

STATE OF MONTANA

VS.

***STATE OF WYOMING AND STATE OF NORTH
DAKOTA***

HEARING

05/01/2017

AB Court Reporting & Video

216 16th Street, Suite 600

Denver Colorado, 80202

303-296-0017

AB Court Reporting & Video

No. 137, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Plaintiff,

vs.

STATE OF WYOMING AND STATE OF NORTH DAKOTA,

Defendants.

May 1, 2017

9:00 a.m.

This hearing was held before SPECIAL
MASTER BARTON H. THOMPSON, JR.

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1 The above-referenced hearing was taken on
2 May 1, 2017, commencing at 9:00 a.m., at 1823 Stout
3 Street, Denver, Colorado, before Michele Koss,
4 Registered Professional Reporter and Notary Public
5 within and for the State of Colorado.

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7 (Appearances as noted on the record.)

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

2 SPECIAL MASTER THOMPSON: This is a
3 hearing, probably the final hearing at least before
4 the Special Master, in No. 137, Original for the
5 Supreme Court of the United States in the case of
6 Montana vs. Wyoming.

7 So several sort of just initial
8 thoughts on this. So what I plan to do is to spend
9 most of this morning, if not all of this morning,
10 dealing with the issues of declaratory relief,
11 because that appears to be where there are
12 differences between the states of Montana and
13 Wyoming regarding the decree itself.

14 So, in my view, the declaratory
15 relief is a very important aspect of this particular
16 action. It was part of Montana's original claim for
17 relief, and I understand that Montana cares as much
18 about future operations of the river as it has about
19 prior operation of the river.

20 What I hope to do is to talk about
21 focusing on the differences between Montana and
22 Wyoming with respect to the nature of declaratory
23 relief.

24 And my goal in this is both to make
25 sure that what I recommend to the United States

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1 Supreme Court accurately reflects the rulings to
2 date, as well as hopefully avoid some possibility of
3 another dispute over the Tongue River coming back to
4 the United States Supreme Court again.

5 As I think most of you know, these
6 cases not only tend to last a long time, as this
7 case has already proven but, furthermore, they tend
8 to have the sort of unhappy aspect of once they are
9 resolved, then coming back once again to the United
10 States Supreme Court. And to the degree that I can
11 help avoid that, I would like to do so.

12 I very much appreciated the briefs
13 and proposed decrees of both sides. As far as I can
14 tell from looking at those briefs, they suggest two
15 things.

16 The first thing is that, Mr. Kaste,
17 you were absolutely right that asking the parties to
18 suggest proposed decrees has generated more things
19 to talk about. That is what we will focus on this
20 morning. I am not surprised by that.

21 And, in fact, the second thing that
22 proves to be is that I want to understand whether or
23 not both sides have any areas of agreement and
24 disagreement and, furthermore, whether or not they
25 really understand what the Supreme Court has ruled

1 so far.

2 And, furthermore, if you really want
3 to get a sense of what the hearing disputes are, one
4 of the best things to do is try to get people to
5 reduce things to paper. It is because it is a lot
6 easier to gloss over things when things are not on
7 paper.

8 So this morning the things that will
9 be most helpful to me is really making sure I
10 totally understand the positions of both of the two
11 sides, and perhaps, even more importantly,
12 understand the factual concerns behind those
13 disputes.

14 Because I want to make sure that not
15 only will I get the law accurate in this particular
16 situation, but in addition to that that I understand
17 the potential consequences for choosing one versus
18 another suggested sets of language for the way in
19 which the Tongue River is operated going forward.

20 So particularly on the question of
21 how various forms of items will actually affect the
22 operation, that is really important to me because
23 that is an area where you understand a lot more than
24 I do. And there may very well be important
25 subtleties in the choice of language one direction

1 or another that I might be missing or even, if you
2 try to explain it to me, I might not have fully
3 understood it so far.

4 Okay. How to proceed forward? At
5 one point in time I thought maybe the easiest thing
6 to do was to take one or the other proposed decrees
7 and just walk down it provision by provision and
8 find out what both sides' thoughts on it are.

9 But the problem I have with that is I
10 don't think we would have gotten out of here today
11 if I tried doing something here like that. The last
12 thing I want to do is actually try to draft the
13 language by hearing. I just don't think that is
14 going to work.

15 So what I have done is made a list of
16 both what I see as the major issues that we need to
17 discuss this morning, as well as some perhaps less
18 consequential issues, or at least they seem less
19 consequential to me, but where there are still
20 differences between Montana and Wyoming. I still
21 come up with a fairly long list.

22 So we are going to have to be
23 relatively efficient in our discussions of these
24 issues. Let me list the issues.

25 And one of the first things that I am

1 going to ask you after I ask both sides to actually
2 identify counsel, is to ask you whether or not there
3 are some issues that I am missing that we really
4 need to discuss this morning.

5 So in terms of the major issues, I
6 have eleven. Issue number one is the differences
7 between Montana and Wyoming in change in place of
8 use. That is an issue that seemed to come up on
9 both sides.

10 Issue number two is under what
11 circumstances can Montana make a call for water for
12 storage in the Tongue River Reservoir? That is the
13 second issue, calls for water for storage.

14 The third issue is what I will call
15 the futile call issue. I say that because I am not
16 sure that is why Wyoming actually included the
17 language in its proposed decree, but here I am
18 talking about the language that Wyoming suggested
19 basically says or suggests that it would not have to
20 regulate somebody off unless that water makes a
21 difference to Montana.

22 Montana does not include that in any
23 of its proposed decree.

24 The fourth issue would be the
25 appropriateness of and the need for information

1 exchanges. So this gets to Montana's suggestion of
2 having an Appendix A and B, as well as information,
3 for example, with respect to groundwater.

4 Issue number five is to what degree
5 should the declaratory relief spell out the nature
6 of a call?

7 So Wyoming has included some specific
8 language as to what a call should look like.
9 Montana has not.

10 The sixth issue is groundwater.
11 Obviously there are some differences between the two
12 parties as to the way groundwater should be handled.

13 Issue number seven is intrastate
14 regulation. And this gets to the
15 upstream/downstream language that Montana has in its
16 provision where it provides for intrastate
17 regulation upstream of the pre-1950 Montana
18 appropriators making a call; whereas Wyoming does
19 not have that type of distinction.

20 Issue eight is Wyoming's obligations
21 if there is a call.

22 Montana has some very specific
23 provisions. Wyoming, on the other hand, leaves it
24 quite general.

25 Issue number nine is what, if

1 anything, the decree should say with respect to
2 Native American water rights. So this gets to
3 Provision C in the Montana decree.

4 Issue number 10 is retention of
5 jurisdiction, which is Provision D in the Montana
6 decree.

7 And then issue number 11 is surplus
8 water issues which really focuses on the language
9 adjudicated amounts in the draft proposed Montana
10 decree.

11 So those are what I consider to be
12 the major issues. That does not necessarily mean we
13 need to spend a lot of time talking about each of
14 those. I just want to make sure that I understand
15 the parties' concerns of any actual issues behind
16 them for each of those 11.

17 So let me give you now the minor
18 issues. I probably should not have said that.
19 Again, I do not think these are minor. This is
20 perhaps less consequential than the first 11 and
21 might not even be what the parties focused on.

22 Issue number one is what exactly is
23 the coverage of the decree?

24 So, for example, Wyoming in talking
25 about the general holding with respect to Article

1 V(A) of the Compact. Montana specifically talks
2 about the Tongue River.

3 Issue number two is that Montana has
4 I think at least three provisions in its decree that
5 deal with issues of burden of proof, who has the
6 burden of proof.

7 My question there is, is burden of
8 proof something that belongs in a declaratory
9 decree?

10 Issue number three is that really
11 goes to the way in what I would consider the
12 reasonable and beneficial use requirement is defined
13 in each of the two decrees. I will talk a little
14 bit more about that when we get to that particular
15 issue.

16 Issue five is that there is some
17 slight language differences in the way in which
18 Montana and Wyoming describe the reservoir operation
19 provisions for the Tongue River Reservoir. I want
20 to understand if a lot of those differences are
21 consequential and, if so, how are they
22 consequential?

23 The fifth is that Montana includes
24 one provision with regard to supplementation in
25 reservoirs, and there was no discussion of that, and

1 I notice Wyoming did not have it. I am curious as
2 to whether or not that is something that I should be
3 concerned about.

4 And then I would say that -- I will
5 have to take a look at this. Issue six that I have
6 down here is the detail Montana call procedure. I
7 know what that is. It is that in the case of
8 Wyoming, although you have specified what should be
9 integral, you do not specify, for example, who the
10 call is going to come from and whether or not
11 Montana needs to document it.

12 Again, I find that in several cases
13 it was sort of interesting, sort of reversible. I
14 think the position of the parties would be Wyoming
15 leaves it relatively general and Montana offers a
16 very specific provision.

17 I am curious as to, Wyoming, whether
18 you care whether or not it provides for a very
19 specific provision.

20 So those are the issues that I
21 sketched out because I realize that at the end of
22 this morning that what I will need to do is go back
23 and actually draft out a proposed decree, and then
24 there will probably still be some language
25 differences that we have not touched on this

1 morning. You might introduce something that we
2 haven't discussed this morning.

3 What I am going to propose is that --
4 and so, again, think about this and we can talk at
5 the end of the hearing as to whether or not this is
6 an appropriate schedule -- is that I would have to
7 have to both sides' by May 15 a proposed decree.

8 And then both sides would have a week
9 to let me know whether or not there are any
10 particular aspects of that provision that we have
11 not talked about today that you are concerned about.

12 So it gives you an opportunity to
13 fine tune language and say, hey, this language is
14 something that if you just change this slightly, it
15 would be more accurate.

16 Then both sides a week after that
17 will be able to respond to each other. This is in
18 support of my current goal of trying to get a final
19 report to the U.S. Supreme Court for the end of June
20 so that, with any luck, the Supreme Court could then
21 address this when they come back in October.

22 So that's my goal, but I realize that
23 there might be slippage in time. At the end of the
24 day or the end of this morning hopefully we can come
25 back and actually talk about whether or not that

1 schedule makes sense.

2 So, with that, why don't I have
3 identification of the parties at this stage. And so
4 we will start, as always, with plaintiffs, State of
5 Montana.

6 MR. DRAPER: Good morning, Your
7 Honor. John Draper, counsel of record for Montana.
8 With me is Jeffrey Wechsler from Montgomery Andrews.
9 We are co-counsel here.

10 With us today, I would also like to
11 introduce, we have Kevin Smith, the director -- and
12 I think you will recognize many here, including Mr.
13 Smith, he is the director of state projects here for
14 the Research Division of Department of Natural
15 Resources and Conservation.

16 We also have Dale Book, one of our
17 lead technical experts.

18 We also have with us Mr. Hayes of the
19 Tongue River Water Users Association and counsel
20 Brenda Hall. I think you will recognize Ms. Hall as
21 well.

22 So we expected to have more actually.
23 The Solicitor General Dale Schowengerdt was going to
24 be here representing Attorney General Fox. Along
25 with him Alan Joscelyn, until recently the Chief

1 Deputy Attorney General of Montana, recently
2 retired. And Jan Langel, the acting Director of the
3 Division of Water Resources of Montana Department of
4 Natural Resources and Conservation. Unfortunately
5 their plane had technical difficulties. The flight
6 was canceled and it was their only chance to get
7 here in time for the hearing. So they regret not
8 being here.

9 SPECIAL MASTER THOMPSON: Okay.

10 Thank you very much.

11 Welcome, everybody. Mr. Hayes, I
12 don't think that I have ever seen you so well
13 groomed as this morning. It is delightful to see
14 all of you again. So thank you very much.

15 So, Mr. Kaste, for the State of
16 Wyoming.

17 MR. KASTE: As always, James Kaste,
18 Deputy General for the State of Wyoming. I am here
19 with General Peter Michael and Senior Assistant
20 Attorney General Christopher Brown. Wyoming State
21 Engineer Patrick Tyrrell.

22 SPECIAL MASTER THOMPSON: It is
23 delightful to see all of you again. I am going to
24 miss you all once this case is over.

25 MS. VERLEGER: Jennifer Verleger for

1 the State of North Dakota. As always, I am all by
2 myself.

3 SPECIAL MASTER THOMPSON: Thank you
4 very much. It is great to have you here this
5 morning. And we have Ms. Whiting for the Northern
6 Cheyenne Tribe.

7 MS. WHITING: Jenny Whiting for the
8 Northern Cheyenne Tribe amicus party in the case. I
9 am here by myself as well.

10 SPECIAL MASTER THOMPSON: Okay.
11 Thank you very much, everybody, again for the briefs
12 and the draft material. It was quite helpful.

13 First thing is, to people's
14 knowledge, am I missing any major issue we need to
15 discuss this morning?

16 I will start with Mr. Draper.

17 MR. DRAPER: Not that I notice as you
18 went through those issues. I think you will find
19 there are some more in there as we go through them,
20 but it seemed like a very thorough list.

21 SPECIAL MASTER THOMPSON: Okay.
22 Great.

23 Mr. Kaste.

24 MR. KASTE: Shockingly, I have my own
25 idiosyncratic. I think you missed the most

1 important one which is what are we trying to do with
2 this decree? All of these things flow from the
3 underlying and more fundamental issue of what is it
4 we are hoping to accomplish with this decree?

5 And once we understand that, once you
6 make a decision about that, the rest of these things
7 are easy. So I think we need to talk about that
8 first and most importantly.

9 SPECIAL MASTER THOMPSON: Okay. So,
10 Mr. Kaste, I was actually -- I was not ahead of you.
11 I was probably exactly on the same page.

12 What I wanted to do is actually start
13 out by permitting both you and Mr. Draper an
14 opportunity to talk about what you believe this
15 particular decree should accomplish.

16 So we will start out there, and then
17 we will dig into the particular issues. I just
18 wanted to make sure there was not something in the
19 specifics that I was missing.

20 MR. KASTE: Okay, Your Honor.

21 SPECIAL MASTER THOMPSON: Thank you.

22 So I set aside for both sides not a
23 lengthy period of time, but an initial period of
24 time just to describe what they think the decree
25 should try to accomplish or anything else you think

1 that is useful in framing the discussions this
2 morning.

3 Mr. Draper.

4 MR. DRAPER: Thank you, Your Honor.

5 In terms of what we are trying to
6 accomplish here, I think it is pretty well set out
7 in your opinion on remedies that the Supreme Court
8 would want to have a separate decree that specifies
9 the rights and obligations of the states going
10 forward, not simply adopting Special Master reports
11 which have many statements and recommendations
12 scattered through them, but to set out the specific
13 parameters for maintaining compliance with the
14 Compact in the future, and that goes to both states.

15 What responsibilities does Montana
16 have in order to enjoy its rights under the Compact,
17 and what responsibilities does Wyoming have to honor
18 the obligations it has to Montana under the Compact?

19 As you have said, the parties have
20 shown that we are not always in agreement as to
21 exactly what those rights and responsibilities are.

22 In your opinion on remedies you set
23 out some of the disagreements that came up in the
24 recent couple of years where we did have calls and
25 there were a number of problems or at least

1 potential problems that came up during that period
2 that showed that the states look at this
3 differently.

4 And the best thing that the Supreme
5 Court can do here is to set down a definite series
6 of principles that each state has to abide by and
7 clarify those positions sufficiently and
8 specifically so that they are not in need of coming
9 back for further clarification to the Supreme Court
10 in a short period of time.

11 Hopefully once this decree is
12 entered, it will serve as the framework for
13 cooperation between the two states under this
14 Compact for many years, hopefully generations.

15 So we believe that the proposal that
16 we made goes a long ways towards achieving that.
17 And we think you are on the right track, as we have
18 indicated, in your opinion on remedies and some of
19 your issues that you have just mentioned and the
20 curiosity that you have about why one state is more
21 specific than the other on certain issues.

22 Basically we are asking you to be as
23 specific as reasonably possible so that there is not
24 any room for doubt on our part or on Wyoming's part
25 as to what each state needs to do to live amicably

1 and cooperatively under this decree in the future.

2 SPECIAL MASTER THOMPSON: So let me
3 ask you two questions. One is a question I have
4 already stepped over the threshold for but would
5 still like your opinion, and that is one thing that
6 you did do is view the declaratory judgment as an
7 opportunity for summarizing in a precise fashion so
8 the Supreme Court can look at it and agree as to the
9 basic principles that come out of basically the
10 first two phases of the case. We can consider sort
11 of the legal issues which were resolved in the first
12 interim report and then second, the liability issues
13 in the second report.

14 Another way of looking at this is
15 that the purpose of the decree is look at the issues
16 that the parties have had to date to determine what
17 the working rules are going forward.

18 And in connection with that, I
19 obviously will not want to suggest that the Court
20 engage in any type of an advisory opinion as to the
21 issues that the parties have confronted up until
22 now, but, again, it is a little bit less wet so one
23 has to come before and instead of looking again at
24 facts that are before the -- that involve the two
25 parties, trying to actually determine what is

1 necessary to make sure the parties will not have a
2 disagreement going forward.

3 I assume Montana's position is that
4 it is the latter. And so my question for you is,
5 number two, prior Supreme Court original
6 jurisdiction matters, can you point to instances in
7 which decrees have actually been forward looking
8 without being bound necessarily with any liability
9 issues?

10 MR. DRAPER: Yes, I can.

11 SPECIAL MASTER THOMPSON: Okay.

12 MR. DRAPER: To respond to your first
13 point, we do feel there is some value in stating
14 general principles that have come out of rulings by
15 you and the Court during the course of this case.
16 That is why we have a general provision opening
17 section in the suggested form of judgment and
18 decree.

19 That is followed by a more specific
20 section which goes to operations during each year to
21 explain exactly and practically what needs to happen
22 in order for people to be sure they are complying
23 with the Compact.

24 As far as examples, there are several
25 I think. I would first bring your attention to the

1 example of Kansas vs. Colorado on the Arkansas
2 River. That case ended in 2009 with the entry of
3 the decree in that case. We attached that decree to
4 one of our briefs. I am not sure which one.

5 It is a little tricky because the
6 last time I checked the Supreme Court Recorder on
7 West Law it did not include the decree. There was a
8 little confusion originally, but as the Court always
9 says, it is part of the U.S. Report. So that is
10 easily found there and the bound volumes, recent
11 bound volumes of the U.S. Report are on the Supreme
12 Court website and easily available. So that can be
13 accessed that way fairly easily.

14 In that case, the final report of the
15 Special Master consisted of three volumes. I
16 brought two volumes today with me that set out the
17 rules for compliance with that Compact going
18 forward.

19 These include rulings of the Special
20 Master where there were differences between states
21 and also documents that specify how the parties will
22 stay in compliance and account for Compact
23 operations in the future. That has two volumes that
24 are operative.

25 There is a third volume that is the

1 documentation for the groundwater model in that
2 case, and that includes also the actual electronic
3 form of the groundwater model which is central to
4 staying in compliance in that case because it was
5 largely a groundwater case. And to account for
6 groundwater impacts, it took the groundwater model
7 and surface water model that were integrated, and it
8 is all in there in electronic form with the full
9 volume of documentation.

10 We do not need all of that detail in
11 this case, but it is a good example of how a
12 Compact, when it comes before the Supreme Court in
13 the circumstances of a dispute between the states,
14 offers results in an assessment by the Court about
15 the general principles in the Compact. It is a
16 situation that is slightly or perhaps in a large way
17 different from what the situation was at the time of
18 the Compact.

19 Those general principles have to be
20 applied to the current controversy and the decree
21 needs to be set out in sufficient detail to guide
22 future activities. That is what the Court adopted
23 in that case. There are other examples.

24 There is the more recent example of
25 Kansas vs. Nebraska. There again a big groundwater

1 case. The model and documentation and the actual
2 electronic version of that model are at the Court as
3 part of the binding decree in this case.

4 I think Your Honor is aware that
5 these more recent cases are available on the Supreme
6 Court website under case documents and the clerk has
7 the documents I am referring to set out there
8 completely. You don't get the DVD that has the
9 electronic model, but everything else you can get.

10 So there is more detailed
11 information, for instance, that is considered
12 necessary to implement the Compact going forward.

13 They don't want to have that all in
14 the U.S. Reports. In these cases it has been done
15 by referring to those appendices in the decree so
16 that you can keep the decree that appears in the
17 U.S. Reports pretty concise.

18 In those cases, for instance, the
19 Arizona or the Kansas/Colorado decree is probably
20 seven or eight pages in the U.S. Report, and yet
21 there are three volumes behind it that are referred
22 to and incorporated and available to everybody off
23 of the Supreme Court website.

24 So that may have been a little bit of
25 a long-winded response, but I think it does help put

1 what we are talking about today in context.

2 SPECIAL MASTER THOMPSON: Okay.

3 Thanks.

4 And so my second question is so, as
5 you know, in the Texas vs. New Mexico case the
6 Special Master there got into trouble when the case
7 went up to the U.S. Supreme Court by trying to
8 actually change the nature of the Compact and, in
9 particular, the Commission in that particular
10 case -- so that the Commission would operate more
11 effectively to help resolve disputes.

12 So that raises the question in my
13 mind of to what degree should the Supreme Court or
14 would the Supreme Court be willing to go beyond the
15 specific terms of this particular Compact to enter a
16 a decree that the two sides might not agree on with
17 specific provisions?

18 An example would be, for example, if
19 you, if Montana chooses a call, then Wyoming has two
20 days in which to respond. That is getting into sort
21 of a level detail that I would have loved to have
22 the two parties to have been able to operate on the
23 procedure. I think it is in the interest of both
24 sides to do it.

25 If the two sides cannot agree on how

1 that is to be resolved, can the decree actually
2 include anything that was not in the Compact?

3 MR. DRAPER: I think the Texas vs.
4 New Mexico case on the Pecos River is very
5 instructive. In '83 the Court issued an opinion in
6 that case that included the famous statement that if
7 there is a Compact approved by Congress that is not
8 somehow unconstitutional, that the Court will not
9 enter a decree inconsistent with any of its
10 expressed terms.

11 In that case they were being asked by
12 New Mexico to change the expressed terms of the
13 Compact. Special Master Breitenstein felt that the
14 Court had sufficient equity powers to make the
15 federal representative on the Pecos River Commission
16 a voting member and be able to break ties, which had
17 some immediate action by that Commission to
18 administer the river or pave the way to compliance.
19 That was what the Court was reacting to, and I don't
20 think we are anywhere close to that in this case.

21 Here we are not -- nobody, either
22 Wyoming or Montana, is suggesting any inconsistency
23 with the Compact, and your reports are certainly
24 consistent with it and interpreted.

25 One of the useful statements that

1 came out of the Pecos litigation between Texas and
2 New Mexico was the '87 opinion that the Court issued
3 at 482.US.124 in which Justice White wrote for the
4 Court, the unanimous Court and resolved all of these
5 final issues there, but he said that the function of
6 the Court in that case was to take a generally good
7 written Compact and interpret it and specify what
8 the specific consequences of that general language
9 would be for the states.

10 That is what I think we are involved
11 in here. What are the specific consequences of the
12 general language interpreted by you and the Court of
13 the Yellowstone River Compact in this case?

14 I would point out also that when that
15 case finally entered a decree, it was a decree that
16 came out in '87 of that opinion, but it was later
17 amended and that decree appears at 485.US.388. That
18 was entered in '88 and is still in effect. And that
19 amended decree specifically referred to the
20 compliance being -- they used a particular Texas
21 exhibit in that case which was, which is called the
22 Pecos River Master's Manual. It was Texas Exhibit
23 108, but it specified that amended decree in the
24 U.S. Report as being the set of rules.

25 They didn't have computers setting

1 obligations then at the time or the way we can now,
2 but there were equations on how you go about
3 administering compliance and assessing compliance.
4 There it is done on a yearly basis.

5 So the Court was specifying specific
6 results that had to take place every year at a
7 specified place and how it was documented.

8 And in that case, as Your Honor may
9 be aware, they did appoint a river master who then
10 takes these submittals and enters the final order as
11 to whether the State of New Mexico is in compliance
12 for that year.

13 So you can see that there are a lot
14 of specifics that the Court got into and felt very
15 comfortable getting into so it could help the states
16 understand what their obligations and rights were
17 going forward so that there would be no dispute
18 about that or at least minimize the disputes.

19 As Justice Frankfurter once said, All
20 avoidance of dispute is not within human gift, but
21 to minimize that I think is our joint effort here
22 going forward.

23 We want to settle the issues that
24 have been brought before the Court in this case in a
25 way that we will put them to rest for a long time to

1 come.

2 SPECIAL MASTER THOMPSON: Okay.

3 Thank you very much.

4 Mr. Kaste.

5 MR. KASTE: May it please the Court,
6 Counsel. Like I said, I think the most important
7 issue and what everything flows from is, what are we
8 here to do?

9 I think that you are here to declare
10 the rights and obligations of the parties on the
11 issues that were actually litigated and necessarily
12 decided in these proceedings.

13 We had a trial, and in that trial a
14 number of issues were necessarily resolved to reach
15 your conclusions; and then we had a remedies phase
16 and a number of issues were necessarily resolved to
17 reach your conclusions.

18 Those are the things, the rights and
19 obligations, that were part and parcel of these
20 proceedings that belong in the decree. I think that
21 you are absolutely right, if the parties were to
22 agree to other things, fine, that is cool. We can
23 throw that in.

24 If the parties do not agree and they
25 were not necessarily decided by you in the course of

1 litigation, they do not belong in the decree. They
2 belong in a future trial, which we have not had yet.

3 Now, that is a fundamental thing that
4 I think that we are bound by. We can only expound
5 upon those things that were tried and that you had
6 to decide to get to the resolution that you did.

7 From the State of Wyoming's point of
8 view, we do not love all of your rulings, but we
9 have accepted all of your rulings and believe that
10 the decree that comes out of these proceedings
11 should use the words that you carefully chose in
12 reaching those rulings; sometimes to our benefit and
13 sometimes not. But those words you picked very
14 carefully and we accepted those words. We would
15 like to see those words that define our rights and
16 obligations in the resulting decree.

17 I don't believe that the decree is a
18 time for us to change the rulings that you made in
19 the case, to alter the outcome of the case by
20 picking different words that may have different
21 meaning and different consequences to both states.
22 That is not what I believe we are here to do absent
23 agreement by the parties.

24 Your rulings on the remedies, you
25 said that the decree should come directly from the

1 rulings. You used the word directly, and I think
2 for good reason. Other rights and obligations that
3 might be included in the decree must be dictated by
4 the terms of the Compact and then if they are
5 critical to implementing the Compact.

6 I don't believe in the course of
7 either one of these decrees that there are other
8 obligations, other than the ones that you have
9 already discussed in your various rulings, that are
10 dictated by the terms of the Compact and necessary
11 or critical to implementing the decree.

12 You can see that when you look at
13 sort of the new things that Montana has offered to
14 include in its decree.

15 For example, a process by which we
16 decide who gets the call or how a call is going to
17 work.

18 I think I asked you at least a half a
19 dozen times to rule specifically that the Compact
20 requires that the call be in writing, at least six
21 times. You said no, it is not in the Compact.

22 That is the ruling in this case.
23 That is the ruling that ought to be memorialized and
24 guide the parties' rights and obligations going
25 forward, because that is the ruling that you made.

1 You said without equivocation, it was
2 repeated efforts, that the Compact is not requiring
3 the call be in writing, to take a particular form or
4 be given to a specific individual. That is not in
5 the Compact.

6 So to include that in the decree
7 after the actual substantive outcome of the
8 proceedings was 180 degrees different from that does
9 violence to the rulings that you have made. I don't
10 think that we can or should do that. We cannot and
11 should not be changing the outcome of this case in
12 the decree itself.

13 So I think, alternatively, if you
14 look at the competing decrees and you look at it
15 with an eye towards memorializing the rights and
16 obligations which necessarily flow from the
17 litigation we engaged in and we exclude the new
18 things that Montana has put in, I kind of think of
19 it as hopefully you will see that there is not that
20 much difference between what the parties have to
21 say.

22 But I do think that there is more
23 than just I say tomato and you say tomato aspect to
24 the content of the specific words that the parties
25 have chosen, and we think you have picked these

1 words for good reason after careful consideration.

2 We see that Montana has picked
3 different words. We are not comfortable with that.
4 We cannot assume that those choices that Montana
5 made to deviate from the specific wordings in your
6 rulings are inconsequential. They may not be. We
7 do not know. We didn't litigate those word choices.
8 We didn't litigate the content of these changes that
9 Montana proposes.

10 Now, Wyoming, of course, I think has,
11 we tried to be forthright, but in one particular
12 instance we would like you to change the wording
13 because we fear the consequence of those specific
14 words that you chose and we have good reason, and I
15 will discuss that later.

16 But outside of that one instance
17 where I think that the parties generally are saying
18 the same thing also in different words, I think we
19 should be here declaring the rights as they were
20 determined in the course of the litigation and not,
21 and that is my view, about the changes that Montana
22 proposes to the language creating quasi injunctive
23 relief where none was worded.

24 If you look at the structure of the
25 language that Montana proposes having failed to

1 attain injunctive relief, we can sneak it in the
2 back door through the language that we use in the
3 decree.

4 To your point about, well, other
5 decrees are they forward looking, some are because
6 they include injunctive relief and some have big,
7 huge models associated with them because that's the
8 needs the case required. We don't need that in our
9 case.

10 I will point to the decree in the
11 Kansas vs. Nebraska case, which has a little bit of
12 both. There are nine substantive provisions in that
13 decree. They are one sentence each. It is a model
14 of efficiency.

15 And then attached to that, after
16 those nine substantive provisions, are the
17 provisions that change the accounting procedures and
18 calculations.

19 I think a lot of that was referred to
20 by the parties, those changes. But those
21 calculation changes and accounting procedures were
22 necessary in that case.

23 I think in a case where you have
24 delivery obligations between the states and they are
25 appropriately governed by models, it is perfectly

1 fine to include them in your decree.

2 We don't have an operating model in
3 this instance. Our Compact is fairly unique, as you
4 have come to know, and a model does not govern.

5 I truly believe that we are best
6 served by adhering to things that you have said in
7 the exact way that you have said them, and that's
8 the best possible way to avoid future disputes both
9 about the decree and about the operation of this
10 Compact going forward.

11 SPECIAL MASTER THOMPSON: Okay. So,
12 thank you, Mr. Kaste.

13 Let me just ask a variety of
14 questions that your comments gave rise to, and I
15 will not take these in any particular order.

16 Let us start with declaratory relief
17 versus injunctive relief. So the reason why I
18 decided not to award injunctive relief in this
19 particular case is I believed Wyoming all along that
20 whatever the Supreme Court's ultimate judgment in
21 this particular case is, whatever decree it enters,
22 that Wyoming would comply with it.

23 And because of, I think, the
24 sensitivities the Supreme Court has to actually
25 order a state to do something when the state is more

1 than prepared to abide by everything by decision was
2 that there was no need for injunctive relief, we
3 will stay with declaratory relief.

4 So, to be honest, I get a little bit
5 concerned then with the notion, well, maybe you
6 cannot spell things out as much because you have not
7 gone the injunctive route rather than declaratory
8 route.

9 So, in your view, what is it that one
10 cannot do in a declaratory judgment that one could
11 do in an injunctive judgment other than to say the
12 state is enjoined to do the volume or not to do the
13 volume?

14 MR. KASTE: Well, in some respects it
15 is a question of semantics and injunction is the
16 command compelling the state to do something in the
17 future, either not take a specific action or take a
18 specific action.

19 Declaratory relief declares the
20 rights and obligations of the parties, and from
21 those rights and obligations we know what we are
22 supposed to do or not do in the future, and in many
23 respects they are two sides of the same coin.

24 You have to understand your rights
25 and obligations, and then either your future action

1 is obvious or you can be told to take some future
2 action to result in what your rights and obligations
3 are.

4 But there is this possibility with
5 injunctive relief that we continue to be before the
6 Court unnecessarily. I think that the declaratory
7 relief puts us in the position where we can then
8 react to the changing conditions in the river
9 understanding our rights and obligations in a more
10 flexible way.

11 If you start putting specific things
12 in this decree that dictate how Wyoming and Montana
13 are supposed to respond to an ever changing set of
14 circumstances, which is what this basin is like, we
15 are going to find ourselves at loggerheads at times
16 probably for no good reason.

17 This is a dynamic hydrologic
18 situation for which we have terrible forecasting,
19 and so we have to be able to make decisions about
20 what to do in the moment.

21 You have seen that over the course of
22 last two years with the calls coming back and forth,
23 where Montana has placed a call based on current
24 conditions and then lifted the call based on then
25 prevailing hydrologic conditions.

1 We are not yet in a position to
2 understand the hydrology of this basin with such
3 certainty that we can start spelling out what the
4 parties' future obligations are under any given set
5 of circumstances.

6 We are trying. Both sides are trying
7 to get the Federal Government to try to improve our
8 forecasting and models so that we can make better
9 decisions in realtime, but that is a statistical
10 inquiry, not a legal inquiry.

11 So to start amending future
12 obligations I think is unwarranted and potentially
13 can cause future disputes.

14 Whereas, if we understand the
15 fundamental legal right that each party has by
16 virtue of the Compact, we are better suited to
17 respond to dynamic hydrologic conditions.

18 At the end of the day spelling out
19 the rights and then mandating are sort of two sides
20 of the same coin. I think we can articulate the
21 rights and obligations of the issues that were tried
22 in a way that will eliminate or mitigate future
23 disputes among the parties.

24 While there was back and forth
25 communications between the parties in the last

1 several years in which there seemed to be some
2 sniveling at each other, the parties did what they
3 were obligated to do in both instances.

4 We got the information ultimately
5 that Wyoming wanted to see from Montana, and Montana
6 got the response that it wanted to see from Wyoming
7 and the communications back and forth got better in
8 the second year than the first. Information sharing
9 got better in the second year than the first.

10 There is no reason to start trying to
11 dictate from among high the future flexibility and
12 interactions of the parties outside the very basic
13 legal rights that we determined here.

14 SPECIAL MASTER THOMPSON: Okay. So
15 let me sort of probe a little bit more your initial
16 comments.

17 Montana in this particular case was
18 in its -- it sought both damages for past breaches
19 of the Compact by Wyoming but also was seeking to
20 get declaratory relief moving forward.

21 I assume so long as there was a live
22 controversy, in other words, Montana did not show it
23 had standing because, in fact, it was being injured,
24 that Montana could have sought declaratory relief,
25 did not have to ask for damages for past violations.

1 And that could include declaratory relief that, in
2 fact, Montana would want to put a call on the river.

3 Second of all, that Wyoming would
4 have an obligation to respond to that particular
5 call.

6 And so here I am going to push things
7 a little bit forward. There is nothing specifically
8 in the Compact about how Wyoming would respond to a
9 call, but providing implicit provisions just like
10 you would in any Compact, I would think that, number
11 one, one could say Wyoming has an obligation to
12 respond within a reasonable time.

13 Will you agree with that?

14 MR. KASTE: I am pretty sure that I
15 have asked you to do just that by saying that it
16 would be reasonable and the Compact should
17 implicitly provide that Montana's call be in
18 writing. You said no, that is not in there.

19 Like I said, if you haven't made that
20 decision in this case and wanted to add something to
21 this decree that we have not already litigated, then
22 I would want a trial. I want a trial on those
23 specific provisions, and I want an opportunity to
24 argue and present evidence about the propriety of
25 those rulings, because we haven't litigated those

1 yet. To do that at the 11th hour is improper in my
2 view.

3 New provisions, while they might make
4 some sense, do not belong in this decree. They
5 probably more properly -- not probably, they are
6 probably the subject of rule making by our Compact.

7 And then if in a future dispute the
8 parties have continuing or different problems
9 related to the operation of the calls back and
10 forth, that is a subject of a future case on which
11 different declaratory injunctive relief might flow.

12 To imply in the decree out of the
13 blue new obligations that were not the source of our
14 trial prejudices both parties, because neither one
15 of us would have an opportunity to have that issue
16 necessarily and fully litigated in front of you and
17 ultimately the Court.

18 SPECIAL MASTER THOMPSON: So let us
19 go back for a second.

20 You are absolutely right that you
21 suggested that calls need to be in writing and
22 looking at the Compact and making a reasonable
23 interpretation of it I concluded that a writing is
24 not required. At the same time though, the Compact
25 itself says nothing about any call.

1 But interpreting the Compact in
2 order, to number one, provide substance to what
3 prior appropriation needs to be in the Compact, as
4 well as what should be reasonably required in the
5 order, what my ruling was that the Supreme Court has
6 now adopted is that Montana, if it wants water, has
7 to make a call. It has to alert Wyoming that it
8 needs water.

9 So how is that different from then a
10 requirement that Wyoming has to respond to that call
11 within a reasonable period of time? For the moment,
12 I am not getting into --

13 MR. KASTE: We had a full and fair
14 opportunity to litigate the first question in front
15 of you and ultimately the Court. That was part of
16 the case, and we litigated it for a long time.

17 The next question was not fully and
18 fairly litigated in front of you or before the
19 Court. That is not part of this case. It is not a
20 proper subject.

21 SPECIAL MASTER THOMPSON: So I
22 understand -- so let me just ask two aspects of
23 this.

24 The first one is, so I understand
25 your view that somehow there are evidentiary issues

1 involved in that particular question as to whether
2 or not Wyoming has to respond within a reasonable
3 period of time, without specifically deciding that
4 question right now, I guess I find that a little
5 bit --

6 MR. KASTE: The problem is that we
7 don't know. We didn't have a chance to explore
8 whether or not there were legal issues associated
9 with that because we didn't have that as an issue
10 during the litigation of this case. I don't know
11 whether there is an evidentiary concern there. It
12 was not an issue in the case.

13 It just seems wholly inappropriate to
14 start imposing rules that interpret or imply
15 mandates from the Compact that neither party had an
16 opportunity to litigate.

17 SPECIAL MASTER THOMPSON: So let us
18 go back to several aspects on this.

19 First of all, the case was phased,
20 right, so there was a liability phase and then there
21 is a relief phase. Part of the relief is Montana is
22 actually asking for declaratory relief. I can
23 readily imagine, in fact, I would not think that
24 there are a variety of issues with respect to
25 declaratory relief that we did not have to

1 necessarily resolve with respect to liability.

2 So, for example, does Wyoming have to
3 respond within a reasonable period of time to a
4 Montana call? That was not an issue in liability
5 because Wyoming did not respond at all to the call
6 and they are just denying it. They did not take any
7 specific action in response to it. So it was not an
8 issue that could have come up in the liability case.

9 I am perfectly willing, if you want
10 to, to extend this last phase to have some, I guess,
11 we can have some more summary judgment motions, if
12 you want, with respect to specific aspects such as
13 whether or not Wyoming has to respond to a call
14 within a reasonable period of time.

15 MR. KASTE: You cannot just
16 wily-nilly run around and declare rights that seem
17 like they would be great to have. Your remedy flows
18 from the liability phase of the case. We cannot
19 just add on remedies that did not necessarily flow
20 from a liability phase of the case because you think
21 that it might be nice.

22 Your remedy is limited to that which
23 is necessary to make whole the litigation that came
24 before the Court on the issues that they brought and
25 declare, as it is necessary, the rights and

1 obligations of the parties, enjoin as is necessary
2 to ensure future compliance and then you are done.

3 We cannot run around wily-nilly doing
4 good, and that is what I think the ultimate import
5 of what you are saying is. I think that I can do
6 good and answer stuff here that will make
7 everybody's life a little easier. No, we are not
8 free to do that.

9 SPECIAL MASTER THOMPSON: So number
10 one, I assure you that I am not running around
11 willy-nilly, and I know that the Court is not
12 running around willy-nilly.

13 So the question here is simply look
14 at what the dispute is between the parties, and I
15 agree that I cannot and the Court should not issue
16 advisory opinions that have nothing to do with the
17 dispute that has been between the two parties.

18 But going back to my first point,
19 Montana, I believe, could have just brought an
20 action for declaratory relief in this particular
21 case without having a liability issue.

22 If they had said as part of that
23 declaratory relief, look, one of the things that we
24 want is that we want a judgment and, in fact, under
25 the Compact Wyoming has to provide water that meets

1 pre-1950 appropriators in Montana to the decree that
2 are not getting water and there are
3 post-appropriators in Wyoming that are using water,
4 and you would then respond to well, no, we don't
5 think there is any obligation like that but,
6 furthermore, we think that Montana needs to actually
7 issue a call and we think that a call should be in
8 writing.

9 And Montana says so we don't think it
10 should be in writing, and it should not take
11 necessarily any form, but if we do have to call, we
12 believe that Wyoming should have to respond within a
13 reasonable period of time.

14 What if we come up with a declaration
15 that said Montana needs to alert Wyoming, it does
16 not need to take -- Montana needs to clearly alert
17 Wyoming that, in fact, they need water and under
18 those circumstances Wyoming would then have to
19 respond within a reasonable period of time?

20 MR. KASTE: So in your hypothetical
21 Montana asks for this specific relief in part of the
22 trial that preceded the decree. If we had tried
23 whether or not the Compact imposes an implied
24 requirement that in some specific period of time
25 that a call has to be responded to, then it would be

1 the proper subject of the decree, if that had been
2 part of the complaint.

3 If the parties had an opportunity to
4 litigate it fairly and fully and it ended up in the
5 decree, fine. You are right, the word call is not
6 in the Compact. The parties litigated that question
7 and you resolved that question.

8 SPECIAL MASTER THOMPSON: So let me
9 then ask one final question along these lines which
10 is, again, the liability phase dealt with liability
11 issues.

12 We are now to the question of what
13 should be the form of relief? So we are now on the
14 declaratory relief side. I am not planning to put
15 anything in to the declaratory relief that cannot be
16 resolved as a question of law.

17 If somehow I put something like that
18 in there, then if someone wants me to put in
19 something that actually requires an evidentiary
20 hearing and there are issues of fact that need to be
21 resolved, then we would have a trial on it. But I
22 do not see why one cannot at this particular stage
23 resolve an issue of law that goes to the question of
24 declaratory relief.

25 You seem to want to actually link

1 everything back to phase two of the case.

2 MR. KASTE: Phase one.

3 SPECIAL MASTER THOMPSON: Phase one
4 as you define it. I look at this as three different
5 phases. First of all, the legal issues that we
6 dealt with in terms of motions to dismiss. You are
7 right.

8 MR. KASTE: That is why we had phase
9 one, so we knew what the proper subjects of phase
10 two are and to go beyond the issues that were
11 decided in phase one.

12 As I said, a willy-nilly attempt to
13 do good, whether they are legal issues or factual
14 issues, is not appropriate. It is outside the power
15 of the Court even.

16 You cannot step back from the case or
17 controversy that was brought before you in the phase
18 one and start doing things that are new or different
19 and have not been litigated.

20 SPECIAL MASTER THOMPSON: So let me
21 separate again two things. One is case controversy.
22 I agree with you entirely that the Court needs to
23 stay within the case or controversy requirement.
24 They made that clear many times.

25 Second question though is what was

1 specifically supposed to be resolved in phase one
2 versus phase two?

3 Going back, it looks to be phase one
4 was a question of liability. Phase two was
5 declaratory relief. And you just suggested there
6 are some things that you did not necessarily need to
7 resolve as a matter of liability that you do for
8 purposes of declaratory relief.

9 MR. KASTE: The declaratory relief in
10 this case comes from the first phase. And you made
11 your decision on remedies and the decree is not
12 memorializing that which we decided.

13 Those things that you declared, the
14 rights and obligations that you declared were those
15 things that arose during the liability phase that
16 you necessarily had to resolve to move on and you
17 did that.

18 Like I say, we think that you chose
19 your words carefully, and we would like the
20 inclusion of those words in the decree because they
21 accurately reflect what happened in the case.

22 To change that, to change those
23 words, it necessitates a new trial on whatever those
24 new issues might be or even to change the wording
25 necessitates further liability proceedings because

1 those are the resolutions that you reached.

2 If you want to change the resolution,
3 we have problems. This is a little late to be
4 wordsmithing against things that you have already
5 written down.

6 I guess I have said it as best as I
7 possibly can and in the most articulate way that I
8 can that what we necessarily did and actually
9 decided belongs in the decree and nothing more.

10 If there are other issues that were
11 not actually litigated in the liability phase, they
12 were not necessary to the resolution of the
13 questions that were presented in the complaint.
14 That is it.

15 Now, they might be interesting
16 questions that we have to resolve in the future, but
17 that is a different case. That is not this case.

18 SPECIAL MASTER THOMPSON: Okay.
19 Thank you.

20 MR. KASTE: Thanks.

21 SPECIAL MASTER THOMPSON: Mr. Draper,
22 anything else?

23 MR. DRAPER: Yes, Your Honor, if I
24 could just respond to the points that you were just
25 discussing with Mr. Kaste.

1 He began by debating the issue of
2 specificity and whether that is justified to try to
3 be specific or whether it should be maintained as
4 general.

5 I think the Court and even yourself,
6 Your Honor, have been clear that the party that
7 benefits from specificity is the downstream state to
8 the decree. The one who wants to avoid specificity
9 is the upstream state typically in these situations.

10 So it is very normal for the upstream
11 state, in my experience, to oppose every bit of
12 specificity that they can because that gives them
13 wiggle room in the future.

14 If there is wiggle room, what
15 happens? There is a dispute on the river and they
16 do not want to let the water down; and they say the
17 language is not specific enough to make us honor
18 your call.

19 And what is the option then for the
20 downstream state? It is not a good one. It is only
21 this Court that can assist us.

22 This is in line with the thinking of
23 the Court on all of these cases about going forward.
24 It needs to try to resolve these in a way that that
25 kind of issue is minimized, to the extent that it

1 can be consistent with the principles that you have
2 seen to avoid conflicts in the future.

3 Mr. Kaste referred to the short
4 decree in the recent case of Kansas vs. Nebraska.
5 To understand that, underlying that are five volumes
6 of final settlement agreements that was the subject
7 of the 2003 decree in that case. That decree itself
8 is a paragraph, but it adopted those five volumes.
9 It was one specific section or a couple of specific
10 sections out of those five volumes that got changed
11 in the new order in 2015. Everything else was in
12 place, the model, model documentation, all the
13 operating rules that have been adopted by the Court
14 earlier.

15 So there is a lot of icebergs under
16 those nine paragraphs that allowed it to be a fairly
17 succinct statement in the U.S. Supreme Court.

18 As far as issues that are, according
19 to Mr. Kaste, not in the Compact now that we are
20 considering putting in the decree, I think
21 everything that we are asking for grows out of the
22 Compact, is based on the Compact. Just the document
23 about prior appropriation, that is all specified in
24 Article V(A). From that you have derived the
25 obligation that we have to make a call.

1 So the factors that tend to that
2 requirement are naturally also brought into play and
3 need to be resolved. Otherwise you are just setting
4 the stage for more conflict. We will be right back
5 here and we will have failed in our goal, which I
6 think is a joint goal that we have now that there
7 not be any future conflicts to have to take the time
8 for us in court.

9 I think it is interesting that
10 Wyoming is now suggesting that we need a trial, a
11 remedies trial. As you may recall, there were
12 exceptions to your second report. They said we did
13 not even need this phase of the case. We should
14 skip it completely, and now they are saying we need
15 a trial.

16 But beyond the irony of that, as a
17 matter of principle, I do not necessarily agree with
18 them.

19 We had a lot of trials in the
20 Arkansas River case between Kansas and Colorado over
21 remedies. The Supreme Court issued its first
22 opinion in that case finding liability in 1995.
23 Now, it did not quantify that at that time. So the
24 quantification still had to go forward. That is
25 part of liability.

1 But the final decree, a lot of which
2 consisted of these volumes that I showed you
3 earlier, was not entered until 2009. So what is
4 that, 14 years later or something like that? That
5 is a lot of trials. We had 220 days of trial in the
6 case. A lot of that was after 1995. Not
7 exclusively remedies, but certainly some of it went
8 to remedies.

9 Your point about how a case could be
10 brought without asking for damages just for
11 prospective relief is well taken.

12 I will give an example of the suit
13 brought against Wyoming itself by Nebraska that
14 resulted in opinions by the Court in 1993 and 1995.
15 That was only for prospective relief. They did not
16 ask for damages. There were damages that were going
17 to be built and injunctions were sought to stop what
18 Nebraska saw as an impending violation of the decree
19 in that case.

20 I just wanted to make those supported
21 points to comment on the discussion that Mr. Kaste
22 had.

23 SPECIAL MASTER THOMPSON: Okay.
24 Great. Thank you.

25 This has actually been a really

1 valuable discussion, and I think will probably make
2 some of the rest of this morning's hearing a little
3 bit easier.

4 Why don't we go down the specific
5 items that I listed this morning. Why don't we
6 start with the issue of changes in the place of use
7 which both Montana and Wyoming have very different
8 views on, I think.

9 So certainly the provisions of
10 Montana, which I think are Sections A11 and A12 of
11 their proposed decree, specifically provides that
12 Article V(A) of the Compact protects pre-1950
13 appropriative rights to change their water use
14 efficiency so long as the pre-1950 water rights
15 remain unchanged with respect to the irrigated
16 acreage of use and location and capacity of
17 diversion.

18 That should be compared to Wyoming's
19 provision, which is in Section II (D) of its
20 proposed decree which provides that, again, the
21 Compact permits change in water use efficiency,
22 consumptive use and return flow within the legal
23 parameters of the appropriative rights.

24 So I think it would be a lot easier
25 if, Mr. Kaste, you sought it out and help explain

1 why this is important to Wyoming.

2 MR. KASTE: Certainly. This is one
3 of the differences where I think we don't really
4 disagree all that much. There is a lot of different
5 verbiage there. The principles both parties I think
6 adhere to are the same.

7 The Court ruled that Wyoming increase
8 their efficiency. Okay. We wanted to reserve that.
9 At the same time, the Court did not rule, you
10 haven't opined on anything related to change of use,
11 change of right of use.

12 Both states permit their water rights
13 holders to change place of use. And in so doing
14 both states require that movement from one place to
15 another not injure anybody else. You can see that
16 in both state statutes.

17 So when Montana talks about
18 application of a no entry rule to change the place
19 of use, Wyoming agrees. It is memorialized in our
20 statute. There is a long litany in our statute of
21 things that we cannot do to hurt somebody else if
22 you want to change the place of use. We agree with
23 Montana on that.

24 We agree with Montana that when you
25 change a place of use, you cannot expand the amount

1 of water that you use. You cannot expand your water
2 right.

3 What we want to do is just avoid any
4 confusion about those two different things. Your
5 irrigation efficiency improvement versus change of
6 place of use.

7 And the language that was in the
8 Court's original opinion is very susceptible to an
9 argument in the future that change of place of use
10 is somehow prohibited by the language by the Court
11 where it talks about on some land. We are talking
12 about efficiency and improvements versus change of
13 place of use.

14 To avoid that confusion we have
15 suggested, and I think in a perfectly fine way to
16 articulate this, is that you have the right to
17 change within the legal parameters of your water
18 right, which means you look to state statutes about
19 what you can and cannot do in order to change your
20 place of use.

21 Our statutes are roughly equivalent,
22 although the wording is slightly different, but the
23 principles are the same. I think that the simplest
24 way to articulate that is to say you can change your
25 place of use so long as you do it in conformity with

1 the state statutes. That is it. I think we
2 generally agree.

3 The question is, what is the best way
4 to say it? Montana has a little bit more wording
5 and they do not reference the statutes in the way
6 that we would like to see it.

7 That is really our minimal hangup
8 there, is how best to reference those future of
9 people so that they can, in fact, change the place
10 of use as long as they abide by state law. I think
11 this is a lot more noise than is necessary for the
12 problem that Wyoming articulated.

13 SPECIAL MASTER THOMPSON: So let me
14 just sort of address several hypotheticals. I
15 understand what Wyoming's position is and what
16 Montana's is.

17 The first thing is, if somebody in
18 Wyoming says I want to change my place of use and,
19 by the way, in changing the place of use I am also
20 going to now be using sprinklers rather than flood
21 irrigation, so I am actually going to at the same
22 time change my place of use and be consuming more
23 than I was before so that there will be less return
24 flow than there was before, is Wyoming's position in
25 that particular case that that is an impermissible

1 change in the place of use because in the process
2 you are changing the return flow?

3 MR. KASTE: Watch very carefully Mr.
4 Tyrrell's head and see if it is going up and down.

5 SPECIAL MASTER THOMPSON: It is
6 starting to begin to move.

7 MR. KASTE: When that petition to
8 change comes before the Wyoming State Board of
9 Control, the Board of Control is not permitted and
10 will not allow the person to move more water on to
11 the new lands that it was consumptively using on the
12 old lands.

13 Now, you may change the way in which
14 you irrigate your new lands, but you are going to
15 then have to get, to make up for the limitations of
16 your consumptive use, a new current day priority to
17 fill the remainder of your pivot.

18 So our pivots, oftentimes you will
19 see pie shaped wedges with different priority dates
20 in it which are not uncommon at all. You may have a
21 pre-'50 right up to the amount of your consumptive
22 use at your prior location and the fillings that are
23 have on a current priority, a pre-existing priority
24 that you may have from somewhere else.

25 Is he nodding or shaking his head?

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1 SPECIAL MASTER THOMPSON: He is
2 bowing his head.

3 MR. TYRRELL: It is very difficult to
4 hear everything from back here.

5 MR. KASTE: See, I am guaranteed that
6 he has to sort of agree with me because he cannot
7 hear what I said.

8 The reality of the situation, while
9 it is perfectly appropriate, it happens all the time
10 to move your water right from an irrigated field to
11 a new place where you are going to use a pivot, you
12 must take the haircut that comes along with that
13 that limits you the consumptive use you use there,
14 which will make sure that you do not injure somebody
15 by virtue of the change.

16 The remainder of the considerations
17 are outlined in the Wyoming statute. You can do
18 both, but you will take a reduction in the amount of
19 water that you are allowed to divert.

20 SPECIAL MASTER THOMPSON: So actually
21 why don't I suggest, Mr. Tyrrell, do you want to
22 come up too? Come into the well.

23 MR. TYRRELL: As long as it is legal,
24 Your Honor.

25 SPECIAL MASTER THOMPSON: It is. You

1 can come all the way up. Okay.

2 So, again, I just want to make sure
3 that I understand. If somebody wants to change
4 their place of use and at the same time they are
5 also going to be changing their irrigation when they
6 change their place of use, they are held to, number
7 one, the same amount of diversion, but also they are
8 held to the same amount of consumption?

9 MR. TYRRELL: Your Honor, where I
10 might disagree slightly with Mr. Kaste is primarily
11 it is the diversion in acres. We look harder at
12 consumptive use in a change of use proceeding where
13 the consumption on the land going from irrigation to
14 municipal, for example, if that were to happen, then
15 that beneficial use is critical.

16 Typically in a plain vanilla change
17 of place of use, if they have a good history of use
18 on those acres and they want to go from a 100-acre
19 polygon irrigated field to a 100 acres under pivot,
20 that acreage moves but they are still limited to the
21 one per 70 cfs of water that is in our statute. We
22 would not necessarily go to them and say give us all
23 the consumptive use data off your field.

24 As long as they have a good, solid
25 history of irrigation, they can move the acres with

1 that priority date and with that diversion amount.
2 And we would allow them, if they change from flood
3 to pivot on the field before moving and they wanted
4 to move and go from flood to pivot on the new field,
5 it is eight acres and the diversion amounts I think
6 are primary there.

7 But in terms of a pure or a very
8 engineering scale beneficial or depletive analysis
9 just doing a place of use, we do not do it that
10 rigorously. We do it in a change of use more so
11 than a change of place of use. That is the
12 distinction that I was mulling over in my head as to
13 what I hear.

14 SPECIAL MASTER THOMPSON: Okay. I
15 don't know the exact procedure in Wyoming, but if
16 there was a downstream appropriator that had
17 specific acreage that knew, in fact, a change of
18 place was occurring and suspected that at the same
19 time that the farmer was probably going to put in
20 some new irrigation equipment in order to use that
21 in the field, that that would probably change the
22 consumptive use because of the change on what is
23 being grown and how it is being grown and he
24 complained about it, you would look at it then?

25 MR. TYRRELL: You bet. The idea

1 there, Your Honor, is a change like this is
2 typically advertised to anybody who might have
3 standing on between points of diversion or on that
4 same ditch or point of diversion.

5 And if there is a risk of a loss of
6 return flow or loss of water that would be a water
7 right injury to another party due to not only a
8 change in place but a change in type of irrigation,
9 that could go to hearing. It would all come out.

10 It would be up to the hearing officer
11 and ultimately the board to balance that evidence
12 and say, is there an injury here or not?

13 But that is the kind of question that
14 another party on that source could raise and could
15 take us to a contested case hearing, yes, sir.

16 SPECIAL MASTER THOMPSON: Okay.
17 Thank you. That is fine.

18 So, second, I hope that, in fact, you
19 don't give me a different answer than I am
20 expecting. So the Supreme Court in this particular
21 case has held that if, in fact, you have a farmer in
22 Wyoming who is not changing place of use, place of
23 diversion type of use but is instead just changing
24 their irrigation structure, normally that would not
25 be something that you would have to review, correct?

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1 MR. TYRRELL: Correct.

2 SPECIAL MASTER THOMPSON: That same
3 farmer actually puts new irrigation equipment in and
4 they are saving some water in the process, the water
5 that they save they now want to use on some new land
6 that is not currently under their prior
7 appropriative right, that would be something where
8 you would step in and say no, you cannot do that?

9 MR. TYRRELL: That is correct. We
10 would view that as an extension of a water right.

11 SPECIAL MASTER THOMPSON: Okay. So
12 let me ask a slightly different more nuanced
13 question.

14 What there constitutes a new acreage?
15 So by that I mean, what is the acreage for purposes
16 of a change?

17 So presumably you have an irrigation
18 right for, let us say, 160 acres of land that sort
19 of has been defined. That person has been using 120
20 acres historically and now they want to save water
21 on that 120 and put water to use on that other 40
22 acres.

23 How does that work?

24 MR. TYRRELL: In Wyoming if they had
25 an adjudicated right for the 160 that at some point

1 was proven up on, it would not be adjudicated.

2 If at some point in the past they
3 hadn't proved up on that full 160, unless those
4 additional 40 acres had been removed from the books,
5 they could bring those back under irrigation.

6 But what typically happens in that
7 case is they get a permit for 160 acres. They
8 irrigate 120, and then they call the field staff out
9 to take proof and adjudicate those 40 if at that
10 time are not being irrigated eliminated from the
11 permit at that point.

12 SPECIAL MASTER THOMPSON: So
13 basically you do have to use the water on that
14 particular acreage in order to prove it up?

15 MR. TYRRELL: Once adjudicated, those
16 acres exist until they are abandoned.

17 SPECIAL MASTER THOMPSON: Okay.

18 Final question, which is the one that
19 I find interesting and my guess is Montana might
20 also, which is you have 160 acres that a farmer has
21 been using. That farmer ends up actually in 2017
22 putting in new irrigation equipment by which they
23 are able to save some water that would otherwise
24 have been return flow and they are planning now just
25 to use it on that 160 acres.

1 So we talked earlier about that that
2 is not something where you would step in because
3 they are using the water on the same acreage as
4 before.

5 Six months later they come to you and
6 say, we want now to move some of that water to
7 different acreage. We have been using all of it for
8 six months now. We have that additional consumptive
9 right for the last six months so now we are going to
10 move it and somebody complains, but your return flow
11 is reduced.

12 But the response is, well, actually
13 it has been reduced for six months and that was
14 perfectly fine. So now that we actually have
15 reduced consumption, we want to move it to different
16 acreage.

17 MR. KASTE: The change would be the
18 injury in that hypothetical, I think.

19 SPECIAL MASTER THOMPSON: So the
20 question there becomes --

21 MR. TYRRELL: I am not sure I
22 followed your question, Your Honor.

23 SPECIAL MASTER THOMPSON: I want to
24 make sure that you do. Maybe, again, this is not
25 something that Montana had in mind.

1 Here is my question. This might not
2 ever come up and therefore I probably should not be
3 raising this particular question but my question is,
4 can you do in two steps what you cannot do in one
5 step?

6 We have already established that one
7 step, if somebody objects, you cannot move your
8 water right to different land and increase the
9 amount of consumption.

10 So my question is, could you instead
11 do it in two steps by changing your amount of
12 consumption on the first acreage and then six months
13 later, maybe two days later, changing where you are
14 using it, what the territory is, and saying, well,
15 my change is no longer in any way harming anybody
16 because I actually increased the consumption on the
17 first acreage?

18 MR. KASTE: I think the answer to
19 that is no because the causal event causing injury
20 in the second phase there is the change and you have
21 a right to address that injury. Downstream
22 appropriators have a right to address that injury.
23 So I think that the answer is no.

24 You can go ahead if you think that
25 you disagree.

1 MR. TYRRELL: I don't know that I
2 disagree. As an engineer I think differently in
3 explaining things than my attorney might.

4 In our case law, if you change your
5 irrigation methods on the ground, the person down
6 the hill from you has relied upon your returns to
7 them and they may have relied upon them up to that
8 point, but they cannot force those returns to
9 continue.

10 SPECIAL MASTER THOMPSON: Correct.

11 MR. TYRRELL: So an interesting part
12 is if I move my one per 70 from this plot to this
13 plot, as long as there is no injury in that move,
14 that can happen. The injury can both come from the
15 motion of the board saying we cannot allow this
16 because that will create an injury or from the
17 complaint of another appropriator.

18 To do it in two steps that you cannot
19 do in one step, I am still formulating that in my
20 head. I would think that you still are only able to
21 move your headgate demand on your acres. We would
22 typically not dictate to anybody exactly how you
23 irrigate before or after the move, but we would
24 analyze either in one or two steps, is there an
25 injury to another appropriator in there?

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1 SPECIAL MASTER THOMPSON: Okay. This
2 is helpful.

3 So I will hear from Mr. Draper now as
4 to what Montana wants to see.

5 MR. DRAPER: Your Honor, I think the
6 question you were raising there was helpful.

7 I would express it this way: You and
8 the Court have ruled that the method of your
9 irrigation cannot be changed from flood to sprinkler
10 increasing consumptive use, decreasing return flows
11 and hurting downstream users that depend on that for
12 return flow.

13 The question I think that is
14 important to answer is you have that increase in
15 consumption and that increase in consumption moved
16 off the property. You can bootstrap that
17 particularly into another use.

18 If you had a different use, say
19 industrial use, you would need to know the
20 consumptive use. Are you able to move something
21 more than your original consumptive use?

22 I think listening carefully to
23 Mr. Tyrrell and to Mr. Kaste that we are in
24 agreement on this, that you cannot move that
25 enhanced consumptive use.

1 If you want to move a right either in
2 terms of type of use, place of use or otherwise in
3 the cardinal aspects of the water right, you have to
4 apply the no injury rule where you compare the
5 original impact that that was having, i.e., the
6 original consumptive use, with the impact of that
7 same consumptive use in the new configuration of
8 that water right that they are applying for. I
9 think we are in agreement on that.

10 SPECIAL MASTER THOMPSON: Okay. So
11 let me just ask Wyoming on this.

12 So do you have any objection to the
13 provision that you cannot use that water on new
14 acreage that is not part of the adjudicated acreage
15 that that right originally attached to?

16 MR. KASTE: Say that again.

17 SPECIAL MASTER THOMPSON: So we go
18 back to one of the hypotheticals. Feel free to come
19 up.

20 MR. KASTE: Okay.

21 SPECIAL MASTER THOMPSON: So we have
22 the hypothetical of somebody saves water and they
23 now want to use it on acreage that was not part of
24 the adjudicated right to begin with.

25 MR. KASTE: They can move their

1 adjudicated right in accordance with the statutory
2 processes in place in either state.

3 I really think the best way to
4 resolve this is by reference to the existing state
5 procedures that dictate in both cases the process by
6 which a change is made and the protections for
7 downstream appropriators.

8 And to try and articulate that better
9 or differently than either state has done in their
10 statute seems to me like potentially risking
11 disputes where none need arise.

12 So if you have an adjudicated right
13 in Wyoming and you want to pick it up and move it,
14 you have to go through the statutory procedure
15 which, like I said, I think the best way to address
16 any concerns about that move is by reference to the
17 state statutes. I don't believe that the state
18 statutes applies or allows for an expansion of the
19 use when you make changes. I think both statutes
20 try and make sure that the water right is not
21 allowed to expand its use when it is moved.

22 SPECIAL MASTER THOMPSON: Okay. I
23 assume neither side has any concern with the notion
24 that outside of the expansion of use people can
25 change their place of use so long as it does not

1 harm junior appropriators?

2 MR. KASTE: That is correct, Your
3 Honor. We have specified those requirements in the
4 language that we proposed rather than leave it to
5 whatever those requirements are and how they might
6 be interpreted by the board and Wyoming and so on.

7 The Court is, just the way it did in
8 that ruling on consumptive use, is setting down what
9 the principle is that it believes is required by the
10 Compact.

11 SPECIAL MASTER THOMPSON: Okay. And
12 so Mr. Tyrrell and Mr. Kaste originally said
13 basically there is no real dispute here, there is
14 just differences in the language.

15 Mr. Draper, do you agree with that
16 largely?

17 MR. DRAPER: I largely agree with
18 that. The general principles we are talking about
19 are the same except for that one point that I
20 started with.

21 But I think, as I listened to them
22 carefully, they said you cannot bootstrap the
23 increase in consumption and take it off and use it
24 as an enhancement, and they talked about how a water
25 right is adjudicated in Wyoming. They have a very

1 good system for that and it implies a certain
2 consumptive use. That is what can be moved.

3 I think, as Your Honor was
4 suggesting, if you move irrigation by moving a
5 quarter section to a neighboring quarter section,
6 that was the only change, even though you are moving
7 the original consumptive use, again, this principle
8 adopted by the Court as far as the Compact
9 compliance is concerned, you can put sprinklers on
10 there and become more efficient.

11 But it really comes up when you get a
12 change in the type of use. It depends on the
13 modification. Mr. Tyrrell is suggesting you are
14 going to have a different -- say you need to know
15 that consumptive use, and I think both states are in
16 agreement that that the original consumptive use
17 that is required by the no injury rule --

18 MR. KASTE: I don't know that I agree
19 with that.

20 SPECIAL MASTER THOMPSON: Mr. Kaste,
21 can you speak into the microphone?

22 MR. KASTE: I don't know how we would
23 necessarily be in a position to determine with
24 particularity the original consumptive use on a
25 right that may have been perfected in 1892. I think

1 the board looks at all the evidence that it can
2 marshal, but the best evidence that we are likely to
3 have is what are we doing today? What is going on
4 in that field today? What acreage are they
5 irrigating? What have they historically irrigated?

6 We are trying to find that good
7 evidence, but to find a number from 1892 as to
8 consumptive use rather than acreage irrigated might
9 be difficult.

10 So the evidence is going to, that is
11 going to be available to anybody looking to make the
12 change is going to necessarily be better in the
13 present than in the past.

14 SPECIAL MASTER THOMPSON: Mr. Draper.

15 MR. DRAPER: Your Honor, Mr. Kaste's
16 concern reminds me of the concern that Justice Pryor
17 expressed during the argument in this case. He
18 said, how can we talk about consumptive use if you
19 cannot tell what the consumptive use is? You cannot
20 go out there and measure it. How do they intend to
21 regulate consumptive use?

22 Well, the Court ultimately had no
23 problem with that concept. Mr. Tyrrell and his
24 counterparts and all of the western states, that is
25 what they do every day, with the help of their

1 staffs of course, is they estimate using standard
2 engineering and hydrologic principles the
3 consumptive use, the historic consumptive use of a
4 water right. That is what you have to do every
5 time.

6 If you want to move an 1892 right,
7 you determine using best engineering and hydrologic
8 practices what that consists of. It is something
9 that you would do every day and it has not stopped
10 the Court in this case and it should not. It is a
11 codifiable matter. Mr. Book and others, they do
12 that for a living. The decisions are made by people
13 like Mr. Tyrrell.

14 MR. KASTE: I would say that I am a
15 much bigger fan of the word historic because I think
16 Mr. Draper is right, that is the way we talk about
17 it and the work that we do relates to historic use.
18 Original is new and different and I don't know what
19 it means. I am not sure how to quantify it.

20 When we use the word historic use,
21 that is a word people in the water world understand,
22 not me, but people in the water world. That is a
23 much better way to describe this than original.
24 Original is ambiguous because it is not widely used
25 for these purposes.

1 So when Mr. Draper says historic, I
2 like it a lot better. I think it is more
3 appropriate.

4 MR. DRAPER: That is, I think, the
5 standard terminology.

6 MR. KASTE: Like I said, we do have a
7 lot of agreement, but the question that you have to
8 really address is how best to articulate that
9 agreement, and we have tried two different
10 approaches.

11 If there is a middle ground between
12 those approaches that you think captures that, as
13 long as you are fair to the agreement between the
14 parties, I think we are okay. We know you choose
15 words carefully. I said that a couple of times
16 today.

17 MR. DRAPER: I think the question
18 here for Your Honor is whether these requirements
19 will be specified in the decree or not.

20 If there will be just a reference to
21 how states normally do it, I think that is their
22 approach, and I think it is better to deal with what
23 the Court has done previously in this case, and that
24 is to specify the requirements as part of the
25 requirements of the Compact as such.

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1 SPECIAL MASTER THOMPSON: Okay.

2 Thank you.

3 Anything else on this particular
4 point?

5 MR. KASTE: No, Your Honor.

6 I assume that you want to move to
7 major issue two?

8 SPECIAL MASTER THOMPSON: Yes. Major
9 issue two, which is the question of Montana making
10 or when Montana can make a call for water for
11 storage in the Tongue River Reservoir.

12 And, as I see this issue, it is
13 basically, as a preface, part of the problem is
14 trying to predict moving forward what is going to
15 happen in terms of the snowmelt in Wyoming, the
16 total amount of water available in the spring.

17 Wyoming's view is that you believe
18 that for Montana to make a call it has to predict
19 forward as to whether or not the Tongue River
20 Reservoir is likely to fill. And if they believe it
21 might not fill, to provide evidence to Wyoming of
22 that. If they provide the evidence, then Wyoming
23 would respond.

24 Montana's view is, on the other hand,
25 it is very hard to make those types of predictions

1 and so we are going to have to basically sort of
2 have clear line rules, and that is if there is less
3 than 45,000 acre-feet of water in the winter,
4 Montana cannot call. If the reservoir is not filled
5 in the spring, then it can make a call.

6 But it is basically a question of, do
7 you make a prediction and provide evidence or are we
8 going to have some bright line rules?

9 I do just want to really -- I think
10 that we have already talked about the dispute here.

11 Is that basically the difference
12 between the two parties?

13 MR. DRAPER: Yes, Your Honor. Our
14 position is that under the prior appropriation
15 doctrine if your storage right has not been met, you
16 are entitled to make a call. You don't have to do
17 anything else. The question is in the winter if
18 there is 45,000 in there and, if not, the call can
19 be made if Montana so choses. In the spring, if it
20 is less than the full capacity, a call is
21 appropriate if Montana choses to make such a call.

22 SPECIAL MASTER THOMPSON: Okay. The
23 45, so I understand the spring rule is basically if
24 the reservoir is not filled, then we can keep
25 filling and we can call post-1950 appropriators in

1 Wyoming until the thing fills.

2 Where does the 45,000 acre-feet
3 number come from other than the fact that that is
4 where you like to try to maintain the reservoir
5 during the winter? You don't want to increase it
6 beyond 45,000?

7 MR. DRAPER: There is a safe fill
8 quantity that you can have in the winter where you
9 need to keep the water level below the concrete
10 structures that would be injured by ice. That has
11 been determined to be in an authoritative way 45,000
12 acre-feet.

13 There is always thinking going on and
14 testing on how that can be increased. The more you
15 can enter the winter season full in the reservoir,
16 the less you need to fill in the spring. This is
17 the traditional way that the reservoir has been
18 filled and is therefore the right that is recognized
19 by Montana.

20 And you cannot fill more than 45,000
21 without endangering the structure, but we want to be
22 able to do that because our reason for having the
23 reservoir there is so that we can store water. That
24 is what we like to do. If we can do it without
25 endangering downstream circumstances and without

1 endangering the structure itself, that is why we got
2 the 45,000 limit in there.

3 SPECIAL MASTER THOMPSON: Your
4 thought is that if they can store 55,000, then they
5 should be able to call up to 55,000?

6 MR. DRAPER: Yes, if that was
7 determined. You know, there is a committee that
8 handles this and is very careful about protecting
9 the structure. Filling in the winter is something
10 that is good for reservoirs to do. It minimizes the
11 need to make calls during irrigation season, and so
12 I think most states would benefit by that.

13 SPECIAL MASTER THOMPSON: What would
14 a call during the winter mean to Wyoming given that,
15 as I understand, there is no direct use of water, if
16 I remember correctly, during the winter so it is all
17 in storage at that point? My memory also is that it
18 is difficult to go up there and let more water out
19 of the reservoirs in the mountains.

20 MR. DRAPER: Well, it just means that
21 they should not store more water after that call is
22 put on under post-1950 storage rights. Many of
23 these reservoirs have both pre- and post-storage as
24 you are aware of, and the pre-1950 storage rights
25 are affected by a call. But no storage should be

1 done after the point in time that the call is made
2 under post-1950 rights.

3 SPECIAL MASTER THOMPSON: Okay. And
4 so, again, my understanding is that it is very
5 difficult to actually go up and change the headgates
6 on those reservoirs during the winter.

7 Am I correct about that, Mr. Kaste?

8 MR. KASTE: It is next to impossible
9 and to no good end because in those months the water
10 is frozen and not really flowing into the
11 reservoirs. If I might --

12 SPECIAL MASTER THOMPSON: I know you
13 don't want me to go this route. I am sort of
14 exploring.

15 MR. KASTE: I guess my position would
16 be we feel like you already went down this path and
17 made a call, a decision that balanced the
18 difficulties of dealing with the reservoir call in
19 the winter or in the early spring when our
20 forecasting is speculative at best.

21 With the direct futile call, if there
22 is not enough water in the creek to satisfy your
23 need and call, easy, the superintendent makes a
24 realtime decision based on current hydrological
25 conditions.

1 With regard to the reservoir, it is a
2 much more difficult calculation and we felt like you
3 reached an appropriate balance between the competing
4 interests about when a call was properly and not
5 properly made by suggesting in your footnote, and
6 granted it is a footnote, but I don't know that it
7 is a really good decision because, I like said, it
8 is an inappropriate balance. There needs to be
9 significant evidence showing that without more water
10 the reservoir might not fill to its capacity.
11 Because, of course, it fills over a period of time.
12 It does not happen instantaneously.

13 I am not sure that I agree with the
14 way that you are articulating it, but before Montana
15 can make a call it needs to walk into a Wyoming
16 office and slap down some paper that says here is
17 our significant evidence. That is not what we were
18 required to do over the past two years.

19 Montana is looking at the same
20 forecasting information that was available to
21 Wyoming and that was not an unreasonable
22 determination in whatever day it was in April in
23 both of those years that the snowpack was not going
24 to provide adequate runoff to fill its reservoir and
25 they made a call. Perfectly appropriate in our view

1 and perfectly consistent with the determination you
2 made in this footnote, but it leaves open the
3 possibility that there could be a situation in which
4 there is a call made and we have got completely
5 different hydrological conditions and a call is not
6 appropriate.

7 There might be times where the
8 reservoir is not full and yet a call is an
9 appropriate thing to do because the runoff is
10 anticipated to be well in excess of the capacity
11 that the reservoir has remaining.

12 This year is a good example of that.
13 Montana did not make a call because we have so much
14 snow on that mountain Montana is, in our view,
15 reasonably dumping water out of that reservoir to
16 make space for the spring runoff. That is an
17 appropriate reasonable thing for Montana to do under
18 these circumstances.

19 Now, the reservoir is not full today.
20 So if the rule is Montana can make a call any time
21 it is not full, Montana would be in the position
22 today to make a call on Wyoming to stop storing
23 water in its reservoirs to fill Tongue River
24 Reservoir when it would be completely inappropriate
25 and imprudent to do so.

1 The balance that you struck protects
2 both parties, and we are of the belief that it is
3 appropriate to include that balance with regard to
4 the filling of this reservoir and the call on this
5 reservoir in the new decree.

6 SPECIAL MASTER THOMPSON: Mr. Draper.

7 MR. DRAPER: Your Honor, we feel
8 strongly that you need to stick with the overall
9 decision that you made. The prior appropriation
10 here governs. When a prior appropriation right is
11 not fully satisfied, you can call and, in the case
12 of a storage reservoir, it can call. There are
13 operational limitations that are elsewhere in our
14 proposed decree.

15 There is a lot of water there at the
16 moment. We are up to I think around 65,000
17 acre-feet right now. So there is no call. We would
18 not have the right if there were other circumstances
19 that required it.

20 In this case, with the release of
21 that size, because we are trying to evacuate space,
22 we do those things. We are going to have unusual
23 runoff this year, if not unprecedented. So within
24 the confines of that we are trying to maintain as
25 much room in that reservoir as possible at the

1 moment. That is no reason for you to impose upon
2 Montana a non-prior appropriation rule that would
3 say, well, if Wyoming thinks that the reservoir
4 might not fill, that it can object to a call and say
5 no, we are not going to stop storing post '50 water
6 rights in our reservoirs. Our people tell us we are
7 probably not going to fill. That is not consistent
8 with prior appropriation.

9 SPECIAL MASTER THOMPSON: Mr. Kaste,
10 you are going to convey something?

11 MR. KASTE: If I understand it --

12 SPECIAL MASTER THOMPSON: Mr. Brown
13 can come up too.

14 MR. KASTE: I have offered to let him
15 conduct these hearings on behalf of the State of
16 Wyoming repeatedly and he keeps turning me down. I
17 don't know why.

18 Mr. Brown's point was that the rule
19 articulated by Montana is not the rule in Wyoming.
20 I think to the extent that we litigated this
21 question, what the evidence shows in Wyoming was
22 when water was available, you needed to store it.

23 So our main concern was, well,
24 Montana is not necessarily doing that at times.
25 They were letting water out of their reservoir at

1 times when they could have stored it.

2 The focus of our inquiry was really
3 on, you know, when you have this obligation to make
4 a call, how do you square that with the reservoir
5 that is dropping water out of the bottom?

6 I think that the balance that we
7 reached both in terms of reasonable reservoir
8 operations and this requirement, because reservoir
9 storage is different than direct flow calls, is an
10 appropriate balance.

11 There are -- it makes little to no
12 sense, and I don't think that the law requires
13 Wyoming to respond to a call that Montana makes just
14 because the reservoir is not full today when it will
15 be full tomorrow without any action on Wyoming's
16 part.

17 It does require the parties to work
18 collaboratively, and at times there would be a
19 dispute about what is and isn't likely to happen in
20 the future. Nevertheless, that has always been the
21 situation, I guess.

22 I would make the point, as you
23 probably remember, the hydrology in the basin is
24 such that we are blessed with usually pretty clear
25 results. We either have way too much snow and we

1 have to dump water out or we have almost no snow and
2 we are scared to death and we have to store as much
3 as possible. The two extremes make the inquiry
4 pretty easy most years.

5 This rule will help us in those years
6 when the snowpack is not definitive and we are
7 trying to figure out what makes the most sense.

8 Like I said, I feel like you made
9 this decision already and I feel a little bit of
10 deja vu where I feel like I have to re-litigate
11 things that I already won. Well, I don't know that
12 we won, but I think that we both benefit from the
13 balance that you struck.

14 SPECIAL MASTER THOMPSON: Mr. Draper.

15 MR. DRAPER: Your Honor, the decree
16 as proposed by Montana protects them from a call
17 when we are releasing more than 175 cfs. We have
18 only reserved that right between 75 and 175 cfs
19 which we need to have during the winter. Under
20 these kind of circumstances we are not suggesting
21 that we have that right. That has to be understood
22 that the operations of the dam under different
23 circumstances and especially when you get down in
24 your winter to those situations specified in the
25 decree, we have the right to continue to do what we

1 have been doing in the past, reasonably manage
2 within that regime.

3 Your Honor, circumstances like right
4 now we are releasing 1,000 cfs, there is no question
5 whether there is going to be a call under those
6 circumstances.

7 SPECIAL MASTER THOMPSON: I just want
8 to sort of finalize this because I am not sure there
9 is anything more to be gained here, but just so I
10 fully understand this.

11 I mean, I see Montana's position as
12 basically being that you want to avoid a situation
13 where you are having to make a forward decision as
14 to whether or not the reservoir is going to fill,
15 you want to avoid being placed in a position where
16 you are the one that is taking the risk and deciding
17 whether or not you see the reservoir as filling up
18 and you do not want to get into an argument of
19 whether or not it is likely to go up. You want to
20 be able to make a determination on your own without
21 Wyoming having any objection that if the reservoir
22 is not filled yet --

23 MR. DRAPER: Yes, we need to set out
24 the rules in a decree. As Mr. Kaste candidly
25 suggested, in some cases there will be disputes

1 between the states. So if we adopt their position
2 that it is going to depend on the predictions of
3 whether it is being filled or not, then we know we
4 are going to have disputes. We know that is going
5 to happen. That is no way to set this up. We are
6 setting ourselves up for failure. We want a decree.

7 SPECIAL MASTER THOMPSON: Mr. Kaste,
8 your view is that Montana should not be calling on
9 the reservoir unless there is indication that, in
10 fact, the reservoir is not going to fill; is that
11 correct?

12 MR. KASTE: Correct.

13 SPECIAL MASTER THOMPSON: Okay. And
14 I am not sure I see -- I am looking for ways of
15 potentially bridging the differences, but this
16 strikes me as basically a difference as to where the
17 risk is going to lie, whether it is going to lie on
18 the Wyoming side or the Montana side.

19 MR. KASTE: Sure. That is why I said
20 that I think you struck an appropriate balance in a
21 way to adopt Montana's view that does not eliminate
22 the possibility for disagreements, it just
23 eliminates the test for determining how we should
24 resolve the issue.

25 So you put in a test and in the

1 absence of that test what we might see is Montana
2 makes a call and Wyoming is saying, you are nuts,
3 no, without benefit of the test that articulated an
4 objective measure that both parties can turn to to
5 determine whether or not Wyoming should respond
6 affirmatively or negatively to Montana's call.

7 SPECIAL MASTER THOMPSON: So, again,
8 Mr. Draper, I understand your point, what you would
9 like is a nice, clear rule so that you do not have
10 to argue about if Montana takes a look at whether
11 the reservoir is filled and it isn't and therefore
12 you call the reservoir?

13 MR. DRAPER: Yes. We cannot totally
14 eliminate the potential for a dispute, but we can
15 minimize it and to invite it by putting that kind of
16 provision in the decree would not be a good idea in
17 our view.

18 SPECIAL MASTER THOMPSON: Okay.
19 Thanks.

20 Let us go to the next issue. We will
21 go for about another, say, ten minutes and then we
22 can take a morning break.

23 The next issue is what I call the
24 call. It is 2(E) of Wyoming's language which
25 specifically provides that the Compact protects

1 pre-1950 appropriate rights and that it prevents the
2 sufficient water from reaching pre-1950
3 appropriative rights in Montana where those rights
4 were unsatisfied.

5 My understanding is that Montana
6 objects to that particular provision because you
7 view that as basically adding a call type
8 requirement that was not part of any prior decision.

9 So in the case of Montana and
10 Wyoming, is that why that is in there or is that in
11 there for a different reason?

12 MR. KASTE: Well, I can address that,
13 Your Honor. It is in there because you wrote it.
14 Those are your words. Like I said, Your Honor, we
15 wanted to stick with your words. I think it
16 accurately reflects Wyoming's obligation under the
17 Compact.

18 What we have an obligation to do is
19 to curtail those diversions that prevent sufficient
20 water from reaching folks in Montana when they are
21 entitled to it.

22 So we have an obligation to shut off
23 those people in Wyoming who need to be shut off, but
24 we don't have an obligation to shut off folks whose
25 use of water will make no difference for the folks

1 down in Montana who need it.

2 So, for example, we have groundwater
3 pumping and we have a lot of evidence about the
4 groundwater pumping and we didn't have any evidence
5 about big groundwater pumping right next to the
6 river that is hydrologically connected in such a way
7 that it is going to make one bit of difference if we
8 shut that pump off for water users in Montana in
9 that year. So why on earth would the Compact
10 require, and the Compact does not require, us to
11 shut off the groundwater well two miles from the
12 river that is pumping out water that will have an
13 effect on Montana in thousands of years from now?
14 That is consistent with the way that you ruled in
15 this case. That is why we used your exact language.

16 SPECIAL MASTER THOMPSON: Okay. Mr.
17 Draper.

18 MR. DRAPER: There has been talk of a
19 futile call by Wyoming throughout this debate. It
20 had to prove issues of futile call and it presented
21 no evidence to you. There is no positiveness in
22 this case that that doctrine has application here
23 and, therefore, the way that it should be handled,
24 and I believe you considered that under your
25 affirmative defense discussion, is that if that

1 situation should arise, that it would be up to
2 Wyoming to carry the burden in establishing it.

3 Another way of saying that is that
4 the presumption is that there is no futile call
5 situation unless it should be proved otherwise.
6 Therefore, Wyoming in response to a call should not
7 be refusing to comply on the basis that it has
8 unilaterally determined that there is some futile
9 call aspect.

10 SPECIAL MASTER THOMPSON: Okay.
11 Thank you.

12 Mr. Kaste, I know the language which
13 I used.

14 MR. KASTE: Well, it seems different
15 than your typical futile call. I think there is,
16 again, maybe more agreement than the parties let on.

17 You can look at the actions the State
18 Of Wyoming undertook in the last two years, and I
19 think what you can conclude is that the actions we
20 undertook to address a call were in substantial
21 conformity with rulings in the case and our
22 obligations under the Compact.

23 It was not necessary to go to every
24 single post-1950 diversion utilizing our state
25 resources and manpower and take some physical action

1 with regard to that headgate. That was not
2 necessary because most of those headgates at the
3 time the call was made were not diverting water.
4 There was no need, in order to satisfy Montana's
5 call, to undertake what would be a monumental
6 physical task for the state and its employees.

7 That seems perfectly reasonable to me
8 that what we ought to do and what we are required to
9 do by the Compact is to shut down those diversions
10 which are taking water post-1950 rights in the face
11 of a call. If the diversion is not taking water,
12 well, we don't have to shut it down.

13 If the diversion is being given to
14 groundwater that is a sufficient distance from the
15 stream that is not going to impact the flow of
16 water, we don't have to shut that down either. That
17 seems utterly wasteful and not mandated by the
18 Compact because it does not result in water for
19 these farmers in Montana who are the beneficiaries
20 of Montana's call.

21 With regard to this, there is no
22 evidence of a futile call. Frankly, I think the
23 import of your ruling on the groundwater evidence in
24 this case is exactly that. The groundwater that was
25 taken out during the years at issue did not have an

1 effect on the river such that Montana was entitled
2 to compensation or a remedy as a result of that
3 groundwater pumping, which was vastly greater in its
4 quantity than what we see today because the CBM play
5 is currently over. So the import of your ruling on
6 groundwater pumping, there is no evidence that it
7 makes a difference. It is futile to shut those
8 folks off.

9 That would be different if we had a
10 big groundwater pump in the alluvium of the Tongue
11 River and it was pumping out 600 gallons a minute.
12 You can watch that river suck down as you go past
13 that pump. That is a pump that we would be
14 obligated to go out and shut off.

15 The State of Wyoming would do that if
16 those conditions existed in the basin, but they do
17 not. That is not the way that that the groundwater
18 is utilized in this basin.

19 SPECIAL MASTER THOMPSON: So let me,
20 I just want to walk through three different
21 situations here and then see whether there is more
22 than that.

23 So the first situation is that you
24 have a post-1950 water right holder who is not
25 diverting any water.

1 What would that mean to shut them
2 down then?

3 MR. KASTE: Well, the use of the
4 word, the way Montana describes it is it creates
5 this affirmative obligation to regulate which we
6 view as being that now the supervisor of the
7 shoulder division needs to take his personnel up and
8 down that basin and lock and tag those diversions
9 when they are not taking any water which requires a
10 lot of work on their part. If you remember from the
11 testimony, it ticks people off.

12 Our view is that instead of making
13 this heroic effort all the way across the basin on
14 every single headgate, that we go to the ones that
15 are taking water and shut them down. So there is
16 regulatory activity taking place, but it is in
17 proportion to the amount of use that is going on at
18 the time that the call is made.

19 So I would say that the use of
20 Montana's language is in a sense universality of
21 action rather than affirmative action at those
22 diversions that are actually using water and need to
23 be shut down.

24 SPECIAL MASTER THOMPSON: So do I
25 understand it though you are going to go up and down

1 the river and see whether or not someone is
2 diverting?

3 MR. KASTE: Yes.

4 SPECIAL MASTER THOMPSON: And if you
5 see some with water going through, you then go in
6 there and shut them down so that then would regulate
7 the headgate?

8 MR. KASTE: Yes. The net effect is
9 the same, but one is a lot more work for us.

10 SPECIAL MASTER THOMPSON: So,
11 Mr. Draper, focusing in on this one situation, do
12 you have any concerns with what Mr. Kaste just
13 described?

14 MR. DRAPER: I don't think that we
15 do, Your Honor. We ask that the post-'50 rights be
16 regulated off. If they are already off, there is no
17 need for additional action as Your Honor was
18 pointing out.

19 What particular tagging or other
20 process they want to put upon themselves is their
21 own choice, but we just need assurance that the
22 post-'50 rights aren't diverted. That is all.

23 SPECIAL MASTER THOMPSON: Mr. Kaste,
24 if I understand, your concern is with the term
25 regulate off means actually locking the headgate?

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1 MR. KASTE: Yes. I think that is
2 what it means.

3 SPECIAL MASTER THOMPSON: So there
4 seems to be an agreement here, but it is just a
5 question of the actual language used?

6 MR. KASTE: Correct. Shockingly, I
7 would say we should use the language already used.

8 SPECIAL MASTER THOMPSON: The second
9 situation which is let us talk about the groundwater
10 for a moment. So the trial actually dealt with the
11 coal bed methane wells.

12 So in California there are frequently
13 people who rather than taking the water directly out
14 of the river will pump near the river, and
15 California actually does separate out groundwater
16 and surface water. There is groundwater that is
17 effectively the same as surface water and it is
18 regulated along with all of the surface water.

19 That was not an issue in the trial or
20 at least no one complained that there was anything
21 of that nature in this action, there was anyone
22 taking water.

23 Is Montana's concern that there are
24 actual people like that on the river that need to be
25 regulated or is it even broader than that?

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1 MR. DRAPER: As far as regulating
2 groundwater?

3 SPECIAL MASTER THOMPSON: Yes.

4 MR. DRAPER: Our understanding is
5 that their general policy is that when you have
6 close groundwater rights that are nearby the river,
7 they make a determination in Wyoming whether that is
8 regulated as part of the Tab Book regulation surface
9 water and it is those rights that need to be
10 included in the regulation.

11 If you have a well in the back of the
12 stream that normally regulates, often they are
13 calling a more senior right, that groundwater needs
14 to be shut down just like the surface water.

15 SPECIAL MASTER THOMPSON: Okay.

16 Mr. Kaste.

17 MR. KASTE: Well, that is generally
18 correct. In Wyoming the State Engineer has the
19 authority to regulate hydrologically connected
20 groundwater and it makes a determination where it is
21 appropriate to do so. That has happened in three
22 areas in the state of Wyoming. The Tongue River
23 basin does not have one of those areas in it. We
24 have not had an occasion to make a determination
25 that there is hydrologically connected groundwater

1 use such that particularly a well needs to be
2 regulated in response to a surface water call.

3 Our concern with the language
4 proposed by Montana is that it is broad enough to
5 mandate the regulation of groundwater in response to
6 a call regardless of whether there has been this
7 demonstration of hydrologic collection that the
8 State of Wyoming ordinarily recognizes.

9 But Mr. Draper is correct where we
10 recognize that hydrologic connection, the State
11 Engineer does regulate groundwater wells in
12 conjunction with the surface water call. It just
13 has not happened in the Tongue River Basin.

14 And my understanding about the way
15 people utilize their groundwater in that basin, we
16 don't have a lot of people pumping out of the
17 alluvium. We have a lot of people with pumps in the
18 river, but not a lot of people pumping out of the
19 alluvium. Most of the groundwater wells are to
20 different formations and so we have not needed to do
21 that.

22 We do not want a decree that mandates
23 that we take action with regard to groundwater wells
24 that are not sufficiently hydrologically connected
25 to making a difference in the amount of water that

1 would be available to Montana.

2 So where we presented evidence in the
3 state wherein such groundwater wells do exist and
4 are making those kind of depletions in response to a
5 surface water call, the State Engineer would shut
6 them off, but that is not present currently.

7 SPECIAL MASTER THOMPSON: Mr. Draper.

8 MR. DRAPER: Your Honor, I think the
9 regulation that we are suggesting be appropriately
10 included in the decree is the regulation that
11 relates to the surface water, and I thought there
12 were some examples, but there certainly could be
13 examples of that in the future of where they are
14 included in the Tab Book regulation. Somebody
15 decides that it is better to put in a random well
16 system in the bed of a river or a well right on the
17 bank where it deserves to be regulated for the
18 protection of Wyoming users, then this decree ought
19 to be worded in such a way that it covers those.

20 SPECIAL MASTER THOMPSON: Okay. So I
21 remember actually some of the discussions at trial a
22 long time ago. So you have to excuse me for not
23 remembering all of the various aspects of that, but,
24 Mr. Tyrrell, in the Tab Book for the Tongue River
25 are there any such wells?

1 MR. TYRRELL: Your Honor, I don't
2 believe so unless somebody has moved a groundwater
3 right. You are talking about this near stream
4 environment to a surface water right to a point of
5 diversion near the stream where you see that in
6 other parts of the state. I am not recalling any
7 big diversion of that type along the Tongue off the
8 top of my head.

9 Certainly, if those occur, our
10 superintendents and staff would be regulating them
11 if they affected stream flow for other rights
12 adjacent to them anyway.

13 SPECIAL MASTER THOMPSON: So it does
14 not sound again as if there is a dispute between the
15 parties as to whether or not groundwater rights
16 which can be determined to be hydrologically
17 connected to surface water and therefore moved to
18 the Tab Book should be regulated, although there may
19 be a disagreement as to whether or not any such
20 exist at the moment.

21 MR. BROWN: He invites me to talk and
22 he shakes his head when I stand up.

23 I wanted to note a couple points.
24 There was some evidence that we explored about two
25 or three different wells off the river. Certainly

1 that is the exception and not the rule. Mr. Kaste
2 was absolutely correct, there is only three places
3 in Wyoming where that connection has been so
4 formally declared as to rope in a broader universe
5 of wells with regard to interconnection of surface
6 stream.

7 The opportunity does exist in the
8 permitting process whereby on a case-by-case basis
9 the State Engineer can put a condition on a
10 particular permit that says, I recognize that this
11 is stuck in the alluvium and it can be regulated.

12 I am not thinking of a specific
13 example like that in the Tongue River Basin, mostly
14 because there is no irrigation going on from wells
15 up there. It is usually only these high capacity
16 wells that we are worrying about.

17 There is potentially, I think I am
18 thinking of places in the Green River Basin where
19 you can have those conditions, but generally that
20 declaration has not been made by the State Engineer
21 in this particular river basin. I cannot think of,
22 other than those two or three big use wells, a place
23 where that interconnection actually exists. So just
24 to flesh that out. That is probably what you are
25 remembering with regard to that connection.

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1 SPECIAL MASTER THOMPSON: Okay.

2 MR. KASTE: Again, this is all really
3 about how best to articulate things which the
4 parties are mostly on the same page on. You
5 referenced one paragraph in Wyoming, a proposed
6 decree, and in Section II we have this language that
7 you create that says basically Wyoming's obligation
8 after it gets a call from Montana is to regulate and
9 administer post-1950 appropriative rights of Wyoming
10 that prevents sufficient water from reaching the
11 border and Montana's pre-1950 appropriative rights
12 are unsatisfied.

13 To me that covers Wyoming's
14 obligation whether the water right in Wyoming
15 prevented sufficient water for reaching Montana is
16 groundwater, surface water or storage water. I
17 think that you said it well there. I think it
18 covers all the potential uses in Wyoming.

19 So we understand our obligation would
20 be to address any water right that is preventing
21 sufficient water from reaching Montana regardless of
22 how we are pulling it out of there.

23 SPECIAL MASTER THOMPSON: Just to be
24 clear, I think there was a third situation, and I
25 don't think this has been clarified, but it is

1 basically Montana sees that language and worries
2 that the next time they need a call, Wyoming is
3 going to say there are these flows but it is never
4 going to get to you. And so they are worried about
5 the possibility of you objecting on a futile call
6 basis. I think -- why don't you respond to that,
7 Mr. Kaste.

8 MR. KASTE: Well, with regard to
9 surface water, I think that is unlikely. We
10 understand our obligation under the Compact. It is
11 articulated in this very language is there is
12 post-1950 use in the Tongue River and in the face of
13 a call from Montana, we are obligated to stop those
14 people with those post-1950 rights.

15 I am not aware of the circumstance
16 that came up during the trial where we had a
17 post-1950 right diverting outside of groundwater
18 context and said, yes, but do not worry about that
19 one. We did have a large portion of the basin where
20 the internal calls made by Wyoming water users with
21 pre-1950 rights double up those potential post-1950
22 diversions upstream of the territorial rights in
23 Wyoming and that did take care of a large measure of
24 the basin internally and made sure that we shut off
25 the vast majority of our post-1950 rights well

1 before Montana was ready to make a call on Wyoming.

2 As you will recall, the majority of
3 rights at issue in the case were downstream on the
4 Tongue River where there were not very many or any
5 pre-1950 rights and in the Prairie Dog system where
6 we had this situation. So that you have internal
7 regulation that takes care of a lot of the surface
8 water rights.

9 I am pretty sure that if there is a
10 1892 water right in the Tongue River Basin in
11 Wyoming and we have a post-'50 on above them, we are
12 going to hear about it and take care of it. So the
13 opportunities for Wyoming to make a futile call
14 regarding surface water I think are none.

15 SPECIAL MASTER THOMPSON: So if I
16 understand, the major concern that you have about
17 this language is in reference to groundwater
18 extractions away from the river?

19 MR. BROWN: I will give you an
20 example here. If you remember from the litigation
21 Koltiska and Pumpkin Patch, it was on Prairie Dog.
22 It was not Powder River water that came, it was
23 direct flow in Well Cap Creek. Well, it was found
24 that part of that violated the Compact in 2004 or
25 2006. I think since that point in time we worked

1 with that water user in working and exchanging out
2 of the Prairie Dog.

3 So the State Engineer, they are still
4 going to be pulling out of that post-'50 right out
5 of Wild Cat, but they arranged for additional Powder
6 River water to come over to make up for depletion.
7 The requirement was, absolutely, you have to shut
8 off all post-'50 rights. We have to go and shut
9 that off and, in fact, they have arranged for an
10 exchange to ensure post-'50 depletion does not harm
11 them.

12 That is just one example. It is
13 probably not the only example. That is one example
14 we are saying that you absolutely have to go out and
15 shut off all post-1950s does not work because that
16 depletion is not harming Montana because it has been
17 made up for.

18 SPECIAL MASTER THOMPSON: Okay. So
19 let me -- Mr. Draper, one final word and then we are
20 going to take our ten-minute morning break.

21 MR. DRAPER: The terminology regulate
22 off, regulate without the word off may imply that
23 you are simply reducing or somehow limiting that
24 right without actually enforcing it to shut down.

25 So we felt that we needed some kind

1 of definite language that could be understood by
2 anybody. I think our language is pretty good to
3 focus on the Tongue River water.

4 It is interesting and helpful to hear
5 about some of the complicated pumping and exchanges
6 that they work on. We are focusing on Tongue River
7 water, and that is what the diversion of that under
8 post-'50 right is, that it all has to be regulated
9 off. If somebody is bringing in Powder River water,
10 that is not affected by this language.

11 SPECIAL MASTER THOMPSON: Okay.
12 Thanks.

13 So my goal on this will be to make
14 sure that, in fact, Montana is fully protected while
15 at the same time not causing untold expense and
16 problems for Wyoming. I believe I can come up with
17 language that will do that effectively.

18 So why don't we take a ten-minute
19 break at this point in time. We will start up again
20 at quarter to, and we are going to be really
21 efficient. I will probably be wandering around
22 during that period of time so just ignore me.

23 (Recess was taken.)

24 SPECIAL MASTER THOMPSON: Let us go
25 ahead and start up.

1 Mr. Kaste, actually I found it useful
2 to have you both up at the podium at the same time.
3 You can always go back to your desk or table, but at
4 the same time this actually prevents you from having
5 to pop up and down over and over again. So let us
6 be as sufficient as possible. We have to be out of
7 the courtroom by one o'clock, which I told them we
8 would be finished.

9 So the next issue is the
10 appropriateness and need for information exchanges.
11 So this gets to Montana's Exhibits A or Appendices A
12 and B. So as I understand what Montana wants to do
13 is to have Appendix A, which lists the pre-1950
14 appropriators in Montana, and Appendix B, which
15 lists post-1950 appropriators in Wyoming.

16 My understanding also is that is the
17 proposal for -- I guess it actually would be
18 Appendix G, I am sorry, which I understand comes
19 basically from the Tab Book. So the first thing is
20 to clarify what it is that Montana wants from the
21 Tab Book.

22 MR. DRAPER: We attached an example
23 and it may be pretty close to what the appendix
24 would be and that is the sorted list from the Tab
25 Book of post-1950 rights. That was done. We took

1 it from the exhibit in the trial. We put it in to
2 explain our position. It is no big deal to come up
3 with it. It specifies what we are talking about in
4 the decree. The decree talks about post-1950 rights
5 in Wyoming need to be shut down in certain
6 circumstances, and this is the list.

7 Again, this can be contained in the
8 appendix to the report. For instance, this does not
9 have to burden the U.S. Reports themselves. That
10 has been an acceptable format for the Court in the
11 past.

12 SPECIAL MASTER THOMPSON: Let me
13 start out with a question for you and I will
14 question Mr. Kaste.

15 So a question for you, Mr. Draper, is
16 as I understand Wyoming's point is, well, you can go
17 and you can look at the adjudication file for the
18 Tongue River Montana and there you can get a list of
19 the old decree and post-1950 appropriators in
20 Montana with the relevant dates and Montana can go
21 to the Wyoming public records and see what is
22 actually listed there as to post-1950 appropriators.

23 So why do we need to put this in the
24 decree at all? Why don't we just assume both
25 parties can get it from public records?

1 MR. DRAPER: It is similar to their
2 requirements to just trust the procedure. Trust
3 those and you can figure out what it is and we don't
4 need to specify it in the decree.

5 Well, here I think we need to be
6 definite as part of being specific. What water
7 rights? Are you talking about some amorphous group
8 that somebody does not know about?

9 These are definite water rights that
10 I think the Court would appreciate having a basis
11 for its decree to be specified expressly and not by
12 reference. It is a very easy thing to do, and it is
13 completely consistent with the kind of appendices we
14 have had in others.

15 It should not be a burden on either
16 state to provide the two sets that we are talking
17 about, and it would not be a burden either on those
18 reports or on the Supreme Court Clerk's Office. It
19 puts your Special Master's report up there and the
20 decree can refer to an appendix as defining what
21 they are talking about in the decree.

22 SPECIAL MASTER THOMPSON: So
23 Mr. Kaste, Mr. Draper's suggestion is easy. So is
24 it not easy?

25 MR. KASTE: Something might be easy,

1 but does it serve a useful purpose?

2 Here the answer is no, it does not
3 serve a useful purpose. It could be updated the day
4 after we submit it. These appendices are subject to
5 change on both sides of the line. I don't see what
6 purpose it serves to try and memorialize the state
7 of affairs that is subject to flux in the future.
8 We have to update it on a regular basis.

9 We are imposing on ourselves some
10 obligation to go back to the Court and say, guess
11 what, we have had changes in these water rights in
12 the future and we have to have some continuing
13 obligation to make sure that this thing that is now
14 attached to the Court's decree remains accurate.

15 To me it serves no purpose. Why
16 would we do a thing that has no purpose? If it is
17 easy for us to pull this information out, which in
18 some respects it is, and utilize that in our
19 day-to-day interactions with each other, what good
20 does it do to attach it to the decree to muddle it
21 up with information that ultimately becomes
22 inaccurate?

23 I don't know what purpose it serves.
24 Well, I heard from Mr. Draper what if I don't like
25 it. If the Court likes it, that is zippy, but it

1 needs to be there for a good reason. The Court
2 needs to find utility in its decree and there is
3 none.

4 SPECIAL MASTER THOMPSON: So we could
5 argue each of these points for a long time, but I do
6 not want to spend a lot of time on this one.

7 But my understanding is that
8 basically one of the things Montana also discusses
9 is once a year, if you do have more post-'50 right
10 appropriators, you tell Montana that.

11 MR. KASTE: I don't see that in the
12 Compact anywhere. I don't. It's not in the
13 Compact. This is not an obligation the Compact
14 necessarily requires of us. That seems like a
15 superfluous act to me. It is not sufficient to go
16 back to the Court once a year and interact with them
17 when we have an opportunity to interact with each
18 other.

19 SPECIAL MASTER THOMPSON: So two
20 things. First of all, Mr. Kaste, I understood
21 everything that you said earlier, that if it is not
22 in the Compact, that you don't want me to add -- you
23 don't want me to interpret the Compact to require
24 anything that I have not already suggested that the
25 Compact requires. So recognize that I have heard

1 you on that.

2 Putting that aside just for a minute,
3 if, in fact, Montana wants to make sure that it can
4 ensure that Wyoming is following the Compact, my
5 understanding is that Montana really wants updates
6 on two things. The first thing is if there are any
7 new post-1950 appropriators that are added to the
8 list, you let Montana know that.

9 And, second of all, my understanding
10 is that if there is any type of information as to
11 groundwater wells that is material, you don't have
12 to do any additional work, but if there is more
13 information about that in the Tongue River, Powder
14 River basins, that you let Montana know that once a
15 year.

16 MR. KASTE: That might be something
17 the State of Wyoming is willing to do as part of the
18 Compact administration through the commission as
19 good neighbors. We will share and always share
20 information between us as part of the Compact
21 administration that occurs in the Commission, and
22 there is informal communication amongst the various
23 officials from state to state at times. It is not
24 required by the Compact. It is not something that
25 necessarily flows from the litigation in this case.

1 The practical reality is that this
2 information will be available to Montana. It will
3 be available through a different form.

4 SPECIAL MASTER THOMPSON: Mr. Draper,
5 Wyoming, would you like to see that in the decree?

6 MR. DRAPER: We have seen how
7 effective the Compact Commission has been in
8 protecting Montana in the past. Given that sad
9 experience, anything that is calculated to implement
10 the principles that you have taken up as a result of
11 this case I think our appropriate.

12 Wyoming came into this case saying
13 those Compact rights are not even relevant. Well,
14 you said and the Court said they are relevant. Now
15 they say, no, no need to even specify them. Do not
16 worry about it.

17 This is an important aspect of having
18 the basis for the decree in the public record and
19 not subject to records that may exist and change in
20 the State of Wyoming and to have changes in that is
21 quite appropriate. It is calculated to minimize
22 disputes, get information shared that is shown to be
23 necessary to understand and implement various rights
24 of the two states.

25 This goes also to the groundwater.

1 You have held that groundwater pumping in the Tongue
2 River, Powder Basins have the potential to take
3 water that is due to Montana on a call. The
4 requirement that we are proposing here is that if to
5 the extent that groundwater well and pumping
6 information is available for other purposes, that it
7 be shared at these meetings. It is a bilateral
8 recommendation here.

9 We are saying that we, Montana,
10 should share that kind of information for
11 groundwater pumping below the state line just the
12 way they pump above the state line has potential
13 impact on Compact compliance. This is a way for the
14 states to share information as to the potential to
15 relate to Compact violations in the way that allow
16 identification of problems before they become big
17 enough to require the attention of the U.S. Supreme
18 Court. It does not present any significant work.
19 It is an appropriate way for the Court to ensure
20 that its original jurisdiction is protected.

21 SPECIAL MASTER THOMPSON: Okay. Let
22 us move on to what the declaratory relief should say
23 with respect to a call. I think there is really
24 three issues here.

25 So the first one is that in terms of

1 what a call by Montana needs to say, in other words,
2 what information it is conveying. Montana's
3 declaratory language I think just refers to Montana
4 needs to make a call.

5 Wyoming's thoughts about making a
6 call conveys that Montana is not getting sufficient
7 water in the needs of its 1950-appropriators and
8 they want water from Wyoming, I believe that what I
9 said in my second report is that a call needs to
10 clearly conveyed to Wyoming that Montana is not
11 getting sufficient pre-1950 or sufficient water to
12 meet the needs of its pre-1950 appropriators.

13 So unless somebody tells me that is
14 what you should not do, that is what I am inclined
15 to do.

16 MR. KASTE: I think that is a long
17 phrase that you are substituting in there. We can
18 do it. The word call should convey all of that by
19 itself.

20 MR. DRAPER: If you want to add that
21 extra language, I am sure that we can do that.

22 SPECIAL MASTER THOMPSON: Again, I am
23 doing this as a hypothetical. I do not want to get
24 people in any disagreement later about what is a
25 call or --

1 MR. KASTE: I don't agree it is
2 additional language. It is the language that you
3 have already given us. There was heated debate by
4 Montana about whether or not the communications may
5 in those years suffice. The way to resolve that I
6 think needs to be preserved since it forms the basis
7 of just about everything else that you decided that
8 followed.

9 MR. DRAPER: Your Honor, this point
10 has come up quite a bit in Mr. Kaste's presentation
11 to you. If it is good enough for determining past
12 history, it is good enough for future. That is not
13 true. That is a general principle. It is not true
14 here. That is why we are in this remedy space.
15 Just because something was determined in '04 and '05
16 and other years were not, Montana being told by
17 Wyoming and now told, well, at that time that it did
18 not need to make a call and somehow it now needs to
19 go prove that it had led to presentation of evidence
20 in the past, but I think that is totally different
21 question.

22 The general principle here is that it
23 is not, it is not a good criteria to say you are
24 only good in the forward-looking decree. What you
25 have said and you have seen the exact same words as

1 you did to analyze past history.

2 SPECIAL MASTER THOMPSON: So I
3 understand that point generally, but in this
4 particular case I actually think it is useful to say
5 what a call needs to do. It sounds as if there
6 actually might be disagreement between the parties
7 as to whether or not something would actually be a
8 call. So I think it is important to say what
9 information needs to be in the call.

10 The second situation though is what
11 form a call needs to take. And what I basically
12 said before is that it did not have to take any
13 particular form.

14 Montana however in its proposed
15 decree actually specifies that all -- let us see
16 here. That communications initiating the call shall
17 be made by Montana's Yellowstone River Compact
18 Commissioner or his or her designee. If it is
19 verbal, it needs to be documented.

20 And I guess I am not quite sure why
21 Wyoming could complain if Montana wants to actually
22 provide additional detail as to how it will go about
23 doing that.

24 MR. KASTE: Well, your ruling about
25 what constituted a call or not defined the rights

1 and obligations of the parties to this Compact.
2 That needs to be memorialized.

3 To do something different in the
4 decree would be for us to rewrite the content of
5 that Compact and impose upon ourselves rights and
6 obligations that the Compact does not. You
7 interpreted the Compact and told us what our rights
8 and obligations are under it. The State of Wyoming
9 is unwilling to add stuff to that Compact at this
10 point in this form.

11 SPECIAL MASTER THOMPSON: So this is
12 a very peculiar situation to be in. While I do
13 understand your general proposition on this and I
14 also appreciate your purity of position and I can
15 tell you that if you were to concede our point, in
16 this specific instance I would assume that that was
17 a concession of the general board.

18 It does strike me, and I said this in
19 my last opinion, that no matter what the decree
20 could say as a matter of proper interpretation of
21 the Compact, that I don't think there is anything
22 that prevents the parties from saying, you know, it
23 would actually also be useful to spell a particular
24 procedure out a little bit more and we are perfectly
25 happy to agree on this particular procedure and we

1 will put it in the decree.

2 MR. KASTE: We may well be perfectly
3 happy to agree to a procedure, but not in this form.
4 In front of the Commission as part of the
5 administration, as part of your rule making process
6 we might agree on a whole bunch of stuff, not in
7 this decree.

8 MR. DRAPER: Your Honor, I think what
9 we need is specificity. We do not want to get into
10 a situation where we do this and the Supreme Court
11 did not say that was sufficient. We are going to
12 have to have a trial on it. We will see if it is
13 sufficient. We don't mind putting some words in
14 here, so long as we know what the rules are.

15 As long as they can keep the rules
16 indefinite, there is room for disagreement and, of
17 course, being in possession of the resource they are
18 the winners and we are not protected.

19 SPECIAL MASTER THOMPSON: Okay. I
20 think that I understand both sides. I must admit I
21 am still a bit baffled by both sides.

22 Again, I understand I think Wyoming's
23 desire for purity here so it cannot be seen as
24 actual use of being willing to waffle on this
25 particular point.

1 Mr. Kaste, since you are looking
2 oddly at me, I am assuming that is not the reason
3 why you are holding out on this particular point,
4 but I am little bit baffled on the arguments. I am
5 a little bit baffled as to the motivation on both
6 sides. So while I might not understand the
7 motivation, I understand the background.

8 So let us go into the next point
9 which is the question of intrastate regulation, and
10 this gets into the fact that Montana has that
11 language about regulating upstream of the pre-1950
12 appropriators in Montana.

13 Mr. Kaste, you will tell me that that
14 is not in the language of any of the special reports
15 or any of the Supreme Court opinions and therefore
16 should not be included; is that correct?

17 MR. KASTE: And not consistent with
18 the Doctrine of Appropriation. I do not understand
19 how Montana can pass water through the Tongue River
20 Reservoir to satisfy a post-1950 right while that
21 reservoir has made a call on Wyoming.

22 So there are post-1950 water rights
23 in Montana receiving water when post-1950 water
24 rights in Wyoming are being asked to be called off.
25 That is not consistent with the obligation that the

1 Compact imposes as you have determined that they
2 exercise appropriate intrastate regulation before
3 making a call.

4 If you are passing through, water
5 through the Tongue River Reservoir to satisfy
6 downstream post-1950 rights, your house is not in
7 order. That is my position. Very simple.

8 SPECIAL MASTER THOMPSON: Okay.
9 Thank you.

10 Mr. Draper.

11 MR. DRAPER: I find their position
12 baffling. The Tongue River Reservoir is a pre-1950
13 right. If it needs to call for water, it can get
14 that water only from upstream. We are not talking
15 here about the rules for operation.

16 Mr. Kaste seems to be somehow
17 injecting that into this question. As long as there
18 is two water rights above it that are post-'50,
19 those have to be attended to. If there is tributary
20 inflow down below, there is no way that can benefit
21 the reservoir. And if a post-'50 right is otherwise
22 entitled to that, that is not a concern that should
23 affect what we are talking about.

24 So it just seems to us that I think
25 it is just a failure of communication. We both

1 strongly adhere and advocate the prior appropriation
2 system but for a water right to be a senior water
3 right to be able to call downstream juniors, where
4 does that come from? That is not a principle of
5 prior appropriation.

6 That is all we are saying. If this
7 is somehow confusing them, we are willing to limit
8 some language, but it seems very simple.

9 SPECIAL MASTER THOMPSON: So let me
10 see and, Mr. Kaste, you can try to explain more, but
11 let me see if I understand the concern and let me
12 give two hypotheticals here.

13 So the first one is that there are
14 some post-1950 appropriators downstream from the
15 reservoir. The reservoir has called the river
16 because it is concern that it is not going to be
17 filled. But the reservoir releases water
18 specifically for those downstream post-1950
19 appropriators because they say we would love to get
20 some water and there is not enough water in this
21 river for us right now.

22 So I understand Mr. Kaste's concern
23 in that situation is that the reservoir cannot
24 release water specifically for that downstream
25 post-1950 appropriator at the same time that it is

1 calling for upstream.

2 MR. DRAPER: That is a very strange
3 notion, but that is true. We are not going to be
4 releasing water to post-'50 people when we are
5 trying to, on the one hand, fill the reservoir
6 subject to the senior rights downstream and safety
7 concerns. We are not going to be releasing to
8 post-'50 and maybe we need to specify that. It
9 seems like totally superfluous language, but I don't
10 really think that we have got an issue here.

11 We should not have an issue of that
12 storage right once it starts delivering water, which
13 is typically at the end of the season. That is a
14 different story. But it is stored under a pre-1950
15 right. When it is storing it, it is not releasing
16 to a junior right. TMY is senior to the reservoir.
17 So it has to let water to the extent that TMY is
18 calling for it through, but not to any other more
19 junior rights in the reservoir, just to the senior
20 rights.

21 There is a few others in there, but
22 the idea that you are suggesting in your example,
23 maybe we need to protect against, it just seems like
24 it is so obvious that we didn't think that. If you
25 are calling for a right, then to the extent you can,

1 you are satisfying that right and you know that you
2 cannot satisfy it at the expense of seniors to you
3 downstream and you cannot satisfy it at the expense
4 of creating an unsafe situation downstream. I think
5 it is just a communication problem.

6 SPECIAL MASTER THOMPSON: Mr. Kaste,
7 well, is it just a communication problem?

8 MR. KASTE: No. I don't think your
9 hypothetical is exactly what Wyoming is concerned
10 about. I think that that hypothetical is plenty
11 provided for in the language that Montana used in
12 its provision. It expressly authorizes that
13 condition to occur. And Wyoming does not believe
14 that that is acceptable under the Compact.

15 Your second hypothetical is going to
16 be now if water comes in from a tributary downstream
17 of the Tongue River Reservoir and some post-1950 guy
18 gobbles that up, is that a problem? No, that is not
19 problem. The language that you see in Montana's
20 decree authorizes the situation that you very
21 described.

22 SPECIAL MASTER THOMPSON: Then I
23 think that I know how to track the language to meet
24 Wyoming's concerns and at the same time make sure
25 that Montana's rights are protected.

1 So the next provision which is on my
2 list, and I think we basically already talked about
3 this in the introductory comments, were Wyoming's
4 obligations in the case of a call.

5 And, as I understand Wyoming's point,
6 it is that we have dealt with that before. We
7 should not deal with that now absent some kind of
8 legal proceedings to actually establish what those
9 should be.

10 I understand Montana's position to
11 basically be we need some specific procedures so
12 that we don't get into a dispute once Montana calls
13 the river again and Wyoming sits there for two weeks
14 and does not do anything during that period of time.

15 So am I saying anything inaccurate on
16 both sides' position on that?

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

18 MR. DRAPER: No.

19 SPECIAL MASTER THOMPSON: Okay. The
20 next question then is on the water rights and so
21 this gets specifically to Montana's provision
22 paragraph C which is labeled no effect on rights
23 from reservations, and it goes on to say nothing in
24 the decree shall affect the water rights or water
25 rights of any Indian tribe or any Indian

1 reservation.

2 And, Mr. Kaste, I know that you have
3 objected to this provision and I understand your
4 legal arguments for it.

5 Could you just explain to me what you
6 are worried about with respect to this particular
7 condition?

8 MR. KASTE: It is not what you ruled.
9 Shockingly, it is not what you ruled. Your rulings
10 in the second interim report deviated from this
11 language and I don't know what mischief could arise
12 as a result of it, but if you didn't make the
13 ruling, I am inclined to conclude that there is
14 mischief afoot and I ought to oppose it.

15 Also, it makes no sense to reiterate
16 the exact language of the Compact, and that is what
17 this is. It definitely makes no sense to say
18 something different than what formed the actual
19 basis of your ruling with regard to the tribe's
20 rights.

21 SPECIAL MASTER THOMPSON: Okay. So
22 what I am really seeking to understand is what, if
23 anything, it is underlying of the dispute between
24 the two sides.

25 And, Mr. Kaste, I am now giving you

1 basically or hearing you say I don't know, but it
2 might very well be that there is something and that
3 is why I do not want any other language?

4 MR. KASTE: I do know why. I prefer
5 that you use language that you already used. I do
6 not know why this language was chosen as opposed to
7 the language that you chose.

8 SPECIAL MASTER THOMPSON: Why do you
9 prefer the language that I used before other than
10 that is the language that I used before?

11 MR. KASTE: They say a different
12 thing. One, the Compact, the language that they
13 copied from the Interstate Compact between us is
14 different than the finding that you made, which is
15 the Court did not have jurisdiction over the
16 Cheyenne tribe in this case. Those are very
17 different things.

18 I think that we ought to memorialize
19 the actual holding that you reached because you
20 didn't have jurisdiction over the tribe for the
21 purposes of this case. It is inaccurate to say
22 anything else. I kind of think we ought to be
23 accurate in what we propose that the Court enter.

24 SPECIAL MASTER THOMPSON: And so let
25 me make sort of the other argument which is because

1 of that, the Court presumably wants to make sure
2 that, in fact, in ruling on this they are not
3 affecting what the Northern Cheyenne rights are.
4 They don't have any jurisdiction over those. So
5 that would be the reason for setting out something
6 specific like this.

7 MR. KASTE: Of all the things that we
8 don't like, these last two are probably the least
9 important, and I understand that they probably might
10 be inclined to do something that you might be
11 inclined to do, but, as I stated before, I really
12 think we ought to limit ourselves to the things that
13 you actually decided instead of now saying something
14 in an advisory capacity for future litigation.

15 The Court is perfectly capable of
16 looking at a future case at the outcome of these
17 proceedings and saying in the course of an opinion
18 that didn't have any effect on the tribe's right.
19 They were not even a party.

20 The Special Master determined that we
21 should adopt the ruling that the Court had no
22 jurisdiction over the trial. Does it make it harder
23 for the Court to do that in a future case because we
24 don't have the language that Montana has proposed?
25 I don't think so.

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1 SPECIAL MASTER THOMPSON: I am so
2 pleased that Ms. Jennifer is actually going to say
3 something.

4 MS. VERLEGER: I know that you are
5 surprised.

6 SPECIAL MASTER THOMPSON: I am
7 pleased I said.

8 MS. VERLEGER: I think on this we
9 will take the position of Wyoming as we would prefer
10 you to not rule on this issue. We have some other
11 issues with North Dakota, Montana having other
12 disagreements on language similar to this and what
13 it means as far as not having any impact.

14 So I think we would actually prefer
15 that the issue was not resolved in this situation
16 and not discussed.

17 SPECIAL MASTER THOMPSON: Okay. And
18 can somebody give me a sense of what those issues
19 are?

20 MS. VERLEGER: Basically as far as,
21 you know, Montana has negotiated a lot of their
22 Indian water rights settlements with their tribes.
23 North Dakota has not. This comes up a little more
24 on the Missouri River, but Montana takes a
25 position -- well, Montana does not take a position,

1 that is why they use this language it does not
2 impact. It does not have any influence.

3 North Dakota takes the position that
4 whatever tribal settlements that Montana wants to
5 enter into, that is their right, however, if there
6 is an apportionment of, specifically I am talking
7 about Missouri River now, if there is an
8 apportionment of the Missouri River, that needs to
9 come out of Montana's apportionment. That is their
10 piece of the pie. Montana does not necessarily
11 agree to that that is why they like this language,
12 and I think that is kind of looking in a smaller
13 subset of that issue, it will not on the Missouri
14 River but a tributary.

15 SPECIAL MASTER THOMPSON: I
16 understand that that has been an issue between
17 Montana and Wyoming in this particular proceeding.
18 Basically Wyoming's view has been that in settling
19 Federal water rights issues with the Northern
20 Cheyenne tribe that that was all fine, that it comes
21 out of Montana's share of the river and Montana does
22 not necessarily agree with that.

23 So I realize that is an issue, and I
24 would certainly want to make sure that in any
25 particular language that is used in this decree it

1 does not in any way affect that particular debate.

2 So, Ms. Whiting, do you want to say
3 something?

4 MS. WHITING: Thank you, Your Honor.
5 We definitely support the language that has been
6 proposed by Montana in the decree. And our reason
7 is that the issue of the tribe's rights has come up
8 several times in this case over the ten years that
9 it has been in litigation, and the Court has
10 consistently said either that you don't have

11 jurisdiction to determine anything in regard to the
12 tribe's rights or that it is not necessary to decide
13 the tribe's rights for the particular issue at hand.
14 And the Court in I think every major
15 ruling that it has made or that the Special Master
16 has made has confirmed that, even in the most recent
17 rulings where it was not necessarily raised, but the
18 Court or your report or decision confirmed that you
19 did not intend to address anything in terms of the
20 tribe's rights.

21 And so given that it has been raised
22 many times throughout the proceedings and that you
23 have consistently said no, we are not deciding
24 anything here either because of jurisdictional
25 reasons or because of factual reasons that you don't

1 need to determine it, it seems appropriate to
2 confirm it again in the decree language.

3 Obviously there are a number of ways
4 to craft such language, but it does seem to us that
5 the least ambiguous way is to merely repeat the
6 language in the Compact itself.

7 There are, obviously, issues relating
8 to how that language is essentially interpreted. If
9 you attempt to craft language that is maybe somewhat
10 different or that may be slightly more ambiguous, it
11 seems to me that that leads to problems.

12 So, for us, the best way to deal with
13 that is to merely reiterate the language in the
14 decree or the Compact, excuse me, and that presents
15 the least ambiguous way of saying that the
16 proceedings would not affect the tribe's rights.

17 SPECIAL MASTER THOMPSON: So I
18 actually -- so, first of all, I understand all of
19 the various positions and let me actually look at
20 the language and think about it, but my goal would
21 be to again ensure that nothing that is decided in
22 this particular case will change the arguments one
23 way or the other with respect to, with respect to
24 any water rights questions in this particular case
25 recognizing that I don't want to, because it does

1 not have jurisdiction, I cannot do something at this
2 particular stage that would impact the tribe's
3 rights and at the same that I do not want to do
4 anything that forecloses whatever arguments are out
5 there right now that makes it seem as if the Court
6 has resolved this.

7 So I am not sure that there is
8 anything more to say on this particular issue other
9 than, Mr. Kaste, you said it was one of the less
10 important issues perhaps for you. My guess is this
11 is an area where I have to be very careful on
12 deciding what I say. Thanks.

13 MR. KASTE: Let me tell you where I
14 am on this. They are important, at least the two
15 pieces with regard to potential of jurisdiction. I
16 understand that this language is often seen in
17 decrees that the Court issues in regional action
18 cases and it is verbatim from those. I get it.
19 Many of those cases, Your Honor, if not all of them
20 contain injunctive relief. There is a need to
21 intercede in the future in order to enforce that
22 injunctive relief. I think this language that there
23 is not injunctive relieve is at odds with
24 contradictory proceeding language earlier in the
25 decree that says other than the money that you

1 receive, the rest of your complaint is dismissed.

2 Your case is over.

3 I think what it does is it encourages
4 us to go to the Court with every little concern that
5 we may have as we attempt to implement the
6 Administrative Compact into the future. It does not
7 provide sufficient incentive for us to manage our
8 own affairs in the forms that we have available to
9 us and, therefore, I think it is counterproductive
10 to include such language.

11 SPECIAL MASTER THOMPSON: Mr. Draper,
12 obviously, the Supreme Court always prefers to be
13 able to just get final a case and say we addressed
14 it. So why should this be a dangerous issue?

15 MR. DRAPER: I don't think it depends
16 on whether there is an injunction in the decree or
17 not. The Court has not made a decision. They
18 retained jurisdiction in the Kansas vs. Nebraska
19 case. There is no injunction there. This is
20 typical language. It does not encourage anybody to
21 do anything. It simply makes explicit power of the
22 Court, if it should choose to exercise it, to come
23 in and modify a decree. It gives the Court the kind
24 of flexibility so that it can address any issue that
25 might come up or some kind of enforcement action.

1 By retaining its power to do that does not encourage
2 people to come to the Court with unnecessary action.

3 SPECIAL MASTER THOMPSON: Again, I
4 think that I understand both sides.

5 So the final issue on these major
6 issues was the question of surplus water issues. I
7 would appreciate a little bit more background on the
8 relevance of this particular issue.

9 Did you talk at length about this at
10 trial?

11 MR. KASTE: Well, this issue arose by
12 the virtue of inclusion of some language by Montana
13 in its proposed decrees which Wyoming sees as an
14 effort to in a sense unilaterally eliminate and
15 impart an adjudicated water right which relates to
16 their entitlement to surplus water.

17 Wyoming had a statute passed in 1945
18 pre-Compact, which says that pre-1945 rights are
19 part of adjudicated rights under certain conditions
20 have a right to a second cfs per 70. It is part and
21 parcel of their adjudicated right. It is an
22 indistinguishable, unrestrictable right that is part
23 of every water holder's right. We can lose that.
24 These water rights holders can lose it. The
25 testimony that you did hear was that the conditions

1 in which you utilize that second cfs rarely exist in
2 the Tongue River Basin. So practically not really
3 an actual issue.

4 When those conditions do exist, in
5 those rare circumstances, people have a right to
6 take that second cfs, therefore, language suggesting
7 that it is no longer available to those rights has
8 no place in this decree. That is the long and short
9 of it I think.

10 SPECIAL MASTER THOMPSON: And so
11 before you get up, Mr. Draper, so if I understand
12 Montana's argument is basically that the surplus
13 water rights are really only utilizable to the
14 decree if there is surplus water in the river, that
15 there is not going to be surplus water in the river
16 if insufficient water is reaching Montana and then,
17 therefore, you never have the right to use surplus
18 water if Montana has called for it?

19 MR. KASTE: Yes. I am not sure that
20 I understand exactly their point because there is
21 not in the traditional sense of the word pure
22 appropriation or administration by priority across
23 the state line. That is what they seem to be
24 suggesting in this limited instance, that we have
25 some pure administration across the state line.

1 I understand Montana is offended by
2 the notion that there might be the use of surplus
3 water in Wyoming and always has been, but that was
4 not an issue in this case. It was not necessarily
5 decided by you in the course of any of your rulings
6 that under certain conditions there would be no
7 resort to surplus water for Wyoming's water use.
8 You have not ruled on that question in this case.
9 It was not necessarily before you. So it does not
10 belong in the decree.

11 To unilaterally restrict these people
12 of part of their adjudicated water rights where that
13 was not part of the case that you had to decide in
14 order to reach your rulings is not right.

15 SPECIAL MASTER THOMPSON: So this is
16 helpful to me because I think that maybe now I am
17 beginning to understand surplus water rights.

18 So is it Wyoming's position then
19 that, at least for the moment, that surplus water
20 rights belong to pre-1950 appropriators or at least
21 they belong to those who appropriated prior to 1945;
22 is that correct, Mr. Kaste?

23 MR. KASTE: Correct.

24 SPECIAL MASTER THOMPSON: And that
25 even though those are only usable to the degree that

1 there is surplus water available in the river, the
2 determination of whether or not there is surplus
3 water in the river is one that is actually made
4 looking at the Wyoming side of the border, not the
5 Montana side of the border, and that because they
6 are considered part of pre-1950 rights, that they
7 are protected against pre-1950 appropriators in
8 Montana?

9 MR. KASTE: That's correct. These
10 are not post-1950 rights subject to a call from
11 Montana.

12 If you recall, during the course of
13 the trial you heard that some people, instead of one
14 per 70, they may have access to one per 40. What
15 this does is it gives these folks a legislative
16 determination made in 1945 that when those
17 conditions existed that additional water would be
18 beneficial to go to these people and it became part
19 of their right pre-1950. This use was available.
20 The Compact drafters knew about it. The Compact
21 drafters made provisions for it by saying pre-1950
22 rights are addressed in this way. This is part and
23 parcel of pre-1950 rights, and to treat it as if it
24 is somehow lesser priority and therefore subject to
25 call by Montana is inappropriate, and also something

1 that we really do not need to litigate and did not
2 litigate in the course of the trial.

3 SPECIAL MASTER THOMPSON: Okay.

4 Mr. Draper.

5 MR. DRAPER: Your Honor, all we are
6 asking is that the decree include language that
7 requires that the pre-1950 rights be strictly
8 regulated to their events.

9 Mr. Kaste is talking about what
10 constitutes the right. We are not trying to specify
11 what constitutes the right. If it is a valid part
12 of a pre-1950 right, then you can exercise it.

13 All this does is simply say we are
14 going to cut off, during call we are going to cut
15 off post-1950 in Wyoming and we are going to make
16 sure that pre-1950 are not taking more than their
17 rights.

18 SPECIAL MASTER THOMPSON: Okay. So,
19 Mr. Kaste, other than potentially worrying about
20 other language in Montana's proposed decree
21 accomplishes that task, do you hear any differences
22 between you and Mr. Draper?

23 MR. KASTE: Well, I agree that
24 pre-1950 rights are not authorized to take more than
25 their adjudicated water rights ever regardless --

1 well, no, they are not. They are not. So we have
2 an obligation consistently to make sure that people
3 stay within the boundaries of their water rights.
4 Those boundaries however include a right to surplus
5 water where it exists.

6 And so, yes, I am concerned, very
7 concerned about the language Montana proposes
8 including those surplus water rights because they
9 cannot and should not be included. Those are part
10 and parcel of the pre-1950 right.

11 SPECIAL MASTER THOMPSON: So what I
12 understand you saying is you don't believe people
13 should be able to take more than the adjudicated
14 rights, but people prior to 1945, those adjudicated
15 rights include surplus water?

16 MR. KASTE: Yes.

17 SPECIAL MASTER THOMPSON: Do I hear
18 you saying something differently, Mr. Draper?

19 MR. DRAPER: No, we are just
20 annunciating the general principle that I think is
21 appropriate for the Supreme Court decree under the
22 circumstances of a call that the senior rights are
23 not diverting more than they are entitled to.

24 SPECIAL MASTER THOMPSON: Okay.

25 Thank you.

1 So then just looking at my list of
2 small differences, I actually think that I can
3 resolve all of them with respect to all but two.
4 And the one that is relatively minor, but I am just
5 curious so that, again, if you look at Wyoming's
6 proposed decree, it is the paragraph that you
7 included, Mr. Kaste, that is sort of the grand
8 inclusive as to where we start paragraph, I think
9 your paragraph E, the balance says that Article V
10 (A) protects pre-1950 rights for the beneficial uses
11 of water of the Yellowstone River System in Montana
12 from post-1950 surface and groundwater diversions in
13 Wyoming.

14 So what you are referring to there is
15 the language that, in, fact the Court has adopted in
16 its original Supreme Court opinion refers to the
17 entire Yellowstone River System.

18 Mr. Draper, in your overarching
19 provision, which is in, let us look first at A1, it
20 is limited specifically to the Tongue River.

21 I assume, Mr. Kaste, you have no
22 objection to the general provision referring to the
23 Yellowstone River System with the recognition that
24 when we get more specific, those are issues that we
25 talk about in relation to the Tongue River --

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1 MR. KASTE: I think that is correct.

2 SPECIAL MASTER THOMPSON: -- it is a
3 Supreme Court ruling.

4 MR. KASTE: That makes sense to me.

5 SPECIAL MASTER THOMPSON: So I
6 assume, Mr. Draper, you have no objection to it
7 being stipulated to the Tongue also?

8 MR. DRAPER: No, Your Honor.

9 SPECIAL MASTER THOMPSON: Another one
10 which I know no one ever talked about it and
11 probably partly because it first appeared, at least
12 when I was looking at it, in Montana's revised
13 decree, there is the provision, and we are talking
14 about B19 now, that specifically says sedimentation
15 of reservoirs in Wyoming or Montana with
16 multi-storage rights with different priorities may
17 be counted first against the more junior storage
18 rights.

19 So, Mr. Draper.

20 MR. DRAPER: Your Honor, we did talk
21 about sedimentation in trial as a physical
22 phenomenon that has taken place in the reservoirs
23 and we accounted for it when necessary.

24 It seemed appropriate to include a
25 provision here that treats sedimentation the way we

1 are treating the order of filling. I agree we didn't
2 have a particular dispute over how you allocated
3 sedimentation between junior and senior rights, but
4 it goes right along the same principles and was
5 appropriate to specify that at this time.

6 SPECIAL MASTER THOMPSON: I
7 understand that Wyoming has the provisions with
8 respect to senior rights and junior rights so it
9 does go along with that.

10 So, Mr. Kaste, any objection to this
11 from Wyoming?

12 MR. KASTE: Yes. We didn't try this
13 issue. Mr. Brown informs me that it is inconsistent
14 with Wyoming law where sedimentation is enabling
15 across all priorities. It is not something that I
16 think we applied with regard to the Tongue River
17 Reservoir sedimentation issues here. This was not
18 necessary for you to include as you did in the
19 nature of the Tongue River Reservoir rights in its
20 original capacity.

21 I see no good reason to include this.
22 It is inconsistent with at least Wyoming's thought
23 and is not necessary to rulings in the case.

24 SPECIAL MASTER THOMPSON: I am going
25 to go back and look at the record more on this

1 particular point. Unless you have anything more to
2 say, I understand both sides.

3 MR. KASTE: Sure. I don't.

4 SPECIAL MASTER THOMPSON: All right.
5 So, actually, let me ask one other quick question
6 which is with respect to paragraph, actually B17 and
7 18 of Montana's proposed decree, and this started
8 with Wyoming's language and Montana has taken it and
9 modified it slightly, part of the differences in the
10 language stems from Wyoming's language is that in
11 both of the cases the assumption is that those
12 reservoirs release their senior water first for
13 example. And Montana changed the language to
14 accounting may be.

15 So, again, I am curious, is there a
16 reason why I should choose one or the other
17 languages? Is this a serious consequence?

18 MR. KASTE: We chose the language
19 that you used. You used those words. While the
20 standard practice may be reflected in these
21 paragraphs, people who own reservoirs can make
22 different provisions for how they operate the
23 reservoir and they can decide amongst themselves
24 what water to take out of it.

25 But your ruling says in the absence

1 of evidence related to some other agreement on
2 reservoir owners, the assumption is we both use
3 Wyoming and Montana reservoirs. Again, I am going
4 to advocate that we continue to use the words that
5 you carefully chose rather than change it, even
6 though there may appear to be a minimal difference
7 between assumption and may.

8 SPECIAL MASTER THOMPSON: Mr. Draper.

9 MR. DRAPER: The difference between
10 the two is that the Wyoming version requires that
11 unless shown otherwise that it is going to be as
12 specified. We changed that most states have more
13 flexibility if they choose to operate in a certain
14 way and count in a certain way that is allowed here,
15 that that is permitted. This just gives both states
16 a little bit more flexibility, but it assures them
17 if they want to account as we have done in this case
18 so far, that that is allowed.

19 SPECIAL MASTER THOMPSON: So, again,
20 let me understand both sides. I have to go back and
21 take a closer look at the context. And I understand
22 Wyoming chooses the language I have utilized. I
23 want to go back and look and see exactly why you
24 want this particular language and how Montana's
25 suggestion does harm to that particular ruling.

1 Okay. That's my entire list of
2 items. The first thing is, am I forgetting
3 something important in terms of the different
4 decrees?

5 MR. KASTE: We are here to answer
6 your questions. So if you feel like you have had a
7 good discussion that will help you put together the
8 decree and you think it is best for this case, then
9 we have done our job. I don't know if we have done
10 our job, but that is the measure of our success.

11 SPECIAL MASTER THOMPSON: Okay.

12 MR. DRAPER: I think that we have
13 covered most of the issues. The only thing is the
14 schedule that you mentioned once we get past the
15 substance of the decree.

16 SPECIAL MASTER THOMPSON: So do you
17 both want any time just to confer on this as to
18 whether or not there is anything that we have
19 missed?

20 MR. DRAPER: Yes, I think a
21 five-minute opportunity would be well used.

22 SPECIAL MASTER THOMPSON: Let us do a
23 three-minute opportunity.

24 (Recess was taken.)

25 SPECIAL MASTER THOMPSON: Okay. Back

1 on the record.

2 MR. DRAPER: We conferred, Your
3 Honor, and we have nothing further to raise at this
4 time.

5 SPECIAL MASTER THOMPSON: Okay.
6 Thank you, Mr. Draper.

7 Mr. Kaste.

8 MR. KASTE: Nothing further from
9 Wyoming.

10 Do you want to talk about Calienti?

11 SPECIAL MASTER THOMPSON: Yes.

12 MR. KASTE: Okay. I do not mean to
13 put you on the spot. We are all, I mean generally
14 aware of your participation in the case. I wanted
15 to make sure that we are all on the same page and
16 all out in the open with regard to all the parties
17 and your participation in that case and let I think
18 everybody have a chance to say we have no concerns
19 and wanted to relay any concerns that you might have
20 that you want to bring to our attention.

21 SPECIAL MASTER THOMPSON: Okay. So
22 let me just say that although I am involved in the
23 case at the moment, I have not appeared before the
24 U.S. Supreme Court and. One of the things that I
25 will be doing, if I decide I want to appear in front

1 of the Supreme Court is ask the Court's permission
2 first. Because I realize that this is a bit of an
3 unusual situation and it comes from the fact that I
4 am both in private practice as well as special
5 master in this particular case. It would be useful,
6 and I was not planning on it, but it would be useful
7 to know whether or not there is any objection from
8 the parties?

9 MR. KASTE: Wyoming does not object
10 to your participation in that case at any level.

11 SPECIAL MASTER THOMPSON: Okay.

12 MR. DRAPER: My information is just
13 from Mr. Kaste. As I understand it, Wyoming may
14 file an amicus brief in support of the position that
15 you may sit on in that case and it is an certiorari
16 situation where petitions can be filed or may be
17 filed.

18 SPECIAL MASTER THOMPSON: So,
19 Ms. Whiting, just to let you know, I am counsel in
20 the Aqua Caliente case for the Coachella Valley
21 Water District and they have announced that they
22 will file a sur petition in that particular case.

23 So the question I will ask the Court
24 is whether or not there would be any objection on
25 the Court's part in my being involved in the sur

1 petition itself. So, again, I will ask the Court's
2 permission of that. I wanted people to respond on
3 that.

4 MR. DRAPER: For the record, we do
5 not object.

6 MR. KASTE: And as Ms. Whiting more
7 carefully points out, the State of Wyoming may find
8 themselves on the same side of the case. And there
9 might be opportunities or necessities for there to
10 be communication regarding that case between
11 yourself, representatives of the State of Wyoming
12 and other litigants might be interested in appearing
13 in that case. I believe we are all capable of
14 handling those communications without raising any
15 propriety concerns. I hope that yourself and
16 Montana believes that we can do the same. I think
17 it is especially important in doing to make sure
18 that everybody is on the same page with regard for
19 that possibility to occur.

20 SPECIAL MASTER THOMPSON: And just to
21 let you know, Ms. Whiting, because this is probably
22 most relevant to you actually, my plan, if I am
23 actually permitted to participate in the sur
24 petition stage, is that I will not directly
25 communicate with counsel. There are other counsel

1 involved in this matter. I think that it would be
2 much more appropriate that they be involved than I
3 be involved.

4 MS. WHITING: Obviously I have not
5 talked to Montana about this at all. It does seem
6 like Montana does have a position on groundwater.
7 It is reflected in the Compacts, and so there would
8 be some difference of position there.

9 SPECIAL MASTER THOMPSON: Okay. I
10 understand that. In this particular case, as far as
11 I can tell the issue that is in Caliente is not an
12 issue specifically in this particular case because
13 that case deals with groundwater which is not
14 hydrologically connected to the surface water. So
15 it is a very different type of situation.

16 MR. KASTE: I appreciate that. I
17 didn't mean to put you on the spot. I think light
18 is the best thing for everybody and transparency is
19 the best thing for everybody. And we want to make
20 sure that we understand what everybody's plans are
21 and make sure that there is no concern from any of
22 the other parties.

23 SPECIAL MASTER THOMPSON: Understood
24 entirely. This is one of those sort of off
25 situations where you have a client that suddenly

1 finds themselves in this situation.

2 As I said before, I will actually
3 make an appearance in this case and ask the Court if
4 that is appropriate and therefore it is not an issue
5 yet but I appreciate the parties' guidance on that.

6 MR. KASTE: Well, when you make your
7 submission, you can report accurately that it
8 appears the parties have no objections.

9 SPECIAL MASTER THOMPSON: Okay.

10 So the calendar, I think that there
11 was something that Mr. Draper wanted to address.

12 MR. DRAPER: Right. My notes show
13 that you plan to get us your draft report with the
14 decree on May 15 and give us each a week to respond
15 to it and then a further week to respond to the
16 other state.

17 SPECIAL MASTER THOMPSON: That would
18 be correct.

19 MR. DRAPER: That is good timing from
20 my point of view. I am going to be out of the
21 country most of the time until the 15th, and out of
22 the country again starting on the 25th of May. So
23 staying to the ten-day window would be very helpful
24 to me if that can be preserved.

25 SPECIAL MASTER THOMPSON: Okay. I

1 will do my very best to do that.

2 And, I guess, the only other thing is
3 that, Mr. Kaste, you should feel free obviously if
4 you want to object to anything that is in the decree
5 I propose or you think that, in fact, there needs to
6 be further fact finding or you believe that you have
7 not had an adequate opportunity to comment on that,
8 that goes for you also, Mr. Draper, both of you
9 should feel free to say so and then I will decide
10 whether or not, in fact, that cannot be in the
11 decree at all or if, in fact, we need to have
12 further proceedings. I am hoping that is not the
13 case. I recognize that is possible.

14 MR. DRAPER: Very good, Your Honor.

15 MR. KASTE: Now, I was about to say,
16 as I really truly hope that this is our last time
17 together in this group for this reason, on behalf of
18 the State of Wyoming, we greatly appreciate the time
19 and efforts and energy that you have put in on this
20 case and thank you very much for your service.

21 SPECIAL MASTER THOMPSON: Thank you.

22 MR. DRAPER: We would also, and it
23 has been a pleasure, Your Honor, to be here before
24 you.

25 SPECIAL MASTER THOMPSON: I

1 appreciate that. Let me just say, as I said all
2 along, that I think all sides, not only Montana and
3 Wyoming, but also everybody has done an excellent
4 job of illuminating the issues in this case, arguing
5 the case.

6 And so it has been a pleasure to
7 serve in this role because of how well all sides
8 have managed themselves and moved this forward.

9 I wish sometimes that the two sides
10 would get together and settle the case but, as
11 Mr. Kaste pointed out the last time, I realize this
12 is water in the West and that that is sometimes not
13 possible.

14 So hopefully we will be able to
15 resolve this case at this point and you will have
16 one final opportunity to file exceptions to the U.S.
17 Supreme Court if you want to and we can resolve it.

18 So this has been a pleasure on my
19 part also, and I will get you a proposed decree on
20 the 15th of this month.

21 So, I guess, one final thing.
22 Mr. Draper, you take off on the 25th of May and when
23 do you get back?

24 MR. DRAPER: The 10th of June.

25 SPECIAL MASTER THOMPSON: Okay. So I

1 am thinking already about what that means in terms
2 of the timing of getting a draft of the final report
3 to the Supreme Court.

4 MR. DRAPER: Thanks.

5 MR. KASTE: Thank you, Your Honor.

6 SPECIAL MASTER THOMPSON: And, with
7 that, I guess I should actually use the gavel and
8 say that this particular proceeding is adjourned.

9 (The proceedings adjourned at 1:02
10 p.m., May 1, 2017.)

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1 STATE OF COLORADO)
2) Ss. REPORTER'S CERTIFICATE
3 COUNTY OF DENVER)

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

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

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

16 In witness whereof, I have affixed my
17 signature this 10th day of May, 2017.

18 My commission expires November 6, 2018.

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