

No. 137, Original
IN THE SUPREME COURT OF THE UNITED STATES
VOLUME 25 OF 25 VOLUMES
TRANSCRIPT OF TRIAL PROCEEDINGS

STATE OF MONTANA
v.
STATE OF WYOMING
and
STATE OF NORTH DAKOTA
Plaintiff,
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
8:39, Wednesday, December 4, 2013

Vonni R. Bray, RPR, CRR
P.O. Box 125
Laurel, MT 59044
(406) 670-9533 Cell
(888) 277-9372 Fax
vonni.bray@gmail.com

Proceedings recorded by machine shorthand
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1 APPEARANCES

2 FOR PLAINTIFF STATE OF MONTANA:

3 Mr. John B. Draper, Special Assistant AG
4 Montgomery & Andrews
5 325 Paseo de Peralta, 87501
6 P.O. Box 2307
7 Santa Fe, NM 87504-2307
8 Telephone: (505) 986-2525 Fax: (505) 982-4289
9 E-mail: jdraper@monand.com

7 Mr. Jeffrey J. Wechsler, Special Assistant AG
8 Montgomery & Andrews
9 325 Paseo de Peralta, 87501
10 P.O. Box 2307
11 Santa Fe, NM 87504-2307
12 Telephone: (505) 986-2637 Fax: (505) 982-4289
13 E-mail: djwechsler@montand.com

11 Mr. Cory Swanson
12 Deputy Attorney General
13 602 Sanders
14 P.O. Box 201401
15 Helena, MT 59624
16 Telephone: (406) 444-4774 Fax: (406) 444-3549
17 E-mail: coswanson@mt.gov

15 Ms. Anne Winfield Yates
16 DNRC Chief Legal Counsel
17 1625 Eleventh Avenue
18 P.O. Box 201601
19 Helena, MT 59620-1601
20 Telephone: (406) 444-0503 Fax: (406) 444-2684
21 E-mail: ayates@mt.gov

19 Mr. Kevin R. Peterson
20 DNRC Legal Counsel
21 1625 Eleventh Avenue
22 P.O. Box 201601
23 Helena MT 59620-1601
24 Telephone: (406) 444-5785 Fax: (406) 444-2684
25 E-mail: KevinPeterson@mt.gov

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APPEARANCES CONTINUED

FOR DEFENDANT STATE OF WYOMING:

Mr. James C. Kaste
Water & Natural Resources Division
Sr. Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-3535 Fax: (307) 777-3542
E-mail: james.kaste@wyo.gov

Mr. Chris Brown
Water & Natural Resources Division
Sr. Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-3406 Fax: (307) 777-3542
E-mail: chris.brown@wyo.gov

Mr. Andrew J. Kuhlmann
Water & Natural Resources Division
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
Telephone: (307) 777-3537 Fax: (307) 777-3542
E-mail: andrew.kuhlmann@wyo.gov

Mr. Peter J. Michael
WY Attorney General
State Capitol Building
Cheyenne, WY 82001
Telephone: (307) 777-7841 Fax: (307) 777-3542

FOR DEFENDANT STATE OF NORTH DAKOTA:

Ms. Jennifer L. Verleger
Assistant Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone: (701) 328-3640 Fax: (701) 328-4300
E-mail: jverleger@nd.gov

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1 WEDNESDAY, DECEMBER 4, 2013, 8:39 A.M.

2 SPECIAL MASTER: Okay. And everyone can be
3 seated. So why don't we actually start out by getting
4 a sense of where we're going to go today, and then we
5 can continue Mr. Hinckley's examination.

6 So, Mr. Draper.

7 MR. DRAPER: Your Honor, as I envision today,
8 we would address your questions to the witness; I would
9 follow with any follow-up; there would be redirect; and
10 then as I understand it, Wyoming would like to do
11 closing arguments. We don't really think it's the most
12 efficient use of time, but we're glad to participate.
13 And we will have a short closing statement as a result.

14 And I think that should do it.

15 SPECIAL MASTER: Okay. So you do not
16 anticipate, then, calling any rebuttal witnesses?

17 MR. DRAPER: In terms of rebuttal, the answer
18 is no unless something is raised here in the final
19 testimony of Mr. Hinckley. And in particular, the one
20 that I'm thinking of is that Mr. Book is able to
21 address the question that arose yesterday if it turns
22 out that Mr. Hinckley is not able to do that. So
23 that's the one thing that I have in mind at this point
24 is a possibility.

25 SPECIAL MASTER: Okay.

1 MR. KASTE: He is --

2 SPECIAL MASTER: Thank you. And I think
3 that's fair.

4 MR. KASTE: Your Honor, he is. And you
5 should probably start with that one. That sounds great
6 to me. I do think a closing argument would be
7 valuable, and then a short discussion about the future
8 schedule and what would be helpful to you in terms of
9 briefing and findings and conclusions.

10 SPECIAL MASTER: Okay.

11 MR. DRAPER: Yes, Your Honor, we think that
12 really the most helpful for you is going to be our
13 posttrial briefs. And once we've submitted those to
14 you, it may be helpful to have a day of argument in
15 Stanford to address any final questions raised by the
16 parties or by yourself.

17 SPECIAL MASTER: Particularly if it's minus
18 11 degrees here.

19 MR. DRAPER: Yes.

20 MR. KASTE: I stand by my statement that I
21 never want to go to Stanford.

22 SPECIAL MASTER: Okay. That sounds great.
23 So then why don't I start out by asking my various
24 questions. And then, Mr. Draper, you'll have an
25 opportunity to do any additional cross that you want,

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1 followed by Mr. Kaste with any further direct.

2 BERN HINCKLEY (CONT.),

3 having been first duly sworn, testified as follows:

4 EXAMINATION

5 BY SPECIAL MASTER:

6 Q. So let me just walk through with you,
7 Mr. Hinckley, the various parts of your testimony that
8 you went over yesterday. And, again, the reason is, as
9 you know from sitting here for several weeks now, my
10 questions are both to clarify points that may be a
11 little bit less clear to me, also to make sure the
12 record is as complete for the Court as possible, and
13 also occasionally to probe here and there on particular
14 points.

15 So -- and I'm just going to go through to
16 make sure that, in fact, I'm getting all of my various
17 questions.

18 So my first question actually follows up on
19 my questions yesterday on the limit as to what you can
20 actually testify on. But I noticed on page 3 -- and as
21 I said, primarily I'm just going to be going
22 numerically through your exhibit -- through your expert
23 report step by step.

24 So the first one's on page 3. And you'll see
25 there under heading 1, you say that "Book's concept of

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1 'full' is inconsistent with the 1950 capacity of the
2 reservoir, with the 1950 level of storage contracts,
3 and with the water right."

4 And just a prefatory comment, I think
5 ultimately a question, of course, is to whether or not
6 Mr. Book's concept of full is consistent or
7 inconsistent with the water rights that Montana might
8 have is a question of question of law.

9 But having said that, when I looked at your
10 Subsection C at pages 4 to 5, which is where you
11 discuss the water rights, I never actually saw any
12 place there where you pointed to a particular aspect of
13 the water right that you thought were inconsistent with
14 what Mr. Book had in his expert report.

15 So is there a particular aspect of this
16 section here that I should be looking at and thinking
17 about that question from your perspective?

18 A. Yeah. In the sense, it's looking for
19 something that I wasn't able to find. So harken back
20 to our discussion yesterday, not that I was trying to
21 play lawyer, but one does need to look at the water
22 rights to have sense of what is a relevant argument to
23 bring forward. So one has to at least study the rights
24 to the extent of trying to make the technical analysis
25 useful.

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1 In this case, what Mr. Book did was the
2 obvious thing of simply peg the injury to Montana
3 pre-'50 uses at the physical capacity of the reservoir.
4 Tacitly, although, I don't know that he ever said that
5 is the right.

6 When I go back and look at the abstracts
7 which have changed over of the period from '82 to as
8 recently as last fall trying to see if there's a clear
9 expression of what is the right for Tongue River
10 Reservoir, the closest one can come -- well, the most
11 recent incarnation of the right that's being proposed
12 for adjudication is this unlimited storage delivery
13 requirement of 60,000 acre-feet.

14 So I worked through in Section C what I
15 thought the implications of that might be with respect
16 to how much water that translates into by way of a call
17 against upstream juniors, and then left it at that.
18 So, no, I didn't -- this is what I think the right is.
19 My perception, from a layman's point of view, is that
20 the right is kind of amorphous.

21 Q. Okay. So that's helpful. And I think that's
22 consistent with what you have in your particular report
23 here. First of all, as I understood what you were
24 saying here was that you found it difficult to figure
25 out exactly what the right was when you went back and

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1 actually looked at a variety of documents.

2 And then, second of all, as you point out,
3 one of the things that you looked at was what are the
4 numerical implications of various types of
5 interpretations of those rights.

6 And I should, by the way, compliment both you
7 and Mr. Book in providing encyclopedic amount of
8 information on the operations and uses of water in the
9 Tongue River area. Okay.

10 The next question which I had is on your
11 testimony with respect to the -- oh, one other question
12 on page 3. This is at the very bottom of page 3. And
13 again, I just want to clarify here. You say in the
14 years 2001, 2002 -- well, now that you started that --
15 let me actually rephrase things.

16 At the bottom of page 3 you talk about what
17 the peak storage was in four years: 2001, 2002, 2004,
18 and 2006. And as you discussed with Mr. Kaste
19 yesterday, you then, at the top of page 4, say that the
20 "reservoir storage was volumetrically sufficient to
21 satisfy the contract volume set in 1950."

22 And so as I understand what you're saying
23 here is if you look at this purely as a matter of
24 volume, that there was more than 30,000 acre-feet of --
25 or 32,000 acre-feet of water available in all of those

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1 four years?

2 A. That's correct.

3 Q. Okay. And so that does not take into
4 account, if it's relevant, any of that water that would
5 belong to the Northern Cheyenne?

6 A. No. No. The comparative I'm using here is
7 the level of contracts that were established at the
8 time of the compact. That was the 32,000. So that's
9 why I picked that as my benchmark and compared several
10 operations to that benchmark.

11 Q. Okay. And that's what I thought you were
12 saying here. But, again, I just wanted to clarify on
13 that particular point.

14 A. That's exactly right.

15 Q. Then if we turn to page 7, this is where you
16 discuss the various irrigation, stock, and municipal
17 rights downstream of the Tongue River Reservoir. And
18 you discussed with Mr. Kaste yesterday the fact that,
19 as I understand what you were saying, that the amount
20 of water that would be needed to satisfy and to meet
21 the stock water rights downstream in terms of actual
22 releases from the reservoir does not vary by the number
23 of cattle involved.

24 A. Well, it varies a very tiny amount based on
25 the cattle involved. If you recall, the McBeath memo

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1 put a number to how many cattle he thought were there,
2 I believe, and it came out to .03 CFS, if I recall. So
3 if I had ten times that many, it's .3, and if there
4 were hundred times that many, it would be 3, which
5 comes out of the 50, which is the carrier water.

6 So my point was that -- what I extracted from
7 the McBeath memo was the 50 CFS that it takes to get
8 water down to meet whatever the demand is from cattle,
9 and that that calculation, as he presented it, is quite
10 insensitive to the number of stock rights. But that's
11 pertinent to -- because the actual consumption is such
12 a tiny, tiny part of the total of the 50 CFS.

13 Q. So this is where I get a little bit confused,
14 and so this is where you can help me. So your reliance
15 is on the McBeath memo; correct?

16 A. Yes. I relied on his -- as he expressed it,
17 the engineering judgment to say 50 CFS was a sufficient
18 flow to carry stock rights.

19 Q. And he went through a fairly careful analysis
20 it seems, relatively detailed, to figure out, well,
21 this cattle here is the number of CFS that's actually
22 needed to meet the consumptive use of the livestock and
23 comes up with a very specific number. And then he
24 comes up with, okay, 50 is the number that you need to
25 get it down there.

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1 So why did he -- first of all, if you have
2 any sense of, why would you bother to go through that
3 type of analysis on the amount for the livestock if
4 ultimately it's a number like 50 is going to meet .034
5 CFS or 3.4 CFS?

6 A. Well, on one hand, I think he was being
7 methodical. But if I remember the memo correctly, he
8 also then extracts an acre-feet of consumption for the
9 cattle. 20 acre-feet or something.

10 Q. Yes, it's 29.

11 A. So the number of cattle matters to the
12 consumptive use, 'cause theirs is the only consumptive
13 use. The rest of it is just flowing on down the
14 stream. So, you know, one interpretation, that's what
15 the beneficial use is, the very small .03 CFS which
16 becomes the 40 acre-feet, or whatever it was.

17 So my assumption would be that he was
18 interested in both the flow that it takes to meet the
19 right as well as what the ultimate volume it would take
20 to meet the right is. And the volume is based entirely
21 on how much water is extracted from the system by the
22 cattle. That's the very small number. That would be a
23 reason why he would care about the number of cattle for
24 that little piece.

25 Q. So the amount of flow that you need in order

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1 to get water to a particular point does not depend on
2 how much water you actually need to get there?

3 A. Well, it would if that use -- say there was a
4 10-CFS demand that you were trying to meet. Then you
5 would have to figure out, what does it take to get the
6 water there? And what does it take to actually meet
7 that need?

8 But in this case, that need, the consumptive
9 use is so tiny that it's inconceivable to me that if I
10 double, triple, quadruple the consumptive demand it
11 would change the carrier demand.

12 So it's proportionate, is why this particular
13 demand is such a tiny piece that I think we can reflect
14 the number of rights, for example.

15 Q. All right. I mean, I think I understand your
16 basic point. But I'm still trying to understand when
17 you have a relatively small volume like that, okay, how
18 do you determine what you actually need in order to get
19 that amount of water down to the point of use?

20 A. Well, I assume in this case that it's
21 independent of the need, and he was looking at the flow
22 conditions in the river, the length of the channel,
23 conveyance losses. I don't know if he considered ice.
24 We discussed that. He wasn't explicit in all the
25 things he considered in what is the appropriate amount

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1 to get down there.

2 If I was delivering that into a sealed pipe
3 that was kept above freezing, I would put .03 CFS into
4 the pipe. He's delivering it through however many
5 miles of open channel, so had to consider what the
6 implications of that were as a conveyance system and
7 how far it deviated from a closed pipe. And that's
8 where the 50 CFS comes from, is my interpretation of
9 his memo.

10 Q. So there would be a variety of different
11 factors, then, that go into determining what that flow
12 rate is necessary to get a small amount, as you point
13 out, of CFS down to the confluence with the
14 Yellowstone?

15 A. Certainly. And I would expect that 50 CFS
16 number to be completely unique to that particular
17 situation. Were this river somewhere else or a shorter
18 river or was a tortuous river, it would be a different
19 number.

20 Q. Okay. And we've talked about some of the
21 factors, and so if I can better understand it. Some of
22 them, like icing, I would imagine would not be
23 particularly -- that the relationship of the amount of
24 water that you need to avoid everything icing up, so
25 the cattle can't even drink the water, would not be

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1 particularly sensitive to the actual amount of water
2 that you have to get down there. But other things I
3 would think like, for example, the loss of water along
4 the river would be sensitive to the amount of water
5 that you have to get down there.

6 A. Oh, in the sense of -- yeah, if you were
7 trying to transport 100 CFS to the end, it would suffer
8 more losses than 50 CFS.

9 Q. So if this number is not sensitive to -- and,
10 again, I realize we're dealing with a small amount that
11 actually has to get down there. So if it's not
12 sensitive to that, how would you -- what would it be --
13 and I know we're sort of speculating now because we
14 don't have Mr. McBeath here.

15 What would not be sensitive to the ultimate
16 amount you have to get down there?

17 A. I'm not sure we're casting the question quite
18 right yet.

19 Q. Let me rephrase it a different way. If you
20 know you have to get a small amount of water down to
21 the end of the stream --

22 A. Okay.

23 Q. -- as a matter of winter flows, there's some
24 factors that you would expect would be dependent upon
25 how much you have to get down to the bottom of the

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1 stream. That would be, for example, if you have water
2 that you're losing for one reason, evaporation, if it's
3 a losing stream and you're losing water out of it, all
4 of that you would think would be sensitive to the
5 amount of water that you have to get down to the base.

6 And so my question is what factors would you
7 consider -- this is a hypothetical, nothing to do with
8 the Tongue. What factors would you consider that
9 wouldn't be sensitive to the amount of water that you
10 had to get down there?

11 A. Well, let's -- so let's think of it as a
12 conveyance-loss question in any river system you want
13 to work on. When one is looking at conveyance losses,
14 one looks at seepage losses out of the river channel,
15 evaporation from the water surface. Evapotranspiration
16 from the stream side vegetation would be the principal
17 components of loss.

18 Now, the ice is a different condition with
19 which I haven't ever dealt. But it makes intuitive
20 sense that there would be some relationship between the
21 amount of water and how the ice would form. If I had
22 zero flow, presumably there would be no ice form
23 because there would be no water to form ice.

24 And then as one dialed up the water, I'm
25 envisioning there would be some optimum flow for making

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1 ice. And beyond that, it would be contrary to making
2 more ice. You'd have plenty of flow to keep the river
3 clear.

4 So somewhere in that analysis of how much
5 water do I have to release here to get this much water
6 here is not unreasonable to me that ice would be part
7 of that discussion along with the more conventional
8 pieces of evaporation, evapotranspiration, seepage
9 losses.

10 Now, as long as the amount that I'm trying to
11 deliver is quite small, then the amount of water it
12 takes to keep the channel open is going to be
13 insensitive to what that small number is. If I'm
14 trying to deliver 200 CFS, obviously, I'm going to have
15 to release 200 plus however much it takes to insure
16 that the whole 200 gets to the end. And in that larger
17 river, things like evaporation and ET are going to be
18 larger from the larger river surface.

19 Often that's expressed in a percent per mile,
20 for example, as conveyance loss. So I think what's
21 special about this one is we're kind of off the hook in
22 that the delivery requirement is so tiny that it really
23 ricochets very little into the corpus of how much water
24 has to flow down the river.

25 Q. This has been helpful to me. In some cases,

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1 I'm just thinking through some of these issues as we go
2 along.

3 So then, again, just so that I can understand
4 better, on page 10 you talk about Figure 5b, which is
5 your calculation of -- or it's your model monthly
6 contents of the Tongue River Reservoir, in this case an
7 assumption that there would be a bypass of 75 CFS. And
8 I just wanted to make sure I understood.

9 If you are using the 69,400 acre-foot 1950
10 capacity, then there are two years in which, under the
11 75-CFS bypass, it would not completely fill; is that
12 correct?

13 A. That's correct.

14 Q. And it's just a little bit hard to read the
15 chart. It looks to me as if those are 2002 and 2004?

16 A. Yes.

17 Q. Okay. And I'm also curious, on the chart
18 itself on Figure 5b, is -- are the hash marks the
19 beginning and end of the water year?

20 A. Yes. As the legend indicates, those are
21 water-year increments, and then the label is placed in
22 the middle of the year. The years separate themselves
23 out nicely because every spring you see the peak, and
24 those low spots are going to be in September, October
25 typically.

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1 Q. Okay. Thanks. And then also notice it would
2 fill to at least 66,000 acre-feet in all years.
3 There's nothing -- the 66,000 figure was simply the
4 figure that, when you look to see the lowest points to
5 which it filled, it's 66,000; is that correct?

6 A. That's correct.

7 Q. There's no special meaning to 66,000 other
8 than that?

9 A. Just slide the ruler down to fix that 2002
10 peak.

11 Q. Okay. Then on the next page, you say -- this
12 is the bottom of the first paragraph up there. You
13 say, "These results indicate that the reservoir would
14 have been entirely drained in 2004, 2005, and 2006 had
15 a 175-CFS winter bypass been coupled with historical
16 releases of storage."

17 So two questions. The first is, when you say
18 "coupled with historical releases of storage," are you
19 talking about the actual releases of storage in those
20 years, or are you talking about something different?

21 A. No. In those years. The modeling that
22 generated all three of the figures, 5a, b, and c,
23 didn't attempt to say whether they released
24 appropriately or not. We simply took what they did
25 that year and superimposed it on our volume accounting.

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1 Q. Okay. Now, when you say "historical releases
2 of storage," are you talking about releases of storage
3 once the various water users called for their storage?

4 A. No. That's probably not as well stated as it
5 should be. We simply took the historical releases from
6 the reservoir, whatever they were. So what we did is
7 we stopped any special accounting on the 1st of May and
8 said, whatever happens after the 1st -- we will impose
9 on the model starting the 1st of May whatever actually
10 happened. And if there was a hundred thousand
11 acre-feet that ran out of the bottom of the reservoir
12 for whatever reasons, then we ran hundred thousand
13 acre-feet out of the model.

14 Q. Okay.

15 A. So that it really isn't coupled -- certainly
16 isn't coupled to any specific storage orders or even
17 storage natural flow, is probably a better word there.
18 It would have been just the historic outflows from the
19 reservoir.

20 Q. Okay. So this is helpful in my understanding
21 of your analysis. So what you did was you imposed a
22 175-CFS bypass that began on October 1st and ran
23 through April 30th?

24 A. Correct.

25 Q. Okay. And --

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1 A. And all three of the bypasses were set up in
2 that same way, as you just said it, October 30.

3 Q. Okay. And then what you did was any water
4 that flowed out of the Tongue River Reservoir after
5 that was considered a release of storage?

6 A. Was -- well, considered an outflow from the
7 reservoir. That's why I said a better term here would
8 have been that whatever came out of the reservoir
9 stating May 1 historically we took out of the model, so
10 that we were not getting into whether that was done
11 correctly or incorrectly or storage or natural flow or
12 whatever. We assumed, for the sake of this model, that
13 whatever happened historically, May 1 to
14 September 30th, was correct. It is what it is.

15 Q. So, again, that's May 1 to September 30. The
16 actual outflows are what you mean by historical
17 releases of storage?

18 A. Yes. That would have been a better way to
19 say it.

20 Q. Let me clarify on that. Are you simply
21 looking at the amount of water which is coming out of
22 the reservoir at that point?

23 A. Yes.

24 Q. Are you taking into account water that is
25 coming over the state line?

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1 A. No. This would be just the water that came
2 out of reservoir. Now, typically, somewhere after
3 May 1 that's going to include everything coming across
4 the state line plus whatever augmentation they want to
5 add with the reservoir itself.

6 Q. So if one wanted to actually figure out how
7 much water was being released from storage, then what
8 you would have to do is to take the outflow numbers
9 that you used here and subtract the state line flows?

10 A. Yeah. I'm smiling because it gets more
11 complicated than that because you've got the
12 evaporative losses in the reservoir.

13 Mr. Book provided us a table where he
14 attempted to reconcile that. But there are, in detail,
15 some interesting issues in terms of evaporation and
16 inflows for the reservoir from its own catchment.

17 So it has other inflows, albeit quite small,
18 than the flow at the state line. So one sees
19 aberrations in the attempt to reconcile the volume in
20 the reservoir as measured by the stage and that the
21 strict accounting, as you're envisioning it, of the
22 only water into the box at state line and the only
23 water out is the gauge below the dam. So, yeah, when
24 one can do that; we did not.

25 Q. Okay. But, again, so if I understand this,

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1 what you did -- when you're talking here about the
2 historical releases of storage, then there what you did
3 was you simply looked at the gauge numbers for what was
4 flowing out of the reservoir in that period?

5 A. I think that's right.

6 Q. Okay. And as you point out, if you actually
7 were trying to figure out exactly how things operated,
8 you would need to take into account evaporation. But
9 there's no specific accounting for the evaporation
10 here. In other words, you don't take some evaporation
11 numbers and put those in this part of the model either?

12 A. No, there's no explicit accounting of that.
13 Whatever that is is built into whatever they chose to
14 release from the reservoir.

15 Q. Right. Understood. Okay. And then I need
16 to ask, even though I feel a little uncomfortable about
17 this because it refers to a deposition of Mr. Hayes --
18 and, of course, I've not seen that deposition, and that
19 probably is the clearest understanding of exactly what
20 was said here.

21 You say here, in the middle of the page,
22 "Even under 75-CFS bypass, the reservoir would have
23 achieved substantially more storage than was found to
24 be adequate to meet irrigation demands during the
25 reduced capacity period from 1978 to 1999."

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1 Now, as I interpret that, there was a
2 discussion during Mr. Hayes' deposition of whether or
3 not the local ranchers were able to get along with the
4 water that they had during that reduced period. Is
5 that correct?

6 Or -- I mean, I find it sort of somewhat
7 difficult, to be honest, to know exactly what that
8 means. And, as I say, the best thing would probably be
9 the deposition itself. But what did Mr. Hayes say then
10 that you're using as part of your testimony here?

11 A. Well, I don't recall the exact words either.
12 But the sense of it was everybody was fine before the
13 enlargement. It seems to me that came up in several
14 points. The first commissioner was appointed in 2001.

15 Why is that? We didn't need one before that.
16 Were you adequately supplied before 2001? The answer
17 is in the affirmative.

18 So, again, I can't quote the exact language,
19 but the clear statement that I took from the deposition
20 was, we didn't have a water supply problem prior to
21 2001. And that would apply to this period when the
22 reservoir was not filled to its capacity for whatever
23 reasons, suggesting, I think, pretty strongly, that
24 whatever that storage was, it was adequate to get the
25 job done.

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1 Q. Okay. Thanks. If you turn to the top of
2 page 12, you have a statement here which is, "Because a
3 storage right is inherently based on future use, there
4 can be no immediate injury to that right due to
5 diversions by upstream juniors. Only if the storage
6 right subsequently fails to fill will an impact from
7 such diversion be realized."

8 And the reason I want to focus on this for a
9 second is I could imagine situations where that could
10 be an issue. And it also seems to run counter to what
11 my, sort of, automatic lay assumption would be, which
12 is that if you have a reservoir that hasn't filled and
13 it looks like it might not fill at a time when you were
14 making decisions regarding what you should plant, that
15 that would actually have an impact on it even if later
16 in the year the reservoir actually fills.

17 A. I think the key phrase in your question is
18 "if you thought it wouldn't fill." And regulation of
19 reservoir rights are inherently imprecise in that way,
20 because let's pause and look at the opposite extreme
21 where monstrous snowpack -- clearly that reservoir is
22 going to fill before the demand season arrives.

23 Yes, it is senior to some upstream right, but
24 it would be senseless to deprive that upstream right of
25 its use simply because the reservoir wasn't filled.

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1 And on paper it's the senior right that isn't satisfied
2 yet, so you better fill it up.

3 So a regulator faced with that situation has
4 to make that difficult decision of, well, are they
5 going to fill or aren't they? And I think we heard
6 Mr. Tyrrell describe a situation where he denied a call
7 expecting it to fill in the case of inland lakes. And
8 he was sweating bullets as we got down to the last day
9 of the month and it just barely filled. And he was
10 exonerated.

11 But that's an inherently difficult situation
12 to know whether to honor the call, is the terminology
13 used in Wyoming, based on whether it's going to fill or
14 not, with everyone understanding that if it does fill,
15 then it would have been injurious to those junior users
16 unnecessarily to cut them off to fill sooner.

17 Q. So I understand entirely the point that if
18 you know there's going to be -- you know there's going
19 to be water to fill, and so the question is simply
20 amount of timing; that just because there's a junior
21 who is using some water early in the season doesn't
22 mean you're injured if, nonetheless, you're going to
23 fill up and you'll have all the water that you need?

24 A. Right.

25 Q. But I want to make sure you're not saying

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1 if -- and let's ignore for a moment the question of the
2 bypass. Okay? -- that if you have a reservoir that is
3 right now running much lower than it has in the past in
4 terms of its filling up and doesn't look like it's
5 going to get much better based on what you know in
6 terms of snowpack and the like and there's some juniors
7 upstream who are taking water, that that wouldn't be --
8 that that couldn't be a potential injury because it
9 would influence how much water you actually think
10 you're going to be able to rely upon.

11 A. If I'm understanding your question correctly,
12 you've caused the opposite extreme where we know it's
13 not going to fill, in which case it is in priority as
14 per its water right starting, in a traditional water
15 year context, October 1, and anybody junior to that
16 right would and should be regulated for that right.

17 Q. What about something in the middle, where
18 it's, but we don't know about the future right now,
19 you're going to be making some planning decisions?

20 A. Well, that puts a challenge to the regulatory
21 authority as to how they perceive that to go forward.
22 Now, in some cases we heard a lot of talk in this
23 about, say, the North Platte system. In that case, the
24 parties have all sat down and developed a forecasting
25 procedure. So they have all bought into the notion of

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1 if da-da-da-da-da on February 1, then we will accept
2 that it's a situation meriting regulation.

3 Now, subsequent months may prove them right
4 or wrong, but they have all agreed at the outset that
5 these are the criteria we will use to make that very
6 difficult decision of are we going to fill or not? So
7 I don't know that there's a solution to that. It's a
8 case-specific and situation-specific decision.

9 Q. Okay. So that's helpful. And let me again
10 just clarify and make sure you're not saying something
11 totally different. You're not saying that people
12 that -- farmers and ranchers, water users, don't have
13 to make decisions early in -- or at some point in a
14 water season prior to the reservoirs filling about what
15 they might need to plant?

16 A. Oh, so what decisions flow from that
17 anticipation or whether they are going to fill or not,
18 yeah, that again depends on the particular situation.
19 The reason that the program is set up as it is on this
20 North Platte example that I've given you is to honor
21 the fact that planting decisions, seed ordering,
22 fertilizer, the whole summer's irrigation program can
23 depend critically on what the anticipated water supply
24 is.

25 But that, too, is case specific. Alfalfa

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1 farmers typically have a great deal more flexibility in
2 how they manage their water supply than, say, say sugar
3 beet farmer. Beets are a very labor- and chemical- and
4 seed-intensive crop that needs to fully irrigated to
5 make any money at all. So one would not want to plant
6 sugar beets unless they were sure they had a water
7 supply. An alfalfa operation has more flexibility in
8 that it can suffer the impact of a less-than-ideal
9 water supply.

10 So it depends entirely on what the irrigation
11 operation is being served consists of as to how
12 critical those decisions are and what the timeline for
13 making those decisions is.

14 Q. Okay. Thanks. Okay. Then the next section
15 is with respect to Montana's direct-flow demands. I
16 think I have only two sets of -- I think I have one set
17 of questions here. The questions all deal with the
18 issue of return flows. And so let me just go through
19 them. And some of them, again, are just clarification.

20 So at the top of page 20 you're talking about
21 Mr. Book's methodology. And as I understand what --
22 your description of it, it assumes that 4 percent
23 returns in that particular month of that diversion,
24 96 percent returns later. And that's spread out over
25 basically a two-year -- slightly longer than two-year

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1 period of time. And if you look over that entire
2 two-year period of time and differentiate between the
3 May-to-September period and the October-to-April
4 period, 55 percent falls, in one or another year, into
5 the May-to-September period?

6 A. No. Outside --

7 Q. Outside the May-to-September period?

8 A. Yes. Otherwise you said that exactly right.

9 Q. Okay. Okay. And in your analysis, and in
10 the one analysis you have on page 21, as you discussed
11 with Mr. Draper yesterday, you assumed that everything
12 returns in the same month as the diversion; is that
13 correct?

14 A. Yes.

15 Q. Yeah. And there -- to your knowledge,
16 there's never been a study that has suggested that that
17 is, in fact, the case; right?

18 A. On the Tongue River, you mean?

19 Q. Yeah, in the Montana area of the Tongue
20 River. Is there a study that says --

21 A. I'm aware of no specific studies of the
22 timing of return flows. Perhaps with the exception of
23 that interesting story Mr. Muggli described for us
24 where the return flows were very large and very rapid.

25 Now, I offered in this report a -- what I

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1 called a reality check in the sense of let's look at
2 the winter flows, and we can, by that method, see how
3 much would be lagged into the winter because we can put
4 a finger on it. So that's probably as close as I can
5 come to a quantitative analysis of whether that
6 actually happens or not, which is why I attempted it
7 here in the report.

8 Q. Right. No, I understand that. I followed
9 that whole analysis that you have at the top of
10 page 21.

11 But now yesterday, when you were talking to
12 Mr. Draper about the analysis, if I remember, one of
13 the things you brought up was the oxbow characters of a
14 lot of the land.

15 And is the importance of the oxbow simply the
16 fact that distances to the river at any particular
17 point are closer? Or if there is something more than
18 that or different than that, could you explain again
19 why it's important that the land's on oxbows?

20 A. Okay. The argument is purely geometric. The
21 so-called Glover or AWAS -- it goes by various
22 different names, Jenkins, Schroeder; one sees different
23 names attached to it from different authors'
24 technique -- they are all the same basically, which is
25 that the river is straight and the well is at a point

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1 distance from that.

2 And the way Mr. Brown modeled it was using
3 that conventional program. And instead of a well, he
4 would have the field would sit here; the center of the
5 field would be considered an injection point; and then
6 we would run the numbers to see how long it takes water
7 to get from that injection point to this river.

8 Now, obviously, if this river is wrapped
9 around that point, it gets there much more quickly.

10 Q. So basically, if I can think about it, if you
11 have a straight line here and the side of it, then you
12 might have one sort of directly perpendicular line that
13 you can measure. But to the degree the water runs in
14 different directions, it takes longer to get to the
15 river. But if you're in oxbow, then you have a lot
16 more short distances to which you can travel?

17 A. Yeah, that's fair.

18 Q. Okay. And you also said -- if I remember
19 correctly, you also talked about your assumption of one
20 month being reasonable because of the fact that -- and
21 then you started talking about the actual -- I thought
22 the actual amount of the return flow that was likely to
23 occur. And I'm afraid that I didn't follow that
24 portion of your testimony clearly.

25 A. I'm happy to take another go through that.

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1 And it varies somewhat on what exactly it is
2 that the Book model is intended to represent. So maybe
3 it's helpful to picture the situation in 1950 when the
4 diversions were being made more commonly by open
5 ditches and fairly inefficient systems. And we've
6 heard a lot about the improvements and efficiency that
7 have occurred over the years.

8 So that's the model that the Book numbers are
9 built around, is relatively inefficient diversions. I
10 think I threw out the number 30 percent, 25 percent
11 being the difference between what the Book model
12 diverts from the river and how much is actually used up
13 at the crop. Now that difference has to get lagged
14 back into the river. As the efficiency increases, we
15 simply take that much less -- the crop demand stays the
16 same; we take that much less out of the river.

17 So my point is that taking less out of the
18 river is the same thing as taking the old amount out of
19 the river but giving it back immediately so that I --
20 that isn't working?

21 Q. Still. It might be impossible to actually
22 explain it to me in a way I understand, but you might
23 want to try.

24 A. Let's make it one ditch, one field. So the
25 river is running down. I take a hundred units out of

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1 the river and it runs down the ditch onto the field.
2 The crop uses up 50 units. That leaves me 50 of return
3 flow, which has to make its way back to the river.

4 Now, if that made its way back to the river
5 quickly, which is kind of the way I've modeled this,
6 the river would see that just the same as if I only
7 took 50 out in the first place, used the 50 up, and
8 didn't give anything back.

9 So I can duplicate the effect of higher
10 efficiency by simply taking the extra water, giving it
11 right back to the river as though it had never been
12 diverted.

13 Q. Okay. I now --

14 A. Think of it from the river's point view in a
15 mass balance.

16 Q. Okay. I understand that point now.

17 So let me also ask: Going back to page 20
18 for a moment, you also mention, that last paragraph or
19 the last full paragraph, the last line you say, "In
20 light of other research on the Tongue, including Book's
21 own work in Wyoming," and it wasn't clear to me -- I
22 didn't see any reference -- by what you mean by Book's
23 own work in Wyoming.

24 A. Well, if you'll recall --

25 Q. Are you talking about his work in this

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1 particular case?

2 A. Oh, yeah. For his expert report where he
3 then looked at the return flows from his post-'50
4 storage, and he assigned those a set of return flow
5 factors in order to assess when that water became
6 available for state line flows. So that's all I'm
7 referring to here, is that in the Wyoming context,
8 Mr. Book adopted a first month return fraction, just to
9 use that first month as our indicator of, I think,
10 34 percent. 30 percent it was?

11 Q. That's --

12 A. Yeah, 30 percent.

13 Q. Okay.

14 A. And I was simply noting the difference
15 between that and the 4 percent that was used in
16 Montana.

17 Q. Okay. I noticed that the GeoResearch
18 modeling that you refer to at the very beginning of the
19 paragraph also assigns a higher return flow in Wyoming
20 than in Montana. So I guess my question is --

21 A. Right. Why is that?

22 Q. No. I think I sort of understand the reason.
23 But do you have any reason to believe that, in fact,
24 Wyoming and Montana have the same return flow rates?

25 A. No, I don't think I was holding him to being

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1 the same. My notion here was not 4. So whether the
2 correct number is 35, 40, 50, it's over here. And
3 that's the basis of my suggesting that we can see, just
4 from that stark contrast, that the 4 percent is quite
5 stingy.

6 Q. So your concern with the numbers was not that
7 Mr. Book used higher number for Wyoming, but simply
8 that you believed that the ratio between those two
9 suggests that Montana is too low?

10 A. Well, I guess I would express it more that in
11 other apparently similar areas, return flow factors
12 much higher than that are routinely applied, including
13 being applied by Mr. Book in an area that is not hugely
14 dissimilar. So correct number, we would have reason to
15 believe, is somewhere in the 35, 40, 50 range rather
16 than the 4.

17 Maybe that's the same thing you just said,
18 but the point is the contrast between, is 4 the right
19 number? I'm suggesting we know that 4 is not the right
20 number by its comparison to numbers that have been used
21 elsewhere.

22 Q. Okay. Let's turn, then, to the next section
23 of your expert report, which deals with the
24 CBM-Associated Ground Water Development. And as you
25 pointed out yesterday, if you use the BLM model and

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1 factor in the amount of groundwater that is produced
2 from CBM wells that finds its way back into the river
3 system, obviously the questions that you address at
4 pages 27 through 31 are quite relevant.

5 And so -- and yet I find this is one of the
6 areas where it's hard for me to figure out exactly what
7 to do with the data. So let me actually just sort of
8 walk through a variety of questions.

9 The first one is with respect to Figure 10.
10 And a variety of people have talked about the reduction
11 in the amount of CBM production which has occurred in
12 Wyoming and, to some degree, in Montana, during the
13 last, say, 15 years with things peaking in the 2000s
14 and beginning to come down. And so, you know, I don't
15 find that particularly controversial. One of the
16 things you have here is a sort of parallel peaks a
17 couple of years apart, which is interesting.

18 My question is did you do any type of
19 analysis as to why this happens? Or why -- let me
20 rephrase that. Why this has happened?

21 A. No. What? The peakiness of it or
22 displacement?

23 Q. Well, the peakiness of it.

24 A. Well, it's the nature of the resource. One
25 decreases the pressure in the coal, coalbed methane

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1 seam, and that begins the production of natural gas.
2 And that production is most pronounced when the
3 pressure is first relieved.

4 So let's look at a pop bottle. When you
5 first pop the cap off, it fizzes like crazy, and the
6 fizz rapidly declines. That's what you're seeing here.

7 Q. So back to my question. Did you do an
8 analysis of why these particular figures occur in the
9 way they do? Because, you know, there are other
10 factors that presumably could be relevant here, such as
11 price of natural gas, regulation. And so my only
12 question is, really -- because I can speculate also as
13 to why there's some particular peakiness -- is did you
14 do any analysis of that or was this just the numbers?

15 A. These are just the numbers. The fact that
16 the peaks seem to be similar within the various basins
17 suggest that all of those factors tend to affect
18 production in similar ways. But you're absolutely
19 right. The price of natural gas particularly and
20 probably will drive these things lower quicker than,
21 say, some of these more early developed basins like the
22 Little Powder, which was not facing that desperate
23 competition from other natural gas.

24 So, no, there's no dissection of these. What
25 I thought was useful was the historical parallels that

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1 we see, which are almost obviously coupled with the
2 production characteristics of the resource itself, this
3 tendency to have a rush that then declines, so the life
4 of a CBM well is not long.

5 Q. Right. Right. Okay. That's helpful. One
6 of the things -- and counsel can point this out to me
7 if there's actual figures out there. But my guess is
8 there are figures here and there; I just need to pull
9 them together.

10 As to poor CBM production, during the years
11 in question, the percentage methods of disposal,
12 looking at all the various different types categories,
13 is there anything in your report that I can look at and
14 say, okay, you know, you do have a figure of -- I think
15 it's here -- 10 percent of the produced water -- or the
16 BLM assumes that 10 percent of the produced water would
17 be injected. But I don't see any figure to say, well,
18 this amount was reinjected, and this amount was put
19 into reservoirs that were lined, and this percentage
20 was put in reservoirs that were not lined.

21 So I guess my first question -- and I think
22 I've been pretty careful. I assume there's no chart
23 that shows that in your testimony. I'm not suggesting
24 that there's any other testimony that gives me that.

25 A. You are absolutely right. There is no such

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1 chart in my materials.

2 Q. Okay. And is that because you didn't try to
3 put together that or because you just can't get the
4 data?

5 A. No to the former. We tried to put that
6 together. It's a very difficult thing to assemble in a
7 coherent place. The records are in different locations
8 within the DEQ and the State Engineer agencies. No one
9 is explicitly tracking the infiltration rates.

10 The linings are put in in response to
11 problems, is my understanding. They aren't required,
12 so there isn't a big list of lined reservoirs and
13 unlined reservoirs. One could potentially develop that
14 by looking at individual permits and perhaps looking at
15 the as-built diagrams of those for thousands and
16 thousands of these.

17 There have been attempts made by the DEQ
18 office in Sheridan to develop some pie charts of just
19 what you're talking about, this percent and this
20 percent. And then, of course, it changes, not just
21 year to year, but almost day to day.

22 So, yes, we attempted to put our finger on
23 what it is. That's a very large undertaking compounded
24 if you were to say what it was in past years. So those
25 data just are not readily available in any kind of a

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1 coherent form. Theoretically, it could be done, but
2 even DEQ internally has been unable to come up with
3 much.

4 Q. So that I'm clear: And the fact that I don't
5 find that type of information on -- in any of the
6 reports suggested to me that either the data was really
7 hard to get or no one really liked the numbers and so
8 no one wanted to actually report what the numbers were.

9 A. No, we looked for that, and I suspect others
10 have also. And the conclusion was that if you were
11 going to develop such a chart, you would really be
12 starting from scratch, as in one by one by one by one
13 assembling it.

14 Q. And so just so that I understand: So Wyoming
15 DEQ, it might have records as to when something is
16 lined and when something is not lined, but it would
17 probably be in association with an individual permit;
18 it's not as if people actually keep track of those
19 numbers?

20 A. That's correct. And the injection portion,
21 for example, is handled under the Underground Injection
22 Control program, UIC, which is a whole separate bunch
23 of folks within the Department of Environmental
24 Quality. So it's also fractured within the agency.

25 Q. Okay. So then let me ask a number of

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1 questions on page 29. So here's where you start
2 talking about a variety of personal communications. So
3 you had personal communications with Jason Thomas
4 regarding what WDEQ means by an impoundment designed to
5 fully contain effluent. So who is Mr. Thomas?

6 A. In my notes I can tell you his exact title
7 and phone number, and those notes were shared with
8 Montana in discovery.

9 He's one of the DEQ project managers that
10 permits these impoundments. Because all of the
11 discharges of CBM water are considered outfalls,
12 whether they're to a stream or to an impoundment, you
13 have to have some sort of permit through DEQ and the
14 WIPDES program. That's the agency or the program with
15 which Mr. Thomas is associated. So he was the logical
16 one to ask, what do you guys mean when you write this
17 must be a full containment impoundment? And Mr. Thomas
18 shared with me their definition of fully containment --
19 full containment.

20 Q. Okay. And one of the things that it's a
21 little bit hard for me to sort of fully evaluate here,
22 is, so what data are we actually talking about here?
23 So does WDEQ keep a list of some types of impoundments?
24 It doesn't keep apparently track of what you told me a
25 moment ago as to whether or not impoundments are lined,

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1 but it separates impoundments into other types of
2 categories where it does keep data?

3 Your testimony is that Mr. Book misunderstood
4 what DEQ said, but that suggests that DEQ gave some
5 type of data. And I haven't seen what that is.

6 A. Okay. Mr. Larson.

7 Q. I'm sorry. Mr. Larson.

8 And sorry. Mr. Book.

9 A. Okay. In the backup materials supplied by
10 Mr. Larson in the report were spreadsheets that he
11 obtained from Wyoming Department of Environmental
12 Quality. On those spreadsheets, impoundments were
13 identified as full containment or not. And he assumed,
14 as far as we can tell -- and I think that was explored
15 in deposition -- based on no more than those words in
16 that spreadsheet, assumed "full containment" means no
17 infiltration. That's the assumption that I've
18 convinced myself was just unwarranted. It just doesn't
19 mean that.

20 Q. And that's because Mr. Thomas --

21 A. Mr. Thomas told me, so I have seen that in --
22 well, in their permit documents. In retrospect, more
23 of those should have been brought forward. My
24 expectation was that when that obvious terminological
25 ambiguity was brought to Mr. Larson's attention, that

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1 it would have carried the day. So I didn't go to great
2 pains to bring in documentation of this fact, nor was
3 Mr. Thomas identified as a witness in the case. I
4 assume that decision flowed from that same expectation.

5 Q. Okay. And who is Kathy Shreve? The bottom.

6 A. Kathy Shreve, if I'm remembering right, she's
7 one of the database -- the keepers of the database at
8 DEQ. And specifically, I think we talked to her about
9 the Underground Injection program. Again, I'd have to
10 go to my notes to get everybody in just the right
11 place. But we worked with Kathy Shreve on other
12 projects related to DEQ discharge permits and
13 specifically the Understanding Injection Control
14 program.

15 Q. Okay. And how did she determine that
16 80 percent of operators used impoundments?

17 A. Their databases aren't in very good shape.
18 And the one that Mr. Larson -- was delivered to
19 Mr. Larson was not in very good shape in terms of
20 clear, consistent presentations. They do maintain
21 lists of whether the water is a discharge to the
22 surface or whether it goes into an impoundment. And
23 she extracted from her database the number of
24 80 percent goes into an impoundment of some sort.

25 Q. Okay. And then it says "most of which were

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1 not lined."

2 A. That would have been her representation to
3 me.

4 Q. But that's not according to you and the
5 database?

6 A. She may have said that just from her
7 experience with the individual files rather than it
8 being in the database. That information exists in file
9 drawers, individual files by permit. When I talk about
10 the database is how much of that has been extracted
11 into some kind of a comprehensive database. It's not
12 an entirely pretty situation.

13 Q. And what about -- who is Don Fischer?

14 A. Don Fischer is an employee of Department of
15 Environmental Quality in Sheridan, who, if I'm
16 remembering correctly, has some ancillary role in the
17 permitting and monitoring of the compliance with their
18 discharge permits.

19 Permitting is done out of Cheyenne office.
20 Some of these programs and compliance is monitored from
21 the Sheridan office. So he was the gentlemen that I
22 understood to have on-site familiarity with the nature
23 of these impoundments. So just another source within
24 DEQ that had been suggested to me as somebody who had
25 real experience with how these things look on the

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1 ground.

2 Q. And what was the basis of his opinion in
3 90 percent of the impoundment water infiltrates?

4 A. Just his own observations working with the
5 files. I didn't probe as to why he thought 90. And I
6 think he offered 90 as a large number, nearly
7 100 percent. He would not have said 90 as in the
8 difference between 85 and 95. I was eliciting from him
9 a qualitative assessment of what he thought was
10 probably going on with these impoundments.

11 But let's understand that all of these
12 conversations with DEQ, they were clear, and it's
13 consistent with their permitting representations, they
14 don't track the percent of the infiltration.

15 Q. Right.

16 A. Well, I'm asking them, what do you think?
17 You've been out there looking at these things and
18 working with these guys for years and years. What's
19 your sense of it? And that's where something like the
20 90 percent comes from.

21 Q. But he had not done any study of
22 infiltration, had he?

23 A. Well, he had not done any focused document
24 study of infiltration. He had -- like Mr. Schroeder,
25 he had looked at a lot of these ponds and just

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1 generally observed their characteristics, and this is
2 the conclusion that that experience brought him to.

3 But, no, it was not done in any formal
4 documented way like the study we saw from Mr. Wheaton,
5 for example. That was one of the few where somebody
6 has actually gone out and tried to put a number to it.

7 Q. And I hate to sort of harp on this, but, you
8 know, I can understand somebody perhaps having an
9 estimate of the amount of impoundments that were lined,
10 okay, the question we were dealing with a moment ago.
11 But this is the amount of water that actually
12 infiltrates. And so, again, he hasn't done a actual
13 study of infiltration, had he, to your knowledge?

14 A. Well, in my mind, there would be a spectrum
15 of if I had a pond that I saw a fair amount of water
16 going into, the pond never seemed to fill up, I would
17 conclude that there was massive infiltration from that
18 pond. Now, that wouldn't qualify as a study or
19 something documented or -- but it would be a reasonable
20 interpretation of what one saw.

21 So I am not uncomfortable, absent of a
22 carefully designed study and a well-populated database,
23 from drawing upon the resources that are available to
24 me to try get a handle on what this number is.

25 And I readily concede, as I said earlier in

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1 the testimony, it's not a very well-constrained number.
2 So we try and get the best estimate that we can based
3 on the permitting requirements, which do not include
4 anything intended to inhibit infiltration.

5 Q. Okay.

6 A. And then the best we can do is to interview
7 those who have had opportunity to observe the water
8 balance, the actual actions of these facilities.

9 Q. Yeah. And as I understand, just to be fair
10 to you on this, you don't use the 90 percent figure, do
11 you?

12 A. No.

13 Q. No. You use the range between the
14 43 percent, which, as I understand it, is taking the
15 original BLM percentages, their assumed percentages,
16 and then -- let me just ask on that.

17 What did you actually vary there in order to
18 get the 43 percent?

19 A. That was done simply by proportioning the
20 anticipated disposition of CBM water in that particular
21 scenario at a something like -- I think I may have
22 remembered this differently yesterday, but we ought to
23 look it up if it mattered -- but 45 percent for a
24 discharge, 35 percent infiltration impoundment,
25 10 percent containment impoundments, 10 percent

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1 injection. Table 4-3 of 2002.

2 Q. And you're actually pretty good in terms of
3 remembering the numbers. It's actually on page 10 of
4 Exhibit M10.

5 A. Okay. So then I just -- both Mr. Larson and
6 I came to the same conclusion, the correct one, I hope,
7 that there had been nowhere near that percentage of
8 direct discharge to the surface. And that had been a
9 controversial aspect of CBM development since the
10 get-go.

11 He took the -- what is the number for surface
12 discharge?

13 Q. Well, so -- and this is where it's sort of
14 relevant. So the way in which the -- and I'd be happy
15 to hand this to you and you can look at it. Let me
16 read it for the record.

17 So for the upper Tongue River, the water
18 handling methods were -- it originally assumed
19 35 percent surface discharge, 45 into infiltration
20 impoundments, 10 percent into containment impoundments,
21 0 percent on land application, and then 10 percent in
22 injection. So I'll hand you the table if you want to
23 take a look.

24 A. Okay. That's --

25 Q. So my question is simply, when you then took

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1 that table and modified it to get the 43 percent
2 recharge rates, what numbers did you change?

3 A. I simply took the 35 percent surface
4 discharge, which we agree was 0. Now, what Mr. Book --
5 Mr. Larson, rather, did was to take the 33 percent
6 total that we see over here in Column 10 of Table 4-3
7 in the 2002 BLM report 33. That's we started. The
8 35 percent of surface discharge didn't happen. He
9 simply threw it away like it went into the atmosphere
10 or something.

11 I thought that was inappropriate. They must
12 have done something with that water. So I simply
13 redistributed it proportionately among the remaining
14 options -- infiltration impoundment, containment
15 impoundment, and injection -- and let the numbers flow
16 through. And that turns the 33 into a 43. So I was
17 trying to do as little -- compromising whatever input
18 there was behind that table by simply reportioning
19 this one piece in the same proportions they had
20 projected.

21 Now, I think we need bear in mind that the
22 authors of these reports didn't have perfect data to
23 work with either. So somehow their percentages acquire
24 a gravity that's really no greater than some of the
25 numbers that we've come up with. We don't know what

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1 all they had behind that. But in 2002, that was all
2 entirely speculative.

3 Q. No, right. And so I appreciate -- or
4 understand what you were trying to do here. And I just
5 wanted to make sure I understood exactly what numbers
6 you had changed for purposes of getting the 43 percent.
7 So you've answered that question.

8 So you used 43 percent at one end of your
9 range, and then 60 percent of the other end of your
10 range is from the -- is it AECOM?

11 A. AECOM.

12 Q. From the 2009 study. So I understand how you
13 developed your range.

14 I also understand, you know, Mr. Larson's
15 argument and a variety of the other testimony that's in
16 here. The only thing that concerns me, and the reason
17 I was really focusing on that 90 percent figure, is
18 that there's this relatively careful material, and then
19 there are a lot of other numbers sort of thrown in
20 here. And one of them is that 90 percent figure.

21 And, again, you don't know how he came up
22 with that 90 percent number?

23 A. Just from his experience. He was simply
24 integrating his observations over the years. My
25 interest in putting it in was, as we were talking about

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1 the return flows factors, let's gather up all the
2 information we can and see if it's consistent.

3 Now, in my mind, had Mr. Fischer said, oh,
4 there's none of that leaks at all, I would have been
5 somewhat more leery of those numbers in the 50,
6 60 percent range.

7 Now, the fact that he said 90 percent and
8 Mr. Schroeder tells us how very few of these are lined,
9 I think that's all ancillary evidence that is
10 supportive of the kinds of numbers that we see coming
11 out of more careful studies, like the AECOM work.

12 So I offer that simply as corroborative
13 background information.

14 Q. Okay.

15 A. Not as dispositive by any means.

16 Q. And I appreciate why you say you're providing
17 these numbers. But number one, it strikes me there's a
18 difference between, on the one hand, lining and, on the
19 other hand, infiltration.

20 So, again, I have to ask, with respect to
21 Mr. Fischer, do you know how many reservoirs he had
22 even looked at over time to see exactly how much water
23 was being lost out of them?

24 A. I do not.

25 Q. Okay. And to your knowledge he didn't do any

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1 infiltration study?

2 A. Infiltration studies of --

3 Q. Yeah, study to see actually how much water
4 gets out of one of these reservoirs.

5 A. And that does happen less often than we might
6 like, and some of those are quoted in the report here,
7 like the one that Mr. Wheaton testified to. I didn't
8 quote him. But the -- say, his partner's study, the
9 AECOM studies that saw the mounding under the
10 reservoirs. We do have data that are quoted in the
11 report where the effects of infiltration were, in fact,
12 documented on specific reservoirs.

13 But if you're suggesting that there might
14 be -- ideally would be every reservoir has a set of
15 monitoring that might be associated with it, that might
16 be nice, but it doesn't happen. So we have the data
17 that we have. And I think it all points us towards a
18 range, as I identified it here, now 43. I don't
19 believe that needs to be 43.00. Somewhere in the
20 40-to-60 range would be an appropriate way to address
21 the modeling in the absence of a detailed study of each
22 piece.

23 As I think I indicated in my direct
24 testimony, from a sensitivity point of view, this
25 factor looms large. And we're, one, engaged in a

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1 longer study. It would be a very obvious one where the
2 modeling would say, this is an important factor that's
3 poorly constrained; we need to constrain it. And that
4 wasn't done for these studies.

5 Q. And I'm sorry. You mentioned -- was it a
6 Wheaton study a moment ago?

7 A. Referring to the John Wheaton study we saw
8 through the testimony.

9 Q. Okay.

10 A. I neglected to put that in as a reference.

11 Q. Okay. Thanks. This is a mistake. You
12 actually give me more time, and I ask questions.

13 MR. KASTE: I would prefer at the end of the
14 case you understood what you were doing.

15 SPECIAL MASTER: You know, I've not resisted
16 asking a question that I thought was important. And
17 it's valuable, particularly with both yours and
18 Mr. Book's testimony where, again, there's a wealth of
19 data, to have the opportunity to ask a few more
20 questions. But I've kept the court reporter longer
21 than I would normally do.

22 So why don't we take a ten-minute break. And
23 I have probably about 10 or 15 minutes of questions
24 left. And after that we will finish up.

25 (Recess taken 10:00 to 10:13)

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1 a.m., December 4, 2013)

2 BY SPECIAL MASTER:

3 Q. Okay. So before we leave CBM, I have two
4 other questions. The first one deals with Figure 11
5 and includes the direct discharges. Yes, Figure 11,
6 which is at Wyoming 43062.

7 A. Okay.

8 Q. And I just have two small questions here. So
9 as I understand it, the months of direct discharge that
10 you take into account in your final table are the
11 discharges for the months of May and September of 2004?

12 A. Yes.

13 Q. And so two questions. First of all, are the
14 numbers indicated here, are these amounts that were
15 permitted for those periods, or are these actual
16 measure discharges reported back to DEQ?

17 A. The latter. These are the -- the operator
18 reports to DEQ under these discharge permits.

19 Q. Okay. And the second question is these were
20 discharges that took place for the whole month. So
21 basically you get to 12:01 a.m. -- I'm a little bit
22 exaggerating here -- but you turn on your discharges on
23 May 1st and then on May 30th you turn it off, since
24 these are CFS.

25 A. Yeah. I'd have to go back to my original

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1 database. I may have converted those from acre-feet.
2 I'm not remembering what the actual reporting
3 requirements are. These are going through a meter, and
4 they're simply reading the meter like an odometer on
5 the first of the month every month and sending the data
6 in.

7 So, again, I'd have to go back and look at
8 the form in which I received those. But my expectation
9 is that those were in some volume for the month, 'cause
10 that's how those permits are written. And I've
11 converted them to CFS.

12 Q. So you think you started with acre-feet,
13 converted to CFS, and then converted back to acre-feet?
14 'Cause that's what you report at the end.

15 A. Oh, at the end. Yeah, we'd have to go back
16 and track through that. My memory of the reporting
17 I've done under WIPDES permits has been volumetric.

18 Q. I have no idea whether it's going to be
19 relevant, but if you could check your notes at some
20 point and let me know?

21 A. So our question is whether the native format
22 of those was average CFS or acre-feet?

23 Q. Acre-feet. And if it was CFS, whether there
24 was a time period or --

25 A. Well, it would have been an average CFS for

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1 the month. I mean, the -- there's no possibility that
2 it's a CFS as of, you know, an instant in time. That
3 wouldn't make any sense from a permitting point of
4 view.

5 Q. Yeah, okay.

6 A. Unless they said at noon on the 4th of each
7 month.

8 Q. If you could just report back as to exactly
9 what the data said for those two, that would be useful.

10 Okay. And then the other question on the
11 CBM-associated groundwater production is paragraph 4
12 that's at the bottom of page 30 and the top of page 31,
13 and if Mr. Kaste took you through that portion of your
14 expert testimony, then I must have drifted away for a
15 second because I don't recall it.

16 A. Let me catch up. Where are we?

17 Q. Bottom of page 30 and top of page 31 in a
18 section which reads, "The BLM model used by Larson
19 ignores a portion of the CBM-associated groundwater
20 production in Montana."

21 And I ask about this only because it's short,
22 but I didn't understand it.

23 A. I think -- I suspect Mr. Kaste skipped
24 through it because it isn't a critical point. So let
25 me attempt to -- what I was getting at there was simply

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1 to point out that the BLM model didn't include all of
2 the potential CBM -- all of the CBM production in
3 Montana. So there's this small faction of CBM
4 production not included in the model.

5 To me, that's symptomatic of the larger sense
6 in which the model really wasn't attempting to gather
7 up every CBM well in that corner of the basin, and it
8 would make a tiny difference if they had.

9 Q. Okay. Okay. That's helpful. That actually
10 does help me understand that section. Okay.

11 The only other thing then I want to talk
12 about is Table 6 on page 33, in which you summarize the
13 various adjustments that Mr. Fritz makes and then that
14 you make to the Fritz-adjusted Book numbers. So why
15 don't I start out with the question that you looked at
16 overnight, which is the import returns.

17 And the question was whether or not those
18 return flows were during the nonirrigation season.

19 A. And it was a very good question. And I can
20 report success, I think, in tracking it down and would
21 offer the following corrections to this report as a
22 result. May I just walk through those?

23 Q. Yeah.

24 A. I think it would be -- and we can talk about
25 why. But I think it would be appropriate to delete

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1 Matrix D on page 33. There's A, B, C, and D.

2 Q. Right. And the only change on D is the
3 import returns?

4 A. Let's just strike D.

5 Q. Okay.

6 A. On the previous page, the bottom paragraph
7 discusses Table 6d, and that paragraph should just be
8 struck as well.

9 Q. Okay.

10 A. The last full paragraph on page 32 and on
11 page 31, going backwards on you, the paragraph labeled
12 No. 2 similarly should simply be struck.

13 The reason for that -- for those deletions is
14 precisely as the question suggested, that in the fairly
15 complex series of calculations and assumptions between
16 Mr. Book and Mr. Fritz and when that came time for me
17 to take the handoff, I misunderstood, miscommunicated
18 with Mr. Fritz in terms of just when those Kearney Lake
19 depletions hit the stream.

20 So consistent with the way I've handled the
21 post-'50 storage, the Wagner-Fivemile, those Kearney
22 Lake return flows should have been zeroed out as well,
23 which is what was done on Matrix C on page 33 and then
24 the discussion on page 32 addressing itself to
25 Section C.

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1 So we're just backing up the addition I had
2 made incorrectly to accommodate the Kearney Lake return
3 flows.

4 Q. Thereby eliminating Mr. Kaste's opportunity
5 to demand water back from Montana?

6 MR. KASTE: It was a demand for payment of
7 beer, and I'm very disappointed by that.

8 MR. WECHSLER: I'll still buy you a beer.

9 SPECIAL MASTER: So let me -- so that
10 actually eliminated some of the questions I had. So I
11 think I only have two other questions.

12 BY SPECIAL MASTER:

13 Q. So first of all, in Table C, as I understand
14 it, the changes that you've made there are, again, the
15 takeout of post-1950 storage and the Wagner-Fivemile
16 for the reasons that you discussed yesterday; and then
17 on the evaporation side, what you did there was that
18 you removed the portion of the evaporation depletion
19 that occurred outside of the irrigation season; is that
20 correct?

21 A. That's correct.

22 Q. Okay.

23 A. And that's why it's a relatively small
24 number.

25 Q. Right. So I think that answers my question.

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1 So you removed it, then, for the period, again,
2 October 1 through the end of April; is that --

3 A. That's correct.

4 Q. Okay. And the way in which you did that
5 was -- how did you calculate the amount you needed to
6 remove?

7 A. I just took that right off Mr. Book's
8 evaporation tables and surface areas. Those are listed
9 as monthly values. I just threw away the winter
10 months.

11 Q. Okay. That's what I thought. And then the
12 second question is we talked about that minus 30 that
13 you have under CBM effects for 2004. And, again,
14 that's reflecting the direct discharges for May and
15 September that we were talking about a moment ago; is
16 that correct?

17 A. That's correct.

18 Q. And so let me ask the question, and then you
19 can help me on this. So if I ultimately were to
20 conclude -- more importantly if the Supreme Court
21 ultimately concluded that, in fact, that there is
22 insufficient evidence here under the CBM model to
23 conclude that, in fact, that there was water that was
24 produced to the injury of Montana, my question is
25 whether or not there is any statistical reason why you

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1 would then also say, oh, in addition to that, by the
2 way, for 2004, we're going to take this additional
3 minus 30 off.

4 And the reason I ask that is that if you take
5 the table that was in Dr. Schreüder's testimony -- and
6 here, I can actually hand you the page. So this is
7 page 19 of Dr. Schreüder's testimony. And this is
8 basically the table at which he looks at various
9 assumptions as to what the return flow was, and he
10 looks at what Mr. Larson assumed 25 percent and he
11 looked at the 43 percent.

12 A. 45 percent.

13 Q. 45 percent, sorry, and 60 percent. If I
14 remember what he says there, is that, you know, some of
15 these numbers are negative. You know, if you take some
16 of -- particularly Mr. Larson's, they are positive; but
17 they are all within the actual amount of water, which
18 gets lost in the model anyway, which is 100 acre-feet.

19 And so, you know, particularly, for example,
20 if you take your 45 percent numbers for 2004, and you
21 add in 30, you're still within that sort of margin --
22 what I think of in that particular context, sort of
23 margin of error.

24 So what's the justification statistically for
25 saying, oh, we're going to take this into account

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1 differently?

2 A. Well, I think you could apply the same
3 general question to any of these depletions if they are
4 all plus or minus, which they certainly are, what is on
5 the threshold of significance? I didn't look at it
6 that way, rather tried to find the numbers as closely
7 as we can where we can isolate them.

8 So I think the correct way to think of the
9 CBM direct discharge is as though it were a pipeline
10 from some other source.

11 So the Larson/Dr. Schreüder discussion, the
12 BLM 2002 model that they used, has this fuzziness to it
13 that leads to Dr. Schreüder's identification of
14 indistinguishable from zero. So that's the best we
15 could do with that source of water.

16 Now, separate from that, we have this
17 discretely measured input that we do know the answer
18 to. So I see it as a separate issue, in a sense.
19 Here's a pipe that's coming out of the hill and it's
20 flowing water and it's reported monthly by its
21 operator. So I know that number quite precisely.

22 So I'm simply not extending that envelope of
23 uncertainty associated with the groundwater discharge
24 to this discrete surface water discharge which we do
25 know precisely.

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1 Q. But in this particular case, the reason why
2 the CBM groundwater is relevant is because it's return
3 flow from the amount that's pumped out. And if I
4 understand what Dr. Schreüder is saying there, it could
5 be 100, one way or the other?

6 A. Well, the piece that he's saying could go a
7 hundred one way or another is the groundwater input to
8 the river.

9 Q. Yeah.

10 A. That could be this or that. Who knows? He
11 didn't say anything about the surface water input into
12 the river, which neither he nor Larson addressed. And
13 we have precise data on that through the operators.

14 So, again, I'm just not tarring the discrete
15 number that we do know with some precision with the
16 same brush that applies to this groundwater base flow
17 that's coming into the Tongue River simply because they
18 happen to both be associated with CBM.

19 Q. Right, right, right.

20 A. See them as two separate issues. And we're
21 trying to be as precise as we can with each piece of
22 the puzzle.

23 Q. Okay. I understand what you're saying. Let
24 me just ask it a different way. The original model
25 included estimates of direct flow back into the river

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1 system?

2 A. Yes, it did.

3 Q. Okay. But you've now taken that out and
4 said, well, we know this number. And, therefore -- and
5 we know this number, and I think you'd probably add in,
6 we know this number, and it's going directly back into
7 the river. So there's no sort of modeling that's
8 needed on that aspect.

9 A. That's exactly right. That number is
10 independent of the modeling and any of the assumptions
11 and the uncertainties and storage coefficients and
12 layering. All of that is the uncertainty associated
13 with the groundwater input or depletion of the Tongue
14 River.

15 This number, which is the direct surface
16 discharge, is simply water that was viewed out of the
17 ground and put into the perennial stream. And we know
18 it precisely.

19 So I see those as two quite different
20 elements, like the numbers that have been generated for
21 the impact of post-'50 irrigation, for example.
22 There's another element that has an error bar
23 associated with it certainly. And we bring it through
24 as best we can.

25 Q. Okay. But -- and so I think I understand

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1 your point entirely. But just so I'm also clear, it
2 was part of the original -- there was an estimate of
3 the direct discharge as part of the original CBM model?

4 A. The matrix that we were looking at a moment
5 ago had a number for that. Now, how that translated
6 through to the Tongue River, I don't recall. I didn't
7 track that. And it would have been quite speculative.

8 So how, ultimately, the 2002 BLM model
9 handled the direct discharge, I don't remember the --
10 as Dr. Schreüder testified -- I think he was absolutely
11 right -- the focus of that model was impacts on ground
12 water levels and quality of discharge.

13 So when I was reviewing that model when it
14 first came out, there just was no concern about what it
15 was saying in terms of augmentation or depletion of
16 flows of the Tongue River. So it had an element of
17 surface discharge. Where it routed that, I don't
18 recall.

19 Q. Okay. Thanks.

20 SPECIAL MASTER: I think, then, those are all
21 of my questions.

22 So Mr. Draper, do you want, like, two
23 minutes -- or I guess first question is: Do you have
24 any more questions?

25 MR. DRAPER: As you assumed, Your Honor, I do

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1 have a few. A couple minutes would be helpful.

2 SPECIAL MASTER: Okay. That would be great.

3 (Discussion held off the
4 record.)

5 SPECIAL MASTER: Okay. Mr. Draper.

6 MR. DRAPER: Thank you, Your Honor.

7 RECROSS-EXAMINATION

8 BY MR. DRAPER:

9 Q. Good morning, Mr. Hinckley.

10 A. Good morning.

11 Q. You were talking with the Special Master
12 about Table 6 on page 33 of your report, which is
13 Exhibit W3.

14 A. Okay.

15 Q. Now, you've asked that Table D -- or the
16 section of Table 6 that is labeled D be removed from
17 your exhibit; is that right?

18 A. That's correct.

19 Q. And so your final figures as to the effects
20 of the activities that you recognized in Wyoming as
21 affecting Montana pre-'50 rights are the ones that are
22 then at the bottom of Part C of your Table 6; is that
23 right?

24 A. Yeah. I would just add one small
25 qualification. Those would be the impacts to flows

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1 entering the state of Montana. There's still some
2 issue, as I outlined in the text, between how those
3 would relate to contemporaneous direct-flow demand
4 deficits in Montana.

5 So I'm with you to the extent this is my best
6 estimate of what happened in Wyoming. What the impacts
7 on Montana were is ambiguous by virtue of the absence
8 of any seasonal differentiation.

9 Q. So in going from Part D to Part C of your
10 Table 6 for your final conclusions for this
11 information, you've changed a set of negative numbers
12 to a set of positive numbers; correct?

13 A. That's correct.

14 Q. And a positive number means a positive effect
15 on state line flows?

16 A. Means a depletion, a decrease in the flows
17 entering the state of Montana.

18 Q. And to put it in more layman's language, that
19 means instead of your final conclusion being that
20 you've provided more water to Montana than it deserves
21 under the compact, there's actually these figures that
22 show that, with an opposite sign, that there was, in
23 your opinion, some depletions of flows at the state
24 line?

25 A. I think I've been told I'm not allowed to

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1 opine on what is deserved under the compact.

2 Q. Very good.

3 A. But the sign of the small impact of Wyoming
4 post-'50 activity has changed, in my opinion, from the
5 small negative to the small positive.

6 Q. And in Table 6C, you've discussed the CBM
7 effects in the last line that show up as a negative 30
8 acre-feet in 2004; correct?

9 A. Yes.

10 Q. And that's effluent water, isn't it?

11 A. That's discharge water. "Effluent" would be
12 another name for it, yeah.

13 Q. So that has whatever water quality
14 degradation that occurs in the CBM process associated
15 with it; isn't that right?

16 A. My understanding of that point is it's coming
17 out of a water treatment plant. So, yes, to your
18 question, with the understanding that there's a lot
19 goes on between it coming out of the ground and it
20 going into the river.

21 Q. Turning back a couple pages in your report,
22 at the bottom of page 30, you have a section labeled
23 with the number 4 that the Special Master asked you
24 about where you say, "The BLM model used by Larson
25 ignores a portion of the CBM-associated groundwater

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1 production in Montana."

2 First of all, why should Mr. Larson have
3 included CBM pumping in Montana in his analysis?

4 A. I didn't offer .4 as a criticism of
5 Mr. Larson's work; I offered it as an observation on
6 the expansiveness of the BLM model upon which he
7 depended.

8 Q. Isn't it true that he removed the wells that
9 were already in the model in the state of Montana?

10 A. He offered a dissection of the Montana
11 portion of the CBM production from the Wyoming portion
12 of the CBM production. In this case, the Montana piece
13 that he was dealing with was slightly less than the
14 whole Montana piece.

15 Q. And wouldn't you agree it was appropriate to
16 remove CBM pumping in Montana from an analysis of the
17 effects of Wyoming pumping on the Tongue River?

18 A. It was.

19 Q. So this is, as you say -- as you've
20 clarified, this is not a criticism of Mr. Larson?

21 A. No. I think this is more a comment on the
22 model which he used. And I suppose collaterally that
23 would be a criticism of his, dependent on that model.
24 But it's certainly a very fine point.

25 Q. But the fact he made that change is not a

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1 problem as far as you're concerned?

2 A. His numbers would have come out in tiny ways
3 different had he had a model that included those. If
4 you'll recall, there was some discussion of what the
5 impact of Montana depletions were on Wyoming and how
6 that's calculated in terms of how the subtraction was
7 made. Dr. Schreüder went through that.

8 So, again, we're talking some very fine
9 points. But it would have made a small numerical
10 difference to Mr. Larson's use of the model had it
11 included these.

12 Q. And you have not made an analysis of any such
13 difference?

14 A. I have not.

15 Q. Now, you in your references to return flows
16 and the different methodologies used by you and
17 Mr. Book with regard to the rapidity of returns to the
18 stream, you discussed the testimony of Mr. Muggli --
19 isn't that right? -- where he had done an ad hoc test
20 with his diversion?

21 A. Yeah. I think we all heard that tale. And
22 it was relevant to the question the Special Master
23 asked me, and that's where that came in.

24 Q. And isn't it very possible that increases
25 that he saw in flow was simply discharge of bank

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1 storage?

2 A. You would have to go back and see the details
3 as he presented them. I don't know.

4 Q. If it were just a release of bank storage,
5 that wouldn't say anything about return flows from
6 water applied to crops, would it?

7 A. Well, it would in the sense that the bank is
8 the aquifer in which the crops are being watered. So
9 one could use the release of bank storage as a way to
10 get at local transitivity, for example. So the two
11 are not unrelated.

12 Q. But they're certainly not necessarily
13 connected?

14 A. "They" being the return flow from the
15 irrigated fields and the bank storage?

16 Q. Yes.

17 A. Yes, they are related. That bank, whatever
18 you want to call the bank, is part of the material
19 through which those return flows have to pass.

20 Q. So your point was if it was bank storage,
21 that that had some implication for the rapidity of the
22 return flows of fields that were at some other
23 locations?

24 A. I'm suggesting that bank storage could
25 provide one some information that would be relevant to

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1 the issue of the transitivity of the aquifer. But
2 whether there was any bank storage involved in that
3 experiment or not, I certainly don't recall him saying
4 anything about the stage of the river. One might be
5 able to back that out of the records knowing the dates
6 or something.

7 SPECIAL MASTER: Mr. Draper, before you go on
8 to another question, just so I'm sure I understood the
9 last exchange, could you just explain what bank storage
10 is?

11 THE WITNESS: Sure. The -- as the stage of a
12 river -- which means the elevation of water surface --
13 as it rises, then it's able to push water out into its
14 banks. So in a sense there's a groundwater reservoir
15 that goes along the river. And as the river level
16 drops, that water is going to, you know, relax back
17 into the stream.

18 So bank storage, it can be a large issue in a
19 river where the stage is changing dramatically. And
20 the adjacent aquifer is quite permeable and quite
21 large. You can store a fair amount of water off to the
22 sides, if you will. And as the water drops back down,
23 it will drain in. So it goes back and forth, in and
24 out of bank storage with the stage of river.

25 SPECIAL MASTER: Okay. Thank you.

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1 BY MR. DRAPER:

2 Q. Mr. Hinckley, the Master queried you about
3 the people that you had spoken to at the water quality
4 department with regard the degree of infiltration from
5 CBM; correct?

6 A. Yes.

7 Q. I'd like to show you again the Exhibit M564
8 that we discussed briefly yesterday.

9 MR. KASTE: I think this is outside the scope
10 of your examination to which he is supposed to be
11 responding. If we're going to go back through all the
12 junk we went through yesterday on cross-examination,
13 we're never going to get done here.

14 SPECIAL MASTER: So there hasn't actually
15 been a question yet. And I'll confess, I forgot
16 exactly what the exhibit discusses. So...

17 MR. DRAPER: Let me just address that.

18 SPECIAL MASTER: Let's just hear the
19 question, and I'll permit at least one.

20 BY MR. DRAPER:

21 Q. So the Special Master asked you about the
22 people you contacted at the WDEQ with respect to the
23 part of your report on infiltration of CBM returns;
24 isn't that right?

25 A. That's correct.

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1 Q. Okay. And he also queried you with respect
2 to the existence of studies of that infiltration,
3 didn't he?

4 A. He did.

5 Q. And looking at M564, which we identified
6 yesterday on the record, if you turn to page 6-22, this
7 federally sponsored study, just below the middle of the
8 page below those bullets, actually reports on such a
9 study, doesn't it?

10 A. You want me to read this page?

11 Q. That particular paragraph, yes, please.

12 SPECIAL MASTER: Yeah, because I know
13 Mr. Kaste is going to object right now.

14 You know, although I'm actually fascinated by
15 what's inside of that, at the moment I don't think the
16 foundation has been laid. I don't think we're likely
17 to do it. So the document is not going to come in.

18 I certainly think you can ask him whether or
19 not he's aware, you know, whether -- I think you can
20 ask him, for example, whether or not he contacted other
21 organizations. I think you could ask, you know, what
22 type of research he actually did to try to find out the
23 information. But I don't think we can get this
24 document into the evidence by asking him direct
25 questions about it.

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1 MR. DRAPER: Well, it's simply a
2 cross-examination exhibit, Your Honor, addressing the
3 care with which the witness investigated the
4 information available to support his claim that there
5 were large amounts of infiltration.

6 MR. KASTE: And I think this was asked and
7 answered yesterday. We're replowing the same ground
8 here.

9 SPECIAL MASTER: And, again, what I want to
10 try to avoid is testimony about the contents of this
11 document itself. And so I'm perfectly happy to have a
12 couple of questions, 'cause I don't think it's going to
13 take very long, about what Mr. Hinckley's investigation
14 was. But, unfortunately, we can't go into the details
15 of this document.

16 MR. DRAPER: Okay. Thank you very much, Your
17 Honor. I will keep that in mind.

18 BY MR. DRAPER:

19 Q. Mr. Hinckley, this indicates that there was
20 some federal investigation that went into a handbook
21 that was prepared for the federal government; isn't
22 that right?

23 A. I have no idea. Is there something that
24 leads you to that conclusion?

25 Q. Just the front cover.

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1 A. You want me to read what it says?

2 Q. No, thank you. My question is: You did not
3 do a search that located this study; isn't that right?

4 A. That's correct.

5 Q. And this study did include materials
6 specifically relevant to the geographical area that
7 we're talking about here; is that right?

8 A. Did it? I don't know that. If you'd like me
9 to read something in it, I could do so.

10 Q. No, I don't think that's necessary.

11 MR. DRAPER: I think that's all the questions
12 I'll need to ask him on that, Your Honor.

13 SPECIAL MASTER: Okay. Thank you,
14 Mr. Draper.

15 BY MR. DRAPER:

16 Q. Another area you discussed with the Special
17 Master was the fact that there had been conversion, to
18 a certain extent at any rate, to sprinkler systems from
19 gravity-flood irrigation in the Tongue River Basin in
20 Montana; correct?

21 A. Yes.

22 Q. And that to the extent that that had taken
23 place, it was a justification for assuming more rapid
24 returns to the stream from irrigation; is that right?

25 A. Yeah, I'd characterize it as that having more

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1 rapid returns produces a similar hydrologic effect as
2 an explicit accommodation of the change in efficiency.

3 Q. And doesn't that rest upon the assumption
4 that you have, in effect, reduced the diversions in
5 Montana?

6 A. Yes. Efficiency defined as the difference
7 between the ratio of diversions to crop needs. I'm
8 assuming as efficiency goes up, crop needs stay the
9 same, diversion goes down, just from the algebra.

10 Q. First of all, as a formal matter, the water
11 right has not been reduced in terms of what's possible
12 and legal to divert; correct?

13 A. I think that is correct.

14 Q. And as long as the -- I think we heard from
15 the Master and the Court on this. As long as the
16 diversion amount is not exceeded, that conversion can
17 be made; correct?

18 A. As far as I know. I don't mean to interpret
19 Montana water law, but that seems sensible. And I
20 don't believe I've represented the water rights have
21 been changed to accommodate the changing efficiencies.

22 Q. And whether the conversion to sprinklers
23 results in less diversions is not something you know as
24 a general matter; isn't that right?

25 A. Reduced relative to previous diversions or

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1 relative to water rights?

2 Q. Relative to previous diversions.

3 A. I have made no study of that. That certainly
4 would be our expectation and one of the reasons that a
5 farmer would convert to a sprinkler.

6 Q. But the amount of return flows and,
7 therefore, their timing would not necessarily change
8 because of that, would it?

9 A. Oh, I think the timing and volume of return
10 flows will change as a result of converting from
11 gravity to sprinkler, yes.

12 Q. But to the extent that water is actually
13 diverted, it will necessarily either be used by the
14 crop or returned to the stream; isn't that right?

15 A. Yes.

16 Q. Okay.

17 MR. DRAPER: If I could have just one second,
18 Your Honor.

19 SPECIAL MASTER: You certainly may,
20 Mr. Draper.

21 MR. DRAPER: That will do it. Thank you very
22 much, Your Honor.

23 SPECIAL MASTER: Okay. Thank you.

24 Mr. Kaste.

25

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REDIRECT EXAMINATION

BY MR. KASTE:

Q. I'll be brief. First of all, with regard to the study you were just talking about with Mr. Draper, did Mr. Larson cite that study in his report?

A. Not that I'm aware of.

Q. Huh, okay. Now, this is the thing I got right. Let's look at Figure 5a. Now, you were actually talking with the Special Master about this in the course of the narrative portion of your report. And I think it was very confusing when you talked about the historic reservoir releases, and I think the way your testimony came across is that your figures here include both the releases from storage and the direct flow. And I want to clear that up.

When we look at these figures, do they include in that May 1-through-September 30th period just the releases from storage, or do they include releases from storage and direct-flow diversions, in a sense dropping the reservoir more than one would anticipate?

A. Well, your question is correct. I may have made a bit of a hash of that. There are several things going on here. The figures are, as labeled, Tongue River Reservoir modeled monthly contents. So what the

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1 figure reflects is the change in the volume of the
2 vessel.

3 Q. And is the same true for the piece of text
4 you were discussing with the Special Master when you
5 talked about historic releases from storage?

6 A. So the piece of text is found at the top of
7 page 11, end of the first paragraph. The sentence
8 reads, "These results indicate that the reservoir would
9 have been entirely drained in 2004, 2005, 2006 had a
10 175 CFS winter bypass been coupled with historical
11 releases of storage."

12 The statement is correct as written. And the
13 discussion we had, I'm afraid I was addressing a
14 related issue of how we handled the model over the
15 irrigation period. And the point I was trying to make
16 was that we no longer adjusted the rate of storage
17 after May 1, as previous to that we had set it at 75 or
18 50 or 175 CFS depending on the scenario.

19 Once we hit May 1 we had no way of
20 distinguishing releases for the downstream senior
21 rights represented by the stock rights, but rather we
22 recognize the possibility that releases -- or bypasses
23 of natural flow might have been made in response to
24 downstream irrigation demands which we didn't have any
25 way to quantify.

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1 So my point was that starting May 1, we let
2 the historical operations of the reservoir rule rather
3 than holding it to the constraints that we had imposed
4 on it from October to the end of April.

5 So, again, I didn't say that very well the
6 first time through. But the point is that we no longer
7 constrained how the reservoir was operated relative to
8 its historical operation starting May 1. So bypasses
9 were made as bypasses historically were made. Releases
10 were made as releases historically were made.

11 Q. And what you're looking at during the period
12 of irrigation season, both in the text and your
13 figures, is the change in the storage contents of the
14 reservoir, and that gets you to your starting point for
15 the next winter season to which you then apply that,
16 depending on which figure we look at, the
17 particularized bypass to see what effect that would
18 have on the changing content; right?

19 A. That's correct.

20 MR. KASTE: Did that make sense to you? Do
21 you understand?

22 SPECIAL MASTER: It makes sense to me. But
23 now I'm actually confused as to why you thought I was
24 confused.

25 MR. KASTE: 'Cause I am certain that he said

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1 on the stand that those numbers on the downslope, as
2 water is coming out, included both the storage and
3 direct flow, which would lead to a dramatic drop in the
4 graph which is unwarranted. And I hoped that -- or I
5 thought that that was confusing when I heard it. And
6 it sounded completely backwards of the way I thought it
7 was.

8 And I just want to make sure that that is
9 clear, that those charts are reflective of change in
10 storage contents, and then that that change is limited
11 to over the course of the winter season, the bypasses
12 that he modeled, and the irrigation season the actual
13 change in content.

14 SPECIAL MASTER: Let me see if I can
15 understand then. When you talk about the historical
16 releases of storage from the reservoir, in the sentence
17 on page 11, what you're talking about is -- for
18 example, in a given month, if you have the reservoir
19 level drop from X feet to Y feet, the amount of storage
20 that would have been in that slice of the reservoir is
21 what you mean by the historical release?

22 THE WITNESS: Yes. The word "release" and
23 "bypass" and "outflow" tend to get confused. So
24 outflow is all the water that comes out the bottom of
25 the reservoir; release to be that portion of the

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1 outflow that came from decreasing the storage; and then
2 bypass being the portion of the outflow that came
3 through the reservoir from up above.

4 SPECIAL MASTER: Right.

5 THE WITNESS: What I've done is tried to
6 honor the historical imminution and contents of the
7 reservoir for each summer month.

8 SPECIAL MASTER: But let me put it
9 differently. If you -- there's two different
10 numbers -- and, again, I do think it's useful to make
11 sure we're talking about exactly the right numbers.

12 One number is the actual releases from the
13 reservoir which you could measure from, you know, the
14 gauge. The second would be looking at what the change
15 in elevation of the reservoir is and what that means
16 about how much water -- how much less water is actually
17 stored in the reservoir now than was last month.

18 What I understand you're saying is that when
19 you refer to the historical releases of storage, what
20 you're talking about is the latter figure rather than
21 the former?

22 THE WITNESS: Now I'm lost between your
23 former and -- one more time.

24 MR. KASTE: The answer is yes, Bern. Just
25 yes. I think you can figure this out if you look at

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1 the label on your figures which talks about modeled
2 monthly contents.

3 BY MR. KASTE:

4 Q. Is that a fair way to hone in on this as to
5 what you're describing?

6 A. Right. I think these are correctly labeled
7 that we honored the historical change in contents.

8 SPECIAL MASTER: Okay. So this is -- again,
9 this is helpful to see whether or not it is ultimately
10 relevant.

11 MR. KASTE: See why I thought it was
12 confusing?

13 SPECIAL MASTER: Yeah. But on this
14 particular point, one of the reasons I went into it is
15 because it didn't specifically refer to the table here.
16 So, again, when you say historical release of storage,
17 you're talking about the change in the contents of the
18 reservoir, not simply the total amount of water flowing
19 out the northern end of the reservoir?

20 THE WITNESS: That's right.

21 SPECIAL MASTER: Okay. Okay. And, again,
22 what you're saying here is that if you use the 175-CFS
23 winter bypass for that October 1-to-April 30 measure
24 and then you use the historical releases of storage,
25 then the reservoir goes dry in those years.

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1 THE WITNESS: Yes. The point of the
2 sentence, beyond the numerics, was simply that the
3 175-CFS nominal winter bypass requirement could not
4 have been met in these years. Obviously, it was not
5 met in these years, demonstrating to us that it is, in
6 fact, a somewhat discretionary aspect of reservoir
7 management.

8 SPECIAL MASTER: Right. And when you say
9 dry, you mean even the Northern Cheyenne Tribe's water
10 would disappear in those years?

11 THE WITNESS: Yeah. There was no distinction
12 here between the tribes, and I think 5c should show
13 that as the 175-CFS bypass hits rock bottom.

14 SPECIAL MASTER: Understood. Okay. Thanks.
15 BY MR. KASTE:

16 Q. All right. One more thing. I'd like you to
17 look at page 32 of your report. Now, you explained to
18 all of us why it makes sense to eliminate -- I'm
19 calling it the D portion of the information conveyed on
20 page 33 -- in light of the timing of those import
21 returns from Kearney Lake. And so you have a positive
22 number down at the bottom of C; right?

23 A. Correct.

24 Q. So what I'd like to do is have you look at
25 the second-to-last paragraph, the one preceding the

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1 last paragraph that you said should be removed as well.
2 And it says -- I'll read it maybe, 'cause I can go
3 slower. "At such small flows" -- is that a reference
4 back to your Table C?

5 A. Yes, it is, and the CFS equivalents that
6 immediately precede the paragraph you're looking at.

7 Q. So as you're talking about Table 6c, I guess
8 is the right way to describe it, then your report says,
9 "The practical benefit to a pre-1950 appropriation in
10 Montana, if a call for priority regulation were to have
11 taken place, cannot be determined without investigation
12 of the specifics of such a call; e.g., date, location,
13 conveyance losses, travel time, et cetera."

14 Did I read that right?

15 A. Yes.

16 Q. And is that true? Is the fact that we have
17 these little numbers here at the end of the day, does
18 that really mean anything in terms of knowing that
19 somebody somewhere in Montana got injured by these few
20 minor activities in Wyoming? Have we made that
21 connection?

22 A. No. I think the closest we've come is to say
23 here are depletions to state line flows during the
24 irrigation season, May 1 to September 30th. So there's
25 no more connection to specific activities in Montana

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1 than that.

2 Q. And these values that you have in Table 6C
3 carry through the problem, and I think Mr. Fritz
4 identified with Mr. Book's report, was that they're
5 annual values, except to the extent you've reduced
6 evaporation for the irrigation season; is that right?

7 A. Yeah, but I think with my adjustments these
8 are seasonal values.

9 Q. They're not tied to the particularized call
10 dates, are they?

11 A. No.

12 Q. So these numbers are wrong? As a matter of
13 fact, they're wrong?

14 MR. DRAPER: Your Honor, Mr. Kaste has been
15 asking a series of very leading questions here where
16 the witness is just called upon to answer yes or no to
17 his long soliloquies, and I object to that form of the
18 question.

19 BY MR. KASTE:

20 Q. I'll change my questions from "These numbers
21 are wrong, aren't they?" to "Are these numbers wrong?"

22 A. The statement I presented to address that is
23 the last paragraph above the conversion CFS, the Book
24 estimates included in Table 6, 6C with the
25 understanding that they're likely overstated. So it

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1 seems to me unlikely that there would be an exact
2 correspondence between these seasonal totals and a
3 direct-flow demand deficit in Montana. And certainly
4 that difference is going to be in the direction of
5 these being too large.

6 Q. Mr. Draper used the phrase with you in
7 discussing the results on Table 6C as this is your best
8 estimate of what depletions occurred from Wyoming, got
9 down to Montana. And we've heard a lot of different
10 numbers in this case.

11 Do you have confidence in any of them that
12 they reflect the reality of the situation?

13 A. Well, any of us could refine these numbers
14 endlessly. So there's an error bound on any of these.
15 And there are large assumptions and measurement errors
16 of various sizes associated with these numbers. So all
17 I can tell you is -- we know they're wrong because
18 I'm -- I'm doing my best to field. The real numbers
19 are almost certainly different from the specific
20 numbers.

21 Q. As per usual, I didn't understand most of
22 what you said. Was the answer to my question no?

23 A. Tell me the question again.

24 Q. Do you have confidence in any of the numbers
25 you've heard during the course of this case that

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1 represent the reality of the situation?

2 A. They don't precisely represent the reality of
3 the situation.

4 MR. KASTE: I don't have any further
5 questions.

6 SPECIAL MASTER: Okay. Mr. Hinckley, you are
7 free to step down from the stand. And it looks like
8 your normal seat is still over there.

9 So, Mr. Kaste.

10 MR. KASTE: Yes, sir.

11 SPECIAL MASTER: Does the defense rest at
12 this point?

13 MR. KASTE: The defense rests.

14 SPECIAL MASTER: Okay. Thank you. So what I
15 would suggest is we take a break and then come back.
16 As I say, any closing argument that either side would
17 like to make would be welcome at that point. And it
18 looks to me as if we'll have enough time, certainly
19 this afternoon -- and I'll make sure we do -- to talk
20 about the next steps.

21 So, again, thank you very much. And we will
22 be back in -- we can even take a 15-minute break right
23 now.

24 (Recess taken 11:11 to 11:29
25 a.m., December 4, 2013)

1 SPECIAL MASTER: Everybody can be seated.

2 MR. KASTE: You asked Mr. Hinckley a
3 question --

4 SPECIAL MASTER: Oh, that's correct.

5 MR. KASTE: -- to follow up on a break, and
6 he did. So with everybody's permission, Mr. Hinckley
7 can report to you how values of direct discharges are
8 recorded on the DEQ records.

9 SPECIAL MASTER: Okay. I appreciate that.
10 Thank you, I was going to ask you later. So I'm glad
11 you've gotten to it.

12 THE WITNESS: Okay. The short answer, I
13 called back to the office and brought up the actual
14 spreadsheet. So the spreadsheet we received from the
15 Wyoming Department of Environmental Quality, which was
16 provided in the relied-upon documents submitted with my
17 expert report, was entitled "Tongue CBM Direct
18 Discharge Outfalls.xls."

19 The units that were reported to us from the
20 DEQ database was in MGD, million gallons a day. And we
21 converted those to CFS for the Figure 11 and then on
22 into acre-feet for the table.

23 SPECIAL MASTER: So it does sort of raise the
24 question I guess I asked earlier, which is how I sort
25 of got into this to begin with -- I actually checked

1 the calculations, and they were correct -- if you
2 assume that, in fact, you turn this thing on and it
3 just spews the stuff out 24 hours a day for that period
4 of time.

5 THE WITNESS: So we started with an average
6 MGD for the month, is what was reported to us as
7 reported by the operator DEQ. We don't know whether
8 that actually happened as I envisioned it: hit the
9 switch, run steady, or all happened on one day. But we
10 ran the average over the month and we made the unit
11 conversion from there.

12 SPECIAL MASTER: Okay. Thank you.

13 So we've come to the end of this portion of
14 the proceedings. And as I mentioned yesterday and as
15 we'll discuss later, there will be another opportunity,
16 obviously, to argue this case in detail in the
17 posttrial briefs. And we've had a lot of evidence.
18 And we've had a lot of evidence on a lot of different
19 issues. So I don't expect that, you know, in the next,
20 say, hour of the proceedings, that we're going to be
21 able to cover everything.

22 But I do believe that closing arguments are
23 traditional. They are -- actually, I think there's a
24 good reason for it. It's an opportunity for you to
25 basically summarize things when things are fresh in

1 somebody's memory. And I will start going back over
2 the record before I actually get the posttrial briefs.

3 And so this is also an opportunity to, if
4 there are particular things to point out that you think
5 I should be looking at, this is an opportunity to do
6 that also.

7 So these don't need to be long, because,
8 again, you're going to have another opportunity. But I
9 just want to make sure that both sides did have an
10 opportunity to summarize things at this stage. And in
11 addition to that, if there are particular things you'd
12 like point out to me that you think I really should
13 focus on, then, you know, I'd be happy to take that
14 guidance at this particular stage.

15 So, Mr. Draper, I assume, by the way, that
16 North Dakota does not plan to present any type of
17 closing argument?

18 MS. VERLEGER: We do not plan a closing
19 argument.

20 SPECIAL MASTER: Okay. Thank you.

21 So, Mr. Draper.

22 MR. DRAPER: Your Honor, we will, as I
23 mentioned earlier, present a short closing argument.
24 There is, as you say, quite a bit of material in the
25 record at this point, and I think it will benefit from

1 the briefing and perhaps argument once you've had that,
2 briefed with care by the parties. But we will present
3 a short closing at this time. And Mr. Wechsler will do
4 that.

5 SPECIAL MASTER: Okay. Thank you.

6 CLOSING STATEMENT

7 MR. WECHSLER: Thank you, Your Honor. And we
8 weren't anticipating closing argument. So, like
9 President Lincoln, who you referenced, we haven't had
10 time to do a very short closing argument, but I'll do
11 my best to be brief. And I'm going to focus really on
12 the evidence in the case, which I think makes a
13 compelling case that there were violations by Wyoming
14 of the Yellowstone River Compact.

15 So I'll start with what we consider to be the
16 main elements of the claim. And that is, as you have
17 described it, sufficient notice was provided to Wyoming
18 that Montana had pre-compact rights that were going
19 unsatisfied and that at that time, there was
20 post-compact uses in Wyoming.

21 So starting with the notice issue, now in
22 previous rulings you've held that '04 and '06 were
23 not -- were years where notice was no longer an issue.
24 So I'll start with 1981.

25 And we know that prior to this, the trial,

1 Wyoming had strenuously argued, in fact presented
2 evidence in two different motions, indicating that
3 there was no call prior to 2004.

4 After the close of discovery, after the
5 expert reports had been submitted by Montana, we were
6 then provided the documents that ultimately became
7 Exhibit 136, which were the notes from the discussions
8 between Mr. Fritz and Mr. Christopulos. And I think
9 those very clearly show that there were conversations,
10 a series of conversations between Mr. Fritz and
11 Mr. Christopulos, which Mr. Fritz testified to, that
12 there was a call made in that year, 1981.

13 Now, at that time Montana was told, no, we're
14 not going to honor that call. And that, since 1981, is
15 a position that Wyoming has maintained.

16 It's also important to note that, despite
17 Wyoming's claim that a call, a verbal call, would
18 generate a mountain of paper, including interoffice
19 memorandums, letters to the governor, correspondence
20 amongst the states, in fact, the only piece of paper
21 that we have that indicates there was a call in 1981
22 are those notes that were produced after discovery.

23 I think it's also telling that the -- in
24 1981, there was no reference in the annual compact
25 meeting of that call whatsoever. In fact, we don't see

1 a reference until 1982. And Mr. Moy testified the
2 reason we do see that in 1982 is because he
3 specifically made a point of raising that issue.

4 Moving through the '80s, we did see an
5 exchange of letters between the governors, under which
6 I think Wyoming quite clearly said that the only
7 allocation under the compact is Article V.C,
8 essentially, we're not recognized under the pre-compact
9 protection for Montana. And, again, that is a position
10 that Wyoming has maintained throughout this time and,
11 in fact, up until the point of this lawsuit, we learned
12 from Mr. Tyrrell and others.

13 Moving to 1987 to 1989, we saw that
14 throughout this period in the 1980s, Montana made
15 significant efforts to attempt to develop a methodology
16 for administering the compact. And Mr. Moy testified,
17 who was the only one that has testified that was
18 involved in those efforts, that the reason for that was
19 Montana was concerned that it wasn't getting its share
20 of water, including its pre-1950 share of water.

21 And we saw that in a very early memo. I
22 believe it was 1982 that Mr. Moy sent to Mr. Fritz
23 saying, yes, there is a basis for calling Montana's --
24 making a call for Montana's pre-1950 rights. That
25 continued throughout the '80s, again, unsuccessfully,

1 largely because Wyoming was unwilling to recognize
2 protection from Montana's pre-1950 rights.

3 You then get to the '87, '88, '89 period
4 where Mr. Moy, again, clearly testified that he
5 informed Wyoming officials that Montana was short of
6 water, that there were pre-1950 rights not being
7 satisfied in Montana, and that Wyoming had to take some
8 action in order to make sure that water got to Montana.

9 Again, those were ignored by Wyoming. We
10 know that those happened in '87, '88, and '89, as
11 Mr. Moy testified, because they were very water short
12 years, and also because by 1989, there was a document
13 about the history of the compact that Mr. Moy testified
14 that he wrote that -- that at the end of the period
15 that he had been making a series of notifications to
16 Wyoming. And, ultimately, he got so frustrated that he
17 had to step away from the Yellowstone River Compact
18 for, essentially, a period of almost ten years. And
19 he didn't get involved again until 2000.

20 Which takes me to the next period of notice.
21 So now moving into the early drought years of the
22 2000s, both Mr. Moy and Mr. Stults testified that they
23 received a series of communications with water users,
24 including Mr. Hayes, Mr. Muggli, and others, and
25 they -- that prompted them to have discussions with

1 Wyoming. And we have seen documents in the record that
2 reflect those discussions with the irrigators.

3 Again, Mr. Moy and Mr. Stults clearly
4 indicated that they informed Wyoming that they were --
5 that Montana was short of water to satisfy its pre-1950
6 rights and that they were expecting more water to be
7 coming from Wyoming and that they both testified that
8 they very clearly made those communications and that
9 they believed those communications were understood by
10 the Wyoming officials.

11 So what does Wyoming say? Well, essentially
12 what we heard from the testimony of Wyoming
13 officials -- and it sort of has evolved over this case.
14 But what we heard from Mr. Whitaker, Mr. Fassett, and
15 Ms. Lowry, and those three in particular, was, yes,
16 it's true Montana told us there were shortages in
17 Montana; they did tell us they were short of water;
18 they did tell us there were pre-1950 rights not being
19 satisfied in Montana, and that included the Tongue
20 River Reservoir and the T & Y Canal, which they were
21 aware were pre-1950 rights.

22 So by the end of the trial, the Wyoming
23 position had morphed essentially into, well, you didn't
24 make the right kind of call; you didn't ask for the
25 right thing; while you may have told us that you had

1 pre-1950 rights that were short, you also needed to
2 tell us, in a particular form, that we needed to
3 curtail certain rights in Wyoming.

4 So it begs the question of, well, what's the
5 right standard? What do we measure a call or notice
6 by?

7 Now, prior to the trial, you did provide some
8 guidance on that. And my reading of those rulings is
9 that the notice simply needed to inform Wyoming that
10 the Montana pre-1950 rights were unsatisfied, that that
11 notice did not need to take a particular form, be in
12 writing, be made from any particular person.

13 We also have other sources that we can look
14 to to see what might be the standard by which we're
15 measuring. One would be the compact. We know the
16 compact was silent on the call or notification
17 question. And so the second logical place is to look
18 to the Yellowstone River Compact Commission.

19 Now, in 1982, when Mr. Moy raised this issue,
20 in fact, they identified what ought to be done. And
21 this is from J32, and it's a quote:

22 "Montana voiced its concern that during
23 low-flow years, Wyoming needs to regulate its post-1950
24 water rights more carefully so that Montana can use its
25 pre-1950 water. Montana, in turn, must notify Wyoming

1 that it is not able to obtain its pre-'50 water."

2 So there was only notification, not you have
3 to curtail specific rights, not that it has to be in
4 writing or any of these things.

5 We can also look to the testimony of the
6 water commissioners from Wyoming as to what do they
7 consider to be a call? We heard from Mr. Boyd,
8 Mr. LoGuidice, Mr. Knapp, and Mr. Schroeder. And
9 universally, they all testified that a call occurs when
10 a senior downstream user gives notice that he is short
11 of water. Now, even by the testimony of Wyoming
12 witnesses in this case, that was done in those years,
13 in 1987 through 1989, the early 2000s.

14 Okay. So moving to the next element, which
15 is Montana's pre-1950 rights were unsatisfied. I first
16 want to point out that the system in Montana is not a
17 complicated one. This is not extremely complex
18 plumbing that you have in Montana. You have the Tongue
19 River. At the very top of the Tongue, meaning the
20 south end upstream in Montana, right basically at the
21 state line, you've got a reservoir, which is one of the
22 prominent features. You then have the Tongue River
23 continuing down. At the very bottom is the T & Y
24 irrigation canal, which is a large pre-1950 right,
25 second oldest on the river in Montana, and also the

1 largest direct-flow right in Montana.

2 And there are very few tributaries, and those
3 tributaries rarely have water. And I'm not aware that
4 there is really any irrigation going on in those. And,
5 in fact, we didn't hear about any irrigation occurring
6 in any tributary in Montana.

7 So the pre-1950 shortages in Montana can be
8 divided into both storage and then direct flow. So
9 looking first at storage, the Tongue River Reservoir
10 was built in 1938. It filled by the mid-1940s. As
11 Dr. Littlefield testified, the drafters of the compact
12 were aware of the Tongue River Reservoir when they
13 entered into the compact.

14 Under Montana law and practice, as testified
15 to by Mr. Smith and others, the right was fully
16 perfected at the time they built the reservoir, filled
17 the reservoir, and then just offered that water for
18 sale, which was done in 1937, and filled sometime, as I
19 said, in the 1940s. And that, then, is the measure of
20 the water right up to the full yield of that reservoir.

21 Montana's law is not unusual. Mr. Tyrrell
22 testified that in Wyoming, a storage right is fully
23 perfected when a reservoir is built. And so where --
24 in this instance, Wyoming bears the burden of showing
25 that Montana's treatment of water rights is not

1 consistent with the doctrine of appropriation, which
2 will be difficult for them to show given they do the
3 same thing in Montana. So the pre-1950 use --

4 SPECIAL MASTER: Did you mean Wyoming?

5 MR. WECHSLER: Wyoming, I did. Thank you.

6 The pre-1950 use, then, is the full annual
7 yield, the capacity prior to the compact.

8 It's uncontested that the Tongue River
9 Reservoir did not fill in the years at issue, 2001, '2,
10 '4, and '6, at least the years at issue for damages
11 purposes.

12 Now, Wyoming has concocted an argument having
13 to do with 32,000 because that was the original number
14 of contracts that were sold. But as we have seen from
15 the Tongue River Water Users' Association and the
16 documents that what the users contracted for was to
17 purchase all of the water from the reservoir up to the
18 firm annual yield of that reservoir. And at that time,
19 that was considered to be 32,000 acre-feet.

20 The -- moving then to the shortages of direct
21 flow rights in Montana, Montana's flow rights are
22 separate and distinct from the Tongue River Reservoir.
23 And so it's not fair in the way that Wyoming has
24 attempted to characterize it as saying, well, don't
25 worry about the direct flow because you've got the

1 reservoir; both of them were short, and they shouldn't
2 be equated as the same. There are 77 pre-1950
3 direct-flow water rights in Montana. Again, as I
4 mentioned the largest is at the bottom.

5 Now, Montana created a demand model
6 essentially to be able to aid in determining when is it
7 that Montana is short? When those 77 pre-1950 water
8 rights are not satisfied. And we very much stand by
9 that model. And we believe that it was conservative.

10 It shows that in all but three years since
11 1961, there was insufficient flow to satisfy the
12 direct-flow pre-1950 rights in Montana. Wyoming has
13 essentially focused much of their case having to do
14 with the direct-flow rights on that demand model.
15 That's really been their target. Many of their
16 arguments about return flows and contemporaneous demand
17 are aimed at that demand model. As I said, we
18 certainly stand by that. The results can be seen in
19 Table 5 of Exhibit M5.

20 But it's not necessary for the purposes of
21 2001, 2002, 2004, and 2006 to rely on the demand model,
22 because in this case, we have had witness after witness
23 from Montana come up to the stand and indicate that in
24 those years, the only two rights that were receiving
25 water were the Nance right and part of the T & Y, not

1 even all of the T & Y; and the remainder of the
2 pre-1950 rights -- and, again, we heard from somewhere
3 around ten Montana irrigators -- the remainder of them
4 were required to use stored water.

5 So it really cannot seriously be argued that
6 there was sufficient flow entering the state to satisfy
7 Montana's pre-1950 rights. There were times, we've
8 seen in the record, that the water at the state line
9 got to as low as 11 CFS, I believe, which I think we
10 can all agree would not even satisfy the T & Y right.
11 And that's setting aside the other 75 pre-1950 rights
12 in Montana.

13 Now, the next thing to recognize is that
14 during those years that damages were calculated,
15 Montana was short essentially the whole year. Now,
16 there were times in the winter where Montana was not
17 storing, having to do with the 45,000 level. But other
18 than that, the reservoir did not store in the spring
19 fill period, which is the historic fill period for it,
20 the measure of its water right. And continuing after
21 that, the direct-flow rights were not satisfied. And
22 so throughout that entire period, Montana was short of
23 water.

24 We've also heard from the Montana irrigators
25 and officials that this caused significant harm in

1 Montana. There were irrigators that had to shut down
2 irrigation. They had to irrigate less acreage. They
3 were less productive with the acres that they did
4 irrigate. They had to sell cattle. They had to
5 acquire hay and other feed from other sources, all of
6 which caused significant harm and financial hardship
7 for many of the water users in Montana.

8 And, in fact, it hit them from two ways. On
9 the one hand they had less direct flow, and on the
10 other hand they also were reduced in the amount of
11 storage they had available. And so they got as low as
12 less than 50 percent of what their normal storage right
13 was. And so that was very difficult for the state of
14 Montana.

15 Turning, then, to the post-1950 use in
16 Wyoming. It's uncontroverted that there are a number
17 of post-1950 reservoirs in Wyoming, and it's also
18 unconverted that Wyoming stored water in those
19 post-1950 reservoirs in 2001, '2, '4, and '6.

20 In Wyoming, you can't access the reservoirs
21 until the spring. And we heard from the water
22 commissioners that it is routine to readjust the
23 storage at the end of the filling season to make sure
24 the senior right gets its full share of water.

25 Now, that's all that Montana asked. But

1 despite the fact that Wyoming did not release any of
2 the storage water until late June in those years -- in
3 other words, it was still in the reservoirs -- it did
4 not honor Montana's request.

5 Turning, then, to the post-'50 irrigation in
6 Wyoming, despite its claims that Wyoming has incredibly
7 tight records, it had no measuring devices on the main
8 stem of the Tongue or on Prairie Dog Creek and,
9 therefore, had no idea -- no way of determining how
10 much water was being used.

11 Wyoming never regulated the lower part of the
12 main stem of the Tongue, and only once did they
13 regulate the Tongue at all in 2006. That was on an
14 upper portion. They never regulated Columbus Creek,
15 Fivemile Creek, Prairie Dog Creek, or the lower part of
16 Big Goose Creek below the Alliance Ditch.

17 Most of the Wyoming witnesses testified that
18 when there's no regulation, Wyoming users take all
19 available water up to their full appropriations,
20 including in those years '01, '02, '04, and '6. The
21 irrigation season ends in September; it begins in May.
22 And, again, we had multiple Wyoming witnesses come up
23 here and say that, in fact, during those years, '01,
24 '02, '04, '06, they were irrigating throughout the
25 season. It's undisputed -- my reading of Mr. Fritz's

1 report, it's undisputed that there was post-1950
2 irrigation use in Wyoming in the years at issue.

3 Turning then to CBM, which is the last
4 post-1950 impact in Wyoming, there's no dispute between
5 the experts, Mr. Larson and Mr. Schreüder, that there
6 is a hydrologic connection between the CBM-produced
7 water and the surface flows. Mr. Larson utilized a
8 BLM-created model, which was developed in order to
9 address CBM impacts in the Powder River Basin,
10 including the Tongue River Basin.

11 Wyoming would have you believe that that BLM
12 is totally inappropriate, completely not for the
13 purposes that it was used in this case. But based on
14 Mr. Larson's extensive experience, including interstate
15 proceedings and including developing MODFLOW, which is
16 the methodology that actually went into the BLM model,
17 Mr. Larson determined that it was appropriate for the
18 use in this case.

19 Now, boiling everything down between the two
20 experts, I think the main issue between the experts is
21 the amount of infiltration that comes from the produced
22 water and the impoundments.

23 That's kind of a squirrely issue, as we found
24 out today. There was only one witness that came up to
25 the stand that actually has studied that issue and

1 looked at that issue. That witness was called by
2 Wyoming. That was Mr. Wheaton.

3 Now, Mr. Wheaton testified there was almost
4 no infiltration to the regional groundwater aquifer
5 from the CBM produced water.

6 Turning then briefly to Wyoming's defenses,
7 the first one that they had raised, I believe in their
8 pretrial brief and elsewhere, was the interstate
9 remedies question. Essentially, their argument was,
10 well, there's post-1950 users in Montana that were
11 getting the direct-flow water.

12 We heard from each of the water commissioners
13 that was appointed in Montana in those years,
14 Mr. Kepper, Mr. Gephart, Mr. Fjell. And each one of
15 them was consistent. Those commissioners testified
16 that they measured every diversion in Montana. They
17 were on the river every day. They made sure that only
18 those rights that were entitled to rights received
19 water.

20 Contrary to Wyoming's pretrial position,
21 those water commissioners testified that they regulated
22 all water use, including direct flow. They also
23 accounted for storage and direct flow separately.

24 In the end, there really is zero evidence
25 that there was any post-1950 user in Montana that

1 received direct-flow water out of priority. Really the
2 impression that I think all that evidence gave was that
3 it was a very effective system in Montana.

4 It's also not particularly surprising, given
5 that the water users who were in Montana testified that
6 they were aware of their water use, their water rights,
7 their neighbors' use and rights, the storage rights,
8 because they are all taken from the same source. And
9 as I mentioned, the only two rights receiving water in
10 those particular years, direct-flow water, '01, '02,
11 '04, '06, after the spring runoff, were Mr. Nance and
12 part of the T & Y.

13 The next defense that Wyoming has attempted
14 to focus on is the issue of waste. And this has come
15 in two forms. One, they say that the winter flows
16 through the reservoir, as they like to call them,
17 foregone storage opportunities, are waste. And the
18 second is that there was waste from the direct-flow
19 users.

20 I think there's no evidence of either one of
21 those. It is noteworthy that Wyoming bears the burden
22 of establishing waste and also, as I said, of
23 establishing that Montana's practices were not
24 consistent with the doctrine of appropriation.

25 Now, turning to the waste in the reservoir,

1 there were two experts in this case who were qualified
2 and offered opinions on the operations of the Tongue
3 River Reservoir. Both of those experts, Mr. Smith and
4 Mr. Aycock, were Montana experts. Mr. Hinckley
5 expressly stated that he was not offering any opinions
6 on the operations of the Tongue River Reservoir.
7 Rather, he said, he was simply essentially engaging in
8 an accounting exercise. And that's very different.
9 And I think makes it incredibly difficult for Wyoming
10 to prove its burden.

11 Mr. Smith and Mr. Aycock both testified in
12 their expert opinions that the operations of the Tongue
13 River Reservoir were reasonable and consistent with the
14 practices in Montana and elsewhere. They both
15 expressed expert opinion that there were multiple
16 justifications for the winter flows through the
17 reservoir, including the historic operations of the
18 reservoir, which formed the water right itself, and
19 that that water right had the fill period in the
20 spring.

21 The senior stock rights downstream, those
22 were necessary to prevent property damage from ice
23 floes. They were necessary to prevent damage to the
24 spillway of the reservoir. They were necessary to
25 prevent ice damage -- I'm sorry -- damage to property

1 from flood control and also necessary to prevent damage
2 from -- to the outlets from ice.

3 All of those things are consistent with the
4 doctrine of appropriation. We heard from the Wyoming
5 witnesses that reservoirs and other diversion works in
6 Wyoming are not required to be operated in a way that
7 causes damage to the diversion work itself or the
8 reservoir or to downstream property. We heard that
9 they will operate reservoirs consistent with the water
10 right itself.

11 We also heard about the practices in Wyoming.
12 And we heard that in the Tongue River Basin, for
13 example, there are winter flows that are essentially
14 bypassed through the reservoir, including Park and
15 others, and that those winter flows have never been
16 charged against the Park Reservoir, for example.

17 Now, Wyoming says, well, there was never
18 really a call made involving Park. Park never made a
19 call. And that's not exactly true because Park called
20 water from Cross Creek. We know that water was sent
21 down from Cross Creek down to Park. And even when that
22 happened, Park never once was charged for the bypasses
23 that went through the reservoir.

24 Again, there was some notion that -- there
25 was some storage rights to satisfy those winter flows.

1 But I think we showed that, by orders of magnitude,
2 those are vastly insufficient to cover the winter
3 flows.

4 And so essentially what Wyoming attempts to
5 do is to impose a standard and a practice on Montana
6 that it doesn't do itself in the state of Wyoming.
7 And, in fact, we also can see in the operating plan of
8 the Tongue River Reservoir, which was adopted pursuant
9 to federal law, the Northern Cheyenne Tribe Compact, by
10 an advisory committee which included the federal
11 government, that the winter flows should be 175 CFS.
12 And this 175 CFS is entirely consistent with the winter
13 flows, including those flows that existed at the time
14 of the compact. There is no contrary evidence.

15 Turning to Wyoming's argument that there was
16 waste of direct flows, again, we heard from multiple
17 Montana irrigators, we heard from Montana water
18 commissioners, and none of them indicated that there
19 was any waste whatsoever.

20 Mr. Muggli testified that the T & Y was
21 diverting almost the entire flow of the -- was
22 diverting the entire flow of the river during many of
23 the months at issue in those early 2000 years, the 2000
24 drought years, and that also there was no water coming
25 out the end of the T & Y.

1 Mr. Aycock reviewed the flows below the T & Y
2 and, in fact, the flows in general on the river, and in
3 his expert opinion, the Tongue River in Montana,
4 including those flows and including the way they
5 operated the reservoir, was managed very efficiently.
6 Again, there's no contrary expert opinion.

7 Turning to the contemporaneous demand
8 argument from Wyoming, again, this is really directed
9 at the demand model, because it can't seriously be
10 argued that there wasn't contemporaneous demand from
11 Montana in 2001, '2, '4, and '6. The T & Y was
12 receiving only a part of its water. None of the other
13 pre-1950 water rights were getting any water,
14 direct-flow water, and so they were forced to use
15 stored water. And, therefore, we know that they were
16 ready, able, and willing, as Wyoming likes to say, to
17 take that water. We also know that the reservoir
18 didn't fill and that Montana made repeated requests for
19 water for those reservoirs.

20 Next, we've heard a lot about return flows.
21 Again, I don't know that there was any Wyoming expert
22 that actually quantified return flows. We heard that
23 from Mr. Hinckley. There's really no expert opinions
24 to substantiate that sort of notion that they have put
25 out there.

1 The only expert that actually reviewed the
2 issue of whether there was -- the Tongue River in
3 Montana is gaining or losing, the only one to directly
4 address that issue or evaluate that issue was
5 Mr. Dalby. And Mr. Dalby indicated and testified that
6 the Tongue River in Montana during dry irrigation years
7 is a slightly losing stream. And, again, there's no
8 other expert opinion on that particular issue.

9 Even if there were return flows in, let's
10 say, Mr. Book's conservative assumption, I might say,
11 of some return flows that it's slightly gaining in the
12 irrigation season, even if that were correct, it
13 wouldn't get close to the amount of water necessary to
14 satisfy the direct-flow rights in Montana. Again,
15 we're talking about flows that were as low as 15 CFS.
16 Extremely low in these drought years.

17 And, finally, the sort of overarching
18 argument that Wyoming seems to be making is that, well,
19 maybe there was a violation, but that violation was
20 only small, and so let's not worry about it. There's
21 no de minimis exception in the compact or in the case
22 law for a violation of a compact which occurred here.

23 You heard from irrigators in Montana that
24 every small amount of water counts. You heard from
25 DNRC administrator, Mr. Tubbs, and from the attorney

1 general of the State of Montana, General Fox, that this
2 case is extremely important to the water users of the
3 Tongue River Basin and to the state of Montana as a
4 whole.

5 And try as Montana might, with the various
6 assumptions and various incredibly, what I would
7 consider, inaccurate assumptions, they still could not
8 develop a final number that put them at zero. And so
9 all the evidence in the case is that there was impact
10 from Wyoming's post-1950 use in Montana.

11 SPECIAL MASTER: By the way, I think you just
12 said, try as Montana might. I assume, again, you meant
13 Wyoming there?

14 MR. WECHSLER: I absolutely meant Wyoming.

15 And for all those reasons, we would
16 respectfully request that there be a ruling on the
17 liability phase of this case in Montana's favor. Thank
18 you, Your Honor.

19 SPECIAL MASTER: Before you actually sit
20 down: So first of all, I'm glad we're actually doing
21 this because this is valuable for me to hear both sides
22 set out their cases as they see them. And your closing
23 is, I think, an example of the value of that.

24 Let me just mention one or two points that,
25 as you think about your posttrial briefs, will be

1 valuable. One of them is my guess is that, in
2 connection with the filling of the reservoir, that
3 there will probably be a number of issues here, some of
4 which you've already focused on in terms of what's the
5 appropriate size of the reservoir for purposes of
6 looking at its filling. You had also mentioned the
7 question of the actual rights to stored water out of
8 the reservoir.

9 And without, I think, unreasonably
10 anticipating what one of the things Wyoming will
11 probably talk about is that if you look at the compact
12 itself, Article V.A of the compact provides for the
13 protection of appropriative rights to the beneficial
14 uses of the waters of the Yellowstone River system.

15 And then if you look at the definition of
16 "beneficial uses," it's defined to be "the use by which
17 the water supply of a drainage basin is depleted when
18 usefully employed by the activities of man."

19 And so it does raise the interesting question
20 of when you look at the reservoir rights and I think --
21 although again this is something both sides are free to
22 brief -- I don't think you can argue that it doesn't
23 technically say anything about storage, and, therefore,
24 storage rights are not protected. But it does raise
25 the interesting question of when you talk about a

1 reservoir right, what does it protect?

2 And my guess is one of the things Wyoming
3 will probably argue is that, well, initially there was
4 only 30,000 feet being diverted from it and being used;
5 and, therefore, really you only get protection for
6 30,000 feet -- is it 30,000 or 32,000? 32,000. So you
7 really only get protection for 32,000 acre-feet of
8 storage.

9 My guess is, looking at Montana's side,
10 number one, you know, again, your claim is going to be
11 in part that, well, under Montana water rights, you
12 know, you perfected a right to this much storage and
13 that's what gets protected.

14 But this has to be interpreted through the
15 lens of the compact. So it raises the -- I think, the
16 interesting question of what is the actual amount of
17 reservoir storage that should be protected under the
18 compact? Is it what Montana recognized as a reservoir
19 right? Is it, as I would expect Wyoming to argue, just
20 32,000 acre-feet of storage?

21 If -- and let me just make an assumption
22 here. We've talked sometimes about sort of like one a
23 half fills. You know, if that were, say, the Montana
24 rule, is it 32,000 acre-feet times 1.5? You know, it
25 does raise that interesting question.

1 So that's one of the issues that I know I'll
2 appreciate both sides briefing. And I think I have a
3 better sense of where Wyoming will come out on this
4 because they will argue for just 32,000 acre-feet, and,
5 you know, that's only the amount that was being
6 diverted for beneficial use.

7 I have less sense of -- well, no, I guess I
8 do know what Montana's argument is. It's Montana's
9 water rights says this is what you get, and what this
10 is really protecting is Montana's full recognition of
11 reservoir right. I don't know if you wanted to say
12 anything about it at this point in time, but I'm just
13 saying I think that will be an issue.

14 MR. WECHSLER: Yes, Your Honor, and I agree
15 that it's a complex issue, certainly one we will
16 address, as you indicate, in our posthearing brief.

17 I will say a couple of things about that.
18 And the first I'll say is that it's not the first time
19 that the definition of beneficial use has come up in
20 this case. If you remember what Montana argued,
21 relatively strenuously, in the first interim report and
22 to the Court was that that had a particular definition
23 in the compact. And that definition needed to be given
24 a -- the meaning that the word said.

25 And my reading of your report and my reading

1 of what the Court said is, well, it's not so different
2 than what it is under the doctrine of appropriation.
3 So I think what you look to is the doctrine of
4 appropriation. We see in Wyoming, we see in Montana,
5 that the beneficial use of a reservoir is that amount
6 that the reservoir has fully filled to and the firm
7 yield of that reservoir.

8 And so that has to be the amount of the
9 pre-1950 water right. The amount that was put to
10 beneficial use was that entire firm yield of the
11 reservoir in 1950.

12 I would also -- I think it's unreasonable to
13 think that, you know, there's documents -- and we know
14 that Montana, as part of negotiating the compact, one
15 thing that was incredibly important to Montana was the
16 storage in Montana. And so it would be unreasonable to
17 say that Montana would agree or even that Wyoming would
18 demand that "Well, we know that storage is super
19 important to you, Montana. But even though it's really
20 important, we're going to say that you've built this
21 really large reservoir and you filled it, but you only
22 get 32,000 acre-feet."

23 And the last point before I stop on that
24 particular issue, and the rest we'll put in the brief,
25 is that that 32,000 contract amount, acre-feet amount

1 is the amount actually delivered to the users. Now,
2 Wyoming hasn't offered any evidence whatsoever to say
3 what's the firm annual yield -- what does that
4 reservoir need to fill in order to satisfy those 32,000
5 acre-feet?

6 The evidence that we have is that they
7 believed that the full fill, that the reservoir needed
8 to be filled to its full capacity, in order to satisfy
9 that 32,000 acre-feet. And that was what the water
10 users were agreeing to take.

11 SPECIAL MASTER: Okay. Second thing that I
12 assume will still come up there -- and I was reaching
13 for my copy of the compact during part of your
14 argument; so if I missed it let me know -- but the
15 question of the Northern Cheyenne rights. From, in
16 particular, Mr. Draper's cross-examination the other
17 day, I assume part of the argument is that that water
18 sits down at the bottom of the reservoir and that,
19 therefore, you know, we don't have to worry about that.
20 But I was just curious as to what Montana's argument is
21 on that.

22 MR. WECHSLER: Well, I think part of the
23 argument is certainly in this case, up until this time,
24 there is no -- you don't get into the amount, the
25 additional amount that was added to the reservoir in

1 1999. And the reason that's true is you have the
2 minimum pool that's roughly 10,000 acre-feet down at
3 the bottom of the reservoir. And there's been
4 testimony that Montana never stored more water than it
5 did in any one year prior to the compact, other than
6 the first year, 1999, that it filled up essentially to
7 the full 79,000 postrehabilitation amount.

8 I will point, if -- to the extent that it's
9 necessary to determine whether the Northern Cheyenne
10 right in the reservoir is pre-compact; in other words,
11 comes out of Montana's share or before either state
12 takes that.

13 I think that Article VI really provides the
14 answer. I know at the beginning of the case you
15 mentioned the Arizona v. California case. Now that
16 compact, of course, has different language. And while
17 I don't remember exactly the language, my recollection
18 is it says something, nothing shall change the
19 obligations of the federal government, words to that
20 effect.

21 This compact says nothing in this compact
22 shall adversely impact the rights of the Northern
23 Cheyenne Tribe. And we know that -- we've seen
24 testimony that the Northern Cheyenne Tribe claim based
25 on Winters Doctrine law -- I won't go into, but that it

1 was a pre-1900 right.

2 If the Northern Cheyenne tribe right has to
3 come out of Montana's share, the way that we know the
4 compact works is Wyoming gets its pre-'50 rights first;
5 then Montana gets its pre-1950 rights. And there are
6 years when the reservoir -- or there's shortages. And
7 so Wyoming gets all of its rights and Montana might not
8 get all of its rights.

9 And what that would mean for the Northern
10 Cheyenne Tribe, if it's construed to come out of
11 Montana's share, is they would be adversely affected.
12 They couldn't get all of their water. It would be
13 impossible. So that would be directly at odds with the
14 compact.

15 And the -- it's also true that the Northern
16 Cheyenne Tribe and the reservoir right are commingled;
17 and, therefore, Montana is not able to get its full
18 storage right unless the reservoir is full. And the
19 same is true of the Northern Cheyenne.

20 SPECIAL MASTER: Okay. So that's helpful.
21 Sort of in the back of my mind, particularly during the
22 earlier portion of the trial, one of the things that I
23 was a little bit concerned about was whether or not we
24 would actually get into a situation about the Northern
25 Cheyenne would become indispensable parties to this

1 case, which is something I obviously want to avoid.

2 But as you both talk about these issues, keep
3 that in mind and alert me if you think at any
4 particular point in time that's a worry. I'm sure that
5 Ms. Whiting will probably be following along on all
6 this and making sure that the Northern Cheyenne's
7 rights are not in any way affected by anything that the
8 Supreme Court might do in this particular case.

9 But, again, that was a concern I had earlier
10 and would want both sides just to alert me at any point
11 in time if that became a concern.

12 The last thing that I'll just mention that
13 your argument raised in my mind, and I'll sort of let
14 you know, at least way before seeing the posttrial
15 briefs and the oral arguments, I've been thinking about
16 the questions of waste -- how individual water users
17 might be using their water and the like -- is really
18 that -- the question is how the system is administered
19 more than it is a question of a particular water user
20 in a particular situation.

21 In other words, every system is going to have
22 some degree of, I guess maybe, sort of a question of
23 slippage in its regulatory system.

24 So the question really becomes, you know, for
25 example on the Montana side, whether or not the way in

1 which Montana was regulating the water during the
2 relevant periods of time was adequate under the
3 compact. So it's really sort of a system question,
4 again, rather than looking at a microlevel of
5 particular individuals.

6 And one of the questions that I think, again,
7 will be relevant here is, what's the standard for doing
8 that? And when we had our arguments on the various
9 summary judgment motions before the trial, I had
10 suggested it was really sort of a question of, you
11 know, does it comport with the way in which prior
12 appropriation systems are generally managed and was it
13 reasonably managed?

14 And, of course, it's always easy for lawyers
15 and judges and special masters to reach for the term
16 "reasonableness," because it's something that we all
17 think we know and probably all disagree a bit on
18 exactly what it means. But, you know, once we get into
19 the facts here, you know, what the exact standard is by
20 which the system should be judged, I think, is
21 important.

22 And on this, one of the things that, you
23 know, just thinking about prior original jurisdiction
24 cases, one case that comes to mind is the -- I guess,
25 was it Colorado versus New Mexico or New Mexico versus

1 Colorado?

2 MR. DRAPER: Colorado v. New Mexico.

3 SPECIAL MASTER: That's what I thought.

4 Okay. The Colorado v. New Mexico case, now, that was
5 an equitable-apportionment case rather than a compact
6 case. But it was relevant in the sense that the
7 special master in that particular case originally
8 pushed for a standard that would have been more
9 conservative of water, more exacting of the way in
10 which water was being used than the state actually
11 employed at that particular point in time.

12 And the court ultimately, I think, seemed to
13 sort of relax a bit, you know, how much they were
14 worried about eking out, you know, the last amount of
15 water that you might be able to save for other people
16 to use.

17 Other than that, I'm not sure there's much
18 precedent out there from the Supreme Court as to how
19 you might resolve a question of this nature. But I
20 just mention that as some quick ramblings on wondering
21 exactly how one approaches that particular question,
22 how the Court might want to approach it in the context
23 of this particular compact.

24 And recognize, of course, that this goes, you
25 know, both directions. And so, you know, whatever

1 standard you think about applying in Montana, that
2 could be potentially used on the Wyoming side also.

3 I will differentiate, though, between two
4 different situations. One would be on the Wyoming side
5 if, as a -- and, again, this is just my initial
6 thinking, but I figure all of this is probably relevant
7 for purposes of your briefing.

8 On the Wyoming side, to the degree you have a
9 river which is, you know, well regulated and it just
10 happens that there is somebody out there who is
11 post-1950 who, you know, turns on some water when
12 somebody is not looking and utilizes it, then that
13 strikes me as the sort of thing that happens, right?
14 And it's hard for Montana to complain, if Wyoming is
15 regulating things well, that there's that type
16 slippage.

17 On the other hand, if you have a stretch of
18 river like the lower part of the main stem of the
19 Tongue where there's no regulation at all because
20 there's no one downstream that calls that portion of
21 the river, then that seems to be a different issue,
22 because there, it's not really, you know, the fact that
23 Wyoming has a great system -- and I'm doing this as an
24 illustration at the moment; I'm not necessarily
25 concluding that it is a great system -- but that

1 Wyoming has a great system and it just happens there's
2 inevitable slippage in it; it's that, well, this
3 portion of it just hasn't been regulated. And if, in
4 fact, Montana were treated like any other appropriator
5 in Wyoming that's downstream and senior, then you would
6 have regulated those people.

7 Well, that's different. That's not getting
8 to the question of what is the reasonableness of the
9 system that's being employed. It's, instead, getting
10 to the fact that there's a gap in the system. And
11 there I would think that the compact would fill that
12 gap and say, okay, in this situation, where you're
13 supposed to protect pre-1950 appropriators, pre-1950
14 appropriators in Montana shouldn't be treated any
15 differently than pre-1950 appropriators who are
16 downstream in Wyoming. So I want to differentiate
17 those two types of situations.

18 But, again, the way I've been thinking about
19 this is thinking about it as sort of systemwide. In
20 the case of Wyoming, are there any gaps that, under the
21 compact, should be filled? And in the Montana case,
22 does the way in which the system has been regulated,
23 does it comport generally with prior appropriation and
24 is it reasonable?

25 And it's there where I begin thinking about

1 cases like Colorado v. New Mexico, because it's the
2 only case where the Supreme Court has gotten into the
3 question of, well, under the prior appropriation
4 system, there again, though in a situation of equitable
5 apportionment, exactly what will we demand of the
6 states? Because I think one can reasonably say that
7 every state in the U.S. has some slippage in its
8 system. There is inevitably a little bit of water
9 that's lost, and it varies from state to state. And so
10 the question is how much do you demand?

11 MR. WECHSLER: Your Honor, I think most of --
12 the question of the standard is complicated. And if
13 it's okay with you, I'll reserve that for the brief
14 other than to say I believe -- and I don't think
15 hearing you saying anything different. I do believe
16 that the system in Montana -- I think the evidence
17 shows it was an extremely effective system and actually
18 not so different than the one in Wyoming.

19 The rest of the testimony -- or that issue,
20 if it's okay with you, I'll reserve for the posthearing
21 brief.

22 SPECIAL MASTER: That will be fine. And,
23 again, I wasn't, in making those comments, in any way
24 suggesting that there's any significant deficiency in
25 what the Montana system has been. But simply, you

1 know, what exactly that standard is that is required of
2 a system is, I think, going to be a relevant question
3 here.

4 And, you know, I'm not sure, getting to your
5 particular point -- and I realize that Montana believes
6 its system is like Wyoming's system. But even if they
7 are different, I'm not sure it's the difference that
8 matters so much as the question of, you know, is it a
9 reasonable prior appropriation system for purposes of
10 managing this portion of the compact?

11 MR. WECHSLER: Understood. And I don't mean
12 to suggest that Montana's system is the same as
13 Wyoming's. I simply am saying it's a very effective
14 system, and in many ways I think it's a better system.
15 But I'll leave Mr. Kaste to disagree with me on that.

16 SPECIAL MASTER: And with Mr. Hayes sitting
17 back there, you better say nice things about the
18 Montana system.

19 Okay. It's 25 after the hour. So what I
20 would suggest is now that we take a break, and that --
21 I assume, Mr. Kaste, the length of your argument for
22 any comments that I would make would be probably about
23 the same length as Mr. Wechsler's?

24 MR. KASTE: I'm having a hard time judging
25 that because he went really fast. There were a lot of

1 words in a short period of time. I don't anticipate
2 that it will be any longer than Mr. Wechsler. I think
3 he did a fantastic job of being concise, and I hope to
4 be as concise.

5 I cannot, in the limited time that I have to
6 prepare for this closing argument, give a comprehensive
7 overview of the evidence, just focus on what we think
8 are some of the important points. And I don't think it
9 will take terribly long. I will try to address the
10 things that you raise with Mr. Wechsler to the extent
11 that I can.

12 SPECIAL MASTER: Okay. That's good. So what
13 I'm thinking is why don't we go ahead and start at
14 1:30. I think that will give us enough time for your
15 closing, then have a break, and then to talk about the
16 process from this point forward.

17 So we're recessed for lunch at this point in
18 time, and I'm going to stay here because I actually
19 want to talk to the deputy for a moment.

20 (Recess taken 12:27 to 1:32
21 p.m., December 4, 2013)

22 SPECIAL MASTER: Okay. Everyone can be
23 seated except for Mr. Kaste.

24 CLOSING STATEMENT

25 MR. KASTE: Thank you. Thank you for the

1 opportunity to present these closing remarks,
2 understanding that they are not the full arguments that
3 we might make and certainly haven't been able to
4 marshal all the evidence in support of the statements
5 made in the course of this closing that we will
6 ultimately rely on.

7 But I do think this is worthwhile and helpful
8 to hear what the parties' initial reactions were at the
9 close of evidence. So here are the State of Wyoming's.

10 SPECIAL MASTER: Okay.

11 MR. KASTE: As we've said multiple times,
12 while this is a case among sovereigns states, at its
13 core this is a simple breach of contract case. And in
14 any breach of contract case, the party alleging the
15 breach has the burden of proof on each essential
16 element of its claim.

17 Moreover, a party seeking to enforce a
18 contract containing a condition precedent, such as the
19 notification requirement in this case, that party bears
20 the burden of proof as to the occurrence of the
21 condition. And if there's no evidence of the
22 occurrence of the condition, the duty of the defendant
23 has not been triggered, and his or her promise cannot
24 be enforced.

25 Montana has fairly consistently argued that

1 the burden of proof in this case falls on Wyoming.
2 But, in fact, that is not the law. And even the
3 Montana Supreme Court has found, for example, in Tucker
4 v. Missoula Light & Water Co., that an appropriator
5 seeking to enforce his rights under the doctrine of
6 appropriation must prove his need for the water as well
7 as his right thereto and his ability to use the same
8 through his system of distribution.

9 Montana has failed to meet this burden and
10 failed to prove any of the five essential elements of
11 its claim. I did notice during the course of Montana's
12 closing argument that their belief is that there are
13 three essential elements to their claim. Wyoming
14 asserts that there is not, that there is, in fact, an
15 obligation in this case in order to prevail that
16 Montana must prove causation and injury as they would
17 in any contract or tort case.

18 The evidence in this case clearly establishes
19 that Montana did not make calls on Wyoming before 2004.
20 It's worth noting that unlike the summary judgment
21 proceedings on this issue, you are no longer required
22 to view the facts in the light most favorable to the
23 nonmoving party. Instead, now that the evidence is
24 closed, you can judge the evidence presented by both
25 parties on its merits and make appropriate inferences

1 from that evidence.

2 Here the evidence from the Wyoming witnesses
3 was unequivocal. No one from Montana made a call or
4 demand on Wyoming for regulation before 2004. Instead,
5 at times outside the irrigation season and after the
6 fact, Montana officials expressed concern about the
7 conditions that had prevailed in their state during the
8 preceding irrigation season and wondered if there were
9 ways to administer the compact in the future that would
10 result in more water for Montana.

11 These discussions about administration of the
12 compact were generally focused on the application of
13 Article V.C, which makes perfect sense given that both
14 states understood that provision is the vehicle by
15 which appropriated water was allocated by the compact.
16 These kinds of communications are qualitatively
17 different from a call for regulation, and they clearly
18 were not understood to be calls by the officials in
19 Wyoming.

20 The difference between how Wyoming reacted to
21 the two different kinds of communications is telling.
22 When Montana actually made calls, there was a
23 significant and well-documented series of
24 communications. E-mails and letters were exchanged
25 within and between the states. There were briefings to

1 the governor, calls between officials, meetings, press
2 releases, requests for information, and marshaling of
3 staff to report on conditions. None of this happened
4 before 2004.

5 Similarly, when calls were actually made,
6 they're reflected in the annual reports of the compact
7 commission. Even the phone call by Mr. Fritz to
8 Mr. Christopoulos in 1981, which was a hypothetical
9 inquiry as opposed to a call, made its way into the
10 report. And with regard to 1981, it's clear that the
11 injury Montana was concerned about never occurred. At
12 that time, Mr. Fritz was concerned about filling the
13 reservoir, and it did fill.

14 In contrast to these well-documented
15 responses to Montana's call in 2004 and 2006, there
16 isn't a piece of paper corroborating Montana's claims
17 that it made calls before 2004. This disparity is
18 telling and determinative.

19 Accordingly, Wyoming is titled -- entitled to
20 the entry of judgment on all of Montana's claims for
21 all remaining years before 2004. In 2004 and 2006,
22 Wyoming has consistently admitted that Montana did make
23 calls. But Montana has failed to prove the remaining
24 elements of its claims for those years. Montana, of
25 course, has the burden of proving its pre-1950 rights

1 were actually short in 2004 and 2006.

2 As it relates to the Tongue River Reservoir,
3 Montana misapprehends the nature of its right under
4 Article V.A -- yeah, under Article V.A of the compact;
5 and, consequently, its claim of injury to that right is
6 misplaced. Montana's Article V.A right in the Tongue
7 River Reservoir is defined by the terms of
8 Article V.C.3, not Montana law. The compact clearly
9 protects existing uses in existing reservoirs under
10 Article V.A and new uses in existing reservoirs under
11 Article V.C.

12 Mr. Wechsler noted that we had talked about
13 beneficial use in this case in the past. That's true,
14 but in the context of the consumptive requirements and
15 the consumptive use of water in the direct-flow portion
16 of this case. Reservoirs under the compact are treated
17 differently. They are specifically called out and
18 treated differently than the direct-flow uses by virtue
19 of the language in Article V.C.

20 The evidence in this case has been very
21 clear. As of 1950, the existing uses in the Tongue
22 River Reservoir were limited to the provision of less
23 than 32,000 acre-feet of water for contracts with the
24 Tongue River Water Users' Association. The evidence is
25 similarly clear from the historical record that it only

1 took 45,000 acre-feet of water in the reservoir to meet
2 these contract demands.

3 Montana says, well, reservoirs are important.
4 Wouldn't it make sense that we would want our reservoir
5 filled up all the way? Well, probably. Except that in
6 the course of the compact negotiations, the parties
7 agreed to treat existing uses in existing reservoirs
8 differently than new uses in existing reservoirs. And
9 we are bound by the provisions of the compact in that
10 regard.

11 Of course, even if Montana is entitled to
12 45,000 acre-feet that it took to deliver the contract
13 water as of 1950, the evidence demonstrates that it
14 received this amount of water in both 2004 and 2006.
15 While Mr. Hinckley's testimony established this fact
16 perfectly well, one need only look to Table 4-A of
17 Mr. Book's report to see that in May of 2004, the
18 reservoir end-of-month contents were 46,300 acre-feet
19 and in May of 2006, the end-of-month contents were
20 60,020 feet. And these were not necessarily the peak
21 storage values for those years.

22 Of course, these amounts were actually
23 stored. And even without accounting for Montana's
24 bypasses in excess of what was necessary to meet the
25 needs of downstream senior rights, Wyoming met its

1 obligation under the compact as it relates to Montana's
2 Article V.A right in that reservoir.

3 And, of course, Wyoming asserts that
4 Montana's Article V.A right is limited by the doctrine
5 of appropriation to that which is necessary to satisfy
6 senior rights. In this regard, Arizona v. California
7 is instructive. In that case the court stated that
8 invested rights to the appropriation of water are
9 subject only to the right of prior appropriations.

10 Moreover, the compact contains an explicit
11 definition of beneficial use which dictates that
12 Montana cannot call on Wyoming to fulfill these
13 nonbeneficial bypasses. This is true regardless of
14 whether Montana has historical released water for these
15 purposes. Montana cannot rewrite the definition of
16 "beneficial use" in the compact through its course of
17 conduct, nor can it unilaterally change the doctrine of
18 appropriation simply by force of habit.

19 Wyoming is not obligated to fill Tongue River
20 Reservoir to its current or even its pre-1950 capacity,
21 and it is not obligated to pay for Montana's
22 discretionary operational decisions. Wyoming is
23 entitled to judgment on Montana's claims arising from
24 an alleged injury to the reservoir.

25 With regard to its direct-flow rights,

1 Montana attempted to show a shortage with the flow
2 model based on paper rights using continuous diversions
3 on lands that were not necessarily even irrigated in
4 2004 and 2006. This model, as explained by
5 Mr. Hinckley in detail, does not approximate reality,
6 and it's insufficient to show any actual
7 contemporaneous shortage.

8 The only other evidence of shortage comes
9 from the testimony of the individual irrigators.
10 However, there was no testimony establishing a causal
11 link between these shortages and actions in Wyoming.
12 Mr. Book was the likely candidate to provide this
13 causal link. But if you look at the last paragraph on
14 page 4 of his original report, he acknowledges that he
15 didn't undertake that task.

16 That paragraph reads, "The investigation
17 conducted for this report does not include
18 quantification of damages to the -- to Montana water
19 users. An assessment of the effects of the depletions
20 in Wyoming on deliveries to water users in Montana
21 would require further analysis."

22 His testimony on the stand was consistent
23 with his representation in the report. In the absence
24 of evidence establishing causation, Montana's claim
25 must fail.

1 Finally, Montana did not compile information
2 from which we could fairly determine that its pre-1950
3 rights were not being satisfied after May 18th, 2004,
4 or July 18th, 2006 -- excuse me, July 28th, 2006, or
5 that any shortage could not have been remedied by
6 appropriate intrastate regulation. Montana had both
7 the burden and the opportunity to collect the necessary
8 data to demonstrate a true shortage both before and
9 after this suit was filed. And it failed to do so.

10 The records of the water commissioners, which
11 would seem to be a natural place to amass this
12 information, are incomplete and, frankly, a mess.

13 You asked about what standards should we
14 utilize to judge the two systems to determine whether
15 or not they comport with the compact obligations
16 imposed on both parties. And I think that there is
17 room in both states for the kind of situations you
18 describe in which the regulatory system is doing
19 overall a very good job and a water user here or there
20 isn't picked up by that system. And I agree, again,
21 that in a situation like the lower main stem of the
22 Tongue River, where our regulatory system is not doing
23 a very good job of ensuring that post-1950 uses are
24 curtailed, the compact can be the vehicle by which we
25 change that action.

1 The compact imposes, however, similar
2 obligations on the State of Montana. As you described
3 it, Montana sits in a position of the downstream senior
4 appropriator. And in that situation, in the downstream
5 senior appropriator makes a call on the upstream
6 appropriator. As you heard from numerous witnesses
7 from Wyoming, the very first place they need to go is
8 to that calling right to assess the circumstances
9 surrounding that call.

10 We need to have the same opportunity as our
11 water commissioners or our hydrographer commissioners
12 to assess the circumstances related to Montana's calls.
13 That means that we need to have records and personnel
14 in place on those particular days when calls are made
15 from which we could verify the actual need and
16 necessity for regulation of junior appropriators in
17 Wyoming.

18 What we can tell, from the records of the
19 water commissioners, is that natural flow in the Tongue
20 River in Montana is chronically undercounted. And
21 there are a number of important pieces of a properly
22 functioning regulatory system which are missing from
23 the actions of the Montana water commissioners.

24 They took no account of return flows, which
25 are likely to play an important role in such a long

1 river system. They did not regulate the tributaries
2 for the benefit of the seniors on the main stem. They
3 do not know what water is being used on the
4 reservation, and yet we heard there is irrigation
5 occurring there.

6 If the dam only releases water for specific
7 contract deliveries, where did that water come from?
8 Where are the records reflecting the calls that were
9 made for reservoir deliveries? And how can we measure
10 what actually seems to be coming out of the dam against
11 what these purported calls were without that evidence?
12 And why are they taking calls for storage water at
13 times when the flow of the river is well above what is
14 necessary to meet even the paper demands? How could
15 T & Y Irrigation Canal receive 1200 acre-feet of water
16 in excess of what it appears to have called for in 2006
17 if the water commissioners were actually in command of
18 the river?

19 The Montana water commissioners are diligent
20 and hard-working guys, but their methods were
21 inadequate to ensure that Montana engaged in
22 appropriate intrastate regulation before calling
23 Wyoming in 2004 and 2006. Their methods and their
24 records were inadequate for Wyoming to verify the
25 presence of an actual shortage of water. There's

1 simply not enough evidence to conclude by a
2 preponderance of the evidence that Montana showed a
3 real shortage at any particular time or that diversions
4 that were occurring were not more accurately ascribed
5 to post-1950 rights.

6 Montana would have you simply apply a
7 presumption that, gosh, don't we all know that a
8 certain amount of water at the state line must equate
9 to a shortage? Well, we can't base a judgment in this
10 case on a presumption. Montana has the burden of
11 proving by a preponderance of the evidence an actual
12 shortage existed.

13 No one in the state of Wyoming realistically
14 believes that there are not times late in the summer
15 when the flows at the state line are likely to equate
16 to a direct-flow shortage in Montana. However, for
17 purposes of this case, the evidence is insufficient to
18 establish that that occurred on July 24th -- or
19 July 28th, 2006, or May 18th, 2004. I think the
20 evidence that we have seen indicates, particularly with
21 regard to May 18th, 2004, that that call may have been
22 substantially premature.

23 And I have no doubt that as Montana continues
24 to implement a more functional and sophisticated
25 regulatory system, then in future years Montana will be

1 able to demonstrate actual shortages to its direct-flow
2 rights. But it cannot do so in 2004 and 2006.

3 Montana has also failed to show when
4 post-1950 use occurred in Wyoming in relation to the
5 call dates in 2004 and 2006. Mr. Book made no attempt
6 to figure out when water was applied to lands in
7 Wyoming and instead, as Mr. Fritz pointed out, looked
8 at annual amounts that are of essentially no value in
9 these proceedings. There's been no evidence
10 establishing that any of the parcels identified by
11 Mr. Book in his rebuttal report actually used water
12 after the call dates in 2004 and 2006.

13 As an aside, it's worth noting that the
14 evidence from witnesses such as Ms. Ankney, Mr. Pilch,
15 and Mr. Fritz demonstrates many of these parcels were
16 not irrigated in 2004 and 2006 with water from the
17 Tongue River.

18 With regard to storage in Wyoming, the State
19 of Wyoming, based on the careful records of its
20 hydrographer commissioners, showed that no storage
21 occurred anywhere in Wyoming after the call in 2006.
22 And Wyoming, not Montana, demonstrated that, in fact, a
23 small amount of storage did occur after the call in
24 2004.

25 Of this small amount, senior appropriators in

1 Wyoming would have used some of this water if it had
2 not been stored and only a very small amount in a
3 couple of reservoirs may have even been unavailable to
4 Montana. Of course, Montana failed to show that that
5 small amount of water would actually have made a
6 difference in any reservoir or to any particular
7 direct-flow right. There's not been any evidence
8 showing that the few feet of water stored in Wyoming
9 after the calls in 2004 would have made it to any
10 particular irrigator in Montana. This causal link is a
11 necessary prerequisite to liability, and there's been
12 no proof on this subject in this trial.

13 Moreover, Montana had water in its reservoir
14 that it didn't use in 2004 and 2006. And from
15 Wyoming's perspective, it doesn't matter whether
16 Montana assigned that water to the tribe or the Water
17 Users' Association. The fact remains that the supply
18 was there. And we've heard during the course of this
19 trial repeatedly that those two water rights are
20 commingled. And that's fine. But they are limited by
21 Article V.C.3.

22 Wyoming is not responsible for Montana's
23 discretionary decision to provide the Northern Cheyenne
24 Tribe with a storage right. That decision was not
25 mandated by the Winters Doctrine and, in fact, seems at

1 odds with the doctrine since the reservoir did not
2 exist at the time the reservation was created.

3 This may be a reasonable compromise for the
4 folks in Montana and it surely protected Montana's
5 existing irrigators. But Wyoming's compact obligations
6 are unaffected by that compromise. Montana is
7 responsible for the satisfaction of the Northern
8 Cheyenne Tribe's reserved rights out of its allocation
9 under the Yellowstone River Compact.

10 With regard to the effect of CBM production
11 in Wyoming, it's obvious that Mr. Larson's results are
12 not reliable. As Dr. Schreüder explained, Mr. Larson
13 took a model created for an entirely different purpose
14 and skewed certain inputs. The factual basis for his
15 alteration of the return flow rate is demonstratively
16 wrong, as evidenced by the testimony of David
17 Schroeder, Mr. Steir, and Mr. Hinckley. Just fixing
18 this one problem with Mr. Larson's analysis eliminated
19 any effect on Montana in 2004 and 2006.

20 Finally, Wyoming has proven that Montana
21 failed to store a substantial amount of water over the
22 years. And this waste of water, in and of itself, is a
23 complete defense to Montana's claims and justifies the
24 entry of judgment in Wyoming's favor. Figure V.A, in
25 Mr. Hinckley's report, is perhaps the clearest

1 demonstration of the effects of Montana's decisions not
2 to store available water.

3 Montana's alleged depletions which are
4 profoundly overstated, are dwarfed by the bypasses of
5 available water in 2004 and 2006. Wyoming understands
6 that reservoir operations are complicated and
7 influenced by many factors. But the doctrine of
8 appropriation, and thus the compact between these two
9 states, places the burden of these decisions on the
10 reservoir operator and not the upstream juniors.

11 If, as we've heard from a number of witnesses
12 from Montana, every acre-foot counts, then we need to
13 count every acre-foot. Accordingly, Montana, not
14 Wyoming, must bear the consequences of its own
15 decisions.

16 Finally, I want to talk about the future,
17 'cause I think everybody acknowledges and recognizes
18 that this case is about the future and not about the
19 past. And I want to talk about the testimony you heard
20 from Montana's first witness, Mr. Tubbs, in which he
21 asked you to formulate a set of rules governing the
22 administration of the compact.

23 First of all, Wyoming has never denied that
24 it did not honor Montana's calls in 2004 and 2006. Of
25 course, Montana's first call was complicated by

1 requesting actions that clearly are not contemplated by
2 the compact.

3 Wyoming is not obligated to regulate pre-1950
4 rights for the benefit of Montana, nor is it obligated
5 to release water stored in priority prior to a call if
6 that water was stored -- even if that water was stored
7 under post-1950 rights. Montana's request that Wyoming
8 do these things in 2004 obviously should not have been
9 honored. And that invalid call cannot form basis of
10 liability in this case.

11 Nevertheless, when these calls came in, as
12 you heard in Mr. Tyrrell, Wyoming acted under an
13 interpretation of the compact that proved to be
14 incorrect. Wyoming did not take exception to your
15 ruling, although it was at odds with Wyoming's prior
16 interpretation. Mr. Tyrrell and the State of Wyoming
17 intend to honor the obligations that flow from that
18 ruling. Accordingly, in future years Wyoming will
19 honor valid calls from Montana.

20 What that means, however, as a practical
21 matter is beyond the scope of these proceedings.
22 You've not been presented with sufficient evidence from
23 which you could fairly develop the rules Mr. Tubbs
24 requested. And, frankly, the claims made by Montana
25 are not conducive to nor do they warrant the imposition

1 of a wholesale administrative scheme uninformed by the
2 technical expertise of the compacting parties. Those
3 issues, none of which have been developed in this case,
4 must be left to the compact commission and, failing
5 that, a very different lawsuit.

6 Your task in this case is simple: to
7 determine whether Montana proved by a preponderance of
8 the evidence that Wyoming breached the compact. The
9 evidence convincingly demonstrates that Wyoming did not
10 breach the compact, that Montana's shortages were the
11 product of its own decisions; and, therefore, your
12 recommendation to the Court ought to be complete
13 dismissal with prejudice.

14 SPECIAL MASTER: Okay.

15 MR. KASTE: Thank you.

16 SPECIAL MASTER: Thank you. So I really just
17 have one follow-up question. Just like Mr. Wechsler's
18 closing, that was very valuable and, again, is very
19 useful for me at this stage to hear both sides' summary
20 of their cases.

21 So you had -- actually, I heard you the other
22 day reference Section V.C.3 of the compact. And I
23 might have missed something earlier, but I do not
24 remember this coming up in any of the arguments
25 earlier. So I actually didn't look at it until just

1 now.

2 MR. KASTE: I'm shocked that you haven't
3 memorized this compact.

4 SPECIAL MASTER: There were portions of it I
5 didn't realize I needed to look at before. So really
6 quickly -- I know you probably don't have a copy of it
7 in front of you.

8 MR. KASTE: I have a pretty good idea what it
9 says.

10 SPECIAL MASTER: Okay. So what's your
11 interpretation of this language in V.C.3?

12 MR. KASTE: Article V.C.3 defines Montana's
13 Article V.A right in existing reservoirs by
14 denominating that there are different treatments for
15 existing uses in existing reservoirs and new uses in
16 existing reservoirs.

17 SPECIAL MASTER: And so several things. And,
18 again, I haven't had, really, any time to take a look
19 at this before. Quickly, what's the difference
20 between, in your view, between V.C.2 and V.C.3?

21 MR. KASTE: V.C.2 I think talks about new
22 reservoirs. Is that right?

23 SPECIAL MASTER: It says in all reservoirs,
24 which is sort of odd because you're right, V.C.3 talks
25 about existing reservoirs. So you would expect that

1 maybe V.C.2 would talk about new reservoirs. And,
2 again, my guess is -- and I realize I'm not giving
3 Montana an opportunity to argue this, and so I'm just
4 sort of curious as to begin thinking about this
5 particular issue.

6 MR. KASTE: Well, I think it's pretty clear
7 when we look at the language of V.C.3 that it is
8 specific to existing reservoirs and that there's a
9 different mathematical treatment of those new uses in
10 existing reservoirs.

11 So it's fairly obvious, I think, that the
12 drafters of the compact anticipated that those new uses
13 in existing reservoirs would be part of the
14 mathematical equation that pertains to the Article V.C
15 water, which necessarily means that there's a portion
16 of that existing reservoir that is covered under V.A
17 and a portion that is covered under V.C.

18 SPECIAL MASTER: Yeah, and -- okay. I'm
19 beginning, I think, to -- V.C.2 also talks about areas
20 that are completed subsequent to January 1, 1950.

21 MR. KASTE: That's right. That's the new
22 reservoir language.

23 SPECIAL MASTER: Yeah. And so your view on
24 what is meant by the point of measurement. Is that
25 defined anywhere?

1 MR. KASTE: The point of measurement, I
2 think, is Locate, Montana. I think it's a town --
3 what's the name of the town?

4 SPECIAL MASTER: Okay. So --

5 MR. KASTE: Intake. Intake, Montana.

6 SPECIAL MASTER: Okay. So here, by the point
7 of measurement, it's the point of measurement on the
8 Tongue River, not a point of measurement on the
9 reservoir itself?

10 MR. KASTE: I believe that's true. Because I
11 think the V.C calculation is sort of comprehensive and
12 not necessarily specific to that particular reservoir.

13 SPECIAL MASTER: Okay.

14 MR. KASTE: It's a larger computation along
15 each of the river systems to give us our percentage
16 allocations of the unused and unappropriated waters of
17 that particular river.

18 SPECIAL MASTER: Okay. So then the question
19 would become, assuming that, in fact, V.C.3 is relevant
20 in this particular case -- and, again, since I saw
21 this, I don't want to make any presumption. But if it
22 is, then one of the questions would be what is meant by
23 the term "net change in storage"? How would you
24 actually calculate that?

25 MR. KASTE: Well, that's part of the

1 Article V.C mathematical calculation that we don't have
2 to worry about in this case since we're only dealing
3 with claims under V.A. But you could figure out which
4 part is V.A and which part is V.C, look at the net
5 change in storage, and that's part of the existing
6 reservoir that is a V.C right, and you would stick that
7 into the equation for that particular reservoir and
8 that particular river.

9 SPECIAL MASTER: No, I understand that. But,
10 again, I've just seen this. So if I understand your
11 argument -- and correct me if it turns out that I'm
12 misstating it -- that what this is suggesting is, okay,
13 to the degree that there is a change in storage after
14 January 1, 1950, and in particular a net change in
15 storage after January 1, 1950, then that goes into the
16 V.B calculations; and, therefore, implicitly that must
17 mean that the only part that goes into the V.A
18 calculation is whatever was there before the net
19 change?

20 MR. KASTE: No.

21 SPECIAL MASTER: No, that's not what you're
22 saying. Okay. Well, there's another thing to talk
23 about then.

24 MR. KASTE: Well, the net change in storage
25 in acre-feet, I think, refers to the change in that

1 portion of the existing reservoir that's going to be
2 counted under Article V.C. And that's defined as that
3 portion of the reservoir which is used for irrigation,
4 municipal, and industrial purposes developed after
5 January 1, 1950.

6 So we know that we have these existing uses
7 in various reservoirs in Yellowstone River Basin that
8 had particularized uses as of 1950. And those are
9 protected under V.A. At the same time, those existing
10 reservoirs, apparently some of them had space.

11 Certainly the Tongue River Reservoir did. And the
12 drafters of the compact said, any new uses of those
13 reservoirs are going to be accounted for and come out
14 of the Article V.C allocation between the states.

15 So the V.A right is defined by the uses
16 existing in existing reservoirs as of 1950, and then
17 the mathematical equation to that portion of the
18 reservoir that is developed after 1950, you take the
19 net change in, say, that pool, in any given year and
20 plug it into your Article V.C calculation to determine
21 whether or not we're in compliance with the 60/40
22 split. And it seems relatively straightforward.

23 And that's why I say the direct-flow
24 discussion of beneficial use that occurred earlier in
25 this case raises a different issue than the issue you

1 we're presented with at this phase of the case.
2 Because these reservoirs are called out differently by
3 the compact and treated differently by the compact, no
4 portion necessarily of that existing discussion related
5 to consumptive use has much bearing on the
6 determination that you're going to have to make in this
7 phase of the proceedings. The direct flow and
8 irrigation rights aren't treated this way by the
9 compact.

10 And by virtue of this express language, we
11 know that these reservoirs are treated somewhat
12 differently. And we have to figure out, well, what
13 does that mean? And I think it's fairly clear. It
14 means that there are two pools inside Tongue River
15 Reservoir, the V.A pool, and a V.C pool. And the V.A
16 pool was about 32,000 acre-feet plus what it took to
17 deliver that. I think we can grant Montana that. But
18 I think the historic evidence that we've seen,
19 particularly from Mr. Sullivan in his memo, was that
20 45,000 acre-feet was more than adequate to supply those
21 32,000 acre-feet of contracts.

22 And that's the end of the inquiry with regard
23 to the reservoir. To the extent we have a continuing
24 fight about the remaining contents, we need to do the
25 full equation under Article V.C to determine where we

1 are with regard to the unappropriated and unused waters
2 of the Yellowstone River. And that's not an issue in
3 this case. So we don't have to do the hard math
4 associated with that calculation.

5 SPECIAL MASTER: Okay. So two things. I
6 think I understand your argument now. And what was
7 confusing me earlier was discussions of net changes in
8 storage. But what you're saying is words "net change
9 in storage" here actually is referring to the net
10 change in storage in any particular water year that
11 then gets calculated into section V.B. And so your
12 reference to this particular section is simply to
13 suggest that the storage, other than storage for the
14 water necessary to deliver water to beneficial uses as
15 of --

16 MR. KASTE: 1950.

17 SPECIAL MASTER: -- that's right -- is
18 actually covered under V.B rather than V.A?

19 MR. KASTE: Correct.

20 SPECIAL MASTER: Okay. So, again, we
21 shouldn't get any more into this at this point in time
22 because we will have an opportunity to argue these
23 particular issues. This is the first time that I've
24 actually seen this. But I want to understand at least
25 what your argument was on this particular point since

1 you had referenced it.

2 MR. KASTE: And I agree this is the first
3 time you've seen this. When we got to the summary
4 judgment stage, we thought we had a deal with Montana,
5 as you know, and we thought that that deal imposed
6 certain obligations on both states. And it was our
7 intent to live up to what we believed our obligations
8 to be.

9 You have given us what I think is very --
10 probably the right ruling, given the language in that
11 1992 agreement about what its effect is. And I think I
12 told you in the summary judgment proceedings that
13 without that 1992 agreement, Montana would be worse
14 off. And I meant it. They are worse off. We had
15 made, we thought, some compromises when we engaged in
16 that agreement. But if it doesn't mean what we think
17 it means, we revert to the language of the compact, and
18 the language of the compact is clear.

19 SPECIAL MASTER: Okay. So, again, won't
20 discuss this anymore at the moment. I want to make
21 sure Montana has an opportunity to give its view of the
22 compact before we get into this particular discussion.
23 But I did want to -- since as I said, I hadn't heard
24 that reference other than I think you may have said
25 something about it a couple of days ago.

1 MR. KASTE: I said it in my motion for
2 judgment on partial findings, and that was the first
3 time that I brought it --

4 SPECIAL MASTER: Right, I remember that. But
5 I think also maybe a couple of days ago you briefly
6 referenced it.

7 MR. KASTE: I pop off all the time. I'm not
8 sure what I might have said.

9 SPECIAL MASTER: Okay.

10 MR. KASTE: And I suppose I want to address
11 one more thing, 'cause I think that you are -- you're
12 struggling with exactly the right issue with regard to
13 the standard that ought to be applied to the regulatory
14 systems in both states. And, obviously, nobody is
15 seeking perfection. These are complicated systems that
16 cover vast areas, and there are a host of moving parts
17 on any given day.

18 But I think what Wyoming is entitled to is
19 the reasonable assurance that the activities inside of
20 Montana that are taking place in advance of a call are
21 verifiable and are such that we can rely on their
22 representation that a call is truly appropriate.

23 And that's going to mean some record keeping.
24 And it's going to mean maybe some more sophisticated
25 regulatory activities by the State of Montana. And

1 certainly they have improved dramatically, beginning in
2 2001 when the first commissioner has been appointed.
3 But they still have a ways to go.

4 Maybe not that far really. But, you know,
5 we're judging this particular case on what they had
6 available to us in 2004 and 2006. And you'll notice,
7 of course, in 2004, the call letter didn't include an
8 affidavit from the water commissioner. That would have
9 been really great to have. We got one in 2006.

10 But still, of course, had a lot of questions
11 about what is going on in Montana. And I think Wyoming
12 is completely justified in asking in response to a
13 call, the same way we would with any calling right, is
14 it really appropriate for us to shut off a junior water
15 user in our state at this time? And we need to have
16 some reasonable amount of assurance before we go take
17 away someone's livelihood in Wyoming that this is
18 necessary and appropriate to do so.

19 What that's going to look like in terms of
20 what Montana chooses to do by virtue of its regulatory
21 activities, I don't know. But I do know that they need
22 to have a more comprehensive and recreatable accounting
23 that they can present to us and say, "Here's where all
24 the water is going. We have taken the appropriate
25 intrastate regulatory measures to insure that when you

1 turn off your farmer in Wyoming, it's going to show up
2 at the calling headgate here in Montana."

3 And I don't think that's an unreasonable
4 thing for Wyoming or any upstream junior to ask of the
5 downstream calling right.

6 SPECIAL MASTER: Okay. So, again, you know,
7 thank you on this. I guess my only other thought on
8 the last question is, you know, to me, it's an issue
9 of, you know, as you've put it, whether or not the
10 Montana system gives Wyoming the sufficient -- the
11 ability to determine that, yes, this is a legitimate
12 call.

13 At the same time, I also think that we need
14 to reflect that Montana is the downstream state, and,
15 obviously, they're at a disadvantage there. And one
16 can keep asking for more and more and more information
17 and, in doing so, never end up doing anything. So I
18 think the question does become, what's the appropriate
19 information that needs to be reliable enough, credible
20 enough, so that if Montana requests its water under
21 Article V.A of the compact, then Wyoming will provide
22 it.

23 MR. KASTE: And I can tell you -- and I think
24 you probably heard this from Mr. Tyrrell. He has no
25 intention of moving the goalposts. I think he told

1 you, I just need to know where the goalpost is in order
2 to act. And we do need to know where the goalpost is.
3 And it is truly unfair to say, whatever you bring me is
4 not going to be good enough. And that's not Wyoming's
5 intention. We have every intention of living up to the
6 obligations that you have found the compact imposes
7 upon us with regard to Article V.A. Mr. Tyrrell told
8 you that.

9 I think we do probably need some assistance
10 in defining that standard. But I think, as Mr. Tyrrell
11 told you, defining the procedures and the mechanisms by
12 which regulation ought to occur in given circumstances
13 is a very complicated question and one which is
14 probably best suited to the technical experts in both
15 states. And if we can't get there by some other
16 proceeding, then maybe we're back in this court.

17 But here today, you're asked to decide a
18 fairly narrow question about breaches that occurred in
19 the past and not to, sort of, make wholesale an
20 administrative scheme that doesn't have the expertise
21 and the input of both of these parties that would be
22 necessary.

23 I think that the work that you saw and heard
24 from a number of witnesses about what it took to create
25 those kinds of systems on other rivers in the Bear

1 River system and the North Platte system is indicative
2 of the kind of work that's going to be necessary in
3 this case to create a system that the parties find
4 acceptable and that meets both of their needs and takes
5 into account all of the variability and technical
6 issues that arise on this river.

7 And I'm perplexed by Mr. Tubbs' request that
8 you should do that in these proceedings without the
9 benefit of all that additional information that
10 certainly wasn't developed here in the course of trying
11 to figure out these prior breach of contract claims.

12 SPECIAL MASTER: Okay. So at this particular
13 stage, obviously, we're just dealing with the issue of
14 liability, which should be determined based on what the
15 evidence is that's been presented over the past several
16 weeks. And if, indeed, there is liability, then we can
17 continue on to determine what the appropriate remedy
18 would be.

19 And I have full confidence that the Supreme
20 Court will only resolve those issues that it needs to
21 on this particular record.

22 MR. KASTE: This and every other case. The
23 bare minimum, which is wise.

24 SPECIAL MASTER: So I also have to ask,
25 though, is -- if every acre-foot counts, then you have

1 to count every acre-foot. Is that your version of if
2 the glove fits?

3 MR. KASTE: If the glove fits. Well, I
4 thought it was cute and appropriate. You know, we've
5 heard often about how important even small amounts of
6 water can be for a particularized farmer. And we know
7 that's true. We heard a number of these farmers talk
8 about how a little bit of water makes a big difference
9 for them.

10 And so from Wyoming's perspective, we should
11 do our best to help all of these folks out to the
12 extent we can. And that's going to mean the kind of
13 accounting for farmers on both sides of the state line
14 that it takes in order to ensure that things are being
15 done properly.

16 And, you know, maybe back in the old days we
17 didn't have to do a very detailed and sophisticated
18 accounting of what happened at Tongue River Reservoir.
19 But in times of drought, and perhaps those times are
20 increasing in number, we are going to have to do that
21 on the Tongue River Reservoir.

22 And Wyoming's position is our farmers can't
23 get shortchanged any more than Montana's farmers should
24 get shortchanged. And we see those bypasses going out
25 to the Yellowstone River and go, I don't understand why

1 we would be responsible for those decisions.

2 And you can understand the position of
3 Wyoming's farmers when they look at that particular
4 activity and then hear from Montana, "We should get
5 more water." It strikes those folks as fundamentally
6 unfair.

7 SPECIAL MASTER: Okay. Thank you. So let me
8 just say in closing, before we get on to the next
9 portion of the administrative proceedings, that the
10 Supreme Court takes these types of original
11 jurisdiction matters very seriously. This one
12 obviously has been up to the Supreme Court once before
13 and will now be going up a second time.

14 And, you know, one of the things I will make
15 sure in my report to the Supreme Court is not only will
16 I carefully review and sift and analyze the evidence in
17 this particular matter, but I will do that with the
18 background understanding that this is a dispute that
19 matters a great deal to the water users in both Montana
20 and in Wyoming and perhaps in North Dakota; and that,
21 therefore, this is a matter that requires the utmost
22 care and deliberation. And I will make sure, in my
23 report to the Supreme Court, that that is clear to the
24 Court itself.

25 I think that counsel on both sides of this

1 case have done an exceptionally good job in presenting
2 evidence on behalf of their states and the users of
3 those states. And I think that those presentations and
4 the quality of those presentations reflect, again, the
5 importance of this particular case and the importance
6 with which the two states take the dispute in this
7 particular matter.

8 It is always, I guess, unfortunate that when
9 we divide the U.S. up into individual units, sometimes
10 in a somewhat geographically random fashion, that it
11 means that you end up with disputes of this nature that
12 can't be resolved outside of court. But the
13 constitution provides that the Supreme Court can
14 resolve these types of matters when those disputes
15 cannot be resolved voluntarily. And, again, the
16 Supreme Court takes that original jurisdiction very
17 seriously.

18 So I just want to, again, before we move on
19 to the administrative portion, thank the attorneys for
20 both sides, as well as everybody who has been working
21 with you for what I think has been, as I say, a very
22 good presentation of the materials. And although one
23 might always wish that the evidence in some situations
24 clearly showed exactly what the situation is, I have
25 little doubt that the Court, in resolving this

1 SPECIAL MASTER: Okay. So let's talk about
2 the next steps in this proceeding. So first of all, I
3 just want to talk a moment about the exhibits. So my
4 understanding is is that the court deputies have been
5 coordinating with both sides to ensure that the list
6 that we've been keeping of the exhibits that have been
7 admitted is accurate. And so my hope is that list is
8 going to be accurate. If at some point in time it
9 turns out there's an inaccuracy, we can deal with it
10 then.

11 In order to try to avoid just carting a lot
12 of paper around, what I have asked my deputy to do is
13 to basically take that list, make sure that all of the
14 exhibits that have been admitted are shipped to me in
15 San Francisco so I'll have those. And that's going to
16 be particularly valuable, because I've been writing
17 notes on a lot of the exhibits in this particular room.

18 But we will probably just throw away, for
19 lack of a better term, all of the additional hard
20 copies of those exhibits which are here rather than
21 spending a lot of money to cart them around. They will
22 be recycled into other valuable paper items, I'm sure.

23 Mr. Draper?

24 MR. DRAPER: Your Honor, parties have
25 discussed this a bit, and we thought we would confer

1 first and then provide you an agreed -- like a thumb
2 drive with all of the admitted exhibits on it
3 electronically so that you would have that.

4 There have been some that have been divided
5 into A and B, and there's some additional ones from the
6 original list that came in, and that we would agree
7 that we had a complete list of all the joint and then
8 the admitted exhibits of each state and the
9 demonstrative exhibits and just provide that to on you
10 a thumb drive to give you an agreed set in that regard.

11 MR. KASTE: Yes, that sounds like it makes
12 the most sense to us. You could then give that to
13 whomever at the Supreme Court or make copies as
14 necessary depending on what the Court requires.

15 But with regard to your hard-copy set, other
16 than the ones that have been admitted and you have your
17 notes on, if you want to take the remainder of
18 Wyoming's exhibits and throw them away, that's fine
19 with us.

20 SPECIAL MASTER: Okay. I will -- then that's
21 the process that we'll follow. So, again, just to
22 confirm, any of the copies that we have here of the
23 exhibits, then those will be shipped to my office at
24 Stanford.

25 And I would still go with the system, though,

1 if for any reason you can't find a copy of the exhibit
2 here and you know it's been admitted, if there's an
3 extra copy upstairs, then put that in the box and send
4 it to me, because that way I don't have to print
5 anything out and waste more paper. Everything will be
6 available.

7 If you're interested and willing in coming up
8 with a new thumb drive that includes all the exhibits
9 that have actually been admitted, including the new
10 numbering systems, that, obviously, would be quite
11 valuable. And what I would ask is maybe if could you
12 send me, like, three thumb drives, with the notion that
13 I'll ultimately want to send one to the Court and -- in
14 fact, I think this is an innovation in original
15 jurisdiction matters.

16 But one of the nice things about this is, as
17 I mentioned, I think in the past, although the Court
18 has paid a lot of attention to the record, I think it's
19 been an infrequent occurrence to actually get copies of
20 independent exhibits, unless they turn out to be
21 critically important, because it's just been a hard
22 matter to do that because of the size of some of these
23 records.

24 This will make it even more available to the
25 Supreme Court justices and their clerks so that they

1 might even be able to look at more exhibits than they
2 have in the past. So I should think this is a nice
3 improvement on traditional process.

4 MR. DRAPER: It's going to be much easier. I
5 think in some cases they have actually called for the
6 record, period. And then a truck has to head for
7 Washington, D.C.

8 SPECIAL MASTER: And then, of course, once
9 they're there, then they're generally not in the
10 clerk's office; they're somewhere else in the court.
11 So you have to go somewhere else and actually get the
12 exhibits and pore through them. So I do think this is
13 going to be quite valuable. So that will be useful.

14 MR. KASTE: What do you think an appropriate
15 time frame for doing that would be? Donna probably
16 could do it really fast, but I wouldn't want to impose.

17 SPECIAL MASTER: I don't think you have to do
18 it necessarily that quickly, only because, again, I
19 have my own set from these proceedings. And so as a
20 general matter, I probably will not have to access that
21 thumb drive, or at least I can't think of a good reason
22 why I would need to in your typical case.

23 So I don't think there's an immediate rush on
24 doing that part of the housekeeping.

25 MR. DRAPER: I was thinking in terms of

1 sometime after the holidays.

2 SPECIAL MASTER: That would be fine with me.

3 MR. KASTE: Great.

4 SPECIAL MASTER: Okay. So that takes care of
5 the exhibits.

6 MR. DRAPER: Your Honor, I just have one
7 question that occurs to me.

8 SPECIAL MASTER: Yes, Mr. Draper.

9 MR. DRAPER: On the list of exhibits, has
10 that been updated electronically? I haven't talked to
11 the clerk or Donna about that.

12 SPECIAL MASTER: No. And so at the moment,
13 what we've been doing on the list of exhibits is to --
14 the deputy has been keeping track, by hand, each of
15 various exhibits. And one of the reasons that I wanted
16 to make sure we did it that way is that the alternative
17 has been sending that to my assistant in Palo Alto,
18 having her then revise it, and sending it back here. I
19 was just afraid that things might be lost in the
20 process.

21 So what my plan was to do is to now get that
22 list and update it electronically. Now, to do that,
23 one thing that would be useful would probably be to get
24 the electronic copy of that particular file. I don't
25 think I have it.

1 MR. DRAPER: If you don't, we can easily
2 provide it.

3 SPECIAL MASTER: Yeah, if you could do that,
4 then what I could do is have my assistant in Palo Alto
5 then go through and update that. And then, presumably,
6 you can utilize that to then generate -- well, no, you
7 can probably use that to generate everything.

8 MR. DRAPER: Well, I think as a practical
9 matter, each party has been keeping track. So we have
10 our list as well. It might be good, as we're getting
11 that thumb drive with the actual exhibits on it, to
12 maybe at that point confirm with a final electronic
13 version from your assistant that it matches our records
14 and that everybody is clear and agreed on that. And
15 that then could be provided at the same time as the
16 thumb drive with the exhibits on it.

17 SPECIAL MASTER: Okay. So I think that
18 sounds good to me.

19 Peggy, does that make sense from your
20 standpoint?

21 THE CLERK: Yeah. I don't have the ability
22 to do anything on the computer. It's all --

23 SPECIAL MASTER: That's right. That's why,
24 as I said, I'll have Susan do it.

25 THE CLERK: I'll send everything to Susan and

1 explain how it works. And I've given a copy to both
2 the State of Montana and the State of Wyoming. So they
3 have what I have.

4 SPECIAL MASTER: Okay. And what I can do is
5 I can -- hopefully Susan could complete that before the
6 holidays, because I think we go off on -- I think the
7 20th of December, I think, is the last day. Then the
8 university closes down for something like two and a
9 half weeks. So I'll make sure she gets that out.

10 And then if there's any issues of
11 disagreement between the two lists that Wyoming and
12 Montana has and what Susan sends, then we can, at that
13 point, resolve those.

14 MR. DRAPER: That will work.

15 SPECIAL MASTER: Okay. Excellent. Anything
16 else on the exhibits?

17 MR. DRAPER: That's all I can think of at the
18 moment, Your Honor.

19 SPECIAL MASTER: Okay. Excellent. So then
20 we -- the posttrial briefs, I've looked to see what
21 both other special masters have done. I'm familiar
22 with, of course, what other courts do.

23 By my own preference, I'm looking for advice
24 from all of you on this. My own preference would be
25 trial briefs that actually integrate the law and the

1 facts rather than setting up a set of proposed findings
2 of fact and then, afterwards, a discussion of the law.
3 I just find that it's much easier to pick out those
4 together. And I believe that's what the special master
5 in Kansas v. Nebraska did, or at least it looked to me
6 that way from the posttrial briefs that actually came
7 in.

8 MR. DRAPER: That's correct, Your Honor.

9 SPECIAL MASTER: So that would be my
10 preference in terms of format.

11 The second thing is that -- and, again, my
12 understanding from the Kansas v. Nebraska case was that
13 the way in which the special master there handled
14 things was that both sides had a date by which they
15 filed their posttrial briefs and then, in that case,
16 all three sides, but that in this case, both sides
17 would have an opportunity to file posttrial brief on
18 the same date and then respond to the others posttrial
19 brief.

20 MR. DRAPER: Yes, two simultaneous filings.
21 So there would be one opportunity for each state to
22 respond to the other's initial filing.

23 SPECIAL MASTER: One of the things I like
24 about that is it gives both sides an opportunity to
25 respond to the other side. It also means I would get

1 sort of everything at once rather than sort of in
2 piecemeal going on. But I would appreciate any
3 thoughts that either side have on that particular
4 approach.

5 MR. DRAPER: Those two filings of
6 simultaneous briefs seem to be a good mechanism, and it
7 worked well in that case.

8 SPECIAL MASTER: So, Mr. Kaste, this is
9 probably a little bit different than the courts in
10 Wyoming do this, as you keep reminding me on things.

11 MR. KASTE: Well, there's the right way and
12 the way everybody else does it. Obviously, my
13 experience has generally conformed to the Rules of
14 civil Procedure that provides for the proposed findings
15 and conclusions at the close of the case.

16 I think that can be done just as effectively
17 in the manner that you have described with regard to
18 the simultaneous briefings. I think that that would
19 work very well. I think it's important from my
20 perspective, as I would like to respond to what the
21 State of Montana has to say. And I'm sure from their
22 perspective, they would like to tell you that I'm full
23 of it too.

24 So I think it would be a good procedure. I
25 think we're going to need maybe a significant amount of

1 time to put that first brief together. And I think
2 some of the time that may be necessary may be dependent
3 upon the amount of time it takes to get our complete
4 transcript. And this has been a very long trial. And
5 I don't know what the timeline is on that. I certainly
6 don't want it any faster than you want to do it.

7 MR. DRAPER: I would add to that. I think I
8 see it in a similar way. The first thing we need is
9 the transcript, because I assume you want specific
10 references. If we're saying someone said this, then we
11 need to give you the page and line that that was said
12 so that you can take a look at it yourself if you want
13 to.

14 SPECIAL MASTER: Yeah. On the -- you know,
15 the reason why, as I say, I like the law and the facts
16 integrated together is that, at least the way my mind
17 works, I think of it in terms of issues. And I've
18 actually even found district court opinions that set
19 out all the facts and then later discuss what the law
20 is to be -- to be less understandable than those that
21 integrate the two together. And that's probably the
22 way in which I will do my report to the Supreme Court,
23 is in that style.

24 Now, if you want to, of course, you are more
25 than free to also submit proposed findings. I'll be

1 happy to take anything. But I would integrate them.
2 And, of course, in that context, you can always have a
3 discussion of the law and then, you know, specific
4 discussion of what you think the facts are in applying
5 the law in that particular issue.

6 MR. KASTE: I think I would envision doing
7 what I typically do in most briefs and start with a
8 factual section and then integrate those facts into the
9 legal arguments later on. And that's not necessarily
10 issue specific, but I like to tell a story at the
11 beginning.

12 SPECIAL MASTER: Okay. And in a moment we
13 can go off the record and talk about when you might get
14 the completed transcript, because you're absolutely
15 right, Mr. Draper. One -- I would say the two most
16 valuable portions of this, from my perspective, will
17 be, number one, the discussion of the law, because we
18 haven't been doing that during the trial itself; and
19 then second of all will be actual references to
20 sections of the trial that you believe are most
21 relevant to the factual issues that I'll need to make
22 recommendations to the Court.

23 So you will need the full transcript on that.
24 And my thought was probably something in the nature
25 of -- and, again, we can find out when the transcript

1 would be available. But on the assumption that it
2 probably won't be for a couple of weeks, that it would
3 then be -- you know, like a month period of time after
4 you got the transcript for filing the first one. And
5 then probably a somewhat shorter period of time, you
6 know, something like 20 days or something like that
7 after that for the reply.

8 But, I realize, number one, the holidays are
9 coming up. So I'm more than happy to reflect that.
10 But, you know, I do want to make sure that I get a
11 report to the Supreme Court on a somewhat prompt basis
12 at this particular stage. And I'm thinking out loud.

13 You know, it's probably -- it's unlikely the
14 Court is going to be considering this particular report
15 in this session, because by the time they receive the
16 report, ask you all whether or not you have exceptions
17 to it, and then you file exceptions, it's going to be
18 past the last day in which they have a conference. But
19 it would be nice to set all of this up so that they
20 could, you know, ideally consider it at the very
21 beginning of the next term.

22 So -- but I'll consult with the Court as to
23 when they would like, if possible, to get the report.
24 But, again, the sooner the better so that they don't
25 evaluate me badly on this.

1 SPECIAL MASTER: So let's go back on the
2 record. So then the question becomes, I do think,
3 given the nature of the case, it probably will be
4 valuable also to have a posttrial hearing. And, again,
5 my understanding, from what I could see from the
6 record, was that the special master in Kansas v.
7 Nebraska actually issued you a draft report, and then
8 he held the hearing after the draft report; is that
9 correct?

10 MR. DRAPER: That's the way he did it, Your
11 Honor. He had that hearing after rather than before
12 issuing the draft.

13 SPECIAL MASTER: So I've been thinking about
14 this. And the advantage of doing it that way, of
15 course, is that there you have a very clear direction
16 to respond to. The only concern I have about that is
17 the concern that even subconsciously, once somebody has
18 actually written something down in the form of a draft
19 report and then circulated it, it becomes more
20 difficult for that person to actually then change their
21 opinion based on what they hear somebody say.

22 And as I say, I think that's just the way
23 things work subconsciously. I would certainly, if we
24 did it that way, be as open as I possibly could. But I
25 just wonder whether or not there isn't that problem

1 there.

2 And I wonder whether or not the better way of
3 doing it might be, instead, to have a hearing before I
4 actually issue a report publicly, but to give some
5 guidance on what I consider to be some of the key
6 questions and issues, both factually and legally, on
7 which I would appreciate the most guidance.

8 And to be effective, that would require that
9 I have been working on a report and at least have sort
10 of a sense of, you know, when I sit down to actually
11 write it, what are the sections that become most
12 difficult to write because it's hard to see exactly
13 factually or legally a clear, unbriefed answer.

14 MR. DRAPER: I might offer my reaction to
15 that, Your Honor. I think your notion is very good.
16 If you would like to get the comments of the parties
17 and answers to any questions you might have before you
18 kind of lock yourself into what you think needs to be
19 decided, I think that there's a great advantage to
20 that.

21 I, as a party -- and I would think Wyoming
22 might agree with this -- that when you have first read
23 those briefs and you have questions for each side that
24 you haven't either -- you have a true question or you
25 feel you need to clarify as to what the thinking is or

1 give a party a last chance to defend a position or
2 something, you give them that opportunity.

3 And it gives you the most flexibility, I
4 think, in terms of coming to a report with the full
5 input of the parties based on the record. And I think
6 your notion of if there are particular issues that you
7 want the parties to be sure to be ready to address at
8 an argument, that specifying those can be very helpful.

9 SPECIAL MASTER: Mr. Kaste.

10 MR. KASTE: It's a weird day. I think the
11 idea of promulgating a draft report, people just don't
12 change their minds that often. And then it makes the
13 hearing seem somewhat superfluous. I think the way in
14 which you handled the summary judgment proceedings by
15 issuing some notes about the questions that you wanted
16 answers to worked very well. Perhaps a little earlier
17 notice about those questions would be nice to give us a
18 little bit of a heads-up about what we should prepare
19 for.

20 But I think that the report ought to come out
21 after the hearing. And I do think that the better use
22 of all of our time would be for you to identify for us
23 what it is you have concerns about in advance of that
24 hearing. I thought that worked very well.

25 SPECIAL MASTER: Okay. So several things.

1 One of the things that I will try to do, actually even
2 before the end of this calendar year, on the assumption
3 that the record in this case is not going to be ready
4 before then and, therefore, you don't need to know
5 today, I will try to set out at least sort of the
6 various areas that I want to make sure that the
7 posttrial brief addresses, as well as any particular
8 questions that would be useful for me.

9 I mean, we've begun to do that a little bit
10 in the closings, and I think I can probably do a little
11 bit more of that so that at least when you're doing the
12 posttrial briefs in whatever format order that you want
13 to present them, you know that you've addressed the
14 various issues that I might have.

15 And then what I will do before the posttrial
16 hearing is, again, to set out the particular questions,
17 both factual and legal, where it would be useful to
18 have some particular discussion during the hearing
19 itself. And in order to do that effectively, I'll need
20 to be drafting, at least penciling out, sections of the
21 special report.

22 So I should be able to do it earlier than I
23 did on the summary judgment motion where, the truth of
24 the matter was, that it was only about four days before
25 that I finished all the various papers that you had

1 given me as part of the summary judgment. So I wasn't
2 able to get you those questions much ahead of time.

3 So why don't we go ahead and do that in that
4 fashion. And then what I will do after that is I will
5 submit a -- this is all subject to change, but I will
6 plan to submit a draft report. And just like I did for
7 the last draft -- or the last report that I submitted
8 in this particular case, I will circulate that ahead of
9 actual filing, not for argument on it at that
10 particular stage, but instead to make sure that, in
11 fact, I have correctly stated what the evidence shows
12 in various areas. And if there's just something that
13 you find that's just blatantly incorrect, you can point
14 that out to me. So it won't be as if you won't have an
15 opportunity to look at the report also. Okay.

16 MR. KASTE: And I guess I would suggest with
17 regard to timing that we just sort of operate on our
18 court reporter's schedule. And oftentimes, in various
19 courts, the time for a brief runs from the date in
20 which the transcript is certified. And perhaps we
21 would just tie our 60-day window to some notice from
22 Vonni that she's done and that we have them all and
23 then tack 30 days onto that for the response brief.

24 So not necessarily set a specific date. And
25 that would accommodate, in the event there's some kind

1 of hiccup with regard to the transcript that causes it
2 to be a few days later than expected, we don't have to
3 run around and file orders changing dates.

4 MR. DRAPER: I think that's, again, a great
5 suggestion. Tying it to when the complete transcript
6 is available to the parties is a very typical and
7 logical procedure.

8 SPECIAL MASTER: Okay.

9 MR. KASTE: So don't hurry, Vonni.

10 SPECIAL MASTER: Well, no, let me think. I
11 will issue an order next week on this. There are two
12 things I want to give thought to based on what we've
13 talked about so far. The first is whether or not to
14 give 60 days or 45 days on that first brief. And what
15 I want to do is talk to the Court, get a sense of the
16 overall schedule and see how this actually flows in
17 order to make sure that this is also useful from the
18 standpoint of the Court's overall schedule. But I
19 understand both sides request to have 60 days rather
20 than a shorter period of time.

21 And then the second question is whether or
22 not to just go from when the final transcript is to be
23 certified or whether or not to sort of set a date that
24 will be changed if that certification is later. And
25 that's so that Vonni knows that I have a particular

1 date that I'm aiming for, although I'm sure she will
2 get this done as quickly as possible.

3 And then if we do end up, for example, with
4 January -- end of January for the transcript, then it's
5 the end of March for the -- if it's 60 days, it would
6 be the end of March for the initial posttrial brief and
7 then the end of April for the second one, the replies.
8 And that probably means we'll be talking about the
9 latter part of May, then, for the actual hearing.

10 Wouldn't want to push it much beyond that.
11 But at the same time, that would -- I will need time to
12 actually process what you've sent me. And so what I'll
13 probably do, then, is get you my thoughts and questions
14 about ten days ahead of time, and then we would have
15 the argument.

16 And any problem with having that at Stanford?

17 MR. DRAPER: Absolutely not, Your Honor.

18 MR. KASTE: Why do you want me to go to
19 Stanford so bad? No, that's --

20 SPECIAL MASTER: 'Cause you didn't make it
21 the first time we did one.

22 MR. KASTE: If that's convenient for you, and
23 given that we don't have to move the entire trial
24 there --

25 SPECIAL MASTER: That's what I'm thinking.

1 MR. KASTE: If just a few of us have to go,
2 then that would be great. And I do want to express,
3 again, how thankful we all are, and in particular, all
4 of our witnesses, probably on both sides, that this
5 trial was conducted here in Billings. It has made a
6 world of difference for the various folks that have had
7 to sit in that witness chair.

8 SPECIAL MASTER: I'm sure it did. And I also
9 hope for those of you, like Mr. Hayes, who has been our
10 most dedicated member of the audience for this trial,
11 you know, I hope it also helped all of you to have it
12 here. But I'm glad we were able do that.

13 And by the way, I thanked this morning,
14 again, the district court for actually hosting us here.

15 So, okay. So I think that, then, takes care
16 of those various matters. And I'm just checking here.

17 MR. DRAPER: I want to thank Mr. Kaste for
18 making our record 100 percent by coming into line on
19 that last point. We're 100 percent, at least since the
20 trial finished here.

21 SPECIAL MASTER: Okay. And, actually, I
22 should say that Billings has been a delightful place to
23 spend this period of time. I've actually gotten to
24 know a variety of people in the town. So although it
25 tends to be the -- at Stella's that I think I know the

1 most people at this particular point.

2 Okay. Anything else that people can think
3 about at this point administratively?

4 MR. DRAPER: Not that I can think of at the
5 moment, Your Honor.

6 SPECIAL MASTER: Okay. Then what I will do
7 is I will embody all of this into another case
8 management order. As I say you know, I think there are
9 only those sort of two questions that are open: The 60
10 days versus 45 days; and second of all, whether or not
11 to have a fixed date to set this from or whether or not
12 to do it from the actual certification of the final
13 record in the case.

14 And I will then embody this in an order. As
15 part of that order, I'll also set out particular areas
16 I want to make sure the posttrial briefs are focused
17 on.

18 MR. DRAPER: Very good.

19 SPECIAL MASTER: Okay. Then I would say at
20 this stage -- you know, I've already said what, you
21 know, I thought about the overall presentations. But I
22 just want to say it really has been delightful to be
23 here with all of you for the last two months. That's a
24 long period of time.

25 And I know that's been true, not only for all

1 of the attorneys, but, again, people like Mr. Hayes,
2 who was here diligently following the proceedings, as
3 well as people like Mr. Book and Mr. Hinckley and
4 Mr. Aycock who were here as experts, and also counsel
5 for North Dakota, who it must not always have been easy
6 to sit there and not be able to get up and actually
7 make argument on your own; although, I'm sure the state
8 of North Dakota didn't mind.

9 So thank you very much for your presentations
10 in this case. It was expertly done. And I appreciate
11 it very much. And I'll look forward to seeing all of
12 you next year probably at Stanford University.

13 So at this point, I'm going to do two things.
14 First of all, I'm going to wield this thing.

15 And so that's the end of the trial in Montana
16 v. Wyoming, No. 137, Original, in the Supreme Court of
17 the United States on the liability phase of the case.

18 So we're now off the record.

19 (Trial Proceedings concluded
20 at 2:58 p.m., December 4,
21 2013.)

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REPORTER'S CERTIFICATE

I, Vonni R. Bray, a Certified Realtime Reporter, certify that the foregoing transcript, consisting of 189, 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 14th day of February, 2014.



Vonni R. Bray, RPR, CRR
P. O. Box 125
Laurel, MT 59044
(406) 670-9533 - Cell
(888) 277-9372 - Fax
vonni.bray@gmail.com