

No. 137, Original

IN THE SUPREME COURT OF THE UNITED STATES
TRANSCRIPT OF FINAL PRETRIAL HEARING

STATE OF MONTANA

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

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

James F. Battin United States Courthouse
2601 2nd Avenue North
Billings, Montana 59101
9:16, Tuesday, October 15, 2013

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1 TUESDAY, OCTOBER 15, 2013, 9:16 A.M.

2 SPECIAL MASTER: Okay. Everyone can be
3 seated. So good morning, everybody. And I hope you
4 are as impressed with these facilities as I am. This
5 is a truly wonderful courtroom.

6 So why don't we begin with introductions. So
7 if, Mr. Draper, you want to introduce people for the
8 State of Montana.

9 MR. DRAPER: Thank you, Your Honor. Good
10 morning. With me, starting at the end, is Attorney
11 General Tim Fox, for Montana.

12 SPECIAL MASTER: Good morning, General Fox.

13 MR. DRAPER: Next to him is Cory Swanson,
14 Deputy Attorney General of Montana.

15 MR. SWANSON: Good morning, Your Honor.

16 SPECIAL MASTER: Good morning.

17 MR. DRAPER: Next to me, Jeff Wechsler from
18 our firm, Montgomery & Andrews. Also over here in the
19 jury box is Kevin Peterson of the Montana Department of
20 Natural Resources and Conservation. And with us is my
21 assistant, Donna Ormerod.

22 SPECIAL MASTER: Good morning.

23 MR. DRAPER: Thank you, Your Honor.

24 SPECIAL MASTER: Thank you, Mr. Draper.

25 So, Mr. Kaste, for the State of Wyoming.

1 MR. KASTE: Good morning, Your Honor. I'm
2 James Kaste from the State of Wyoming. With me on the
3 end, of course, is Peter Michael, the Attorney General
4 of the State of Wyoming.

5 SPECIAL MASTER: So if I can interrupt there
6 to welcome General Michael and also to congratulate him
7 formally on becoming the Attorney General for the State
8 of Wyoming.

9 MR. MICHAEL: Thank you very much, Your
10 Honor.

11 MR. KASTE: Next to Attorney General Michael
12 is Bern Hinckley. Mr. Hinckley is one of the expert
13 witnesses Wyoming intends to bring to this trial. And
14 he'll be sitting with us most of the time. He's our --
15 basically our representative for these proceedings.

16 Next to him is Andrew Kuhlmann from the
17 Attorney General's Office. And Chris Brown from the
18 Attorney General's Office.

19 SPECIAL MASTER: Good morning, Mr. Brown.
20 And, Ms. Verleger.

21 MS. WERLINGER: Jennifer Verleger from North
22 Dakota.

23 SPECIAL MASTER: Okay. Again, good morning
24 to everybody.

25 So my guess is that at least this morning and

1 maybe even for the first couple days of the trial, at
2 least some of us will still be trying to figure out all
3 of the various equipment that is around the courtroom
4 and figuring out how to use it. So I view this as
5 going to be a little bit sloppy from the technical
6 standpoint.

7 So there's a variety of things I want to
8 cover this morning. And my hope is, my expectation is
9 that we might be able to finish this up before lunch
10 this morning, and that would give everyone this
11 afternoon an opportunity to get organized and be
12 prepared for the start of trial tomorrow.

13 So a couple of things on the very front end
14 of my particular list I wanted to take care of. The
15 first is, as you all know, we are visitors in this
16 particular courthouse, which means that there will be
17 some days when we probably will not be able to use this
18 particular courtroom. And there may be some days when
19 we won't even have a room in this particular
20 courthouse. So we'll all be itinerant, in that sense
21 of the term, and moving around.

22 I've asked whether or not there will be a
23 place where people might be able to store some of the
24 boxes if, for example, we have to move out of the
25 courthouse for a day or two but you don't want to be

1 able to take everything with you. At a minimum, we can
2 store them down in the chambers where I'm currently
3 situated. And it might also be that there will be a
4 storeroom or something of that nature where we'll be
5 able to store the boxes.

6 But, again, please stay with me on this, and
7 we'll try and work through these various interruptions
8 as best as possible.

9 Second of all, Mr. Draper sent me an e-mail
10 last week, which I think probably all of you received,
11 or if you didn't receive the actual e-mail, you at
12 least know about it, that we probably can use the
13 hearing room for the Montana Oil and Gas Commission
14 when we're not in this particular facility. And I've
15 seen pictures of the interior of that facility. And it
16 looked to me better than probably anything we're likely
17 to be able to obtain in a hotel. And it's not quite
18 situated like a courtroom, but I think we can probably
19 figure it out.

20 But I had two or three questions. The first
21 was for counsel for Wyoming: Have you thought about
22 the use of that particular facility, and is it okay
23 with you? And then the second or follow-up question to
24 that was, I thought if we did have time this afternoon,
25 if we could arrange it, it might be useful to go over

1 there and actually take a look at that hearing room,
2 give some thought to how exactly we would set it up so
3 that if we do have to move over there, we're prepared.

4 MR. KASTE: That facility sounds fine for the
5 state of Wyoming. If we have some time this afternoon,
6 that would be great.

7 SPECIAL MASTER: Okay. Mr. Draper, do you
8 think you could check with Montana and see whether we
9 might be able to get into that room this afternoon?

10 MR. DRAPER: I'd be glad to do that, Your
11 Honor.

12 SPECIAL MASTER: Thank you very much.

13 Then a second, very small but potentially
14 very important, matter is that my courtroom deputies
15 were looking at the consolidated exhibit list that I
16 have and that is up on the official website, and it
17 appears to be missing page 63. So if Montana and
18 Wyoming could check to see whether or not indeed there
19 is a page 63. It looks like there must be because the
20 exhibit numbers actually jump from Wyoming 177 to
21 Wyoming 188. If you could make page 63 available to us
22 so that we can complete our copy. Okay. So, again,
23 just a small administrative matter.

24 So next what I would propose is that we turn
25 to the various in limine motions that the State of

1 Wyoming filed. And on most of them, what I propose is
2 I let you know how I would propose to rule on them.
3 And then I would be happy to invite any argument that
4 either side has that will inform whether or not I
5 should actually rule the way I intend. And then there
6 are two of them that I actually would appreciate some
7 additional argument on.

8 So the first motion I want to turn to is the
9 motion in limine to exclude the affidavits identified
10 as exhibits by Montana. And my current inclination is
11 to grant this particular motion. It does not appear to
12 me as if Rule 807 would apply in this particular
13 situation.

14 And the reason is that under Rule 807, the
15 affidavit, in order to be admissible, needs to be more
16 probative than other testimony or evidence that could
17 be offered. And given, then, in all of these cases,
18 the witness will actually be testifying live, it's hard
19 to see how the affidavit is any more probative than the
20 live testimony itself. And there is nothing in any of
21 the papers that would suggest to me that the exception
22 applies in this particular case.

23 So on this particular motion, then, as I
24 said, my inclination is to grant the motion.

25 So, Mr. Draper.

1 MR. DRAPER: Your Honor, we'll accept that
2 ruling, and I don't think further argument is
3 necessary.

4 SPECIAL MASTER: Thank you very much,
5 Mr. Draper.

6 So that means that Montana Exhibits 125 to
7 130, 228, 242, 276, 277, and 370 are all excluded,
8 recognizing, of course, that if something came up that
9 made it necessary to introduce one of these affidavits,
10 because one of the witnesses could not testify live,
11 you're always welcome to then make a motion to bring
12 one of those exhibits in. But at the moment, all of
13 those exhibits are excluded.

14 The second motion, then, is the motion in
15 limine to exclude the scientific literature identified
16 as exhibits by Montana. And in the case of this
17 particular motion, my current inclination is to grant
18 the motion in part and to deny it in part.

19 And let me just explain what I would propose.
20 So for any scientific literature to be admissible as
21 evidence in this particular proceeding, Montana will
22 need to meet the requirements of both parts A and B of
23 Rule 803(18). And so that would mean that both the
24 expert witness would need to rely on that particular
25 scientific literature on direct examination, and in

1 addition to that, establish the scientific literature
2 as reliable authority.

3 But assuming that the expert witness has done
4 that, what I would propose is, rather than having the
5 expert witness actually have to read the portion of the
6 scientific paper that he is relying upon into the
7 record, at that point, I would admit whatever portion
8 of that scientific paper the witness has said that he
9 is relying on in his testimony.

10 In the case of a jury, I think it's important
11 that you actually have just that portion read into the
12 evidence. But I actually don't see the reason to do
13 that in this particular proceeding. And in addition to
14 that, I would appreciate, frequently actually, knowing
15 the particular context of it. Because I think
16 sometimes that context can either undermine or affirm,
17 actually, the way in which the expert is utilizing that
18 particular scientific paper.

19 So, Mr. Kaste. It's your motion.

20 MR. KASTE: I can't be as easy as Mr. Draper.
21 Obviously, the rule says quite clearly, that the
22 publication is inadmissible. The statement referenced
23 by the witness is. And I understand that there's not a
24 jury in these proceedings. But, nevertheless, neither
25 you nor the Court ought to be traipsing through

1 scientific literature unaided by the testimony of the
2 witness. And the testimony of the witness is going to
3 be through particularized statements. If in his
4 discussion you need more information from him in order
5 to contain context, I think that that conversation
6 ought to occur between you and the expert witness as we
7 conduct their testimony.

8 It makes everybody, I think, very
9 uncomfortable to give you a big stack of information
10 with no guide from the expert witness and send you back
11 in chambers to do what amounts to an independent
12 investigation. And I really strongly object to
13 deviating from the procedure that's so clear in the
14 rules.

15 SPECIAL MASTER: Okay. So, Mr. Kaste, I
16 understand your point. Let me just say on that that
17 one of the things that I would not expect would be to
18 have the witness say, well, you know, I actually relied
19 upon on that entire paper, and then admit the entire
20 paper. Instead, what I'm expecting is that there will
21 be certain portions of it that would be admitted into
22 evidence. And furthermore, to the degree I have
23 questions about, I will have read these, actually,
24 ahead of time. And so I will have an opportunity to
25 actually talk to the witness at that particular point.

1 So, hopefully, that allays your fears a
2 little bit. But I actually do think, in this
3 particular case, it would be valuable, rather than
4 having it read in, to actually be able to look at
5 portions of it and actually introduce that as an
6 exhibit, again, as material that the witness is
7 actually relying upon.

8 MR. KASTE: I understand. I'm not going to
9 argue with regard to the ruling. It makes sense to me.
10 But it does raise a concern about previewing the
11 exhibits that have not yet been admitted. I understand
12 that that's your plan. And I just want to raise
13 everybody's awareness to the idea that until an exhibit
14 is admitted and foundation has been laid, the Court
15 usually doesn't read it and certainly doesn't take that
16 into consideration until it's come from the witness on
17 the stand.

18 The procedure is a little bit backwards when
19 you read it in advance. And I'm sure that you're
20 sensitive to our concern with things that aren't
21 properly admissible or portions of things that aren't
22 properly admissible might have passed before your eyes
23 before you make the decision in the case. And as long
24 as, I guess, we're all sensitive to that concern and
25 the Court is sensitive to that concern, I don't have

1 any big problem with the procedure that you're
2 proposing, that you read every exhibit in advance of
3 the testimony of the witness from whom it will be
4 offered.

5 But it's fairly abnormal. In my experience,
6 the Court assesses admissibility first. And then we
7 look at substantive content of the exhibit at the time
8 the witness testifies. And that's the basis upon which
9 the Court makes its decision and not what I -- I hate
10 to describe as an independent investigation that occurs
11 in chambers. That's my concern. And I trust you can
12 differentiate what you hear today and what you may be
13 doing in the evenings in chambers.

14 SPECIAL MASTER: So, Mr. Kaste, I think you
15 can rest assured that, in fact, I will be able to
16 distinguish between those.

17 The other thing -- I guess, two additional
18 points that are worth mentioning in this particular
19 context. The first is that I can't guarantee, as I
20 probably just suggested, that I'm going to read every
21 word of every exhibit ahead of time. But I will have
22 at least taken a look at them. I think it's going to
23 make the proceedings go more quickly.

24 And ultimately, I probably would have taken a
25 look at all of them anyway because either they will be

1 admitted into evidence or you or Mr. Draper will have
2 objected to them and I will uphold the objection. But
3 I'll probably have taken a look at them in upholding
4 the objection.

5 So I think it's inevitable that I'm going to
6 end up probably seeing more than will ultimately be
7 part of the record. And everybody should be confident
8 that I will be very careful not to take those pieces of
9 evidence into account in the final decision.

10 Now, your comment, though, I think does raise
11 another important point, which is that to the degree
12 that there is a lengthy scientific paper and the
13 witness says, well, I relied upon this paper in
14 formulating my testimony in this particular case, the
15 one thing that I don't want you to have to worry about
16 is that you then have to rebut everything that's in
17 that particular paper because you don't know exactly
18 what I'm going to consider.

19 So that's, again, why I think it's going to
20 be very important that rather than the witness saying,
21 I relied upon this entire paper, that we can be very
22 specific as to the portions of that paper that the
23 witness has relied upon so that, again, you're not
24 having to worry about the entire document coming into
25 evidence and then somebody citing it for a portion

1 that's totally different than what the witness actually
2 relied upon.

3 So, Mr. Draper, that means that I will want,
4 when any of your experts are on the stand, that they be
5 very specific in the portions of the paper that they
6 relied upon. I might very well have a question that I
7 might, then, ask with respect to another portion of the
8 paper, if I think it's relevant to what the witness
9 just said, in which case, you would be able to ask
10 about that, Mr. Kaste. And similarly, if you had
11 another portion of the paper that you thought
12 undermined the way in which the witness relied upon the
13 one passage that they're using, you would be free to
14 then, of course, raise that. But I think that's going
15 to be better than having the possibility of having a
16 30-page piece of scientific analysis that comes into
17 the record because the witness is really only relying
18 upon one part.

19 Mr. Draper.

20 MR. DRAPER: Thank you, Your Honor. I think
21 the concerns that Mr. Kaste has voiced come directly
22 out of the jury system. You are not a jury, obviously.
23 You are an expert finder of fact. And the ultimate
24 finder of fact here is the Supreme Court consisting of
25 the nine Justices. The concern that motivates those

1 rules are not present here. In fact, the opposite
2 concern is present here, that somehow a case of this
3 type will be decided on less than a full record.

4 In the past, entire sections of books, entire
5 articles have been admitted in these proceedings. They
6 have not led to any miscarriage of justice. I would
7 hope that we would not get into the process during
8 testimony, if these become a matter of controversy, of
9 chopping up scientific papers and trying to parse them
10 out paragraph by paragraph as to which ones are going
11 to come in and which aren't. And you end up with some
12 kind of mangled kind of a document that doesn't make
13 sense. Many times they will be an organic hole. And
14 it's not appropriate to admit just the conclusion or
15 just one section of the analysis and leave out the
16 rest.

17 So the discussion that's been generated by
18 Mr. Kaste, I think, is a dangerous one. And in terms
19 of your looking at the exhibits, years ago I used to be
20 in Mr. Kaste's opinion. And I think in front of a jury
21 where they're the finder of fact, you need to be very
22 careful. But here, we consider, for instance,
23 prefilings testimony. That means exhibits and all of
24 the testimony that goes with them. And the idea is
25 that the judge, the special master is reading all of

1 that ahead of time and without the benefit of live
2 testimony.

3 So that whole notion that he's pushing on you
4 here is just out of place. And I would caution you
5 very strongly against taking that too far.

6 SPECIAL MASTER: Okay. Thank you. So
7 several things: First of all, I do not interpret what
8 Mr. Kaste said a moment ago as either pushing me or
9 impugning my ability to actually resolve this case but
10 probably simply to try to warn me to make sure that, in
11 fact, I don't consider things that I ultimately don't
12 admit into evidence. And taking it in that particular
13 light, I think it's a fair comment. But I think
14 everybody understands I'm not going to be considering
15 exhibits that ultimately do not come into evidence when
16 I ultimately make my recommendations to the United
17 States Supreme Court. So I appreciate your defense of
18 that, Mr. Draper.

19 And, you know, I realize that in this
20 particular case, there might be disputes over exactly
21 what can come in on a scientific paper. As I said, my
22 only concern, the thing I want to be careful about is
23 simply that a scientific paper does not come in for one
24 proposition and then it's ultimately quoted for a
25 totally different proposition that doesn't have the

1 correct foundations.

2 For that reason, to the degree that a witness
3 can, I'd like them to be as specific as possible as to
4 the portion of the paper that they relied upon. If the
5 answer is, you can't really chop this up, and the
6 bottom line is, I relied upon the analysis that you
7 find in this particular paper, then in that particular
8 case, I probably will let the entire exhibit come in.

9 But I just want to be very careful in
10 balancing the concern about letting things come in that
11 are not admissible on the one hand; the other hand,
12 making sure that this proceeding goes smoothly and
13 that, ultimately, you have a complete record that
14 permits me, and ultimately the United States Supreme
15 Court, to reach the correct result.

16 MR. KASTE: If I may, just briefly, Your
17 Honor, I think Mr. Draper raises a fairly fundamental
18 point of disagreement between the parties about how
19 these proceedings ought to operate. Mr. Draper is
20 right; certainly some concerns with regard to the Rules
21 of Evidence are primarily motivated by our need to
22 adequately inform a jury of laymen. And you're not one
23 of those. Nevertheless, the Rules of Evidence are
24 applicable in both jury and nonjury proceedings. And
25 it is our firmly held view that a complete record only

1 contains evidence that is relevant and otherwise
2 admissible. You know, a complete record doesn't
3 include a picture of me and my kids. It isn't
4 relevant.

5 And that the Rules of Evidence, while merely
6 a guide in these proceedings, reflect the combined
7 wisdom of the legal community over the last several
8 hundred years. I think it would be folly for us not to
9 pay attention to what they have to say about what is
10 and is not appropriate evidence. And I certainly think
11 that the Supreme Court, perhaps more than any court,
12 ought to have a record well-grounded in the Rules of
13 Evidence.

14 And so it is going to be Wyoming's position
15 throughout these proceedings, that if something does
16 not comply with the Rules of Evidence, it ought not to
17 be admitted despite the fact that there's not a jury
18 sitting in this box. And I understand that your
19 position is that where there's a close call, you're
20 going to err on the side of admission for the benefit
21 of the Court. And I appreciate that stance.

22 But there are going to be some things here,
23 for example, like the affidavits, that aren't close
24 calls. And it is our expectation that they will be
25 excluded from this case. And so I'm going to get up at

1 various points in this trial, and I'm going object
2 based on the Rules of Evidence. And if our fundamental
3 understanding about what is and isn't appropriate in
4 these proceedings is wrong, you're going to have to let
5 me know that.

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

8 MR. DRAPER: One point there, Your Honor.
9 Mr. Kaste has informed you that if it doesn't conform
10 strictly with the Rules of Evidence applicable in the
11 district courts, that he's going to be objecting and
12 that he expects you not to admit such evidence. And
13 that is directly contrary to Rule 17 of the Supreme
14 Court. Directly.

15 And it has -- and the Court, over the
16 years -- and we're talking hundreds of years -- has
17 emphasized that these are not proceedings that are
18 subject to those rules. They are used as guides. It's
19 good to know what those policies are.

20 And then you need to determine, we all need
21 to determine, how do they apply in this context? And
22 to have a strict application, as Mr. Kaste suggests --
23 and apparently he's going to badger this proceeding
24 with those kinds of objections -- is not the
25 appropriate approach to this case.

1 SPECIAL MASTER: Okay. Thank you,
2 Mr. Draper.

3 So let me try and make several points with
4 respect to this discussion. The first is, as
5 Mr. Draper just pointed out, and as I know Mr. Kaste is
6 aware, under the Supreme Court rules -- I looked at
7 both the Federal Rules of Civil Procedure and the
8 Federal Rules of Evidence for guidance, but I'm not
9 bound by them.

10 In thinking about the proceedings, I would
11 probably draw a distinction between two or three
12 different types of evidentiary disputes that I can
13 imagine that we would have. The first would be over
14 the relevance of particular testimony. And this, for
15 example, brings up the questions that we'll come to in
16 a moment under the Daubert rule.

17 To the degree that I believe that it's
18 possible that the Supreme Court would go a different
19 direction than I would in the actual resolution of the
20 case and that if they are going to go a different
21 direction, that they will want to have that evidence
22 upon which to rule, then I will be inclined to admit
23 more than I otherwise would. Because, again, the
24 ultimate decision maker in this particular case is the
25 United States Supreme Court. My role is simply to pull

1 together a record and then to make my recommendations
2 to the Supreme Court as to how they should rule based
3 on that particular record.

4 I think that set of questions is different
5 than a variety of other evidentiary questions, such as,
6 for example, the question on the affidavits which the
7 first motion in limine was directed to, where the
8 question is really not as to the relevance, but,
9 instead, it's as to whether or not there is a better
10 way of actually having evidence enter the record. So
11 rather than having affidavits, we have a live witness.
12 There's no reason to have the affidavit in there. The
13 affidavit could simply cause mischief in that
14 particular situation.

15 And on those, my inclination will generally
16 be to follow the Federal Rules of Evidence because they
17 have been developed over time in order to determine
18 what evidence should be admitted and what evidence
19 should not be admitted.

20 Even there, though, there are times where,
21 because of the nature of the proceeding, I will vary
22 from the Federal Rules of Civil Procedure. In this
23 particular motion with respect to the scientific
24 literature, is a good example of that.

25 To the degree that there are particular

1 evidentiary issues, Mr. Kaste, or, Mr. Draper, where
2 you disagree with my variance from the Federal Rules of
3 Evidence, what my hope is is if that's a type of
4 objection that is coming up frequently, that we can
5 simply have a standing objection so we don't have to
6 discuss the objection every single time that it comes
7 up. But I don't want to prevent either side from,
8 obviously, raising any objections they want to. And,
9 again, as a general matter, the Federal Rules of
10 Evidence is what we will look to in determining whether
11 or not particular evidence should be admitted.

12 Okay. So then on the motion in limine to
13 exclude the scientific literature, again, any
14 scientific literature that is going to be introduced
15 has to have the foundation elements of both parts A and
16 B of Rule 803(18). But I will permit the scientific
17 literature itself to be admitted with that particular
18 foundation -- or I should correct myself, the portion
19 of the exhibit that the expert witness has relied upon.

20 Okay. The next motion in limine is the
21 motion to exclude the report and testimony of Douglas
22 Littlefield. So let me start out on this one with just
23 a question for Montana. At this particular stage, how
24 do you see Mr. Littlefield's testimony as being
25 relevant? To what questions do you intend to have

1 Mr. Littlefield address himself?

2 MR. DRAPER: Your Honor, Dr. Littlefield will
3 be testifying to matters that respond to your motion --
4 or your ruling on the motion related to specific water
5 administration applying to the compact and the
6 historical context in which matters were discussed
7 during negotiations that relate to that general issue.

8 SPECIAL MASTER: And given that I already
9 ruled in the memorandum of opinion on Montana's motion
10 for summary judgment, that Montana does not have to
11 follow any particular procedure but does need to follow
12 a procedure which complies with the compact, is
13 Mr. Littlefield's testimony still important to you?

14 MR. DRAPER: Yes, Your Honor. The -- it will
15 be sculpted to fit the ruling that you have made in the
16 pretrial motion ruling. And we'll seek to set the
17 context for which -- in which you will make your
18 ultimate decision, applying the standard that you have
19 set out there.

20 SPECIAL MASTER: Okay. Thank you. So let me
21 tell you what my inclination is on this particular
22 motion. And I'll let you speak, Mr. Kaste. But just
23 to let you know, and here's one where I'm going to err
24 in favor of allowing in something that, depending on --
25 you know, it's not absolutely certain. But if I were

1 ruling on this in a role other than Special Master, I
2 might come to a different ruling.

3 But I'm going to -- my inclination is to deny
4 the motion for the reasons which were discussed in
5 Montana's response to -- well, to your motion, but with
6 the following caveat, which is that my hope is that the
7 testimony of Mr. Littlefield will be structured in two
8 ways: No. 1, to meet the various standards and
9 requirements which I mentioned in my ruling from the
10 bench in Denver. And I noticed, Mr. Draper, you did
11 incorporate that language into your reply.

12 But in addition to that, at this particular
13 stage of the proceeding, there's really no reason for
14 Mr. Littlefield to range widely on the actual history
15 of the compact itself. But at this particular stage,
16 as I understand the relevance of Mr. Littlefield's
17 testimony, it really goes to whether or not the
18 particular procedures and standards that the State of
19 Montana utilizes are permissible under the compact.
20 And so my hope is that the testimony will go to those
21 specific issues rather than talking very generally
22 about the meaning of the compact. Because, again, I
23 think that both the Supreme Court's ruling itself in
24 this particular case, as well as my various memorandum
25 opinions set out the general structure for how the

1 compact should actually apply in this particular case.

2 I'll also mention that I have been influenced
3 on this particular motion by the fact that, if I
4 recall, under your time estimates, Mr. Draper,
5 Mr. Littlefield is only going to be on the stand for, I
6 think, two to three hours. My hope is that it is much
7 less than that. But my -- if this were going to be a
8 longer piece of testimony, I might feel different about
9 this.

10 Mr. Kaste?

11 MR. KASTE: I kind of figured that was
12 coming. And -- but it does give us all an opportunity
13 to focus in on something that I think has been
14 neglected at times as we're preparing for trial, which
15 is that waste of time, which is in the rules, is an
16 important concern for everyone involved and that,
17 again, this is going to be a place where Wyoming and
18 Montana probably have a difference of opinion about
19 what is and what is not a waste of time. And it's
20 probably an issue that I'm going to bring up from time
21 to time as it appears that we're running far afield
22 from the issues that are actually before you for trial.

23 And Mr. Littlefield's testimony, to our way
24 of thinking, is far afield given the various
25 interpretations that the compact said. And we sort of

1 know what the rules are. But I understand completely
2 your inclination to give the Supreme Court more
3 information rather than less. And as long as we can
4 try and move this thing along and actually shed some
5 focus on what matters, I won't interrupt very often.
6 And I don't intend to interrupt very often. But there
7 will be times, I suspect, where I think we're running
8 far afield. And I'll try to bring them to your
9 attention and be the one not to be running far afield.

10 SPECIAL MASTER: Okay. So thank you,
11 Mr. Kaste. And I can let you know that both you and
12 Mr. Draper are free to do that at any particular point
13 in time. And I'll also do it myself if I think we're
14 actually covering territory that has already been
15 decided in response to one motion or another.

16 Mr. Draper.

17 MR. DRAPER: Thank you, Your Honor. This
18 exultation of time limits over other values in this
19 case by Mr. Kaste, I think, is inappropriate. Our main
20 responsibility is not to rush through this. If it
21 requires a certain amount of time, that's what's
22 needed. And it's a responsibility of all the parties
23 and the Master to be sure that we provide the kind of
24 record that the Court wishes to have in this case and
25 that we not artificially truncate it or truncate parts

1 of it because we're in a mad dash to finish by some
2 artificial deadline. And the less time we spend
3 arguing about this, the more time we can actually get
4 substantive evidence on the record. Thank you.

5 SPECIAL MASTER: Okay. So thank you,
6 Mr. Draper. And your last point has not gone
7 unnoticed. We shouldn't spend much more time on this
8 particular motion in limine, or we may spend more time
9 on that than Mr. Littlefield actually spends testifying
10 in the case. So, again, I'm going to permit
11 Mr. Littlefield to testify subject, again, to the
12 limitations and restrictions that I set out from the
13 bench in Denver and, in addition, to the request that
14 the testimony be addressed to help shed historical
15 light on the questions that are still remaining in this
16 case rather than questions that have already been
17 resolved in this particular proceeding.

18 Okay. The next of the motions is Wyoming's
19 motion in limine to exclude the expert testimony by
20 Steve Larson. And Mr. Kaste also will not be surprised
21 by this: That inclination here is actually neither to
22 grant nor deny your motion at this particular point
23 but, instead, to hold for resolution later in the
24 proceedings. So I think Daubert is relevant in a
25 proceeding of this nature. But I don't see any

1 prejudice here to waiting to rule until after the
2 presentation of the testimony.

3 At that point, I think the Supreme Court will
4 deserve my guidance. And at that point, I could decide
5 one of three different things: I could decide that, in
6 fact, Mr. Larson's testimony is so unreliable for the
7 arguments that -- for the reasons that Wyoming has
8 suggested that, in fact, the testimony should be
9 excluded under the Daubert rule.

10 Second of all, that it is not so unreliable
11 that it should be excluded from Daubert but that given
12 all of the, again, arguments that Wyoming has made now
13 and will probably make again, that Mr. Larson's
14 testimony should be discounted. Or I could decide that
15 Mr. Larson's testimony is actually quite reliable and
16 very probative on the issues in this particular case.

17 And because I could decide any of those three
18 things based on what I know right now, again, I'm not
19 going to deny the motion. But I'm just going to hold
20 the motion in abeyance until after Mr. Larson has
21 testified. That will permit me to have a much better
22 basis than I have right now as to the reliability of
23 Mr. Larson's testimony.

24 As I've already mentioned, if I ultimately
25 conclude that Mr. Larson's testimony should be excluded

1 entirely for reasons of reliability, I will not
2 consider that in making my recommendations to the
3 Supreme Court. And I will actually inform the Supreme
4 Court that should not be part of the record upon which
5 they should decide the case.

6 If for any reason they were to disagree with
7 me, though, we also wouldn't have to come back and hear
8 Mr. Larson testify separately. The downside,
9 obviously, here is time both in Mr. Larson's testimony
10 and in the testimony of the expert witness that Wyoming
11 has to respond to Mr. Larson. But in this particular
12 case, I think that that downside is outweighed by the
13 advantages of waiting. I also think that the merits of
14 this particular motion demonstrate the wisdom of
15 waiting.

16 Wyoming, I think, raises significant
17 concerns, but it's not clear to me, based on the record
18 right now, that those concerns are great enough to
19 actually exclude his testimony on the basis of Daubert.
20 And I have some support in this from Special Master
21 Kayatta in *Kansas v. Nebraska*. And I will spell
22 Kayatta for you later.

23 MR. KASTE: No, that's not a surprise. Thank
24 you. We'll renew the motion at the appropriate time.

25 SPECIAL MASTER: Okay. Thank you.

1 Okay. So the next motion in limine is the
2 motion in limine to limit the presentation of evidence
3 in this case to the nine years that survived Wyoming's
4 initial summary judgment motion. So, Mr. Draper, based
5 on some of the telescoping of my views on this and some
6 of my prior opinions, you probably won't be surprised
7 on this. But I'm going to grant this motion in part
8 but also deny it in part.

9 And in particular, my inclination -- I should
10 give you a chance, Mr. Draper, before I give my final
11 ruling to respond if you want. But my current
12 inclination is to exclude the evidence regarding what
13 I'll call the summary judgment years -- and the summary
14 judgment years are 1952 to 1986, 1990 to 1999, and
15 2005 -- to exclude the evidence for those years for the
16 purpose of establishing liability for those years or
17 seeking any relief retrospective or prospective for
18 those years.

19 Looking back at both the motion and also my
20 rulings on Wyoming's motion for a partial summary
21 judgment, I think it is clear that those motions were
22 addressed to any form of relief. And I see no basis
23 for distinguishing, in this particular case, between
24 liability on the one hand and relief on the other. In
25 other words, there's nothing special about notice that

1 would suggest that it is a matter of the relief rather
2 than a matter of the liability itself.

3 So both based on, again, the language of the
4 motion, in my opinion, and on the conclusion that the
5 issue is really one that goes to the liability question
6 rather than the relief issue, I would exclude the
7 evidence, again, for purposes of establishing liability
8 for those years, which is really what we've been
9 talking about for the last year and a half in any case.

10 However, I will permit evidence from or about
11 those years for the limited purpose of trying to
12 establish liability for the years that actually are in
13 issue at this particular stage of the proceeding, which
14 is 1987 to 1989, 2000 to 2004, and 2006. And my
15 understanding from Wyoming's reply is that they
16 actually concede that, in fact, evidence from those
17 years can be admitted for context and background.

18 I realize that, of course, that opens up the
19 potential for trying to get all of that evidence in as
20 context and background. But I trust that counsel for
21 Montana is not going to try and bring in all of the
22 evidence for those years unless they are useful as
23 background for the years that are actually in issue in
24 this particular case. And, of course, Wyoming can
25 object if they think that particular evidence from

1 those years is irrelevant to the years that are
2 actually at issue.

3 My inclination is also not to require Montana
4 to identify potential exhibits at this particular point
5 in time that fall outside the exception. Instead, I
6 think, given the way -- and we'll come back to this
7 later -- that I suggest I want to structure the trial
8 where actually Montana notifies Wyoming ahead of time
9 for each witness what exhibits they plan to use for
10 that particular witness, that will give Wyoming an
11 opportunity to take a look at an exhibit and decide
12 whether or not they actually want to object to the
13 introduction of that particular exhibit.

14 I'll also note in this particular situation
15 that I think that given the years that Montana is
16 actually able to introduce evidence to establish
17 liability, which are the years 1987 to '89, 2000 to
18 2004, 2006, you will be able to establish a record
19 there that when this case -- or if this case gets to
20 the United States Supreme Court, if the Supreme Court
21 disagrees with me on the question of notice, we should
22 in any later proceeding be able to deal with those
23 additional years without much difficulty.

24 So I do not see much in the way of a downside
25 for excluding those years. And, again, although I

1 agree that the motion was specifically with respect to
2 damages and other remedies, that liability question
3 flows neatly from that. And I think Wyoming would have
4 every reason to object if, at this particular stage, I
5 read their earlier summary judgment motion more
6 narrowly.

7 MR. DRAPER: Your Honor, if I may.

8 SPECIAL MASTER: You may, Mr. Draper.

9 MR. DRAPER: Thank you. I think your ruling
10 on damages is very clear, looking at the years. You --
11 at our request, you put the word "damages" in the title
12 of your ruling. Obviously, retrospective relief, that
13 was a motion process that got started by Wyoming. It's
14 actually a type of remedy.

15 We're not in the remedy phase at this time.
16 You eventually entered the case management plan that
17 bifurcated the case between the liability and remedies
18 phases. So to reach out into the remedies phase and to
19 go beyond the -- not only the boundaries of the phase
20 we're currently in, but beyond the boundaries of the
21 motion that was filed, on the basis that it applied to
22 damages or other relief, well, that's other
23 retrospective relief. It's not -- damages could be in
24 the form of money, or it could be in another form, like
25 water, in particular, as you may recall from the 1987

1 case in the Pecos River litigation. The Court made
2 that clear that there were different forms of
3 retrospective remedies. And damages is obviously a
4 retrospective remedy. And that is a limiting factor of
5 the order that you entered.

6 You have said that you're inclined to believe
7 that the rationale that led you to your decision with
8 respect to damages and other, I would say retrospective
9 remedies, should also apply to notice for purposes of
10 prospective remedies. And while, as you have put it,
11 there's something to be said for that, it's not
12 something that you have asked to be briefed. It's
13 something that was a subject with respect to damages,
14 of summary judgment dispositive motions. And to rule
15 in a motion in limine context and reach out and include
16 in that an area that you did not discuss in those
17 motions and your rulings and to limit the evidence
18 based on that without the appropriate briefing and
19 consideration that should go into such a limitation, I
20 think is going too far.

21 We would also note -- you may, I believe,
22 have noticed that we have submitted additional
23 information that very late in the game was provided to
24 us. It very clearly chose notice being given in the
25 early 1980s. And this information was not provided to

1 us until after you had been asked to make your
2 decisions and had made your decisions. So there is
3 reason to disbelieve some of the basis on which those
4 motions were offered. And in particular here, the
5 extension of that to cover liability issues, whether
6 the compact was violated or not, and whether a state's
7 going to be precluded from presenting evidence on that,
8 I think, is going too far. Thank you.

9 SPECIAL MASTER: Okay. Thank you,
10 Mr. Draper.

11 So, Mr. Kaste, any response from you? And I
12 guess the one thing that I would like to have a
13 response on is the additional evidence that Mr. Draper
14 referred to.

15 MR. KASTE: Okay. That was brought out in
16 the brief recently. I forget exactly what month that
17 occurred in. In July, one of the employees of the
18 State of Wyoming, looking in a drawer that has nothing
19 to do with the Tongue River, related to a tribe that is
20 not the Northern Cheyenne Tribe, pulled out an old
21 file. And in that file were some handwritten notes by
22 John Buyok, who used to work for the State of Wyoming.
23 And it was provided to me that day. And it was
24 provided to Montana as soon as I got a Bates stamp on
25 it, but I think the next day. And I called

1 Mr. Wechsler immediately and said, guess what?

2 As happens in many, many cases, particularly
3 ones where discovery is extensive, there's a drawer
4 that somebody goes, oh, yeah. And they pulled it out.
5 Montana was provided this information before the close
6 of discovery. Late. And we acknowledge that it was
7 late.

8 But, nevertheless, when you look at the
9 content of the materials, they are very consistent with
10 what you already know about the 1982 Yellowstone River
11 Commission Compact minutes, which 1981, there was some
12 concern about the flow in the Tongue River. There was
13 some communications between some state employees. And
14 it's really, when you look at it, fairly early in the
15 year. They're May communications, and they're an
16 inquiry about what would you do kind of things.

17 There were -- those communications ended up
18 being reflected in the 1982 minutes as the language
19 that you previously saw that said, if Montana is going
20 to do this, they know they need to give us a call. And
21 I forget the exact language from the 1982 minutes of
22 the Yellowstone River Compact Commission meeting. But
23 you've seen them and discussed them in the course of
24 your prior rulings, that they were precipitated by
25 certain discussions between the states about the way

1 the river was running at the time. And they culminated
2 in this statement in 1982, if Montana is going to do
3 this, they are going to have to notify Wyoming. I
4 believe the exact word used in the minutes is "notify."
5 And that's a pretty strong indication that the content
6 of the communications reflected in those handwritten
7 notes are not a call. They're just not.

8 And I have to apologize on behalf of our
9 staff, the staff of the State Engineer's Office, for
10 not having located these documents prior to the time
11 that they were disclosed. They were clearly relevant.
12 They should have been located and produced at the very
13 beginning of this case. But it happens sometimes in
14 litigation that you find something important late in
15 the game. But I can tell you for a fact that Montana
16 had those the day after I did.

17 And I really don't think that they create a
18 sufficient question about a call in 1981 to warrant
19 reversal of your prior ruling. And, in fact, I believe
20 the communications were from Mr. Fritz to Mr. Buyok.
21 Mr. Fritz was deposed. I think he described in his
22 deposition about what he could recall from
23 communications with Wyoming. I believe he did an
24 affidavit. Maybe not Mr. Fritz. But the opportunity
25 to obtain that information from Mr. Fritz has been

1 there the whole time. And so if he thought he made a
2 call in 1981, he could have testified to that and did
3 not.

4 So I don't think that it warrants reopening
5 that particular year. And, of course, it relates to
6 one year, not the multitude of years covered by your
7 prior rulings. So like I say, we come in hat in hand
8 on that one. I hope that that doesn't mean we've been
9 less than diligent throughout the remainder of
10 discovery. We certainly have tried our best.

11 With regard to your ruling, if nothing
12 Mr. Draper said is close to changing your mind, then I
13 don't think I have anything really to say. I think the
14 ruling is dead-on. And I think the last thing anybody
15 needs in this case is more briefing.

16 SPECIAL MASTER: Okay. Mr. Draper.

17 MR. DRAPER: Your Honor, we believe that this
18 is serious new evidence that was provided after you
19 made your ruling. It makes it very clear that
20 Montana -- as it says here on page 48187 of the Bates
21 number, "Montana is wondering if the junior to 1950
22 rights in Wyoming can be regulated to provide water to
23 supply Tongue River Reservoir."

24 They're expressing just the kind of notice
25 that you said you wanted to see, that they are

1 expressing to Wyoming their own shortages and wondering
2 if they can't get some more water down. Now, if that
3 doesn't amount to a call, I don't know what does. This
4 is right in a period where because this information was
5 not available to either state at the time, that we are
6 precluded as a matter of law from showing any damages,
7 and you are now extending that to liability.

8 The important thing is that it was provided
9 after the summary judgment motions that were based on
10 this kind of information and, I think, initiates those,
11 certainly as to the specific time period involved and,
12 in general, showing that even back at that period,
13 there were these types of complaints being made and, I
14 think, to some extent, undermines the basis, then, for
15 the ruling on summary judgment. Thank you.

16 SPECIAL MASTER: Okay. Thank you,
17 Mr. Draper.

18 Mr. Kaste.

19 MR. KASTE: If it would help, Your Honor, I
20 don't have any concerns if Mr. Fritz wants to talk
21 about what he did or didn't do in 1981. That's fine
22 with me. If he wants to come in and say, yep, I looked
23 at those notes, here's what the content of my
24 conversation was with Montana, great.

25 What we know already is that the year 1981

1 would likely be covered by your recent ruling that
2 damages wouldn't be available in that year because
3 there's not sufficient evidence to demonstrate damages
4 were warranted. This year would fall into the same
5 category as 1987 through 1989. It's years in which, I
6 mean, the evidence is remarkably stale. There has been
7 plenty of testimony in front of you already in the
8 summary judgment proceedings that Montana has been
9 concerned, of course, about its water supply for a long
10 period of time. And there is, of course, a significant
11 distinction between mere concern and inquiries about
12 what Wyoming would do, and an actual call which is a
13 demand that Wyoming take action for the benefit of
14 Montana.

15 But if Mr. Fritz would like to testify about
16 his conversations or his dealings with Mr. Buyok in
17 1981, I don't care. I view this as the same situation
18 as 1987 to 1989. In the main, neither party has
19 sufficient evidence to do much with it. And it's just
20 so old as to not be terribly helpful.

21 But I agree, we did get this out a little
22 late. But I do think the fact that we got this sent
23 out a little late is somewhat mitigated by the fact
24 that you're only hearing about it now. Because it
25 happened this summer. It happened months ago. And if

1 Montana felt that it made such a difference in their
2 case, that they should raise it and bring it to your
3 attention and ask for some reconsideration of things
4 that occurred in the past, I think the burden was on
5 them to bring it to your attention. Burden was on us
6 to get it out to Montana, and in a timely way; we did
7 that. From there, I think all you can assume from
8 their delay is that it must not have been all that
9 important.

10 But I think it's fine if Mr. Fritz wants to
11 testify about 1981. And I think you would likely hear
12 testimony about the minutes from 1982 and Montana's
13 understanding of the need to make an affirmative
14 request for regulations and for action in Wyoming.
15 They knew that in 1982. And Wyoming's position, of
16 course, in this litigation will be they didn't do that
17 until 2004.

18 SPECIAL MASTER: Mr. Draper.

19 MR. DRAPER: Thank you. I would hope that
20 Mr. Kaste would have no objection to the admission of
21 this material as an exhibit in this proceeding. We've
22 identified it as Exhibit M136.

23 MR. KASTE: Well, now I do kind of have an
24 objection. Because a person with the foundation
25 sufficient to warrant the admission of this exhibit

1 probably doesn't exist in these proceedings. Mr. Fritz
2 can be asked if this material would refresh his
3 recollection. From the absence of a witness with
4 foundation, I'm a little bit concerned. Frankly, I
5 don't care. It means so little to what we're here to
6 do today, I don't care.

7 MR. DRAPER: I don't know if that was an
8 agreement --

9 MR. KASTE: Stipulated.

10 MR. DRAPER: Okay. Stipulated. Yes. I
11 would point this out, Your Honor: All of a sudden,
12 this is our fault. It was provided to us in June when
13 the expert reports and rebuttal expert reports were
14 already complete. Discovery was essentially over
15 except for a few exceptions.

16 And we also would point out that the
17 dispositive motion had already been ruled upon. So
18 that point with all the other things going on, we have
19 brought it to your attention. It came in a flood of
20 documents. We had to sort it out and realize what was
21 going on. And, obviously, it's material that should
22 have been presented to us much earlier. It's kept in
23 their normal business records. And it has resulted in
24 a prejudicial ruling that shouldn't have been entered.
25 Thank you.

1 SPECIAL MASTER: Okay. Thank you,
2 Mr. Draper. So actually, one last question,
3 Mr. Draper. So when is it in your order of witnesses
4 that Mr. Fritz is likely to be testifying?

5 MR. DRAPER: He's listed as our tenth
6 witness, Your Honor, and is tentatively scheduled for
7 later in October. We haven't been able to finally nail
8 down that time with him.

9 SPECIAL MASTER: Okay. Thanks. Let me make
10 several points with respect to this particular motion.
11 So first of all, again, if you look back to both
12 Wyoming's motion as well as my memorandum opinions,
13 they all address both damages as well as other
14 remedies. And it doesn't say "other retrospective
15 remedies." It says "other remedies."

16 Mr. Draper, I think you've served the State
17 of Montana well in carefully reading everything. And I
18 specifically recall your asking me to rename the
19 memorandum opinion so that it paralleled what Wyoming
20 had actually entitled its particular motion. But,
21 again, although the heading specifically says
22 "damages," if you read the motion, you read the
23 memorandum opinions, it's with respect to all remedies.

24 As for the question of whether or not this
25 should also extend to liability, I, number one, do not

1 see any reason -- no one has given me any reason -- to
2 actually distinguish between liability on the one hand
3 and remedies on the other hand with respect to the
4 question of notice. And, again, there's nothing
5 special about notice that would suggest that it should
6 go to the question of just damages or just remedies
7 rather than the question of liability more generally.

8 Given my earlier ruling that Montana needed
9 to provide some type of notice to Wyoming that, in
10 fact, its pre-1950 appropriators were not getting the
11 water that they needed, if you, say, had a 60-year
12 period of time during which maybe Montana actually
13 never received all the water that it needed to meet its
14 1950 appropriators but never said anything to Wyoming,
15 and then came in and tried to argue that Wyoming was
16 liable and that Montana should get prospective relief,
17 I don't see how you could actually justify the
18 prospective relief given, again, the requirement of
19 providing some type of notice to Wyoming with, again,
20 the exceptions that I set out in my earlier memorandum
21 opinion.

22 And I mentioned this in my ruling on
23 Wyoming's motion for summary judgment. I specifically
24 suggested that I thought this was a good basis for a
25 motion in limine. Montana has had an opportunity to

1 reply to Wyoming's motion in limine in this particular
2 situation. So I also do not believe that Montana has
3 been deprived of an opportunity to actually argue
4 whether or not it should apply equally to questions of
5 liability.

6 So for that reason, I'm going to -- well,
7 actually rule as I suggested earlier, which, again,
8 excludes the evidence regarding those summary judgment
9 years for the purposes of establishing liability but
10 not for the limited purpose of trying to establish
11 liability for the years that are actually in issue.

12 However, I'm going to reserve the right to
13 actually change the specific years for which I granted
14 summary judgment based on what Mr. Fritz testifies, if
15 and when he takes the stand and if and when you show
16 him this particular exhibit. So if, for example, he
17 responds that he actually does remember 1981 he brought
18 up, the question that people in Montana who had
19 pre-1950 rights, they weren't be satisfied. And he
20 brought that up, and Wyoming basically said, no,
21 compact doesn't have anything to do with that, then I
22 reserve the right to conclude, based on that, that, in
23 fact, 1981 should be an issue.

24 I don't expect that would change my ruling on
25 any years other than 1981 and, again, based on what he

1 remembers when his memory is refreshed, a couple years
2 around then. But it will all depend on what Mr. Fritz
3 testifies at that particular point in time as well as
4 what Wyoming's witnesses also testify.

5 I would have preferred that Montana had
6 actually brought this up earlier and asked to have that
7 portion of my ruling reconsidered based on the evidence
8 that was presented by Wyoming. And I hope if either
9 side suddenly gets presented with new evidence that's
10 relevant, they immediately bring that up. But at the
11 same time, I don't want to deprive Montana of the
12 opportunity of utilizing this particular exhibit if, in
13 fact, it just does change the basis for my summary
14 judgment motion for a couple of years.

15 Okay. So any question about the rulings?
16 Okay.

17 So that, then, brings me to the final two
18 motions in limine, which both deal with the Tongue
19 River Reservoir and storage in the Tongue River
20 Reservoir. And on these, I will tell you at the very
21 outset that my inclination is probably not to grant the
22 motions at this particular point in time because I
23 think they both raise relatively complex issues that
24 I'm not confident I have enough in front of me in the
25 limine motions to address. But on both of these, I

1 actually would appreciate some additional guidance and
2 argument from counsel.

3 So rather than taking them together, why
4 don't we actually take them separately, at least for
5 argument purposes. And then we can come back and
6 discuss them together.

7 So why don't we start, actually, with
8 Wyoming's motion in limine to exclude the evidence or
9 argument that the 1999 Tongue River Reservoir
10 enlargement is protected by Article V, A of the
11 Yellowstone River Compact. And, Mr. Kaste, since this
12 is your motion, why don't I start with a couple
13 questions for you. And you're also welcome to raise
14 any additional points that you want.

15 So let me just say at the -- the first thing
16 is that I received replies from Wyoming on all of the
17 various motions in limine. But looking back at all of
18 the e-mails that Ms. Carter forwarded me, I didn't find
19 any reply with respect to this one.

20 MR. KASTE: I didn't file one. I don't have
21 to. What is your -- I'm interested in knowing what
22 your primary concern is about this motion 'cause I want
23 to address that. I think, honestly, Montana has raised
24 an interesting and relevant point with regard to the
25 nature of carryover in the reservoir. And maybe, for

1 purposes of this case, does it matter if the carryover
2 storage is always carried at the bottom of the
3 reservoir?

4 And good point, frankly. Good point.
5 Nevertheless, we think, and I'm still working the math
6 on this thing, that at no point should we be in a
7 position to condoning that the enlargement of the
8 reservoir as it pertains to the arrangement between the
9 states and the Yellowstone River Compact has a priority
10 date that is consistent with the original date of the
11 reservoir. That would just be a fiction, one to which
12 neither Wyoming nor North Dakota acceded when Montana
13 entered into the Northern Cheyenne Tribe Compact with
14 the other parties in negotiations that we weren't in.

15 I think that the priority date of the
16 reservoir could very well affect Wyoming adversely in
17 the future. And we know, of course, that Wyoming was
18 very concerned about that and attempted to create an
19 agreement that we thought protected ourselves from any
20 adverse effects that may result from the enlargement.

21 In addition, an issue that we haven't raised
22 in our motion but probably should have, and you see it
23 in Montana's responses, is this idea that the Tribe's
24 right and Montana's right is commingled, which could
25 very easily have adverse effect on Wyoming as well.

1 Because if the enlargement's down at the bottom and the
2 tribal right is separated and it doesn't get used in
3 any given year, then the amount of water that Wyoming
4 is essentially responsible for making sure Montana has
5 in order to fill its reservoir, is significantly
6 different than if that water is somehow commingled, and
7 Montana said we're entitled to a larger amount of
8 water.

9 I think the right thing do with regard to
10 this motion is to sit back, relax, and see what
11 questions you have at the end of this trial. Because
12 like I said, Montana has raised a good point about the
13 arrangement of the reservoir. And they have raised a
14 point which is consistent with the operation of the
15 reservoirs in Wyoming. And like any case, as you move
16 along and move along, you think, wow, I should have
17 thought of that a year ago. But nobody ever had. And,
18 of course, the importance of the reservoir to this case
19 has blown itself to the forefront over time.

20 So I don't know if I need to do anything
21 formal or not, but I frankly think we ought to sit
22 back, relax, and see what the evidence is with regard
23 to this reservoir, whether we need to decide this
24 issue. And if we determine we do, I'm going to be
25 adamant that that is post-1950 rights, post-Yellowstone

1 River Compact.

2 With regard to the other one, I think that
3 that one's one that we ought to decide up-front because
4 it dramatically affects what is and is not relevant in
5 these proceedings.

6 But if you'd like to allow Montana to address
7 this motion, I'm happy to sit down. Or I can move
8 right into the next one.

9 SPECIAL MASTER: Okay. Let me just give you
10 a notion of where I am with respect to this particular
11 motion. And I'm actually pleased to hear you suggest
12 that the best thing to do with respect to this
13 particular motion is to sit back, hear the evidence,
14 have it fully briefed at the very end of the trial, and
15 then make a determination.

16 I think there's a variety of issues here, and
17 the amount of briefing that has gone into them is
18 insufficient to really permit me to rule on this
19 particular motion at this particular point in time.
20 And it's difficult also for me to do that without
21 really understanding the full extent of the evidence
22 that's likely to come in on this particular question.

23 It probably would have made this case a lot
24 easier if I had ruled for Wyoming with respect to your
25 interpretation on the Northern Cheyenne Compact. It

1 would have made things a lot simpler. But as I said in
2 my memorandum of opinion, I ultimately concluded that
3 Wyoming's interpretation of it simply stretched the
4 language too far. But it's left the question, then, of
5 what do you do with the additional capacity that was
6 added to the reservoir?

7 I think that raises both the various
8 questions that Montana has raised in its replies and,
9 in particular, that question of, as you empty the
10 reservoir, what water actually gets emptied first
11 versus emptied last? But it also raises some
12 fundamental questions about exactly what the impact of
13 the Northern Cheyenne Compact is on the allocations of
14 water between Montana and Wyoming.

15 And if you look to see what precedent exists
16 out there already with respect to Federal Reserve water
17 rights and their implications for compacts, the most
18 obvious precedent, I think, is Arizona v. California,
19 which provided that the Federal Reserved Water Rights
20 in that particular situation was to be taken out of the
21 amounts allocated to the individual states.

22 And so that would suggest, at least
23 superficially, that in this particular case, that I'm
24 perfectly fine if Wyoming wants to settle with the
25 Northern Cheyenne Tribe, but at that point, it

1 basically comes out of any water that was allocated to
2 Montana under the compact. But, of course, this is a
3 different compact. And as Wyoming has stressed from
4 the very outset, it doesn't allocate a specific amount
5 of water to Montana. But, instead, as the United
6 States Supreme Court has decided in this particular
7 case, it actually starts out by providing that
8 Montana's pre-1950 appropriative rights shall continue
9 to be enjoyed and then allocates additional rights
10 after that. And none of those particular questions
11 have been briefed in this particular case so far.

12 Ultimately, I think we're going to have to
13 address those particular questions. As I said, the one
14 precedent -- the best precedent that's out there, I
15 think right now, is the Arizona v. California case.

16 MR. KASTE: Well, I'm hopeful that we
17 actually don't have to address those things and that at
18 the end of the case, we'll be able to show that
19 utilizing the methodology employed by Montana's experts
20 with the appropriate parameters on the operation of the
21 reservoir, it fills. And hallelujah if we don't have
22 to get into those hard questions with regard to that
23 other compact. And certainly that's what we hope to
24 prove in the case.

25 But I do think it's best if we just sit on

1 this and think about it for a while before we do
2 anything. So if I need to formally withdraw the motion
3 in limine with the option to renew it in the future,
4 I'll do that. If not, I'll move to the other one.

5 SPECIAL MASTER: So I would suggest at this
6 stage that we simply move to the other one. I think
7 this will be something that will be resolved at the end
8 of the trial.

9 MR. KASTE: Well, the other motion, of
10 course, is Wyoming's motion in limine to limit evidence
11 related to discretionary operational decisions at the
12 Tongue River Reservoir. And, obviously, you've seen
13 from Montana's witness and exhibit list, that part of
14 their rationale for operating the reservoir is, hey, we
15 have to make these decisions about how to operate our
16 reservoir. And as I told you in the summary judgment
17 proceeding, I think that that is perfectly appropriate
18 for Montana to make various decisions based on safety
19 and other considerations with regard to the operation
20 of their dam.

21 Nevertheless, our obligations to each other
22 in this case are governed by the compact. And the
23 compact has a definition of beneficial use in it which
24 is limited. And the Court has already decided in its
25 ruling that beneficial use describes a type of use.

1 And those types of uses that are governed or that are
2 covered by the language "beneficial use" in the compact
3 do not extend to these operational decisions. They
4 extend to the satisfaction of downstream senior rights.
5 And in this case, the only real quantification of those
6 rights is 50 CFS. So to the extent that Montana
7 bypasses more water than that, they do so at their own
8 risk. The consequences of those decisions cannot be
9 borne by Wyoming. They must be borne by Montana.

10 And I think it's very clear, both from the
11 language of beneficial use and I think we cited Arizona
12 v. California in our brief that says that our rights,
13 our junior rights are subject only to senior rights.
14 Of course, the senior rights in this case are the
15 downstream stock water appropriations. They are not
16 preventing ice jams, flood control, fish, protection of
17 infrastructure on the dam. Those are valid
18 considerations. But they're Montana's. They're not
19 Wyoming's. And Montana cannot force the consequences
20 of those considerations on to Wyoming consistently with
21 the plain language of the Yellowstone River Compact.

22 Accordingly, it makes no sense to listen to
23 Montana justify those decisions in these proceedings.
24 Hey, I decided to dump water downriver because I wanted
25 to provide habitat for fish. Great. Doesn't matter

1 for purposes of accounting between the states. Why
2 would the Court want to listen to that? Don't know.
3 Hence, the motion.

4 And there's a significant amount of testimony
5 designated by Montana on that issue, to talk about
6 reservoir issues that have, for example, Mr. Smith who
7 runs the reservoir say, I did that for a good reason.
8 I'm going to say, sure you did. Agreed. But it
9 doesn't matter for purposes of the breach of contract
10 claim that we're here to decide. Because that contract
11 is very clear. And it does not require Wyoming to pay
12 for Montana's voluntary decisions.

13 We will honor the downstream senior rights
14 from the Tongue River Dam. We will not, and we don't
15 think we are obligated to honor voluntary decisions.
16 And I understand that there is a balance that Montana
17 faces. And there is risk involved. That's the nature
18 of having a reservoir; that's the nature of having to
19 protect fish; that's the nature of trying to ensure
20 that these other people and these considerations are
21 addressed. It's just a part of the deal. But it's
22 their part; not ours.

23 And so having this testimony, having these
24 exhibits, having these people come in and talk to you
25 about decisions that cannot affect the balance or the

1 accounting balance between the parties is ultimately a
2 waste of time. And that's our position. It's a waste
3 of your time, my time, the Court's time. And I agree
4 with Montana: It requires you to decide a legal issue
5 in these proceedings. But we really ought to know what
6 the rules are before we play the game. And it would be
7 helpful for all involved if we knew that the rules are
8 as they are provided for in the compact.

9 SPECIAL MASTER: Okay. So that's very
10 helpful. So actually, before you speak, Mr. Draper,
11 let me just give you a sense of, based on my reading of
12 the papers so far, where I would be if I were at this
13 point in time to give you a sense of what I think the
14 rule probably is here and, I think, in the process also
15 give you a sense of where I'm still not quite sure what
16 the rule is.

17 So first of all, I did read Federal Land Bank
18 v. Morris, which is a Montana Supreme Court decision in
19 1941. And having read that, I would agree with Wyoming
20 that the Morris case would seem to clearly adopt the
21 one-fill rule. And that given Wyoming follows a
22 one-fill rule, you know, it would seem to me that that
23 would be a rule that the compact would also follow in
24 this particular case. And, in fact, I guess it would
25 surprise me if it -- if the one-fill rule didn't apply

1 here. And, in fact, it could open up Montana's claims
2 even farther. Because if, in fact, the one-fill rule
3 didn't apply here and, therefore, Montana was free to
4 keep filling up the reservoir over and over again as a
5 matter of a pre-1950 right, at least as I understand
6 the issue and the way in which the one-fill rule
7 operates, if it didn't apply, basically Montana would
8 be able to empty the reservoir and then ask for even
9 more water to come down so they could fill it up over
10 and over again as many times as they wanted to. So it
11 would sort of surprise me if the one-fill rule actually
12 did not apply.

13 Second of all -- and here I feel a little bit
14 less certain, so, therefore, would appreciate a little
15 bit more guidance. I assumed that if in 1951, when the
16 compact was negotiated, that let's assume that Montana
17 were to -- their practice was to just fill up the
18 Tongue River Reservoir as soon as they possibly could.
19 So they didn't let any water flow out of the Tongue
20 River Reservoir. They just filled it entirely as fast
21 as Montana could. And then in the 1980s, they decided
22 for fish and wildlife purposes that they would start
23 releasing some water during those winter months for
24 fish and wildlife. And as a result of that, they now
25 ask for even more water to come down from Montana.

1 At that point, that would seem to me to be an
2 enlargement of Montana's right because they are now
3 asking for water, not just to fill the reservoir as
4 they did before, but also for fish and wildlife
5 purposes. And the fish and wildlife uses would not
6 seem to be a beneficial use for purposes of the
7 compact.

8 I recognize that both Montana and Wyoming now
9 recognize that fish passage is a beneficial use. But
10 if you actually look at Article II, H of the compact,
11 it provides that, "The term 'beneficial use' is herein
12 defined to be that use by which the water supply of a
13 drainage basin is depleted when usefully employed by
14 the activities of man." And that would clearly, to me,
15 suggest that beneficial uses for purposes of the
16 compact refer to uses where you actually take water out
17 of the river, use it for, as described here, an
18 activity of man, and that that actually ends up
19 utilizing some of the water of the river so that it
20 gets depleted.

21 So if that were what was at issue, again, my
22 inclination based on what I've seen in the paper so
23 far, is that that's actually an enlargement and to the
24 degree that Montana is asking for additional water at
25 that point, that it's actually asking for water for a

1 purpose which is not protected under the compact. Not
2 only is it not a beneficial use, but it also wasn't a
3 use back in 1950. So it's not a pre-1951 beneficial
4 use.

5 But then I get to my final set of situations,
6 which is, let's assume that Montana, prior to 1951, did
7 not fill the reservoir up immediately, but they
8 actually let water run through and down into the Tongue
9 River for various purposes -- might have been for the
10 safety of the reservoir at that particular point in
11 time, might have been to avoid having ice on the river
12 downstream, could have been for a variety of different
13 purposes -- and now, basically, Montana is following
14 pretty much the same practice as before in letting a
15 certain amount of water run downstream but protecting
16 all of the rest.

17 On that one, it's far less clear to me, based
18 on what has been provided to me so far, as to exactly
19 how you would resolve that particular issue. It's,
20 first of all, not clear that the one-fill rule applies
21 to that particular situation. Because in that
22 particular case, it's not that Montana is filling the
23 reservoir and then letting water out for another
24 purpose; they are simply letting the water run through.

25 Now, I recognize there -- not to complicate

1 this too far, but I recognize there that when you have
2 an actual in-stream reservoir rather than an off-stream
3 reservoir, that the distinction between actually
4 capturing water and letting it out and letting the
5 water run through might not be as clear as one would
6 like it to be. But, nonetheless, it's not clear to me
7 that the one-fill rule actually applies in that
8 particular case.

9 And I was interested in the decision of the
10 presiding judge in the Snake River Basin adjudication.
11 And I am about to refer to the memorandum decision
12 dated March 20, 2013, that was Exhibit A to Wyoming's
13 motion in which, first of all, in discussing the
14 one-fill rule -- and this is footnote 6 on page 9 --
15 the presiding judge in that particular case notes that,
16 "The department utilizes an accounting methodology for
17 the purpose of determining when a storage water right
18 has been filled and that the methodologies employed by
19 the department for determining when a right has been
20 filled are beyond the scope of these proceedings."

21 And then looking at subpart 4C of the
22 presiding judge's opinion, it's entitled "This
23 basinwide proceeding does not address the issue of when
24 the quantity element of a storage water right is
25 rightfully considered to be filled or satisfied," and

1 then in passing says, "The more important issue
2 pertains to when the quantity element of a storage
3 right is considered a fill. Namely, is water that is
4 diverted and stored under a storage right counted
5 toward the quantity of that right if it is used by the
6 reservoir operator for flood control purposes?" And
7 then goes on to note that's an accounting issue which
8 the basinwide proceeding that this opinion is part of
9 does not address.

10 And then a little bit further on in the
11 opinion, notes that, "The authority and responsibility
12 for measuring and distributing water to and among the
13 appropriators is statutorily conferred to and vested in
14 the Idaho Department of Water Resources and its
15 director."

16 And I don't have enough of the factual
17 background of the Snake River adjudication to know
18 specifically what that is in reference to. But it
19 would seem to suggest that under the one-fill rule,
20 there's still the separate question of, well, if you
21 fill the reservoir for purposes of then letting water
22 out for flood-control purposes, is that water really
23 part of the fill, or can you actually say, well,
24 actually that water was never part of the reservoir for
25 purposes of the one-fill rule, and, therefore, you can

1 still let all of that flood water out and then fill it
2 back up again.

3 So the Snake adjudication decision actually
4 doesn't seem to address this last set of questions that
5 I'm interested in here. And I still, despite having
6 asked both sides for information on this, am not sure
7 exactly how Montana and Wyoming deal with that type of
8 issue to the degree that the issue has actually arisen
9 with respect to a particular reservoir.

10 Again, here I'll just come up with a total
11 hypothetical. But I could imagine, for example, that a
12 State might have a rule that says, okay, during the
13 period from May to July, you can fill this particular
14 reservoir at the following rate. I have no idea
15 whether Montana follows that, whether Wyoming follows
16 that type of a rule. But there must be some type of
17 rule as to when you can fill it and what happens, if
18 during the period of time that you fill it, you don't
19 fill it.

20 And so that's what I'm still struggling with.
21 And to be honest, I don't have enough in front of me to
22 actually address that last set of questions. And it's
23 that type of question that I actually think that, not
24 only might citations to opinions help me in this
25 particular case, but the testimony in this case might

1 be able to help me understand how the two states
2 actually address this. Because number one, as I
3 mentioned in my original recommendations to the United
4 States Supreme Court in my first report, ultimately I'm
5 going to look to see what Montana and Wyoming do in
6 trying to determine what the compact means by prior
7 appropriation law.

8 And in addition to that, as I suggested in
9 connection with my ruling on Montana's motion, the last
10 thing I think that the negotiators of the compact
11 intended was setting up a totally different body of law
12 if they could avoid it. And so at the moment, I'm
13 looking for guidance on exactly how Montana and Wyoming
14 address, as I say, that last set of issues.

15 And so at the moment -- and you can dispel me
16 of this, and Mr. Draper can dispel me of what I've
17 suggested so far as the way I see the law shaping up.
18 What I can do is I can give you guidance at this point
19 in time as to what I think the law is that I will apply
20 at the end of the proceeding.

21 And as I said, based on what I've seen so
22 far, it appears that both states follow a one-fill
23 rule. Based on the language of the compact, if there's
24 a brand-new release of water from the reservoir that's
25 for purposes that did not exist in 1950 and are not a

1 beneficial use under the compact, and the compact
2 specifically talks about beneficial uses depleting the
3 water, then that would seem to me to be a new use for
4 which the compact does not provide protection.

5 But to the degree that they're basically
6 letting the same amount of water go down as they did --
7 let me restate that.

8 To the degree that Montana is letting the
9 same amount of water flow through the reservoir as they
10 did before, then that might very well be permissible.
11 And I just need to know more about how the two states
12 handle that type of an issue.

13 MR. KASTE: Well, I understand. And this is
14 where the rubber meets the road in this case. This is
15 the important thing that you're going to have to
16 decide. What are the rules regarding the operation of
17 Tongue River Reservoir? And how do we count? Because
18 it makes all the difference in the world to both states
19 how you count. And the reservoir is the water right
20 that matters in this case. It's the life blood for
21 Montana farmers all summer long, and it's the big
22 puddle Montana wants Wyoming to fill. That's what
23 matters.

24 And it's all going to depend on how you
25 count. And our position -- and we're going to have the

1 folks from Wyoming come in and explain to you what we
2 do in Wyoming. 'Cause I agree with you that that case,
3 the Idaho case doesn't get to the question of, how do
4 you count?

5 Fair enough. In Wyoming, we issue fill
6 orders on October 1. And we tell people in no
7 uncertain terms -- although, you'll hear Bill Knapp
8 testify, I haven't been doing a good job of sending out
9 those notes, but they all know that your obligation is
10 to fill your reservoir when water's available during
11 the filling season. If you don't, you make that
12 decision at your own expense, not your neighbor's
13 expense. If you don't fill when you had the
14 opportunity to store water and then you come to the
15 hydrographer commissioner and say, I want you to shut
16 off my upstream junior during the irrigation season
17 because I didn't fill, the hydrographer is going to
18 look at what went out of your dam and say, no, I'm not
19 going to honor that call because you missed your
20 chance. And I'm not going to put your bad decision on
21 your neighbor.

22 That's going to be the evidence from
23 Wyoming's witness about how we do it in Wyoming. And
24 our position, of course, in this case is that how you
25 count is dictated by the language of the compact and

1 that you're entitled to certain beneficial issues. And
2 the fact that you may have chosen to release water in
3 the past does not give you the unfettered discretion to
4 continue to choose to discharge that water in the
5 future. Beneficial uses are defined.

6 And in the past, where Montana didn't come to
7 Wyoming and say, we want you to take action to restore
8 our reservoir because of our decisions, doesn't matter
9 to Wyoming. Whether Montana historically bypassed
10 water for any number of reasons, until they come
11 knocking on our door, it's not our job to get into
12 Montana's business. But once they come knocking on our
13 door, then Montana has to demonstrate that it caught
14 the water that was available or the consequences of
15 that decision fall on Montana as a virtue of the plain
16 language of the compact.

17 Not -- and Montana can't go, well, we wasted
18 water for a long time, so it must be okay now. No,
19 that doesn't count. That -- the compact doesn't
20 recognize that if you historically wasted water, you
21 get to keep wasting water. That's 180 degrees
22 different than the doctrine of beneficial use and the
23 doctrine of appropriation provide. They're looking to
24 eliminate this, to provide opportunities to put this
25 water to good use. And the fact that you may have been

1 wasting it for years and sending it straight down to
2 Yellowstone without giving anyone an opportunity to use
3 it without taking the opportunity to store it, it is in
4 no way, then, should it give you the opportunity to do
5 that in the future at Wyoming's expense.

6 That's going to be your position in the
7 litigation on the legal side. Factually, we try and do
8 a pretty good job to make sure our reservoir owners
9 take advantage of the opportunities presented to them.
10 In the Tongue River Basin, you're going to learn it
11 doesn't really matter because all of our high mountain
12 reservoirs are at the very top of the system, the Big
13 Horns, there isn't anyone above those reservoirs.

14 These people face the risk of their decisions
15 completely. If they don't catch the water when it's
16 available and they let it go by, that's it. The
17 mountain is dry. They have no recourse.

18 Montana's in a very different position
19 because its reservoir is located in the middle rather
20 than the top of the system. But that doesn't mean that
21 the rules ought to apply differently. The rule ought
22 to be the same; catch it when it's available or bear
23 the consequences of your own decisions.

24 Now, I'm sure Montana is going to put on
25 evidence about how, well, we've done this in the past.

1 We've done this in the past. We've done this in the
2 past. And our argument to you today and all throughout
3 these proceedings are going to be, so what? Doesn't
4 matter. You should not allow their discretionary
5 decisions in the past to form the basis of charging
6 Wyoming now or in the future.

7 That's all I got.

8 SPECIAL MASTER: Okay. Thanks.

9 Mr. Draper.

10 MR. DRAPER: Thank you, Your Honor. Let's
11 see. You've discussed two of the Wyoming motions with
12 Mr. Kaste.

13 SPECIAL MASTER: Right. And I think on the
14 first motion, as I understand it, we -- there was an
15 agreement that we will not need to rule on that
16 particular motion at this particular point in time. So
17 you're free, if you want to, to address the merits.
18 But at this point in time, I plan to deny that motion
19 recognizing, again, that this is an issue that will
20 need to be resolved at the end of the trial.

21 MR. DRAPER: Very good. And I think you're
22 motion will be vindicated by testimony that you will
23 hear from both sides with respect to some of the issues
24 on that enlargement question, how the reservoir is
25 operated and what is even necessary to make the kind of

1 decision that the motion contemplated.

2 On the effort by Wyoming to exclude evidence
3 relating to the operations of the Tongue River
4 Reservoir, I think that would be -- I think it's based
5 on a critical misunderstanding of what needs to be
6 heard. There's some legal issues there but also
7 factual, as it's been operated that way prior to the
8 compact. But was it being operated at the time of the
9 negotiations that way? Is Wyoming entitled to say,
10 well, you were operating it that way when we agreed to
11 this; we can do that. But now we're not going to agree
12 to give you any of your rights under the compact
13 because we don't like the way you're operating it.

14 It will be a lot of factual evidence that has
15 to come in that will be relevant. I think you
16 indicated your sense of that. You have expressed the
17 opinion in your ruling on the motion with respect to
18 intrastate administration of water, that it is an
19 initial presumption that Montana's existing regulation
20 and administration of its water rights are acceptable
21 under the compact. It's Wyoming's burden to convince
22 you otherwise.

23 The operations that have been occurring
24 historically which have not been radically changed,
25 there would be that situation which you posited if

1 Montana wanted to suddenly recognize other uses
2 including in-stream uses or other values that might
3 today -- people might be more sensitive to and then
4 require that Wyoming fund those. That's not what we're
5 asking for. We're asking for protection of the uses
6 and the reasonable operation of Tongue River Reservoir
7 as it existed at the time of the compact. And Wyoming
8 was on full notice of that. And so it's a little bit
9 misplaced to say, well, if you were wasting water at
10 the time of the compact, that doesn't mean that you get
11 to continue to waste the water.

12 That's their position. But it makes me think
13 of that statement in the senate report about the
14 compact which said, it is not the intent of the compact
15 to change the water that is let down. Something along
16 those lines. I haven't quoted it exactly.

17 But it is not the intent of the compact to
18 change that. And that's what they are trying to do.
19 That's exactly what they are trying to do. And I
20 think, looking at your ruling on the effect of the
21 compact on intrastate operations and the conditions
22 under which water must be administered in order for
23 Montana to obtain its rights, that you will need to
24 look at, is this a reasonable operation of the
25 reservoir? We claim that it is. We have experts in

1 the field of reservoir operations who will so testify.
2 And it's that kind of evidence that you need to hear.
3 You need to have a chance to ask questions. There
4 needs to be the opportunity for Wyoming to
5 cross-examine. But that's exactly the kind of
6 information you need in order to make an appropriate
7 ruling here.

8 I agree it is an important issue. I would
9 further State very strongly for the record that the
10 statements you made regarding the adoption of the
11 one-fill rule by Wyoming is something that we and the
12 Attorney General of Montana disagree with.

13 SPECIAL MASTER: I'm sorry. I didn't hear
14 that last point.

15 MR. DRAPER: Your statement with respect to
16 the adoption of the one-fill rule by Montana, we
17 disagree with that. And I wanted to make that very,
18 very clear on the record.

19 However, I think also your comment regarding
20 questioning whether it really determines the issue
21 here, is a very apt one. And it's not -- we're not
22 seeking to operate the reservoir in any different way.
23 It fills once a year. But it has a reasonable
24 operation that's been practiced since before the time
25 of the compact, that involves releases through the

1 reservoir, like reservoirs do. When we were up on the
2 tour at the Park Reservoir, we heard about how they
3 release water through there in the winter. It happens.
4 And it's part of reasonable reservoir operations. And
5 that is something that's imminently a good subject for
6 expert testimony and for percipient testimony of people
7 who are involved in those operations.

8 So I think that granting the motion at this
9 point would be incorrect. It's something, again, that
10 one can hold in abeyance. But it should not be
11 granted. Because it would take away from you the
12 opportunity to hear all this important evidence that is
13 part of it. There's legal aspects, but there are
14 important factual aspects, which you pointed out in
15 your ruling. Whether it's reasonable, that takes
16 evidence. And as with these other subjects, Wyoming is
17 trying to keep that evidence from you. And we would
18 oppose that in the strongest terms.

19 So I think that would be at least the initial
20 reaction. If you have any further questions, I'd be
21 glad to answer them.

22 SPECIAL MASTER: I think that's fine. Thank
23 you.

24 Mr. Kaste, one last comment?

25 MR. KASTE: Yeah. I think Mr. Draper has put

1 it in just the right terms for us. Is the question
2 before you reasonable reservoir operations? Or is the
3 question before you beneficial use as defined by the
4 compact?

5 And our position is going to be that the
6 compact says right in it beneficial uses. Those are
7 the only appropriative rights that are protected, and
8 that's it. And beneficial use is defined. And Montana
9 says I want you to read into this compact an element of
10 reasonableness. And I understand you're going to take
11 all of this evidence. And I appreciate the fact that
12 you are because this -- like I said, this is the
13 important question in the case.

14 But I think what Montana, at the end of the
15 day, is going to have to do is convince you to read
16 into that compact language which does not exist in it.
17 And our position is, if you read the plain language,
18 these operational decisions, although reasonable -- and
19 I do not have a witness who is going to come in and
20 say, you guys operated your reservoir in a crazy,
21 unreasonable way, unsafe or anything like that. I do
22 not challenge the nature of their decisions for these
23 other purposes. I don't want them to break their dam.
24 I don't want them to endanger people. And I'm not
25 going to offer any evidence along those lines.

1 But at the end of the day, you're going to
2 have to decide, do read into this compact an element of
3 reasonableness that is not apparent in the plain
4 language? And that, I think, sets up the issue for you
5 in just the right way. 'Cause it really, at the end of
6 the day, is going to be an interpretive question from
7 the compact. And the facts can inform, once you read
8 that reasonableness element in, did they meet it or
9 not? But you've got to start with that foundational
10 decision, whether that's in or out of the compact.

11 So I think that Mr. Draper set the issue up
12 very well for you. And I understand, of course, the
13 ruling we'll hear from both sides about what we do from
14 reservoirs. And it will be very interesting.

15 SPECIAL MASTER: So let me just actually add
16 a couple of additional points here, which is that there
17 is at least two different ways in which I think you
18 could look at the amount of water that Montana releases
19 through the reservoir during the winter months rather
20 than retaining the water in the reservoir itself.

21 One way of thinking about it is that -- you
22 know, what their argument is is basically, well, we're
23 putting that water to a beneficial use. Beneficial use
24 is for fish purposes or to avoid the river icing over
25 or to avoid floods, whole variety of different

1 purposes.

2 And I agree to the degree that the argument
3 is, hey, we're putting that water to a beneficial use,
4 then one would think that you have to look at the
5 definition of beneficial use in the compact itself.
6 Again, Article II(H), that refers to depletion of the
7 water when usefully employed by the activities of man.

8 But the other way of thinking about it is
9 that it goes to what your reservoir right is to begin
10 with. So, again, I'm just going to throw a
11 hypothetical because at this point, that's all I can do
12 until I've actually learned more about the facts of
13 this particular case and what Wyoming and Montana do.

14 But let's assume that there is a reservoir
15 that historically a -- the owner of the reservoir
16 cleans out and does repair work on during the winter
17 months. And what they have historically done is to
18 fill that reservoir in March. And they have a senior
19 priority, in fact, to fill that reservoir during the
20 March period.

21 There, if the argument is that, well, you
22 know, you don't have any complaint against the junior
23 appropriators who are holding back some more water in
24 March because you can fill it in January and February,
25 depending on what the law and practice is in a

1 particular State, that might be a perfectly reasonable
2 argument. It might be an invalid argument.

3 So the question there goes to what the actual
4 right is to fill the reservoir under a particular
5 priority. And that's what I'm hoping to get some
6 additional guidance on from both of the two states.
7 And on that particular issue, as to whether or not it's
8 ultimately consistent with the compact, that's going to
9 depend partly on what the case law is out there. But
10 it might also depend on what the practices are. And
11 the practices are most likely to come into evidence.
12 So we have a strange situation here where some of the
13 factual evidence might very well inform the legal
14 determinations. So it's impossible to say exactly what
15 the law is until we actually have some of the factual
16 evidence come in on the record.

17 So I mention that only because I'm really
18 hoping I get guidance from both states on that
19 particular point.

20 So at this point in time, I'm going to deny
21 the motion but -- and I'm also not going to, at this
22 point, give you a definitive legal ruling because,
23 again, I haven't really had the law briefed in a way
24 that I think would actually permit me to make
25 recommendations to the Supreme Court at this point.

1 However, as I suggested earlier, if based on
2 what I have right now, if I were to rule, I would say,
3 number one, that the one-fill rule does apply in
4 Montana. And I understand Montana's argument is that
5 it doesn't. But having read the Federal Land Bank v.
6 Morris case, there's an entire paragraph that seems to
7 adopt the one-fill rule. So unless somebody is holding
8 back a legal opinion from me, it, you know, might be
9 dictum. It wasn't absolutely clear to me as to whether
10 it was dictum. But it's the best guidance we have from
11 the Montana Supreme Court on that particular question
12 at the moment. So if I were required to rule, that
13 would be my ruling there.

14 Similarly, to the degree that Montana decided
15 to start releasing additional water from the reservoir
16 for a purpose which is not a pre-1950 beneficial use,
17 that also would seem to me to be inadmissible under the
18 compact. And the ultimate question then becomes, what
19 is the nature of Montana's pre-1950 appropriative right
20 to fill the Tongue River Reservoir? And on that, at
21 this point, I feel that I need, both, to listen to the
22 evidence; as well, to have a full briefing on the law
23 at the end of the proceedings to make a determination
24 on that particular question.

25 The other thing I'll add is, again, based on

1 my ruling on Montana's summary judgment motion, the
2 question is not simply, does Wyoming have a different
3 rule? Because I've already ruled that Montana is not
4 required to adopt Wyoming's practice. But, instead,
5 is -- first of all, what is Montana's practice in this
6 particular area? And what was it in 1950 as to how you
7 went about actually determining what a right under the
8 prior appropriation system to fill a reservoir consists
9 of? And whatever that right is, however that's
10 defined, is that consistent with the compact, including
11 language in the compact as to beneficial use and
12 recognizing this is all supposed to be consistent with
13 a general prior on appropriator system? And also, in
14 addition to whether or not it is consistent with the
15 compact, whether or not this is the approach that
16 Montana follows everywhere. Because if there's one
17 thing they follow with the Tongue River Reservoir and
18 they're trying to get Wyoming to accept, but, in fact,
19 elsewhere they do something that looks very similar to
20 Wyoming, again, that -- at that point would no longer
21 seem to be an approach that would be properly adopted
22 under the Yellowstone River Compact.

23 So, again, what I'm going to be looking for,
24 both in the evidence and also in the final legal
25 arguments, is the question of what does a pre-1950

1 storage right actually consist of? What does it mean?
2 Does it mean that you have a right to a certain amount
3 of water but you better get out and capture it right
4 away? Or does it consist of a right to fill your
5 reservoir during a set period of time subject, perhaps,
6 to letting some water continue to flow downstream? And
7 then -- and this is where I think the clear law comes
8 into play -- is that consistent with the compact? And
9 then back to the factual, is it the way in which
10 Montana has handled everything and not just this
11 particular reservoir?

12 So that's what I'll be looking for. And I
13 know that Wyoming would have liked me to actually make
14 a legal ruling today. But hopefully that at least
15 provides some additional guidance as to where we should
16 be steering, both in terms of the evidence and also
17 what I'm looking for from the standpoint of ultimate
18 legal issues. And also in the hope that although both
19 sides, in their pretrial memorandum, suggested that
20 this case could not be settled, and the fact that
21 you're all here right now suggests it's not likely to
22 be settled while we're sitting here, I still hope that
23 parties discuss things. And if that discussion of the
24 law helps on that, then I hope it does.

25 Okay. So any other questions on that?

1 MR. KASTE: No, Your Honor.

2 SPECIAL MASTER: Okay. Thank you, Mr. Kaste.

3 MR. DRAPER: Nothing further, Your Honor.

4 SPECIAL MASTER: Okay. So we have, like,
5 about 35 minutes left before the noon hour. And
6 recognizing we haven't taken any break, probably the
7 best thing to do is to maybe take a 10- or 15-minute
8 break right now. And then we can come back and handle
9 a variety of other administrative matters. And one of
10 those is I want to come back to the time limit that
11 Wyoming requested last week.

12 So we are, then, in recess for the next 10 to
13 15 minutes.

14 (Recess taken 11:25 to 11:42

15 a.m., October 15, 2013)

16 SPECIAL MASTER: Okay. Everybody can be
17 seated.

18 Okay. So there's several other things that I
19 wanted to cover. I don't think this will take a great
20 deal of time. So the first thing gets back to the time
21 limits. And as I mentioned before when I was talking
22 to a variety of federal judges over the summer, a
23 number of them actually recommended time limits these
24 days. I recognize that this is a Supreme Court
25 proceeding. But, of course, the Supreme Court itself

1 has time limits. And the Supreme Court does not permit
2 oral argument to go on at length. And my guess is
3 actually they would appreciate me trying to keep this
4 proceeding moving as quickly as possible.

5 But I also -- I'll recognize it's a little
6 bit unusual in these type of proceedings to not have
7 time limits. I'd be the first special master to try
8 it. So what I'm going to do is, because I also trust
9 counsel, is I'm going to put a soft time limit on here,
10 which is basically at the moment, I'm going to just let
11 things play out. As I mentioned on the telephone call
12 on Friday, my hope is that Montana will be able to come
13 in on the lower end of their time estimate for how long
14 it will actually take them to put on their case in
15 chief, particularly given that Wyoming says they're not
16 going to need anywhere close to the amount of time for
17 cross-examination as you provided for them.

18 But I reserve the right at any particular
19 point in time to actually impose a time limit if I do
20 not see the proceedings moving along at an appropriate
21 pace or if I think they are just taking -- we're going
22 off on too many tangents. Now, I realize that it would
23 be a bit unfair to do that and then tell you what the
24 time limit is.

25 So let me just say right now, I'm going to be

1 just keeping informal track on the expectation that
2 both sides will not need more than about 65 hours of
3 time to actually finish both their direct and
4 cross-examination. And if, indeed, Montana were to
5 come in at the low end of their estimate, Wyoming comes
6 in at what they estimate their total amount of time is,
7 you both would need about 60 hours of time. So I've
8 added in an additional five hours.

9 But, again, I don't plan to impose that
10 unless I see actually some need to do so. And I'll let
11 you know along the way as to whether or not I see
12 anything going amiss. But hopefully that will just
13 provide you all with an incentive to move through
14 diligently with, again, recognizing that that's an
15 informal limit. And I would even adjust that depending
16 on how things proceed along.

17 Okay. Any objection to that? Again, I'm
18 just going to be watching. I'm not doing anything at
19 this particular point in time.

20 MR. DRAPER: Your Honor, I think it will be
21 helpful if you see at any point the evidence, the
22 testimony going in a direction that you think is not --
23 is a tangent, to ask us where this is going and make
24 sure that it is relevant. Otherwise, we'll make the
25 proper adjustments so that we are focusing all the time

1 on testimony and evidence that is directly relevant to
2 this case.

3 SPECIAL MASTER: I appreciate that. And
4 that's what I assume on both sides. And that's why I
5 actually don't think I need to impose a time limit at
6 this particular point. But, again, I'm reserving the
7 right just to let you know what that time limit would
8 be if I actually imposed it.

9 And if we're able to do that, we'll be out of
10 here before Thanksgiving, which I think everyone would
11 prefer. So that's the time limit.

12 Case schedule. So we can be let in
13 downstairs at 8:00, and we have to be out of here by
14 5:00. So I'm actually looking to counsel for a little
15 bit of guidance on this. But my preference would be
16 that we probably start at 9:00, recognizing that to get
17 in here and actually get organized might be difficult
18 by 8:30 -- but I would be willing to start at 8:30 if
19 both sides are able -- and that we finish up by 4:30 so
20 we have an opportunity to finish up and get out of the
21 building. But that with, like, a one-hour lunch break
22 and a 15-minute break in the middle of the morning and
23 middle of the afternoon gets us a full six hours of
24 testimony each day.

25 But I'm willing to push it to the other ends

1 if counsel thinks that's possible.

2 MR. DRAPER: Your Honor, I would go with your
3 recommendation to begin with. Let's try it for a few
4 days and see if some adjustment is needed.

5 SPECIAL MASTER: Mr. Kaste, your thoughts?

6 MR. KASTE: 8:30 is a possibility. As long
7 as we stay to relatively short breaks, I'm willing to
8 start at 9:00 if that's your preference.

9 SPECIAL MASTER: Why don't we go ahead and
10 start at 9:00 each morning for the moment and see how
11 it goes. If I don't see us getting a full six hours of
12 testimony in each day, though, then I'll move it to
13 8:30. And similarly, my guess is an hour is sufficient
14 for lunch. If for any reason that proves wrong, again,
15 I'll move it to 8:30 if necessary. But I just want to
16 make sure we do get a full six hours of testimony each
17 day.

18 So we'll then start at 9:00. We will take a
19 break, that I'll call sometime in the morning, for 15
20 minutes. We'll take a one-hour lunch break generally
21 about noon each day. And then we'll do another
22 15-minute break sometime in the afternoon which, again,
23 I'll call. And we will adjourn at 4:30. If for any
24 reason I don't feel that we've gotten in the six hours
25 of testimony or it seems appropriate, again, we can go

1 until 4:45. I just want to make sure I give you enough
2 time to collect your papers and get out of here before
3 the marshal actually locks the doors downstairs.

4 And I'm looking down at my deputies to see
5 whether they're nodding their heads, and they seem to
6 be doing that.

7 Okay. So that's it on the daily schedule.

8 As I mentioned the other day, I do expect to
9 ask questions of various -- of the witnesses. And, of
10 course, you're free to object to my questions just like
11 you would object to any other. And then I will rule on
12 my question, which might sound a little bit silly. But
13 I actually will listen to your objection, and it might
14 very well be that you'll point out a problem that I
15 didn't recognize.

16 Then, finally, I just want to go back to a
17 proposal which I had made earlier and I would like to
18 maintain, which is -- and actually, this might change
19 the timing that I just mentioned. What I would
20 suggest, as I mentioned before, is that generally two
21 days before a day of testimony, that if whoever is
22 presenting their case two days hence can let the other
23 side know what witnesses you expect to call and what
24 exhibits you currently expect to use as part of your
25 questioning of that witness.

1 I recognize things can change. So I'm not
2 saying if you don't put down every single exhibit, if
3 for any reason you realize you have to have another
4 exhibit later on, that will be fine. But my
5 expectation will be that you will provide counsel with
6 a list of all the exhibits you expect to utilize.

7 At that point, I would ask the other side to
8 take a look at those exhibits and let both counsel and
9 me know by the -- at the end of trial the day after,
10 whether you will have any or expect to have any
11 objections on that particular exhibit. Again, I
12 recognize that sometimes you won't know an objection
13 until you see how that exhibit is actually being
14 utilized. But to the degree you see a likely
15 objection, if you could raise it at that point in time,
16 that will permit me, then, the night before the day of
17 trial, to consider those objections and if it seems
18 appropriate to hear them at the very beginning of the
19 next day so that we don't have to use testimony time to
20 resolve those objections.

21 And, again, I recognize that you won't
22 necessarily know every objection at that point. To the
23 degree that there are objections to be heard, what I
24 would suggest is we probably start, like, 15 minutes
25 early for each of those days. So, in other words,

1 start at 8:45 so that we can try to resolve those
2 objections and still get the six hours of trial. If
3 there are not any objections that need to be resolved
4 prior to that day's testimony, we'll just start at
5 9:00. So witnesses will start at 9:00. But there will
6 always -- or if necessary, there will be a 15-minute
7 session before where we'll resolve those questions.

8 Any suggestions on that? Because I'm open to
9 any suggestions to improve that.

10 MR. KASTE: That sounds great. I wanted to
11 let you know Montana has already done that for the next
12 two days. And so we have their list of witnesses and
13 their intended exhibits. And I would propose we talk
14 about Montana's exhibits just briefly today. I think
15 there are a couple things we might want to talk about
16 with regard to the list we received. But we are
17 already doing that -- or Montana is. But it's a good
18 proposal.

19 SPECIAL MASTER: Okay. Great. And, so
20 Mr. Draper, the one request I would make is that if
21 when you furnish the list of your witnesses and
22 exhibits to the State of Wyoming, if you could also
23 give a copy to my courtroom deputy, then she can
24 provide it to me, and I'll be prepared. And I know I
25 haven't asked that before. So that's fine.

1 So that was actually the last thing on my
2 agenda. So are there other things that either of the
3 parties wanted to talk about? And if not, maybe we can
4 go ahead and talk about those exhibits at this point.

5 MR. KASTE: Well, with regard to the
6 exhibits, first of all, I am very sorry. We gave
7 you --

8 SPECIAL MASTER: The mic, I don't think, is
9 on.

10 MR. KASTE: We gave you a ridiculous list of
11 exhibits, and I apologize. The time between the
12 summary judgment proceedings and the date that the
13 exhibit lists were due was very short. And I think we
14 worked frantically to overinclude everything. And I
15 would be willing to bet you have a big, giant stack of
16 boxes back there.

17 SPECIAL MASTER: I do.

18 MR. KASTE: And I'm sorry. That's a failing
19 of counsel to not dwindle this down to what's
20 important. That being said, I have another box for you
21 of the joint exhibit, that is the 2002 Wyoming Basin
22 Plan prepared by HKM. It's a joint exhibit that is
23 four or five volumes long. It was -- it's our
24 obligation to provide that copy to you, and I have that
25 for you to take with you and stick with the other

1 boxes.

2 But like I say, I am sick to look at our
3 exhibit list and find duplicates and things that I have
4 no intention of attempting to admit in this case. And
5 for that, I apologize to everyone involved that has to
6 lug those boxes around.

7 With regard to those exhibits, because there
8 is such a volume, there were some copying errors that
9 we have identified. And the primary one is that if you
10 turn -- particularly early on in Wyoming's exhibits,
11 you turn a tab, and it says Wyoming 12, whatever it may
12 be. And you may not see the first page of that exhibit
13 there. It is likely the last page of the previous
14 exhibit. So as you're going through, if there's some
15 confusion, please look at the preceding exhibit pages
16 to find that first page.

17 You know, we had an enormous copy job and
18 farmed it out. And for the most part, they did a
19 really great job. But there are a couple of errors.
20 Like I said, principally at the beginning of Wyoming's
21 exhibits, the paper is all in there. It's just not
22 necessarily in there with regard to that tab. So one
23 or two pages off, that tab is.

24 SPECIAL MASTER: Okay. And I assume that's
25 true both of the hard copy as well as the electronic

1 copy?

2 MR. KASTE: The electronic copy should be
3 fine. The hard copy has those copying errors
4 associated with this. The electronic copy, I think we
5 created out of PDF documents. And those were whole.
6 They couldn't have a divider jammed in the wrong spot.

7 SPECIAL MASTER: Okay.

8 MR. KASTE: But we do have hard copy exhibits
9 of everything available if you need something or you
10 can't find something. There's a lot to try and keep
11 track of. And like I say, I have five more volumes for
12 you to take with you as we leave today.

13 SPECIAL MASTER: Okay. Great. Thank you.
14 And I assume with this new exhibit, this is something
15 that Montana is fine with. It was just you were
16 supposed to furnish it, and you've now furnished it.

17 MR. KASTE: Yes. It's Joint Exhibit 58. And
18 it's Wyoming Basin Plan, which I think we had greater
19 electronic access to than Montana.

20 SPECIAL MASTER: Great. Thank you. So my
21 one request there is going to be only, because I have a
22 bad back, if I could borrow one of Wyoming's counsel to
23 carry it down or up -- downstairs.

24 Mr. Draper.

25 MR. DRAPER: That all sounds consistent with

1 what we arranged with Wyoming. It probably would be
2 good for us to take a look at your set of exhibits at
3 some point and make sure everything got here in good
4 shape and it's arranged the way you want it. We sent
5 our copy of the Montana exhibits intending that it
6 would be the record copy of the exhibits and also all
7 the other joint exhibits, except for the ones mentioned
8 by Mr. Kaste.

9 Now, we also -- we have brought with us an
10 extra set of the Montana exhibits if you would like
11 those as a working copy. The record copy probably
12 needs to be handled carefully. But if it suits you,
13 this is something that's been done in other original
14 proceedings, if the special master wishes to have a set
15 that is -- in this case they are bound in binders -- to
16 use during the proceedings or make notes or anything
17 like that, we have that available if you -- that would
18 be helpful.

19 SPECIAL MASTER: Wyoming, are you planning on
20 doing the same? Or did you just have the one set,
21 which is all I requested.

22 MR. KASTE: Oh, I got more than one set. And
23 no elevator to my room. I mean, we spent a couple
24 hours dragging boxes up. Like I said, I can give you
25 another bound set. I can give you a set of any loose

1 exhibit that you want. We have, I believe, two
2 additional copies of all of our exhibits, Montana's
3 exhibits, the joint exhibits. Any piece of paper that
4 you would like that you feel would be helpful to you
5 either as a working copy or an official copy, let us
6 know, and we got it.

7 That does raise an interesting point that I
8 guess I'm unclear on. Montana described the copy that
9 they sent to you as the record copy. My understanding
10 is if it isn't admitted in evidence, it's not going to
11 go to the Supreme Court. And so my assumption would
12 be, at some point after these proceedings, we'll have a
13 list of things admitted in evidence and that it would
14 make probably some sense to compile those things and
15 submit them with your report to the Court. But it's
16 not my understanding that everything we put on that
17 list -- because I'm embarrassed of our list, frankly --
18 would go to the Supreme Court.

19 I don't know how you intend to proceed, but
20 if it isn't admitted, I don't think the Court ought to
21 have it. And I don't think we ought to burden them
22 with things that weren't admitted in these proceedings.
23 He may have a different opinion.

24 SPECIAL MASTER: Mr. Draper.

25 MR. DRAPER: Yes, that's not the normal

1 practice in these cases. If an exhibit is not
2 admitted, it's considered lodged. And, for instance,
3 there may be issues about whether the exhibit should
4 have been admitted. All of that is transported to the
5 clerk's office. And there is -- any exhibits that are
6 proposed by either side but not admitted would still be
7 part -- a separate part perhaps, but a part of the
8 material that is transmitted to the Court when it goes
9 up to them.

10 MR. KASTE: And maybe I don't understand the
11 distinction, if there is one, between proposed and
12 offered. I mean, having shipped it to the Court is one
13 thing. But whether you offer it or not -- and I
14 understand an offered but rejected exhibit, the Court
15 may want to see that. But I can't imagine we're going
16 to ask the Court really to take 500 some exhibits.

17 SPECIAL MASTER: Yeah, so just to give you a
18 sense of the procedure which I understand that I follow
19 with the Court, I will actually maintain, during the
20 course of this entire proceeding, the copies of all of
21 the exhibits, both those that have been entered into
22 evidence and those that have not been entered into
23 evidence. So when I issue my report to the Supreme
24 Court, I actually retain the copies of the exhibit
25 during that period of time.

1 The Court can request copies of any of the
2 exhibits, at that particular point in time, that they
3 would like to see. But they actually retain,
4 physically, in my possession. Because the last thing
5 the Supreme Court wants is to have all of these boxes
6 being shipped back and forth between the Supreme Court
7 and my offices.

8 At the very end of the case, when I'm
9 dismissed as Special Master, at that point, everything
10 which I have received at any point in time goes to the
11 United States Supreme Court where it presumably goes
12 into a warehouse that looks similar to the one in the
13 Indiana Jones movies, where it remains forever.

14 So I don't think you have to be concerned
15 that there is going to be a record that includes a lot
16 of things that I've never actually looked at, because
17 no one ever ended up using it as evidence, sitting in a
18 Supreme Court clerk's office and the clerk is taking
19 the time to actually look at some of them.

20 MR. DRAPER: Yes, that's my understanding of
21 your description. And sometimes the Court will call up
22 the record on a particular report, for instance. But
23 what you say is my understanding as well.

24 SPECIAL MASTER: That's right. But my guess
25 is they will not call that up unless it is mentioned in

1 my report or in one of your briefs or it's a piece of
2 evidence that, you know, either the State of Wyoming or
3 the State of Montana believes should have been in the
4 evidence and the Court wants to take a look at to
5 decide whether or not I made a mistake on my
6 evidentiary ruling.

7 MR. KASTE: Do you want the original
8 stickered exhibits, or are the bound copies that have
9 been provided already what you're looking for?

10 SPECIAL MASTER: So right now the original
11 stickered exhibits sit with the two states; is that
12 correct? Or did you send -- did you send the stickered
13 and you sent copies?

14 MR. DRAPER: Well, it's not the old days of
15 stickers. It's now electronically --

16 SPECIAL MASTER: You have to understand, I've
17 not been a litigator for several decades.

18 MR. DRAPER: So we have provided you what we
19 understand to be -- should be the record copy of the
20 exhibits.

21 SPECIAL MASTER: Okay.

22 MR. DRAPER: And that needs to stay pretty
23 intact as we proceed along. And if you'd like -- and I
24 understand we didn't actually bind these. These are in
25 boxes with a file folder where you can pull out an

1 exhibit and look at it if you find it convenient.

2 But the original stickered -- the original
3 record copy, we believe, is now here at the Court in
4 accordance with the part of your order that requested
5 we send a hard copy here.

6 SPECIAL MASTER: Okay. And so I'm just
7 curious, in today's world where there are no longer
8 stickers, how do you distinguish between the two?

9 MR. KASTE: I still put stickers on the stuff
10 that has ink on it and then make copies. I don't know
11 what other people do. But these kind of documents that
12 are -- most of which don't actually have the original
13 ink on them, these electronic stickers work great. And
14 they're much easier for our staff to utilize.

15 MR. DRAPER: So it's a little advantage we
16 used to have, we don't have anymore, to feel that
17 sticker to see if it's the real one.

18 SPECIAL MASTER: Okay. So from Wyoming, are
19 the exhibits that you have submitted already, would
20 those be fine to use as the official?

21 MR. KASTE: Yes, with the caveat that we
22 goofed up a couple of those copies.

23 SPECIAL MASTER: Understood entirely. Okay.
24 And do you have a set of them that are not mixed up
25 like that?

1 MR. KASTE: Well, actually, we have a set
2 of -- we have two sets of loose exhibits, meaning
3 they're in a Redweld and a manila folder, that if
4 necessary -- and it's kind of what I like to do anyway.
5 Take that piece of paper out, hand it to the witness,
6 talk to him about it, and that sort of thing. And we
7 can provide you with any one of those documents or an
8 entire set of them if you so desire. But they're not
9 bound, and they're in boxes in a series of manila
10 folders.

11 SPECIAL MASTER: So how -- when you have a
12 witness up here and you actually use an exhibit, how
13 will you go about doing that?

14 MR. DRAPER: My intention, subject to your
15 direction, is we use -- we have, really, three other
16 sets with us. We have one loose, like the ones that
17 Mr. Kaste is describing. So we've got two copies there
18 that can be used by the witness and by the examining
19 attorney. Plus we have a bound set that we'll keep at
20 counsel table for use there.

21 So I'm expecting to send the witnesses to the
22 stand with a hard copy of the exhibits that are going
23 to be testified to. And it will also be available
24 electronically on our screens as well.

25 SPECIAL MASTER: Okay.

1 MR. KASTE: And that's basically my intention
2 as well, is to send the witness with a hard copy and
3 actually place the page that they're looking at on this
4 ELMO machine in front so that everyone in the courtroom
5 will have an opportunity to see it. That should pop up
6 on your screen as well.

7 SPECIAL MASTER: Okay. Let me -- that
8 sounds -- so several things: First of all, it would be
9 useful for me to have, at least for some of the
10 exhibits -- and maybe we should just make it a general
11 rule -- a paper copy when that person testifies.
12 Because I might very well put my own notations and
13 marks, mark passages that I think are very important.
14 Obviously, we don't want to do that on the official set
15 of copies. And I know I can do that on the iPad, but
16 it's just a lot more difficult for me to do it on the
17 iPad than to do it the old-fashioned way.

18 So I think subject, then, to consulting with
19 my courtroom deputies as to whether or not they want me
20 to follow a different approach, what I would suggest,
21 then, is that you have a copy available for me to mark
22 up. And otherwise, we'll just assume that the copies
23 that are -- that you sent me earlier, the hard copies
24 are the official copies for the U.S. Supreme Court.
25 Hopefully the U.S. Supreme Court will very soon decide

1 that electronic copies are perfectly fine and I'll
2 never have to ship those anywhere. But if they don't,
3 those will be the official copies of it.

4 Okay. And I hope that you've worked with my
5 courtroom deputies to make sure that, to the degree
6 that you are going to be putting the exhibits up
7 electronically, you're handling that and they don't
8 have to worry about that; is that correct?

9 MR. DRAPER: That's right.

10 SPECIAL MASTER: Okay. Great. Okay. But I
11 think that handles the exhibits. So at 2:30 this
12 afternoon, Mr. Draper informed me that we can go over,
13 hopefully, and take a look at the hearing room for the
14 Oil and Gas Commission.

15 MR. DRAPER: Yes, Your Honor. And I've made
16 copies, which I've given to Wyoming, of the sheet that
17 has the address and the directions from this area.

18 SPECIAL MASTER: Is it walkable?

19 MR. DRAPER: Pardon me?

20 SPECIAL MASTER: Is it walkable?

21 MR. DRAPER: No. It's probably about a 10-
22 to 12-minute drive.

23 MR. KASTE: Do you have a vehicle?

24 MR. DRAPER: No, I don't have a vehicle. So
25 I will be --

1 THE CLERK: I have a vehicle.

2 SPECIAL MASTER: Okay. Great. And you don't
3 mind coming along on this?

4 THE CLERK: No.

5 SPECIAL MASTER: Okay. Great. Then I do
6 have a vehicle now.

7 MR. DRAPER: All right. And they are
8 expecting us 2:30 or 3:00. It sounds like they've got
9 a little bit of flexibility. And our guide will be Tom
10 Richmond who is the director of that body.

11 SPECIAL MASTER: Okay. Great. So, then, the
12 only thing that I think remains, then, are the
13 questions of the exhibits for the next two days.

14 MR. KASTE: Yes. Like I said, Montana has
15 provided their list for witnesses and exhibits for the
16 next two days. And I want to talk about expert
17 reports. Because there is an expert report and a
18 rebuttal report on this list. And I have every
19 expectation that those are going to be admitted in this
20 case. But I want to make sure that we play by the same
21 rules.

22 An expert report is definitionally hearsay.
23 All kinds of statements are made out of court for the
24 proof of the truth. And typically, most cases, they
25 are not admitted. But in these kinds of cases, they

1 probably will be and ought to be. And I want to make
2 sure that if we're going to admit one expert report,
3 we're going to admit them all, including mine. I have
4 mine on the list as well. So if we're not going to do
5 that, then I object to those as hearsay, which is on
6 the list.

7 But if we are, we want the rule to apply to
8 the same with regard to the remaining exhibits to
9 Montana's list, I think I'm going to likely have
10 some -- maybe some foundational concerns depending on
11 what the witness says about some of these documents.
12 It's a lot of everything the expert reviewed, which I
13 don't think is necessary for these proceedings to have
14 that expert admit everything that they reviewed in the
15 case. But it's Montana's case. If they want to try
16 that, great.

17 That would be one of those times where I
18 probably stand up and go, really? This is kind of a
19 waste of our time. I believe that the expert can read.
20 I don't need to see every study that he relied on in
21 forming his opinions. But, otherwise, I don't have any
22 huge objections to the contents of these exhibits.

23 SPECIAL MASTER: Okay. And, Mr. Draper?

24 MR. DRAPER: Your Honor, yes, it's, I think,
25 just routine that we're going to propose and, I would

1 hope, have accepted into evidence the expert reports of
2 the experts. Yes, in a very dry world it's hearsay, of
3 course. But in all kinds of expert proceedings where
4 you have expert triers of fact, you do this every
5 single day. So there's nothing unusual about it. And
6 we're not planning to object to theirs either. So
7 that's perfectly fine.

8 I would mention, you said we needed to make
9 any authenticity objections by today. And so we looked
10 over the Wyoming exhibits, and we have a document
11 specifying the ones that we have authenticity
12 objections to. As I understand your order, this is
13 simply notice to the other party that when we get to
14 that day, two days before the witness is going to
15 testify to these exhibits, we get those resolved one
16 way or the other.

17 SPECIAL MASTER: That's correct. So the
18 exhibits you're -- that you have concerns about the
19 authenticity, that's for which day?

20 MR. DRAPER: Their whole exhibit list.

21 SPECIAL MASTER: Okay. Yes. That's correct.
22 Those sort of issues, we'll deal with at the time. And
23 hopefully those sort of things, particularly if it's a
24 question of authenticity, it can be resolved ahead of
25 time.

1 MR. KASTE: Well, typically, with regard to
2 authenticity, that's a claim that I need to bring the
3 custodian of the records. And those are typically
4 handled well in advance. If I need a witness, if
5 that's the claim, I need a different witness to
6 authenticate this document. But if Montana says, I
7 don't care about the authenticity, if there's no
8 objections to any of it, there's a whole bunch of
9 those, so there will be nobody probably give us
10 testimony on that. But if Montana has concerns about
11 the authenticity of any of Wyoming's exhibits as
12 opposed to other objections, relevance, foundation,
13 things like that, I think we're entitled to know about
14 those now so I can get the custodian here.

15 MR. DRAPER: And we're simply following your
16 order, Your Honor. And we're going to give it to him
17 now. And I would say that these are -- it doesn't
18 appear to me that these are instances where there's
19 some chance an exhibit was fabricated or something but
20 more that there is no identification of who the author
21 might be. So we have no way of determining whether
22 it's an authenticity objection or not. So that's the
23 primary way, or for instance, an example would be some
24 document that we asked everybody about that we took the
25 deposition of, they didn't know what it was. And now

1 they're presenting it as an exhibit. Maybe that can be
2 resolved by them saying, oh, we discovered who did
3 that, and it is X. But anyway, we're prepared to give
4 that in accordance with your order at this time.

5 SPECIAL MASTER: Okay. So to the degree that
6 the objections are ones that opposing counsel may need
7 additional time in order to address -- and, Mr. Kaste,
8 I understand your point that authenticity might be one
9 of those.

10 If you could let Mr. Kaste know those now,
11 then that will permit him to think about how those
12 might be addressed. And, again, as to the degree these
13 things can be worked out, particularly on questions of
14 authenticity, that would be great.

15 So I'm just curious, how many exhibits are we
16 talking about?

17 MR. KASTE: A dozen. Actually, I guess more
18 like two dozen.

19 SPECIAL MASTER: Okay. Okay. So one of the
20 things we'll be doing is ending early today. So this
21 might be something that the two counsel might want to
22 get together with in order to try to resolve those
23 rather than having to actually bring somebody to court.
24 Although, if that's necessary, then that will be.
25 Okay.

1 MR. DRAPER: Yeah, that -- I think these are
2 the kinds of things that can be worked out. If not,
3 it's a while before they start their case.

4 SPECIAL MASTER: Okay.

5 MR. KASTE: And it very well could be that
6 some of these exhibits are the ones that -- you know,
7 honestly, we put together an exhibit list that included
8 every deposition exhibit out of necessity more than
9 anything. And it very well could be these are ones
10 that we don't have any intention of admitting. We'll
11 take a look.

12 SPECIAL MASTER: Okay. Then just to answer
13 your question, Mr. Kaste, I do plan to permit expert
14 reports to be admitted once they -- once the expert has
15 actually testified that, in fact, it's their report on
16 all the opinions and are their opinions. And hopefully
17 that will save time in the end.

18 MR. KASTE: It will certainly help you keep
19 things straight.

20 SPECIAL MASTER: Okay. So any other issues
21 with respect to exhibits over the next two days? Any
22 other housekeeping matters we have to deal with?

23 MR. DRAPER: As to the timing of your visit
24 there, shall we agree that we'll meet there at 3:00 at
25 the Board of Oil and Gas Conservation?

1 SPECIAL MASTER: I guess my preference would
2 actually be to do it at 2:30 if people don't have any
3 objection, in part, because I'm looking at my courtroom
4 deputies. I don't want them to have to be sitting
5 around with nothing to do in that interim period. That
6 might not be the case. They might have tons of things
7 they have to do. But I just want to make sure they can
8 leave early.

9 MR. DRAPER: Very good. I just want to make
10 sure we have a definite time we're all aiming for.

11 SPECIAL MASTER: Let's plan on 2:30.

12 MR. DRAPER: Very good.

13 SPECIAL MASTER: So then we will have that
14 tour at 2:30. And then we will be back in session at
15 9:00 a.m. sharp tomorrow morning.

16 And, Mr. Draper, if you can give the list of
17 witnesses and exhibits to my deputy afterwards, then
18 I'll have that, too.

19 MR. DRAPER: I'll do that, Your Honor. And
20 also a copy of the authenticity objections.

21 SPECIAL MASTER: Excellent. Okay. Then with
22 that, I think we are adjourned, and I'll even use this
23 this time.

24 (Proceedings adjourned at 12:21 p.m.,
25 October 15, 2013.)

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REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 108 pages, is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Laurel, Montana this 2nd day of February, 2014.



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