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No. 137, Original

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IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA, PLAINTIFF

V.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA, DEFENDANTS

---

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.  
SPECIAL MASTER

HEARING

Taken before CLAUDIA J. KNAP

CSR No. 6099

November 17, 2009

1 PROCEEDINGS

2

3 BE IT REMEMBERED, that pursuant to Notice, and on  
4 the 17th day of November 2009, commencing at the hour  
5 of 9:00 a.m., in the offices of Stanford Law School,  
6 559 Nathan Abbott Way, Stanford, California, before me,  
7 CLAUDIA J. KNAP, a Certified Reporter, the following  
8 proceedings were had:

9

10 ---oOo---

11 APPEARANCES

12 Barton H. Thompson, Jr.  
13 Special Master  
473 Via Ortega, MC: 4205  
14 Stanford, California 94305

15 For the State of Montana:

16 Chris D. Tweeten  
17 State of Montana  
Department of Justice  
18 215 N. Sanders  
P.O. Box 201401  
19 Helena, Montana 59620-1401

20

21 For the State of Wyoming:

22 Peter K. Michael  
David Willms  
23 State of Wyoming  
Attorney General's Office  
24 Water & Natural Resources Division  
123 Capitol Avenue  
25 Cheyenne, Wyoming 82002

1 For the State of North Dakota:

2 John B. Draper  
3 Montgomery & Andrews  
4 325 Paseo de Peralta  
5 Santa Fe, New Mexico 87501

6 For the State of North Dakota:

7 Todd A. Sattler  
8 State of North Dakota  
9 Office of the Attorney General  
10 500 North 9th Street  
11 Bismarck, North Dakota 58501-4509

12 For the United States Department of Justice:

13 James J. Dubois  
14 United States Department of Justice  
15 Environment & Natural Resources  
16 Division  
17 1961 Stout Street, 9th Floor  
18 Denver, Colorado 80294

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1 PROCEEDINGS

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3 SPECIAL MASTER: I guess the first question  
4 is -- because I'm not sure that these microphones are  
5 on. Or if I speak in this voice, would you be able to  
6 hear me?

7 THE REPORTER: Yes.

8 SPECIAL MASTER: Okay. And can you all hear me  
9 well out there?

10 MR. MICHAEL: Yes.

11 MR. WILLMS: Yes.

12 MR. TWEETEN: Yes.

13 MR. DRAPER: Yes.

14 MR. SATTLER: Yes.

15 MR. DUBOIS: Yes.

16 SPECIAL MASTER: Great. Then let's put  
17 aside -- I won't worry about that, but at any point you  
18 have any trouble hearing me or my enunciation is not  
19 good, just let me know; okay?

20 THE REPORTER: Okay.

21 SPECIAL MASTER: So this morning we're having  
22 another hearing in Montana vs. Wyoming, which is Number  
23 137, original in the Supreme Court of the United  
24 States. And the hearing this morning in particular is  
25 on Montana's motion for summary judgment on the

1 Yellowstone River Compact's application to tributaries  
2 of the Tongue and Powder Rivers.

3 And let me just start out, before asking for  
4 appearances, giving you sort of a brief summary of my  
5 initial reactions to the motion and what I would most  
6 appreciate the various counsel addressing this morning.

7 First of all, I have read all of the briefs  
8 that have been filed. I've gone back; I've looked at  
9 the various other papers that have already been filed  
10 that are relevant to this particular motion. As  
11 always, I found the briefs to be quite helpful; and so  
12 I appreciate all of the time and work that the parties  
13 put into these papers.

14 So first of all, when Wyoming presents its  
15 argument, my understanding, from reading Wyoming's  
16 brief and particular from page 12, is that if I am  
17 correct in the original memorandum opinion, that  
18 Article V(A) gives Montana the right to call all  
19 post-1950 Wyoming appropriators if pre-1950  
20 appropriators in Montana are not receiving their water;  
21 that Wyoming now agrees that that call would apply to  
22 all Wyoming irrigators, including those who are  
23 diverting from tributaries to the Tongue River and  
24 Powder River.

25 So I'd love to get confirmation of that during

1 the hearing.

2 But my question in addition to that is, does  
3 that mean that you would therefore have no objection to  
4 the original language that I had at pages 29 to 30 of  
5 the memorandum opinion, or is there something in that  
6 language that causes you a legal problem?

7 And assuming that there's no problem in that  
8 particular language, I would also love to find out why  
9 you asked me to remove that language, to begin with.

10 I realize that was your right, because as I  
11 mentioned in -- on my supplemental opinion, you have  
12 not briefed that as part of the motion to dismiss.

13 But I'm wondering to some degree why we've gone  
14 through all this effort if what we end up with is  
15 basically back to where we began.

16 Then on the Montana side, part of the argument  
17 of both Wyoming and the United States has been that  
18 your complaint really only raises an argument under  
19 Article V(A), and therefore, I shouldn't go on to  
20 address the interpretation of Article V(B) as it deals  
21 with this question of tributaries to interstate  
22 tributaries.

23 Have you gone back and looked at the complaint  
24 itself? I am inclined to agree with Montana that the  
25 complaint itself is pled relatively broadly and that it

1 refers not simply to Article V(A) but to Article V more  
2 generally.

3 But that still leaves a question that I would  
4 appreciate your and all the counsels' views on, which  
5 is, even if your complaint was pled broadly, it appears  
6 right now as if all we need to do in order to resolve  
7 the legal issues here is to look at Article V(A).

8 And so the question is, is there any reason  
9 why, even if Articles V(B) and V(C) are technically  
10 part of the complaint, that I should go beyond Article  
11 V(A) and also address the question of the application  
12 of the rest of Article V to, again, tributaries, to  
13 these two specific interstate tributaries.

14 That also raises another question, I think,  
15 that I would appreciate everyone's thoughts on, which  
16 is, more generally, do you see any reason why --  
17 assuming that, again, the Supreme Court agrees with me,  
18 that Article V(A) provides the protection that Montana  
19 is seeking in its complaint, do you see any reason why  
20 Articles V(B) and the remainder of Article V is likely  
21 to come up in this proceeding at all?

22 In other words, what remaining relevance, if  
23 any, does it have, and does anyone contemplate raising  
24 the question of the applicability of the remainder of  
25 Article V before the Supreme Court and any exception

1 that you might plan to want to file to my first interim  
2 report?

3           Because my role is really a little bit of an  
4 unusual one as a special master in that I'm both trying  
5 to resolve and ultimately try the issues in this case,  
6 but I'm also providing guidance or advice to the U.S.  
7 Supreme Court. And so for me, it's also an important  
8 question whether or not this issue is likely to come up  
9 before the Supreme Court, even if I don't need to  
10 address it in order to resolve the pretrial setting of  
11 this particular case.

12           Then two other things in terms of the actual  
13 interpretation of the compact.

14           First of all, I understand one of Wyoming's  
15 arguments is that unless I find that the language here  
16 is unambiguous -- and Wyoming argues that it is  
17 ambiguous -- unless I assume if I thought that it  
18 actually stood for the proposition that Article V  
19 didn't extend to the tributaries to these interstate  
20 tributaries, that you would at that point perhaps feel  
21 that I could rule on that.

22           But assuming that I don't find the language  
23 unambiguous, then my understanding of Wyoming's  
24 argument is that you think I should wait until after  
25 discovery to address the meaning of -- or the



1 applicability of Article V to these subtributaries.

2           And I guess my question here is, what is likely  
3 to come up during discovery that would be relevant to  
4 my interpretation?

5           As the U.S. has pointed out, the only extrinsic  
6 evidence that is really relevant is contract  
7 negotiation -- or compact negotiations that were  
8 brought to the attention of Congress or to the state  
9 legislatures.

10           It's quite possible that there is a paper out  
11 there that one compact negotiator or another might have  
12 written at some point that's relevant to this  
13 particular issue that one might unearth in the course  
14 of discovery, but those wouldn't seem to be relevant  
15 unless, again, they were brought to the attention of  
16 the legislature or from -- or Congress. And don't we  
17 know at this stage what all of those are.

18           So is there really any reason -- if I needed,  
19 again, to address the question of the interpretation or  
20 the applicability of the rest of Article V to the  
21 subtributaries, is there any reason for me to wait?

22           And then, also, it strikes me, in looking at  
23 the actual definitions which are in Article II, that  
24 there's a circularity issue in the definitions of  
25 Article II(E) and Article II(F), that Article II(E), in

1 defining tributary, defines it as including interstate  
2 tributaries, and so it appears to incorporate Article  
3 F. But as Montana interprets Article II(F) interstate  
4 tributaries, because it specifically uses the  
5 tributaries term, incorporates tributary as defined in  
6 Article II(E).

7           And I think it leaves one of the differences in  
8 interpretation between Montana and Wyoming is that  
9 Montana places the emphasis on the fact that Article  
10 II(F) refers to interstate tributaries -- and  
11 tributaries is defined in Article II(E) as including  
12 interstate tributaries and tributaries thereof --  
13 whereas Wyoming puts the emphasis on Article II(E) and  
14 emphasizes that it incorporates Article II(F), and  
15 Article II(F) doesn't refer to the tributaries, to the  
16 interstate tributaries.

17           So the question is, if there is a circularity  
18 in there, how does one resolve that circularity?

19           And then finally -- I'm glad to see a map here;  
20 I would love context. So I would love to get a better  
21 sense of how the questions that are raised in this  
22 particular motion are relevant, again, not only in this  
23 particular case but in resolving this motion if I went  
24 beyond what I simply said in the original memorandum  
25 opinion, what are the other potential implications of

1 that, because as I noted before, I want to make sure  
2 that I address all the issues of the United States  
3 Supreme Court as ultimately going to meet to address in  
4 resolving this particular dispute.

5 But I also in the process don't want to create  
6 potential problems elsewhere in the applicability of  
7 this particular compact or address questions that I in  
8 court don't need to address.

9 So hopefully, that's somewhat useful guidance  
10 in giving you a sense of my initial reactions to the  
11 papers and where I would most appreciate all of your  
12 thoughts.

13 Having said that, obviously, I'm also open to  
14 any additional thoughts that you have here, recognizing  
15 again that I have read the papers fairly carefully, and  
16 therefore, there's really no reason to spend a lot of  
17 time restating what you've already said in the papers  
18 themselves.

19 So then why don't we turn to identification of  
20 counsel.

21 So why don't we start, since it's Montana's  
22 motion, with Montana.

23 MR. DRAPER: Your Honor, I'm John Draper,  
24 Counsel of Record for Montana. And with me is  
25 Christopher Tweeten, Chief Civil Counsel for the State

1 of Montana's office of attorney general.

2 SPECIAL MASTER: Okay. Thank you very much.

3 And the State of Wyoming.

4 MR. MICHAEL: Your Honor, Peter Michael, Senior  
5 Assistant Attorney General for Wyoming. And with me is  
6 David Willms, Assistant Attorney General from the State  
7 of Wyoming.

8 SPECIAL MASTER: Okay. Again, welcome.

9 And, Mr. Dubois, I assume you're here for the  
10 United States.

11 MR. DUBOIS: James Dubois for the United  
12 States, Your Honor. Good morning.

13 SPECIAL MASTER: Thank you very much.

14 And North Dakota.

15 MR. SATTLE: Good morning, Your Honor. Todd  
16 Sattler, Assistant Attorney General for the office of  
17 attorney general, North Dakota.

18 SPECIAL MASTER: Okay. And as always, I assume  
19 that North Dakota does not plan to make an argument  
20 unless somebody suddenly finds some reason to complain  
21 about what's happening in North Dakota?

22 MR. SATTLE: That's true, Your Honor. Thanks.

23 SPECIAL MASTER: Okay. Thank you very much.

24 So with that, let me just check again with the  
25 court reporter.

1           Your hearing is fine down there?

2           THE REPORTER: Yes.

3           SPECIAL MASTER: Okay. Great.

4           So, Mr. Draper.

5           MR. DRAPER: Thank you, Your Honor.

6           Good morning. And I'd like to first refer to  
7 the map that we've put up, with Susan Carter's help, to  
8 give us a little bit of context for the argument that  
9 will be made this morning regarding the tributaries.

10           This is the same map that appears in much  
11 smaller format in the White briefs, the motion for  
12 leave to file and brief that fold out. We simply made  
13 a bigger version of the attribution from the one that's  
14 inside the brief. It's over here because we have a  
15 page number over there. But otherwise, it's the same  
16 as you've seen in the brief.

17           And I might just point out a few of the major  
18 features that we're talking about here.

19           In color, we have the two basins that are the  
20 subject of this proceeding. The Tongue River Basin is  
21 the upper one on the northwest side, and the Powder  
22 River Basin is the one that's on the southeast side.

23           You can see here -- for reference, here's  
24 Yellowstone National Park. There's a reference map up  
25 here to show how it relates to the surrounding states.

1 The main stem of the Yellowstone River traces through  
2 the northern part of the basin, and we have so-called  
3 interstate tributaries. You can see Clarks Fork here,  
4 the Bighorn here, and then the Tongue River and Powder  
5 River as you go east across the basin.

6 We have, as you can see, indicated in blue the  
7 parts of the river in each case that are actually  
8 denominated, the Tongue River or the Powder River.

9 There are certain tributaries that have been  
10 shown here. Of course, there are many tributaries.  
11 We've selected ones that we thought would be most  
12 helpful to the Court at the time we filed the brief,  
13 and those are shown in a lighter blue.

14 But as you, for instance, get to the top end of  
15 the Powder River Basin, there really is no river that  
16 denominates the Powder River. They're all forks of the  
17 Powder River or other tributaries.

18 Same is true if you look at the Bighorn.

19 You mentioned that the decision that you make  
20 on this may have some ramifications for other parts of  
21 the basin or compact.

22 And I would point out that the Bighorn River is  
23 not showing as extending above Boysen Reservoir. This  
24 is on the Wind River down here. So this whole upper  
25 part of the Bighorn Basin, just like the upper of the

1 Powder Basin, has no river with that main stem  
2 denomination in it but tributary of that river.

3 So with that --

4 SPECIAL MASTER: Can I ask you --

5 MR. DRAPER: Yeah.

6 SPECIAL MASTER: -- some questions. And I  
7 realize we're not at the factual stage yet. And so all  
8 of this is simply background that helps me.

9 Where are the principal reservoirs that Montana  
10 believes may be interfering with pre-1951  
11 appropriators?

12 MR. DRAPER: Those are in the upper parts of  
13 the Tongue and Powder Basin, generally above Sheridan  
14 in the Tongue River Basin and in this western area of  
15 the Powder River Basin.

16 You can see Lake DeSmet is named on this map,  
17 and there are other reservoirs that are shown as blue  
18 specks in this area. They're not named on this map.  
19 But I would direct your attention to the second map  
20 that is contained in the same brief. And that picks  
21 out that area that I'm referring to here.

22 This is on page A-2 of the White brief, the  
23 original motion to leave for file document. And it  
24 shows that area in much greater detail. And, in fact,  
25 the reservoirs that are picked out as examples in the

1 original brief are all shown on that second map.

2 SPECIAL MASTER: And one other question that  
3 occurred to me last night, which is that the motion  
4 itself requests partial summary judgment that the  
5 Yellowstone River Compact applies to all surface  
6 waters, tributary to the Tongue and Powder Rivers.

7 Originally the motion to dismiss, this was just  
8 in connection with the surface reservoirs. But my  
9 understanding is that this particular motion you're  
10 bringing applies not only to the surface reservoirs,  
11 but it would also apply to any post-1950 appropriators  
12 withdrawing water directly for use from the surface  
13 waters tributary to the Tongue and Powder; is that  
14 correct?

15 MR. DRAPER: That is correct, Your Honor.

16 In that sense, the motion is somewhat broader  
17 than the paragraph that Wyoming asked to be removed.  
18 My understanding is, as you've indicated, they no  
19 longer disagree with your particular language. But as  
20 a result of that, we were asked to consider filing a  
21 motion for summary judgment. And it appeared to us  
22 that it was best to state this broadly consistent with  
23 the bill of complaint that had been approved for filing  
24 by the Court.

25 So as you will recall in the complaint, the



1 various means by which we allege the compact with being  
2 violated referred to Article V generally. And that  
3 goes to each of those various forums of activity that  
4 we claimed, at least in some instances, were violating  
5 the compact. We named extra acreage put in after the  
6 time of the compact. And that includes acreage that  
7 takes its water off the tributaries; extra reservoirs,  
8 as was referred to in the paragraph that you referred  
9 to; and then groundwater, groundwater pumping that  
10 affects not just the main stem, which is a very small  
11 part of the basin, but the areas covered by the  
12 tributaries.

13 And it's really, in fact, the tributaries that  
14 are going to be affected by groundwater pumping. Very  
15 small proportion would be affected only on the main  
16 stem.

17 SPECIAL MASTER: Okay. That's very helpful.

18 And in my memorandum opinion, I suggested that  
19 at least some groundwater was covered under the  
20 compact, left open the question, exactly what  
21 groundwater. So that will be an issue resolved at a  
22 later point in time.

23 Now you're only addressing surface water, but  
24 your expectation would be that when we get to the  
25 question of groundwater, that whatever groundwater is

1 covered, you would expect to argue that includes  
2 groundwater that is hyperlogically interconnected with  
3 the tributaries to the Tongue and Powder Rivers?

4 MR. DRAPER: I agree with you, Your Honor, as  
5 far as you went, but I think there is a further element  
6 in that.

7 The tributaries receive their water in part  
8 from groundwater discharge into those tributaries.  
9 That's the base flow. Really, there are two  
10 components. Generally, these streams -- as you're  
11 fully aware, there's the runoff component. If there's  
12 a rainstorm and water gushes down the tributary and on  
13 into the main stem and on down across the state line to  
14 the measuring points.

15 But there's also groundwater recharge. You  
16 have the Bighorn Mountains. Water seeps in, becomes  
17 part of the groundwater flow system, and discharges at  
18 various points on tributaries and becomes -- when it  
19 discharges on tributaries, it becomes surface water.

20 Now, the effect of the Wyoming position would  
21 be to exclude that surface water. And that -- in other  
22 words, that surface water, if their position is  
23 accepted, could be fully depleted and not -- it's not  
24 part of the compact allocation. It's just out there  
25 in -- you know, it's the Wild West. There's no

1 allocation of that water, under their theory, and it  
2 becomes surface water when it discharges from the  
3 groundwater to the surface water streams. In fact,  
4 that's where the main stem gets essentially all of its  
5 water is from these tributaries. And a good portion of  
6 that would be the base flow. It's not the result of  
7 some sudden event like a rainstorm, but it's the result  
8 of snowmelt that works its way through the groundwater  
9 system and discharges at various points along the  
10 tributaries.

11 SPECIAL MASTER: Thank you.

12 MR. DRAPER: One further point that relates to  
13 the geography that I think would be helpful in  
14 assessing the position of the states is the relative  
15 size of the basins as compared to the size of the main  
16 stem riverbeds that Wyoming believes that they're --  
17 that the compact is limited to.

18 If you take, for instance, the Tongue River  
19 Basin -- shown here outlined in black -- as we said in  
20 our opening brief, the White brief, the size of this  
21 basin is 5400 square miles.

22 We also pointed out that the length of the  
23 Tongue River in this basin is about 225 miles long.

24 If this river from its upper parts, where it's  
25 probably -- you can probably jump across it, to its

1 lower parts, where it's broader, if that were to  
2 average, say, a hundred feet across, just as a ballpark  
3 figure, that's about two hundredths of a mile. A  
4 hundredth of a mile would be 52.8 feet.

5           So if you said that's maybe two hundredths of a  
6 mile across, on average -- just to get us in the  
7 ballpark that we're talking about -- times 225 miles to  
8 get the area that they say is left, when you exclude  
9 the tributaries, that comes out to about 4 1/2 square  
10 miles: .02 times 225.

11           So you have about 4 1/2 square miles that is  
12 left in the compact, once you exclude your tributaries.

13           Now, 4 1/2 square miles is less than one tenth  
14 of 1 percent of 5400 square miles, the size of the  
15 basin.

16           So the effect in the Tongue River Basin of  
17 accepting the Wyoming position is to exclude more than  
18 99.9 percent of the basin with respect to the  
19 allocation of post-compact water, the water that was  
20 unused on January 1, 1950.

21           And if you do the calculation for the Powder  
22 River, you get the same general ratio.

23           This river, the Powder River, is more like 500  
24 miles long, and the basin is something like 13,200  
25 square miles. These are the figures that were included

1 in our brief. I don't think there's any dispute about  
2 them.

3 So in both cases, both basins, Wyoming is  
4 saying that you ought to rule that -- with respect to  
5 post-compact water, which we know is the water that the  
6 drafters were actually worried about allocating, that  
7 they excluded more than 99.9 percent of that water.  
8 It's not there. It's excluded from the compact. It's  
9 for purposes of post-compact securing of the water  
10 which was necessary and so that the federal government  
11 would know how the water was split in case it was in a  
12 position to build federal projects.

13 SPECIAL MASTER: So let me stop you there  
14 and -- just one correction.

15 My understanding is that Wyoming is now  
16 arguing -- assuming that, again, I was correct in the  
17 memorandum opinion -- that Article V(A) protects  
18 pre-1951 appropriators in Montana from subsequent  
19 actions in Wyoming, that actually it covers all this  
20 area that you're talking about, not only the Tongue and  
21 Powder Rivers but also tributaries there too.

22 So the issue that you've raised right now seems  
23 to be -- make something that would be quite relevant to  
24 post-1950 appropriators in Montana. But that doesn't  
25 seem to be the question that's before me right now.

1           So could you tell me why it is that that's a  
2 relevant question in this particular case?

3           MR. DRAPER: Well, it is a relevant question,  
4 Your Honor. The reason for that is, as you noted  
5 yourself, the bill of complaint clearly includes  
6 Article V(B). It does not call out Article V(A) at any  
7 point.

8           The other reason that it's appropriate to  
9 consider is because it's the subject of our motion. We  
10 simply asserted the position -- we believe that the  
11 compact supports this -- that Article V(B) encompasses  
12 the entire basin, including the tributaries. And  
13 that's consistent with the breadth of the claim that we  
14 made in the complaint. It's consistent with the  
15 breadth of the claim that was specifically approved by  
16 the Supreme Court when it granted our motion for leave  
17 to file. We were moving for leave to file the  
18 complaint, and I think it's very clear that the  
19 complaint is not limited to V(A) but covers all of  
20 Article V.

21           SPECIAL MASTER: So there are two ways in which  
22 I could interpret what you're saying.

23           One is that although Wyoming is now, as I  
24 understand it, conceding that -- under my  
25 interpretation of the compact, that Article V(A)

1 applies to diversions of storage on tributaries to the  
2 Tongue and Powder Rivers, that that by itself isn't  
3 going to resolve Montana's motion complaints and that,  
4 therefore, I need to go on to address the broader  
5 question because it's necessary in order to resolve  
6 this case and give Montana the relief that it's asked  
7 for in the complaint.

8           And if so, I still don't understand why I need  
9 to go on. So you're going to need to help me there.

10           The other possibility is, you're saying, even  
11 though I don't need to resolve those other questions in  
12 order to ultimately rule in favor of Montana on the  
13 portion of the complaint that's still standing, that  
14 nonetheless, you've asked for a broader ruling on  
15 Article V.

16           Article V is in the complaint as a whole, and  
17 therefore, I should address it, even though I really  
18 don't need to, in order to ultimately, again, address  
19 Montana's motion complaint.

20           MR. DRAPER: I think you raise some helpful  
21 points there in that it was frankly a surprise to us  
22 that we got this response, that when we were arguing  
23 that tributaries are included without being specific as  
24 to whether it was V(A) or V(B), suddenly we get this  
25 counterargument that V(B) is excluded from your

1 complaint.

2 Now, when they first opposed our complaint,  
3 they said it's all part of Article V(B). They can't  
4 show it -- and, you know, they were going ahead of  
5 themselves in terms of alleging facts. They can't show  
6 a violation of V(B). And we said no. We're -- the  
7 central part of our complaint is V(A).

8 Now they've gone to the other side, and they  
9 say, oh, V(B) is excluded. They're whipsawing back and  
10 forth. The truth is that we pled Article V as a whole.  
11 And it's not necessary to respond specifically to your  
12 question. It's not necessary to go out and decide the  
13 question with respect to the -- whether we can pursue a  
14 V(B) claim here, which is what they're challenging us  
15 on.

16 This is simply a summary judgment motion that  
17 was meant to address tributaries. And it's been  
18 hijacked to some extent by this argument that, well,  
19 we ought to decide the scope of the complaint now under  
20 this motion for summary judgment.

21 We don't think that we ought to be excluded in  
22 the process of deciding on the tributary issue from  
23 what we have clearly pled in our complaint. And that's  
24 what they're trying to do, and I -- in a sense, it's  
25 kind of a highjacking of a motion for summary judgement



1 on tributaries.

2 And all we're trying to do, at a minimum, is to  
3 support your position that you stated in your original  
4 memorandum opinion, and we didn't have any objection to  
5 that.

6 It did rely on the definition of interstate  
7 tributaries to some extent, which is a term that's used  
8 in V(B). But in terms of going further and making a  
9 further ruling on V(B) -- which Wyoming did not seek to  
10 dismiss a V(B) claim, which is clearly in the  
11 complaint -- they didn't say, well, we have a basis for  
12 dismissing your V(B) claim. They didn't try to do  
13 that.

14 So in specific answer to your question, it's  
15 really enough for us. And we found when they responded  
16 to our motion, that all of a sudden now they agree with  
17 what was in the original memorandum opinion, which was  
18 something of a surprise after they asked us all to go  
19 through this process.

20 But at bottom, the minimum that we're looking  
21 for is a reinstatement of your paragraph. And if you  
22 choose not to make a ruling on the scope of the  
23 complaint with respect to V(B), that would be fine with  
24 us.

25 Nobody has sought to dismiss that claim that's

1 in the complaint. It's otherwise not in danger, except  
2 it is here by this form of response that we've had from  
3 the State of Wyoming.

4 So yes, we could live with less than what we  
5 stated as our goal in the motion for the summary  
6 judgment. Yes.

7 SPECIAL MASTER: Okay. So let me approach this  
8 in a different way.

9 So the reason why, as I mentioned earlier, I  
10 think that the actual complaint seems to be pled  
11 broadly in terms of Article V rather than just Article  
12 V(A) is that it is all one article, as you pointed out  
13 in previous arguments. It seems to set up a three-tier  
14 system. And looking at Article V(B), it helps, I  
15 think, in the interpretation of Article V(A).

16 Nonetheless, the key provisions, for purposes  
17 of protecting the pre-1951 appropriators in Montana,  
18 appears to be Article V(A). And that's what I focused  
19 on in my original memorandum opinion.

20 So I understand, from what you're saying now,  
21 that if I simply took the original paragraph that was  
22 in my memorandum opinion and put it back in there and  
23 in my first interim report to the Supreme Court  
24 basically say what I was originally planning on saying  
25 with respect to this question of the tributaries to the

1 Tongue and Powder Rivers, you can live with that?

2 MR. DRAPER: Yes, Your Honor.

3 SPECIAL MASTER: My only other question there  
4 is -- you said you can live with it. Is there any  
5 aspect of this particular case that would benefit from  
6 going beyond that simple question? I mean you said you  
7 can live with it; and I guess I'm still wondering, is  
8 there any reason to address that particular question in  
9 order to resolve this case?

10 MR. DRAPER: Well, depending on how things  
11 proceed after this initial motion period, it may be  
12 necessary. If we're challenged by Wyoming to decide  
13 some of these issues that we think are very clear  
14 and -- to us -- arguing that tributaries are generally  
15 included under the compact seems like a very unified  
16 principle to establish, and it's clearly justified by  
17 the language of the compact.

18 And there's no need to go in and parse out  
19 between V(A) and V(B) in a way that has potential to  
20 hamstring the case as we go forward, and then we have  
21 to stop and have another set of motions on V(B).

22 So it just seems to us very clear, simple,  
23 consistent with the drafters' expressed intentions in  
24 the compact to just confirm that tributaries are  
25 intended to be part of the allocation. Generally. And

1 it can be divided between pre-1950 and post-January  
2 1950 uses.

3 If -- and that's -- and really, you stated it.  
4 The Court stated it in the memorandum opinion in terms  
5 of a V(A) conclusion. And that's fine. That goes  
6 partway.

7 The natural next step is V(B). But if the  
8 simplest thing is to just stick with where the Master  
9 came out on V(A), that's fine with us for the moment.

10 SPECIAL MASTER: And again, it's not necessary  
11 for purposes of ruling on this particular motion, but  
12 I'm curious: Has there been any disagreements between  
13 Montana and Wyoming over the inclusion of the  
14 tributaries to the Tongue and Powder Rivers in the  
15 compact commission's implementation of Article V(B)?

16 I'm just wondering whether or not there's a  
17 subtext here that you all know about and I don't know  
18 about in terms of why the interpretation of Article  
19 V(B) is relevant.

20 MR. DRAPER: Well, Your Honor, they -- Wyoming  
21 has raised an argument here that I didn't -- in terms  
22 of the inclusion of post-compact storage on  
23 tributaries, which is inconsistent with the way that  
24 the states have jointly shown, that they understand the  
25 compact in their annual report. We attached a sheet of

1 the reservoirs to our reply brief on the motion for  
2 leave to file.

3 That divides the storage between pre-January 1,  
4 1950, and post-January 1, 1950.

5 And I hadn't realized -- we hadn't realized  
6 that --

7 SPECIAL MASTER: I'm sorry. Where was that?

8 MR. DRAPER: That's the -- Montana's reply  
9 brief on the motion for leave to file bill of  
10 complaint. Small tan volume. It was filed in April of  
11 2007.

12 SPECIAL MASTER: Okay. I see it.

13 And so this is appendix asterisk?

14 MR. DRAPER: Yes. This shows page A-1 in the  
15 lower right as you fold it out, and it's entitled  
16 Annual Summary of Contents for Yellowstone River  
17 Compact, Reservoirs Or Lakes. And the asterisk  
18 indicates that it is from -- it is the table from the  
19 Yellowstone River Compact Commission Annual Report for  
20 2004, page 20.

21 So I don't think that's a full answer to your  
22 question, but that does show how the states have dealt  
23 with storage. And those reservoirs, as you will note,  
24 are on tributaries.

25 SPECIAL MASTER: Okay. So actually, let me

1 just restate the question in a little bit less complex  
2 of a fashion.

3 To your knowledge, has there been any dispute  
4 in the implementation of Article V(B) in the past as to  
5 whether or not the tributaries to the Tongue and Powder  
6 Rivers are included? No matter how the states have  
7 dealt with it, has there been any dispute between the  
8 states on this issue?

9 MR. DRAPER: In general, Montana has complained  
10 that it's not being accorded the rights it's entitled  
11 to under the compact.

12 The State of Wyoming has rebuffed the State of  
13 Montana. Those discussions have not gotten down to the  
14 kind of detail you're talking about.

15 They simply felt that there was nothing they  
16 had to do under the compact to stay in compliance.

17 And so we didn't get down to the details of are  
18 we talking about percentages under V(B) or are we  
19 talking about V(A). And as you know, they -- up until  
20 your ruling, at least, they've been claiming that they  
21 had no obligations under V(A) either.

22 SPECIAL MASTER: Let me, again, phrase the  
23 question slightly differently.

24 Have -- I know that there have been  
25 disagreements over whether or not pre-1951

1 appropriators in Montana are getting the waters that  
2 Montana believes that they are entitled to under the  
3 compact. That's what has led to this particular case.

4           Have there also been disputes over whether or  
5 not the post-1950 appropriators are receiving all the  
6 water that they are entitled to under Article V(B)? To  
7 your knowledge.

8           MR. DRAPER: Wyoming, to my knowledge, has  
9 taken the position that all you need to do is look at  
10 those measurement points down on the main stem where  
11 the interstate tributaries join the main stem of the  
12 Yellowstone River, and under Article V(B), that shows  
13 they're in compliance.

14           We brought this case because we believe they  
15 were not in compliance.

16           SPECIAL MASTER: But your case here only deals  
17 with the pre-1951 appropriators.

18           My only question is, to your knowledge, have  
19 there been any disagreements between the two states  
20 over the amounts of water that is divided between  
21 post-1950 appropriators in Montana and Wyoming?

22           MR. DRAPER: All I can say, Your Honor, is that  
23 there have been disagreements about whether Wyoming is  
24 complying with the compact under Article V(A). Wyoming  
25 takes its position that they always have been, and we

1 take the position that they have not.

2 SPECIAL MASTER: Okay. So turning, then, to  
3 the actual language of the compact, as I mentioned  
4 earlier, the two sides, Montana and Wyoming, appear to  
5 have different approaches to how they integrate  
6 Articles II(E) and II(F).

7 Your emphasis is the fact that tributaries  
8 specifically includes interstate tributaries and  
9 tributaries, and therefore, your argument is that  
10 interstate tributaries under Article II(F) must include  
11 tributaries to interstate tributaries; is that correct?

12 MR. DRAPER: Yes, Your Honor.

13 SPECIAL MASTER: And Wyoming, on the other  
14 hand, their argument is, basically, that the term  
15 tributary is -- includes the interstate tributaries.  
16 So interstate tributaries is really a smaller category  
17 of tributaries. And since tributary is defined as  
18 including interstate tributaries and tributaries that  
19 are -- but interstate tributaries, the subpart of  
20 Article II(F), doesn't; that it's clear that Article  
21 II(F) doesn't include the tributaries to those  
22 particular rivers mentioned there.

23 So how do I resolve those two interpretations?  
24 How do I choose between those?

25 MR. DRAPER: I think it's very simple, Your



1 Honor. This is a classical, logical syllogism.

2 All tributaries include tributaries thereof  
3 under II(E). It says that, Article II(E), if I may  
4 read it: "The term 'Tributary' means any stream which  
5 in a natural state contributes to the flow of the  
6 Yellowstone River, including interstate tributaries and  
7 tributaries thereof."

8 And I'll leave off the exception about the  
9 Yellowstone.

10 So tributaries include tributaries thereof.  
11 Okay? All tributaries include tributaries of the  
12 tributaries.

13 The second point in the syllogism is,  
14 interstate tributaries are tributaries.

15 So all tributaries include tributaries thereof.  
16 Interstate tributaries are tributaries. Therefore,  
17 tributaries of interstate tributaries are included.

18 SPECIAL MASTER: First of all, if Article II(F)  
19 says the term interstate tributaries means tributaries  
20 that are interstate, then you would have tributaries  
21 incorporated in II(F). But instead what you have is  
22 actually a term that is being defined, right? So  
23 Article II(F) refers to the term interstate  
24 tributaries?

25 So I guess one question is whether or not

1 tributaries is really part of the definition of  
2 interstate tributaries or simply a word in the term  
3 that is then defined?

4 MR. DRAPER: I don't know how it could be any  
5 clearer. When you look at the previous definition that  
6 says tributary, the word tributary includes interstate  
7 tributaries.

8 So an interstate tributary is a tributary as  
9 defined in II(E). II(E) says that explicitly. And  
10 II(E) also points out that all tributaries include  
11 tributaries of the tributaries. Then you come to a  
12 listing of the interstate tributaries.

13 Why would they be -- why are they listed in the  
14 first place, one could well ask.

15 Well, this is where, really, the allocation of  
16 the compact between the states of Wyoming and Montana  
17 occurs, is on these interstate tributaries. It doesn't  
18 occur on the main stem. That's protected in  
19 Yellowstone Park, and the rest of it is all in Montana.

20 So as between Wyoming and Montana, the real  
21 allocation work, the heavy lifting, is going to be on  
22 the interstate tributaries. And the drafters chose a  
23 single term to include all four of those.

24 So as a practical matter, they needed to name  
25 them somehow so they could -- so they could talk about

1 it in the rest of the compact.

2           There's no indication -- in fact, there's a  
3           contraindication that they meant to limit -- to use  
4           some other definition of what tributary is in the  
5           expression interstate tributary. They took care in the  
6           previous definition to be sure that tributaries of  
7           interstate tributaries were included when you talked  
8           about interstate tributaries.

9           SPECIAL MASTER: So again, I've read all of the  
10          briefs pretty careful. So while I'm giving you an  
11          opportunity, if there is anything else you want to  
12          specifically point out with respect to your argument  
13          that you think it would be additional to what is  
14          already in the briefs, if you want to add anything,  
15          you're free to add it right now.

16          MR. DRAPER: Thank you, Your Honor. I will do  
17          so.

18          We did mention the first paragraph of the  
19          compact, and I would invite the Master's attention to  
20          the full wording of that preamble or that preamble  
21          paragraph or first paragraph.

22          It has the broad wording that you mentioned in  
23          the brief. It also refers to the desire to provide an  
24          equitable division and apportionment of such waters.  
25          And you see with respect to the post-compact waters,

1 that purpose is -- almost entirely defeated when you  
2 exclude 99.9 percent of the basin.

3           And then it goes on to say "encourage the  
4 beneficial development and use thereof, acknowledging  
5 that in future projects or programs for the regulation,  
6 control, and use of water in the Yellowstone Basin, the  
7 great importance of water for irrigation." There it  
8 specifically is mentioning this intention to allocate  
9 waters for future use. Future projects. That's why  
10 they were doing this.

11           As we know from previous discussion of V(A),  
12 they had to deal with V(A). They were having a hard  
13 time quantifying those rights at the time. And so they  
14 included V(A) to protect those and allocate the water  
15 according to how it was being used at that time so that  
16 they could get on to the real work of the compact,  
17 which was the allocation of the post-compact.

18           SPECIAL MASTER: So again, let me stop you  
19 there.

20           My understanding of what Wyoming is claiming is  
21 not that the compact negotiators left out 99-plus  
22 percent of the waters, but they just allocated that  
23 99-plus percent of the waters for purposes of post-1950  
24 appropriations to the states where those tributaries  
25 are found.

1           So it might not end up that you end up with  
2 very much water that then gets allocated to Montana  
3 from those various Wyoming tributaries. But haven't  
4 you still allocated all of the waters of the  
5 Yellowstone River? You're just allocating more than  
6 Wyoming under your interpretation.

7           MR. DRAPER: No, I don't think so, Your Honor.  
8 What they're arguing, as we understand it, is that the  
9 compact does not cover tributaries. When it doesn't  
10 cover tributaries, that means it's not in the compact.  
11 Therefore, the tributary waters are unallocated. The  
12 post-compact tributary waters are unallocated. Now,  
13 they're up there, and they're coming down every day in  
14 Wyoming, but they have not been allocated.

15           And when you -- they haven't just been  
16 allocated to Wyoming. They're not saying that.  
17 They're saying they're excluded from the compact, which  
18 is, of course, contrary to the phrase I just read from  
19 the preamble, that there would be an equitable  
20 apportionment of these waters and that they wanted, as  
21 we put in the brief, to avoid all present and future  
22 controversies.

23           Well, if it's excluded from the compact and  
24 it's unallocated, what does that mean? It means we  
25 need an equitable apportionment suit in the United

1 States Supreme Court's original jurisdiction, exactly  
2 the controversy that was meant to be avoided by this  
3 compact.

4 So they're not trying to allocate it to  
5 Wyoming. They're just saying it's excluded. And by  
6 the way, it's in Wyoming. So it's going to be up to  
7 Montana, then, logically, to bring that equitable  
8 apportionment suit to divide and allocate the waters  
9 that they say are excluded from this compact.

10 SPECIAL MASTER: So again, it's about five  
11 to 10:00. So I don't want to spend all the time on  
12 just this one argument. I want you to have some time  
13 later to, well, obviously, respond.

14 So again, I've read the paper. So the question  
15 is, is there anything new that you'd like to mention  
16 that wasn't raised in the papers?

17 MR. DRAPER: I think that should do it for the  
18 moment, Your Honor.

19 SPECIAL MASTER: Okay. Thank you very much.

20 MR. DRAPER: Thank you.

21 SPECIAL MASTER: Okay. Then, Mr. Michael.

22 MR. MICHAEL: Yes, Your Honor. If it please  
23 the Court -- Your Honor, let me go through your  
24 questions. I didn't bring my outline that I went over  
25 the last few days because I think every one of your

1 questions are the things that are the key questions.  
2 So I have it listed twice. I think you hit the nail on  
3 the head on the key questions.

4 So let's start with the confirmation of our  
5 position.

6 Wyoming, as we said in our brief -- and I'll  
7 actually mention to the Court that in our brief, we  
8 cited a footnote from our very first pleading, the  
9 orange book, Footnote 8 from that, where we admitted  
10 that under V(A) the term that is key as far as the  
11 coverage of V(A) is the Yellowstone River System. The  
12 defined term is extremely broad, as we point out in our  
13 brief.

14 So obviously, we differed with the special  
15 master. You ruled against us on the issue of how the  
16 doctrine of appropriation applies. You said the  
17 doctrine of appropriation applies across the state line  
18 to the extent -- as explained in your order, your first  
19 order.

20 But be that as it may, regardless of the  
21 outcome of that, the application of V(A) clearly  
22 applies to the Yellowstone River System.

23 So if your ruling is correct, if we don't file  
24 a bill of exceptions, it becomes a law of the case. Or  
25 if we do and the Court says no, Special Master

1 Thompson's correct; Wyoming, your exception is  
2 overruled, if that occurs, then the law of the case  
3 will be that a call from a pre-50 user in Montana could  
4 extend to the highest diversion in Wyoming. There may  
5 be issues of futile call, those kinds of things. But  
6 theoretically, a Montana pre-50 could call all the way  
7 up under V(A) to any diversion point in the Yellowstone  
8 River System.

9           Now, there is a distinction here, Mr. Draper,  
10 that I'll just -- I'll just mention at this point in  
11 time. There's definitions in the compact of the  
12 Yellowstone River System. There's definitions where  
13 they use the term rivers, and there's definitions --  
14 and tributaries. And there's also a definition of the  
15 basin.

16           And it is obviously a big distinction between  
17 appropriable flows in a stream or a creek or a  
18 tributary or a spring or a swamp, a surface feature  
19 versus the fact that yes, there can be a rainstorm  
20 event that has sheet water flowing down over ground and  
21 then winding up eventually in the drainage. That's how  
22 precipitation works. So I think we have to keep that  
23 in mind.

24           So I do disagree with the -- basing a lot of  
25 our concepts on talking about sizes of basins and 99



1 percent of the water, those kinds of things, I disagree  
2 with that, because I think we're talking about  
3 appropriation -- I think the drafters are talking about  
4 appropriations from what we would call water sources, I  
5 think, or a surface water source, or if your ruling's  
6 correct, interconnective groundwater sources. But that  
7 would still involve a well, a pump point of a well. It  
8 wouldn't simply be the whole drainage.

9           So I just -- I thought I'd mention that as an  
10 aside. It's not the main point.

11           But the main first point is yes, consistent  
12 with what we said in Footnote 8, that there's a  
13 difference between the Yellowstone River System in V(A)  
14 and the term interstate tributary, one of the keystone  
15 terms in V(B). And so that's the basis for that  
16 concession. Simple interpretation of what the phrase  
17 Yellowstone River System is. Extremely broad phrase;  
18 includes all the tributaries.

19           Let me -- if I could go on to the next and  
20 then -- let me apologize to the Court. I think,  
21 looking back at the Court's ruling, the first opinion,  
22 that discussion on V(A) is on target.

23           The footnote that I guess caused us to -- maybe  
24 we overreacted, but the footnote -- your footnote that  
25 you started describing, well, interstate tributaries

1 would be defined in such a way, that was our concern,  
2 that we were -- now we were talking about a V(B) case  
3 and -- in fact, all of our argument at that point, our  
4 motion to dismiss, had been based on V(A). And the  
5 reason it had been based on V(A) was because of what  
6 Montana said about its complaint when we first filed,  
7 in the very first set of pleadings.

8           And I can see that Wyoming initially, when we  
9 read the complaint, given our theory about how this  
10 compact works -- and it was a theory that had been in  
11 Wyoming State government for quite some time. It was  
12 incorporated in our special -- our state engineer's  
13 letter in 2006 back to Jack Stoltz in Montana.

14           Our -- the theory in Wyoming was that V(A) was  
15 a grandfathering clause that recognized rights but not  
16 a clause that protected rights. You've disagreed with  
17 that, obviously.

18           So -- but our thinking going into that initial  
19 pleading was, the way Montana -- and I said this back  
20 in February, our big hearing in Denver, that our theory  
21 was that Montana, if they wanted to state a claim, they  
22 had to state a claim under V(B). V(A) was a  
23 grandfathering recognition of rights, intrastate  
24 rights, without an interstate prior appropriation  
25 scheme.

1           So when we did respond to Montana's initial  
2 filing with the Supreme Court, we focused on V(B). I  
3 readily concede that. We focused on V(B). And Montana  
4 has replied to that. I think it was very significant.  
5 And this leads to one of your questions you asked that  
6 I think we have to see where we stand on this.

7           They said very strongly that "Wyoming, your  
8 reply is nonresponsive and irrelevant" -- it's in their  
9 reply brief -- because you're talking about V(B). Our  
10 case isn't a V(B) case. Our case, our fundamental  
11 case, our central case, however many qualifiers they  
12 want to put on it, is a V(A) case. And I think that's  
13 where -- at that point, when we were allowed by the  
14 Court to file a motion to dismiss, then we ran with  
15 that. Okay.

16           It's a V(A) case. Let's talk about the  
17 doctrine of appropriation under V(A), what does that  
18 mean? And that's what we focused on back on February  
19 3rd of this year, when we had our first hearing.

20           And so the question, I think, that that raises,  
21 then, is this: If the complaint in a very broad  
22 reading under Federal Rules of Civil Procedure 8 can be  
23 read -- because it doesn't distinguish between V(A) and  
24 V(B). It just says we have an Article V complaint  
25 against Wyoming; that's what Montana says in the

1 complaint -- is it this point in time inappropriate for  
2 a V(B) claim to go forward? Not so much based on the  
3 complaint itself but on the fact that Montana told the  
4 highest court in this country that its central claim  
5 was under V(A), that it's fundamental claim is under  
6 V(A), and any discussion by Wyoming on V(B) was  
7 nonresponsive and irrelevant.

8           What kind of -- throw the word out here --  
9 judicial estoppel was created by that? And I -- we  
10 don't -- we haven't submitted any -- I haven't had any  
11 cases on that that I submitted. The United States  
12 agreed with us on that and said we think this is a V(A)  
13 case and why are we talking about interstate  
14 tributaries, because that's a clause -- phrase that  
15 only appears in V(B) and in the definition of  
16 tributary.

17           So I think that's the question: What -- is it  
18 appropriate to go forward with V(B)? Of course, if  
19 Mr. Draper were to say, in response to your question a  
20 moment ago, that Montana really doesn't have any  
21 intentions of pursuing the V(B) claim, then I -- we  
22 know where we stand.

23           It's important -- it's an important issue. And  
24 the reason it's important, I think, is there's issues  
25 on the ground that in terms of how -- what we would

1 spend on expert witnesses in this case if a V(B) case  
2 goes forward that are not included in a V(A) case, a  
3 V(A) case where you have one appropriator of Montana or  
4 two or ten but defined appropriators that aren't  
5 receiving the water that had some kind of pre-1950  
6 water right, whether it's 1914 or 1890, whatever it is,  
7 on a specific date that they contacted Montana State  
8 engineer and he calls up the Wyoming State engineer and  
9 says, do you have any post-50 irrigators on the Powder  
10 River Basin or in this Powder River all the way to the  
11 tributaries, and if you turn them off, that water would  
12 get to our people, that's a very discrete case.

13           And I think it's one that's fairly easily  
14 discovered and fairly easily proven or disproven,  
15 whereas the allocation case under B, which is a  
16 cumulative prior -- or convertible flow scheme, the  
17 amount of proof necessary for that is much, much larger  
18 and much more -- you have to have a cumulative count  
19 from October 1st of the water -- the beginning of the  
20 water year through whatever given date.

21           If Montana were to say, you think, Wyoming, you  
22 violated V(B) on July 15th of 2008, and we say, well,  
23 Montana and Wyoming have to go back and get all their  
24 figures about which post-50 rights -- how much they  
25 diverted from October 1st of 2007 through July 15th of

1 2008, much more onerous matter of proof.

2           And I think that leads, Your Honor, to a  
3 question that you raised a little bit ago, which was,  
4 what has happened in that regard over the last 50-plus  
5 years? Has there been a V(B) dispute between Wyoming  
6 and Montana?

7           And I think the answer is, there has not been a  
8 specific V(B) dispute. There's been discussions and  
9 complaining by Montana in the '80s, especially. In the  
10 1980s there was a whole round of discussions between  
11 engineers from -- water engineers from Wyoming and  
12 Montana about how we can make this compact work in a  
13 drought scenario.

14           How would we do the count? What kind of  
15 methodologies might we agree to that doesn't require us  
16 to send a meter reader, a water commissioner to every  
17 diversion point up and down these drainages every day  
18 of the year or to require our irrigators to count every  
19 molecule of water that they divert from the river to  
20 make the divertible flow system work? There were  
21 suggestions about that concept.

22           But on the other hand, the question -- the more  
23 specific question we asked was, have there been  
24 disputes about that? And I don't think there has been.  
25 I think what was coming to Wyoming has been more --

1 certainly when Montana made a motion, a resolution,  
2 shortly before they filed suit in early 2007, in  
3 December 2006 Montana made a motion in a compact  
4 commission meeting, and I think it was a V(A) -- sort  
5 of a V -- more of a V(A) allegation. We've got  
6 pre-50s.

7           And as Your Honor is also aware -- and I think  
8 this has been taken care of -- we've also been a little  
9 bit concerned and worried that Montana was alleging the  
10 depletion type of compact. And I think you took care  
11 of that in your most recent ruling, where we had said  
12 would you please rule on that. And you said, I don't  
13 think I need to because the complaint doesn't allege  
14 the depletion compact.

15           And I think that issue is out of the issue.  
16 The issue is it A or B and where do we go from here.

17           So hopefully, I respond to that issue about the  
18 history of this -- you know, of what's happened between  
19 Montana and Wyoming. I don't think there's been a  
20 specific history of the defined dispute that's required  
21 the parties to go ahead and make that elaborate count  
22 in any particular year where they went back to October  
23 1st and counted all their diversions in a particular  
24 watershed. That hasn't occurred, as far as I know.

25           SPECIAL MASTER: Okay. So that's quite

1 helpful.

2           So actually, let me ask several follow-up  
3 questions. First of all -- and again, this is just as  
4 background.

5           MR. MICHAEL: Right.

6           SPECIAL MASTER: It helps me in understanding  
7 the contours of the case.

8           Article V(B) sets out allocation scheme, for  
9 example, on the Tongue River, 40 percent of the unused  
10 and unappropriated waters go to Wyoming; 60 percent go  
11 to Montana.

12           Is it my understanding from what you just said  
13 that, at least as a general matter, the states have  
14 never had to get into actually measuring those  
15 percentages because as a general matter, people feel as  
16 if the two states are staying within their allocations?

17           MR. MICHAEL: I guess I can't say why, but  
18 certainly in our initial response, we felt like it's  
19 been quite clear that Wyoming has been so far below  
20 that that there just isn't any possibility -- it would  
21 have to -- and the reason for that is very -- it's  
22 quite simple. And this has -- this has come up over  
23 the years. It's background, I understand, but I think  
24 it's helpful.

25           In the '80s, the complaints that Montana had in



1 the '80s were, it's just not fair to count the flow at  
2 the mouths of these four interstate streams. Okay?  
3 The Mile City -- Bighorn, Mile City, near Terry,  
4 Montana, the mouths of the stream, because the  
5 denominator of the equation under V(B) becomes very  
6 large and includes water that flowed through Montana  
7 and return flows that came out of the Montana  
8 diversions.

9           It was buyer's remorse. Montana, my goodness,  
10 we should have done that measurement at the state line.  
11 That's what would have been better and fair. And they  
12 complained over the years that that's not a fair way to  
13 do it.

14           And if -- implicit in that complaint was, we're  
15 never going to be able to complain about this because  
16 when you measure it at those points, the denominator of  
17 the equation becomes so large because -- and the reason  
18 it is -- the reason that I think the initial  
19 drafters -- and maybe I'm going too far afield here.  
20 I'm sorry. But as you recall -- we've discussed many  
21 times and both states have conceded throughout this  
22 case to you, that main stem reservoirs at the state  
23 line were really the key.

24           For example, Bighorn Reservoir here right at  
25 the state line -- and I see when Montana put this map

1 together, quite rightly identified Moorehead as the  
2 location. And that was the proposed reservoir on the  
3 Powder. And then they even mentioned in their map --  
4 and again, quite rightly -- Tongue River Reservoir  
5 right at the border. So we had these three sites that  
6 were expected to be developed. One was already  
7 partially developed, the Tongue River. So we had the  
8 three sites.

9           And if those reservoirs were built and stored a  
10 lot of water, then the measurement at the -- further  
11 downstream and putting that denominator in V(B), most  
12 of that water wouldn't make it there. It would be in  
13 the reservoir and get used in Montana, and then the  
14 percentages -- Montana wouldn't suffer from this unused  
15 water that goes out the bottom and increases the  
16 denominator and makes Wyoming's ability to allocate  
17 post-50.

18           So there's that. That's floating around in the  
19 background. That's been around, I think, throughout  
20 the years. Again, background. I don't think it's  
21 something we should -- could base a decision on in this  
22 motion but something that might be helpful.

23           SPECIAL MASTER: All right. That is useful.

24           Let me follow up, though, with -- with, again,  
25 the following question.

1           So there are these percentage allocations that  
2 are set out in Article V(B).

3           MR. MICHAEL: Yes.

4           SPECIAL MASTER: And Article V(C), in talking  
5 about what quantities those percentage factors apply  
6 to, the very first one, for example, is the total  
7 diversions above the point of measurement for  
8 irrigation and industrial uses.

9           So one would think, if you actually had ever  
10 applied the particular formulas that are set out in  
11 Article V(B), somebody would have had to decide, for  
12 purposes of totaling up the amounts diverted under  
13 V(C) (1) or the amounts stored under V(C) (2) and  
14 V(C) (3), that somebody would've addressed the question  
15 of whether or not those particular amounts came from  
16 just the main stem of the Tongue and Powder Rivers or  
17 also the tributaries.

18           So I understand no one's ever done those  
19 calculations before?

20           MR. MICHAEL: It has been -- in fact, the  
21 interesting part about it is that the actual drafters  
22 for the first ten years or so, L.C. Bishop, the Wyoming  
23 State engineer and his successor, Earl Lloyd, and Fred  
24 Buck, who was the Montana State engineer who --  
25 critical, you know, members of the engineering

1 committee and compact negotiators, in their annual  
2 reports in the 1950s, said no need to do a count;  
3 Wyoming isn't close to its percentage. But they didn't  
4 say how. They didn't say why. They didn't say what  
5 they would be counting.

6 But that is the kind of thing. If we are going  
7 to have a V(B) case, that is the kind of extrinsic  
8 evidence. Now, they're not alive today, but there may  
9 be people they talked to that are.

10 And so -- but we don't have a record -- there's  
11 certainly an indication that they knew that there was a  
12 formula and that if there was a problem, that the  
13 formula would have to be applied. And there's lots of  
14 indication that it requires measurements and diversion  
15 points, because we know Montana passed the statute  
16 saying you've got to measure the diversion points  
17 shortly after the compact. But there isn't really a  
18 discussion that specifically says how that would be  
19 done.

20 And so -- but again, we have 15,000 pages of  
21 documents in our archives, and we've been through them  
22 a few times. We haven't really been through them with  
23 respect to the interstate tributary issue with  
24 granularity because it's a monumental task. But  
25 there's a lot of documentation. We don't know what

1 Montana has, so I don't know what -- and I -- and what  
2 this comes down to, Your Honor, was a question I think  
3 you asked -- one of your last questions or -- let's  
4 see. It was your fourth question, which is  
5 interpretation of the compact if it's unam -- if it's  
6 ambiguous, is there still a reason why -- am I getting  
7 ahead of ourselves --

8 SPECIAL MASTER: Yeah --

9 MR. MICHAEL: Sorry --

10 SPECIAL MASTER: I do want to get back to that  
11 particular question.

12 MR. MICHAEL: Okay.

13 SPECIAL MASTER: I'm trying to understand this,  
14 so -- beyond the question of what some of the  
15 individuals involved in the drafting of this particular  
16 compact thought, is it my understanding that no one has  
17 ever had to apply the formulas in Section V(B) and  
18 therefore decide under Section V(C) whether or not to  
19 include diversions for storage on the tributary to the  
20 Powder and Tongue Rivers?

21 MR. MICHAEL: Yes. It's never happened.

22 SPECIAL MASTER: And since it's never happened,  
23 then there's never been an opportunity for disagreement  
24 between the states on that question?

25 MR. MICHAEL: I think that's accurate. I think

1 this is the first time it's come up.

2 And of course, in our reply -- our initial  
3 reply to the bill of complaint was, it hasn't come up  
4 to this point. I mean the best would be at 10 percent.  
5 Of course, most of our calculations, they were based on  
6 our interpretations, so we didn't include these small  
7 amounts up in these little reservoirs and so forth in  
8 that affidavit that was attached to our first reply --  
9 our brief.

10 So, you know, we did take the same  
11 interpretation we're taking now, which is interstate  
12 tributaries means rivers --

13 SPECIAL MASTER: Okay.

14 MR. MICHAEL: -- not the tributaries thereof.

15 SPECIAL MASTER: All right. So let me go back  
16 and --

17 MR. MICHAEL: Yes.

18 SPECIAL MASTER: -- again, follow up on some of  
19 the earlier points.

20 So again, in the memorandum opinion at pages 29  
21 and 30, I have addressed the question of whether or not  
22 Article V(A), under my interpretation of Article V(A),  
23 would prohibit new diversions of water for storage  
24 facilities on tributaries to the Powder and Tongue  
25 Rivers, if those diversions interfered with pre-1950

1 appropriate rights in Montana.

2           So is it my understanding that Wyoming has no  
3 problem with that interpretation of Article V(A),  
4 assuming, again, that I am correct that Article V(A)  
5 sets up a prior appropriation protection for those  
6 early Montana appropriators?

7           MR. MICHAEL: Right. Let me confirm that  
8 again, because we do not have a problem -- if the  
9 Yellowstone River System in V(A) -- a broad term that's  
10 been -- and it would allow -- if the document of  
11 appropriation applies to the Yellowstone River System  
12 in the way that you've laid out, it would reach the  
13 high -- the highest reservoir -- of course, with the  
14 provisor that if the reservoir was storing out of  
15 priority and all that stuff.

16           But yes, it would reach the highest reservoir  
17 or highest diversion point if -- there's other issues.  
18 There'd be a few call issues, I'm sure. If it was 300  
19 miles away and the water would never get there, that'd  
20 be under the document of appropriation. Wyoming might  
21 be able to say that. But that would be a fact  
22 depending on a future case or a specific instance.

23           But potentially, yes. We conceded that, and I  
24 think it's consistent, again, with the footnote that we  
25 did in our very first brief in the case.

1           So that would not be a -- that is not an issue  
2     in the case, and something could be set aside for --  
3     and the United States was interested in that same very  
4     question, and they filed a brief simultaneous with us  
5     and was wondering what we would say about that. And we  
6     confirmed in our brief, and I'm confirming again here  
7     today.

8           Is there anything unclear?

9           SPECIAL MASTER: No. That's exactly what I  
10    wanted to hear --

11          MR. MICHAEL: Okay.

12          SPECIAL MASTER: -- and -- so let me ask you  
13    one other question. As the case is currently set up,  
14    assume I take my memorandum opinion, supplemental  
15    opinion, the opinion on the motion intervened by -- and  
16    then our governors will come down in the next day or  
17    two. And I put all that together in my first report to  
18    the Supreme Court. I also include this language that I  
19    had in the original memorandum of opinion.

20          MR. MICHAEL: On 29 and 30.

21          SPECIAL MASTER: 29 to -- to 30. I include  
22    that there.

23          Do you see any reason or do you contemplate  
24    that you will be raising any questions regarding the  
25    applicability of Article V(B) to the tributaries to



1 these two rivers in any arguments you make before the  
2 Supreme Court?

3 MR. MICHAEL: There is the footnote. There is  
4 your footnote on page 29 which starts to lean into but  
5 it does not explicitly say that you've interpreted  
6 it -- the term interstate tributary.

7 Again, if that's -- if we were to consider that  
8 dictum at this point or not even a firm decision on  
9 your part, we wouldn't have to take that up, I don't  
10 think, with the Supreme Court.

11 SPECIAL MASTER: And, in fact, the only reason  
12 why I included that footnote was in case that question  
13 came up in the Supreme Court's consideration --

14 MR. MICHAEL: Okay.

15 SPECIAL MASTER: -- of these initial motions.  
16 I wanted to make sure that that was there in order to  
17 provide the Supreme Court some guidance as to how I  
18 interpret it or might -- correct myself -- might  
19 interpret that.

20 MR. MICHAEL: If it has -- if it's not final,  
21 then -- or the decision on your part, you know, we  
22 wouldn't have to take exception to that because it's  
23 not a -- you know, part of your decision. It's a -- as  
24 you just described it, not fully decided by you.

25 SPECIAL MASTER: Okay. Thank you.

1           MR. MICHAEL: That would be the way -- our  
2 approach on that.

3           SPECIAL MASTER: Okay. So then the next  
4 question is, if for any reason I decided that I did  
5 need to address this particular question in response to  
6 Montana's motion for summary judgment, what type of  
7 documents might you find in discovery that you think  
8 would actually be something that the Supreme Court  
9 could consider in resolving this compact  
10 interpretation?

11           MR. MICHAEL: Well, the one I thought might be  
12 of special interest would be something we might find  
13 that sheds some light on what Mr. Bunston said on -- I  
14 think it was December 7th or December 8th of 1950, when  
15 the change was made when the V(B) -- now, am I missing  
16 this now? I don't want to go into V(B) if we're not  
17 going to --

18           SPECIAL MASTER: I still want to address  
19 Article V(B).

20           MR. MICHAEL: Okay.

21           SPECIAL MASTER: If we haven't finished --

22           MR. MICHAEL: All right.

23           SPECIAL MASTER: -- oral argument, and it might  
24 very well be that after I hear all the arguments, I  
25 decide I have to address this question --

1 MR. MICHAEL: Okay.

2 SPECIAL MASTER: -- so --

3 MR. MICHAEL: Okay. But if V(B) needed to be  
4 addressed, and then so we're talking about would there  
5 be extrinsic evidence that would -- that you found to  
6 be ambiguous under the plain meaning of the compact,  
7 what kind of documents would be helpful in doing that?  
8 What would discovery reveal?

9 You know, we have the -- Mr. Bunston's  
10 statement from Montana -- one of Montana's delegations,  
11 saying one sentence in the minutes on that key date  
12 when the key change was made, is the previous  
13 diversions had said Tongue River Basin -- or Tongue  
14 River System, Bighorn River Basin, Clarks Fork River  
15 Basin.

16 So the term basin and system were used in the  
17 V -- what became the V(B) part, and then Mr. Burg  
18 changed that and went with the word interstate  
19 tributaries versus basin or system. So we had that --  
20 the change happened on that day.

21 Bunston from Montana said, my God, that means  
22 that we don't -- the percentage is -- basically, the  
23 way I interpret the sentence of the minutes is -- what  
24 he said was, that would mean that we wouldn't have to  
25 count -- we wouldn't be counting diversions on these

1 tributaries, the interstate tributaries, and that could  
2 hurt Montana. So there was, apparently, a discussion  
3 of that.

4           Is there anything that would shed light -- now,  
5 these folks -- these negotiators are dead, so is there  
6 something we might find to shed light on it? There's a  
7 lot of correspondence back and forth on so many issues  
8 in the 15,000 pages we found in our archives and in  
9 other stuff that Montana found.

10           Other issues, other documents that may come up  
11 is more discussion and indications on the mapping.

12           The engineering committee toured, for example,  
13 the upper Big -- the Bighorn River. And they had  
14 mapping of where they thought new acreage, post-50  
15 rights, might be carved out in each state. And that  
16 could shed light as extrinsic evidence of what the  
17 drafters may have intended.

18           Did they really want to have everybody  
19 measuring every diversion on these little tributaries  
20 that go -- the -- a little bit of runoff, a month of --  
21 a month or three weeks of use, and then they're dried  
22 up? Did they really want to count those, which would  
23 be a reason for V(B) to be more limited, consistent  
24 with our interpretation.

25           Knowing where they were looking and where they

1 thought future developments were going to be could be  
2 very important. And that -- you know, there's a number  
3 of different mapping. There was mapping projects.  
4 There was the 1940 mapping. So that's another area of  
5 discovery that I think could be very -- could be  
6 helpful to shed light on this ambiguity and that would  
7 be contemporaneous with the drafting or before the  
8 drafting.

9 SPECIAL MASTER: So let me just interrupt you  
10 there and ask two questions.

11 First is, my understanding from reviewing the  
12 Supreme Court cases interpreting compacts is that in  
13 looking at extrinsic evidence to interpret ambiguous  
14 phrases, that all I should be looking at are those  
15 portions of the history of the compact that were before  
16 Congress or before the state legislatures.

17 And so I guess my first question is, do you  
18 disagree with that?

19 MR. MICHAEL: I disagree, because in New Jersey  
20 vs. Delaware, the latest case, 65 -- cross motions for  
21 summary judgment on the meaning of discrete phrase,  
22 6500 pages of documents were submitted to the Court.  
23 And Justice, I think -- certainly, Justice Scalia in  
24 his dissent, discussed the issue of -- criticized the  
25 Court's review. Judge -- both Justice Scalia and the

1 Court majority disagreed over what the course of  
2 conduct of the parties after the compact -- I don't  
3 know for how many ensuing years it was -- that -- what  
4 light that shed on it.

5 And they disagreed. They go -- oh, I don't  
6 know -- they did this, this, this, and this. And that  
7 means Delaware was right, and Justice Scalia said no.  
8 They did this, this, this and New Jersey's  
9 interpretations.

10 So course of conduct, something that we know  
11 under contract, basic contract law, is one way to  
12 interpret -- help interpret a contract, conduct of the  
13 parties, how they follow the compact.

14 Again, you've already hit on the question, but  
15 we don't have a dispute.

16 So is there going to be course of conduct?  
17 Will we find some course of conduct information?

18 But we've had -- there was a lot of discussions  
19 about, you know, how to go about coming up with maybe a  
20 more useful measurement scheme to try to make V(B) work  
21 if we ever got there.

22 So I think there could be some course of  
23 conduct information. And I think legally -- but your  
24 question is just legally. Legally, New Jersey vs.  
25 Delaware, I mean it said that in this case, the conduct

1 of the parties in interpreting their own compact is  
2 very important extrinsic evidence.

3 SPECIAL MASTER: Okay. So let me correct my  
4 prior question. So I'm talking specifically about the  
5 actual history of the negotiations of the compact.

6 And to the degree that there are documents out  
7 there written by one negotiator to another negotiator,  
8 talking about what they thought the compact meant, if  
9 that was never shown to the legislatures or Congress as  
10 part of their evaluation, is that relevant?

11 MR. MICHAEL: Well, I would say this, but -- I  
12 can't give you black letter law on it. But I would say  
13 this. In -- we cited in one of our earlier briefs a  
14 report by a special master in *New Jersey vs. New York*,  
15 a 1993 case. And the special master's report also  
16 cited Justice Scalia's textbook on interpretation in  
17 which the emphasis there by the special master in that  
18 case and by Justice Scalia was that you -- the most  
19 important thing you can determine is what the drafters  
20 said.

21 And I think there was a comparison of what the  
22 drafters said versus what was in the Senate report.  
23 And the point was, what the drafters said and the  
24 interaction of the drafters is much more important than  
25 what somebody told the Senate to put in a report when

1 they rubber-stamped the compact later on.

2 And so in a conceptual way now, the question  
3 you asked is that -- it goes further, though, because  
4 we know that the drafters of this compact thought it  
5 was important to have official minutes, and they made a  
6 set of official minutes.

7 So I guess the question would be, to what  
8 extent, if we found a smoking gun letter between Fred  
9 Buck of Montana and Earl Lloyd or L.C. Bishop of  
10 Wyoming, would we be able to use that?

11 I'm sorry; I can't answer that question right  
12 now. But I certainly -- you know, I'm sure -- if it  
13 helps Montana, they're going to want to get it in,  
14 that's for sure, if we go there.

15 And we -- you know, I don't know what the  
16 arguments are. I don't know how far you would go if  
17 you have official minutes, through other documents, and  
18 how reliable. And then you get into rules of evidence,  
19 you know. It's hearsay, but are there other -- you  
20 know, other rules?

21 So there might be evidentiary rules as well as  
22 some other authority.

23 SPECIAL MASTER: So that's very useful.

24 So the next question that I have on my list was  
25 the question of how one actually integrates Articles



1 II(E) and II(F). Which is subsidiary to which?

2 MR. MICHAEL: Yeah, let me turn to the compact,  
3 because I think there's -- let me answer that question  
4 by starting with a bit of an overview of how I look at  
5 the approach here, because obviously -- I think you've  
6 already said in previous -- I think we had a status  
7 conference thing at the August 5th status conference,  
8 where you -- you said -- you agreed that if it's  
9 ambiguous, then there might be further -- room for  
10 further proceedings, or certainly maybe it's not --  
11 it's premature, at least, to decide this issue if it,  
12 in fact, is in the case.

13 So how do you determine ambiguity? And you do  
14 it, of course, within the four corners of the document.  
15 So then the question becomes, when you look at the four  
16 corners of the document, what tools do you use?

17 And I think there's -- there's two basic  
18 approaches, two basic tools that you would use. And  
19 this is in a number of U.S. Supreme Court cases, well  
20 known to all of us, contract principles. But start by  
21 looking at the terms themselves and how they're used in  
22 the document. And then also, there may be some other  
23 things within the four corners of the document that  
24 shed light on the way that these drafters went about  
25 doing it.

1           And I guess what I'm saying there is, if -- and  
2 I can -- I could go through this document and -- you  
3 start with the preamble. There's many, many places  
4 where a word river has been used -- for example, the  
5 Yellowstone River -- where the drafters felt it was  
6 necessary -- for example, at the very beginning of the  
7 preamble, they said with respect to the waters of the  
8 Yellowstone River and its tributaries. So they  
9 understood the difference between Yellowstone River and  
10 that that, in and of itself, in terms of a common part,  
11 does not include its tributaries, because we have to  
12 say.

13           So that's a more generalized look at the four  
14 corners of the document. But let's get -- the question  
15 you asked, let's go to the other part of this, which  
16 is -- let's look at what they did specifically in the  
17 definitions. And I think you start with a fairly  
18 simple proposition.

19           Article II -- let's take a look -- let's start  
20 with that. Let's start with interstate tributaries.

21           Well, let's look at all the definitions, A  
22 through H, Article II(A) through H. Every one of those  
23 definitions begins with "The term." So we're being  
24 introduced by the drafters to a term.

25           And some of the terms are multiple-word terms,

1 and some of them are single-word terms. But every one  
2 of those terms that they wanted to find, they put  
3 quotation marks around. And in the version I'm looking  
4 at -- I'm looking at the public law version here, not  
5 the Montana or Wyoming statutes.

6 But in the version I'm looking at -- I think  
7 it's quoted the same way in the one you're looking at,  
8 which is from Montana's brief -- those words -- the  
9 word or the phrase that's being -- the term that's  
10 being defined is capitalized as well.

11 For example, interstate tributaries -- and I  
12 think what the drafters were doing there were -- they  
13 were saying this -- when -- this phrase here, we're  
14 going to tell you the -- instead of putting in bold --  
15 probably in those days they didn't have -- you know,  
16 they had regular old typewriters so if they want  
17 something to look big and bold, they capitalized words.  
18 So -- but anyway, they put quotation marks and  
19 capitalized the terms. And so we're -- it's quite  
20 clear, I think, what the term is, interstate tributary.

21 Then after that phrase, interstate tributary,  
22 the next word is critical because it's the verb; it  
23 says "means." Means. So that -- so now, after the  
24 word "means," that's when we start the definition. So  
25 we have the term, and the term means what?

1           And so let's look at the definition. And this  
2 is where I think Montana's analysis falls apart.

3           When we look at the definition, it says the  
4 interstate tributaries means the Clarks Fork,  
5 Yellowstone River, the Bighorn River -- except for the  
6 Bighorn River, which we could discuss if we have time,  
7 if you want to -- the Tongue River and the Powder  
8 River, et cetera, et cetera.

9           So the term tributary doesn't show up in the  
10 definition part. It is only part -- it is a word that  
11 is within the phrase that you're defining.

12           So I think that's pretty straightforward.

13           So we start with the word interstate  
14 tributaries. And what is it? It's these rivers.

15           And again, I go back to the common parlance,  
16 the plain meaning that I mentioned a moment ago.

17           Look at Montana's map. What's the Bighorn  
18 River? Here's the Bighorn River in the dark blue.  
19 Well, we know this is the Wind River and this is the  
20 Little Wind River. Actually, Wyoming believes the  
21 Bighorn River starts here, a little further up from  
22 Boise. We -- in all our records, it starts at the  
23 confluence of Little Wind River.

24           But the concept is correct; Montana's concept  
25 is correct. These rivers, in common parlance, are

1 these dark blue main stems and not the tributaries of  
2 those rivers. That would be the ordinary, plain  
3 meaning.

4 And that's what the definition says. It  
5 doesn't talk about tributaries. The definition defines  
6 the term interstate tributaries as these rivers.

7 To me, straightforward, simple. If I'm going  
8 to go fishing on the Tongue River, that's not fishing  
9 Goose Creek. It's the Tongue River. That's how people  
10 speak, and that's how people talk about rivers.

11 So the same approach to parsing a definition  
12 applies to tributary, E. And E is the term  
13 "tributary" -- quotes -- means. And so then we go to  
14 what does it mean?

15 Well, it "means any stream which in a natural  
16 state contributes to the flow of the Yellowstone  
17 River." Is that the basin? Is that water flowing  
18 across the ground? No. It's water in a stream,  
19 appropriable water. Okay? But it's anything.

20 So in that case, yes, the tributary would be  
21 the middle fork of the Powder, on and on and on,  
22 thousands of them, that contributes to the flow of the  
23 Yellowstone. It's clearly the broader definition.

24 And within that definition, the drafters  
25 decided to say, including the interstate tributaries,

1 the term we just talked about, is the defined term,  
2 shows together, and tributaries thereof.

3           Okay. Why did they do that? We can think  
4 about why they might have done that and -- I think it's  
5 probably decent draftsmanship to show that we're not  
6 setting -- we have interstate tributaries in this  
7 circle over here, and we have tributaries over here,  
8 and we want you all to know that interstate tributaries  
9 is a subset of tributaries.

10           So we're going to say that clearly. Since we  
11 defined the terms, we want to say it's a subset, 'cause  
12 if we -- somebody might be confused and think, well,  
13 this says tributaries, but that doesn't include  
14 interstate tributaries because they have a separate  
15 definition.

16           So I think it was probably smart for them to  
17 say we include the interstate tributaries as tributary.  
18 And they clearly follow.

19           And then the next part of the hierarchy is a  
20 different one, which is, what is the Yellowstone River  
21 System? And then they use the word tributaries --  
22 plural of tributary -- is used, without interstate  
23 tributaries, within Yellowstone River System. It means  
24 the river and all of its tributaries.

25           And then they -- they make sure, you know, it's

1 not just stream -- including springs and swamps. So  
2 they want to be even broader and go beyond the streams  
3 and -- I think the hierarchy is fairly clear.

4           And as you said, boy, if you go the other way,  
5 if you go Montana's way and you say that the word --  
6 the fact that the word tributaries appears in the  
7 phrase interstate tributaries brings that back in, now  
8 you got this competing circularity -- I don't know what  
9 you want to call it. Which came first, the chicken or  
10 the egg? You run into all kinds of problems about what  
11 it means. And then interstate tributary starts to look  
12 like that it means every tributary through Yellowstone  
13 simply because that's in there. So I think that's not  
14 a good way to look at it.

15           That's the way I look at it, anyway, and that's  
16 my explanation.

17           SPECIAL MASTER: Okay. That's very helpful.

18           So let me just ask again, in consideration of  
19 time, whether there's any additional points that are  
20 not already covered in your brief that you would like  
21 to bring up?

22           MR. MICHAEL: If I might, Your Honor, let me  
23 just check real quick a second through my notes and  
24 see -- it would be only in response to maybe something  
25 Mr. Draper had to say.

1           Do you mind, Your Honor, if I ask Mr. Willms to  
2 see if there is anything else?

3           SPECIAL MASTER: That's fine.

4           MR. MICHAEL: Your Honor, Mr. Willms also  
5 reminds me that in my discussion here a little bit ago,  
6 I did -- in reading the definition of Little Bighorn I  
7 mentioned that I could talk about, is that something  
8 that would be of interest to you? The point -- Montana  
9 made the point that because -- that Little Bighorn --  
10 it says excluding Little Bighorn, that that -- there's  
11 a reverse implication that it must include all of the  
12 tributaries in that definition of interstate  
13 tributaries. Is that something that would be of  
14 benefit?

15           SPECIAL MASTER: Not unless you have something  
16 that you haven't already said in your briefs.

17           MR. MICHAEL: Well, let me say something that I  
18 haven't already said in the briefs that I think you  
19 ought -- you should keep in mind, is, when you look at  
20 Article V and you look at V(B) (2), which is -- it says  
21 Bighorn River, exclusive of little Bighorn River, I  
22 would just say it's important to look further down at  
23 (B) (2) (b), after the percentages, and note that the way  
24 the drafters excluded the Little Bighorn River was by  
25 excluding a mass quantity of flow based on a



1 measurement that would be taken with the Little Bighorn  
2 runs into the Bighorn River.

3           And so the exclusion is not an exclusion of  
4 diversion points along the Little Bighorn. It's an  
5 exclusion of a quantity of water from what would  
6 otherwise be measured at the measuring point, which is  
7 down here on the main stem.

8           So the exclusion is a main stem concept. It's  
9 not a -- and the reason I say that is this -- and why  
10 is that important? Well, Montana says because the  
11 Little Bighorn is excluded, the negative implication of  
12 that is, if it wasn't excluded, then all the diversion  
13 points along the Little Bighorn and every other  
14 tributary would be counted for purposes of V(B).

15           But in fact, the negative implication of that  
16 exclusion is simply that a mass quantity, which  
17 normally would count every molecule that passes these  
18 gauges at the bottom, is going to subtract another mass  
19 quantity. And it's not -- and mass quantity is simply  
20 based on a gauge at this point.

21           So the negative implication's not the negative  
22 implication Montana is indicating for that.

23           And then we have, of course, another provision  
24 where the drafters also said in V(B) that the Powder  
25 River -- the Little Powder River here is included. And

1 you have to ask the question, how is it included? Is  
2 it included by simply not taking it out of the mass  
3 quantity measuring point in the denominator, which is,  
4 I think, (C)(1), or is it excluded -- included by  
5 counting all the diversions along the little Powder for  
6 purposes of V(B)? So I think that's the question.

7 But I think that negative implication's not --  
8 I think it's very important to look at B. Look at  
9 V(B)(2) small (b) in terms of what that exclusion  
10 really means.

11 SPECIAL MASTER: Okay. Thank you.

12 Actually, I have one final question, really  
13 small --

14 MR. MICHAEL: Sure.

15 SPECIAL MASTER: -- which is, when we  
16 originally were talking about these tributaries to the  
17 Powder and Tongue River -- we were talking in terms of  
18 certain reservoirs -- Montana, in its motion for  
19 partial summary judgment, has asked for a ruling that  
20 the Yellowstone River Compact applies to all surface  
21 waters tributary to the Tongue and Powder Rivers.

22 If I decided just to focus on Article V(A) and  
23 not to address Article V(B) and I therefore ruled that  
24 Article V(A) of the Yellowstone River Compact applies  
25 to all surface waters tributary to the Tongue and

1 Powder Rivers, my understanding is that Wyoming agrees  
2 with that particular point.

3 MR. MICHAEL: Yes, we agree with it, although  
4 let me just make -- this is -- let me respond.

5 Obviously, under V(E), there's some exclusions,  
6 domestic. And there's one in there that's based on  
7 spreader dikes. So I think -- when we say waters, what  
8 do we mean? I think the compact covers waters that are  
9 appropriable versus, again, spreader dikes, where --  
10 you know, how do you measure how much got spread across  
11 the land, some pinch point, that kind of thing.

12 So there was -- you know, the phrase Yellow --  
13 waters is obviously the problem -- one of the  
14 problematic phrases we're wrestling with here, waters  
15 of the Yellowstone River. So with that proviso, I  
16 would say yes, under V(A), inappropriable flow -- well,  
17 springs -- a tributary -- springs, streams, and swamps.

18 We know our disagreement about groundwater,  
19 obviously, but springs, streams, and swamps, and --  
20 that are tributary, that fit within the tributary, fit  
21 within the definition of the Yellowstone River System,  
22 and therefore, they would be covered under V(A).

23 SPECIAL MASTER: Thank you very much.

24 MR. MICHAEL: You're welcome.

25 SPECIAL MASTER: Mr. Dubois.

1 MR. DUBOIS: Good morning, Your Honor.

2 May I -- if it please the Court, Jim Dubois for  
3 the United States.

4 I think that you've answered the first question  
5 that we had, which is, there is no controversy,  
6 apparently, over your language in paragraphs -- or  
7 pages 29 and 30. So I will largely stick to the issue,  
8 I think, of whether or not you should be addressing,  
9 essentially, what are V(B) issues.

10 As the United States pointed out, you do have a  
11 gatekeeper function. And the Court has said that the  
12 opposed -- the effective opposed amendment to the  
13 pleading, that it should be scrutinized to -- closely,  
14 in the first instance, to see whether they would take  
15 the litigation beyond what the Court reasonably  
16 anticipated when it granted leave to file the initial  
17 pleadings.

18 In this case, what you had was the initial  
19 pleading and brief attached to it. And in that initial  
20 memorandum, Montana argued, essentially, that -- they  
21 argued only for V(A). In support of its filing it  
22 makes in the initial pleading, it makes three mentions  
23 of Article V(A), it makes six references to protection  
24 of pre-1950 water rights, zero references to V(B).

25 Today you, yourself, have said, well, this is

1 all about protection of pre-1950 water rights. So  
2 clearly, you're only seeing this as having been pled  
3 and described in what would be reasonably anticipated  
4 by the Court is a violation of V(A). Montana has asked  
5 you to make rulings that are related to, essentially,  
6 V(B).

7 I believe at page 36 of your original  
8 memorandum opinion regarding diversions, you said -- "I  
9 don't" -- basically, you said, "I don't need to reach  
10 that, because it relates to V(B) and it's premature."

11 So we're really back to the same thing that the  
12 special master in your original memorandum opinion has  
13 said: "I'm not going there, because that's beyond what  
14 is reasonably foreseeable from the pleadings I have so  
15 far and what's reasonably anticipated by the Supreme  
16 Court."

17 So I think that you're back into the same  
18 problem again. These arguments all relate to,  
19 essentially, interpretations for purposes of V(B)  
20 complaint to a violation of V(B) that has not been  
21 discussed in any meaningful way in the complaint -- in  
22 Montana's first justification for being allowed leave  
23 to file.

24 Interestingly enough, when Wyoming came in and  
25 said they have an alleged violation of V(B), Montana

1 came back and said, well, but we have alleged a  
2 violation of V(A). We agree; the United States agreed.  
3 They've alleged a violation of V(A). And that is why  
4 we ended up with a motion to dismiss based on V(A), the  
5 crux of Montana's arguments, really.

6 Well, if you would've granted that motion to  
7 dismiss, it's okay, because we had another claim that  
8 wasn't -- that, you know, we just sort of ignored in  
9 our first pleading. But we had another claim under  
10 V(B) that we wanted to bring up. And it wasn't the  
11 subject of Wyoming's motion to dismiss, so you can't  
12 dismiss the case.

13 So you then would be faced with a second motion  
14 to dismiss, or I suppose under the federal rules,  
15 having missed your opportunity to make a motion to  
16 dismiss, Wyoming would then be barred from that? All  
17 that is sort of illogical.

18 So I think that that's really the crux of it  
19 should you get to the arguments regarding interstate  
20 tributaries. And the United States is of the position  
21 that it is not necessary. It expands and extends the  
22 litigation into new areas. And therefore, like the  
23 description of the diversion issue in the original  
24 memorandum opinion, you simply should take a pass on  
25 that.

1           Clearly, if Montana wants to move for leave to  
2 amend, they can do that. But until that point, a  
3 motion for interpretation of -- under V(B) is  
4 premature.

5           Now, as to your initial -- your set of  
6 questions, to the extent that I can take those on, I  
7 think I've addressed the first two. The initial  
8 reaction is that Montana was not disagreeing. I think  
9 that's been resolved. I think I've explained why we  
10 respectfully disagree with your view. There's a  
11 difference between the complaint and the overall  
12 presentation of the case to the Supreme Court.

13           I don't disagree with you that we -- we don't  
14 disagree with you that the complaint, in some respects,  
15 is quite broad. But what was the Court given to expect  
16 the range of -- the scope of this case was? And that,  
17 I think, is somewhat broader and is defined by what  
18 Montana's filed.

19           SPECIAL MASTER: Let me just say for --

20           MR. DUBOIS: Certainly.

21           SPECIAL MASTER: -- clarity, by the way, that  
22 the reason why -- as I mentioned earlier, I think that  
23 the complaint was originally written relatively  
24 broadly. And the relevance of Article V(B) is in the  
25 initial provision that Article V(B) only allocates the

1 unused and unappropriated waters of the interstate  
2 tributaries. And I think, actually, it's probably -- I  
3 believe the United States pointed out that helps in the  
4 interpretation of Article V(A) --

5 MR. DUBOIS: Oh, absolutely.

6 SPECIAL MASTER: -- make it absolutely clear  
7 that Article V(A) protects appropriations that predated  
8 the compact.

9 MR. DUBOIS: Absolutely, Your Honor. I  
10 understand why, to the extent that it relates to the  
11 fundamental claim of protection of pre-1950 water  
12 rights, you have to roll those in.

13 I think that the issue, however, you're being  
14 asked to weigh in on is not really related to the claim  
15 to protection of the V(A) rights. It would actually be  
16 under V(B) and the percentage allocations, so I -- I --  
17 but I do understand the distinction you're making, Your  
18 Honor.

19 And I -- I think your third question was, is  
20 there any reason that V(B) or (C) are likely to come up  
21 in these proceedings, now that you've gotten beyond  
22 sort of the initial interpretation question. I think  
23 what I've heard from the parties is no.

24 Maybe they can clarify, but I think that that  
25 has also been addressed and -- which also is a reason



1 not to go beyond the narrow confines of what has been  
2 asked for for relief.

3 SPECIAL MASTER: Well, let me just -- just to  
4 pause there. I think this is a really important point.

5 My understanding also, from the -- from both of  
6 the two parties, is that at the moment, they do not  
7 contemplate Article V(B) coming into play, based on  
8 that memorandum opinion that I wrote, other than  
9 perhaps, again, just to emphasize the meaning of  
10 Article V(A). And to the degree that either party  
11 disagrees with that, Mr. Draper, obviously, will have  
12 another opportunity to speak. But if Mr. Michael  
13 disagrees with that, he should say so now.

14 MR. MICHAEL: No. I agree, Your Honor. Thank  
15 you for the opportunity.

16 MR. DUBOIS: Which, I think, comes sort of  
17 circular around to what the Court reasonably  
18 anticipated when it granted leave to file.

19 And as I said, this, I think, is really more of  
20 a matter of a gatekeeping function more than any  
21 particular disagreement with the arguments of the  
22 parties.

23 And I think your final question was, what do  
24 you do if -- how do you resolve sort of the circular  
25 ambiguity of II(E) and (F)? And I think that

1 Mr. Michael correctly stated that you look at the  
2 entire document.

3 And I suggest, perhaps, to Your Honor that  
4 maybe the question isn't being framed right.

5 Interstate tributaries -- I mean, obviously, as  
6 far as what goes between the states, the only thing  
7 that you're really looking at is how much water crosses  
8 the border ultimately, and are you fairly dividing it?

9 But perhaps the better question in looking at  
10 how that term was used in V(B), which I don't think you  
11 need to get to, is looking at, I think, the paragraph  
12 that you were pointing at earlier, which is V(C), and  
13 how that treats how you calculate what that is.

14 And interestingly enough, that says in V(C) --  
15 in tallying up those diversions, for instance, in  
16 V(C) (2), it says net change in storage in acre-feet in  
17 all reservoirs in Wyoming and Montana above the point  
18 of measurement completed subsequent to January 1, 1950,  
19 and if you got -- and obviously, the next subparagraph,  
20 (C) (3), talks about the net change in storage in  
21 existing reservoirs in Wyoming and Montana above the  
22 point of measurement, the point of measurement, again,  
23 being the confluence with Yellowstone itself.

24 That is very large and inclusive language as  
25 far as how you calculate whether or not you're living

1 within your percentages.

2           So perhaps getting wound up on interstate  
3 tributaries is a bit of a red herring and the wrong  
4 question to ask.

5           I won't definitively say what the right answer  
6 is, because I'm not sure I'd know it and I certainly  
7 couldn't tell you what it was. But I suggest to you  
8 that perhaps it's the framing of the question that  
9 ultimately would be relevant should there be a V(B)  
10 claim ever made at some point.

11           But in the meantime, the United States takes  
12 the position, as the gatekeeper of this matter, that  
13 your role partly is to keep it from metastasizing into  
14 larger things that are not apparently before the Court.  
15 And there are indications, I believe, that you and  
16 Mr. Draper were discussing the annual summary of  
17 contents for the Yellowstone River at the end of their  
18 response to Wyoming's initial motion to strike.

19           SPECIAL MASTER: It's actually called Montana's  
20 reply.

21           MR. DUBOIS: Thank you.

22           But the last page of that is -- at least  
23 indicates that there has been some accounting pursuant  
24 to the compact, and there doesn't seem to be a dispute  
25 at this point over V(B), and therefore, it is

1 premature.

2 SPECIAL MASTER: Okay. Thank you very much.

3 MR. DUBOIS: Thank you, Your Honor.

4 SPECIAL MASTER: Okay. Mr. Draper.

5 MR. DRAPER: Thank you, Your Honor.

6 With respect to Mr. Dubois' statements  
7 regarding the scope of our claim, I think we should be  
8 clear that the United States and now Wyoming are taking  
9 the position that by implication, the clear language of  
10 our bill of complaint has been limited.

11 By implication, this case hasn't been going  
12 that long. The Court granted the motion to leave to  
13 file the bill of complaint. It wasn't a question of  
14 filing a brief.

15 Historically, these cases were started almost  
16 with no brief. You file a motion and don't even file a  
17 brief for a one-paragraph justification. And to say  
18 now you can look at that, and if it doesn't justify  
19 each element that you can parse out of the generally  
20 pleaded case, that that has been implicitly denied by  
21 the Court would be a very surprising result.

22 And we take very seriously the scope of our  
23 complaint. It's carefully drafted here. We intended  
24 to cover all of Article V. Wyoming initially  
25 understood it to include only Article V(B). Now

1 they're trying to get Article V(B) totally excluded  
2 based on implication.

3 Whenever we've been asked, "Are you asserting a  
4 claim under V(B)," we say yes. It's only by  
5 implication that these notions have been justified or  
6 sought to be justified by either Wyoming or Montana.

7 And the question on that is whether -- not so  
8 much what have the disputes been or what was  
9 specifically alleged, but will Montana be barred, as a  
10 matter of law, henceforth from continuing its claim  
11 under all of V(B)? That's what they're trying to do  
12 here in the guise of a motion for summary judgment that  
13 responded to your removal of that paragraph from your  
14 memorandum opinion at the request of Wyoming, who now  
15 agrees with the paragraph.

16 So we believe it would be quite a miscarriage  
17 if the result of this turn of events was to actually  
18 diminish in a material way what the Supreme Court's  
19 already ruled may be filed.

20 Going back to Mr. Michael's comments, if I may.

21 He referred to sheet water that flows into the  
22 main stems, I think it was, in the instance of his  
23 reference.

24 Sheet water, as I understand it, just to be  
25 clear, is water that hasn't reached a water course,

1 even a rivulet that we define under the prior  
2 appropriation doctrine as constituting the division  
3 between water that's generally appropriable and not.

4 And that sheet water, or surface water, as it's  
5 called in the compact, is specifically excluded in  
6 compact Article V(E) (2).

7 So that is not allocated. So it's not  
8 something that we can rely on being in the river. That  
9 very clearly expressly is excluded, unlike tributaries.

10 But if -- based on the arguments that Wyoming  
11 is making, tributaries are excluded, then there's  
12 practically nothing in terms of the quantity of the  
13 water that's left in the river. It's only what appears  
14 in the bed itself. And, of course, groundwater  
15 recharge, as we've talked about before, as it moves  
16 toward the stream system, goes -- it will go to the  
17 nearest tributary.

18 And so there's very little area that could  
19 actually contribute to flows in the main stem itself if  
20 Wyoming is successful in excluding the tributaries from  
21 V(B).

22 Mr. Michael also claimed that a V(B) case or  
23 claim would be much more burdensome or involved than a  
24 V(A) case. And actually, if one thinks about it, the  
25 answer is clearly the opposite.

1           V(B) is the allocation that the drafters could  
2 understand and could provide for. They struggled for  
3 many years before the adoption of the final compact,  
4 but how to quantify that use of water that was already  
5 occurring at the basin, in other words, the V(A) water.

6           And they finally threw up their hands and said  
7 we're just going to preserve that in V(A). Whatever it  
8 is, it's preserved. It's too complicated, and it's  
9 going to take too long to work all the details out, to  
10 specify just how that sorts out.

11           And what we're really here for is to provide  
12 for potential federal projects. And the federal  
13 government has said it needs to know how this water's  
14 going to be divided if it's going to consider federal  
15 projects.

16           So you can see that history shows that a V(B)  
17 case is certainly -- there's no indication that it  
18 would be more complicated than a V(B) case. The V(A)  
19 case would be the hard one.

20           I would point out that Article V(B) has been at  
21 the heart of Wyoming's arguments against Montana in  
22 most instances. They have always raised V(B) as their  
23 protection. And now they're saying it's not even in  
24 our complaint that covers all -- obviously covers all  
25 of Article V.

1           Mr. Michael also said that Wyoming had conceded  
2           that the important reservoirs were on the state line.  
3           I do not believe that is true. I'm not aware that  
4           we've conceded anything in that regard.

5           I've also requested information today from  
6           counsel as to what -- what kind of disputes have arisen  
7           under V(B). And I would encourage you not to make a  
8           decision here on the legal scope of the complaint based  
9           on the offhand responses to your question. They have  
10          not been requested before. They have not been  
11          researched and would obviously require that if that  
12          were actually a -- an aspect of the basis for any  
13          decision you might make.

14          SPECIAL MASTER: Just to supply you some  
15          comfort there, I was just trying to get some background  
16          to try to understand what, if any, issues there might  
17          already exist between the parties.

18          MR. DRAPER: Very good.

19          I think, in general, I'd like to state our  
20          position with respect to this potential ruling on V(B),  
21          that we do feel that it would be inappropriate to limit  
22          the scope of the complaint based on a motion by the  
23          plaintiff for summary judgment on tributaries. That is  
24          not an issue that was contemplated. Interstate  
25          tributaries, it appears, in V(B), it was part of the



1 master's decision that caused us to have to file this  
2 to preserve that decision with the master.

3 And so it was natural to state in similar terms  
4 that were broad enough to cover V(B), our motion for  
5 summary judgment.

6 With respect to the discovery issues that you  
7 questioned Mr. Michael about, it is true that some of  
8 the items that he mentioned, the course of conduct of  
9 the parties, that has been looked to when it had to be.  
10 But it's obviously a third tier of interpretation.

11 You need -- we need -- we all know that we need  
12 to look first at the compact itself. And we believe  
13 that that answers the question.

14 There's no need for discovery. And only if it  
15 presents a true ambiguity do we need to go outside the  
16 compact. And the first thing to do is to go to the  
17 documents that Congress had before it when it was  
18 considering whether to approve this compact or not.

19 Those are the ones that are definitive. And to  
20 go beyond that, you're starting to tread on less  
21 certain ground.

22 And the third tier below that, in my view of  
23 it, is the course of conduct. It's not irrelevant if  
24 that's all that you're left with. We can see that the  
25 course of conduct is clearly consistent with the

1 wording.

2           It's a comfort that there's nothing out there  
3 that would give us cause that the plain wording was  
4 somehow misleading us. But to use it as a primary  
5 source of interpretation and therefore justify  
6 discovery on it seems a little bit far-fetched.

7           And on our favorite topic of the circularity of  
8 interstate and tributaries and tributaries by  
9 themselves or any of that, I think it's something  
10 that's been dealt in maybe an over -- overthought  
11 about.

12           We have tributaries defined. And we then have  
13 a term that limits -- that is a limiting term,  
14 interstate tributaries. They're a subset of  
15 tributaries. And they're named. They have to be.  
16 That's where the real allocations were taking place  
17 between the two states.

18           This could have been four separate compacts on  
19 those four rivers, if you wanted to. Those are the  
20 interstate rivers here. But they combined them in V(B)  
21 and referred to them by this common term. And it was  
22 simply a limitation. They didn't mean all tributaries.  
23 They meant certain tributaries that were named. And  
24 having defined all tributaries to include subsidiary  
25 tributaries, there was no danger that that would be

1 misinterpreted to exclude tributaries of the Tongue and  
2 Powder Rivers.

3 Thank you very much.

4 SPECIAL MASTER: Okay. Let me just ask you one  
5 last question.

6 So to separate out two issues: One is the  
7 breadth of Montana's complaint. The second one is the  
8 motion for summary judgment.

9 So on the breadth of the complaint, you know,  
10 my current inclination there is to basically not  
11 address that particular question here. I don't think  
12 it's necessary to determine at this stage whether or  
13 not there is any aspects of Article V(B) that might  
14 arise later in the case or, for example, if the Supreme  
15 Court were to disagree with my particular  
16 interpretation of the compact here, whether or not  
17 Montana might have any arguments under Article V(B).

18 If that's -- if I put aside, therefore, the  
19 question of the breadth of the complaint in this  
20 particular case and I just look at the motion for  
21 summary judgment, or for partial summary judgment,  
22 given my memorandum opinion in this particular broad  
23 case, is there any reason you're going to need to rely  
24 on Article V(B) to determine -- is there any reason why  
25 you currently contemplate that you would need to also

1     rely on Article V(B)? Doesn't Article V(A) provide you  
2     all the protections that you need?

3             MR. DRAPER: Well, I understand your question  
4     to have the previous qualifications you stated in  
5     asking other counsel that question. V(B), which  
6     applies to the unused and unappropriated waters at the  
7     basin, is helpful in understanding the theory of the  
8     compact as a whole and how V(A) fits into that whole.

9             So yes, you're going to have to look at V(B)  
10    for a full and competent understanding of V(A). But  
11    I -- I perhaps should stop and ask you if I'm reading  
12    that correctly.

13            SPECIAL MASTER: Let me rephrase it.

14            Will there be any reason why you need to rely  
15    upon the substantive allocations in Article V(B)?

16            MR. DRAPER: Well, during the whole course of  
17    this case?

18            SPECIAL MASTER: Yes.

19            I'm just wondering, is there any relevance of  
20    Article V(B) in this case right now other than in  
21    helping to interpret Article V(A)? Does it provide you  
22    any additional protection that you're going to be  
23    relying upon? To your knowledge.

24            I realize -- I'm not going to exclude you from  
25    making additional arguments down the road if you want

1 to -- if you want to raise them. But as this case  
2 stands right now, do you contemplate needing to rely on  
3 Article V(B) other than as it helps in interpreting  
4 Article V(A)?

5 MR. DRAPER: We have pled a claim under all of  
6 Article V. That includes specifically Article V(B).  
7 And yes, we will need, as a legal matter, to have every  
8 right to rely on that part of Article V as we go  
9 forward in this case, yes.

10 SPECIAL MASTER: So I'm not asking you to give  
11 up any potential arguments down the road. I'm trying  
12 to understand, again, whether or not Article V(B) has  
13 any independent significance here other than as an  
14 interpretation of Article V(A) as this case currently  
15 stands.

16 MR. DRAPER: With respect to what issues?

17 SPECIAL MASTER: With respect to -- so Montana  
18 here is seeking protection of its pre-1951  
19 appropriators. And I've ruled that under Article V(A),  
20 that Article V(A) gives it protections against a  
21 variety of different actions in Wyoming.

22 And my only question is, whether or not you  
23 currently contemplate that Article V(B) is going to  
24 be -- you're going to need to rely upon Article V(B) to  
25 achieve anything that is not already in Article V(A).

1 MR. DRAPER: Yes.

2 SPECIAL MASTER: In what way?

3 MR. DRAPER: Well, you're asking about attorney  
4 work product now and what our current thinking is, what  
5 our knowledge of facts is, if I understand your  
6 question. And, of course, we're not prepared to go  
7 into that under the scope of the hearing today. I  
8 think that would be premature.

9 And if that's the master's desire, then we  
10 would need to -- in order to give you a full answer on  
11 that, we would need complete discovery on that. And we  
12 would -- we do intend to rely on V(B) as a substantive  
13 matter. And just how that will sort itself out in the  
14 future is, in part, dependent on discovery that has not  
15 occurred yet.

16 It depends critically on the Supreme Court's  
17 ruling on your memorandum opinion. If the Supreme  
18 Court accepts the Wyoming position and rejects the  
19 special master's report, V(B) is the only claim that we  
20 have.

21 SPECIAL MASTER: Thank you.

22 MR. DRAPER: Thank you, Your Honor.

23 SPECIAL MASTER: Again -- well, again, thank  
24 you very much. The briefing, your whole argument, has  
25 been quite helpful. And again, in the next day or two,

1 I'll be releasing the decision and opinion on the  
2 question of the motion to intervene.

3 I talked to the Supreme Court before moving  
4 forward with Montana's motion for partial summary  
5 judgment and was told that they thought it would be  
6 very useful to resolve this particular motion before  
7 filing a first interim report.

8 But I'm still anxious at this stage to get that  
9 first interim report to the Supreme Court as soon as  
10 possible. I do not know whether it will be possible,  
11 if either of the parties files exceptions and the  
12 Supreme Court decides to hear those, whether it will be  
13 possible to hear those during this term. But I figure  
14 the sooner I get it up there, the faster this case will  
15 move forward there and then potentially, assuming the  
16 Supreme Court doesn't decide the whole case should be  
17 dismissed, come back to me again.

18 So I'm hoping to try to do all of this before  
19 people head off for Christmas. And in that connection,  
20 do you people have a sense of when you're going to be  
21 disappearing in your various offices?

22 So why don't I start with Montana.

23 MR. DRAPER: Your Honor, I start to become  
24 unavailable around the 19th of December.

25 SPECIAL MASTER: 19th? Okay. Anyone earlier

1 than the 19th of December?

2           What I expect to do is -- what my hope is, is  
3 to be able to provide you with a draft of the interim  
4 report that I would ask you to review, simply to look  
5 for factual errors or any errors I should correct  
6 before I send it to the Supreme Court. Okay?

7           I'm not asking for any new argument. I just  
8 want to make sure you have an opportunity to look at it  
9 before I send it to the Court. And my expectation is,  
10 I'll probably give you about a week to read through it.

11           Again, I'm not asking for argument. I'm just  
12 asking you to look to see whether or not there's any  
13 obvious errors that I should correct.

14           So with that in mind, then, when's the last  
15 date that you could get --

16           MR. MICHAEL: Your Honor, I have no problems at  
17 all. I'm -- I have no -- going nowhere. I'll be  
18 working right through, so you can ignore my schedule.  
19 I'm fine.

20           SPECIAL MASTER: I'm sorry to hear that.

21           MR. DUBOIS: I have no plans or problems, Your  
22 Honor, so whatever.

23           SPECIAL MASTER: Okay. North Dakota?

24           MR. SATTLER: No. I'll be here, too.

25           SPECIAL MASTER: Okay. That's very helpful.



1           So anything in terms of the current status  
2 of -- of the case? I assume -- at this stage -- I'm  
3 always afraid to ask this, because every time I do,  
4 somebody tells me they're about to file a new motion.

5           But at this stage, I assume that people, you  
6 know, have exhausted their current set of motions, and  
7 I can go ahead and prepare the first interim report?

8           MR. DRAPER: Your Honor, yes.

9           SPECIAL MASTER: Okay.

10          MR. DRAPER: I did want to clarify Montana's  
11 position on the motion for summary judgment. And that  
12 is, that it was filed because you were taking out that  
13 paragraph from your memorandum opinion. It would be  
14 acceptable to us to, on the basis of the motion, put it  
15 back in.

16          As long as there was no diminishment of our  
17 claim with respect to V(B), I don't think there's any  
18 necessity that you were not doing that in that original  
19 paragraph. And if our motion were granted simply  
20 because of the extent of putting that back in, that  
21 would be acceptable to us.

22          SPECIAL MASTER: So again, I have not,  
23 obviously, written the opinion yet on this motion for  
24 partial summary judgment. But I can tell you right  
25 now, based on the arguments that I've heard today, that

1 my contemplation would be that I would grant the motion  
2 for partial summary judgment as it applies to Article  
3 V(A).

4           So that's going a little beyond the original  
5 memorandum opinion, that the original memorandum  
6 opinion only dealt with the surface storage issue. And  
7 so here, on the motion for partial summary judgment, it  
8 would be focused on Article V(A)'s application, not  
9 only to the surface storage but other diversions of  
10 water from the Powder and Tongue Rivers and the  
11 tributaries thereto.

12           But I don't believe that it's necessary, given  
13 the current posture of the case, to go beyond that and  
14 to address Article V(B), because at least for the  
15 moment, before I go back and review the papers one last  
16 time, I'm not convinced that Article V(B) will turn out  
17 to be relevant to the ultimate resolution of Montana's  
18 complaint.

19           At the same time, at this point in time, I also  
20 don't think it's necessary to make a final definitive  
21 ruling on exactly what is within Montana's complaint  
22 and what is not.

23           You know, I'm not convinced that Article V(B)  
24 will be necessary other than as an interpretative aid  
25 to Article V(A). But I realize we're not far enough

1 along to understand whether or not there is something  
2 that I am missing. But I haven't heard it yet.

3 So that's just to let you know. I think we're  
4 on a stand at this point in time. Again, I'll be  
5 issuing an opinion fairly quickly on this.

6 MR. DRAPER: Your Honor, just to be sure we're  
7 fully clear on that, that would be acceptable to  
8 Montana as long as there's no prejudice, in so doing,  
9 to our right to pursue our claims under Article V(B).

10 SPECIAL MASTER: I guess I should actually ask  
11 you, Mr. Dubois: Is there any reason that you would  
12 see why I need to make a final definitive determination  
13 on what's included in Montana's complaint and what is  
14 not?

15 MR. DUBOIS: No, Your Honor.

16 SPECIAL MASTER: Okay. Thank you.

17 Mr. Michael, any thoughts on --

18 MR. MICHAEL: Well, Your Honor, we're not  
19 anticipating filing anything additional, so I think  
20 you're ready to go with the interim report. And if  
21 this issue of whether V(B) becomes part of the case is  
22 put off for another day, we don't have any problem with  
23 that.

24 What I've heard you say, I suspect we won't  
25 file anything if that's likely what you set down on

1 paper here.

2 SPECIAL MASTER: Great. Thank you very much.

3 Hopefully, it was warmer here than it was in  
4 Denver today. And so I hope you actually are able to  
5 stay around and enjoy the Palo Alto sunshine.

6 One thing that you all might be thinking about,  
7 by the way, is -- again, probably won't get to see you  
8 for a year or so at this stage. Hopefully, it will be  
9 faster. But when we -- particularly if this case ends  
10 up being tried, I'll be giving some thought as to  
11 whether or not you want to do it in Denver,  
12 particularly if it ends up being winter or instead if  
13 we should have it out here.

14 So with that, again, thank you very much. And  
15 no reason to rise. We'll just adjourn at this  
16 particular stage. And again, I'll be sending out  
17 something to you in the near future.

18 Thank you very much.

19 (Whereupon, the proceedings were concluded at  
20 11:23 a.m.)

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1 STATE OF CALIFORNIA )  
2 )  
3 COUNTY OF ALAMEDA )

4

5 I, CLAUDIA J. KNAP, do hereby certify:

6 That said proceedings were taken before me at said  
7 time and place, and was taken down in shorthand by me,  
8 a Certified Shorthand Reporter of the State of  
9 California, and was thereafter transcribed into  
10 typewriting, and that the foregoing transcript  
11 constitutes a full, true and correct report of said  
12 proceedings that took place;

13 IN WITNESS WHEREOF, I have hereunder subscribed my  
14 hand this 14th day of December 2009.

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CLAUDIA J. KNAP, CSR No. 6099  
State of California

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