
23 didn't even tell your boss, and you didn't put it  
24 in the annual report, the genuine issue of  
25 material fact that even August or July is good

1 enough, that we go to the end of August -- which,  
2 of course, is -- you know, wouldn't lead to  
3 anything, would be a total waste of everybody's  
4 time. In a dry year, look at the end of August.  
5 It's ridiculous. But to let that go forward, that  
6 creates a genuine issue of material fact.

7           The message is, that we can be mushy  
8 about dates. And I don't think you can be mushy  
9 about dates in a prior appropriation system. And  
10 I don't think the plaintiff can be mushy about it.  
11 And they have to be -- a message needs to go out  
12 to plaintiffs that want to bring cases in this  
13 type of a setting -- it's unusual, because people  
14 want lawyers to say, "Get us our water," and then  
15 they document it, and then they don't wait  
16 20 years to sue.

17           So it's unusual, of course, to have  
18 this happen. It's post hoc that appears to be  
19 some recollection. I mean, as vague as it may be.  
20 Mr. Kerbel said, "Stults said time is not our  
21 friend," as far as his memory. Kerbel said, "Boy,  
22 you know, years ago, years ago." So you've got  
23 this vague thing.

24           But to let that go forward, based on  
25 that evidence, and say that it's a genuine issue,

1 because I'll push it to the last possible date and  
2 give this witness the benefit of the doubt, I  
3 don't think it creates a genuine issue. He  
4 doesn't know. He doesn't know. When you look at  
5 that testimony -- in fact, they have a means to,  
6 that very year, at the December report, to put in  
7 here, "We made a call. Wyoming didn't do  
8 anything."

9           And this guy purposely kept it from his  
10 Compact commissioner to confirm the date that they  
11 did it. And they -- maybe he could have  
12 remembered the date in December that he now can't  
13 remember 25, 30 years later. So I don't see how  
14 you can say there's a genuine issue of material  
15 fact. And you can say, yes, we'll give them the  
16 benefit of that doubt, five-and-one-half years  
17 into the case to keep that issue alive. It should  
18 be dead.

19           SPECIAL MASTER THOMPSON: So two other  
20 questions. First of all, continuing on on this  
21 same piece of testimony. I understand your  
22 position that Mr. Stults has to make -- has to  
23 provide a call, make a call in an official  
24 capacity. But I guess I'm also curious as to the  
25 nature of that. So in Wyoming -- let's deal with

1 Wyoming procedures. If you have -- a senior is  
2 not getting enough water, and they call up whoever  
3 is the official on their particular river system  
4 and say, "We're not getting enough water. And,  
5 you know, we think more water should be released  
6 down to us, because we're seeing a lot of people  
7 upstream who seem to be getting plenty of water,"  
8 would that be sufficient, or does it have to  
9 actually take the form of, "We demand that water  
10 be released to us"? Would that be the response?  
11 Are you demanding that water be released?

12 MR. MICHAEL: We take it in paper. We  
13 take it on paper. We require written call in  
14 Wyoming to our person. Because it's a serious  
15 business here, and you are at risk. You're  
16 telling us that your headgate is low and you need  
17 the water. And we have a piece of paper. So when  
18 this person upstream says, "He didn't say that. I  
19 can't believe you said that." Well, I have his  
20 demand right here in my hands. The commissioner  
21 has got it on paper.

22 SPECIAL MASTER THOMPSON: Is there an  
23 official form? Is there some sort --

24 MR. MICHAEL: They have a stack of  
25 forms. They have forms. Our commissioners have

1 forms to call.

2 SPECIAL MASTER THOMPSON: I would  
3 actually love to get a copy of whatever the form  
4 looks like.

5 MR. MICHAEL: Sure. They'll take notes  
6 on that.

7 SPECIAL MASTER THOMPSON: Let me ask  
8 you one other question, because I want to make  
9 sure we save enough time for Montana to also make  
10 any comments that it has. And my question is, so  
11 the years 2004 and 2006, there were letters from  
12 Montana to Wyoming. And I understand from your  
13 initial brief that there's a question in your mind  
14 of timing and whether or not there should be  
15 damages for any failure to buy water -- pre-1950  
16 Montana appropriators -- prior to the dates of  
17 those letters. But does Wyoming concede that  
18 those letters are a sufficient notice, under the  
19 Compact, to Wyoming as of the dates of those, or  
20 is Wyoming --

21 MR. MICHAEL: 2006, I think, is a lot  
22 easier. Authorized by the governor -- both of  
23 them said authorized by the governor. Both of  
24 them said our Compact commissioner to your Compact  
25 commissioner. And 2006 is, "This is our

1 circumstance. We think you're violating the  
2 Compact." 2004 I think meets that, even though  
3 Montana -- the basis for it was wrong. They said,  
4 "We get to call all your pre-'50s." Wrong. "We  
5 get to make you release reservoir water that might  
6 be stored in priority." Wrong.

7 But they did say, "This is a call under  
8 the Compact, for you to comply under the terms of  
9 the Compact. And it's because we think we're  
10 short and not getting the water under the Compact  
11 that we're entitled to." So in that regard, I  
12 think that those are adequate. That's why we  
13 conceded it.

14 SPECIAL MASTER THOMPSON: Okay.  
15 Thanks. I appreciate that. Just thinking about  
16 the time, I know I've taken up a lot of your time  
17 with questions. And I'm aware of the fact that we  
18 need to be out of here at noon. So what I would  
19 suggest is that at this point I ask Mr. Draper to  
20 come up. And to the degree you have other things  
21 that you were planning on saying that you think  
22 are really important, that you reserve that for  
23 your reply time.

24 MR. MICHAEL: That's fine, Your Honor.  
25 And really what you are interested in is what's

1 important to me. So I'll -- mostly rebuttal is  
2 what I'll need. Thank you.

3 SPECIAL MASTER THOMPSON: I appreciate  
4 that. And let me just suggest if you want one  
5 minute, Mr. Draper, to talk to your co-counsel,  
6 that would be fine. But I'm not going to take a  
7 formal break. I'm just going to sit here for,  
8 like, a minute, if you're willing to get up and  
9 start your presentation. And I promise you I have  
10 lots of questions for you, too.

11 MR. DRAPER: Very good. Thank you. We  
12 will take a minute. Your Honor, could we have  
13 just enough time for a bathroom break?

14 SPECIAL MASTER THOMPSON: I think that  
15 would be fine. In fact, why doesn't everyone use  
16 this opportunity for a bathroom break. But I  
17 really do want to start back in, like, three or  
18 four minutes, no later. So just be fast.

19 MR. DRAPER: Thank you.

20 (Recess from 10:27 a.m. to 10:34 a.m.)

21 SPECIAL MASTER THOMPSON: Let's go back  
22 on the record. And so, Mr. Draper, I understand  
23 that it is Mr. Wechsler who will be doing this  
24 part of the argument?

25 MR. DRAPER: Yes, Your Honor.

1                   SPECIAL MASTER THOMPSON: Okay. Thank  
2 you very much. So, Mr. Wechsler, I'm sure that  
3 you're anxious to respond to everything that  
4 Mr. Michael has had to say. But let me actually  
5 start out by asking you questions. And I'll give  
6 you some time later on to respond to anything else  
7 that people would like. But I want to make sure  
8 that I have an opportunity to ask you the  
9 questions that I have and we don't run out of time  
10 for that.

11                   And I'm going to take the issues in a  
12 slightly different order for you than I did for  
13 Mr. Michael. I actually want to start out with a  
14 question of adequacy of the notices and then get  
15 to the two exceptions after that.

16                   So first of all, on the adequacy of the  
17 notices -- so a whole variety of questions. The  
18 first one is, who, in Montana's view, had the  
19 authority to actually speak for the State under  
20 this Compact?

21                   MR. WECHSLER: Well, I think the answer  
22 to that is, it depended in what context. When  
23 you're talking about communications as between  
24 individuals between two states, we know that this  
25 is a statute both of Montana and of Wyoming and,



1 of course, the Compact as well. And so there are  
2 a number of individuals who are acting on behalf  
3 of the State of Montana. And so it depended on  
4 job positions.

5 Mr. Stults, who was the commissioner,  
6 testified that he believed someone in Mr. Kerbel's  
7 or Mr. Moy's position had the authority to be  
8 speaking. And, in fact, he expected them to be in  
9 constant communications with the State of Wyoming  
10 and having these types of notifications,  
11 communications. In fact, I think at one point  
12 Mr. Stults testified that he endorsed those types  
13 of communications.

14 You'll also find in the materials from  
15 Wyoming there's an interrogatory response, a  
16 supplemental interrogatory response, in which  
17 Wyoming -- I'm sorry, Montana puts out its  
18 position that when it's those individuals who,  
19 within the scope of their authority, would be  
20 anticipated to have those kinds of communications,  
21 that they have the authority from the State of  
22 Montana.

23 SPECIAL MASTER THOMPSON: Okay. And my  
24 understanding of one of Wyoming's concerns is --  
25 you know, there are a lot of people out there, and

1 how do they know, in any particular situation,  
2 whether a particular person in Montana has the  
3 authority to actually make a call?

4 MR. WECHSLER: Well, I guess part of my  
5 problem is the premise of that argument. And that  
6 is, I think -- I assume that we'll get into this  
7 later. But for years, 1952 onward, all of the  
8 communications that Montana had been having with  
9 Wyoming, Wyoming was informing Montana that there  
10 are no obligations on the State of Wyoming under  
11 Article V(A). It simply excludes those rights  
12 from the Compact. Therefore, Montana, you are  
13 afforded no protection. That started in '52 and  
14 it went forward. And you see that in the  
15 testimony of Mr. Moy, Mr. Kerbel, Mr. Stults.

16 So the notion that somehow Wyoming  
17 would have honored a call, had it simply been from  
18 the right person or in the right manner, written  
19 other otherwise, is a faulty premise. There were  
20 numbers of communications. At no point -- you  
21 know, Wyoming is very fond of pointing out that in  
22 1982 and 1983, Mr. Stults did, at a commission  
23 meeting, acknowledge that they would give  
24 notification if they were not receiving water for  
25 pre-1950 water rights.

1                   Well, there's no indication there or  
2 anywhere else in the record that Wyoming ever  
3 said, "Well, that notification has to be in  
4 writing." Well, initially, I guess in their  
5 opening brief a year ago, they argued it had to be  
6 by commission of the commissioner and written.  
7 And as I understand their renewed motion, now, not  
8 only does it have to be in writing, Montana  
9 actually has to request a formal session of the  
10 commission, at which they put forward this notion.  
11 And there has to be a vote by the commission. And  
12 at that point, Montana has somehow satisfied its  
13 administrative call obligations. So did -- well,  
14 did I answer your question?

15                   SPECIAL MASTER THOMPSON: Well, so I  
16 guess I'm going to try to express what I think  
17 Wyoming's concern is here. It is that, you know,  
18 there are a lot of water officials in Montana.  
19 And if one water official calls up and said, "You  
20 know, I don't think we're getting sufficient  
21 water," how does Wyoming know whether or not  
22 that's actually a demand or simply a comment by  
23 somebody in Wyoming (sic) that, you know, they  
24 just don't think they're getting enough water?

25                   MR. WECHSLER: Well, I think that -- I

1 think that what you have here is a relationship  
2 between two sovereign states with -- which places  
3 certain obligations on both states. The  
4 individuals from both sides are familiar with  
5 Mr. Stults, Mr. Moy, Mr. Kerbel. They're aware  
6 that they're attending meetings. They're aware of  
7 their position. In fact, as Mr. Kerbel testified,  
8 there's constant communication.

9           And if there is a notification from one  
10 state to another, from an official to another  
11 official, as that was happening, really, the  
12 notion that somehow the upstream state really  
13 holds all the water, all the cards, all the power,  
14 and somehow if it's not done in a particular  
15 formalistic way, is entitled to simply ignore that  
16 call, is really a troubling one to me, and I think  
17 one that you addressed in your Memorandum Opinion  
18 at page 11.

19           And you indicated that once notice was  
20 provided, quote, the burden would have been on  
21 Wyoming to determine whether the insufficiency was  
22 the result of post-1950 uses in Wyoming. In other  
23 words, there are obligations on the State of  
24 Wyoming.

25           I would also point out that I think --

1 and this is something that I don't know that we  
2 did a good enough job in our briefing of pointing  
3 out. And that is, certainly these communications,  
4 we believe, are sufficient to meet the notice  
5 requirements that you set out there that the  
6 Compact obligates. But you also -- within the  
7 second exception, you indicated that if there were  
8 other sufficient reasons to believe or know that  
9 they had insufficient water.

10 Well, we can talk, if you would like,  
11 about all of the information that Wyoming had, in  
12 terms of, you know, what the water rights -- where  
13 the water rights -- and I can point you to certain  
14 places where they actually had done their own  
15 methodology, sort of a pseudo model, if you will,  
16 and that the real problem was simply they didn't  
17 agree with the Article V(A) versus V(B)  
18 distinction.

19 But my point is, those communications  
20 that occurred from Mr. Moy, from Mr. Kerbel, from  
21 Mr. Stults, beginning in 1981 -- and as you  
22 stated, there's ample evidence in the record to  
23 indicate those communications -- at the very  
24 least, even if there was some formalistic call  
25 requirement under the Compact, which you

1 acknowledged in the Memorandum Opinion, and I  
2 think Wyoming also acknowledged in its opening  
3 brief in 2011, that there is no -- it's not  
4 express in the Compact itself. There's no  
5 language indicating this is how it should be done.

6           So even if there was no formalistic  
7 notice that was required, certainly those  
8 communications that were -- that came from those  
9 individuals and that evidence shows that Wyoming  
10 did have reason to know. They had sufficient  
11 reason to know. That, coupled with all of the  
12 information they had on Montana's water rights and  
13 knowledge about the flow, which shows up in the  
14 annual reports and everybody has access to, that  
15 provided a large body of information that put  
16 Wyoming on notice that Montana was not receiving  
17 adequate water during those years.

18           SPECIAL MASTER THOMPSON: A very  
19 specific question. And unless you have a copy of  
20 the statute with you, you might not be able to  
21 answer this particular question. But in your  
22 opposition papers, you have a paragraph which  
23 talks about the regulatory authority of DNRC over  
24 the waters of the State of Montana. And, you  
25 know, the reference, in specific, to Montana

1 Code 85-1-204. And in the parenthetical  
2 afterwards, you say, "DNRC may exercise any of its  
3 powers in an adjoining state."

4 And I read that particular section.

5 And I'll confess, I read it on my iPhone last  
6 night, because it was the only thing I had with  
7 me. But I didn't see any reference to powers in  
8 an adjoining in that particular section.

9 MR. WECHSLER: I'm afraid I don't have  
10 a good memory of the statute, and so I can't  
11 answer the question.

12 SPECIAL MASTER THOMPSON: Okay. Let me  
13 ask you some more general questions, then, which  
14 is, I asked Mr. Michael how calls work in Wyoming.  
15 So does Montana have a call procedure? And if so,  
16 how does that work?

17 MR. WECHSLER: Well, the call procedure  
18 in Montana is really pursuant to the pure prior  
19 appropriation doctrine. And that is, a downstream  
20 senior simply has to inform the upstream junior  
21 that they're not getting sufficient rights. And  
22 it doesn't need to be from a particular person to  
23 a particular person. It does not need to be in  
24 writing. There's no obligation that before you go  
25 in, enforce your rights, that it's shown on a

1 given date. And that shows up in the case law, as  
2 well as in the testimony of the witnesses.

3 SPECIAL MASTER THOMPSON: And to your  
4 knowledge, are there any regulations or guidance  
5 documents in Montana that provide how  
6 notices are -- or demands or calls are being  
7 provided?

8 MR. WECHSLER: Well, not from  
9 appropriator to appropriator. I'm not aware of  
10 any regulation that set those forth. There is a  
11 process in Montana by which an individual or group  
12 of individuals can petition the Court to actually  
13 regulate; in other words, assign a water  
14 commissioner. And at that point, it's that person  
15 who's obligated to actually be involved under the  
16 direction of the Court in curtailing water rights.  
17 And that occurred on the Tongue River in a number  
18 of years in the 2000s, including 2004, 2006.

19 SPECIAL MASTER THOMPSON: So going back  
20 to your comment that in Montana there is no  
21 requirement that you provide call to any official,  
22 but, instead, the call would be to the junior  
23 appropriator, where you inform the junior  
24 appropriator you do not have sufficient water.  
25 Are there -- what I'm looking for are any cases,



1 administrative documents that provide any guidance  
2 as to the nature of that call or that demand. Do  
3 you know of anything that you haven't cited?

4 MR. WECHSLER: Well, no. And this goes  
5 to the approach that Wyoming was talking about, in  
6 terms of they view this as an opportunity,  
7 apparently, to reargue much of the law. What we  
8 saw from their memorandum, what Montana took, was  
9 that in 2011, briefing had provided a fair  
10 opportunity to the parties to go through and  
11 evaluate what the law is. And as I'm sure you  
12 recall, Montana's position then -- and really,  
13 frankly, our position now, even though we will  
14 live with your orders -- but our position is that  
15 there is no call requirement that's expressed in  
16 there.

17 One of the reasons that Mr. Michael is  
18 struggling so mightily with determining exactly  
19 how that would work in an interstate context is  
20 there is no Compact in which there's been this  
21 requirement of an interstate call. And, in fact,  
22 the relationship between just a downstream junior  
23 and an upstream senior, it's not completely  
24 analogous to what we have here, where we have two  
25 sovereigns, both of which are governing thousands

1 of water users and tens of thousands of acre-feet  
2 of water. And so our position is that really  
3 there is no call requirement in the Compact, nor  
4 does it make sense, nor -- and as we had outlined,  
5 it was unprecedented.

6 At the end of your Memorandum Opinion,  
7 within which you found otherwise, you indicated  
8 that, well, there is an additional time that's  
9 necessary for discovery. By which we understood  
10 that to mean, this was an opportunity for the  
11 states to go out, evaluate the facts, look at the  
12 information that's out there, and then apply those  
13 facts to the law, the ruling that you had already  
14 made.

15 And so I apologize for not having at my  
16 fingertips a number of cases showing the exact  
17 contours of the rule in Montana, but I'm quite  
18 confident that what I've said is correct. And the  
19 reason we did not go and thoroughly include that  
20 in the brief is because we considered this to be a  
21 decided matter.

22 SPECIAL MASTER THOMPSON: Right. And I  
23 understand in your opposition papers you cited  
24 these issues, and that at this point, it would be  
25 inappropriate to reargue it. Nonetheless,

1 ultimately, I expect that I'll need to include in  
2 my next report to the Supreme Court the basis for  
3 my ruling on Wyoming's motion.

4           And in connection with that, just like  
5 I've asked Wyoming for a copy of their -- their  
6 call documents, if there is any information that  
7 Montana can provide regarding the nature of what  
8 needs to be done in Montana if you're a senior  
9 appropriator and you want the junior appropriator  
10 to stop diverting as much water from the river,  
11 I'd very much appreciate getting copies of that.

12           MR. WECHSLER: We'd be happy to. And  
13 if I may, very briefly, I think what you were  
14 asking Wyoming for was copies of their request for  
15 regulation forms. And, actually, that form is  
16 attached to Mr. Tyrrell's affidavit. In the  
17 original set of briefing in 2011, there's what's  
18 styled here, "State Board of Control, Rules and  
19 Regulations." There's a Section 2, "Request for  
20 Regulation," and then there's a Request for  
21 Regulation form. And I think that material is in  
22 there.

23           SPECIAL MASTER THOMPSON: Great. If,  
24 in fact, there's nothing more that Wyoming wants  
25 to provide, because that's all of it, then it's

1 fine simply to tell me that in a brief letter. So  
2 let me go to the particular years that Montana is  
3 claiming it provided adequate notice. And let me  
4 start out, actually, with just a clarification.

5 I think it's clear from the papers, but  
6 I know Wyoming was not absolutely certain. You  
7 list, as I say, a total of 15 years. As I  
8 understand it, those are the only years at the  
9 moment that Montana is claiming that it provided  
10 adequate notice. And, therefore, under my  
11 Memorandum Opinion, Montana is entitled to go  
12 forward with the damages; is that correct?

13 MR. WECHSLER: I think that's basically  
14 correct. I would say that certainly the futility  
15 exception and some of the other exceptions apply  
16 in such a way that, really, from a legal and  
17 factual perspective, Montana should be allowed to  
18 go all the way back to 1952. But recognizing the  
19 difficulties pragmatically of that, Montana is  
20 voluntarily eliminating its claim for damages to  
21 those 15 years.

22 SPECIAL MASTER THOMPSON: And so if I  
23 take those years -- let me just sort of walk you  
24 through them. So 2004 and 2006 were the two years  
25 in which, to our knowledge, there was an official

1 letter from Montana to Wyoming demanding  
2 additional water for pre-1950 appropriators. In  
3 2002 and 2003, as I discussed with Mr. Michael,  
4 there's the Stults testimony regarding the  
5 conversations that he had with Wyoming officials.  
6 I also found, looking at the Kerbel testimony,  
7 specific statements regarding conversations in  
8 1988 and the year 2000.

9           So those were years when I found  
10 explicit reference to particular years. So let me  
11 just then talk about the various other years.  
12 Let's start with the 1980 years. So you address  
13 this at pages 40 and 41 of your opposition papers.  
14 And in this particular case you have, first of  
15 all, citations to the Moy, M-o-y, deposition. And  
16 looking at them, for most of the references I  
17 couldn't find any year specified. But, instead,  
18 it just generally talked about providing notice in  
19 water-short years.

20           And then in the one section that you  
21 mentioned where it seems to reference specific  
22 years, that is page 49 of the Moy deposition,  
23 starting at line 20, going to page 50 at line 7.  
24 And if I look at those particular references --  
25 I'll just actually quote this.

1           So the quote starting on line 20, this  
2 is Mr. Michael asking the question, "Let's go to  
3 Paragraph 4 of your declaration. I'm going to  
4 break this sentence up, as I ask the questions.  
5 'During the period 1981 to 2008, pre-1950 water  
6 rights in Montana experienced shortages.' Let's  
7 stop right there. Well, let's go on, just a  
8 little bit. 'Not only in 2004 and 2006, but also  
9 in other years.' And I wanted to ask you, you  
10 wrote this in 2011. What other years did Montana  
11 pre-'50 experience shortages?'"

12           And the answer, "If I recall, I thought  
13 like 1981, '82, '85. I just remember that we were  
14 going through drought cycles, and my staff was  
15 responsible for dealing with doubt [sic]  
16 issues" -- I assume that's probably drought  
17 issues -- "in the state. And so I'm thinking '81,  
18 '82, '84, '85 were doubt [sic] years" -- again, I  
19 think it's drought years -- "for example."

20           So what I see here is general testimony  
21 that, yes, I remember providing notice periods  
22 when Montana didn't have sufficient water, and  
23 then specific testimony that, well, these were the  
24 years in which I remember we had a drought. But  
25 what I don't see here are specific statements that

1 in 1981, '82, '85, '87, and '89, I provided  
2 notification.

3 So I guess I have a two-part question.  
4 The first is, am I missing something? Is there  
5 some specific testimony or a specific declaration  
6 that said, "We provided notices of these  
7 particular years"? And if not, is this an  
8 adequate basis for me to deny Wyoming's Motion for  
9 Partial Summary Judgment with respect to these  
10 particular years?

11 MR. WECHSLER: Well, I think the  
12 answer, in terms of what are you missing, is  
13 those -- that testimony has to be read in light of  
14 the entire testimony of his deposition and, also,  
15 of his affidavit. As you say, Mr. Moy did testify  
16 that in a number of years they provided notice to  
17 Wyoming, testifying in his affidavit. And so here  
18 he's being asked specifically about his affidavit  
19 and to identify those years; '81, '82, '85.

20 You know, later on in his deposition  
21 he's asked a number of things. Was this a call?  
22 Was it the same as 2004, 2006? Each time he said,  
23 "Yes, that's what I did. I made those calls. I  
24 was demanding water under the Compact," which is a  
25 rather substantial body of evidence.

1                   Which leads me to your second question.  
2   Is this an adequate basis to deny summary  
3   judgment? I think that is -- that's really a very  
4   critical point to be made in this -- in resolving  
5   this motion. You know, I heard Mr. Michael up  
6   here talking about all kinds of different types of  
7   evidence. It's not the evidence that Montana was  
8   pointing to, but other things, like things that  
9   happened in '82, '83, or things that happened in  
10   Compact commission meetings, as a way of sort of  
11   denying facts that Montana put in the record.

12                   That's not adequate for summary  
13   judgment. In this case, in particular, as we set  
14   out in our standard of decision, all of the  
15   inferences have to be read in Montana's favor.  
16   And, in fact, if there's -- if there are different  
17   conclusions that could be reached by a particular  
18   set of facts, then it's necessary to deny summary  
19   judgment.

20                   In this case, the inferences, to the  
21   extent he doesn't explicitly testify that, okay,  
22   these three years are the ones in which we had  
23   provided notice, that inference is very clear --  
24   both from here, his connection to his affidavit,  
25   and then also in the other testimony -- and must



1 be resolved in Montana's favor.

2 At the very least, this creates a -- is  
3 evidence on which a juror or a fact-finder in this  
4 case could conclude -- could reasonably conclude  
5 that, in fact, those were the years. And because  
6 of that, it's necessary to deny summary judgment.

7 And on that, I do want to make one  
8 quick comment about why it was we relied on the  
9 depositions and not the affidavit and not go out  
10 and get additional affidavits. Really, there were  
11 two reasons. One was, we actually thought it was  
12 the fairest way to go about that, because these  
13 depositions really were taken by the State of  
14 Wyoming, with a full, complete opportunity to  
15 cross-examine.

16 And going through those, we felt like  
17 it provided ample information that here is an  
18 issue of fact, something that must be weighed at  
19 trial to determine whether or not that notice was  
20 made.

21 The second reason is with Mr. Moy and  
22 Mr. Kerbel, they are currently employees of the  
23 United States. They are not Montana employees.  
24 And so it's a slightly -- it's not a Montana  
25 witness anymore, is my point. Mr. Stults is

1 retired. So we could -- we would have had the  
2 ability to have access to him.

3 SPECIAL MASTER THOMPSON: So  
4 Mr. Michael started out by basically saying his  
5 view, at this stage of the proceeding, Montana  
6 should have more specific facts that it can  
7 provide than it has in its opposition papers. And  
8 reading the papers myself, a lot of the  
9 information is relatively vague and unspecific  
10 when it gets to questions of dates, and in some  
11 cases, exactly what was said.

12 One thing that really I don't think I  
13 ever saw addressed in its papers as well as I  
14 would like, is in this type of a situation where  
15 there are certain general statements about, "Well,  
16 you know, we -- you know, I know I provided notice  
17 in some drought years, and here are some drought  
18 years." Whether or not that is sufficient to  
19 justify the denial of Wyoming's Motion for Partial  
20 Summary Judgment, when Wyoming has provided  
21 affidavits from some of their key water people  
22 basically saying, "To my knowledge, we never  
23 received any notice. We didn't receive notices.  
24 And in the due course of things, we would receive  
25 them if they had been provided."

1                   And so I hate to give a little bit of  
2 work to both sides, but this will be very valuable  
3 to me. And I want to make sure you have an  
4 opportunity to actually make your argument. To  
5 the degree that there are any cases, judicial  
6 cases, that you think are useful to me in deciding  
7 whether or not Montana has actually provided  
8 adequate information to justify denial of  
9 Wyoming's Motion for Partial Summary Judgment in  
10 those years where there's not specific testimony,  
11 "Yes, in 1982, I provided a notice to Wyoming that  
12 we weren't receiving adequate," I would love to  
13 get your views on that particular issue.

14                   If you think you've adequately briefed  
15 that in your papers, that's fine. But I want to  
16 give both sides an opportunity to provide me any  
17 additional information that you think exists on  
18 how I should resolve this Motion for Partial  
19 Summary Judgment on the record where, as I say, in  
20 some years the exact -- the information as  
21 provided by Montana is, as I say, relatively vague  
22 and unspecific.

23                   And rather than -- well, let me ask a  
24 question. Also -- so similarly, as I say, in  
25 1992, 1994, and 1998 when Montana claims that,

1 again, it provided adequate notice, the only  
2 testimony that I see as to what type of notice, if  
3 any, Montana provided comes from the Kerbel,  
4 K-e-r-b-e-l, deposition. And there, what  
5 Mr. Kerbel basically said, as I read the  
6 depositions, is that he personally notified  
7 officials from the state of Wyoming in a couple of  
8 water-short years in the 1990s.

9           And then to try to show what years  
10 those are, you then note that if you look at the  
11 annual reports, we see that the water-short years  
12 were 1992, '94, and '98. And, again, you sort of  
13 couple those two pieces of evidence together and  
14 say, "Well, there were a couple of water-short  
15 years in which there was notice. We know that  
16 '92, '94, '98 were years in which there was  
17 notice. And, therefore, I, as the initial person  
18 to rule on this particular notice -- I'm sorry,  
19 motion, should conclude that '92, '94, and '98  
20 there was notice.

21           So is there anything that I'm missing  
22 there? And, again, I understand Montana's  
23 position, "We provided notice to begin with." But  
24 is there anything I'm missing in terms of the  
25 record?

1                   MR. WECHSLER: Well, in terms of the  
2 factual record, I think the answer is no. But  
3 when I hear you say, is that enough information  
4 for you to conclude something, I think that is  
5 absolutely the wrong test. At the summary  
6 judgment stage, the burden, intentionally, is  
7 minimal on the non-movant.

8                   And the reason is courts, in general --  
9 and that is particularly true in the original  
10 jurisdiction where the Court has cautioned these  
11 types of summary disposition procedures are  
12 disfavored -- but for summary judgment, in  
13 general, courts do not want to, as they call it,  
14 try a case on the affidavits and depositions.  
15 Rather, if there are -- any reasonable inferences  
16 that could be made connecting that testimony,  
17 those must be made and resolved in the favor of  
18 Montana.

19                   And if there's any evidence out there  
20 that shows that, you know, in fact, those calls  
21 were made in '92, '94, '98, then it's appropriate  
22 to deny summary judgment. That issue would then  
23 come before you in trial. Mr. Kerbel will be up  
24 there testifying. He'll be subject to  
25 cross-examination. His memory will be tested, and

1 you'll be able to evaluate his demeanor. And at  
2 that time, it's the proper time to actually make  
3 that conclusion.

4 And the burden is not on Montana in  
5 this motion. And I would say that inference is  
6 clearly there. It's like my saying, "I went to  
7 that World Series game where the guy made the  
8 basket catch." And someone says, "Oh, when was  
9 that?" "Well, I don't remember." Does that mean  
10 that it's not some game with Willie Mays? No, of  
11 course not. It just means that can be connected  
12 by two separate pieces of information.

13 SPECIAL MASTER THOMPSON: I appreciate  
14 the analogy. And so, again, what I really would  
15 appreciate -- and if you think that, you know, you  
16 said everything that you want to say on this  
17 particular point, great -- but one of the areas  
18 where I would appreciate a little bit more  
19 guidance is on the specific standards for summary  
20 judgment in this type of a setting. Let's assume  
21 that it ultimately comes down to the question of  
22 adequate notice. And we have a situation where  
23 Wyoming has basically submitted declarations that,  
24 just paraphrasing them, if I recall, they  
25 basically say, "We never received any notices."

1 And where Montana has submitted evidence that -- I  
2 recognize, again, that memories are poor at this  
3 particular point in time -- but where, you know,  
4 there's a variety of little pieces of evidence  
5 that got sort of strung together and make some  
6 assumptions along the way.

7           And I understand the terms that are  
8 used in these type of summary judgment cases. And  
9 I realize that in these type of summary judgment  
10 cases you do not grant summary judgment if there  
11 are -- if there is evidence that the opposing  
12 party has provided that, read reasonably, can show  
13 there's an actual disputed fact. But what I would  
14 love is any guidance in terms of any cases that  
15 deal with the type of situation that I'm  
16 confronted by here. Where, as I say, you know,  
17 there's a lot of just sort of vague statements  
18 that, cobbled together, pulled together, might  
19 lead somebody to infer that, yes, you know, maybe  
20 in these years those are the years that he was  
21 talking about. If you said drought year, these  
22 were drought years. So I can infer that these are  
23 the specific drought years.

24           It's that type of a case, that if you  
25 have any information as to similar types of cases

1 that a judge resolved it, one way or the other,  
2 that's what I would love to see. And so, as I  
3 said, I'm going to give both sides an opportunity,  
4 if they know of those certain cases, to provide me  
5 with that information. I'll obviously do my own  
6 research on this. But, ultimately, I'm also  
7 relying on counsel for both sides to provide me  
8 with cases that they think are helpful and  
9 relevant on this particular point.

10 So let me go back now to -- well, on  
11 the first exception that I talked about with  
12 Mr. Michael, which is the suggestion in my  
13 Memorandum Opinion that if Wyoming had basically  
14 said, "We're not going to comply with Article V(A)  
15 and provide any water for pre-1950 rights," or  
16 perhaps even through their actions demonstrate  
17 that, that at that point, Montana would not have  
18 needed to provide a call.

19 So with Mr. Michael, we talked about  
20 two analogies. One was the analogy of exhaustion  
21 of administrative remedies, which Montana raised  
22 in its initial opposition to this motion. And the  
23 second was the analogy of contract law. And I  
24 guess two or three different questions. First of  
25 all, your thoughts on the relevance of those two



1 analogies to this type of a situation. Second of  
2 all, any other analogies that you think are  
3 relevant here. And then, finally, anything that  
4 you want to say in response to Mr. Michael's  
5 comments on those points.

6 MR. WECHSLER: Sure. And so starting  
7 with the analogy, I think your first question was,  
8 our thoughts on the analogies of the contract  
9 principles and exhaustion principles. And I  
10 think, you know, as we pointed out in our original  
11 brief, we think that the doctrine of estoppel  
12 applies, and it applies very clearly in this case.  
13 We also think that it can be analogized as the  
14 doctrine of exhaustion of administrative remedies.

15 And I guess I would point to two  
16 things. One, as Wyoming acknowledges, in Wyoming  
17 this obligation of going from one individual to  
18 another individual, the appropriators themselves,  
19 is not actually necessary. In that regard, it's  
20 really a process. In order for a water user to  
21 actually regulate water in Wyoming, they can  
22 simply go to the Wyoming state officials and fill  
23 out the form that Wyoming has pointed out.

24 And so really what you're talking about  
25 there is the administrative process of learning to

1 regulate water. Second, and I think more  
2 importantly, in terms of the type of analogy that  
3 there is, what you have here is a body created  
4 called the Yellowstone River Compact Commission,  
5 you know, with individuals with voting ability.

6           And now what Wyoming actually argues in  
7 their renewed motion is that the obligation placed  
8 on Montana for a call actually was that the  
9 commissioner make a formal request for a special  
10 meeting during the irrigation season, which I will  
11 point out as an aside, is somewhat -- the reason  
12 it has to be in a special session and why this  
13 whole process doesn't make sense is because the  
14 normal commission meetings are after the  
15 irrigation season.

16           At any rate, what Wyoming argues is you  
17 have a commission. You have to make a special  
18 request for a commission meeting. At that  
19 meeting, you have to formally present, you know,  
20 this call requirement. And then there's a vote.  
21 Again, as an aside, the United States has never  
22 and has indicated it will never make a vote. And  
23 so in that regard, there's sort of this  
24 administrative process, this administrative bond,  
25 which Wyoming, at least, is arguing that a call

1 was necessary to be made to them.

2           And so the important part, really, is  
3 the nature of the -- sort of the futility. And to  
4 back up and put this in the context of what  
5 Montana's argument was then, and still, I think,  
6 is a large part of the considerations you need to  
7 take into account, is this whole argument is a  
8 sort of post facto rationalization by the State of  
9 Wyoming.

10           For years, again, since starting in  
11 1952 and going all throughout, I believe in the  
12 call letter, either in 2006 or 2004, Mr. Tyrrell  
13 actually uses the term, the long-standing position  
14 of the State of Wyoming was that, "Montana, you  
15 don't get a drop of water under Article V(A).  
16 Rather, all it does is exclude those water  
17 rights."

18           They carried that position all the way  
19 into this litigation. And it was not until the  
20 first interim report that they changed that  
21 position. And so what's frustrating to the State  
22 of Montana is now what Wyoming is telling us,  
23 essentially, is, "Montana, if you had simply made  
24 the right notice, if you had followed these  
25 procedures, it would have been enough." And, in

1 fact, they're not just saying notice. They're  
2 saying it has to be all these specifics on what  
3 the notice is. But that, in itself, is a  
4 completely inequitable position.

5           And so turning to -- I think you asked  
6 are there additional doctrines that we would point  
7 to. I guess one thing that I would point out is  
8 that, in general, the Supreme Court's jurisdiction  
9 has been considered -- this is a quote from Ohio  
10 versus Kentucky -- quote, basically equitable in  
11 nature.

12           Here's another quote from -- in the  
13 Kansas versus Colorado case, a Compact enforcement  
14 case in which Special Master Littleworth was  
15 writing in the context of equitable defenses. And  
16 he observed that conventional equity rules  
17 eliminates the Court's agreeing to the issues, but  
18 rather, quote, the incongruities were on  
19 fundamental fairness, rather than what is the  
20 history or even the current practice of the Courts  
21 exercising less extraordinary powers.

22           And, of course, the Supreme Court,  
23 itself, has applied equitable principles as  
24 recently as 2001 in the New Hampshire versus Maine  
25 case. And so to the extent that there are other

1 doctrines out there -- I mean, equity, in general,  
2 the equitable thing here is because Wyoming  
3 constantly took that position, is to not require  
4 Montana to have any of that call time.

5           And I would also point out that there  
6 is the course of dealing doctrine, which has been  
7 applied in contract -- in Compact cases, that the  
8 course of dealing of the two parties kind of helps  
9 to set the obligations of those two parties. And  
10 in this case, Wyoming repeatedly told Montana that  
11 there is nothing under Article V. It doesn't  
12 matter if you make that call. You know, you can  
13 see these communications. It doesn't matter if  
14 Mr. Moy made them, or Mr. Kerbel, or Mr. Stults.  
15 It doesn't matter if you were trying all this time  
16 to -- were working on getting a process where you  
17 could get these water rights without a call  
18 involved. We're simply -- regardless, we are not  
19 obligated to provide you any water under  
20 Article V(A). And that was the case here.

21           SPECIAL MASTER THOMPSON: So let me ask  
22 you -- I just want to go back through a number of  
23 points that you just made. The first is, is that  
24 you quoted just now from one of the special  
25 reports of Special Master Littleworth. Can you

1 tell me which and what page?

2 MR. WECHSLER: I can. First report of  
3 Special Master Littleworth, and I believe it's at  
4 pages 150 and 155. This is a 1994 report.

5 SPECIAL MASTER THOMPSON: And second of  
6 all, you talked about the concept of the course of  
7 dealing. Particular original jurisdiction matters  
8 where that was discussed?

9 MR. WECHSLER: Well, I hesitate to give  
10 those particular cases. I thought of it only when  
11 you were asking if there were any others. And so  
12 rather than open my mouth and ensure that I'm made  
13 to look like a fool, I'll keep it closed and let  
14 you surmise.

15 SPECIAL MASTER THOMPSON: If you could  
16 just furnish me with any relevant citations after  
17 the argument, that would be -- that would be  
18 useful. And so one of the things that I think  
19 makes the question of whether or not exhaustion of  
20 administrative remedies and development analogy  
21 here, is that you could, in theory at least, view  
22 a call as a form of -- you know, this is basically  
23 telling somebody that you need the water, or it  
24 could also be a formal process by which you  
25 actually start the process of getting the water.

1           And to the degree you're dealing with a  
2 regular state proceeding, we can probably  
3 distinguish that. Here, though, you have a  
4 situation where because the states are both,  
5 ultimately, the water right holder, and in  
6 addition to that, the parties to the Compact have  
7 to comply with the Compact, it sort of merges  
8 those two functions in a way. So it's sort of  
9 difficult to tell the difference.

10           As I understand it, in Montana's cases  
11 you described a moment ago, it's really just the  
12 notes. It's not a separate administrative  
13 process.

14           MR. WECHSLER: I think that that's  
15 right. I think that in Montana, really what the  
16 purpose is, notice, although it does have the  
17 process component as well and that is how you  
18 actually physically get your water, as I  
19 mentioned, there is a process by which you can  
20 petition the Court to actually regulate the water  
21 rights. And I don't know off the top of my head  
22 if a call is a necessary prerequisite to meeting  
23 that petition to the Court.

24           SPECIAL MASTER THOMPSON: Okay. And,  
25 also, I understand your view that Wyoming might be

1 a little bit inconsistent in saying that this is  
2 really not a process in the nature of something  
3 that could lead to questions of exhaustion of  
4 administrative process. They're really saying the  
5 whole Compact sort of process should be going to  
6 the commission.

7 But my understanding is that Montana is  
8 saying you don't need to go to the commission; is  
9 that right? You're not contending that you should  
10 have gone to the commission on this?

11 MR. WECHSLER: No. In fact, we were  
12 contending -- of course, we believe that there is  
13 no call requirement. Which, as I pointed out, is  
14 one of the reasons that it's so difficult to be  
15 opposing this. But to the extent that given the  
16 Memorandum Opinion, which is the law of the case,  
17 no, we do not believe that you have to go to the  
18 commission. We agree, as you pointed out in the  
19 Memorandum Opinion, oral is sufficient.

20 SPECIAL MASTER THOMPSON: And as I  
21 understood Mr. Michael's argument, his argument is  
22 basically, you know, prior to -- I'm going to --  
23 actually, let me sort of say something that  
24 Mr. Michael did not say, so he doesn't become  
25 concerned that I'm putting words in his mouth.



1           But you can take the 2004 exchange of  
2 letters and, you know, you might be able to view  
3 that as a time when Wyoming, for the first time,  
4 basically said, "We don't need to provide you with  
5 water for those pre-1950 appropriators." You can  
6 say the same in 2006.

7           There are -- let me ask you explicitly.  
8 I was going to ask you whether or not -- what  
9 statements prior to 2004, in your view, are  
10 explicit rejections by Wyoming of any obligation  
11 to provide water to pre-1950 appropriators?

12           MR. WECHSLER: Well, there is all the  
13 evidence about Wyoming's position. For example,  
14 the 1954 letter, the 1971 letter, the governor's  
15 letter, in which, you know, what they're saying  
16 is, "This is the position of Wyoming. And to get  
17 us to change that, you're going to have to take us  
18 to court."

19           Now, I understood your question to be,  
20 what explicit ones -- what explicit evidence is  
21 there that Wyoming actually said, "You don't get  
22 water"? And to that, I would say, certainly  
23 there's deposition testimony from Mr. Moy,  
24 Mr. Kerbel, and Mr. Stults. And focusing in  
25 particular on Mr. Kerbel, what he said is he

1 made -- he, by the way, had frequent conversations  
2 with his counterparts. Not the people who are in  
3 those affidavits that you referenced earlier, but,  
4 for example, Michael Whitaker, and I think he  
5 mentions Bill Knapp, maybe a few others -- where  
6 he was saying -- he was making one of these calls,  
7 having the call, saying, "We need more water. You  
8 guys need to do something to get us more water for  
9 our water rights."

10                   And what he was told by Mike Whitaker  
11 was, "We -- Wyoming cannot curtail any water  
12 rights in Wyoming for the purposes of providing  
13 water to Montana." And, in fact, that's never  
14 been done. So you get Mr. Kerbel -- well,  
15 Mr. Moy, in his affidavit, talking about the  
16 futility of it. Mr. Kerbel, unsolicited, talks  
17 about feeling -- in the deposition talks about  
18 feeling like he's banging his head against the  
19 wall when he's making these requests, and that it  
20 was really a futile request. And, ultimately, I  
21 should say, Mr. Fritz talks about this as being a  
22 task of pushing a rock up the stream, up a hill.  
23 And then you get ultimately Mr. Stults, who had  
24 to -- who eventually realized he needed to  
25 litigate.

1           As for some specific ones, I guess, you  
2 know, one thing I'll point out, without belaboring  
3 all these various different documents, one  
4 document that I think Wyoming mischaracterizes and  
5 really relies on relatively heavily is this  
6 Ashenberg proposal. So if I could get you to  
7 actually look at the Ashenberg proposal, which is  
8 Montana Exhibit S, what Wyoming says is -- and, in  
9 fact, they said it today -- "Oh, this was just for  
10 Article V(B) rights. This would not have provided  
11 us any -- or Montana any water under  
12 Article V(A)."

13           And so I'll point out just a couple of  
14 things to you and then leave you to study those at  
15 another time. On page 1, which Montana -- I'm  
16 sorry, Wyoming relies on, it actually says, "If  
17 there's insufficient water to satisfy all pre-1950  
18 uses in both states, Wyoming water users were  
19 first satisfied with pre-1950 demands. Montana  
20 users could then appropriate the remainder."

21           And in case that's not clear enough,  
22 you can turn to page 81. This is Montana 14185.  
23 And these are the assumptions. He actually goes  
24 through the process of making a model and the  
25 administrative process by which Montana will be

1 provided its rights.

2                   No. 6 there on page 81, MT 14185, "All  
3 pre-1950 priorities in Montana must be satisfied  
4 prior to any post-1950 priorities in Wyoming."  
5 Again, I'll just point out a couple other things  
6 here and let you study later, because I realize  
7 time is short. But if you turn, then, to page 84  
8 and 85, this is MT 14188, MT 14189, he's actually  
9 providing a process here. You can see that what  
10 he's talking about here is regulating water rights  
11 as to both states.

12                   And I'll represent to you that if you  
13 look back on page, when you have time, MT 14184,  
14 what he's showing here is W1 is a Wyoming pre-1950  
15 user; W2, a post-1950 user; M1, a pre-1950 Montana  
16 user; and M2, a post-1950 user. So he then  
17 illustrates this on page -- if you look on  
18 page 14192. So he's got an exhibit here, and he's  
19 showing how this schematic would actually work.  
20 He says that down -- he has a note at the bottom,  
21 "Post-1950 appropriators in Wyoming must be  
22 regulated to allow 2,000 acre-feet to cross the  
23 state line to satisfy Montana's pre-1950 users."

24                   And then one last document I'll point  
25 you to, this is the corrected Exhibit V, which

1 was -- what happened is Montana -- Wyoming asked  
2 for additional verification of these documents.  
3 And so I'll let you look -- again, study those at  
4 your leisure. But I would point out again, this  
5 is Montana 1042 in there. And there is, again, a  
6 schematic, this time showing, also, reservoirs.  
7 And it says, again: Note: There is insufficient  
8 water to satisfy M1 (Montana's pre-1950 user).  
9 W2 must be regulated and/or water can be released  
10 from storage to supplement the remainder of W2's  
11 demand.

12                   So what was Wyoming's response?  
13 Really, their response can be seen best in  
14 Exhibit W. And this is in addition to, you know,  
15 the regular stuff. But W is a letter from the  
16 state engineer, Jeff Fassett, at the time, or  
17 Wyoming, writing back to Gary Fritz. And  
18 attaching to it, he has this report, Lou Allen,  
19 that Wyoming had talked about.

20                   If you look at page 1 of this report,  
21 this is MT 933, he's talking about the Ashenberg  
22 report. And he says, "While this scheme is  
23 acceptable as a sincere attempt to develop  
24 procedures for water accounting and allocation  
25 under the Compact, the State of Wyoming remains

1 unconvinced that it is a valid approach."

2           It continues on, "Wyoming believes that  
3 the Montana approach deviates significantly from  
4 the allocation procedure described in Article V,  
5 Paragraph C, of the Compact, and that Article V,  
6 C, should be followed literally."

7           Again, on page 936 -- and there's other  
8 references here that I won't belabor -- but on 936  
9 he talks about paragraph V(A) has the effect of  
10 excluding appropriator water users from  
11 existing -- from uses that existed as of  
12 January 1, 1950 from allocation of the Compact.  
13 And if you go through this, you can see that  
14 that's really what he's doing.

15           I'll point out one thing while we're on  
16 this document, and that is, you know, Wyoming  
17 makes this claim, we had no information about  
18 Montana's water rights. How could we possibly do  
19 that? We would have to develop a model. Well, if  
20 you look here, this is actually the developed  
21 methodology, based on their interpretation of  
22 Article V(B) and A, that is, no water in  
23 Article V(A).

24           If you were to look at page 970, they  
25 actually show a schematic here of the various

1 water rights in the Tongue River. And in here  
2 they're pointing out the amount of water that's  
3 pre-'50 in Montana. It goes on, you know, 977, it  
4 has water use demands in both states.

5           You'll also see in 1984 there was a  
6 reference from -- a letter from Governor Schwinden  
7 from Montana, in which they're acknowledging that,  
8 yes, in fact, Wyoming, your estimates -- or your  
9 tabulation of water use in Montana on the Powder  
10 River is correct. So that whole notion is simply  
11 invalid.

12           SPECIAL MASTER THOMPSON: So let me  
13 just generally ask you to address this one last  
14 issue, which is on the question of whether or not  
15 Montana -- or whether or not Wyoming had adequate  
16 information to know that it needed to provide --  
17 when it needed to provide water to pre-1950 -- to  
18 Montana in order to meet the needs of pre-1950  
19 appropriators.

20           There are a lot of documents that  
21 Montana has included with its opposition papers  
22 and that you describe starting at page 4 of your  
23 statement of material facts. As I understand one  
24 of Wyoming's rebuttals, is that even with all that  
25 information, there's no way that Wyoming could

1 know when it needed to provide water and how much  
2 water it needed to provide. So my question is,  
3 does Montana disagree with that? And if so, do  
4 you want to just respond to what Mr. Michael  
5 claimed was missing?

6 MR. WECHSLER: Well, I think -- I mean,  
7 for one, again, you have this body of information.  
8 And we relied most particularly on that 1978  
9 report, as well as this one I just pointed out to  
10 you, which is very detailed information about  
11 where the pre- and post-water rights are. That  
12 1978 document, Exhibit E I believe it is, says --  
13 also includes information about the CIR, the  
14 number of irrigated acres on the Tongue. And then  
15 there's an affidavit from Mr. Dalby, who's an  
16 hydrologist in Montana, as Exhibit F. And he says  
17 this is sufficient information to be able to tell  
18 what the flow should be to satisfy Montana's  
19 pre-1950 water rights.

20 And so I think that that's not a  
21 correct characterization. I think that really  
22 what happened there is not that Wyoming didn't  
23 have information; it did. It shows -- it did not  
24 want to provide that water because of its  
25 long-standing interpretation of Article V(A). As



1 you can see in that Exhibit W, they developed a  
2 very detailed methodology of how that water should  
3 be provided. It simply was that there's nothing  
4 under V(A).

5           And I also, as I alluded to earlier,  
6 and again, this isn't as clear in the briefs as I  
7 would have liked, but I think that you need to --  
8 while in the briefs we were mostly pointing out  
9 these documents and that Wyoming had this  
10 information, and that is, in part, because of the  
11 Memorandum Opinion, where I think you indicated  
12 that low stream flows by themselves would not seem  
13 sufficient in providing effective notice, absent  
14 information, at least about the general quantity  
15 of Montana's pre-1950 water users, which is why we  
16 endeavored to put that information in there.

17           But the thing that we didn't make as  
18 clear as it should be is -- the exception itself  
19 is that when Wyoming had other sufficient reason  
20 to believe and know that insufficient water was  
21 reaching Montana, that has to be understood in  
22 light of the deposition testimony from Mr. Moy,  
23 Mr. Kerbel, and Mr. Stults, that they were in  
24 communication.

25           Again, Mr. Kerbel for example,

1 testified that he talked with Mike Whitaker on a  
2 regular basis, with others, Bill Knapp, Sue Lowry.  
3 And he indicated, "We're not getting enough water  
4 in these years." Mr. Moy, likewise, was doing the  
5 same. Mr. Stults said he talked directly to the  
6 state engineers. So there was a stream of  
7 communication that was going on in each of those  
8 low flow years.

9           And when we're talking about whether  
10 Wyoming had sufficient information to know that  
11 Montana wasn't getting enough water, well, they  
12 had all of this information -- water rights  
13 information. Certainly, that might have been  
14 enough. But on top of that, you had Montana  
15 actually telling them, "We need water. You need  
16 to be getting us water." And that, at the very  
17 least, is sufficient for summary judgment. But,  
18 you know, I think it goes way beyond that.

19           SPECIAL MASTER THOMPSON: So that  
20 answers all my questions. And your argument has  
21 been very valuable. I just want to give you an  
22 opportunity -- and if you want to confer with both  
23 Mr. Draper and Ms. Anders, that's fine. If you  
24 want, like, two or three minutes more for anything  
25 that you haven't said that you think is relevant,

1 I'm happy to listen. But, again, you've answered  
2 the questions that I had.

3 MR. WECHSLER: I would appreciate that,  
4 if I could quickly confer.

5 SPECIAL MASTER THOMPSON: Yes. Give  
6 the court reporter an opportunity to rest her  
7 hands for a second. And I'll tell you,  
8 Mr. Michael, next, I'll give you, like, five  
9 minutes, anything that you want to respond. And  
10 I'll tell you, I don't have any remaining  
11 questions for you.

12 MR. WECHSLER: We have nothing further.  
13 We simply request that the motion be denied.

14 SPECIAL MASTER THOMPSON: Okay. Thank  
15 you very much. Very much appreciate your help to  
16 me in resolving this particular motion. So,  
17 Mr. Michael, anything that you want to say in  
18 response? And, again, I know you probably  
19 disagreed with an awful lot of what Montana said.  
20 And all that is in your briefs. So what I'm  
21 looking for is new information.

22 MR. MICHAEL: Yes, Your Honor. I see  
23 we're 20 minutes to 12:00, and our witching hour  
24 is approaching. So a couple points, though, maybe  
25 a few emphasis points. I did want to note, you're

1 right on the summary judgment materials, but I  
2 think these cases are pretty solid. Scott and  
3 Lujan we cited, U.S. Supreme Court cases, on the  
4 standard of what the non-moving party needs to do  
5 if they have to come forward with some significant  
6 genuine evidence, more than a scintilla of  
7 evidence.

8           You said you knew the standards, but  
9 they're pretty sturdy standards on this. And they  
10 have been for now 25, 30 years with the Celotex  
11 case. So I think that's one thing. Yes, of  
12 course, we'll try to provide you with some briefs  
13 on some specific cases that may come real close.  
14 But, you know, we've done lots of fact patterns in  
15 tons and tons of summary judgment cases. So  
16 you're going to have a certain amount of neatness  
17 here no matter what.

18           I'm looking at a text, "Litigating Tort  
19 Cases," off the Westlaw. Not only is it required  
20 to present some significant probative evidence  
21 making it necessary to resolve different versions  
22 of the dispute and scintilla as tests. So I  
23 wanted to just raise that real quickly. This is  
24 some material, but we'll try to get you more  
25 specific -- an analogous case that's close on

1 that.

2           A couple little points, most of the  
3 things were back and forth here. One of the  
4 questions you asked, and I think it's a good one,  
5 is about this futility thing. The real question  
6 is, did Wyoming say no? Was it ever posed, "Did  
7 Wyoming say no?" And you cannot find that in  
8 these documents. And I really -- we talked  
9 about -- Mr. Wechsler just talked about Exhibit W.  
10 And this is the report back from Lou Allen in '86.  
11 And again, you look at that, it's so focused on  
12 V(C) and V(B) and all this modeling and  
13 discussions about allocating surplus water.

14           To put a "we demand" and "you said no"  
15 into that is just not there. It is not there.  
16 And I don't think that makes it to overcome the  
17 standard. The other thing is, I think Mr. Moy --  
18 I will urge you, I did quote it in my brief, and  
19 I'll just remind you, when Mr. Moy was questioned  
20 on pages 105 and 106 of his deposition, how clear  
21 he was about in the early '80s anything he said to  
22 Wyoming being said at the annual meetings. And it  
23 was so clear.

24           So we're not talking about somebody  
25 saying, "I told Wyoming something in July or

1 August or maybe June." We know when these annual  
2 meetings occur. And that's the reason why we had  
3 annual reports. What he said at the annual  
4 meetings isn't recited anywhere; but nevertheless,  
5 we know when those meetings occurred. So the  
6 timing on that is just beyond a doubt on Moy.

7 In those years, that's all they've got,  
8 because Kerbel wasn't going to meetings. Kerbel  
9 wasn't involved. He was in Billings dealing with  
10 the Bighorn and the Yellowstone, until the '90s.  
11 So that's what they have got from the '80s,  
12 really.

13 Talking about Kerbel, he mentioned --  
14 Mr. Wechsler mentioned something about Kerbel  
15 talking to Whitaker. And I think there's some  
16 important testimony here that you need to take  
17 into consideration. He talked about how Whitaker  
18 supposedly said no. Actually, when you look at  
19 that testimony, Mr. Kerbel said, "I was  
20 sympathetic to Whitaker. And I didn't expect him  
21 to take it further up the chain of command. It  
22 was between me and him. I knew Mike wouldn't be  
23 able to go up the chain of command on something  
24 like that."

25 So you don't have -- this idea of who

1 is speaking to who is very important. And that  
2 gets back to the authority question of who is  
3 speaking to who, and how difficult that becomes  
4 for Wyoming. And then when you get mixed messages  
5 on top of that, when Mr. Kerbel says, "I told  
6 Whitaker that I didn't want him going any further  
7 with this," and then here we go, five months  
8 later.

9           The annual reports are designed to do  
10 what we're here for today, designed to maintain a  
11 record of what happened that we can look at,  
12 loathe this 25 years later. Mr. Fritz says the  
13 opposite. That is tough. That's really, really  
14 tough on a defendant. For that to be the standard  
15 just doesn't seem to make sense. It doesn't seem  
16 to be fair under the law. Just not fair.

17           Let me see. A few other points I want  
18 to just mention. Again -- okay. I've got that  
19 one. I guess just to go back one more time really  
20 quick on this idea of a call procedure, because I  
21 wanted to just clarify a little bit of what we're  
22 trying to say when we talked about -- we talked  
23 about call procedure in the context of authority.  
24 A lot of what we said was in the context of  
25 authority, saying that if Mr. -- because I asked

1 Mr. Stults this in his deposition. I said, "You  
2 had to wear two hats for Montana. You were the  
3 director of the Water Resources Division of the  
4 DNRC. You supervised 150 employees, and you were  
5 also the Compact commissioner. And so if you're  
6 wearing two hats, how does that break out?"

7           And that is the issue in a lot of ways.  
8 Because if he wants to wear the Compact  
9 commissioner hat and go to the meeting and demand  
10 changes in the Compact, start negotiations,  
11 appoint committees and subcommittees, which they  
12 did, to discuss things like V(B) or Article X, the  
13 intake water commissioning case, various things,  
14 if he wanted to do that, there's a process to do  
15 that.

16           But what I gathered from your  
17 Memorandum Opinion, and what I think Montana's  
18 argument is, what was going on here between -- on  
19 this call issue, this notice issue? We're not  
20 concerned so much with what the Compact commission  
21 is doing. But I felt that your decision was  
22 that -- or your thinking was that one state could  
23 put a call on another state. And so the question  
24 there became, how does that get authorized? Who  
25 has the authority to do that? That's a different



1 authority than going to meetings. Well, we can  
2 say that couldn't be done, but the question is,  
3 when it shifts to that venue outside of the  
4 commission where we don't have designated  
5 representatives, what happens?

6           And then the reverse question is, when  
7 we are at the designated venue, and it is an  
8 annual meeting, and the three members of the  
9 commission, including the federal representative,  
10 are sitting in a place just like yours, each one  
11 with a microphone -- and in a lot of these  
12 commission meetings, the person that speaks for  
13 Montana is their representative. And if Mr. Moy  
14 is at a table talking to some other person from  
15 Wyoming and says something, "We thought we got  
16 gypped this year," that is in a context where the  
17 official spokesman is there for Montana. For  
18 Mr. Fritz to say that on the record, some 20 years  
19 later, here we are, and it doesn't get done, that  
20 level of evidence, I don't think, satisfies their  
21 burden of showing an essential element of their  
22 case, which is the timing of giving notification  
23 that would be fair to Wyoming, or fair to any  
24 junior appropriator in the other context under the  
25 doctrine.

1                   So I think that's all I had to follow  
2 up with, Your Honor. If you have any questions?

3                   SPECIAL MASTER THOMPSON: I have no  
4 questions, sir. So this has been very useful.  
5 And just to review, I've asked both sides -- let  
6 me be explicit on this -- if there is information  
7 for either Montana or Wyoming as to the nature of  
8 calls or demands that are required by senior  
9 appropriators under that state's procedure, then I  
10 would love to see that information. If it hasn't  
11 been provided already in the past, you can just  
12 point that out. Mr. Michael?

13                   MR. MICHAEL: Your Honor, the magic of  
14 electronics, we have our website page that was  
15 passed up to me for that form I talked about  
16 earlier.

17                   SPECIAL MASTER THOMPSON: Do you want  
18 to cite that?

19                   MR. MICHAEL: Yes. The other thing I  
20 could do is give it to the court reporter. It's  
21 very long. If she wanted to take it down --

22                   SPECIAL MASTER THOMPSON: Why don't you  
23 give it to her, and she can give it to me.

24                   MR. MICHAEL: (Complied.)

25                   SPECIAL MASTER THOMPSON: And then

1 second of all, you know, there's inevitably a  
2 tendency in these type of proceedings for people  
3 to start out with three pages of sort of general  
4 statements to the Court with respect to what the  
5 standards are for summary judgment. And, you  
6 know, frequently they're general statements. And  
7 I realize that, inevitably, I have to figure out  
8 how to apply those standards in this particular  
9 case.

10           Although, as I said, if either side is  
11 familiar with any cases or knows of any cases that  
12 would be particularly helpful to me in this  
13 particular setting where we are frequently dealing  
14 with relatively vague, unspecific statements,  
15 because we're dealing with people's memories, that  
16 would be very helpful to me in this particular  
17 setting. And I realize there's not going to be an  
18 exact analogy out there, but anything that tries  
19 to apply these standards in factual situations  
20 which you think are similar to this case, that  
21 would be quite useful.

22           And I'm just wondering if I ask people  
23 for -- and this could be in the form of a letter,  
24 doesn't need to be a formal brief -- but in the  
25 form of a letter in, like, two weeks from today,

1 would that be okay? I see a lot of nodding heads.  
2 So unless somebody tells me, no, I'm going to ask  
3 that that be submitted two weeks from today.

4 So those are the only two requests that  
5 that I have. And then my hope is to resolve this  
6 particular issue quickly, certainly by the time  
7 discovery is off, so you actually have adequate  
8 notice as to what years we will be trying issues  
9 of damages.

10 So from that, let me just go over  
11 into -- I think effectively what we have now is a  
12 status conference.

13 THE REPORTER: Excuse me. I need to  
14 change paper.

15 (Discussion off the record.)

16 (Ms. Anders left the room.)

17 SPECIAL MASTER THOMPSON: So first of  
18 all, with respect to Wyoming's Motion for Leave to  
19 Amend its Complaint, as I understand it, Montana  
20 does not oppose the motion, but obviously reserves  
21 the right to disagree with the allegations. Is  
22 that correct?

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

25 SPECIAL MASTER THOMPSON: So I don't

1 think there's any reason to discuss that further.  
2 What I will do is I will issue a -- just a -- I'm  
3 not exactly sure what it will be. I guess it's  
4 some sort of a memorandum of order, basically.

5 MR. KASTE: Maybe I can save you some  
6 time with that. I prepared one for you. I've  
7 given it to counsel for Montana. I don't know if  
8 they have an objection to it. It's very short.

9 MR. DRAPER: Your Honor, he did give us  
10 one as we started this hearing. We haven't looked  
11 at it.

12 SPECIAL MASTER THOMPSON: I'm sorry?

13 MR. DRAPER: We have not had a chance  
14 to look at the paper he's referring to.

15 SPECIAL MASTER THOMPSON: What I would  
16 suggest is if you could just confer after this  
17 session. If there are no disagreements with  
18 respect to form of the paper, then just e-mail it  
19 to me in the form of a PDF -- well, e-mail it to  
20 Susan Carter in the form of a PDF. I will sign it  
21 so that I have the original and can immediately  
22 distribute copies to all parties. And if there  
23 are any disagreements, just work out the form of  
24 that between you.

25 MR. KASTE: We should be able to do

1 that. No problem.

2 SPECIAL MASTER THOMPSON: Great. And I  
3 guess, at that point, Wyoming will be submitting  
4 its amended answer in a draft or in the document I  
5 assume you'll be submitting?

6 MR. KASTE: The proposed order provides  
7 15 days from the date of this entry to file the  
8 proposed answer that was submitted with our  
9 motion, if that's all right?

10 SPECIAL MASTER THOMPSON: That would  
11 certainly be fine with me, if that's fine with  
12 Montana. So quickly on status. So is the trial  
13 in -- I guess it's Maine -- is that still  
14 scheduled for the same time?

15 MR. DRAPER: Yes, it is. It's  
16 scheduled to begin on August 13th.

17 SPECIAL MASTER THOMPSON: Great. And  
18 I've been reading all of the various status  
19 reports that both of the two sides have been  
20 submitting. And it seems to me that other than  
21 the normal disagreements with respect to the  
22 adequacy of answers, that the parties have been  
23 generally getting along fine in discovery and  
24 working out disagreements. And so I guess my  
25 other question is, is there any reason -- is there

1 anything you'd like to discuss at this point with  
2 respect to the way in which discovery has been  
3 proceeding?

4 MR. DRAPER: Your Honor, we noted in  
5 our recent status report that we had initial  
6 concerns about the current discovery responses,  
7 and that we were going to investigate and discuss  
8 that with Wyoming. If that does not resolve  
9 promptly, we will be coming to you about that.

10 MR. MICHAEL: One little maybe updated  
11 comment, Your Honor, is the quantity of documents  
12 that has gone back and forth is really, really  
13 large. I think a little larger -- maybe not as  
14 large as Mr. Draper anticipated, but it's quite a  
15 bit. It's a lot of material. And so it's been a  
16 lot of material and cataloging. I don't know if  
17 that will affect us later on, but it's been quite  
18 the slog.

19 SPECIAL MASTER THOMPSON: I understand  
20 that entirely. And I guess in response to this,  
21 two comments. My general view on this has been to  
22 just read the status reports and not ask for any  
23 type of a status conference, unless I saw a  
24 significant problem arising. And I haven't seen  
25 that. But I would ask in connection with the

1 status report, if at any point in time you would  
2 like me to be involved by having a status  
3 conference, please let me know. It sounds,  
4 Mr. Draper, as if your concerns are things that  
5 you still think you can work out with Wyoming  
6 without flying home?

7 MR. DRAPER: That's our hope, Your  
8 Honor.

9 SPECIAL MASTER THOMPSON: And I know  
10 you're going to trial, but to the degree you can  
11 continue to try to work those out in the meantime,  
12 that's great. Because the second thing I'm going  
13 to say is that, as I suggested, what I would  
14 really intend to do is to take this to trial next  
15 summer. And I know there are a lot of documents  
16 in this particular case. And I know these  
17 proceedings have a tendency to last forever.

18 But I can tell you that when I was  
19 requested to serve as the Special Master by the  
20 Supreme Court in this particular case, the very  
21 first thing I was told was, "Make sure these  
22 things don't drag out forever." And so that's my  
23 goal in this particular case. So again, I'm just  
24 letting you know that's my intent at the moment.

25 MR. MICHAEL: Your Honor, one comment



1 on that just possible coming attraction, is  
2 looking at the deadline -- and, of course, a lot  
3 depends on -- you said you were going to try to  
4 resolve this much on September 15th. But as we  
5 get back in discovery, a lot depends on that, of  
6 course, as the scope.

7           If we got into a situation where we  
8 have to recreate what's gone on in Montana and  
9 Wyoming over a number of years, I can see a  
10 possibility of having to do multiple tracks of  
11 depositions. In other words, two depositions  
12 going on at the same time, multiple counsel. With  
13 rough ranchers involved, they could be real simple  
14 ones. I think that's something that may come up.  
15 Again, it's premature, but I just raised it as  
16 something for Montana to think about as well.  
17 We're staffing up in case that's necessary. And I  
18 just want to make sure that doesn't come as a  
19 surprise.

20           SPECIAL MASTER THOMPSON: I understand  
21 that. And when I was a trial attorney myself, I  
22 was involved in a number of proceedings of that  
23 nature. They tended to actually work out fairly  
24 well. It surprises me, Wyoming seems to have a  
25 number of members of the Attorney General's Office

1 that are potentially available on this, and that  
2 Montana can find enough. So hopefully,  
3 particularly once the trial in the Republican  
4 Group case is over, if that's necessary, then we  
5 will move in that direction.

6 Right now, I don't plan to try to set a  
7 particular time next summer for trial, but I'll  
8 just let you know that what I'm hoping to do is in  
9 probably fall, have a status conference where we  
10 can come back and talk about some of these issues  
11 and talk about when we might actually be trying  
12 this case.

13 And also think about where. Two  
14 obvious places are here in Denver or in Stanford.  
15 Those are probably, I think, the two most obvious  
16 places. So be giving some thought to whether or  
17 not you have a strong preference, one way or the  
18 other. Obviously, if it's at Stanford, you don't  
19 have to worry about my staying at a hotel. Either  
20 of you are probably going to have to stay in a  
21 hotel no matter where it is. This is while it's  
22 tried. So be giving some thought to that. So  
23 anything else at this particular point?

24 MR. DRAPER: Your Honor, I would point  
25 out in terms of -- what we're thinking of in terms

1 of discovery, that we do expect to need to begin  
2 taking depositions, performing inspections, and so  
3 on, immediately after the September 15th date.

4 MR. MICHAEL: Your Honor, one quick  
5 comment on location for trial, maybe to put a  
6 third thought in your mind. We do have a lot of  
7 local witnesses in that area, and it's the summer.  
8 And if you don't have to be at Stanford, I thought  
9 maybe Montana and Wyoming could share hosting you.  
10 It would save an enormous amount of expenses for  
11 moving witnesses around. I don't know. Something  
12 to think about. It's a nice area. Billings,  
13 combination of the two. I don't know if that fits  
14 with your schedule. Better than Denver.

15 SPECIAL MASTER THOMPSON: I guess two  
16 thoughts on that. First of all, one of the  
17 reasons that I've been having the hearings here is  
18 I wanted them to be on a neutral site. And  
19 certainly if the two major parties, Montana and  
20 Wyoming, were interested in having the trial in a  
21 location that would be more convenient for the  
22 witnesses and where neither side would be  
23 concerned about whether or not the location  
24 presented any problems for neutrality, then I  
25 would certainly be willing to entertain having the

1 trial in a location which would be more convenient  
2 for the witnesses.

3           So that would be another thing I would  
4 suggest that -- the three sides, I think, should  
5 be involved in this, also -- but the three sides  
6 should confer and be willing to make a proposal as  
7 to where the case -- I'm certainly open to  
8 entertaining that, because you're absolutely  
9 right, at the trial stage, you also have to worry  
10 about witnesses.

11           MR. DRAPER: Your Honor, I would point  
12 out that these types of trials traditionally have  
13 been on neutral ground, often where the Special  
14 Master is located. That's what we're doing next  
15 month in the Kansas-Nebraska-Colorado case.  
16 That's what happened in the Arkansas case,  
17 Pasadena. And I think it's still a little bit far  
18 out to know whether it's going to be necessary to  
19 have a legion of ranchers come in and testify or  
20 not. I think it's premature to make a decision  
21 based on assumptions like that.

22           SPECIAL MASTER THOMPSON: I understand  
23 that entirely. And all I'm saying is that I would  
24 be open to it. But I would only be open to it if  
25 all sides felt comfortable on having the trial in

1 one of the multiple states involved in this  
2 particular matter. I'm saying this with a smile.  
3 Maybe we should go to North Dakota since North  
4 Dakota is a party.

5 MS. VERLEGER: That sounds good to us.

6 SPECIAL MASTER THOMPSON: I should also  
7 say that North Dakota and South Dakota are the  
8 only two states that I have yet to make it to in  
9 the U.S.

10 The other thing that at some point we  
11 should talk about is actually when we get to the  
12 trial stage, I would appreciate an opportunity to  
13 actually tour the area in which these issues are  
14 involved, because that way I have an understanding  
15 of the actual physical geography. It's frequently  
16 very valuable in these particular cases. But  
17 again, we can talk about that later on.

18 One of the reasons I want to begin  
19 talking about potential dates is particularly, for  
20 example, if we did it here in Denver, I would need  
21 to talk with the Tenth Circuit about when the  
22 courtroom would actually be available. Same as  
23 Stanford; I would need to find out when a  
24 courtroom there would be available for use. So  
25 that's why I wanted to do it sooner rather than

1 later. So anything else to discuss at this point?

2 MR. MICHAEL: No.

3 SPECIAL MASTER THOMPSON: I don't see  
4 either side rushing to say anything at this point.  
5 Again, I just want to emphasize I'm always  
6 available for these kinds of status conferences by  
7 telephone. And I guess the other thing I would  
8 emphasize is the hope that the parties are  
9 continuing to talk amongst themselves as to  
10 whether or not there are ways in which this can be  
11 disposed of short of an actual trial.

12 So, finally, let me just -- I just  
13 remembered, going back, I forgot to ask both  
14 Mr. Dubois and Ms. Whiteing whether or not they  
15 had anything that they wanted to say with respect  
16 to the motions. So let me just ask whether or not  
17 either of you have anything to say right now with  
18 respect to the motions or the status of the  
19 proceedings?

20 MR. DUBOIS: No, Your Honor. The  
21 United States has nothing.

22 MS. WHITEING: The Northern Cheyenne  
23 Tribe has nothing to add. Thank you.

24 SPECIAL MASTER THOMPSON: Thank you  
25 very much. So then at this point, the motion of

1 Wyoming for -- their Renewed Motion for Partial  
2 Summary Judgment is submitted. And this  
3 particular proceedings is adjourned. Thank you  
4 very much, everyone.

5 (The hearing concluded at 12:01 p.m.,  
6 July 27, 2012.)

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1 STATE OF COLORADO)

2 )ss. REPORTER'S CERTIFICATE

3 COUNTY OF DENVER )

4 I, Gail Obermeyer, do hereby certify  
5 that I am a Registered Professional Reporter and  
6 Notary Public within the State of Colorado.

7 I further certify that these  
8 proceedings were taken in shorthand by me at the  
9 time and place herein set forth and were  
10 thereafter reduced to typewritten form, and that  
11 the foregoing constitutes a true and correct  
12 transcript.

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

18 In witness whereof, I have affixed my  
19 signature and seal this 3rd day of August, 2012.

20 My commission expires May 10, 2015.

21

22 \_\_\_\_\_  
Gail Obermeyer, RPR  
23 216 - 16th Street, Suite 650  
Denver, Colorado 80202

24

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